

FILED / PRODUIT

Date: October 13, 2010

CT- 2010-006

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

File No. CT-2010-06

OTTAWA, ONT.

13

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Brent Marsall (also known as Brent Marshall), also doing business in Alberta as Dynasty Spas and Games Room, Rochelle Marsall (also known as Rochelle Marshall), Dynasty Spas Inc., also doing business as EcoSmart Spas, and 1232466 Alberta Ltd., also doing business as Dynasty Spas;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

BRENT MARSALL (also known as Brent Marshall), also doing business in Alberta as DYNASTY SPAS AND GAMES ROOM, ROCHELLE MARSALL (also known as Rochelle Marshall), DYNASTY SPAS INC., also doing business as ECOSMART SPAS, and 1232466 ALBERTA LTD., also doing business as DYNASTY SPAS

Respondents

REPLY

1. This is the Reply of the Applicant, the Commissioner of Competition (the "**Commissioner**"), to the Responses filed on September 29, 2010 by the Respondents, Brent Marsall, Rochelle Marsall, Dynasty Spas Inc., and 1232466 Alberta Ltd. (collectively the "**Respondents**").

2. The Commissioner repeats and relies on the allegations set forth in her Notice of Application (the “**Application**”). The Commissioner denies each and every allegation in the Respondents’ respective Responses, other than admissions by the Respondents to any of the Commissioner’s allegations. The Commissioner does not plead to the last three sentences of paragraph 5 and paragraph 32(c) of the Response filed by Brent Marsall, Dynasty Spas Inc., and 1232466 Alberta Ltd. or paragraph 6 of the Response filed by Rochelle Marsall, as these paragraphs relate to without prejudice communications between the Commissioner and the Respondents through their counsel. The Commissioner reserves her right to address these paragraphs during the penalty and costs phase of these proceedings.

3. In addition, the Commissioner replies to four points that are raised by the Respondents. The replies are set out in the four sections that follow.

(i)
Responsibility rests with the Respondents, not their Suppliers

4. At paragraphs 4-6, 9, and 12-16 of the Response filed by Brent Marsall, Dynasty Spas Inc., and 1232466 Alberta Ltd. (the “**Response**”), and relied upon by reference in the response of Rochelle Marsall, the Respondents seek to deny responsibility for the false or misleading representations by stating that the ENERGY STAR marks in question were printed on the hot tubs’ insulation by the insulation’s manufacturer, which was in turