

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
September 4, 2013	
CT-2012-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 45

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

RESPONSE OF THE RESPONDENT TO THE MOTION OF NATIONAL ENERGY CORPORATION FOR LEAVE TO INTERVENE

PART I - OVERVIEW

1. The respondent, Reliance Comfort Limited Partnership (“Reliance”), consents to leave being granted to National Energy Corporation (“National”) to intervene, but objects to the proposed scope of topics and requests different terms of participation.

2. National's proposed scope of topics is overly broad. Many of National's proposed topics fail the test for leave to intervene, as they are matters for which National would not provide a unique perspective, or are matters which attempt to broaden the scope of this application beyond the issues raised by the Commissioner of Competition (the "Commissioner").

3. As described further below, National has waged a long and acrimonious campaign of meritless litigation against Reliance. The full scope of topics proposed by National, if approved by the Tribunal, would provide National with the right to intervene on each and every aspect of this application, and effectively usurp the carriage of this application from the Commissioner. In this context, the Tribunal should place reasonable restraints on National's intervention and limit its participation to topics on which it clearly brings a unique perspective based on direct, first-hand experience.

PART II – THE FACTS

A. National's History of Litigating Against Reliance

4. National has an extensive history of commencing ill-fated litigation against Reliance. National's litigious history against Reliance cannot be ignored on this motion for leave to intervene, and provides a context in which the scope of National's participation should be determined. In this regard, a "lengthy litigation history" between principals of a proposed intervenor and a respondent was factored into the Tribunal's decision in *Canada (Commissioner of Competition) v Toronto Real Estate Board*, and was also raised on the intervenor motion in *Canada (Commissioner of Competition) v The Canadian Real Estate Association*.

Canada (Commissioner of Competition) v Toronto Real Estate Board, [2011] CCTD No 22 at para 53 [*TREB*]; Reliance's Brief of Authorities ("Authorities") Tab 1
Canada (Commissioner of Competition) v The Canadian Real Estate Association, 2010 Comp Trib 11 at para 10 [*CREA*]; Authorities Tab 2

5. National's campaign of litigation against Reliance is long and complex but will be summarized as concisely as possible here. National began in June, 2010, by commencing an action in *National Energy Corp v Reliance Comfort Limited Partnership* (the "First National Lawsuit"). The First National Lawsuit sought *inter alia*, an interim, interlocutory and permanent injunction against Reliance preventing it from publishing certain statements regarding National. The First National Lawsuit also sought damages of \$40 million for defamation. The First National Claim was dismissed on September 26, 2012.

National Energy Corp v Reliance Comfort Limited Partnership, CV-10-404128 (Ont Sup Ct) (Statement of Claim); Appendix A
National Energy Corp v Reliance Comfort Limited Partnership, CV-10-404128 (Ont Sup Ct) (Dismissal Order); Appendix B

6. In June, 2010, National also commenced an application against Reliance in the name of one of its Vice-Presidents, Douglas MacGregor, in *MacGregor v Reliance Comfort Limited Partnership* (the "Second National Lawsuit"). The Second National Lawsuit was brought in response to the implementation of Reliance's removal reference number return policy (or "RRN Policy"), which is referred to in the Commissioner's Notice of Application and Reliance's Response in this proceeding. The Second National Lawsuit sought a declaration that Reliance's implementation of the RRN Policy constituted a breach of its customer contract with Mr. MacGregor. In this fashion, National sought a precedential ruling that all of Reliance's customer contracts were terminated.

MacGregor v Reliance Comfort Limited Partnership, 2010 ONSC 6925 (Notice of Application); Appendix C
Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership, CT-2012-002 (Notice of Application at para 16) [Commissioner's Application]; Appendix D
Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership, CT-2012-002 (Response to Notice of Application at para 52) [Reliance's Response to Commissioner's Application]; Appendix E

7. In July, 2010, National issued a Statement of Claim in *National Energy Corp. v Reliance Comfort Limited Partnership* (the "Third National Lawsuit"). The Third National Lawsuit sought damages of \$130,000 against Reliance for breach

of contract, and as the purported assignee of claims from customers of Reliance. In particular, National alleged that Reliance had “levied improper charges” as part of an “anti-competition tactic”. The Third National Lawsuit was dismissed on February 28, 2011.

National Energy Corp v Reliance Comfort Limited Partnership, CV-10-406209 (Ont Sup Ct) (Statement of Claim); Appendix F
National Energy Corp. v Reliance Comfort Limited Partnership, CV-10-406209 (Sup Ct) (Dismissal Order); Appendix G

8. In the meantime, the Second National Lawsuit, which attacked Reliance’s RRN Policy, was heard by Echlin J in November, 2010. Justice Echlin held that the implementation of the RRN Policy by Reliance did not constitute a breach of its customer agreement. On the issue of whether the applicant could appoint National as its agent to obtain an RRN number, Echlin J held:

I turn next to whether Macgregor is at liberty to appoint an agent to fulfill his contractual obligations. I find that he is. While Reliance may not be desirous of dealing with National as agent, I can find no reason at law why it should be entitled to require its customers to seek approval of the appointment of an agent, *in the absence of a specific contractual provision to that effect. It was open to Reliance to provide for this in its contract. [emphasis added]*

MacGregor v Reliance Comfort Limited Partnership, 2010 ONSC 6925 at para 10; Appendix H

9. Reliance subsequently amended its customer contract to provide that its customers could not appoint an agent for the purposes of obtaining an RRN number. In response, in February, 2011, National commenced a fourth claim against Reliance in the name of Scott Weller, in *Weller v Reliance Home Comfort Limited Partnership*, (the “Fourth National Lawsuit”).

Weller v Reliance Home Comfort Limited Partnership, 2011 ONSC 3148 (Notice of Application); Appendix I

10. Mr. Weller was the spouse of the Senior Vice-President, Finance of Just Energy Group Inc., the parent company to National. The Fourth National Lawsuit

sought a declaration that Reliance's amendment was void as being contrary to the *Consumer Protection Act*.

Weller v Reliance Home Comfort Limited Partnership, 2011 ONSC 3148
(Notice of Application); Appendix I
Weller v Reliance Home Comfort Limited Partnership, 2011 ONSC 3148
[*Weller*]; Appendix J

11. Justice Strathy, as he then was, dismissed Mr. Weller's application, finding:

[7] A third proceeding was commenced by National against Reliance in June 2010. It arose out of allegations by Reliance that its water heater rental customers were being misled by National's door-to-door sales personnel or "door knockers" who allegedly engaged in aggressive and misleading sales practices, including misleading consumers about the condition of their Reliance water heaters. It was asserted that salespeople would induce the customers to rent a new National water heater and would then, acting as the customer's agent, cancel the customer's contract with Reliance and return the water heater to Reliance.

[8] To combat these tactics, Reliance instituted a new policy, reflected in the contract amendment at issue, which required customers wishing to terminate their rental agreements to first telephone Reliance to obtain a "Removal Reference Number". This was intended to give Reliance an opportunity to speak to the customers, to discover whether the decision to terminate the rental contract was motivated by competitive action by National and, if possible, to persuade the customers to change their minds.

...

[44] The amendment being introduced by Reliance is, from the consumer's point of view, entirely innocuous. It imposes no additional burden on the consumer, other than the burden of picking up the telephone and informing Reliance that he or she wishes to terminate the contract and have the water heater removed – and perhaps the additional burden of being subjected to questions about the reasons for the termination and possibly a sales pitch as to why the customer should continue to do business with Reliance. If, as Reliance asserts and this proceeding suggests, the amendment is impeding National's efforts to convert

Reliance's customers, it may not be a bad thing, from a consumer protection perspective, to provide some counter-balance to the entreaties of the "door knockers".

[45] I doubt that many customers, on receiving notice of the proposed amendment, would be likely to say "That's the last straw; I'm going to cancel my contract." In fact, the only reason Weller wants to raise this issue is that his wife, and his wife's employer, have put him up to it.

Weller at paras 7-8, 44-45; Appendix J

12. Justice Strathy further found that National's attempt to use the *Consumer Protection Act* to attack Reliance's customer agreement was an improper use of the legislation, finding:

[48] Reliance says that the C.P.A. was not enacted for the purpose of being used as a tool by business competitors to advance their commercial interests. It invites me to find that this proceeding offends the principle that litigation should not be used for a collateral purpose. ... This is clearly a case in which the action is being used for a collateral purpose. I have already noted my concern that the interpretation of an important piece of legislation should not take place in the absence of a true *lis*.

Weller at para 48; Appendix J

13. National appealed the Strathy Judgment, without success.

Weller v Reliance Comfort Limited Partnership (31 May 2012), Toronto C53910 (CA); Appendix K

14. Meanwhile, Reliance has been required to commence two civil proceedings against National, and in contrast, Reliance has successfully obtained several orders against National and parties related to it. In particular, in October, 2010, Reliance commenced an action against National in relation to National's misappropriation of certain confidential information from Reliance (the "First Reliance Lawsuit").

Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Amended Statement of Claim); Appendix L

15. On November 8, 2010, Reliance obtained an initial injunction on consent, restraining National and Mr. MacGregor from obtaining, disseminating or using any documents confidential to Reliance, and requiring National to produce an affidavit detailing how it had come into the possession of certain information confidential to Reliance (the “Himel Order”).

Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Ont Sup Ct) (Order of Himil J dated November 8, 2010); Appendix M

16. Reliance subsequently brought a contempt motion with respect to National’s destruction of confidential information contrary to the Himel Order. The motion was again resolved on a consent order that authorized Reliance to appoint a forensic computer expert to investigate National’s computer systems (the “Conway Order”).

Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Ont Sup Ct) (Endorsement of Conway J dated March 16, 2011); Appendix N
Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Ont Sup Ct) (Order of Conway J dated March 16, 2011); Appendix O
Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Ont Sup Ct) (Endorsement of Conway J dated June 27, 2011); Appendix P

17. National then engaged in “foot-dragging and obstruction of the legitimate attempts of the expert to accomplish his mandate” under the Conway Order. As a result, Reliance brought a motion to enforce the Conway Order, which was heard by Strathy J (as he then was). Justice Strathy found that National had:

- Unreasonably delayed the commencement of the expert’s investigation;
- Unduly restricted the scope of the expert’s investigation by refusing to permit the examination of desktop, laptop and personal computers;
- Refused access by the expert to the individual computers of some of National’s employees, including

notably, [Shawn] Dym, Mark Silver (the President of National) and Michael Silver;

- Imposed unreasonable terms on the expert's investigation, including insisting on agreement on search terms before the expert began his investigation;
- Refused or delayed access to National's computers;
- Made unreasonable and unfounded accusations of bias on the part of the expert;
- Made threats, never fulfilled, to bring motions or to seek directions, including instructing the expert to stop work because of a proposed motion that was never brought;
- Communicated directly with the expert without notifying Reliance; and
- Made unfounded allegations of misconduct on the part of Reliance and the expert.

Justice Strathy further ordered National to pay \$45,000 in costs as a "point approximately mid-way between partial indemnity costs and substantial indemnity costs".

Reliance Comfort Limited Partnership v National Energy Corp et al, CV-10-412873 (Ont Sup Ct) (Endorsement of Strathy J dated July 27, 2012 at paras 16, 18, 33); Appendix Q

18. More recently, in December, 2012, Reliance commenced an action against National with respect to, *inter alia*, many of the misleading marketing and sales tactics referred to in its Response to this Application (the "Second Reliance Lawsuit"). The Second Reliance Lawsuit remains pending.

Reliance Comfort Limited Partnership v National Energy Corp, CV-12-470200 (Ont Sup Ct) (Statement of Claim); Appendix R

19. It is in this context that National wishes to intervene in this proceeding. While Reliance agrees that National satisfies the test with respect to certain of the proposed topics, the list of proposed topics is overly broad and would enable

National to convert this proceeding into the fifth installment of its litigation campaign against Reliance. National's involvement should be limited to those topics which are relevant to the Commissioner's application, and where National is clearly positioned to provide a unique and distinct perspective.

B. The Facts Set out in National's Leave Application are Inaccurate or Untrue

20. The affidavit of Gord Potter sworn August 20, 2013 (the "Potter Affidavit") filed by National contains numerous statements that are factually inaccurate or untrue. The misstatements contained in the Potter Affidavit relate, *inter alia*, to National's ability to expand, and Reliance's practices and policies. Reliance intends to challenge the veracity of these and other statements on cross-examination.

PART III –TEST FOR INTERVENTION

21. The test to intervene is well established. The onus is on the proposed intervenor to show:

- (i) The person seeking leave to intervene must be directly affected;
- (ii) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate;
- (iii) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner; and
- (iv) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

TREB at para 21; Authorities Tab 1

PART IV – NATIONAL SHOULD BE GRANTED LEAVE ON REASONABLY LIMITED TERMS

A. National should not be granted Leave to Widen the Scope of the Commissioner’s Application

22. A proposed intervenor should not be granted leave to widen the scope of the Commissioner’s application. In *Canada v Tele-Direct (Publications) Inc* the Tribunal held:

We agree with the respondents that intervenors are restricted to making representations on issues that are relevant to the proceedings as defined by the pleadings. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the Tribunal.

Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership, CT-2012-002 (Motion of National for Leave to Intervene at para 31(a)) [*National’s Motion*]
Canada v Tele-Direct (Publications) Inc, [1995] CCTD No 4 at 4; Authorities Tab 3

23. In determining a motion for leave to intervene, the Tribunal should be “cognizant of the need to keep the proceeding focused and manageable”, and should consider the extent to which the proposed intervenor should be allowed to prolong and complicate the process.

Canada (Competition Act, Director of Investigation and Research) v Bank of Montreal, [1996] CCTD No 1 at 14; Authorities Tab 4
Canada v Air Canada, [1992] CCTD No 24 at 5; Authorities Tab 5

24. Additionally, a proposed intervenor should not be granted leave to intervene where their position on a topic does not differ from that of the Commissioner. In such a case, the intervenor would simply repeat the arguments already advanced by the Commissioner.

CREA at para 13; Authorities Tab 2

25. In this regard, National's statement at paragraph 17(a) of its Request for Leave that "[t]he Commissioner's Application does not appear to address the full scope of the anti-competitive conduct of Reliance", and its allegation that "Reliance has engaged in price discrimination or similar forms of discriminatory promotional programs that target only those customers that are the subject of National's marketing efforts or who have recently elected to switch to National" raise issues that have not been raised by the Commissioner's application. For this reason it fails the test to intervene. Additionally, this is not a valid "difference of opinion" (as claimed by National) to be considered in the disposition of this motion, since the alleged difference of opinion relates to a matter that is irrelevant to this application.

National's Motion at para 31(a)

26. Moreover, National's position is that it "intends to support the position of the Commissioner generally, based on the allegations in the Commissioner's Application".

National's Motion at para 31(a)

27. National's only further attempt to differentiate its position from that of the Commissioner is located at paragraph 31(a) where it states:

[T]here are topics on which the position of the Commissioner and National appear to differ... The Commissioner's Application does not appear to address the full scope of the anti-competitive conduct of Reliance. Additional anti-competitive conduct includes (at least) the following... Reliance has refused to permit National to act as an agent for customers with respect to the process for obtaining the RRN required by Reliance for the return of a tank.

National's Motion at para 31(a)

28. This statement is not accurate, since the subject matter of this allegation is addressed specifically in paragraph 17 of the Commissioner's Notice of Application, which states:

Under the RRN Return Policy, Reliance creates significant barriers to the return of its water heaters by, among other things: ...

ii. prohibiting competitors from obtaining a RRN on behalf of customers;

iii. refusing to provide a RRN to customers who contact Reliance with a competitor on the call; in such cases, Reliance regularly prevents these competitors from joining in on customer calls, notwithstanding that customers have agreed to have competitors on these calls; and

iv. refusing to recognize agency agreements between customers and competitors that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heater.

Commissioner's Application at para 17; Appendix D

29. Hence, National has presented no instances in which its position differs from that of the Commissioner.

B. National's Participation should be Restricted to Matters in Which it has Direct, First-Hand Experience

30. In *Canada v Visa Canada Corp.*, the Commissioner brought an application against Visa Canada Corporation and MasterCard International Incorporated under s 76 of the *Competition Act*. TD Bank, as an "issuer" and "acquirer" of credit cards, sought leave to intervene on the application.

Canada v Visa Canada Corp, [2011] CCTD No 2 [*Visa*]; Authorities Tab 6

31. After a detailed review of the relevant law, Simpson J for the Tribunal refused to allow TD Bank to adduce "general broad based evidence about the business of issuing credit cards or about the operation of the Canadian payments system".

Visa at para 46; Authorities Tab 6

32. In reviewing the topics proposed by TD Bank, Simpson J. acknowledged the relevance of the various topics but restricted TD Bank to providing its "unique

firsthand perspective”. For example, Simpson J. further refused to permit TD Bank to intervene regarding its “perceptions of the impact of the Proposed Order on its Merchant and cardholder customers” and its “view of the reasons for the Merchant Restraints”.

Visa at para 49; Authorities Tab 6

33. As National has presented no instances in which its position differs from that of the Commissioner. The scope of National’s intervention should therefore be limited to those topics regarding which it has unique perspective and direct, first-hand experience.

C. National should not be Granted Leave to Intervene with respect to Some of its Proposed Topics

34. Each of National’s proposed topics will be addressed in turn in this section.

Proposed Topic (a): The Development of the Ontario Rental Water Heater Industry as it Relates to National

35. National does not offer a unique perspective on this topic. As noted at paragraph 17 of the Potter Affidavit, the Commissioner was already active in the Ontario rental water heater industry when National began operations in 2008. As set out at paragraph 39 of the Commissioner’s Notice of Application, the Commissioner has been active in the industry since at least 2002. Hence, between the Commissioner and National, the Commissioner is in the best position to speak to the development of the Ontario rental water heater industry and National does not present a unique point of view or distinct perspective. Moreover, the Commissioner has already investigated this issue prior to bringing this application.

Commissioner’s Application at para 39; Appendix D

Proposed Topic (b): The issue of Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of National to effectively compete and expand in the Relevant Market

36. The topic of "Reliance's anti-competitive acts" lacks specificity, notwithstanding the subsequent language of "as they relate to National". Reliance is, however, agreeable to National intervening on the following topic phrased in neutral terms:

The impact, if any, of Reliance's water heater return policies and procedures on National and its ability to compete and expand in the Relevant Market.

37. To the extent National seeks to include broader acts within this topic, these should be clearly specified, as opposed to permitting National to intervene on the general, open-ended topic of "other anti-competitive conduct".

Proposed Topic (c): The impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers

38. Reliance objects to National's intervention on the two topics referred to in this heading. First, National requests to intervene on behalf of "customers or potential customers". In effect, National is proposing to speak for consumers. National, however, is not a consumer, nor is it a proper spokesperson for consumers. As noted above, National's attempt to use consumer protection legislation in litigating against Reliance in *Weller v Reliance Comfort Limited Partnership* was dismissed specifically because National was not a consumer and should not have been using consumer protection legislation to advance its commercial interests.

Weller at para 48; Appendix J

39. National's attempt to speak on behalf of consumers is particularly inappropriate given that Reliance has included in its Response very serious allegations that National has engaged in marketing and sales tactics aimed at misleading consumers.

Reliance's Response to Commissioner's Application at para 18; Appendix E

40. Second, the proposed topic of “the impact of [Reliance’s] conduct on the ability of National to effectively induce customers to switch suppliers” is repetitive of topic (b) above, namely the impact of Reliance’s policies and procedures on National and its ability to compete with Reliance. The Tribunal should not grant leave to a party to intervene on topics which are similar to each other.

TREB at para 54; Authorities Tab 1

Proposed Topic (d): National's interactions with Reliance with respect to the matters at issue in the proceeding including dealings with Reliance regarding the water heater removal and return process

41. Reliance does not object to this proposed topic.

Proposed Topic (e): National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets

42. National does not offer a unique or distinct perspective regarding the appropriate product and geographic markets. Rather, National proposes to echo the position of the Commissioner. National has, in its Request for Leave to Intervene, simply adopted the “Relevant Market” as defined by the Commissioner. Any argument and opinion regarding this topic by National will be repetitive of the position argued by the Commissioner. As noted above, having regard to the additional delay and costs to the proceeding caused by the proposed intervenor, leave to intervene should be refused where the proposed intervenor’s position would be repetitive, or does not differ from that of the Commissioner.

National's Motion at para 5

43. Moreover, a party should be denied leave to intervene where it is asking for leave to replicate an investigation already undertaken by the Commissioner. In *Washington v Canada*, the Tribunal held:

The difficulty with [the proposed intervenor] Smit's position is that it is essentially asking the Tribunal for leave to replicate the investigation into this matter which has already been undertaken by the Director. ... It is the Director's responsibility as a representative of the public interest to investigate the proposed variation and to determine whether or not it should be opposed. The Director has used the authority given to him under the Act to investigate the impact of Tiger Tugz's entry and he has concluded that the variation will not compromise the level of competition in the relevant market.

Washington v Canada, [1998] CCTD No 4 at para 19; Authorities Tab 7

44. National seeks leave to investigate matters which the Commissioner is appropriately positioned to investigate, and which the Commissioner has already investigated. For this reason, National should be refused leave to intervene on the issues of the product and geographic markets.

Proposed Topic (f): The issue of Reliance's dominant position as it affects National and competition in the Relevant Market generally

45. The topic as phrased assumes that Reliance occupies a dominant position in the Relevant Market, and is therefore not a proper topic. To the extent that the proposed topic is *whether* Reliance has a dominant position in the Relevant Market, Reliance does not oppose National's intervention. If the proposed topic is aimed at whether or how Reliance's position affects National, Reliance objects only because this is already covered in topic (b) above.

46. To the extent National proposes to intervene on how Reliance affects competition "in the Relevant Market generally", National should not be permitted to provide its general views on competition in the Relevant Market, particularly since its position does not differ from that of the Commissioner. Rather, National should be limited to intervening on whether and how its own ability to compete has been affected. This topic is, again, already covered as topic (b) above.

Proposed Topic (g): The issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally

47. Reliance does not object to this proposed topic to the extent it relates only to National. However, as noted above, National does not offer a unique or distinct perspective regarding whether there has been substantial lessening or prevention of competition “in the Relevant Market generally” and its intervention should be restricted to only those matters directly involving National.

Proposed Topic (h): Barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance’s conduct in creating artificial barriers to entry and expansion for National and raising National’s costs;

48. Reliance does not object to this proposed topic, provided it relates only to National’s own direct experience, and is phrased in neutral language. Reliance is amenable to the topic of:

Barriers to entry and ease of entry into the Relevant Market,
based on National’s experience in entering and expanding in
the Relevant Market.

Proposed Topic (i): The Statements made and the conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding;

49. Reliance does not object to this proposed topic.

Proposed Topic (j): The impact of the Commissioner’s proposed remedies on National and on competition in the Relevant Market

50. Reliance does not oppose this topic as it relates only to National, but again objects to National intervening with respect to the impact of the Commissioner’s proposed remedies “on competition in the Relevant Market” to the extent this refers to competition in the general sense. National does not offer a unique or distinct perspective on competition in the Relevant Market beyond its own participation therein.

51. In summary, Reliance is agreeable to National’s intervention on the following topics:

- (a) The impact, if any, of Reliance's water heater return policies and procedures on National and its ability to compete and expand in the Relevant Market;
- (b) National's interactions with Reliance with respect to the matters at issue in the proceeding including dealings with Reliance regarding the water heater removal and return process;
- (c) The issue of whether Reliance has a dominant position in the Relevant Market;
- (d) The issue of the substantial lessening or prevention of competition as it relates to National;
- (e) Barriers to entry and ease of entry into the Relevant Market, based on National's experience in entering and expanding in the Relevant Market;
- (f) The statements made and the conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding; and
- (g) The impact of the Commissioner's proposed remedies on National.

52. These topics represent the reasonable extent to which National provides a unique perspective based on first-hand and direct experience. National's request to participate in every aspect of this application should be refused, not only as a result to being inappropriate under the test for leave to intervene, but also given National's track record of bringing meritless litigation and conducting them in a vexatious manner.

D. Proposed Terms of Participation

53. Reliance consents to the proposed terms of participation, subject to the following additional terms and clarifications as underlined:

- (i) To review any discovery transcripts and access any documents of the parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal);
- (ii) To produce an affidavit of relevant documents, inclusive of all correspondence between National and the Commissioner, and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene;

- (iii) To adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene;
- (iv) To conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene;
- (v) To file expert evidence within the scope of its intervention in accordance with procedures set out in the *Competition Tribunal Rules*;
- (vi) To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences where National's interests are in issue; and
- (vii) To make written and oral argument, on topics for which National is granted leave to intervene, including submissions on any proposed remedy.

54. Reliance further requests that any order granting National leave to intervene be expressly subject to any confidentiality order(s) obtained by Reliance, as the Commissioner's application may require Reliance to divulge confidential and highly sensitive information regarding Reliance's finances, business plans and operations.

Documents and Correspondence Provided by National to the Commissioner Must be Disclosed

55. Information voluntarily provided to the Competition Bureau (the "Bureau") during an investigation may be disclosed when proceedings are commenced. Subsection 29(1) of the *Competition Act* specifically provides that information can be disclosed "for the purposes of the administration or enforcement of the Act". Judicial recognition of this exception is well established.

Canada v Chatr Wireless Inc, 201 ONSC 3387 at paras 63-68 [*Chatr*];
Authorities Tab 8

56. In *Canada (Commissioner of Competition) v Chatr Wireless Inc*, The Commissioner applied for a confidentiality order with respect to information voluntarily provided by the complainants. Justice Marrocco, for the Ontario

Superior Court, held that “the nature of the assurances given by the Competition Bureau and the Commissioner with respect to confidentiality are well-known”.

Justice Marrocco held:

Accordingly, the risk that disclosure of information may occur, if a proceeding is commenced, is a reality for the Commissioner and for those who voluntarily provide that information to the Competition Bureau. Until the court makes a ruling, the risk of disclosure exists. The decision to make a sealing order is case specific. Making a sealing order in this case will not change the fact that there is a risk of disclosure every time the Commissioner concludes an investigation and decides to commence proceedings.

Chatr at paras 48, 55; Authorities Tab 8

57. The likelihood of disclosure is recognized and publicized by the Bureau. The Bureau published, in 2007, a bulletin entitled, “Information Bulletin on The Communication of Confidential Information under the Competition Act” (the “Bulletin”). In s 4.2.1.2 of the Bulletin, the Bureau formally states that the communication of confidential information may occur when proceedings are initiated.

Chatr at para 52; Authorities Tab 8, citing Competition Bureau, Interpretation Bulletin, “Information Bulletin on the Communication of Confidential Information Under the *Competition Act*” (10 October 2007) at s 4.2.1.2; Authorities Tab 9

58. The approach of the Commissioner with respect to disclosure has been the subject of judicial comment. In *Canada v Air Canada*, Strayer J, held:

... the Director takes the position that anyone providing information to the Director either voluntarily or pursuant to an order under section 11 must expect that such information may be used by the Director in the administration of the Act including applications before this Tribunal under the Act. This implies that persons asked to supply information should govern themselves accordingly and should not expect voluntary communications to be privileged from disclosure, if required by orders of courts and tribunals in proper cases.

Chatr at para 64; Authorities Tab 8, citing *Canada (Director of Investigation and Research, Competition Act) v Air Canada*, [1993] CCTD No 4 at para 5; Authorities Tab 10

59. In considering whether to grant the Bureau's assurance of confidentiality, the court held:

I am satisfied that the information provided by [the complainant] was protected by s. 29 of the Competition Act at that time. However, that section specially provides that information can be communicated "for the purposes of the administration or enforcement of this Act". The enforcement of the Act is precisely what [the complainant] wanted to happen. ... The outcome of this application in no way affects the risk of disclosure that existed at the time [the complainants] voluntarily provided information. The outcome of this application simply determines whether the risk of disclosure will be realized.

Chatr at paras 63, 68; Authorities Tab 8

60. The risk that a complainant might stop voluntarily co-operating with the Commissioner is diminished by its attempt to intervene. National, in causing this application to be brought against Reliance, and now attempting to drive forward the case against Reliance, should not receive the protections previously afforded to it prior to the commencement of this proceeding.

E. Hearing Request

61. Reliance requests an oral hearing of the motion.

F. Costs and Other Procedural Matters

62. As noted in *Canada v Toronto Real Estate Board*, it would be premature to order that National will not be liable for costs, which is a decision that should be left to the panel hearing this matter. This is particularly the case given National's history of litigating in a vexatious manner.

TREB at para 43; Authorities Tab 1

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 3, 2013



BORDEN LADNER GERVAIS LLP

Barristers and Solicitors

Scotia Plaza

40 King Street West

Toronto, ON M5H 3Y4

Robert S. Russell (LSUC #25529R)

Tel / Fax: (416) 367-6256 / 361-7060

Brendan Y. B. Wong (LSUC #51464A)

Tel / Fax: (416) 367-6743 / 682-2824

Denes A. Rothschild (LSUC #56640R)

Tel / Fax: (416) 367-6350 / 361-7068

Zirjan Derwa (LSUC #61461T)

Tel / Fax: (416) 367-6049 / 361-7053

Neil C. Morgan (LSUC #64165U)

Tel/Fax: (416) 367-6738 / 361-7396

Counsel for the Respondent, Reliance
Comfort Limited Partnership

TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**

155 Wellington Street West

Toronto, Ontario M5V 3J7

Adam Fanaki (LSUC #38208L)

Tel: (416) 863-0900

Fax: (416) 863-0871

Counsel to National Energy Corporation

AND TO: **DEPARTMENT OF JUSTICE CANADA**
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9

David R. Wingfield
Josephine A.L. Palumbo
Jonathan Hood
Parul Shah
Tel: (819) 994-7714
Fax: (819) 953-9267

Counsel for the Commissioner of Competition

AND TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario K1P 5B4

Appendix A

RECEIVED
JUN 03 2010

Court File No. CV-10-404128

ONTARIO
SUPERIOR COURT OF JUSTICE

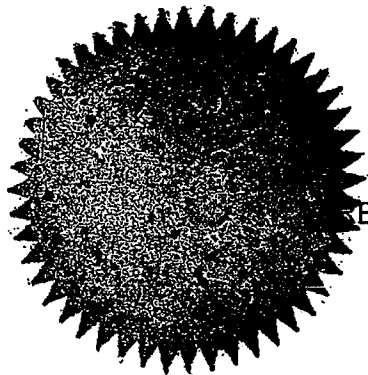
BETWEEN:

NATIONAL ENERGY CORPORATION

Plaintiff

- and -

Defendant



RELIANCE COMFORT LIMITED PARTNERSHIP

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

- 2 -

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

June 2nd

DATE: ~~May~~, 2010

Issued by:
Local Registrar

Address of Court House:
393 University Ave.
10th Floor
Toronto, Ontario
M5G 1E6

TO: RELIANCE COMFORT LIMITED PARTNERSHIP
2 Lansing Square, Ste. 1200
Toronto, On
M2J 4P8

- 3 -

CLAIM

1. The Plaintiff claims:

- a) an interim, interlocutory and permanent injunction restraining the Defendant, its affiliated companies, servants, agents, or others persons acting on its benefit, from, directly or indirectly, publishing statements that:
 - (i) the Plaintiff is misleading the public;
 - (ii) the Plaintiff is not trustworthy;
 - (iii) the Plaintiff is dishonest;
 - (iv) the Plaintiff is unable to service its water heaters;
- b) damages in the amount of \$40,000,000.00;
- c) pre and post judgment interest in accordance with the provisions of the Courts of Justice Act
- d) costs on a substantial indemnity basis pursuant to the provisions of the Courts of Justice Act; and,
- e) such further relief as this Honourable Court may deem just.

The Parties

2. The Plaintiff, National Energy Corporation ("National"), is an Ontario corporation carrying on business in the natural gas fuelled water heater market (the "water heater rental business") under the trade name National Home Services.

3. The Defendant, Reliance Comfort Partnership ("Reliance") is a limited partnership. Its business operations include the water heater rental business operating under the trade name Reliance Home Services.

The False Statements

4. Reliance holds a near monopoly in the water heater rental business in areas outside of the Greater Toronto Area. As a consequence of National soliciting Reliance's customers, Reliance has engaged in a counter-marketing campaign directed at National the purpose of which is to limit the attrition of its customer base. As part of this marketing campaign, Reliance has made false and misleading statements concerning National and its business operations (the "statements").

5. The statements have included allegations, expressly and inferentially, that National is misleading the public, National is not trustworthy, National is dishonest and National is unable to service its water heaters.

- 5 -

Injurious Falsehood

6. National states that Reliance knew that the statements were untrue (or was reckless as to whether they were untrue), and as such, they were made with malice. The statements were intended to hinder National from successfully marketing its services to Reliance's customers and the public in general. National has suffered damages as a result of the statements including the loss of potential customers. National therefore states that Reliance is liable to it for the tort of injurious falsehood. National pleads and relies on the provisions of the *Libel and Slander Act*. National claims damages from Reliance in the amount of \$40,000,000.00.

Violations of *The Competition Act* and *Trademark Act*

7. National states that because the statements were "false" and "misleading" representations made for the purpose of "promoting" Reliance's business interests and "discrediting" National, Reliance is liable to National for breach of s.52(1)(a) of the *Competition Act* and s.7(a) of the *Trademarks Act*.

8. National requests that this action be tried in Toronto.

June 2nd
Date of issue: May , 2010

TEPLITSKYS
Brad Teplitsky LCUC #37342N
1 Yorkdale Rd. #403
Toronto, Ont. M6A 3A1

Tel: (416) 319-7024
Fax: (416) 981-7604

Lawyer for the Plaintiff

National Energy Corporation
Plaintiffs
Short Style of Proceeding

- and -

Reliance Comfort Limited Partnership
Defendant

CV-10-404128

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Court File No.

Proceeding commenced at Toronto

STATEMENT OF CLAIM

TEPLITSKYS
Brad Teplitsky LCUC #37342N
1 Yorkdale Rd. #403
Toronto, Ont. M6A 3A1

Tel: (416) 416-319-7024

Fax: (416) 981-7604

Solicitor of the Plaintiff

Appendix B

**ONTARIO
SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE**

BETWEEN:
ENTRE:

NATIONAL ENERGY CORPORATION

Plaintiff
Demandeur

and / et

RELIANCE COMFORT LIMITED PARTNERSHIP

Defendant
Défendeur

**ORDER DISMISSING ACTION FOR DELAY - FORM 48D
ORDONNANCE REJETANT L'ACTION POUR CAUSE DE RETARD - FORMULE 48D**

The plaintiff has not brought this action to conclusion or set it down for trial within the time prescribed by Rule 48.14 or such other time as was prescribed by order and has not cured the default.

Le demandeur n'a pas mis fin à cette action ni ne l'a mise en état pour inscription au rôle dans le délai prescrit par la règle 48.14 ou par une ordonnance, et il n'a pas remédié au défaut.

IT IS ORDERED THAT this action be dismissed for delay, with costs.

IL EST ORDONNÉ QUE la présente action soit rejetée pour cause de retard, avec dépens.

Susan Pooran

Date: 26-SEP-2012

Date:

Signed by: _____

signature: Local registrar / greffier local

Address of court office: Toronto

adresse du greffe: 393 University Av 10th fl
Toronto ON M5G 1E6

NOTE: An order under Rule 48.14 dismissing an action may be set aside under Rule 37.14.

REMARQUE : La règle 37.14 permet l'annulation d'une ordonnance rejetant une action rendue en vertu de la règle 48.14.

OCT - 1 2012

TO: BARRY HOWARD BRESNER
DESTINATAIRES : BORDEN LADNER GERVAIS
40 King Street W. Scotia Plaza
Toronto ON CA M5H 3Y4

Fax: (416)361-2746

Appendix C

Court File No. *CV-10-404539*

ONTARIO
SUPERIOR COURT OF JUSTICE

Pursuant to Rule 14.05 of the *Rules of Civil Procedure*

BETWEEN:



DOUGLAS MACGREGOR

Applicant

-and-

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on *Friday August 6th at 10:00am*, 2010, at 393 University Ave. Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to

serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: June 8, 2010

Issued by: Y. Grant
Local registrar Registrar

Address of court office:

393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: RELIANCE COMFORT LIMITED PARTNERSHIP
2 Lansing Square, Ste. 1200
Toronto, On
M2J 4P8

APPLICATION**Relief Sought**

1. The Applicant makes an Application for:
 - (a) A declaration that water heater rental arrangement between the Applicant and the Respondent has been terminated;
 - (b) His costs of this proceeding on a full or substantial indemnity basis, plus GST; and,
 - (c) Such further and other relief as this Honourable Court may deem just.

Grounds

2. The grounds for the application are as follows:
 - (a) The Applicant has, for several years, rented a water heater tank from the Respondent;
 - (b) The Applicant has decided to exercise his right to terminate his rental arrangement with the Respondent by returning the tank to the Respondent;
 - (c) The Respondent, in breach of the terms of the rental arrangement, has refused to accept the tank return and has given notice that it intends to continue to bill the Applicant in respect of the water heater tank;
 - (d) There are no material facts in dispute;
 - (e) Rule 14.05 of the *Rules of Civil Procedure*; and,

- (f) Such further and other grounds as counsel may advise and this Honourable Court may permit.

Documentary Evidence

3. The following documentary evidence will be used at the hearing of the Application:
- (a) the Affidavit of Douglas MacGregor, sworn; and,
 - (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Dated: June 8, 2010

TEPLITSKY, COLSON LLP
Barristers
70 Bond Street, Suite 200
Toronto, Ontario
M5B 1X3

Martin Teplitsky (10647K)

Tel: 416-365-9320
Fax: 416-365-7702

Lawyers for the Applicant

and

Applicant Douglas MacGregor

Respondent/Reliance Comfort

CV-10-404539
Court File No.:

Ontario Superior Court of Justice
Proceedings Commenced at Toronto

NOTICE OF APPLICATION

Teplitsky, Colson LLP
70 Bond Street, Suite 200
Toronto, Ont.
M5B 1X3
Martin Teplitsky Q.C. LSUC #10647K
Tel: 416-365-9320
Fax: 416-365-7702
Lawyer for the Appellants/Defendants

Appendix D

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2012-002 December 20, 2012 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

CT-2012- 002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

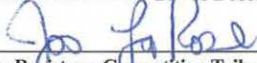
IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership.

BETWEEN:

I hereby certify this to be a true copy of the original document/
 Je certifie par la présente que ceci est une copie conforme au document original

Dated this / Fait ce 20th of December 2012


 For Registrar, Competition Tribunal /
 Pour Registraire, Tribunal de la concurrence

THE COMMISSIONER OF COMPETITION

Applicant

AND**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will make an application to the Competition Tribunal (the "**Tribunal**") pursuant to section 79 of the *Competition Act* (the "**Act**") for an Order pursuant to subsections 79(1), 79(2), and 79(3.1) of the Act, prohibiting the Respondent from abusing its dominant position by imposing exclusionary water heater return policies and procedures; directing the

Respondent to take certain other actions necessary to overcome the effects of its practice of anti-competitive acts; and directing the Respondent to pay an administrative monetary penalty and costs. The particulars of the Order sought by the Applicant are set out in paragraphs 55 and 56.

AND TAKE NOTICE that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal.

AND TAKE NOTICE that the Applicant has attached hereto as Schedule "A" a concise statement of the economic theory of the case.

AND TAKE FURTHER NOTICE that the Applicant will rely on the following Statement of Grounds and Material Facts in support of this application and on such further or other material as counsel may advise and the Tribunal may permit.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. OVERVIEW OF GROUNDS

1. The Commissioner of Competition (the "**Commissioner**") alleges that Reliance Comfort Limited Partnership, which conducts business under various names ("**Reliance**"), has abused and continues to abuse its dominant position in the supply of natural gas and electric water heaters and related services to residential consumers in certain local markets in Ontario (the "**Relevant Market**", as described more fully at paragraphs 29-32 below).
2. Reliance substantially or completely controls the Relevant Market. Since at least 2009, Reliance has preserved and enhanced its market power in the Relevant Market by implementing water heater return policies and procedures that impose significant costs on competitors and prevent customers from switching to those competitors. Reliance's water heater return policies and procedures constitute a practice of anti-competitive acts, the purpose and effect of which is to exclude competitors in the Relevant Market. Furthermore, Reliance imposed these water heater return policies and procedures knowing that they would have a negative exclusionary effect on competitors.
3. Reliance's practice of anti-competitive acts has had and is having the effect of preventing and lessening competition substantially. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.
4. The Commissioner therefore seeks an Order from the Tribunal: (i) prohibiting Reliance from directly or indirectly implementing exclusionary

water heater return policies and procedures; (ii) directing Reliance to take certain other actions necessary to overcome the effects of its practice of anti-competitive acts; (iii) directing Reliance to pay an administrative monetary penalty of \$10,000,000; (iv) directing Reliance to pay the costs of this proceeding; and (v) such other relief as the Tribunal considers appropriate.

II. MATERIAL FACTS

A. THE PARTIES

5. The Commissioner is appointed under section 7 of the Act and is charged with the administration and enforcement of the Act.
6. Reliance is a privately-held limited partnership, wholly owned by Alinda Capital Partners LLC, that rents natural gas and electric water heaters and provides related services to consumers in Ontario.

B. INDUSTRY BACKGROUND

(i) Residential Use of Water Heaters in Ontario

7. In Ontario, most residential consumers rent water heaters.
8. A significant majority of water heaters in Ontario are powered by natural gas. The next most common energy source for water heaters is electricity.
9. Residential consumers are limited in their choice of energy source for heating water by where they live and the infrastructure constraints of their residence. In rural areas, most residential consumers use electric water heaters as natural gas is generally not available in these areas. In contrast, in areas where natural gas is available, residential consumers commonly use natural gas instead of electric water heaters. Natural gas water heaters generally cost less to operate than electric water heaters.

10. Residential consumers may rent natural gas and electric water heaters from a utility company, if available, or from a rental water heater provider. Residential consumers may also purchase natural gas and electric water heaters from retailers, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning contractors. Most residential consumers who rent or purchase a water heater also obtain related water heater services, including installation, repair, maintenance and disconnection. When a customer renting a water heater switches providers, the original rental water heater provider generally requires customers to return the water heater.

(ii) Development of Ontario's Rental Water Heater Industry

11. Ontario's two largest natural gas suppliers, Enbridge, Inc. ("**Enbridge**") and Union Gas Limited ("**Union Gas**"), developed the rental water heater industry in the 1950s to expand the use of natural gas in the distinct areas of Ontario where they each had a monopoly in distributing natural gas. Both natural gas suppliers were also regulated by the Ontario Energy Board (the "**OEB**").
12. In 1999, Enbridge transferred its rental natural gas water heater assets to Enbridge Services Inc., which is now Direct Energy Marketing Limited ("**Direct Energy**"). Similarly, Union Gas transferred its rental natural gas water heater assets to Union Energy Inc., which is now Reliance. The transfer of these water heater assets to Direct Energy and Reliance effectively removed the OEB's oversight and regulation of Ontario's rental gas water heater industry.
13. Since this transfer of natural gas water heater assets in 1999, Reliance has been the dominant supplier of natural gas water heaters in those areas of Ontario where Union Gas distributes natural gas; namely, the area corresponding generally to parts of the following: Northern Ontario, from the Manitoba border to the North Bay/Muskoka area; Southwestern Ontario,

from Windsor to west of the Greater Toronto Area; and Eastern Ontario, not including Ottawa.

14. Reliance has also become the dominant supplier of electric water heaters in certain other areas in Ontario, owing in part to Reliance's acquisition of existing rental electric water heater assets.

C. RELIANCE'S EXCLUSIONARY WATER HEATER RETURN POLICIES AND PROCEDURES

15. Since at least 2009, Reliance has implemented various exclusionary water heater return policies and procedures as an integrated strategy to exclude competitors in the Relevant Market. These exclusionary policies and procedures relate to Reliance's water heater removal process, its return depot operations, and its exit fees and charges, as described below.

(i) Reliance Imposes An Exclusionary Removal Reference Number ("RRN") Return Policy

16. On 17 May 2010, Reliance imposed a new water heater return policy on competitors and customers (the "**RRN Return Policy**"). Before Reliance implemented this policy, Reliance's competitors regularly disconnected and returned Reliance rental water heaters on behalf of customers.
17. Under the RRN Return Policy, Reliance creates significant barriers to the return of its water heaters by, among other things:
 - i prohibiting the customer or competitor from returning a water heater unless the customer first obtains a RRN from Reliance and has signed and fully completed to Reliance's satisfaction a "Water Heater Return Form";
 - ii prohibiting competitors from obtaining a RRN on behalf of customers;

- iii refusing to provide a RRN to customers who contact Reliance with a competitor on the call; in such cases, Reliance regularly prevents these competitors from joining in on customer calls, notwithstanding that customers have agreed to have competitors on these calls; and
 - iv refusing to recognize agency agreements between customers and competitors that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heaters.
18. Furthermore, Reliance uses its RRN Return Policy to deter, impede, and prevent customers from terminating their Reliance rental agreements and switching to a competitor by, for example, keeping customers and competitors on hold for lengthy periods of time, imposing lengthy call-service periods, intentionally dropping calls, and intimidating customers with unwarranted fees and charges.
- (ii) Reliance Imposes Exclusionary Return Depot Policies and Procedures**
19. Through its exclusionary water heater return policies and procedures aimed at return depot operations, Reliance has created additional barriers for customers and competitors attempting to return their Reliance water heaters.
20. Reliance imposes arbitrary restrictions on the return process at its return depots and frequently changes these restrictions. These restrictions enable Reliance to reject at will attempts by customers and competitors to return water heaters, including by arbitrarily limiting return depot hours of operation and the number of water heaters that may be returned to such depots on a given day. Reliance also regularly fails to notify competitors and customers of changes to depot locations and hours of operation.

21. Where Reliance prevents, impedes or deters competitors from returning Reliance's water heaters through its restrictive return depot operations or its RRN Return Policy, competitors are forced to store these water heaters.

(iii) Reliance Levies Exclusionary Exit Fees and Charges

22. Further, Reliance levies multiple and unwarranted exit fees and charges to impede, prevent and deter customers from switching to competitors and to penalize customers and competitors. These exit fees and charges include damage; account closure; drain, disconnection and pick-up; as well as extra billing charges. Competitors need to assume these exit fees and charges on behalf of customers to facilitate customer switching.

(a) Damage Fees

23. Reliance regularly charges unwarranted damage fees by levying such fees:
- i in excess of the value of the damage or the costs of repair to the water heater; and
 - ii for the purported purpose of refurbishing or redeploying a returned water heater even though Reliance does not intend to or cannot refurbish the returned water heater or deploy it to another customer.
24. Further, where Reliance determines in its sole discretion that there has been significant damage, it requires customers to pay an unwarranted buy-out price to purchase the ostensibly damaged water heater, which Reliance nevertheless retains. Reliance also does not publish its buy-out prices; accordingly, customers may be unaware of the buy-out price.

(b) Account Closure and Drain, Disconnection and Pick Up Charges

25. Similarly, Reliance regularly imposes on customers unwarranted account closure charges as well as drain, disconnection and pick-up charges to

impede, deter, and prevent customers from switching to competitors. Competitors need to assume these exit fees and charges on behalf of customers to facilitate customer switching.

(c) Extra Billing of Customers

26. Additionally, Reliance regularly continues to charge customers the Reliance rental rate after customers have switched to a competitor and Reliance has prevented the customer or the competitor from returning the Reliance water heater. Consequently, customers are extra billed rental rates by Reliance, in some cases for up to several months. These additional costs place a significant financial burden on customers that competitors need to assume.
27. Reliance employs internal and external collection processes to harass customers into paying these multiple and unwarranted exit fees and charges. To avoid this harassment and the potential effects on customers' credit ratings, customers pay these unwarranted charges, and competitors also need to assume these costs.

III. SECTION 79 OF THE ACT: RELIANCE HAS ABUSED AND CONTINUES TO ABUSE ITS DOMINANT POSITION

28. By imposing its various exclusionary water heater policies and procedures, Reliance has abused and continues to abuse its dominant position in the Relevant Market.

A. RELIANCE SUBSTANTIALLY OR COMPLETELY CONTROLS THE RELEVANT MARKET

(i) Relevant Market

29. Two distinct product markets can be identified: (i) the supply of natural gas water heaters and related services; and (ii) the supply of electric water heaters and related services. These related services include installation, disconnection, maintenance and repair of water heaters. For the purpose of this application, these product markets have been aggregated. The relevant

product market is thus the supply of natural gas and electric water heaters and related services to residential consumers.

30. For the majority of residential consumers, no reasonable substitutes exist for natural gas or electric water heaters.
31. The geographic market for the supply of natural gas and electric water heaters and related services to residential consumers is local in nature. The relevant geographic markets are (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets in Ontario. For the purpose of this application, these geographic markets have been aggregated.
32. The Relevant Market is thus the supply of natural gas and electric water heaters and related services to residential consumers in the local markets of Ontario where Union Gas distributes natural gas and in certain other local rural markets of Ontario.

(ii) Reliance's Market Power

33. Reliance substantially or completely controls the Relevant Market.
34. Reliance's market power is indirectly indicated by its market share and by barriers to entry. Reliance controls at least 76% of the Relevant Market, based on annual revenues. Reliance's exclusionary policies and procedures create significant artificial barriers to entry in the Relevant Market, which would otherwise be characterized by ease of entry.
35. Reliance's market power is additionally and directly indicated by, for example, its ability to increase and maintain high prices. Since 2005, Reliance has maintained substantially high gross profit margins from renting water heaters to residential consumers in the Relevant Market. Indeed, through the rental payments it receives on its installed base of water heaters in the Relevant Market, Reliance has recovered and continues to recover a

significant multiple of the capital cost of a water heater installed for residential use in the Relevant Market.

36. Since at least 2009, Reliance has preserved and enhanced this market power through its various exclusionary water heater return policies and procedures.

B. RELIANCE'S WATER HEATER RETURN POLICIES AND PROCEDURES ARE A PRACTICE OF ANTI-COMPETITIVE ACTS

37. Through the various water heater return policies and procedures described above, Reliance has engaged and is engaging in a practice of anti-competitive acts. Reliance has imposed and continues to impose its water heater return policies and procedures with the purpose of having an intended negative effect on competitors that is exclusionary.
38. Reliance imposed these policies and procedures with the intended purpose of eliminating and preventing the entry or expansion of competitors and of making competitors less effective in competing against Reliance in the Relevant Market.
39. Furthermore, Reliance imposed and continues to impose these water heater return policies and procedures knowing of their negative exclusionary effects. Reliance knew that, pursuant to a 2002 Consent Order, the Tribunal prohibited Direct Energy (then Enbridge Services Inc.) from implementing similar exclusionary water heater return policies and procedures in the local markets of Ontario where Enbridge distributes natural gas (the "**Direct Energy Consent Order**"). In particular, the Direct Energy Consent Order prohibited Direct Energy from preventing competitors from disconnecting and returning water heaters and from imposing on customers a commercially unreasonable and discriminatory buy-out schedule. Indeed, Reliance provided information to the Bureau explaining the positive effects of the prohibitions of the Direct Energy Consent Order on competition.

40. Notwithstanding the above, Reliance subsequently implemented certain of the water heater return policies and procedures prohibited by the Direct Energy Consent Order. Reliance sought to impose similar water heater return policies and procedures to those prohibited under the Direct Energy Consent Order on the basis that the Direct Energy Consent Order did not apply to Reliance, despite knowing that the Commissioner had concerns about the anti-competitive effects of such water heater return policies and procedures.
41. Moreover, as it relates specifically to Reliance's RRN Return Policy, Reliance implemented this policy after it had expressed concerns to the Bureau about the anti-competitive effects of a similar policy adopted by Direct Energy. Direct Energy implemented a "Return Authorization Number" ("**RAN**") policy on 30 April 2010, while the Direct Energy Consent Order was still in effect (the "**Direct Energy RAN Policy**"). The Direct Energy RAN Policy prohibited customers from returning a water heater unless the customer had first obtained a RAN from Direct Energy. Direct Energy also prohibited third parties from obtaining a RAN on behalf of customers. Following several complaints the Bureau received, the Bureau expressed its concerns to Direct Energy. Direct Energy suspended this RAN policy in June 2010. Shortly after Reliance expressed its concerns to the Bureau about the anti-competitive effects of the Direct Energy RAN Policy, Reliance implemented its similar RRN Return Policy in May 2010. Reliance continued to impose its RRN Return Policy after Direct Energy suspended its RAN Policy.
42. The exclusionary water heater return policies and procedures imposed by Reliance are intended to, and do, exclude and prevent competitors from entering or expanding in the Relevant Market. Reliance's water heater return policies have the exclusionary effect of imposing significant costs on competitors and preventing customers from switching to those competitors.

43. Reliance's RRN Return Policy and its frequent and arbitrary changes to return depot operations, along with its other exclusionary water heater return policies and procedures, have caused competitors to incur significant additional and unwarranted costs. These include transportation and labour costs, as well as the costs of storing the significant backlog of Reliance water heaters that Reliance has refused to accept or has prevented competitors from returning. These significant costs imposed by Reliance limit competitors' ability to compete effectively against Reliance.
44. Reliance's exclusionary water heater return policies and procedures also result in significant transactional costs for customers that deter, impede or prevent customers from switching to competitors. To facilitate customer switching, competitors need to assume the unwarranted exit fees and charges imposed by Reliance on customers during the water heater return process. Additionally, Reliance uses its RRN Return Policy to intimidate customers to continue their Reliance rental agreements despite their intentions and preferences to switch to competitors.
45. In some cases, competitors have declined to replace Reliance water heaters with their own water heaters given the significant costs of the unwarranted exit fees and charges they need to assume to facilitate customer switching. In these cases, Reliance customers must continue their Reliance rental agreements despite their preference and intentions to terminate these agreements and to switch to competitors.
46. Consequently, Reliance's exclusionary water heater return policies and procedures have caused at least two competitors to exit the Relevant Market. They have also impeded and prevented several competitors from entering or expanding in the Relevant Market; however, these same competitors had been able to enter other local markets where and while the prohibitions of the Direct Energy Consent Order were in effect.

47. In summary, Reliance has imposed and continues to impose its water heater return policies and procedures with the intended negative effect of excluding competitors. Moreover, given the aforementioned exclusionary effects, it was and is reasonably foreseeable that Reliance's water heater return policies and procedures would have a negative exclusionary effect on competitors.

C. RELIANCE'S EXCLUSIONARY WATER HEATER RETURN POLICIES AND PROCEDURES SUBSTANTIALLY LESSEN AND PREVENT COMPETITION

48. The exclusionary water heater return policies and procedures imposed by Reliance have substantially lessened and prevented and will continue to substantially lessen and prevent competition in the Relevant Market. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.

49. Reliance's exclusionary water heater return policies and procedures establish significant artificial barriers to entry and expansion in the Relevant Market. These exclusionary policies and procedures have caused at least two competitors to exit and prevented and impeded the entry or expansion of several competitors in the Relevant Market.

50. In the absence of Reliance's practice of anti-competitive acts, barriers to entry would be low and substantially greater competition would likely emerge in the Relevant Market from rental providers as well as retailers of residential water heaters.

51. Further, in the absence of Reliance's practice of anti-competitive acts, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality and choice.

IV. CONCLUSION

52. Reliance has abused and continues to abuse its dominant position by imposing exclusionary water heater return policies and procedures.
53. Reliance implemented its exclusionary water heater return policies and procedures as an integrated strategy with the purpose and effect of excluding and preventing the entry or expansion of competitors. Reliance achieves these negative exclusionary effects by imposing significant costs on competitors and preventing customers from switching to those competitors. Reliance thus relies on its exclusionary water heater return policies and procedures, not superior business performance, to retain customers.
54. Reliance's practice of anti-competitive acts has lessened and prevented and continues to lessen and prevent competition substantially in the Relevant Market.

V. RELIEF SOUGHT

55. The Commissioner seeks an Order from the Tribunal pursuant to subsections 79(1), 79(2), and 79(3.1) of the Act:
- (i) prohibiting Reliance from directly or indirectly implementing any exclusionary water heater return policies or procedures;
 - (ii) directing Reliance to accept valid agency agreements between customers and competitors for return of Reliance water heaters;
 - (iii) prohibiting Reliance from charging customers unwarranted exit fees and charges upon termination of a rental water heater agreement;
 - (iv) directing Reliance to provide customers a fixed and commercially reasonable buy-out price schedule upon entering into a rental water heater agreement with Reliance;

- (v) directing Reliance to provide copies of its buy-out price schedule to customers and to make it readily available on its website;
 - (vi) directing Reliance to pay the amount of \$10,000,000 as an administrative monetary penalty;
 - (vii) directing Reliance to pay the costs of this proceeding;
 - (viii) granting all other orders or remedies that may be required to give effect to the foregoing prohibitions, to restore competition in the Relevant Market, or to reflect the intent of the Tribunal and its disposition of this matter; and
 - (ix) granting such further and other relief as this Tribunal may consider appropriate.
56. In determining the amount of an administrative monetary penalty, the Tribunal should take into account the following aggravating factors:
- i Over at least the past three years, and as a result of its exclusionary water heater return policies and procedures, Reliance has caused at least two competitors to exit the Relevant Market and impeded and prevented several others from entering or expanding in the Relevant Market. Further, competitors have incurred significant costs and lost substantial revenue as a result of Reliance's exclusionary water heater return policies and procedures;
 - ii Reliance has financially benefited from its continued abuse of its dominant position. Since 2009, Reliance has generated substantial gross revenue while engaging in the practice of anti-competitive acts described above;

- iii Since 2009, Reliance has also generated substantially high gross profits while engaging in the practice of anti-competitive acts described above.
- iv For at least the past three years, Reliance has implemented its various exclusionary water heater return policies and procedures knowing the negative exclusionary effect they would have on competitors and competition in the Relevant Market. Moreover, Reliance implemented its various exclusionary water heater return policies and procedures knowing that similar water heater return policies and procedures had been prohibited under the Direct Energy Consent Order;
- v The practice of anti-competitive acts has not been self-corrected and is unlikely to be self-corrected; and
- vi Any other relevant factor.

VII. PROCEDURAL MATTERS

- 57. The Applicant requests that this application be heard in English.
- 58. The Applicant requests that this application be heard in the City of Ottawa.
- 59. For the purpose of this Application, service of all documents on the Applicant may be effected on:

**Department of Justice
Competition Bureau Legal Services**
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9

David R. Wingfield (LSUC #28710D)
Executive Director and Senior General Counsel
Tel: (819) 994-7714
Fax: (819) 953-9267

Josephine A.L Palumbo (LSUC #34021D)
Senior Counsel
Tel: (819) 953-3902
Fax: (819) 953-9267

Parul Shah (LSUC #55667M)
Counsel
Tel: (819) 953-3889
Fax: (819) 953-9267

Counsel for the Applicant

AND COPIES

TO: Reliance Comfort Limited Partnership

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Robert S. Russell (LSUC #25529R)
Tel: (416) 367-6256/Fax: (416) 361-7060

AND TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

DATED AT Gatineau, Quebec, this 20th day of December 2012.



John Pecman
Interim Commissioner of Competition

Schedule "A"
CONCISE STATEMENT OF ECONOMIC THEORY

1. Since at least 2009, Reliance has implemented various exclusionary water heater return policies and procedures as an integrated strategy to exclude competitors in the Relevant Market. These exclusionary policies and procedures relate to Reliance's water heater removal process, its return depot operations, and its exit fees and charges.
2. Reliance's exclusionary water heater return policies and procedures impose significant costs on competitors and prevent customers from switching to those competitors.
3. Reliance's exclusionary policies and procedures have substantially lessened and prevented, and will continue to substantially lessen and prevent, competition in the Relevant Market.

Market Power in the Relevant Market

4. The relevant product markets are: (i) the supply of natural gas water heaters and related services to residential consumers, and (ii) the supply of electric water heaters and related services to residential consumers. Related services include installation, disconnection, maintenance and repair of water heaters.
5. The relevant geographic markets for the supply of natural gas and electric water heaters and related services to residential consumers are local in nature. The relevant geographic markets are (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets of Ontario. Reliance's water heater business is concentrated in these relevant geographic markets.
6. The relevant product and geographic markets can each be aggregated. Thus, the Relevant Market is the supply of natural gas and electric water

heaters and related services to residential consumers in the local markets of Ontario where Union Gas distributes natural gas and in certain other local rural markets of Ontario.

7. Reliance substantially or completely controls the Relevant Market. Reliance's market power is indicated by its high market share, barriers to entry and its ability to increase and maintain high prices.

Practice of Anti-competitive Acts

8. The water heater return policies and procedures imposed by Reliance create significant artificial barriers for Reliance customers to return their water heaters and switch suppliers. These barriers raise competitors' costs significantly and impede Reliance's competitors from successfully winning customers based on the quality and price of their products and services.
9. Reliance uses its RRN Return Policy to deter, impede, and prevent customers from terminating their Reliance water heater rental agreements, from returning Reliance water heaters and from switching to competitors.
10. In addition, Reliance regularly imposes arbitrary restrictions on the return process at its return depots and frequently changes these restrictions. Reliance uses these restrictions to enable it to reject at will attempts by customers and competitors to return water heaters. These restrictions impose additional costs on competitors and make it more difficult for them to compete effectively against Reliance.
11. Further, Reliance regularly levies multiple and unwarranted exit fees and charges on customers to deter, impede and prevent customers from switching to competitors and to penalize customers and competitors. To successfully win a new customer from Reliance, competitors need to assume these exit fees and charges on behalf of customers, further increasing their costs and diminishing their ability to compete effectively against Reliance. In some cases, where a competitor is unable to absorb

these significant additional costs, Reliance rental customers are prevented from switching to a competing water heater provider.

Substantial Lessening and Prevention of Competition

12. The exclusionary water heater return policies and procedures imposed by Reliance have substantially lessened and prevented and will continue to substantially lessen and prevent competition in the Relevant Market. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.
13. Reliance's exclusionary water heater return policies and procedures establish significant artificial barriers to entry or expansion in the Relevant Market. In the absence of Reliance's practice of anti-competitive acts, barriers to entry would be low and substantially greater competition would likely emerge in the Relevant Market from rental providers as well as retailers of residential water heaters.
14. Further, in the absence of Reliance's practice of anti-competitive acts, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality and choice.

CT-2012-

COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

(Applicant)

-AND-

RELIANCE COMFORT LIMITED PARTNERSHIP

(Respondent)

NOTICE OF APPLICATION

**DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9**

**David R. Wingfield (LSUC #28710D)
Josephine A. L. Palumbo (LSUC #34021D)
Parul Shah (LSUC #55667M)**

Tel: 819.994.7714
Fax: 819.953.9267

Counsel to the Commissioner of Competition

Appendix E

CT-2012-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

and

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

**RESPONSE OF RELIANCE COMFORT LIMITED PARTNERSHIP
TO THE NOTICE OF APPLICATION**

PART I: OVERVIEW

1. The Application filed by the Commissioner of Competition (“**Commissioner**”) against Reliance Comfort Limited Partnership (“**Reliance**”) is premised upon a fundamentally flawed market definition and assessment of Reliance’s market position.
2. The relevant market for the purposes of the Application is the market for the supply of residential water heater products or services in the province of Ontario (“**Relevant Market**”), not the undefined and artificially disaggregated markets proposed by the Commissioner.

3. Reliance does not substantially or completely control the Relevant Market. With a market share estimated at less than 25% in 2012, Reliance's share of annual sales in the Relevant Market is well below the market share threshold of dominance. Consumers can and do elect to own, rent or finance water heaters from a diverse range of suppliers across Ontario: ranging from plumbers, heating, ventilation and air conditioning contractors, rental supply companies (such as Reliance), retailers (including Sears, Canadian Tire, Home Depot, RONA and Lowes), local utility companies and resource and energy suppliers (such as Imperial Oil). Further, consumers regularly switch suppliers.

4. Reliance's return policies and procedures do not constitute a practice of anti-competitive acts and have not and are not likely to substantially lessen or prevent competition. In fact the return processes and procedures that the Commissioner takes issue with were in part introduced by Reliance to protect and educate consumers against the dishonest behavior of some rival firms to Reliance who seek to compete not on price, service and quality, but rather through the use of false and misleading door-to-door sales practices, a consumer protection issue that is well-documented, is the subject of legislation currently before Ontario's legislature (namely, *Bill 55, Stronger Protection for Ontario Consumers Act, 2013*).

5. All of Reliance's Union Gas legacy customers can terminate their rental agreement with Reliance at any time and are not subject to any minimum term contract.

6. In the circumstances, the Commissioner is unable to discharge the applicable statutory burden under either subsection 79(1) or subsection 79(2) of the *Competition Act*.

7. Reliance has at all times cooperated with the Competition Bureau, including by responding to voluntary information requests. The imposition of an administrative monetary penalty in these circumstances is both unwarranted and an over-extension of the objectives of the *Competition Act*.

PART II: ADMISSIONS AND DENIALS

8. Except as expressly admitted below, Reliance denies all allegations contained in the Application and puts the Commissioner to the strict proof thereof.

9. Reliance admits paragraphs 5 and 11 of the Application.

10. Reliance generally admits paragraph 6 of the Application, other than to state that it is indirectly wholly owned by investment funds managed by Alinda Capital Partners I Ltd.

11. Reliance generally admits paragraph 10 of the Application, but states further that residential consumers are increasingly adopting solar, ground and alternative energy sources to heat water and, in addition to natural gas and electric water heaters, may choose to purchase or rent a combined space and water heater or water heaters fueled by propane, oil, solar power, ground source or some other alternative fuel source.

PART III: MATERIAL FACTS ON WHICH RELIANCE RELIES

A. Industry background

12. In Ontario, the business of renting water heaters was created in the 1950s by the natural gas distributors Consumers Gas and Union Gas as a way of encouraging the retail consumption of natural gas. Rentals of both electric and gas water heaters were later made available through other companies, including many utilities large and small such as Ontario Hydro, North Bay Hydro and Collingwood Utility Services. While consumers could always purchase their water heaters, water heater rental businesses were tied to the suppliers' distribution and utility networks.

13. As part of the deregulation of the Ontario energy industry in the late 1990s, Consumers Gas and Union Gas unbundled their water heater portfolios from their gas distribution businesses, which prior to this time had been tied to these regulated monopolies for natural gas supply. Consumers Gas (by then renamed Enbridge Gas) sold its water heater portfolio to what is now Direct Energy Marketing Limited ("**Direct Energy**"), while Union Gas sold its water heater portfolio to Union Energy Inc. (now Reliance). As the predictable result of this history, a

large number of Reliance and Direct Energy's customers are located in areas where the regulated monopoly markets for natural gas distribution had existed prior to deregulation.

14. The unbundling process initiated greater competition in the market for the supply of residential water heaters: rental suppliers could operate inside and outside the regulated boundaries of the gas distributors. These new suppliers range in size from small independent contractors to wholly owned subsidiaries of large multinational energy providers such as National Energy Inc., doing business as National Home Services ("**National**"). National is a wholly owned subsidiary of Just Energy, Inc., one of the largest retail energy and home comfort suppliers in North America serving over 1.8 million customers and listed on both the New York and Toronto stock exchanges.

15. Today homeowners can own, rent or finance a water heater from a number of sources, including: retailers such as Sears, Canadian Tire, RONA, Lowes and The Home Depot; heating, ventilation and air conditioning contractors; plumbers; rental suppliers (such as Reliance, Direct Energy and National), local utility companies and resource and energy suppliers (such as Imperial Oil).

16. Apart from warranty replacements, water heaters sales result from:

- (a) a consumer electing to replace their water heater (whether for reasons of age, tank size, fuel type, or energy efficiency); and
- (b) the installation of water heaters into newly constructed homes.

17. Many new entrants seek to acquire new sales by driving demand through door-to-door sales activity. Unfortunately, this door-to-door sales activity has also corresponded with a significant and well documented increase in marketplace abuses. Since 2009 the use of misleading door-to-door sales practices by certain suppliers of residential water heaters has continued to rise. The prevalence of the problem has been well documented by the media, the Better Business Bureau, and Ontario's Ministry of Consumer Services ("**Ministry**"). In fact, the Ministry has reported that water heater rentals were the third most frequent source of consumer complaints in 2010 and the second most frequent source of complaints in both 2011 and 2012.

18. Examples of the false and misleading sales practices that have become prevalent in the water heater industry (particularly through the door-to-door sales channel) include sales representatives:

- (a) falsely identifying themselves as working for a customer's existing supplier in order to create the impression that replacement of their water heater would not entail a change of suppliers or termination of their existing rental agreement;
- (b) falsely identifying themselves as a representative of a utility or government agency responsible for inspection of household appliances;
- (c) falsely claiming to be upgrading water heaters for efficiency purposes on behalf of a utility or government agency;
- (d) falsely claiming to be authorized to replace the water heaters throughout a neighbourhood or development;
- (e) falsely claiming that the customer's existing supplier assigned their contract to the salesperson's company;
- (f) falsely claiming that the customer's existing water heater is substandard, beyond its useful life, not installed pursuant to applicable building codes and/or generally unsafe;
- (g) falsely overstating the energy or costs savings that might be realised by switching suppliers;
- (h) misleading or failing to explain fully to the customer their existing supplier's return policies;
- (i) misrepresenting or failing to disclose the term of the contract to which the customer is committing; and
- (j) misrepresenting the actual costs of the regular monthly payments and other charges.

19. That consumers are being misled by door to door sales tactics is borne out by the fact that the majority of Reliance Customers who switch as a result of a door-to-door sales approach are locked into contracts with higher monthly rates. It was also the subject of an independent study funded in part by Industry Canada.

20. Another type of marketplace abuse involves the circumvention of the provisions of Ontario's *Consumer Protection Act, 2002* ("CPA"). The CPA generally provides consumers with a 10 day cooling off period during which they can rescind their contract with a new supplier without penalty. However, certain suppliers seek to negate the statutory protection under the CPA by immediately replacing a switching customer's water heater and then attempting to protect against the original supplier getting notice of the removal by delaying the return of the removed water heater until after the 10 day cooling off period has expired. These competitors are aware that should the consumer contact their existing supplier they will be made aware of their statutory rights and they therefore take all steps to prevent the consumer from contacting their current provider.

21. *Bill 55, Stronger Protection for Ontario Consumers Act, 2013* is currently before Ontario's legislature and has provisions directly intended to address some of the misleading sales tactics that are directly relevant to the Commissioner's allegations against Reliance and have been designed to help ensure consumers approached by door-to-door salespersons of water heaters are properly informed and benefit from a meaningful statutory cooling off period. Reliance was actively involved in the Ministry's consultation process that preceded the introduction of Bill 55.

B. The Relevant Market

22. Residential consumers in Ontario either rent or own their water heaters for the purpose of providing their residence with hot water. Ontario is unique in Canada and in North America generally with very limited exceptions, in that a majority of homeowners have historically rented rather than owned their water heaters.

23. However, like most of Canada and North America, residential consumers in Ontario have a number of options with respect to heating water, including:

- (a) owning or renting a storage water heater;
- (b) owning or renting a tankless water heater (also known as “instantaneous” or “on-demand” water heaters); or
- (c) owning or renting a combination boiler that combines central heating with the domestic water heater.

24. The average useful life of a natural gas or electric residential water heater is approximately 13 to 17 years. During the term of its useful life, a water heater will require very limited maintenance. Whether a water heater is rented or purchased it is typically accompanied by a lengthy warranty or service guarantee from the rental provider or seller as the case may be.

25. While natural gas and electric water heaters are the most common type of water heaters used by urban residential consumers, consumers, particularly those in rural areas, also acquire water heaters that use alternative fuel sources including propane, oil, solar and ground source heating. There is no basis or facts alleged by the Commissioner to support the contention that the product market for the supply of residential water heaters should be disaggregated based on fuel source. Reliance states that water heaters utilizing various fuel sources are substitutes that should be included in the relevant product market.

26. Reliance denies the product markets proposed by the Commissioner and states instead that the relevant product market is the market for the supply of residential water heater products and services.

27. The Commissioner purports to define the relevant geographic market as “(i) the local markets of Ontario where Union Gas distributed natural gas and (ii) certain other local rural markets in Ontario”.

28. Reliance denies that it is appropriate to define the relevant geographic market by reference to the distribution area of a third party to which Reliance has no relationship and in respect of which the boundaries of the markets served have changed since Reliance acquired the

water heater rental business from Union Gas in 1999. Furthermore, the Commissioner has stated no facts to support this market definition and has failed to state any economic theory to support the contention that these areas of Ontario, which were previously regulated natural gas supply monopolies, are relevant or appropriate markets for the purposes of analyzing current competitive interaction.

29. Further, Reliance notes that no facts have been pleaded to support the boundaries of the Commissioner's proposed geographic market or explain the areas purported to be captured by the reference to "certain other local rural markets in Ontario". These alleged markets are undefined and unknown.

30. Reliance denies the market definition proposed by the Commissioner and states that the relevant market is the market for the supply of residential water heater products and services in the province of Ontario ("**Relevant Market**"). Reliance competes throughout the province of Ontario with a myriad of large and small competitors. The competitiveness of the market is in part evidenced by the fact that Reliance has experienced an ongoing erosion of its customer base due to the large number of new competitors that have entered the market. In fact this erosion or attrition rate has increased since Reliance adopted the return policies and procedures in respect of which the Commission bases his allegation of abuse of dominance.

C. The correct approach to measuring market share

31. Contrary to the approach adopted by the Commissioner, the size of Reliance's existing customer base relative to other suppliers (whether measured by units or derived revenue) is not an appropriate basis for measuring or establishing market power.

32. The appropriate and typical measure of market share is share of sales. The number of households with a Reliance water heater installed in their home says nothing about Reliance's current share of the market for the supply of residential water heaters. This is especially so in circumstances where the bulk of Reliance's customers were inherited from a regulated monopoly or acquired from other third parties.

33. By analogy, the number of General Motors vehicles currently under existing leases provides no insight into General Motors' current competitiveness or the state of competition in

the automotive market. Rather an analysis of competitiveness in the market would study the number of vehicles sold or leased by General Motors as a percentage of the total number of vehicles sold in the market in a given year. To the extent that market share reflects the competitiveness of a market it is a question of current sales activity or success among rivals that would typically and appropriately be considered.

34. In 2012, Reliance's share of the Relevant Market's annual sales was estimated at less than 25% - well below the threshold for dominance. The Commissioner states no facts or basis other than the percentage of Reliance's installed based to support the contention that Reliance is in a dominant position in the market place. In fact, since at least 2008, both Reliance and Direct Energy have experienced annual increases in the number of customers leaving its residential rental program in favour of competitors. The table below sets out as a percentage of total customers, the percentage of customers who left Reliance's and Direct Energy's residential rental programs year on year since 2007:

	2007	2008	2009	2010	2011	Sept. 2012
Reliance	2.4%	2.4%	3.1%	3.9%	4.0%	4.5%
Direct Energy	2.1%	3.2%	8.0%	6.4%	6.0%	6.1%

35. For the period 2007 to 2011, 16.0% of Reliance's customers and 25.5% of Direct Energy's customers switched suppliers. For the period January 1, 2012 to September 30, 2012, 4.5 % of Reliance's customers and 6.1% of Direct Energy's customers switched suppliers. This represents a dramatic shift in market share particularly in light of the fact that water heaters have a 13 to 17 year lifespan, meaning that only a small proportion of Reliance's customers would typically be acquiring a new water heater at any given time.

36. Reliance states that it is not dominant in the Relevant Market, nor is it dominant in any market as alleged by the Commissioner in the Application. To the contrary, the competitiveness of the market is indicated by the successful entry of new competitors and the erosion of the customer bases of incumbent rental providers such as Reliance and Direct Energy. Further the

introduction in May 2010 of the return policies and procedures cited by the Commissioner has not deterred the success of Reliance's rivals. There are absolutely no facts nor evidence to suggest that there has been a negative impact on competition whatsoever. In fact, Reliance's policies and procedures have increased competitiveness and supported consumer choices by enabling consumers to avoid unlawful sales practices and permit competition between competitors.

D. Low barriers to entry

37. As acknowledged by the Commissioner at paragraph 50 of the Application, the Relevant Market is characterised by no or very low barriers to entry:

- (a) as demonstrated by the range in the size of suppliers supplying the market, the supply of residential water heaters is commercially viable with or without scale.
- (b) new entrants can begin supplying residential water heaters with minimal upfront capital investment;
- (c) new entrants can finance growth through readily available financing options, including in the case of National, MorEnergy, LivClean and Ontario Consumers Home Services, through securitization;
- (d) supply of water heaters is not, and never has been, regulated.

E. Reliance's residential water heater business

38. Reliance's principal lines of business: are (i) its water heater business through which it rents water heaters to both residential and commercial customers; (ii) its heating, ventilation and air conditioning business; and (iii) its security and monitoring business. Reliance also engages in the business of financing consumer purchases of heating, venting and air conditioning and ancillary home comfort equipment, as well as consumer purchases of boilers, water heaters, water treatment equipment and fireplaces.

39. Operating under the "Reliance Home Comfort" brand, Reliance rents natural gas and electric water heaters to approximately 1.2 million residential customers in approximately 400 communities across Ontario. Reliance owns the water heaters it rents. It manages the sale,

rental, maintenance and service of its products both directly and through the use of independent contractors.

40. While Reliance's customer base was originally concentrated in the regulated monopoly territories of Union Gas, it has expanded its rental water heater business beyond these areas into new communities in Ontario.

41. Reliance rents the following types of water heaters:

- (a) natural gas fueled storage water heaters – conventionally vented, direct vented and power vented models;
- (b) electric storage water heaters;
- (c) gas fuelled tankless residential water heaters; and
- (d) propane water heaters in rural areas of Ontario.

42. In Ontario, Reliance acquires new customers by reason of:

- (a) a customer deciding to switch from his or her current rental supplier to Reliance;
- (b) a customer deciding to rent rather than own their water heater (for example, when their currently installed water heater reaches the end of its useful life);
- (c) a customer purchasing a new home from a builder in which a Reliance rental water heater has been installed;
- (d) acquisition of a third party's rental water heater assets.

F. Reliance's rental terms and conditions

43. All of Reliance's Union Gas legacy customers can terminate their rental agreement at any time by simply returning Reliance's water heater and paying any applicable account closure charge. As at January 2013, only an insignificant number amounting to approximately 7% of Reliance's total customer base may be required to buy out their water heater.

44. The applicable fees and account closure charges to be paid upon termination of a Reliance rental arrangement are based on the age of the water heater being returned and whether or not the terminating customer has requested Reliance carry out some or all of the services required to be performed in order to facilitate the return of the water heater.

Account closure fees

45. All Union Gas legacy customers can terminate their rental agreement with Reliance subject only to the payment of the applicable account closure fee.

46. For customers with a water heater that is over 10 years old, no account closure fee is payable. For customers with a water heater that is between one to ten years old, an account closure fee of \$40 is payable. For customers with a water heater that is less than one year old, an account closure fee of \$200 is payable.

Disconnect and removal fees

47. Suppliers that rent residential water heaters each have policies and procedures (whether arising from their contractual arrangements with customers or otherwise) that govern the way in which their water heaters may be drained, disconnected, removed and returned to them following a customer's decision to terminate their rental agreement.

48. Reliance allows customers leaving its rental program to drain, disconnect, remove and return their Reliance water heater. Therefore Reliance customers are not obligated to pay any fees for these services to Reliance upon termination of their water heater rental agreement. This is in distinct contrast to most other providers of rental water heaters, such as National that specifically prohibit customers from disconnecting, removing and returning rental water heaters. These competitors require their customers to pay fees to them to carry out those services. For example, National charges some of its customers \$337.50 for removal and return of conventional or electric tanks and \$472.50 for removal and return of a power vented tank.

49. By comparison, if a switching customer chooses to have Reliance drain, disconnect, remove and pick up its water heater, Reliance charges that customer \$125.00 (regardless of the

type of water heater). The \$125 charge offsets, but does not cover, Reliance's actual costs of sending a fully licensed contractor to the customer's home to:

- (a) drain the water from the tank;
- (b) disconnect the water heater from the home's water supply;
- (c) where applicable, disconnect the water heater from the home's gas and/or electric supply;
- (d) remove the water heater from the customer's home; and
- (e) return the water heater to a Reliance return location.

Damages charges

50. Consistent with general leasing practices, customers are liable to incur a damage charge if Reliance's water heater is returned with damage beyond normal wear and tear. Until recently it was Reliance's policy and practice to charge the lower of the fair retail value of the cost of the necessary repair or the buy-out cost of the water heater. Effective January 2013, Reliance's policy and practice is to charge the lower of Reliance's average calculated cost of the necessary repair or the buy-out cost of the water heater.

51. Only an insignificant number of customers who returned their water heater during the period 2009 to end of year 2012 were charged a damages charge by Reliance.

G. Reliance's termination and return policy

52. Effective May 17, 2010 Reliance implemented the following termination and return policy ("**RRN Policy**"):

- (a) Customers must call Reliance directly in order to initiate the process of terminating their rental agreement;
- (b) If after speaking with a Reliance representative, the customer still wants to terminate their rental agreement, the customer will be provided with a unique

tracking number – called a “Removal Reference Number” (“RRN”) and details of their nearest return location;

- (c) The RRN is to be recorded on a Reliance form (available to competitors or customers at Reliance drop-off locations) which records certain identifying information regarding the water heater, the customer and the person returning the water heater (if different from the customer). The water heater and form is to be returned to the nearest return location (as communicated to the customer in the manner set out above);
- (d) Reliance will recognize as customer agent any third party to whom the customer has chosen to provide their RRN;
- (e) For the purpose of arranging for the removal or return of Reliance’s water heater, Reliance will only deal with the customer or any third party agent to whom the customer has provided the RRN.
- (f) Reliance will refuse to accept a removed water heater from any person who is unable to either:
 - (i) identify themselves as Reliance’s customer; or
 - (ii) quote the applicable RRN and thereby provide Reliance with assurance that they have been authorised by the customer to effect the return.

53. The RRN Policy initiates the termination process, allows for the tracking of returns, processing of billing and accounting changes and provides customers with a simple means through which to appoint a third party agent to undertake the replacement of their water heater and the return of the water heater to Reliance. This policy is similar to the typical and ordinary return procedures adopted by many commercial enterprises.

54. Contrary to the allegations made by the Commissioner, Reliance does not through its RRN Policy refuse to recognize agency agreements that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heaters. As pleaded above,

Reliance will recognize as customer agent any person to whom a customer has provided their RRN.

55. What Reliance does through its RRN Policy is refuse to recognize agency agreements that give competitors the authority to terminate a customer's agreement with Reliance. This element of Reliance's RRN Policy has been the subject of judicial consideration in the Ontario Superior Courts:

- (a) In *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148, Justice Strathy found (such finding undisturbed on appeal):

The amendment being introduced by Reliance is, from the consumer's point of view, entirely innocuous. It imposes no additional burden on the consumer, other than the burden of picking up the telephone and informing Reliance that he or she wishes to terminate the contract and have the water heater removed – and perhaps the additional burden of being subjected to questions about the reasons for the termination and possibly a sales pitch as to why the customer should continue to do business with Reliance. If, as Reliance asserts and this proceeding suggests, the amendment is impeding National's efforts to convert Reliance's customers, it may not be a bad thing, from a consumer protection perspective, to provide some counter-balance to the entreaties of the "door knockers". (emphasis added)

- (b) In *MacGregor v. Reliance Comfort Limited Partnership*, 2010 ONSC 6925, Justice Enchin, in considering the nature of the contractual amendment that introduced the RRN Policy found:

I find that the requirements advised by Reliance to MacGregor on May 5, 2010 were reasonable and, given the structure of the relationship between the parties, as evidence by the contract, do not amount to an amendment or variation. I can find no term that has been modified. Rather, the method of termination and return of the tank has been clarified in a contractual arrangement that did not contain all of the specifics. (emphasis added)

56. Reliance's primary reasons for implementing and maintaining the RRN Policy were and are:

- (a) to provide Reliance with an opportunity to speak with its customer prior to removal of its water heater to ensure given the prevailing marketplace abuses that its customer:
 - (i) understood they were switching rental suppliers and terminating their agreement with Reliance;
 - (ii) was basing his or her decision to switch on accurate information about Reliance's products and services; and
 - (iii) was aware of their rights under the CPA including their right to a 10 day cooling off period;
- (b) to provide Reliance with an opportunity to attempt to compete to retain the customer;
- (c) to protect its customer's privacy as well as Reliance's potential liability by providing a means of ensuring Reliance was only dealing with a customer's authorised representative;
- (d) to provide a means of tracking water heaters assets during the removal and return process; and
- (e) to allow processing of accounts and adjustment of the outgoing customer's rental charges in a more timely manner.

H. Returns of Reliance's water heaters by third parties (including other suppliers)

57. As set out above, customers can provide any third party of their choosing with details of the RRN and return depot location provided to them by Reliance. Additionally, if a third party is able to quote a valid RRN, Reliance's policy and practice is to provide that contractor or competitor with the return location closest to the address at which the related Reliance water heater had been installed. Reliance's experience, however, is that third parties that routinely seek

to return Reliance's water heaters to it are aware of both the locations and hours of operation of Reliance's return locations.

58. On occasion, certain competitors have made attempts to return dozens, and in some instances, hundreds, of stockpiled water heaters to Reliance in bulk. When faced with competitors seeking to return an unreasonable volume of water heaters in bulk without notice, Reliance has on occasion refused to accept any water heaters beyond the volume that a return location can safely and reasonably accommodate. However, where Reliance is provided with advance notice of bulk returns, it has accommodated these returns to the extent possible.

PART IV: STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS OPPOSED

59. The Commissioner bears the burden of establishing that:

- (a) Reliance substantially or completely controls the Relevant Market;
- (b) Reliance's return policies and procedures constitute a practice of anti-competitive acts; and
- (c) Reliance's return policies and procedures have had, are having or are likely to have the effect of preventing or lessening competition substantially in the Relevant Market.

60. For the reasons set out below, the Commissioner cannot satisfy any one of the elements required by section 79. Therefore the application must necessarily fail.

Reliance does not substantially or completely control the relevant markets

61. Reliance does not substantially or completely control the market for the supply of residential water heater products or services, regardless of how such market is ultimately defined. Barriers to entry are low and consumers benefit from numerous competitive supply options.

62. Reliance's percentage of annual sales in the Relevant Market was estimated to be less than 25% in 2012. During the period 2009 through 2012 inclusive, Reliance has experienced

year on year increases in customers leaving its rental program for the purpose of either switching suppliers or purchasing its water heater.

Reliance has not and is not engaged in a practice of anti-competitive acts

63. The conduct impugned by the Commissioner does not constitute a practice of anti-competitive acts for the purpose of subparagraph 79(1)(b) of the Act.

64. Contrary to the Commissioner's allegations, Reliance's return policies and procedures:

- (a) do not have the nature or character of anti-competitive acts;
- (b) are not objectively predatory, exclusionary or disciplinary; and
- (c) are reasonable commercial practices.

65. Reliance's RRN Policy was designed and implemented to provide Reliance with an opportunity to speak with its customer prior to removal of its water heater, to provide a means of tracking water heaters during the removal and return process, and to allow processing of accounts and adjustment of the outgoing customer's rental charges in a more timely manner.

66. Reliance's RRN Policy:

- (a) is procompetitive in that it permits consumers to benefit from competition between competitors;
- (b) encourages competition on the merits, rather than through the use of false and misleading sales tactics and to ensure consumers are fully informed during the decision making process;
- (c) ensures that consumers are apprised of their rights under Ontario's *Consumer Protection Act*, 2002 and are provided with the opportunity to exercise their statutorily protected cooling off period without any negative consequence, as intended by the Ontario legislature;
- (d) protects Reliance against any liability for inadvertently breaching its obligations to customers by relying on invalid agency appointments;

- (e) ensures Reliance's customers understand their ongoing contractual obligations in order to ensure they are benefiting from the competitive process;
- (f) preserves customers' privacy; and
- (g) provides an efficient means for switching customers to appoint a third party to arrange for the removal and return of Reliance's water heater.

67. Reliance's policies and procedures with respect to the times, locations and numbers of returns it will accept at any one time are a legitimate and reasonable commercial response to the need for Reliance to balance its ability to accept, store and process returned water heaters with other legitimate operational, logistical and occupational health and safety concerns. Any such restrictions on the number of water heaters returnable by competitors at one time are reasonable and do not present any barrier or obstacle to competition.

68. The majority of Reliance's fees and charges are avoidable. The only unavoidable fee on termination is the account closure fee which for virtually all of Reliance's customers who decide to switch providers is \$40 or less. Where other charges do apply, those charges are low by industry standards and are commercially fair and reasonable.

There has not, is not and is not likely to be a substantial lessening or prevention of competition

69. In any event, in circumstances where:

- (a) Reliance enjoys less than 25% of sales of residential water heaters;
- (b) all of Reliance's Union Gas legacy customers are free to terminate their water heater rental agreement at any time;
- (c) Reliance has continued to experience an increase in the number of residential customers leaving its rental program, notwithstanding the introduction of the RRN Policy;

- (d) Reliance's account closure charges and disconnect and return fees will generally have no impact on a customer's decision to switch suppliers and in any event have remained unchanged since 2005; and
- (e) new entrants have been rapidly gaining market share,

there is absolutely no basis for the Commissioner's allegation that "but for" certain of Reliance's return policies and procedures, there would likely be greater entry or expansion of the market and consumers would likely benefit from substantially greater competition.

An administrative monetary penalty is not warranted

70. Reliance has at all times cooperated with and been responsive to requests from the Competition Bureau.

71. Counsel to the Commissioner was carbon copied multiple times on letters of correspondence received by Reliance from certain of its competitors that specifically related to the RRN Policy. At no time did the Competition Bureau or the Commissioner make enquiries of Reliance with respect to this correspondence.

72. In August 2010, after the implementation of Reliance's RRN Policy, counsel for Reliance was advised by a representative of the Competition Bureau to the effect that the Competition Bureau saw increasing competition for the supply of residential water heater services and while it continued to watch the market, had no concerns. It was not until June 2012, when the Commissioner obtained *ex parte* an order against Reliance under section 11 of the Act that Reliance first became aware that the Commissioner had any concerns about Reliance's conduct. Reliance had absolutely no contact from the Commissioner after complying with the section 11 order until late November 2012, at which time it was notified by the Commissioner that the Commissioner had concluded that Reliance was engaged in conduct in breach of section 79 of the Act.

73. The marketplace abuses that the RRN Policy is in part designed to combat are well documented including by various provincial police services, the Ministry and the press. In fact,

as pleaded above, there is currently legislation before the Ontario legislature specifically designed to address such conduct. Further, in July 2012, National (one of Reliance's competitors) was found guilty of breaching section 52 of the Act by the Ontario Superior Court.

74. The Commissioner is under a statutory duty to conduct an inquiry whenever he believes on reasonable grounds that grounds exist for the making of an order under Part VII.1 of the Act (relating to deceptive marketing practices including the making of false or misleading representations) or an offence under Part VI of the Act (including the offence of knowingly or recklessly making a false or misleading representation) has been or is about to be committed. It is inconceivable in the circumstances that the Commissioner was unaware of the marketplace abuses. Despite this and despite being advised by Reliance that the RRN Policy was in part designed to combat the problem of marketplace abuses, the Commissioner made no attempts to investigate the problem prior to commencement of the Application.

75. On December 19, 2012 the Commissioner received a six resident complaint pursuant to section 9 of the Act specifically requesting that he commence an investigation with respect to the marketplace abuses occurring within the Relevant Market. Notwithstanding the direct relevance of that complaint and the now ongoing inquiry pursuant to section 10 of the Act, the Commissioner commenced the Application. In the circumstances, there is no basis upon which the Tribunal should issue an order requiring Reliance to pay any administrative monetary penalty, let alone a penalty in the amount of \$10 million.

76. Further, Reliance says that the Tribunal has no jurisdiction to order an administrative monetary penalty in the amount sought by the Commissioner as the order of such a penalty would be unconstitutional in circumstances where Reliance has not been afforded protection under section 11 of the *Canadian Charter of Rights and Freedoms* and section 2(e) of the *Bill of Rights*.

PART V: STATEMENT OF ECONOMIC THEORY

77. Reliance's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

PART VI: RELIEF SOUGHT

78. Reliance requests an Order dismissing the Application with costs payable to Reliance.

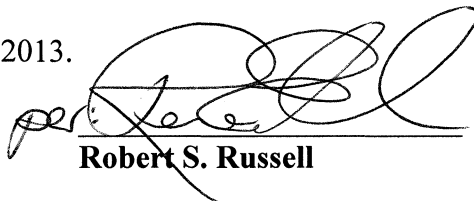
79. Reliance submits that the circumstances surrounding the commencement of this Application warrant the awarding of costs to Reliance on a full indemnity basis.

PART VII: PROCEDURAL MATTERS

80. Reliance agrees that the Application be heard in English and confirms its intention to use English in the proceedings.

81. Reliance requests that the Application be heard in the City of Toronto.

DATED AT Toronto, this 12th day of August, 2013.



Robert S. Russell

BORDEN LADNER GERVAIS

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Robert S. Russell (LSUC No. 25529R)
Tel: (416) 367-6256/Fax: (416) 361-7060
Email: rrussell@blg.com

Brendan Y.B. Wong (LSUC No. 51464A)
Tel: (416) 367-6743/Fax: (416) 682-2824
Email: bwong@blg.com

Renai E. Williams (LSUC No. 57798C)
Tel: (416) 367-6593/Fax: (416) 682-2831
Email: rewilliams@blg.com

Denes Rothschild (LSUC No. 56640R)
Tel: (416) 367-6350/Fax: (416) 361-7068
Email: drothschild@blg.com

Zirjan Derwa (LSUC No. 61461T)
Tel: (416) 367-6049/Fax (416) 361-2755
Email: zderwa@blg.com

Counsel for Reliance Comfort Limited
Partnership

TO: DEPARTMENT OF JUSTICE
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

David R. Wingfield
Executive Director and Senior General Counsel
Tel: (819) 994-7714
Fax: (819) 953-9267

Josephine A. L. Palumbo
Senior Counsel
Tel: (819) 953-3902
Fax: (819) 953-9267

Parul Shah
Counsel
Tel: (819) 953-3889
Fax: (819) 953-9267

AND TO: THE REGISTRAR
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

SCHEDULE A
CONCISE STATEMENT OF ECONOMIC THEORY

I. INTRODUCTION AND SUMMARY

1. Most residential water heaters in Ontario are provided to consumers as rentals through either a utility company or through a rental water heater provider. Additionally, a growing number of consumers own their own water heaters. Sales and rentals are made to owners of existing homes and construction companies. The relevant product market is thus the market for the supply of residential water heater products and services.

2. The geographic market consists of all the areas in which Reliance serves customers, competes for customers, or could potentially serve customers. The geographic market also consists of the service areas of all retail and rental operations that serve these same current and potential customers. For the purposes of the Application, the relevant geographic market is the province of Ontario.

3. The relevant market for the purpose of the Application is therefore the market for the supply of residential water heater products and services in the province of Ontario. Reliance is not dominant in this market.

4. Reliance owns the water heaters it rents, and like any rental company (including its competitors), contracts with its customers. Any rental contract involving a durable good must involve some terms, if only to ensure the safe return of the owner's property at the expiration of the rental contract. The requirement for the renter to contact Reliance directly in order to obtain a return number is not onerous and is not a significant switching cost.

5. The vast majority of Reliance's customers have open-ended rental agreements and are able to switch suppliers at any time. For the small percentage who are under a minimum term rental contract (currently approximately 7%), all are able to switch suppliers before the expiration of the contract by buying out their rental unit or with a small fee. These terms are similar to (and often more favourable than) terms offered by other water heater rental companies and are comparable to the approach adopted by suppliers of other long term consumer contracts, for example car leases and home mortgages.

6. Competition takes place for new customers, for customers whose rental agreements are expiring and for customers who have open-ended agreements. Such competition is fierce and vigorous, and consists of both retaining current customers as well as winning new customers. Reliance's share of annual new agreements (including renewals) is less than 25% in the relevant geographic market, a small market share in a competitive market that is too small for Reliance to exercise market power, and too small for Reliance to be identified as a dominant firm.

II. RELEVANT MARKET

7. Residential water heaters are designed to heat water for purposes of bathing and washing dishes and clothes. Most commonly, the water heater is a tank that is constantly filled with ready-to-use hot water. The water is heated through gas, electricity, and in some cases, oil or alternative fuels. Although additional types (such as tankless water heaters) also exist in a limited number of homes, they all serve the same function. Water heaters are considered an essential good in almost every home, and last approximately 13 to 17 years.

8. The relevant product market is the market for water heater products and services, whether obtained through the rental of a water heater or through the purchase of a water heater. Essentially, the market ensures that customers have hot water when they need it. The precise technology that underlies the water heater system is not necessarily relevant for the vast majority of customers. Customers may switch between heat sources, model type and functionality, and between renting and buying – further supporting the importance of the overall service of hot water on demand rather than the precise contractual and physical means by which the water is supplied. As with any other durable good, competition occurs at the margin of new sales, so a measure of competition can be obtained from the share of new sales and rental agreements obtained by each of the market participants.

9. Consider by analogy the assessment of competition in automobiles – another durable good where new vehicles are both sold and rented (leased). The structure of the market from a competition perspective is defined in terms of market shares of new vehicles by different manufacturers, not with reference to the “installed base” of existing vehicles (i.e. those on the road or parked in driveways). This conclusion would hold even in an extreme case where all vehicles were leased, and even if those leases contained exit payments. Moreover, even if one

manufacturer, say General Motors, had produced a large percentage of the cars currently on the road, no one would suggest that this fact implied market power for General Motors, particularly if its share of new car sales was small.

10. The relevant geographic market is at least as large as the entire area served by Reliance and all its competitors in these areas, as well as in the areas Reliance could potentially serve. First, other than adjusting for water hardness, Reliance charges the same price for water heater rental services to all its customers. Reliance does not price discriminate between different groups of customers who are geographically dispersed. Moreover, the rental rates are published and publicly available on the webpages of many water heater suppliers, demonstrating that Reliance's major competitors do not price discriminate between customers. This fact alone is sufficient to define the geographic market as the province of Ontario.

11. Second, the geographic market includes the location of all suppliers who compete for the business of consumers of water heater products and services. In every municipality of greater than a few thousand inhabitants there are many suppliers who are willing and able to offer a water heater or a water heater contract to builders of new homes and existing homeowners who are interested in changing suppliers. Even assuming that the markets are "local" – the overlapping "local" areas of competitor water heater rental firms and water heater retailers extends the market beyond the narrow boundaries described in the Application. A geographic market that is constructed along the boundaries of legacy gas utility markets creates artificial boundaries of no practical relevance. Union Gas, for example, lists both Direct Energy and Reliance as water heater rental suppliers on its website, along with Sears and the Home Depot as places to purchase a water heater. Enbridge lists six water heater rental providers in its 2011 Builder Guide, including both Direct Energy and Reliance. Many residences (newly constructed and existing homes) purchase their water heaters and all retailers who can potentially sell water heaters to Reliance customers are included within the geographic market. Prominent examples would be the large hardware chains, such as Home Depot, Canadian Tire, Rona and Lowes; and smaller hardware chains. Local plumbing contractors also supply water heaters, either on a rental or purchase basis. There are suppliers in each of these categories who compete with Reliance, and with the other rental companies, and in many cases are willing to offer either contracts to purchase and install a water heater or a contract to install a rental water heater,

depending on the choice of the customer. The location of these suppliers must also be included in the geographic market, supporting the conclusion that the geographic market is the province of Ontario.

III. BARRIERS TO ENTRY AND SWITCHING COSTS

12. The barriers to entry in the water heater rental or retail business are low; a fact acknowledged by the Commissioner in his Application and supported by the number of small suppliers, together with the number of new entrants.

13. No Exclusionary Contracts. Only a small fraction (approximately 7%) of Reliance's customers have minimum term contracts and the vast majority of customers face no contractual penalties should they wish to switch to an alternative provider or purchase their own water heater (whether by buying out their water heater or acquiring a water heater from a retailer). Moreover, the fees associated with contract termination are minimal and do not have the effect of preventing customers from switching to a more competitive source of supply, if one were offered. Taken together, the minimal cancellation fees and the contract conditions, to the extent they apply at all, have an insignificant competitive impact.

IV. MARKET POWER

14. The supply of water heater products and services, whether rented or purchased, is an industry with intrinsically low barriers to entry. As discussed above, competition takes place on a continuous basis, to both gain and retain customers.

15. Given that low switching costs that have already been identified, it is not possible that Reliance could possess market power. It is a fundamental principle of industrial organization economics that market power cannot be exercised in an industry with low barriers to entry and low switching costs for customers. Any attempt to exercise market power by restricting supply or raising prices would be met with more competitive offers from rival suppliers, and with a rapid erosion of the market share of a firm attempting to increase its price.

V. NO PRACTICE OF ANTI-COMPETITIVE ACTS

16. The policies adopted by Reliance to ensure the safe return of their equipment, and to prevent customers from being exploited by deceptive door-to-door sales practices are not anti-competitive acts. To the contrary, their net effect is likely to enhance competition by improving transparency and information available to the consumer and allowing the consumer to make a clear choice between the services offered by competing suppliers. Reliance has a valid and legitimate business purpose for seeking to prevent its customers from making an ill-informed decision to switch their business away from Reliance.

17. The Commissioner identifies the Removal Reference Number (RRN) policy as “exclusionary”. The policy is designed to facilitate a secure transfer of a Reliance water heater back to Reliance should the customer make a choice to switch suppliers. In addition, by insisting on communicating directly with the customer, Reliance is ensuring that the customers’ wishes are clearly communicated and that the customer is making an informed decision.

18. Judged as a switching cost, the requirement to obtain an RRN number is negligible. It amounts to the requirement to make a single phone call.

19. The business practices of Reliance identified by the Commissioner as anti-competitive are informed by a legitimate business purpose and in fact serve to strengthen competition by improving transparency of the actual terms offered by rival suppliers of water heater products and services. They are designed to strengthen the relationship between Reliance and its customers and make future customers more likely to choose Reliance as their supplier.

VI: NO SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

20. Reliance has evolved an efficient business model and has taken advantage of scale and network economies to remain a low cost supplier in the Ontario industry.

21. The market for water heater products and services in Ontario is highly competitive, and increasingly so. During the time period put in issue by the Application, Reliance’s market share has been steadily eroded by competitors.

22. Reliance is not dominant in the Relevant Market. Moreover, given the extremely low barriers to entry and negligible switching costs, even if Reliance were dominant, it would not be possible for Reliance to exercise its market power or likely that any of the practices challenged by the Commissioner could lead to a substantial lessening or prevention of competition.

COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

RELIANCE COMFORT LIMITED
PARTNERSHIP

Respondent

**RESPONSE
TO THE NOTICE OF APPLICATION**

BORDEN LADNER GERVAIS

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Robert S. Russell (LSUC No. 25529R)
Tel: (416) 367-6256/Fax: (416) 361-7060
Email: rrussell@blg.com

Brendan Y.B. Wong (LSUC No. 51464A)
Tel: (416) 367-6743/Fax: (416) 682-2824
Email: bwong@blg.com

Renai E. Williams (LSUC No. 57798C)
Tel: (416) 367-6593/Fax: (416) 682-2831
Email: rewilliams@blg.com

Denes Rothschild (LSUC No. 56640R)
Tel: (416) 367-6350/ Fax (416) 361-7068
Email: drothschild@blg.com

Zirjan Derwa (LSUC No. 61461T)
Tel: (416) 367-6049/ Fax (416) 361-2755
Email: zderwa@blg.com

Counsel for the Respondent, Reliance Comfort Limited Partnership

Appendix F

Court File No.:

CV-10-406209

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NATIONAL ENERGY CORPORATION

Plaintiff

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

- 2 -

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1,500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.


F. Youssef
Registrar

DATE: July , 2010

Issued by: _____
Local Registrar

Address of Court House:
393 University Ave.
10th Floor
Toronto, Ontario
M5G 1E6

TO: RELIANCE COMFORT LIMITED PARTNERSHIP
2 Lansing Square, Ste. 1200
Toronto, On
M2J 4P8

- 3 -

CLAIM

1. The Plaintiff claims:

- a) Damages for breach of agreement in the amount of \$130,000.00.;
- b) pre and post judgment interest in accordance with the provisions of the Courts of Justice Act;
- c) costs on a substantial indemnity basis pursuant to the provisions of the Courts of Justice Act; and,
- d) such further relief as this Honourable Court may deem just.

The Parties

2. The Plaintiff, National Energy Corporation ("National"), is an Ontario corporation carrying on business in the natural gas fuelled water heater market (the "water heater rental business") under the trade name National Home Services.

3. The Defendant, Reliance Comfort Partnership ("Reliance") is a limited partnership. Its business operations include the water heater rental business operating under the trade name Reliance Home Services.

4. National is a competitor of Reliance. Reliance holds a near monopoly in the water heater rental business in many areas outside of the Greater Toronto Area. Over the last few months, Reliance has lost many customers to National as a result of National's marketing efforts.

- 4 -

5. National brings this claim as an assignee of claims its customers (the "Customers") have against Reliance. The Customers are former customers of Reliance who have returned their water heater rental tanks (the "tanks") to Reliance in accordance with their former rental agreements with Reliance.

Unlawful Charges

6. Reliance in breach of the former rental agreements, has levied improper charges (the "charges") on the Customers at the time of the tank returns. The ostensible basis for the improper charges is alleged damage to the tanks.

7. Reliance has imposed the unlawful charges to foster ill will between the customers and National and to discourage potential customers from switching from Reliance to National. This anti-competition tactic is consistent with other tactics Reliance has engaged in to unlawfully stifle competition which tactics are currently the subject of two other proceedings in the Superior Court of Justice.

8. National states that Reliance was not entitled to impose the charges on the Customers. In order to maintain goodwill between National and the Customers, National has reimbursed the Customers for the amount of the charges. National estimates that the approximate amount of the charges is \$130,000.00.

Assignment of Claims

9. National has taken a written assignment of the Customers' claims regarding the improper charges and has given notice of the assignment to Reliance.

- 5 -

10. National therefore claims damages for breach of agreement in the amount of \$130,000.00.

11. National requests that this proceeding be tried in Toronto.


Date of issue: July , 2010

TEPLITSKYS
Brad Teplitsky LCUC #37342N
1 Yorkdale Rd. #403
Toronto, Ont. M6A 3A1

Tel: (416) 319-7024
Fax: (416) 981-7604

Lawyer for the Plaintiff

National Energy Corporation
Plaintiffs

- and -

Reliance Comfort Limited Partnership
Defendant

Short Style of Proceeding

CERTIFIED TO BE A TRUE COPY THE ORIGINATING PROCESS ISSUED HEREIN DATED:	COPIE AUTHENTIQUE CERTIFIÉE ET CONFORME À L'ACTE JURIDIQUE D'INSTANCE DÉLIVRÉ CI-INCLUS FAIT LE:
July 6	20 10
Brad Teplitsky	PER: BT
SOLICITOR FOR THE AVOCAT POUR LE	PAR:

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. CV-10-406209

Proceeding commenced at Toronto

STATEMENT OF CLAIM

TEPLITSKYS

Brad Teplitsky LCUC #37342N
1 Yorkdale Rd. #403
Toronto, Ont. M6A 3A1

Tel: (416) 416-319-7024

Fax: (416) 981-7604

Solicitor of the Plaintiff

Appendix G

Court File No./N° du dossier du greffe CV-10-00406209-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE**

**BETWEEN:
ENTRE:**

NATIONAL ENERGY CORPORATION

**Plaintiff
Demandeur**

and / et

RELIANCE COMFORT LIMITED PARTNERSHIP

**Defendant
Défendeur**

**ORDER DISMISSING ACTION AS ABANDONED
ORDONNANCE REJETANT UNE ACTION POUR CAUSE DE DÉSISTEMENT**

According to the records in the court office, more than 180 days have passed since the originating process was issued, no defence has been filed, the action has not been disposed of by final order or judgment, the action has not been set down for trial, and the registrar has given 45 days notice that the action will be dismissed as abandoned.

D'après le dossier du greffe du tribunal, plus de 180 jours se sont écoulés depuis la délivrance de l'acte introductif d'instance, aucune défense n'a été déposée, l'action n'a pas fait l'objet d'une ordonnance définitive ou d'un jugement, l'action n'a pas été inscrite pour instruction et le greffier a donné un préavis de 45 jours indiquant que l'action sera rejetée pour cause de désistement.

IT IS ORDERED that pursuant to subrule 48.15(1) this action be dismissed as abandoned.

IL EST ORDONNÉ que la présente action soit rejetée pour cause de désistement conformément au paragraphe 48.15 (1).

Date: 28-FEB-2011

Date:

Signed by: Raynor Pinto
signature: Local registrar / greffier local

Address of court office: Toronto
adresse du greffe: 393 University Av 10th fl
Toronto ON M5G 1E6

NOTE: A "defence" means a statement of defence, a notice of intent to defend, or a notice of motion in response to a proceeding, other than a motion challenging the court's jurisdiction.

REMARQUE : Une «défense» s'entend d'une défense visée à la Règle 18, d'un avis d'intention de présenter une défense ou d'un avis de motion en réponse à une instance, autre qu'une motion en contestation de la compétence du tribunal.

NOTE: An order under rule 48.15 dismissing an action may be set aside under rule 37.14.

REMARQUE : La règle 37.14 permet l'annulation d'une ordonnance rejetant une action rendue aux termes de la règle 48.15.

TO: RELIANCE COMFORT LIMITED PARTNERSHIP
DESTINATAIRES : 2 LANSING SQUARE, #1200
TORONTO ON CA M2J 4P8

Appendix H

CITATION: MacGregor v. Reliance Comfort Limited Partnership, 2010 ONSC 6925
COURT FILE NO.: CV-10-404539
DATE: 20101117

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
DOUGLAS MACGREGOR)	Martin Teplitsky, Q.C. and Brad Teplitsky,
)	for the Applicant
Applicant)	
)	
– and –)	
)	
RELIANCE COMFORT LIMITED)	Barry H. Bresner and Brendon Y. B. Wong,
PARTNERSHIP)	for the Respondent
)	
Respondent)	
)	
)	
)	
)	HEARD: November 17, 2010
)	DECISION RENDERED: November 17,
)	2010

2010 ONSC 6925 (CanLII)

ECHLIN J.

ENDORSEMENT REASONS FOR DECISION

[1] This is an application for a declaration that a hot water heater rental agreement has been terminated and/or that Mr. MacGregor is entitled to communicate such termination by a duly appointed agent.

[2] At present, there is a commercial war being waged between Reliance Comfort Limited Partnership and National Home Services. This application is for a declaration that Douglas MacGregor's water heater rental agreement with Reliance has been terminated by Reliance's actions in requiring that if he wished to return his tank he must call first to obtain a tank removal authorization number and complete a water heater return form. These requirements were indicated to MacGregor on May 5, 2010 effective May 17, 2010. In addition, the issue of whether a customer could appoint an agent and whether Reliance was required at law to deal with such agent was raised and responded to.

[3] It is clear to me that I am one of the first steps of many more to come in the litigation which has arisen and will continue in the context of a heated competitive environment.

[4] Given that the parties seek an expeditious result for which a review will undoubtedly be sought, I am providing this Endorsement decision immediately.

[5] While originally budgeted for a mere 90 minute argument, this application has consumed the better part of a day's Court time. I must say that while the parties obviously have very little use for one another, the counsel have exemplified the highest standards of advocacy and civility as would be expected of senior Ontario litigants.

[6] Having regard for the material before me, I find that Reliance has not terminated its water heater rental agreement with MacGregor simply by requiring him to call them, obtain an authorization number and complete a Water Heater Return form. I further find that Reliance is not free to refuse to deal with properly appointed agents of its customers.

[7] I make these findings for the following reasons:

[8] Mr. Teplitsky urged that by adding new requirements, Reliance was unilaterally varying or amending its contract with its customers. I disagree. When the small print terms are examined closely, it is notable that the termination provisions are quite general, and much is left to be determined between the parties regarding the manner of terminating the contract and the return of the tank. In interpreting this contract, I find that the requirements advised by Reliance to MacGregor on May 5, 2010 were reasonable and, given the structure of the relationship between the parties, as evidenced by the contract, do not amount to an amendment or variation. I can find no term that has been modified. Rather, the method of termination and return of the tank has been clarified in a contractual arrangement that did not contain all of the specifics.

[9] The fact remains that customers continue to be at liberty to terminate the contract after May 17, 2010, as they were, before that date.

[10] Having determined that these provisions are valid, I turn next to whether MacGregor is at liberty to appoint an agent to fulfill his contractual obligations. I find that he is. While Reliance may not be desirous of dealing with National as agent, I can find no reason at law why it should be entitled to require its customers to seek approval of the appointment of an agent, in the absence of a specific contractual provision to that effect. It was open to Reliance to provide for this in its contract. It did not do so. My understanding of basic agency law (*vis Boustead & Reynolds On Agency* (2006), London, Sweet v. Maxwell at Article 6 pp. 44ff and *Halisbury On Agency*, Vol. 1(2) at pp. 6-10) is that a person may act by way of agency in nearly every instance except when prohibited by statute or where a personal services contract is involved. Mr. Bresner was unable to point me to any authority to the contrary.

[11] I do not find the customer's duties in this contract to be of a non-delegatable nature.

[12] While Mr. Bresner urged that equitable relief such as a declaration ought not to be awarded in an instance such as this due to the actions of MacGregor and National, I prefer the approach adopted by Lang J. (as she then was) in *Harrison v. Anthopoulos* (2002), 62 O.R. (3d) 463 (S.C.) at para. 27. I applaud the attempts of counsel to attempt to define their client's respective rights in this fashion.

[13] Rather than to engage in inflammatory pleadings, interlocutory proceedings, endless discoveries and a lengthy trial, Messrs. Bresner and Teplitsky have significantly narrowed the issues and agreed upon most facts.

[14] While I am pessimistic enough to believe that there will be considerable further litigation, I reject the suggestion that this was an inappropriate way to proceed.

[15] I received costs submissions from counsel who suggested that partial-indemnity costs ought to be in the \$5,000 - \$10,000 range. While these amounts are fair and reasonable and in keeping with the *Boucher* principles, I am exercising my discretion not to award any costs, having regard for the divided result.

ADDENDUM

[16] Reliance expressed a concern that it might be liable for acting upon the instructions of an agent, if not duly appointed.

[17] In answer to such concerns, I suggest that if National is to be appointed as agent to deal with Reliance that a properly drafted and executed agency agreement be prepared and provided to Reliance to meet such concerns.

ECHLIN J.

Released: November 17, 2010

CITATION: MacGregor v. Reliance Comfort Limited Partnership, 2010 ONSC 6925
COURT FILE NO.: CV-10-404539
DATE: 20101117

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DOUGLAS MACGREGOR

Applicant

– and –

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

ENDORSEMENT REASONS FOR DECISION

ECHLIN J.

Released: November 17, 2010

Appendix I

Court File No. *CV-11-420 702*

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Pursuant to Rule 14.05 of the *Rules of Civil Procedure*

BETWEEN :

Applicant

SCOTT WELLER

-and-

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on *March 2 at 10am*, 2011, at 393 University Ave. Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to

-serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

22nd-11
Date: February 18, 2011

[Signature]
Issued by:
Local registrar

Address of court office:

393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: RELIANCE COMFORT LIMITED PARTNERSHIP
2 Lansing Square, Ste. 1200
Toronto, On
M2J 4P8

APPLICATION

Relief Sought

1. The Applicant makes an Application for:
 - (a) A declaration that the Respondent's proposed amendment to its Terms and Conditions respecting the Applicant's water heater tank rental, as set out in the Affidavit of Scott Weller, sworn February 18, 2011, is invalid;
 - (b) His costs of this proceeding on a full or substantial indemnity basis, plus HST; and,
 - (c) Such further and other relief as this Honourable Court may deem just.

Grounds

2. The grounds for the application are as follows:
 - (a) The Applicant rents a water heater tank from the Respondent pursuant to the Respondent's Terms and Conditions;
 - (b) The Respondent, in breach of the Terms and Conditions and the Regulations under the Ontario *Consumer Protection Act* has given notice to the Applicant that it intends to amend its Terms and Conditions to prohibit the Applicant from appointing an agent to comply with the Respondent's tank return procedures and that if the Applicant does not agree to the proposed amendment, the Respondent will terminate his tank rental agreement;
 - (c) The Applicant does not agree to the proposed amendment;

- (d) There are no material facts in dispute;
- (e) Ss. 41 and 42 of the Regulations under the Ontario *Consumer Protection Act*;
- (f) Rule 14.05 of the *Rules of Civil Procedure*; and,
- (g) Such further and other grounds as counsel may advise and this Honourable Court may permit.

Documentary Evidence

- 3. The following documentary evidence will be used at the hearing of the Application:
 - (a) the Affidavit of Scott Weller, sworn; and,
 - (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Dated: February 18, 2011



TEPLITSKY, COLSON LLP
Barristers
70 Bond Street, Suite 200
Toronto, Ontario
M5B 1X3

Martin Teplitsky (10647K)

Tel: 416-365-9320
Fax: 416-365-7702

Lawyers for the Applicant

and

Scott Weller
Applicant

Respondent Home Comfort
Respondent

Court File No.: CV-11-420702

**ONTARIO SUPERIOR COURT OF
JUSTICE**

NOTICE OF APPLICATION

Teplitsky, Colson LLP
70 Bond Street, Suite 200
Toronto, Ont.
M5B 1X3
Martin Teplitsky Q.C. LSUC #10647K
Tel: 416-365-9320
Fax: 416-365-7702
Lawyer for the Plaintiff

Appendix J



SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

361 University Avenue
Toronto, ON M5G 1T3

Telephone: (416) 327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: May 24, 2011

TO:

M. Teplitsky
B. Teplitsky
Barry Bresner
Brendan Wong

FAX NO.:

416 365 7702
416 981 7624
416 361 2746
416 682 2824

FROM: Laurie Pierras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 13

MESSAGE:

Re: Weller v. Reliance Home Comfort Limited Partnership
Court file no: Cv-11-420702

See attached Reasons for Judgment released today.

The Information contained in this facsimile message is confidential information. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address

Original will NOT follow. If you do not receive all pages, please telephone us immediately at the above number.

CITATION: *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148
COURT FILE NO.: CV-11-420702
DATE: 20110524

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Scott Weller, Applicant

AND:

Reliance Home Comfort Limited Partnership, Respondent

BEFORE: G.R. Strathy J.

COUNSEL: *M. Teplitsky and B. Teplitsky*, for the Applicant

B. Bresner and B. Wong, for the Respondent

HEARD: May 3, 2011

REASONS FOR JUDGMENT

[1] The applicant, Scott Weller (“Weller”) rents a water heater tank from the respondent, Reliance Home Comfort Limited Partnership (“Reliance”). Reliance proposes to amend the rental contract and has sent Weller a notice to that effect. Weller applies for a declaration that the amendment is invalid because the contract does not comply with regulations under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, sched. A (the “C.P.A.”).

[2] While ostensibly a simple consumer dispute, this application is really part of a war for control of the water heater rental market in Ontario. Weller is bringing this application on behalf of one of the protagonists.

[3] Some background is necessary to put the issues in this motion in context. I will begin with a short description of the water heater war. I will then examine the terms of the rental contract at issue, followed by the relevant provisions of the C.P.A. and regulations. I will then outline the submissions of the parties and my analysis of the issues.

The Water Heater War

[4] Since early 2010, there has been aggressive competition in the water heater sector in Ontario. One of the players in that market is National Energy Corporation, which carries on businesses as “National Homes Services” (“National”). The respondent, Reliance, is also a player. The battle has been litigious.

[5] In June 2010, National commenced an action against Reliance seeking damages for defamation and injunctive relief, alleging that Reliance had falsely published statements that National was misleading the public, was untrustworthy and was unable to service its water heaters. A demand for particulars was served, but there has been no response.

[6] National commenced another action against Reliance in July 2010, claiming that Reliance had levied unlawful charges against its own customers, asserting the claim as assignee of those customers. That action has been dismissed as abandoned.

[7] A third proceeding was commenced by National against Reliance in June 2010. It arose out of allegations by Reliance that its water heater rental customers were being misled by National's door-to-door sales personnel or "door knockers" who allegedly engaged in aggressive and misleading sales practices, including misleading consumers about the condition of their Reliance water heaters. It was asserted that salespeople would induce the customers to rent a new National water heater and would then, acting as the customer's agent, cancel the customer's contract with Reliance and return the water heater to Reliance.

[8] To combat these tactics, Reliance instituted a new policy, reflected in the contract amendment at issue, which required customers wishing to terminate their rental agreements to first telephone Reliance to obtain a "Removal Reference Number". This was intended to give Reliance an opportunity to speak to the customers, to discover whether the decision to terminate the rental contract was motivated by competitive action by National and, if possible, to persuade the customers to change their minds.

[9] An application to challenge this new policy was commenced by Douglas MacGregor ("MacGregor"), a Vice-President of National and a former employee of Reliance. MacGregor admitted that he brought the application at the behest of National.

[10] By judgment dated November 17, 2010, in *MacGregor v. Reliance Comfort Limited Partnership*, 2010 ONSC 6925, [2010] O.J. No. 5419 (S.C.J.), Echlin J. found that Reliance's new return policy was not a breach of MacGregor's water heater rental agreement, but found that, in the absence of a specific contract provision to the contrary, MacGregor was entitled to appoint an agent to fulfill his contractual obligations – in other words, he could appoint National as his agent to terminate his agreement with Reliance. Echlin J. noted that it would be open to Reliance to amend its contract to address this issue.

[11] Reliance then implemented an amendment to its water heater rental agreement which provides that it can, in its discretion, refuse to deal with any agent or delegate the customer may appoint to terminate the rental agreement. This amendment, if effective, will give Reliance a chance to speak directly to its customer before the termination becomes operative.

[12] The application before me is National's next assault in this high-stakes commercial war.

Weller and His Contract

[13] Weller happens to be married to the Senior Vice-President, Finance, of National's parent company. It is admitted that he is bringing this application at the request of his wife and of National.

[14] In August 2007, Weller purchased a residence in which a Reliance water heater had been installed. The previous owner had terminated the rental agreement and Weller received a Reliance "welcome package", which set out its rental terms and conditions and its rates and methods of payment. Weller has been paying rental fees on the water heater to Reliance from the outset.

[15] The terms and conditions in the standard Reliance water heater rental agreement provide that the agreement may be amended by Reliance from time to time on written notice to the customer:

You [the Reliance customer] agree that we may change our rental charges, interest rates, service charges, administrative fees, other charges or other terms of this agreement from time to time by announcing such changes to you in advance by written communication.

I will refer to this as the "Amendment Provision".

[16] Under the heading "Termination of the Rental Agreement", the terms and conditions also provide that the customer may terminate the rental contract at any time:

You may (so long as you are not in default under this agreement) terminate this agreement at any time. You agree to return the water heater to us in the same condition that it was delivered to you, normal wear and tear (reflecting its age, normal use and local water conditions and assuming that it has been maintained as required by this agreement) excepted. At your option, you may request us to remove the water heater or, at your own risk, have your own qualified contractor remove it... If you choose to terminate this agreement or if we terminate this agreement because you have breached any term of this agreement, you will pay us our standard removal charges as follows: (i) our account closure charge (currently \$200, if the water heater is one year old or less, or \$40, if the water heater is over one year old, or \$0 if the water heater is over 10 years old) plus (ii) if we remove the water heater, our drain and disconnect charge (currently \$125) or, if the water heater is drained and disconnected by your own qualified contractor...our water heater pick-up charge (currently \$65 for a gas water heater or \$125 for an electric water heater). You will pay such charges when billed by us.

I will refer to this as the "Termination Provision".

[17] Following the judgment of Echlin J., Reliance amended its standard terms and conditions to prevent customers from terminating their agreements through an agent. It sent Weller the following notice, which was attached to his account in February 2011:

Important Information About Your Water Heater Rental Agreement

The Terms & Conditions under which you rent your water heater will be amended to include the following paragraph as the last paragraph under the heading "Termination of the Rental Agreement": "Any return of your water heater must occur in accordance with the return processes and procedures as set by Reliance Home Comfort from time to time. Reliance Home Comfort may in its sole discretion refuse to deal with any agent or delegate you appoint to comply with any such processes and procedures." All of your other Terms & Conditions will remain unchanged except as otherwise provided. If you do not agree to this amendment, please call us at 1-866-RELIANCE prior to this amendment taking effect in order to terminate your rental. If you do not respond to this notice, this amendment will take effect automatically on April 1, 2011.

I will refer to this as the "Proposed Amendment".

[18] As I will explain, it is Weller's position that the Proposed Amendment is invalid because Reliance has failed to comply with the *C.P.A.*

[19] Weller commenced this application in response to the notice of the Proposed Amendment. He claims that he wants to continue to rent from Reliance and to retain his right to appoint an agent to facilitate the return of the tank, in the event he decides to terminate the rental agreement.

The Consumer Protection Act

[20] The parties agree that Reliance's water heater rental agreement is a "consumer agreement" and a "remote agreement", as defined by the *C.P.A.* It is a consumer agreement because, at the time the agreement was entered into, Weller was an individual acting for household purposes and Reliance was "in the business of selling, leasing or trading in goods or

services." It is a remote agreement, because it was entered into when the consumer and supplier were not present together.¹

[21] The *C.P.A.* and its regulations contain provisions requiring a supplier to disclose certain information to consumers before the consumer enters into a consumer agreement. Such disclosure must be "clear, comprehensible and prominent".²

[22] The *C.P.A.* also gives statutory effect to the *contra proferentem* principle in the case of consumer agreements. Any ambiguity is to be interpreted in favour of the consumer.³

[23] Section 93 of the *C.P.A.* provides that a consumer agreement is not binding unless made in accordance with the *C.P.A.* and its regulations, but provides that the court may give effect to a non-compliant agreement if it would be inequitable for the consumer not to be bound:

(1) A consumer agreement is not binding on the consumer unless the agreement is made in accordance with this Act and the regulations.

(2) Despite subsection (1), a court may order that a consumer is bound by all or a portion or portions of a consumer agreement, even if the agreement has not been made in accordance with this Act or the regulations, if the court determines that it would be inequitable in the circumstances for the consumer not to be bound.

[24] There are statutory disclosure requirements with respect to remote agreements. Section 45 provides that "[B]efore a consumer enters into a remote agreement, the supplier shall disclose the prescribed information to the consumer and shall satisfy the prescribed requirements."

[25] Section 37 of O. Reg. 17/05 made under the *C.P.A.* (the "*Regulation*") requires a supplier under a remote agreement to disclose certain information to the consumer before the consumer enters into the agreement and to provide a copy of the remote agreement to the consumer.

[26] The *Regulation* also limits the circumstances in which a remote agreement may be amended:

¹ *C.P.A.*, s. 1: A "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; a "supplier" means a person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier and a person who holds themselves out to be a supplier or an agent of the supplier; a "consumer agreement" means an agreement between a supplier had to the consumer in which the supplier agrees to supply goods or services for payment.

² *C.P.A.*, s. 5(1).

³ *C.P.A.*, s. 11: "Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer."

42(2) A consumer agreement mentioned in subsection (1) that provides for amendment, renewal or extension may, in addition to being amendable, renewable or extendable under section 41, be amended, renewed or extended if the following conditions are satisfied:

1. The agreement indicates what elements of the agreement the supplier may propose to amend, renew or extend and at what intervals the supplier may propose an amendment, renewal or extension.

2. The agreement gives the consumer at least one of the following alternatives to accepting the supplier's proposal to amend, renew or extend:

i. terminating the agreement, or

ii. retaining the existing agreement unchanged.

3. The agreement requires the supplier to give the consumer advance notice of a proposal to amend, renew or extend.

(3) The amendment, renewal or extension takes effect on the later of,

(a) the date specified in the notice; and

(b) the date that is 30 days after the day on which the consumer receives the notice.

(4) The amendment, renewal or extension does not retroactively affect rights and obligations acquired by the consumer before the effective date of the amendment, renewal or extension.

(5) The supplier's notice of a proposal to amend, renew or extend shall,

(a) provide an update of all of the information that was required by the Act or this Regulation to be set out in the agreement when it was first entered into and ensure that the update reflects the effect of the proposal to amend, renew or extend;

(b) disclose all changes proposed to be made to the agreement, including, for each provision that is to be changed, the text of the provision as it would read after the change;

(c) be consistent with those aspects of the agreement mentioned in paragraphs 1 and 2 of subsection (2);

(d) specify the date on which the amendment, renewal or extension would become effective;

(e) specify a means that complies with subsection (6) for the consumer to respond to the notice;

(f) state what the effect will be if the consumer does not respond to the notice;

(g) be provided to the consumer in such a way that it is likely to come to his or her attention; and

- (h) be provided to the consumer at least 30 days but not more than 90 days before the date on which it is proposed that the amendment, renewal or extension would take effect.
- (6) The means for the consumer to respond to the notice shall involve no cost to the consumer and shall be easy for the consumer to use.
- (7) A purported amendment, renewal or extension under this section that does not comply with subsections (5) and (6) is not effective. [Emphasis added.]

[27] The underlined portions of this section, ss. 42(2)2 and 42(5)(c), are most applicable to this proceeding.

The Submissions of the Parties

Weller's Submissions

[28] Weller says that Reliance has no right to amend the agreement because its terms and conditions do not comply with the *C.P.A.* and the *Regulation*. He says that, at the time he entered into the agreement with Reliance, he was not informed of his right to terminate the rental agreement if he did not accept a proposed amendment.

[29] Weller says that under s. 42(2)2 of the *Regulation*, Reliance was required to disclose to him, at the time he entered into the rental agreement, that he had at least one of two options in response to any amendment – either to reject any proposed amendment and continue with the existing terms, or to terminate the rental agreement. Weller says that, having failed to make this disclosure, Reliance is not entitled to amend the agreement and cannot compel him to terminate the agreement if he does not accept the amendment.

[30] Weller also says that although there is a general right of termination in the agreement,

- (a) there is no specific reference to the right of termination being available in response to a proposed amendment to the contract: referring to *Smith v. Co-Operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; and
- (b) the right of termination is not absolute and unqualified – it may only be exercised if the customer is not in default and there are financial consequences because the customer must pay Reliance's removal charges.

[31] Weller also submits that Reliance's notice of the proposed amendment is not valid because it does not comply with s. 42(5) of the *Regulation*, which requires that the notice of amendment must be consistent with the mandated language regarding termination.

[32] He also says that the notice cannot compensate for the deficiencies of the contractual terms and conditions, which are required to inform the consumer of his/her rights at the time of entering into the contract.

Reliance's Submissions

[33] Reliance makes three submissions. It says that:

- (a) it has substantially complied with the *C.P.A.* and that the arguments made by National are purely technical and procedural;
- (b) under s. 93(2) of the *C.P.A.* it would be inequitable in the circumstances for Weller not to be bound by the amendment; and
- (c) this proceeding is brought at the behest of National, and the *C.P.A.* is being used by National in this case for a collateral purpose – namely, to advance its own commercial interests.

[34] On the first submission, Reliance says that it was not necessary for the reference to the right of termination to be immediately adjacent to the amendment provision of the terms and conditions -- it was sufficient that the terms and conditions gave a right of termination. From a consumer protection perspective, the customer did not have to accept a unilateral amendment to the agreement – he or she had a right to terminate the agreement.

[35] Reliance says that the Proposed Amendment satisfies s. 42(5)(c) of the *C.P.A.* because it is consistent with the statutory right to make amendments to terms and conditions “from time to time by announcing such changes ... in advance by written communication.” The Proposed Amendment is also consistent with s. 42(2)1 of the *Regulation*, since it indicates the portion of the agreement that will be amended and how it will be amended. It is also consistent, says Reliance, with s. 42(2)2 of the *Regulation* since it draws the attention of the customer to the ability to terminate the water heater agreement instead of accepting the amendment.

[36] On the second submission, Reliance says that it would be inequitable in the circumstances for Weller not to be bound by the amendment. Weller admitted that he had not read Reliance's terms and conditions and he did not have his copy of those conditions when he received the proposed amendment. If there was a “technical deficiency” in the amendment process, says Reliance, it was not unfair to Weller, who has no real interest in the litigation and is simply a pawn on behalf of National.

[37] The third submission is related to the second submission. Reliance says that the *C.P.A.* was intended to advance the interests of consumers and was not intended to be used by corporations as a tool to attack their competitors.

Discussion

[38] The *C.P.A.* is – precisely as its name suggests – intended to protect consumers: *Québec v. Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211 at 224-225. It should be interpreted with that goal in mind. I accept the proposition of Weller that the *C.P.A.* is remedial legislation, and that it should be given a broad and liberal interpretation to ensure the attainment of its objects.

[39] I begin with an examination of section 42 of the *Regulation*. This provision recognizes that a supplier may have a legitimate reason to amend a remote agreement from time to time and seeks to achieve a fair balancing of the interests of the parties in the context of a standard form consumer contract. The supplier has no right to force an amendment on an unwilling consumer. The consumer must be given either the right to terminate the agreement or the right to retain the existing agreement, unamended.

[40] The Amendment Provision, when read in conjunction with the Termination Provision, does just that. The consumer has the right to terminate the agreement, at any time, and cannot be forced to accept an amendment that he or she does not want. I do not accept the submission, advanced by Weller, that the *Regulation* requires that the agreement must expressly state that if the customer does not accept an amendment he or she can terminate the agreement. Nor is there anything in the *Regulation* that requires an amendment clause to be contiguous with a termination clause. It is sufficient that the agreement gives a right of termination in the event the supplier proposes an unacceptable amendment. That right must be clearly and unambiguously expressed, and I find that it is in this case.

[41] It is not unreasonable to require, as Reliance's terms and conditions do, that the consumer must not be in default (i.e., not be in arrears of rental payments) in order to terminate the agreement; nor is it unreasonable to say that the supplier's standard removal charges must be paid. Otherwise, consumers could seize upon an inconsequential amendment to avoid their contractual obligations.

[42] To the extent that there is any technical deficiency in the language of the Amendment Provision, it was cured by the Proposed Amendment, which was sent to every customer of Reliance, and which makes it crystal clear that the consumer has a right to terminate the agreement and explains how that right is to be exercised.

[43] I turn, next, to an examination of the nature and purpose of the contractual term at issue.

[44] The amendment being introduced by Reliance is, from the consumer's point of view, entirely innocuous. It imposes no additional burden on the consumer, other than the burden of picking up the telephone and informing Reliance that he or she wishes to terminate the contract and have the water heater removed – and perhaps the additional burden of being subjected to questions about the reasons for the termination and possibly a sales pitch as to why the customer should continue to do business with Reliance. If, as Reliance asserts and this proceeding suggests, the amendment is impeding National's efforts to convert Reliance's customers, it may not be a bad thing, from a consumer protection perspective, to provide some counter-balance to the entreaties of the "door knockers".

[45] I doubt that many customers, on receiving notice of the proposed amendment, would be likely to say "That's the last straw; I'm going to cancel my contract." In fact, the only reason Weller wants to raise this issue is that his wife, and his wife's employer, have put him up to it.

[46] In the context of this particular case, considering the purpose of s. 42 of the *Regulation*, the Amendment Provision, the Termination Provision, the Proposed Amendment and the nature of the amendment, I cannot find that the protection of consumers is advanced by accepting the interpretation put forward by Weller.

[47] In coming to this conclusion, I cannot overlook the fact that this interpretation is put forward not by Weller, but by National. As I have observed, the *C.P.A.* is intended to be used to protect consumers. It would be dangerous to construe the statute in the context of a contrived *lis* – this is not, at its core, a dispute between a consumer and a supplier. It is a dispute between two suppliers. It does not advance consumer protection to construe the legislation in the absence of a real factual dispute, particularly a dispute that has been brought for a collateral purpose.

[48] Reliance says that the *C.P.A.* was not enacted for the purpose of being used as a tool by business competitors to advance their commercial interests. It invites me to find that this proceeding offends the principle that litigation should not be used for a collateral purpose: see *Re Fengar Investments Corp.* (1993), 17 C.B.R. (3d) 167, [1993] O.J. No. 422 (Ont. Gen. Div.) at para. 102; *Rona Inc. v. Sevenbridge Developments Ltd.* [2002] O.J. No. 2260 (S.C.J.) at para. 15; *Re Laserwords Computer Services Inc.* (1998), 6 C.B.R. (4th) 69, [1998] N.S.J. No. 60 (C.A.) at para. 54. This is clearly a case in which the action is being used for a collateral purpose. I have already noted my concern that the interpretation of an important piece of legislation should not take place in the absence of a true *lis*.

[49] For this reason, if I am wrong in my conclusion that the Amendment Provision, the Termination Provision and the Proposed Amendment comply with the *Regulation*, I accept the submission of Reliance that this is a case in which s. 93(2) of the *C.P.A.* should be applied and the court should order that Weller is bound by the Proposed Amendment even if it was not made in strict compliance with the *C.P.A.* or the *Regulation*, because it would be inequitable in the circumstances if he were not bound.

[50] Weller argues that s. 93(2) can only be invoked where a consumer is seeking to rescile from a consumer agreement that is not compliant. He says that he is not seeking to withdraw from the agreement and is simply asking that the terms of the agreement be enforced against the party that drafted it.

[51] I disagree with this restrictive interpretation of s. 93(2). That provision states that a court may order that a consumer is bound by all "or a portion or portions of a consumer agreement", that is not compliant. That clearly includes the Amendment Provision, the Termination Provision and the Proposed Amendment.

[52] In this case, there is absolutely no evidence that any consumer, including Weller, has been or will be prejudiced by the Proposed Amendment or that anyone, other than Weller, has the slightest concern about the Proposed Amendment. Indeed, Weller had not read Reliance's

terms and conditions and the notice he received, containing the Proposed Amendment, made his rights very clear to him. This is a case in which it would be iniquitous for Weller not to be bound by the Proposed Amendment, even if it was not made in accordance with the *C.P.A.* and the *Regulation*.

[53] In light of my conclusions, it is not necessary to address Reliance's third argument, that the proceeding should be dismissed because it was brought for a collateral purpose.

[54] For these reasons, the application is dismissed. The parties may make written submissions as to costs, if not otherwise resolved.



G.R. Strathy J.

Date: May 24, 2011

CITATION: *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148
COURT FILE NO.: CV-11-420702
DATE: 20110524

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SCOTT WELLER

Applicant

And

**RELIANCE HOME COMFORT LIMITED
PARTNERSHIP**

Respondent

REASONS FOR JUDGMENT

G.R. Strathy_J.

Released: 20110524

Appendix K

Court of Appeal File No.: C53910

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE JUSTICE ROSENBERG)	TUESDAY THE 31st DAY
)	
THE HONOURABLE JUSTICE JURIANSZ)	OF MAY, 2012
)	
THE HONOURABLE JUSTICE ROULEAU)	

BETWEEN:**SCOTT WELLER****Applicant (Appellant)****- and -****RELIANCE COMFORT LIMITED PARTNERSHIP****Respondent (Respondent)****JUDGMENT**

THIS APPEAL by the Appellant, Scott Weller (“Weller”), from the Order of the Honourable Justice Strathy of the Ontario Superior Court of Justice dated May 24, 2011, was heard January 31, 2012, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, and the Decision and Endorsement released on May 31, 2012;

ON READING the Compendium, Book of Authorities and Factum of the Respondent, Reliance Comfort Limited Partnership, and the Appeal Book, Book of Authorities, and Factum of the Appellant, Weller, and on hearing the submissions of the lawyers for both parties;


1. **THIS COURT ORDERS** that the appeal is dismissed;

2. **THIS COURT ORDERS** that the Appellant shall pay the Respondent the costs of this appeal fixed in the amount of \$7,500.00 inclusive of all taxes and disbursements.

THIS ORDER bear interest at the rate of 3% per annum.



ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

 JUL 11 2012

PER / PAR:

DANIEL MURPHY
REGISTRAR
COURT OF APPEAL FOR ONTARIO

SCOTT WELLER
Applicant (Appellant)

-and-

NATIONAL ENERGY CORPORATION et al
Respondent (Respondent)

COURT OF APPEAL FOR ONTARIO

JUDGMENT

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West, Suite 4700
Toronto, Ontario M5H 3Y4

Barry H. Bresner (LSUC # 19787G)

Tel: (416) 367-6167
Fax: (416) 361-2746

Brendan Y. B. Wong (51464A)

Tel: 416-367-6743
Fax: 416-682-2824

Lawyers for the Respondent
Reliance Comfort Limited Partnership

Appendix L

AMENDED THIS May 5, 2011 PURSUANT TO
 MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (B)

Court File No.: CV-10-412873

ONTARIO

THE ORDER OF _____ SUPERIOR COURT OF JUSTICE
 L'ORDONNANCE DU
 DATED / FAIT LE _____

REGISTRAR
 SUPERIOR COURT OF JUSTICE
 GREFIER
 COUR SUPÉRIEURE DE JUSTICE

BETWEEN:

RELIANCE COMFORT LIMITED PARTNERSHIP

Plaintiff

- and -

**NATIONAL ENERGY CORPORATION, DOUGLAS MACGREGOR, SHAWN DYM,
ADAM COOPER, JOHN DOE, JANE DOE and other persons unknown who have
 conspired with the named Defendants**

Defendants

AMENDED STATEMENT OF CLAIM

Notice of Action issued on October 22, 2010

CLAIM

1. The plaintiff, Reliance Comfort Limited Partnership ("Reliance"), claims as against National Energy Corporation ("National"), Douglas MacGregor ("MacGregor"), Shawn Dym ("Dym"), Adam Cooper ("Cooper"), John Doe, Jane Doe and other person unknown who have conspired with the named defendants:
 - (a) an interim, interlocutory and permanent injunction restraining National Energy Corporation ("National") and Douglas MacGregor ("MacGregor") jointly and severally, and National's officers, directors, servants, agents, employees, and any and all persons acting on behalf of or in conjunction with any of National or MacGregor, and any and all persons having notice of this injunction, from directly or indirectly, by any means whatsoever:

- (i) selling, disclosing, disseminating, distributing, transferring, copying, providing, using, publishing, trafficking in, exposing or offering for sale, in whole or in part:
 - (1) any documents, information, plans, outlines, minutes, notes, presentations, systems, designs, electronic data, instructions, correspondence or memoranda, which are not available to the general public, regarding Reliance's business, including but not limited to its operations, affairs, finances, strategies, marketing, customers, equipment, inventory, systems and business practices that were developed, prepared, used, drafted, procured or purchased by Reliance; and
 - (2) any documents, information, plans, outlines, minutes, notes, presentations, systems, designs, electronic data, instructions, correspondence or memoranda which were unlawfully obtained directly or indirectly by the defendants, or persons acting on behalf, at the request, or under the direction of the defendants, from Reliance;

(collectively, the "Stolen Information")
 - (ii) advising, instructing, counselling, directing, recommending, or informing any person with respect to the identification, purchase, acquisition or use of any of the Stolen Information; and
 - (iii) assisting, aiding or abetting any other person in carrying out any of the activities described in subparagraphs (i) and (ii) above;
- (b) an Order that National, MacGregor, National's officers, directors, servants, agents, employees, and anyone else acting on their behalf, and any person(s) upon whom the Order is served:
- (i) immediately disclose, grant access and deliver up to Reliance or any person acting on behalf of the Reliance ("Authorized Persons") any and all copies of the Stolen Information or information regarding the location, extent or transfer of the Stolen Information;

- (ii) immediately assist the Authorized Persons in locating the Stolen Information, including by advising the Authorized Persons of and answering questions by the Authorized Persons regarding the whereabouts of the Stolen Information, irrespective of whether the Stolen Information is under the possession, custody or control of the defendants or any third party;
- (iii) immediately answer all relevant questions posed by, and render any other necessary assistance to, the Authorized Persons to locate, decode, access, remove, decrypt, image and copy any evidence regarding the Stolen Information, including all evidence fixed on computer hard drives, computer disks, CD ROMs, USB drives, flash media, biometric devices, memory cards and sticks, tapes, and any other magnetic or machine readable or electronic storage media, and any such information or knowledge necessary to achieve full and complete access thereto, including the provision of all keys, identification codes, passwords, and passphrases, for the purposes of accessing any websites, databases, servers, electronic mail, newsgroups, forums, posts, discussion threads, Internet relay chat communications, or online payment processors that at any time were used to store or transfer the Stolen Information, or which may contain information regarding the location, extent or transfer of the Stolen Information;
- (iv) immediately execute such consents and authorizations as in the opinion of Reliance are necessary to facilitate the retrieval of the Stolen Information from any third parties; and
- (v) immediately delete, erase or otherwise destroy any Stolen Information or any ~~any~~ documents, information, plans, outlines, minutes, notes, presentations, systems, designs, electronic data, instructions, correspondence or memoranda relating to or regarding the Stolen Information upon being requested to do so by an Authorized Person; and

- (c) damages for conspiracy, conversion, unjust enrichment and infringement of copyright;
- (d) damages against Cooper for breach of confidence;
- (e) an accounting and disgorgement of any profits made in connection with the misappropriation of the Stolen Information from Reliance;
- (f) aggravated, exemplary, and punitive damages;
- (g) special damages, the particulars of which will be provided prior to trial;
- (h) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (i) the costs of this action on a substantial indemnity scale, plus G.S.T.; and
- (j) such other relief as this Honourable Court may deem just.

The Parties

2. The plaintiff Reliance is in the residential water heater rental business and leases water heater tanks to customers throughout Ontario.
3. The defendant National is an Alberta corporation carrying on business in the natural gas fuelled water heater market in Ontario under the trade name "National Home Services". National and Reliance are business competitors.
4. The defendant MacGregor was an employee at Reliance from November 5, 2001 until September 12, 2008 during which time he held several positions including Dealer Manager, Rental Program. MacGregor resigned from Reliance in order to join National on September 12, 2008 and is currently a Vice-President of National.

5. The defendant Dym is a consultant to National, and an employee of Ajax Estates Holdings, a company wholly owned by Mark Silver, the President of National.
6. The defendant Cooper is an employee of Just Energy, the parent company of National.
7. The defendants John Doe and Jane Doe are unknown individuals who provided Cooper, MacGregor and/or National with Stolen Information, or assisted Cooper, MacGregor and/or National with obtaining or accessing Stolen Information.

The Actions of the Defendants

8. At a time known to the defendants but unknown to the plaintiff, Cooper, John Doe and/or Jane Doe directly or indirectly obtained the Stolen Information from the plaintiff by unlawful means and provided the Stolen Information to National, Dym and/or MacGregor. The details of such misappropriation are not known to the plaintiff but the plaintiff undertakes to provide particulars of such misappropriation prior to the trial of this action.
9. The Stolen Information is proprietary to the plaintiff. The Stolen Information is highly confidential and is not available to the general public. The Stolen Information contains specific strategies relating to the plaintiff's business and affairs, and in particular contains confidential information relating to the plaintiff's business strategies in relation to its competitors, including National. The Stolen Information also contains information regarding the plaintiff's pricing formulas, customers and litigation strategies. The disclosure, dissemination, transfer or sale of the Stolen Information to third parties will cause irreparable harm to the plaintiff.
10. The plaintiff learned of the misappropriation of the Stolen Information on October 18, 2010 at the cross-examination of Christopher Chapman, Director of Strategic Initiatives at Reliance, on an affidavit he swore and filed in an Application commenced by MacGregor against Reliance in court file number CV-10-404539 (the "MacGregor Application"). During this cross-examination, counsel for MacGregor and National produced a document titled "Attrition Steering Committee, June 2009" (the "Confidential

Report”), a powerpoint presentation which was created by the Attrition Steering Committee for use at a meeting of Reliance’s management team and described in detail Reliance’s strategies to prevent customer loss to competitors, and in particular to National.

11. National has acquired, directly or indirectly, Stolen Information for the purpose of obtaining an unfair advantage in the water heater market contrary to the laws of Canada, and in reckless disregard of the plaintiff’s rights. By unlawfully obtaining and using the Stolen Information to its advantage, National has conspired with persons unknown to the plaintiff but known to National to injure the plaintiff, convert the plaintiff’s property to themselves, and unjustly enrich themselves. All of the defendants’ activities in relation to the Stolen Information has been carried out without the knowledge or authorization of Reliance.

The Defendants are Liable to the Plaintiff for their Wrongful Acts

(i) Breach of Duties of Confidence

12. Any access to the Stolen Information was provided to Cooper ~~John Doe and/or Jane Doe~~ in confidence and in the course of the duties that he ~~and/or she~~ performed on behalf of the plaintiff. The circumstances of Cooper’s ~~John Doe and/or Jane Doe’s~~ exposure to the Stolen Information imported an obligation of confidence. Cooper ~~John Doe and/or Jane Doe~~ only became aware of the Stolen Information in the context of his ~~or her~~ work for the plaintiff. The plaintiff pleads that Cooper ~~John Doe and/or Jane Doe~~ owed it a duty to maintain, at all times, the confidentiality of the Stolen Information and not to disclose it or use it for any purpose, including for his ~~or her~~ own profit, the profit of any other third parties or for the benefit of Reliance’s competitors, including National.
13. Cooper ~~has~~ ~~John Doe and/or Jane Doe~~ ~~have~~ breached his ~~or her~~ common law duty of confidentiality or the fiduciary duty owed to the plaintiff by misappropriating, misusing, offering or selling confidential information belonging to the plaintiff to advance his ~~or her~~ and/or National’s interests.

(ii) Conspiracy

14. Beginning at a time unknown and continuing to the present, National, MacGregor, Dym, Cooper, and others persons unknown to the plaintiff but known to National (the “Conspirators”) conspired by unlawful means with each other to injure or harm the plaintiff. The defendants, individually and in concert, have misappropriated and converted to their own use the property of the plaintiff.
15. The identities of all of the Conspirators are known to the defendants but unknown to the plaintiff. The Conspirators agreed to act in concert to offer, sell, distribute, provide, acquire, or use the Stolen Information, which they knew or should have known would harm the plaintiff.
16. As a result of the Conspirators’ acts in furtherance of the conspiracy, the plaintiff has suffered and continues to suffer serious and substantial loss, damage and expense, for which the Conspirators are liable.
17. Because the Stolen Information contains information specific to customer strategies and the litigation strategies of Reliance, the defendants and the Conspirators knowingly and intentionally directed their conspiracy towards the plaintiff, and the Conspirators are liable therefore.

(iii) Conversion

18. In appropriating the Stolen Information for their own use and benefit, the defendants knew or had reason to know that the Stolen Information:
 - (a) is unique to the business of the plaintiff;
 - (b) has no commercially significant purpose or use other than for the strategic planning of the plaintiff; and
 - (c) will be used by other persons to unlawfully undermine the plaintiff’s business and to unlawfully and unfairly compete with the plaintiff’s business.

19. The plaintiff has a proprietary interest in the Stolen Information. By their acts, the defendants have wrongfully converted and usurped to themselves the plaintiff's property. The plaintiff is therefore entitled to an accounting and disgorgement of all revenues and profits made by the defendants from the wrongful conversion of the Stolen Information, and damages from the losses of actual and prospective revenues, profits and proceeds as a result of the defendants' conduct.

(iv) Unjust Enrichment

20. It is critical to the business of the plaintiff that its strategies for customer relations, pricing and litigation plans, including the Stolen Information, remain confidential and available only to persons duly authorized by the plaintiff.
21. The sole purpose of the defendants' business and undertaking in misappropriating or dealing in the Stolen Information, apart from commercial gain, is to injure or harm the plaintiff.
22. The defendants' activities have been carried out intentionally, with full knowledge of the plaintiff's rights, and without the plaintiff's consent. As a direct and proximate result of their wrongful acts, the defendants have been unjustly enriched and the plaintiff has suffered, and will continue to suffer. The exact amount of unjust profits realized by the defendants and profits lost by the plaintiff are presently unknown and cannot be readily ascertained without an accounting.
23. The defendants' activities have illegally exploited the plaintiff's confidential information and property. Use of the Stolen Information by National and any other business competitor of Reliance who obtains possession of the Stolen Information will result in losses of revenue, proceeds, profits and other benefits that are impossible to ascertain at this time. It would be unjust to allow the defendants to retain any of the benefits they have received at the plaintiff's expense.

Irreparable Harm

24. The conduct the defendants have caused significant and irreparable harm to the plaintiff. In particular, the actions of the defendants have caused the plaintiff irreparable harm in that they have permitted National to unfairly compete with Reliance and to unfairly address, undermine and target Reliance's business strategies, policies, operations and practices.

Damages

25. The full extent of the plaintiff's damages are not currently known to the plaintiff but the plaintiff undertakes to provide particulars of all such damages prior to the trial of this action.
26. The defendants have acted in a high-handed, malicious and reprehensible fashion, and in wanton and reckless disregard for the plaintiff's rights. Accordingly, the plaintiff is entitled to punitive, aggravated, and exemplary damages.
27. As a result of the wrongful acts of the defendants, the plaintiff has suffered special damages, particulars of which will be provided prior to trial.
28. The plaintiff proposes that the trial of this action be held in the City of Toronto.

~~November 12, 2010~~ May 4, 2011

BORDEN LADNER GERVAIS LLP
Scotia Plaza, 40 King Street West
Toronto, Ontario
M5H 3Y4

Barry H. Bresner / Brendan Y.B. Wong
LSUC # 19787G / LSUC # 51464A
Tel: 416-367-6167 / 367-6743
Fax: 416-361-2746 / 682-2824

**Lawyers for the Plaintiff,
Reliance Comfort Limited Partnership**

Court File No. CV-10-412873

Reliance Comfort Limited Partnership
Plaintiff

- and -

National Energy Corporation et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

AMENDED STATEMENT OF CLAIM

Notice of Action issued on October 22, 2010

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

Barry H. Bresner / Brendan Y. B. Wong
Tel: 416-367-6167 / 416-367-6743
Fax: 416-361-2746 / 416-682-2824
LSUC # 19787G/51464A

Lawyers for the Plaintiff,
Reliance Comfort Limited Partnership
::ODMA\PCDOCS\TOR01\4628797\1

Appendix M

Court File No. CV-10-412873

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MADAM
JUSTICE HIMEL

) MONDAY THE 8TH DAY
)
) OF NOVEMBER, 2010

BETWEEN:

RELIANCE COMFORT LIMITED PARTNERSHIP

Applicant

- and -

**NATIONAL ENERGY CORPORATION, DOUGLAS MacGREGOR, JOHN DOE, JANE
DOE and other persons unknown who have conspired with the named defendants**

Respondents

ORDER

THIS MOTION, by Reliance Comfort Limited Partnership, for an interim and interlocutory injunction, was heard this date at 393 University Avenue, Toronto, Ontario.

ON READING the motion record and the consent of the parties made without admission of liability by the respondents.

- THIS COURT ORDERS** that National Energy Corporation (“National”) and Douglas MacGregor (“MacGregor”) jointly and severally, and National’s officers, directors, servants, agents, employees, and any and all persons acting on behalf of or in conjunction with National or MacGregor, or any and all persons having notice of this injunction, are hereby restrained from directly or indirectly, by any means whatsoever:

- (i) obtaining, disclosing, disseminating, distributing, transferring, selling, copying, providing, using, publishing, trafficking in, exposing or offering for sale, in whole or in part:
 - (A) any documents, information, plans, outlines, minutes, notes, presentations, systems, designs, electronic data, instructions, correspondence or memoranda and other documents as defined in Rule 30.01(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg.194 as amended, which are not publically available, regarding Reliance's business, including but not limited to its operations, affairs, finances, strategies, marketing, customers, equipment, inventory, systems and business practices that were developed, prepared, used, drafted, procured or purchased by Reliance (collectively "Reliance documents"); and
 - (B) any Reliance documents which were obtained directly or indirectly by any one or more of the defendants, or persons acting on behalf, at the request, or under the direction of any one or more of the defendants, from Reliance, without the knowledge or consent of Reliance, including, without limitation, an internal Reliance document entitled "Attrition Steering Committee June 2009" and any documents created by or for National which contain information obtained from the Reliance documents;

(collectively, the "Confidential Information")
- (ii) assisting, aiding or abetting any other person in carrying out any of the activities described in subparagraph (i) above;

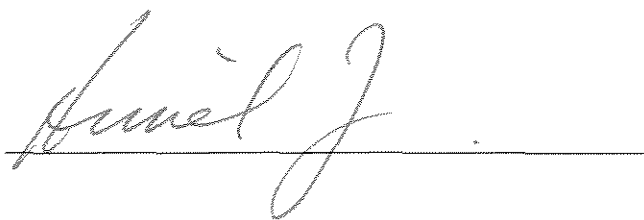
2. **THIS COURT ORDERS THAT** Shawn Dym, on his own behalf and on behalf of National, National's officers, directors, servants, agents, employees, and anyone else acting on their behalf, shall immediately prepare, swear or affirm and deliver to Reliance's lawyers an affidavit which contains:

- (i) a list of all documents herein defined as Confidential Information which have been or are currently in the power, control or possession of any one or more of the defendants and identifying the location of any and all copies of the Confidential Information;
- (ii) a detailed explanation of the circumstances in which the Confidential Information came into the power, control or possession of any one or more of the defendants;
- (iii) a detailed explanation of the use or uses, if any, which have been made of the Confidential Information prior to the date of this Order and identifying any other person or persons, if any, to whom any of the Confidential Information has been provided or disclosed;

3. **AND THIS COURT FURTHER ORDERS THAT** Shawn Dym attend forthwith before an Official Examiner to be cross-examined under oath on the affidavit to be provided under paragraph 2 above to answer all relevant questions posed by Reliance's lawyers relating to the matters raised in the Motion Record;

4. **AND THIS COURT FURTHER ORDERS AND DIRECTS THAT** the defendants, upon request of Reliance's lawyers, shall immediately deliver up the Confidential Information to Reliance's lawyers and confirm, under oath, that any and all

copies of the Confidential Information have either been delivered up or permanently deleted, erased or otherwise destroyed and shall immediately execute such consents and authorizations as in the opinion of Reliance are necessary to facilitate the retrieval of the Confidential Information from any third parties.

A handwritten signature in cursive script, appearing to read "Daniel J.", is written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV 09 2010

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:

PER / PAR:

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RELIANCE COMFORT LIMITED PARTNERSHIP
Applicant

- and -

NATIONAL ENERGY CORPORATION et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3Y4

Barry H. Bresner (LSUC #19787G)
Tel: (416) 367-6167
Fax: (416) 361-2746

Brendan Y. B. Wong (LSUC #51464A)
Te: (416) 367-6743
Fax: (416) 682-2824

Lawyers for the Applicant

Appendix N

J.

March 16/11

Court File No.: CV-10-412873

RELiance COMFORT LIMITED PARTNERSHIP
Plaintiff/Applicant

-and-

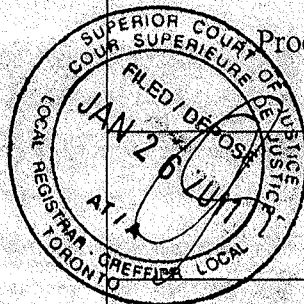
NATIONAL ENERGY CORPORATION
Defendants/Respondents

March 16/11 B. Bresner + B. Wong, for IP.
B. Tepfitsky, for National

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

The IP brought this contempt motion wRT the deletion of "Confidential Information" contrary to Himel J's order (on consent) of Nov 8/10. The motion also sought an order to answer refusals & U/T and complete the examination ordered by Himel J. That has now been resolved by the parties, as has the amendment of the title of the proceeding.



MOTION RECORD
(Motion for Contempt)

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West, Suite 4700
Toronto, Ontario M5H 3Y4

Barry H. Bresner (LSUC # 19787G)
Tel: (416) 367-6167
Fax: (416) 361-2746

Brendan Y. B. Wong (51464A)
Tel: 416-367-6743
Fax: 416-682-2824

Lawyers for the Applicant,
Reliance Comfort Limited Partnership

With respect to the contempt motion itself, much of the hearing focussed on the ~~deletion~~ deletion of emails containing the report. According to the answers to U/T delivered on March 14, 2011, this ~~deletion~~ deletion occurred in early December/10 (no exact date), which was after the Nov 30/10 correspondence from Mr Bresner requesting that Mr Dym bring to his cross "all relevant documents... including... any emails... which evidence the distribution of the [Confidential Report]". Rather than continuing to argue whether there had been contempt, and in light of this post-Nov 30th deletion of emails, the

parties have agreed to resolve this matter by having an independent expert conduct a search to determine if indeed all Conf'd Info is remaining on the def National's system.

Order to go, on consent, in accordance w/ attached terms agreed by the parties.

This leaves the issue of the expert's costs + costs of the motion.

While I have not and do not make any finding of contempt or breach of the order, the appointment of the expert to ~~conduct a search~~ confirm that no copies of the Report remain on National's system was necessitated by the detection of those emails in early December after Mr. Bresner had asked for them to be brought to the cross X. This compromised the P's ability to trust Mr. Dym on cross X with respect to the distribution of the Report on National + to satisfy itself that no copies remain on the system. As such, it is only fair that National pay for the reasonable costs of the expert in searching for the Report + its distribution on National's systems. I order National to pay these costs, up to a maximum of \$12,000 (subject to further court order). However, this shall only be the portion of the search which relates to the Report + its distribution.

Since there was no evidence that National destroyed any other Conf Info, I do not order it to pay the expert's cost in ascertaining that no such other info remains on Nat's system.

As for the costs of this motion, I exercise my discretion to award none other than both parties pay their own. There has been no finding of contempt (which is a serious allegation) on the original basis the motion was brought, nor even with the deletion of the emails post Nov 30/10. I cannot regard either party as successful on this motion - rather, I consider that the negot'd resolution reflects divided success - the def has no finding of contempt against it and the pl has a mechanism to determine whether any Conf Info remains on the def's system.

Conway J.

1. National and its parent, Sun Energy, will grant access to their computer systems during normal business hours or such other times as may be agreed between the parties, to an independent forensic computer expert to be appointed by the plaintiff in order to determine whether any Confidential Information, as defined in the Hinal Order, is stored in or retrievable from that system. Any disputes to the independence or qualifications of the expert can be resolved by the court.
2. The IT group of the respondents will cooperate with the expert.
3. The expert's work plan will be ~~shared~~ disclosed to National and National and, if any dispute arises in that regard, it can be resolved by the court.
4. The expert will provide both parties with a listing of all documents which it believes fall within the definition of Confidential Information prior to releasing the documents to the plaintiff. Any dispute as to ^{the} release of the documents to the plaintiff shall be determined by the court.
5. Upon release of any ^{such} documents to the plaintiff, a copy will be provided to National.

Appendix O

J. 27, 2011

Court File No.: CV-10-412873

Conway J.

RELiance COMFORT LIMTIED PARTNERSHIP

- and -

NATIONAL ENERGY CORPORATION et al.

Applicant

Respondents

*June 27/11 B. Bresner, for A
B. Tephtsky, for R.*

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

The parties have now agreed on the form of order, which I have signed today. The issue re answering the V/T has been resolved on consent.

MOTION RECORD

There was some discussion as to whether the Expert can search National's ^{Just Energy's} servers only on the employees' computers (laptop, desktop) which are owned by National Just Energy. MR ~~XXXX~~ is agreeable to having the employees' computers searched if the Expert indicates that he needs to do so. There is no further court order required with respect to that issue, given the understanding & agreement of counsel. No costs for today's attendance.

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3Y4

Barry H. Bresner (LSUC #19787G)
Tel: (416) 367-6167
Fax: (416) 361-2746

Brendan Y. B. Wong (LSUC #51464A)
Tel: (416) 367-6743
Fax: (416) 682-2824

Lawyers for the Applicant

Conway J.

JUN 28 2011
my

Appendix P

Court File No. CV-10-412873

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**THE HONOURABLE MADAM) WEDNESDAY THE 16TH DAY
JUSTICE CONWAY) OF MARCH, 2011**

B E T W E E N:

RELIANCE COMFORT LIMITED PARTNERSHIP

Applicant

- and -



**NATIONAL ENERGY CORPORATION, DOUGLAS MacGREGOR, JOHN DOE, JANE
DOE and other persons unknown who have conspired with the named defendants**

Respondents

ORDER

THIS MOTION, by Reliance Comfort Limited Partnership (“Reliance”), for an order for contempt and other relief as described in the notice of motion, was heard this date at 361 University Avenue, Toronto, Ontario.

ON READING the motion record of the applicant, the responding motion record of the respondents, and the factums and authorities of the parties, and the consent of the parties to the terms in paragraphs 1 to 5 below,

1. **THIS COURT ORDERS** that National Energy Corporation (“National”) and Just Energy Group Inc. (“Just Energy”), shall grant access to their computer systems during normal business hours or such other times as may be agreed to between the parties, to an independent forensic computer expert to be appointed by Reliance (the “Expert”) in order to determine whether any “Confidential Information”, as that term is defined in the order of Himel J. dated

November 8, 2010, is stored in or retrievable from those computer systems. Any disputes to the independence or qualifications of the expert can be resolved by the Court.

2. **AND THIS COURT FURTHER ORDERS** that the Information Technology group of the respondents will cooperate with the Expert.

3. **AND THIS COURT FURTHER ORDERS** that the Expert's work plan will be disclosed to Reliance and National and, if any dispute arises in that regard, it can be resolved by the Court.

4. **AND THIS COURT FURTHER ORDERS** that the Expert will provide Reliance and National with a listing of all documents which it believes fall within the definition of Confidential Information prior to releasing the documents to Reliance. Any dispute as to the release of the documents to Reliance shall be determined by the Court.

5. **AND THIS COURT FURTHER ORDERS** that upon the release of any such documents to Reliance, a copy will be provided to National.

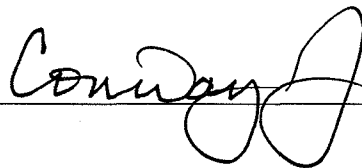
6. **AND THIS COURT FURTHER ORDERS** that National shall pay the costs of the Expert incurred in searching for information, records and other documents relating to the document titled "Attrition Steering Committee, June 2009", or versions thereof, up to a maximum of \$12,000, subject to further order of this Court.

7. **AND THIS COURT FURTHER ORDERS** that there shall be no costs of this motion.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO

JUN 27 2011

AS DOCUMENT NO.:
A TITRE DE DOCUMENT NO.
PER / PAR:


_____ 7

Court File No. CV-10-412873

RELIANCE COMFORT LIMITED PARTNERSHIP
Applicant

- and -

NATIONAL ENERGY CORPORATION et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3Y4

Barry H. Bresner (LSUC #19787G)

Tel: (416) 367-6167

Fax: (416) 361-2746

Brendan Y. B. Wong (LSUC #51464A)

Te: (416) 367-6743

Fax: (416) 682-2824

Lawyers for the Applicant

Appendix Q



SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

*361 University Avenue
Toronto, ON M5G 1T3*

Telephone: (416) 327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: 27 July 2012

TO:

Brendan Wong
Brad Teplitsky

FAX NO.:

416 682 2824
416 981 7604

FROM:

Lauric Pictras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 6

MESSAGE:

**RE: Reliance Comfort Limited Partnership v.
National Energy Corporation et al
Court file no. CV-10-412873**

Please see attached Endorsement released by Mr. Justice Strathy today.

The information contained in this facsimile message is confidential information. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address

Original will NOT follow. If you do not receive all pages, please telephone us immediately at the above number.

COURT FILE NO.: CV-10-412873

DATE: 20120727

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Reliance Comfort Limited Partnership, Plaintiff/Applicant

National Energy Corporation et al., Defendant/Respondent

BEFORE: G.R. Strathy J.**COUNSEL:** *Brendan Y.B. Wong*, for the Plaintiff/Applicant*Brad Teplitsky*, for the Defendant/Respondent**DATE HEARD:** July 23, 2012**ENDORSEMENT**

[1] This is a skirmish in the “water heater wars”: see *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148, [2011] O.J. No. 2344, aff’d. 2012 ONCA 360, [2012] O.J. No. 2415. Unfortunately, a great deal of time and money have been wasted in this particular scrap as a result of the failure of the respondent, and its counsel, to comply promptly and fully with an order of the court.

[2] The plaintiff, Reliance Comfort Limited Partnership (Reliance), moves for an order requiring the defendant, National Energy Corporation (National), and certain identified employees or former employees, to comply with a court-ordered forensic examination of their computers and for an order requiring National to pay the costs of that examination.

[3] In the context of an earlier battle in a different action, *MacGregor v. Reliance Comfort Limited Partnership*, 2010 ONSC 6925, [2010] O.J. No. 5419, Justice Echlin had occasion to remark at para. 5 that “while the parties obviously have very little use for one another, the counsel [Martin Teplitsky and Barry Bresner being the senior counsel on each side, with their juniors Brad Teplitsky and Brendan Wong] have exemplified the highest standards of advocacy and civility as would be expected of senior Ontario litigants”. He added, at para. 13, “[R]ather than engage in inflammatory pleadings, interlocutory proceedings, endless discoveries and a lengthy trial, Messrs. Bresner and Teplitsky have significantly narrowed the issues and agreed upon most facts.”

[4] Reading the record before me, I cannot but wonder where the love has gone. The animosity between the parties has now infected the relationship between some of their counsel. The record indicates a pathetic absence of Justice Farley’s “Three Cs” – “cooperation,

communication and common sense”: *Mortgage Insurance Co. v. Innisfil Landfill Corp.*, [1995] O.J. No. 32, (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2. To that list I would add a fourth “C” and a “P” – civility and proportionality.

[5] I regret to say that the responsibility falls largely on Mr. Brad Teplitsky, who has had carriage of the action for National and who appears as counsel on this motion.

[6] The background is simple enough. Shawn Dym (Dym), a consultant engaged by National, obtained a confidential document (the Document) belonging to Reliance from a former Reliance employee.

[7] The Document set out the strategy of Reliance’s “Attrition Steering Committee”, which was looking at ways to thwart National’s attempts to take away some of Reliance’s customers.

[8] The appropriation of the Document came to Reliance’s attention when it was put to one of its employees on cross-examination in another action involving the parties.

[9] This action, claiming an injunction restraining the abuse of Reliance’s confidential information and damages, was commenced a few days later, on October 22, 2010.

[10] On November 8, 2010, Himel J. made an order, on consent, requiring Dym to deliver an affidavit explaining the circumstances in which the Document had been obtained.

[11] On November 30, 2010, Dym delivered a brief affidavit setting out the circumstances in which he acquired the Document.

[12] On January 4, 2011, at the cross-examination of Dym on his affidavit, Reliance discovered that all e-mails relating to the Document had been destroyed by National.

[13] Reliance brought a motion for contempt. On March 16, 2011, Conway J. made an order, on consent, requiring National to grant access to its computer systems by an independent forensic expert appointed by Reliance, to determine whether any “Confidential Information” (as defined by the order of Himel J. to include not only the Document, but also any other confidential documents of Reliance), was stored in or retrievable from those systems. National’s Information Technology group was required to cooperate with the expert. The expert’s work plan was to be disclosed to the parties and any disputes were to be resolved by the court, as were disputes concerning the release of any documents discovered by the expert.

[14] National was ordered to pay the expert’s costs, up to a maximum of \$12,000, subject to further order of the court.

[15] Pausing here, and considering the background of the matter, including the fact that the order was made on consent in response to a contempt motion against National, one would have expected that National and its counsel would ensure that the order was observed promptly and in letter and spirit; see *iTrade Finance Inc. v. Webworx Inc.*, [2005] O.J. No. 1200 (S.C.J.), referring to *Canada Metals Co. Ltd. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 at 603, (H.C.J.), *aff’d* (1975), 11 O.R. (2d) 167 (C.A.).

[16] Unfortunately, this did not occur. It is nothing short of scandalous that sixteen months after the order was made, on consent, I repeat, the order has not been fully satisfied. National and its lawyer were responsible for foot-dragging and obstruction of the legitimate attempts of the expert to accomplish his mandate. The predictable result is that the costs of the expert's investigation have ballooned, as have the costs incurred by Reliance in attempting to have the order satisfied. No doubt National's legal costs have also escalated.

[17] The delays and obstructions have been compounded by conduct of counsel for National, which has done nothing to advance the discharge of the order and which have included pejorative comments about counsel for Reliance.

[18] I do not propose to recite every example of this conduct, but I find that National and Mr. Brad Toplitsky have:

- unreasonably delayed the commencement of the expert's investigation;
- unduly restricted the scope of the expert's investigation by refusing to permit examination of desktop, laptop and personal computers;
- refused access by the expert to the individual computers of some of National's employees, including notably, Dym, Mark Silver (the president and owner of National) and Michael Silver;
- imposed unreasonable terms of the expert's investigation, including insisting on agreement on search terms before the expert began his investigation;
- refused or delayed access to National's computers;
- made unreasonable and unfounded accusations of bias on the part of the expert;
- made threats, never fulfilled, to bring motions or to seek directions, including instructing the expert to stop work because of a proposed motion that was never brought;
- communicated directly with the expert without notifying Reliance; and
- made unfounded allegations of misconduct on the part of Reliance and the expert.

[19] Counsel for Reliance was not entirely innocent of responsibility for elevating the temperature of the relationship between the lawyers. I have the distinct impression that having caught National with its hand in the cookie jar, Reliance decided to give National a hard and unrelenting spanking. That said, counsel for Reliance faced considerable provocation. He had the support of a court order behind him and was entitled to demand that it be complied with.

[20] The order of Conway J., was not particularly complicated as such orders go. It could have been satisfied with relative ease. In a nutshell, better communication was required, common

sense should have been brought to bear on the problem, cooperation should have been exhibited and there should have been civility between counsel.

[21] At some point, as well, consideration should have been given to proportionality. As I said during the argument, in spite of the considerable work done by the expert, Reliance now knows exactly what it knew at the outset of the investigation: a confidential Reliance document came into the hands of National and was distributed to various people in the National organization. While I am prepared to permit the expert to move forward with his investigation, I propose to defer the issue of the expert's costs until trial. The trial judge can then determine whether the costs of the investigation were truly warranted in light of the information obtained.

[22] I turn to the conduct of this motion, which has a bearing on the costs submissions of Reliance.

[23] The conduct of National's counsel in response to this motion has not been exemplary and has inflated the costs that Reliance incurred.

[24] On May 23, 2012, Low J. ordered a timetable for this motion, which provided for the delivery of affidavits and cross-examinations to be completed by June 28, 2012. Facts were to be delivered by July 19, 2012. The timetable was subsequently amended by Justice Low on June 26, 2012. The responding record was to be served by June 29, 2012. The respondents were to make themselves available for cross-examination by July 10, 2012. Facts were to be exchanged by July 17, 2012. The order was made peremptory on National and it was provided that the failure to deliver materials as required by the timetable was to be a bar to the delivery of such material. The order further provided that National was required to pay Reliance's costs, fixed at \$1,500, within two weeks.

[25] National delivered two responding affidavits. One was sworn by Mark Silver, its president. The other was sworn by Brad Teplitsky, its counsel. Mr. Teplitsky stated that as he was swearing an affidavit he would not be arguing this motion. He repeated that statement in a number of emails to counsel for Reliance.

[26] Reliance delivered an affidavit of its counsel, Mr. Brosner, in response to Mr. Teplitsky's affidavit.

[27] Mr. Teplitsky failed to make himself and Mr. Silver available for cross-examination on July 10, 2012. Reliance then brought a motion, returnable at the hearing of this motion, to strike their affidavits for failure to comply with the order of Low J. Mr. Teplitsky ultimately consented to the affidavits being struck. He appeared at the motion, late I might add, and with no evidence. He delivered no factum. He brought no counsel to argue the motion, in spite of the fact that his credibility had been put in issue by his own (now withdrawn) affidavit, by Reliance's original affidavit and by Reliance's reply to his (now withdrawn) affidavit.

[28] With considerable reluctance, and in spite of justified protests by Mr. Wong, I permitted Mr. Teplitsky to make submissions to avoid further delay of this matter and to ensure that National's position was put before me. The predictable result was that Mr. Teplitsky found

himself defending his own conduct, with no evidence on behalf of his client and no authorities or legal submissions to assist the court.

Conclusion and Order

[29] For these reasons, I order that the all computers (desktops, laptops, tablets and handheld devices) used by Michael Silver, Mark Silver and Shawn Dym be forthwith produced for inspection by the expert for the purpose of conducting his investigation. National and Just Energy shall cooperate with the expert in locating and providing access to these computers. The expert shall be at liberty to determine search terms in the reasonable exercise of his discretion. Issues relating to the release of documents identified by the expert, including issues of privilege, shall be dealt with in accordance of the order of Conway J.

[30] No evidence has been filed on this motion by the expert. I am not prepared to order any other examinations, or grant the more extensive relief requested by Reliance, in the absence of evidence from the expert that further examinations are necessary and would be reasonably likely to disclose evidence that has not previously been discovered. If, having examined the computers of Michael Silver, Mark Silver and Shawn Dym, the expert delivers a report to the effect that investigation of additional computers is necessary, National should consider voluntary compliance. If it does not do so, Reliance may bring a motion for further directions. The motion may be brought before me, in writing.

[31] Except to this extent, I do not propose to accept the parties' request that I remain seized of this matter for the purpose of the interpretation and enforcement of the court's orders and the resolution of any future disputes.

[32] For the reasons set forth above, it is my view that the additional costs incurred by Reliance in enforcing the order, and the additional costs of the expert, should be determined and fixed by the trial judge, who will have decided the issues of liability and damages and who will be in a position to assess the value of the expert's work in relation to the underlying issues in the action and the damage, if any, caused by the alleged misappropriation of the Confidential Information.

[33] I do intend, however, to make an award of costs of the motion, including the motion to strike the evidence of Mr. Teplitsky and Mr. Silver, at a point approximately mid-way between partial indemnity costs and substantial indemnity costs, namely \$45,000, all inclusive. This reflects the complexity of the matter, the importance of the issues and the time spent. It also reflects that the time spent was entirely due to National's failure to comply fully with orders of the court and that the proceedings were made much more complicated than necessary by the conduct described above.


G.R. Strathy J.

DATE: July 27, 2012

Appendix R

Court File No.

CV-12-470200

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RELIANCE COMFORT LIMITED PARTNERSHIP

Plaintiff

- and -

NATIONAL ENERGY CORPORATION

Defendant



STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH

- 2 -

TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

Dec 17th, 2012

Local Registrar

Address of Court Office: **S. Chandradat**
393 University Avenue Registrar
10th floor
Toronto, Ontario
M5G 1E6

TO:

NATIONAL ENERGY CORPORATION
25 Sheppard Avenue West
Suite 1600
Toronto, ON
M2N 6S6

- 3 -

CLAIM

1. The plaintiff, Reliance Comfort Limited Partnership, claims against the defendant, National Energy Corporation, as follows:

- (a) damages in the amount of \$50 million for making false or misleading representations in contravention of s. 52 of the *Competition Act* R.S.C. 1985, c. 19 (2nd Supp.) and in accordance with s. 36 of the *Competition Act*;
- (b) in the alternative, damages in the amount of \$50 million for making false or misleading statements tending to discredit the business, wares or services of the Plaintiff in contravention of s. 7(a) of the *Trade-marks Act* R.S.C., 1985, c. T-13 and in accordance with s. 53.2 of the *Trade-marks Act*;
- (c) in the alternative, damages in the amount of \$50 million for using Reliance's Trade Mark (as defined below) in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in contravention of s. 22 of the *Trade-marks Act* and in accordance with s. 53.2 of the *Trade-marks Act*;
- (d) in the alternative, damages in the amount of \$50 million for the tort of unlawful interference with economic interest and inducing breach of contract;
- (e) a declaration that National has breached s. 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30;
- (f) a declaration that National has directly or indirectly breached s. 43 of the *Consumer Protection Act, 2002*;
- (g) a declaration that National has made false or misleading representations in breach of s. 74.01 of the *Competition Act*;
- (h) a declaration that National has made false or misleading statements tending to discredit the business, wares or services of the Plaintiff in contravention of s. 7(a) of the *Trade-marks Act*;

- 4 -

- (i) a declaration that National has used the Plaintiff's registered trade-mark in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in contravention of s. 22 of the *Trade-marks Act*;
- (j) a permanent injunction restraining National, its employees, agents and persons under its control or power (referred to together hereinafter as "National"), from making the Misrepresentations (as that term is defined below) to Reliance's customers;
- (k) an order, pursuant to s. 53.2 of the *Trade-marks Act*, directing National to deliver up or, to, upon Reliance's written request, destroy under oath any documents, including but not limited to brochures, pamphlets, or other printed documents, bearing the Plaintiff's Trade Mark (as defined below) and used by National in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in contravention of s. 22 of the *Trade-marks Act*;
- (l) a permanent injunction restraining National from publishing, distributing, or otherwise using or disseminating (or causing to be used or disseminated) in any manner any document, including but not limited to brochures, pamphlets, other printed documents, electronic documents and internet postings, containing:
 - (A) false or misleading representations regarding Reliance in contravention of s. 52 of the *Competition Act*;
 - (B) false or misleading statements tending to discredit the business, wares or services of Reliance in contravention of s. 7(a) of the *Trade-marks Act*; or
 - (C) Reliance's Trade-Mark (as defined below) in a manner that is likely to have the effect of depreciating the value of the goodwill attached thereto in contravention of s. 22 of the *Trade-marks Act*;
- (m) punitive damages in the amount of \$10 million;

- 5 -

- (n) Reliance's costs of its investigation in connection with this matter in accordance with s. 36 of the *Competition Act*;
- (o) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O., 1990, c.C.43, as amended;
- (p) costs of this action on a substantial indemnity basis plus HST; and
- (q) such further and other relief as this Honourable Court deems just.

The Parties

2. The plaintiff, Reliance Comfort Limited Partnership, doing business as Reliance Home Comfort ("**Reliance**"), is in the residential water heater rental business and leases water heaters to customers throughout Ontario. Reliance is a Manitoba limited partnership with its head office in Toronto, and it employs approximately 1,000 staff in Canada.

3. Reliance and its predecessor organizations have been in the business of delivering high quality home comfort products and services for over 40 years. Reliance is one of Canada's largest rental water heater providers. The rental water heater business is highly competitive with a number of different entities offering rental services.

4. The defendant, National Energy Corporation, an Ontario corporation doing business under the name National Home Services, is a wholly owned subsidiary of Just Energy Group Inc.

Misrepresentations to Reliance Customers by National Door-to-Door Salespersons

5. As set out in the paragraphs below, since at least 2010, National and its agents (referred to together as "**National**") have made false or misleading representations concerning Reliance to Reliance's customers or to the general public, as a result of which Reliance has lost customers to National. National has further induced Reliance's customers to switch to National using unlawful means.

6. National's door-to-door salespersons, or salespersons ostensibly acting on behalf of National, have attended and continue to attend at the residences of Reliance customers for the purpose of

- 6 -

causing the Reliance customer to switch to National, and in the course of each visit made or make (as the case may be) one or more misrepresentations to the Reliance customer. In particular, in communicating with Reliance's customers, National's door-to-door salespersons made or make representations that were or are false or misleading, including by (the "**Consumer Misrepresentations**"):

- (a) identifying themselves as being employed by, affiliated with, or an agent for Reliance;
- (b) conveying, expressly or impliedly, the impression that replacing their water heater would not entail a change of water heater suppliers or require termination of their Reliance water heater rental agreement;
- (c) identifying themselves as, or suggesting they were: (i) a representative of a utility company or government agency responsible for inspecting the water heater of the Reliance customer, or (ii) otherwise authorized or qualified by a government, industry or public authority to replace the water heater of the Reliance customer, including by stating that they were authorized by a government or other public authority to replace all water heaters throughout a neighbourhood or residential real estate development;
- (d) stating or suggesting that Reliance had assigned the Reliance customer's water heater rental agreement to National;
- (e) stating or suggesting that the customer's existing water heater was substandard, was beyond its useful life, was not installed pursuant to applicable codes or other government or industry requirements, required repair, was hazardous or was unsafe;
- (f) stating or suggesting that failure by the customer to take remedial action, such as by replacing their water heater would be unsafe and may cause harm to themselves or their families;
- (g) overstating or exaggerating the energy or costs savings that might be realised by switching from Reliance to National;
- (h) overstating or exaggerating the costs of replacing their existing water heater with a more efficient water heater through a means other than signing a water heater rental agreement with National;
- (i) stating or suggesting that Reliance is an American company;
- (j) stating or suggesting that National is entirely Canadian owned;

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- (k) stating or suggesting that Reliance customers were entitled to cancel their contracts with Reliance without incurring any further charge from Reliance; and
- (l) stating or suggesting to the Reliance customer that they could be duly appointed to act as the Reliance customer's agent for the purpose of acquiring a "Removal Reference Number" (as described further below).

7. Reliance's water heater return policies require customers wishing to terminate their water heater rental agreements to first phone Reliance and obtain a "Removal Reference Number" ("**RRN**"). National salespersons have called Reliance by telephone and imitated, pretended to be, or identified themselves to Reliance as a Reliance customer for the purpose of obtaining a RRN from Reliance (the "**Identity Misrepresentation**").

8. National has provided Reliance and Reliance customers with agency appointment forms that purportedly may be used to appoint its salespersons as agents of a Reliance customer ("**Purported Agency Form**"). The Purported Agency Forms have a signature line for execution by a Reliance customer. In some instances, National has falsely represented to Reliance that a Purported Agency Form was executed by a Reliance customer, including by providing Reliance with a completed Purported Agency Form bearing a signature or mark on or around the area of the signature block in circumstances where the signature or mark was not actually the signature or mark of the Reliance customer (the "**Form Misrepresentation**").

9. The Consumer Misrepresentations, the Identity Misrepresentation and the Form Misrepresentation (together, the "**Misrepresentations**") were each false or misleading in a material respect.

10. In making and continuing to make each Misrepresentation, National knowingly or recklessly made and continues to make a representation that was or is false or misleading in a material respect, or made and continues to make a false or misleading statement tending to discredit the business, wares or services of Reliance.

11. Furthermore, National knowingly and recklessly allowed and permitted and continues to allow and permit their salespersons to make and continue to make the Misrepresentations,

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notwithstanding that National has received numerous complaints about the false and misleading nature of the Misrepresentations.

12. The Consumer Misrepresentations were and continue to be made to Reliance's customers in Ontario, including but not limited to customers resident in London, Windsor, Hamilton, Burlington, Oakville, Cambridge, Kitchener-Waterloo, Brantford, Guelph, Kingston, Sudbury, Sarnia, Milton, St. Thomas, Chatham, the Greater Toronto Area, North Bay, Ottawa, St. Catharines, Sault Ste. Marie, Thunder Bay and Timmins.

Misuse of Reliance's Trademark

13. At all times material, Reliance's trade-mark "Reliance" was registered under TMA747845, and was a valid and enforceable registered mark under the provisions of the *Trade-marks Act* in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance and consumer and commercial financing services relating to water heaters". Reliance's trade-mark "Reliance Home Comfort" was registered at all times material under TMA724655, and was a valid and enforceable registered mark in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance, consumer financing services relating to water heaters". Reliance's logos are also registered under TMA796930 and TMA797734 and are valid and enforceable marks in association with wares including "water heaters" and services including "[r]ental, sale, installation, service, lease, maintenance and consumer and commercial financing services relating to water heaters" (collectively, the "**Trade-Marks**").

14. National has produced and publicly disseminated documents such as flyers, door hanging advertisements and pamphlets bearing one or more of Reliance's Trade-Marks, which refer to Reliance in a false or misleading manner and depreciate the value of the goodwill in its Trade-Marks.

15. In particular, National produced and publicly disseminated and continues to produce and publicly disseminate materials bearing one or more of Reliance's Trade-Marks that (the "**Misleading Documents**"):

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- (a) overstated the annual fee increases permitted under Reliance's water heater rental agreements;
- (b) stated that Reliance customers and/or former Reliance customers did not need to pay outstanding valid bills to Reliance;
- (c) stated that Reliance lacks a program to provide maintenance on its rental water heaters;
- (d) overstated, exaggerated, or were ambiguous as to any energy or costs savings that might be realised by switching from Reliance to National;
- (e) stated that Reliance's rental water heaters violated applicable codes, or were unsafe; and
- (f) stated that Reliance is an American company or a company owned or controlled by persons or entities residing in the United States of America.

16. The Misleading Documents were each false or misleading in a material respect.

17. In publishing and continuing to publish one or more of the Misleading Documents, and in providing the Misleading Documents to the public and to Reliance's customers, National knowingly or recklessly made and continues to make a representation that was or is false or misleading in a material respect, or made and continues to make a false or misleading statement tending to discredit the business, wares or services of Reliance.

18. The Misleading Documents were and continue to be disseminated to the public in order to convince existing Reliance customers to breach or otherwise terminate their contracts with Reliance and switch to National, or convince potential Reliance customers to sign water heater rental agreements with National instead of Reliance.

Breach of the *Consumer Protection Act, 2002*

19. National has breached the provisions of the *Consumer Protection Act, 2002* by failing to observe and comply with the 10 day cooling off period in section 43 of that Act. National not only fails to inform the consumer of their rights to a cooling off period but further renders the protections of section 43 a nullity by making it impossible or impracticable for the consumer to

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exercise their cancellation rights by immediately removing Reliance's rental water heater and installing a National rental water heater (the "**Immediate Replacement Policy**").

20. National's Immediate Replacement Policy makes it impracticable for former Reliance customers to switch back to Reliance or otherwise cancel their new National water heater rental agreement upon discovering or being informed that the Consumer Misrepresentation(s) or Misleading Document(s) used by National were false or otherwise misleading. National's Immediate Replacement Policy has in fact prevented former Reliance customers who would otherwise switch back to Reliance from doing so. As a result, the implementation of the Immediate Replacement Policy has caused Reliance injury, harm and loss.

21. In addition, notwithstanding National's Immediate Replacement Policy, Reliance's standard contract with its customers provides that the contract (and charges thereunder) will only be terminated upon the return of the water heater to Reliance. However, National has routinely stockpiled up to hundreds of Reliance water heaters for periods in excess of 60 days (the "Stockpile"). In these circumstances, Reliance continues to charge those customers until such time as National makes the return. This has resulted in increased costs to Reliance, including through increased volume to its customer call centres from affected customers challenging Reliance's legitimate billings, and delay in recovering payments for these charges.

National's Liability under s. 52 of the Competition Act

22. The Misrepresentations made and continuing to be made and the Misleading Documents published and continuing to be published by National, as described above, were and continue to be made or published for the direct or indirect purpose of promoting National's water heater rental business.

23. The Misrepresentations were made and continue to be made and the Misleading Documents were produced, published and disseminated and continue to be produced, published and disseminated by National with knowledge of their false or misleading nature.

24. National also knowingly and recklessly allowed and permitted and continues to allow and permit their salespersons, or salespersons ostensibly acting on the behalf of National, to make the

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Misrepresentations notwithstanding that National has received numerous complaints about their false or misleading nature.

25. National knowingly and recklessly caused and causes the Misleading Documents to be produced and published, and allowed and permitted and continues to allow and permit their salespersons, or salespersons ostensibly acting on their behalf, to disseminate the Misleading Documents. Furthermore, National knowingly and recklessly continued and continues to cause the Misleading Documents to be produced and published, and continued and continues to allow and permit their salespersons, or salespersons ostensibly acting on their behalf, to disseminate the Misleading Documents, notwithstanding that National has received numerous complaints about the false or misleading nature of the information therein.

26. Reliance pleads and relies on sections 52(1), 74.01 and 74.02 of the *Competition Act*.

27. Reliance has suffered and continues to suffer injury, harm and loss as a direct result of National's Misrepresentations and its production, publication and dissemination of Misleading Documents, including but not limited to the loss of customer accounts, loss of goodwill and the costs of extensive and ongoing advertising required to counter the misrepresentations contained therein. As such, Reliance is entitled to recover its damages attributable to the Misrepresentations and Misleading Documents and the costs of its investigation in accordance with section 36 of the *Competition Act*.

National's Liability under s. 7(a) of the Trade-marks Act

28. National's Misrepresentations and production, publication and dissemination of Misleading Documents have tended to and continue to tend to discredit the business of Reliance, contrary to s. 7(a) of the *Trade-marks Act*.

29. Reliance has suffered and continues to suffer injury, irreparable harm and loss as a direct result of National's Misrepresentations and the production, publication and dissemination of Misleading Documents, including but not limited to the loss of customer accounts and the costs of extensive and ongoing advertising required to counter the misrepresentations.

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30. Pursuant to s. 53.2 of the *Trade-marks Act*, Reliance requests this Honourable Court to: declare that National has breached s. 7(a) of the *Trade-marks Act*; award Reliance damages to compensate for its losses attributable to this breach; issue a permanent injunction enjoining National from making any of the false or misleading representations detailed herein; and order the delivery up or destruction under oath of all written material containing such false or misleading representations.

National's Liability under s. 22 of the Trade-marks Act

31. National's Misrepresentations and production, publication and dissemination of the Misleading Documents, as described above, which use one or more of Reliance's Trade-Marks, have had and continue to have the effect of depreciating the value of the goodwill attaching thereto, contrary to s. 22(1) of the *Trade-marks Act*.

32. Reliance has and will be required to continue to incur extensive costs to seek to minimize the damage resulting from the loss of goodwill attaching to its Trade Marks.

33. As such, pursuant to s. 53.2 of the *Trade-marks Act*, Reliance requests that this Honourable Court declare that National has breached s. 22(1) of the *Trade-marks Act*; award Reliance damages to compensate the costs associated with attempting to minimize and reverse the loss of goodwill attaching to its Trade-Marks; issue a permanent injunction enjoining National from using Reliance's Trade-Marks in a manner likely to depreciate the goodwill attached thereto; and order the delivery up or destruction under oath of all documents bearing Reliance's Trade-Marks in a manner likely to depreciate the goodwill attached thereto.

Unlawful Interference with Reliance's Economic Interests

34. National made the Misrepresentations and produced, published and disseminated the Misleading Documents with the purpose of inducing Reliance's customers to breach their contracts with Reliance. As a result of National's Misrepresentations, and the production, and disseminated the Misleading Document, Reliance's customers breached or terminated their contracts with Reliance.

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35. In making the Misrepresentations and publishing the Misleading Documents, National interfered with Reliance's economic interests. The Misrepresentations and the Misleading Documents were unlawful, and, *inter alia*, contrary to sections 14 and 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 and sections 52 and 74.01 of the *Competition Act*. The Misrepresentations were made and the Misleading Documents were produced, published and disseminated with the intention of injuring Reliance.

36. In retaining Reliance water heaters as part of the Stockpile, National unlawfully interfered with Reliance's business relationship with its customers and property, as described above at paragraph 21.

37. As a result of the making of the Misrepresentations, the publication of the Misleading Documents and the retention of Reliance water heaters as part of the Stockpile, Reliance has suffered losses, including but not limited to the loss of customer accounts, the particulars of which will be particularized prior to trial.

National's Liability for the Tort of Inducing Breach of Contract

38. In making the Misrepresentations to Reliance's customers, National knew or ought to have known that the individuals with whom they were communicating were customers of Reliance, since, *inter alia*, Reliance's water heaters are marked with Reliance's name. National's conduct, as described above, particularly its actions in falsely informing customers of the provisions of their contracts with Reliance and thereby encouraging them to breach these contracts by removing their water heaters other than in accordance with the terms of their contracts, constitutes the tort of inducing these customers to breach their contracts with Reliance.

39. Prior thereto, Reliance had valid and enforceable contracts with its customers. National was aware or ought to have been aware of the existence of these contracts, and it intended to and did procure breaches thereof. Reliance has suffered the damages of the loss of revenue associated with these contracts, as well as additional costs related to collection of outstanding accounts and recovery of water heaters not removed pursuant to its contractual policies. As such, Reliance is thereby entitled to recover its associated loss, injury and damages.

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Quantum of Damages

40. The full extent of the Reliance's damages are not currently known, however Reliance undertakes to provide particulars of all such damages prior to the trial of this action.

41. National has acted and continues to act in a high-handed, malicious and reprehensible fashion, and in wanton and reckless disregard for the Reliance's rights. Accordingly, Reliance is entitled to punitive, aggravated, and exemplary damages.

42. As a result of the Misrepresentations and Misleading Documents, Reliance has suffered and continues to suffer special damages, particulars of which will be provided prior to trial.

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors

Scotia Plaza

40 King Street West

Toronto, Ontario

M5H 3Y4

Robert S. Russell (LSUC No. 25529R)

Tel: (416) 367-6256

Fax: (416) 361-7060

Brendan Y.B. Wong (LSUC No. 51464A)

Tel: (416) 367-6167

Fax: (416) 682-2824

Renai E. Williams (LSUC No. 57798C)

Tel: (416) 367-6593

Fax: (416) 682-2831

Denes A. Rothschild (LSUC No. 56640R)

Tel: (416) 367-6350

Fax: (416) 361-2452

Lawyers for the Plaintiff

RELIANCE COMFORT LIMITED PARTNERSHIP
Plaintiff

- and -

NATIONAL ENERGY CORPORATION
Defendant

Court File No.

CL-12-470200

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

STATEMENT OF CLAIM

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Robert S. Russell (LSUC No. 25529R)

Tel: (416) 367-6256
Fax: (416) 361-7060

Brendan Y.B. Wong (LSUC No. 51464A)

Tel: (416) 367-6167
Fax: (416) 682-2824

Renai E. Williams (LSUC No. 57798C)

Tel: (416) 367-6593
Fax: (416) 682-2831

Denes A. Rothschild (LSUC No. 56640R)

Tel: (416) 367-6350
Fax: (416) 361-2452

Lawyers for the Plaintiff

Appendix S

CT-2012-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership.

BETWEEN:**THE COMMISSIONER OF COMPETITION**

Applicant

- AND -**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

**REQUEST FOR LEAVE TO INTERVENE
ON BEHALF OF NATIONAL ENERGY CORPORATION**

National Energy Corporation (operating as National Home Services) (“National”) requests leave of the Competition Tribunal pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, and section 43 of the *Competition Tribunal Rules*, to intervene in this proceeding. In support of this request, National relies on the Affidavit of Gord Potter, sworn August 20, 2013 (the “Potter Affidavit”).

A. Name and Address of Proposed Intervenor

The name and address of National is:

National Energy Corporation
25 Sheppard Avenue West
Suite 1700
Toronto, Ontario
M2N 6S6

Attention: Gord Potter

Phone: 416.673.4765
Fax: 416.747.5872

The address for service for National is:

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Attention: Adam Fanaki

Phone: 416.863.5564
Fax: 416-863-0871

B. National

1. National operates under the name "National Home Services" and supplies natural gas and electric water heaters for rental and related services to new and existing homeowners in Ontario and Québec.
2. National is a wholly-owned subsidiary of Just Energy Group Inc. ("Just Energy"), a corporation arranged pursuant to the *Canada Business Corporations Act* that is publicly traded on the Toronto Stock Exchange and the New York Stock Exchange with its head office in Mississauga, Ontario. Just Energy has operations in Canada, the United States and the United Kingdom.

3. In 2008, National began supplying water heater rentals to residential customers located in certain parts of the principal operating territory of Direct Energy Marketing Limited ("Direct Energy") in Ontario.
4. When National entered into the principal operating region of Direct Energy in 2008, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that prohibited Direct Energy from, among other things, preventing competitors from disconnecting and returning water heaters or engaging in other forms of anti-competitive conduct.
5. In 2010, National began supplying water heater rentals to residential customers located in the principal operating region of the Respondent, Reliance Comfort Limited Partnership ("Reliance"), consisting of southwestern Ontario, northern Ontario and eastern Ontario (defined as the "Relevant Market" in the Notice of Application filed by the Commissioner of Competition (the "Commissioner's Application")).
6. When National entered into the Relevant Market in 2010, Reliance – unlike Direct Energy – was not operating under a Consent Order from the Competition Tribunal or similar remedy that prohibited Reliance from engaging in anti-competitive conduct.
7. As described in further detail below, immediately after National entered into the Relevant Market, Reliance began to engage in a number of anti-competitive acts to prevent National from effectively competing and expanding in the Relevant Market.
8. As a result of Reliance's anti-competitive conduct, National's ongoing attempts to expand in the Relevant Market have been constrained or impeded.
9. Since 2010, National has secured approximately 69,100 customers or approximately 6% of the approximately 1.2 million available water heater rental customers located in the Relevant Market. Reliance remains the dominant supplier of water heater rentals in the Relevant Market, with more than 1,100,000

water heater rental customers or approximately 92% of all available water heater rental customers.

10. Although National holds a relatively small share of the Relevant Market, National is the largest competitor to Reliance for the supply of water heater rental services in the Relevant Market. National is also the only competitor to Reliance for water heater rentals with operations in several regions throughout Ontario and Quebec.

C. Test For Intervention

11. National satisfies all of the criteria for intervenor status in this proceeding. In particular:
 - (a) National has been and continues to be directly affected by Reliance's anti-competitive acts, including the exclusionary water heater return policies and procedures implemented by Reliance;
 - (b) The matters alleged to affect National are within the scope of the Tribunal's consideration and are matters sufficiently relevant to the Tribunal's mandate;
 - (c) The representations to be made by National are relevant to issues specifically raised in the Commissioner's Application; and
 - (d) National will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.
12. Each element of the test for intervention is outlined more specifically below and in the Potter Affidavit that forms part of this Request for Leave to Intervene.

D. Matters Required to be Addressed in a Motion for Leave to Intervene

13. Subsection 43(2) of the *Competition Tribunal Rules* (the "Rules") requires a person making a motion for leave to intervene to set out:

- (a) the title of the proceedings in which the person making the motion wishes to intervene;
 - (b) the name and address of that person;
 - (c) a concise statement of the matters in issue that affect that person and the unique or distinct perspective that the person will bring to the proceeding;
 - (d) a concise statement of the competitive consequences arising from the matters referred to in subparagraph (c) with respect to which that person wishes to make representations;
 - (e) the name of the party, if any, whose position that person intends to support;
 - (f) the official language to be used by that person at the hearing of the motion and, if leave is granted, in the proceedings; and
 - (g) a description of how that person proposes to participate in the proceedings.
14. The title of the proceedings and the name and address of National are set out above. The concise statements referred to in Rules 43(2)(c) and (d) are set out below.

E. Matters in Issue that Affect National

- 15. National is directly affected by the matters identified in the Commissioner's Application.
- 16. National is a competitor to Reliance for the rental of natural gas and electric water heaters and the supply of related services to residential customers in the Relevant Market.

17. Reliance has engaged in anti-competitive conduct that constrains or prevents National from securing new customers and expanding in the Relevant Market, including the following:
- (a) The vast majority of homeowners in the Relevant Market are existing customers of Reliance. When an existing customer of Reliance decides to switch to National, the Reliance water heater tank located in the customer's home will be disconnected by National and replaced with a new water heater tank. The old Reliance water heater is returned to one of Reliance's depots by National.
 - (b) Historically, Reliance's competitors and customers routinely disconnected and returned old Reliance rental water heater tanks to Reliance without any form of pre-authorization.
 - (c) However, shortly after National entered into the Relevant Market in 2010, Reliance began to impose arbitrary restrictions to prevent National from being able to return water heater tanks from former Reliance customers in a timely and efficient manner.
 - (d) Specifically, Reliance began to impose on its customers a new requirement that prohibited customers or competitors from returning water heater tanks without first obtaining a "Removal Reference Number" or "RRN" from Reliance.
 - (e) Reliance has used, and continues to use, the RRN policy to attempt to prevent customers from switching to National or other competitors. For example, Reliance requires customers to contact Reliance by telephone to obtain the RRN, Reliance often keeps customers that are seeking an RRN on hold for an excessive period of time, and Reliance threatens to apply additional charges to customers who elect to continue with their request to terminate the rental agreement with Reliance.

- (f) National has attempted to assist its customers through the RRN process by attempting to obtain an RRN on behalf of the customer or by participating with the customer on calls with Reliance. Reliance has refused to permit National to obtain an RRN on behalf of its customers or even to permit National to join in on calls by customers attempting to obtain an RRN, notwithstanding that such customers have requested that National participate in these calls.
- (g) Reliance also began to impose limitations on the process for returning tanks to Reliance's return depots. These restrictions include limiting the number of tanks that National can return at any given time, restricting the return of tanks to only certain days or hours within a day, restricting the locations at which National may return tanks, including refusing to accept tanks at locations where Reliance previously accepted tanks from National, and imposing other restrictions that frustrate National's efforts to return Reliance water heater tanks in an efficient manner.
- (h) Reliance also charges excessive "damages fees" for scratches and dents to tanks that are returned with ordinary wear and tear, as well as for tanks that are clearly outside of their useful life and that will simply be disposed of by Reliance.
- (i) Reliance is constantly changing the policies applicable to its return depots and applying different policies at different return depot locations without providing any advance notice. These restrictions make it even more difficult for National to effectively compete.
- (j) As a result of Reliance's restrictions on the return of water heater tanks, National is currently storing more than 2,100 tanks that it has not been able to return to Reliance. National has been required to expand its warehouse facilities to store water heater tanks that Reliance will not accept on a timely basis.

- (k) In circumstances where National has not been able to return Reliance's tank to a Reliance depot, Reliance will continue to bill the homeowner, even after Reliance has been informed of the homeowner's decision to switch to National. In some cases, this can result in several months of double-billing to customers. National is often required to assume these additional charges to the customer, thereby further increasing National's costs.
18. As a result of Reliance's anti-competitive conduct, National's ability to effectively compete and to expand in the Relevant Market is impeded or constrained.
 19. Reliance's practice of anti-competitive acts has had and is having the effect of preventing and lessening competition substantially. In the absence of Reliance's water heater return policies and other anti-competitive conduct, National would expand in the Relevant Market thereby increasing competition substantially.
 20. As a competitor to Reliance and as a firm attempting to compete and expand in the Relevant Market, National has a direct and significant interest in the outcome of this proceeding and the competitiveness of this industry.
 21. Indeed, National's ability to effectively compete and operate successfully in the Relevant Market is dependent upon the outcome of this proceeding. In the absence of an appropriate remedy with respect to Reliance's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.
 22. Accordingly, National is directly and significantly affected by the outcome of this proceeding.
- F. Matters Alleged to Affect National are Within the Scope of the Tribunal's Consideration**
23. The matters that affect National are within the scope of the Tribunal's consideration and are relevant to the Tribunal's mandate to hear and determine the issues raised by the Commissioner's Application.

24. The matters that affect National relate to:
- (a) The impact or likely impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of competitors to effectively compete and expand in the Relevant Market;
 - (b) The impact of Reliance's anti-competitive acts on customers or potential customers of competitors, including the impact of this conduct on the ability of competitors, such as National, to effectively induce customers to switch suppliers;
 - (c) The impact or likely impact of Reliance's conduct upon competition in the Relevant Market generally and National, in particular;
 - (d) Barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for rivals, such as National, and raising rival's costs; and
 - (e) The impact of the Commissioner's proposed remedies on competitors, such as National, and on competition in the Relevant Market.
25. These matters are within the scope of the Tribunal's consideration of this matter and are relevant to the Tribunal's mandate to hear and determine the issues.

G. National's Proposed Topics are Relevant to the Issues Raised by the Proceeding

26. National's proposed topics are relevant to the issues raised by the Commissioner's Application and are relevant to the Tribunal's mandate to hear and determine the issues.
27. National's proposed topics (the "National Proposed Topics") address the matters that affect National in this proceeding and include:
- (a) the development of the Ontario rental water heater industry as it relates to National;

- (b) the issue of Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of National to effectively compete and expand in the Relevant Market;
 - (c) the impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers;
 - (d) National's interactions with Reliance with respect to the matters at issue in the proceeding, including dealings with Reliance regarding the water heater removal and return process;
 - (e) National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets;
 - (f) the issue of Reliance's dominant position as it affects National and competition in the Relevant Market generally;
 - (g) the issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally;
 - (h) barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for National and raising National's costs;
 - (i) the statements made and conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding; and
 - (j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.
28. The National Proposed Topics are relevant to the issues raised by the Commissioner's Application, including, but not limited to, the following issues raised in the Commissioner's Application:

- (a) The definition of the relevant market for the supply of water heater rental services in Ontario [paras. 29 to 32 of Commissioner's Application];
- (b) Whether Reliance is the dominant supplier of water heater rental services in the Relevant Market [paras. 14, 35 and 36 of Commissioner's Application];
- (c) The history and development of Ontario's rental water heater industry [paras. 7 to 14 of Commissioner's Application];
- (d) Whether Reliance's water heater return policies and procedures have the effect of imposing significant costs on competitors and preventing customers from switching to those competitors, thereby excluding competitors in the Relevant Market [paras. 2, 42 and 43 of Commissioner's Application];
- (e) Whether Reliance's conduct has had and is having the effect of preventing and lessening competition substantially in the Relevant Market [paras. 3 and 48 to 51 of Commissioner's Application];
- (f) Whether in the absence of Reliance's water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market [paras. 3, 42 and 43 of Commissioner's Application];
- (g) Whether Reliance's water heater return policies and other conduct creates significant barriers to entry [paras. 17 and 18 of Commissioner's Application]; and
- (h) The nature of the remedies required to address Reliance's conduct and specifically, whether the relief sought by the Commissioner should be granted [para. 55 of Commissioner's Application].

H. National's Unique or Distinct Perspective

29. National will bring a unique or distinct perspective to the proceeding for the following reasons:
- (a) National is Reliance's largest competitor for the supply of natural gas and electric water heater rentals and related services in the Relevant Market;
 - (b) Although National has supplied water heater rental services in Ontario since 2008, National is a relatively recent entrant into the Relevant Market having commenced operations in that region in 2010, and is therefore uniquely positioned to provide a perspective on the barriers to entry and other conditions of entry into the Relevant Market;
 - (c) National commenced supplying water heater rental services in the principal operating region of Direct Energy in 2008. At that time, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that subsequently expired on April 30, 2012. National is therefore uniquely positioned to provide a perspective on the conditions of entry and expansion both in the presence of, and in the absence of, the Consent Order;
 - (d) The anti-competitive conduct of Reliance was implemented primarily or entirely as a result of National's entry into the Relevant Market;
 - (e) National began offering water heater rental services prior to the implementation of the anti-competitive conduct of Reliance, but has also attempted to enter into other local regions within the Relevant Market following the anti-competitive conduct of Reliance. National is therefore positioned to provide the Tribunal with a unique perspective on the impact of Reliance's anti-competitive conduct on barriers to entry and the costs associated with customer switching, as well as the conditions of competition generally in these regions;

- (f) Although National has a substantially smaller presence in the Relevant Market than Reliance, there is no other competitor to Reliance for water heater rental services that operates in the Relevant Market with the same scope and scale as National;
 - (g) Unlike smaller competitors to Reliance, National also supplies water heater rental services in several parts of Ontario and Quebec. National is therefore positioned to provide the Tribunal with a broader perspective on the supply of water heater rental services in areas both within and outside of the Relevant Market;
 - (h) National has been supplying water heater rental services in Ontario since 2008 and is therefore able to provide the Tribunal with a valuable perspective on the conduct of the participants and the industry generally over the longer term; and
 - (i) As recognition of National's role in the Relevant Market, National is the subject of a number of specific allegations in the Response of Reliance filed on August 12, 2013, including paragraphs 14, 48, 55 and 73 of Reliance's Response.
30. National also has a perspective that is unique or distinct from that of the Commissioner of Competition. As an experienced participant in the industry, as the target of Reliance's anti-competitive conduct and as a firm that is attempting to expand in the Relevant Market, National will bring a perspective to the issues and evidence that is distinct from the Commissioner's perspective.
31. In addition, although National intends to support the position of the Commissioner generally, based on the allegations in the Commissioner's Application, there are topics on which the position of the Commissioner and National appears to differ. For example, the following:
- (a) **Anti-Competitive Conduct:** The Commissioner's Application does not appear to address the full scope of the anti-competitive conduct of

Reliance. Additional anti-competitive conduct includes (at least) the following: (i) Reliance has engaged in price discrimination or similar forms of discriminatory promotional programs that target only those customers that are the subject of National's marketing efforts or who have recently elected to switch to National; and (ii) Reliance has refused to permit National to act as an agent for customers with respect to the process for obtaining the RRN required by Reliance for the return of a tank.

- (b) **Relief Sought:** National also does not believe that the relief sought by the Commissioner is sufficient to address the anti-competitive conduct of Reliance. For example, with respect to the tank return process, the relief sought should include (at least) the following elements: (i) Reliance should be prohibited from implementing any restrictions or limitations that would prevent National or any other licenced third party from disconnecting and returning a used water heater tank on behalf of a customer to Reliance; (ii) Reliance should be prohibited from preventing a customer of Reliance from electing to have a tank disconnected and removed by any licenced service provider (including National) or to remove their own tank; (iii) Reliance should be required to designate specific "Return Locations" where a customer or a licenced third party (including National) is entitled to return disconnected water heaters between normal business hours; (iv) Reliance should be required to identify a sufficient number of Return Locations to adequately serve customers throughout their respective service areas; (v) Reliance should be prohibited from implementing any capacity restrictions or other restraints on the number of water heaters that can be returned to any of the Return Locations in a given period of time; and (vi) Reliance should be prohibited from continuing to bill customers following the point of time at which Reliance is advised that the customer has switched to an alternate supplier.

32. National's unique position as a firm continuously attempting to expand in the Relevant Market and to enter into certain local regions within the Relevant

Market, as a target of Reliance's anti-competitive conduct, and as the most significant competitor to Reliance for water heater rental services places National in a unique position to assist the Tribunal in its consideration of relevant issues.

I. Granting Leave to National is Consistent with Prior Decisions of Tribunal

33. Granting leave to intervene to National is also consistent with prior decisions of the Tribunal. In *American Airlines, Inc. v Canada (Competition Tribunal)*,¹ Iacobucci C.J. stated as follows regarding the intent underlying the provisions of the *Competition Tribunal Act* authorizing intervenors:

It is evident from the purpose clause [of the Competition Act] that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the Competition Act; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those intervenors not only to participate but also to do so effectively. A restrictive interpretation of subsection 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.²

34. Although the principal issue considered in *American Airlines, supra*, was the scope of interventions before the Tribunal, Iacobucci C.J. also recognized that even where the position of an intervenor and the Commissioner are generally aligned, the intervenor is entitled to provide its unique perspective through broader rights of participation in the proceeding. As Iacobucci C.J. stated:

It seems to me that permitting intervenors to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider

¹ [1989] 2 FC 88 (FCA) [*American Airlines*].

² *Ibid* at para 25.

interpretation before us, it is not difficult to envision future situations where the Director and an intervener might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.³

35. Consistent with this general principle, the Tribunal has frequently granted leave to intervene to competitors that have been or will be harmed through the anti-competitive conduct of a respondent. For example, in *Canada (Director of Investigation and Research, Competition Act) v A.C. Nielsen Company of Canada Limited*,⁴ the Tribunal granted leave to intervene to Information Resources, Inc. ("IRI"). IRI was a potential competitor to A.C. Nielsen that intervened in the proceeding on the basis that the anti-competitive conduct of A.C. Nielsen prevented it from entering into the relevant market.
36. Similarly, in *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*,⁵ the Tribunal granted leave to intervene to White and NDAP/DAC, two potential competitors of Tele-Direct. The Tribunal stated, in part:
- We accept that as a publisher of telephone directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also accept that both intervenors have special knowledge and expertise that may assist the Tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate.⁶
37. In *Canada (Commissioner of Competition) v Air Canada* (2001),⁷ the Tribunal granted leave to intervene to WestJet Airlines, a competitor to Air Canada that

³ *Ibid* at para 27.

⁴ [1994] CCTD No 2 (Request for Leave to Intervene of IRI: File No CT-94/01).

⁵ [1995] CCTD No 4, 61 CPR (3d) 528.

⁶ *Ibid* at p 4.

⁷ [2001] CCTD No 5, 2001 Comp Trib 4.

was a target of the anti-competitive acts that the Commissioner alleged in the application against Air Canada.

38. More recently, in *Canada (Commissioner of Competition) v Toronto Real Estate Board*,⁸ the Tribunal granted leave to intervene to RealtySellers, a new company that intended to expand into the relevant market, but was allegedly prevented from entering as a result of the conduct of the respondent.
39. In *Canada (Commissioner of Competition) v Air Canada (2011)*,⁹ the Tribunal granted leave to intervene to WestJet in its capacity as a competitor or potential competitor to Air Canada on a number of the routes that were the subject of the impugned arrangement.

J. Scope of Participation

(i) The Party whose Position National Intends to Support

40. National's primary intention in seeking leave to intervene is to assist the Tribunal in understanding the impact of Reliance's anti-competitive conduct and in identifying the appropriate remedies to address such conduct. If granted leave to intervene, National will generally support the Commissioner's Application.

(ii) A Description of the How National Proposes to Participate in the Proceeding

41. National requests to participate in this proceeding on the following terms:
- (a) to review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process;
 - (b) to produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene;

⁸ [2011] CCTD No 22, 2011 Comp Trib 22.

⁹ [2011] CCTD No 21, 2011 Comp Trib 21.

- (c) to adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene;
- (d) to conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene;
- (e) to file expert evidence within the scope of its intervention in accordance with procedures set out in the *Competition Tribunal Rules*;
- (f) to attend and make representations at any pre-hearing motions, case conferences or scheduling conferences; and
- (g) to make written and oral argument, including submissions on any proposed remedy.

(iii) Hearing Request

42. If either of the parties oppose National's Request for Leave to Intervene, National respectfully requests an oral hearing of the motion.

(iv) Costs and Other Procedural Matters

43. If leave to intervene is granted, National would not seek costs, and requests that it not be made liable for the costs of any party or other intervenor.
44. National undertakes to comply with the *Competition Tribunal Rules* and with any direction of the Tribunal with respect to the conduct of this proceeding.
45. National reserves its right to request further terms with respect to its intervention as it may advise and as the Tribunal may permit as the matter proceeds.

(v) The Official Language to be used by National at the Hearing of the Motion and, if leave is Granted, in the Proceeding

46. National intends to use English at the hearing of the Request for Leave to Intervene and, if leave is granted, in the proceeding.

DATED at Toronto, Ontario, this 21st day of August, 2013.



Adam Fanaki

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, Ontario M5V 3J7
Tel: (416) 863-5564
Fax: (416) 863-0871

Counsel for National Energy Corporation

TO: **DEPARTMENT OF JUSTICE CANADA**
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9

David R. Wingfield (LSUC #28710D)
Josephine A.L. Palumbo (LSUC #34021D)
Parul Shah (LSUC #55667M)
Tel: (819) 994-7714
Fax: (819) 953-9267

Counsel for the Commissioner of Competition

AND TO: **BORDEN LADNER GERVAIS LLP**
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Robert S. Russell (LSUC #25529R)
Brendan Y.B. Wong (LSUC No. 51464A)
Renai E. Williams (LSUC No. 57798C)
Denes Rothschild (LSUC No. 56640R)
Zirjan Derwa (LSUC No. 61461T)

Tel: (416) 367-6256

Fax: (416) 361-7060

Counsel for the Respondent, Reliance Comfort Limited Partnership

AND TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario K1P 5B4

CT-2012-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

**REQUEST FOR LEAVE TO INTERVENE ON
BEHALF OF NATIONAL ENERGY
CORPORATION**

Davies Ward Phillips & Vineberg LLP

155 Wellington Street West

Toronto, Ontario M5V 3J7

Adam Fanaki (LSUC #38208L)

Tel: 416.863.0900

Fax: 416.863.0871

Counsel to National Energy Corporation

COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

RELIANCE COMFORT LIMITED
PARTNERSHIP

Respondent

**RESPONSE OF THE RESPONDENT TO THE MOTION OF
NATIONAL ENERGY CORPORATION FOR LEAVE TO
INTERVENE**

BORDEN LADNER GERVAIS

Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Robert S. Russell (LSUC #25529R)

Tel: (416) 367-6256 / Fax: (416)361-7060

Brendan Y.B. Wong (LSUC #51464A)

Tel: (416) 367-6743 / Fax: (416) 682-2824

Denes A. Rothschild (LSUC #56640R)

Tel: (416) 367-6350 / Fax: (416) 361-7068

Zirjan Derwa (LSUC #61461T)

Tel: (416) 367-6049 / Fax: (416) 361-2755

Neil C. Morgan (LSUC #64165U)

Tel: (416) 367-6738 / Fax: (416) 361-7396

Counsel for the Respondent, Reliance Comfort Limited Partnership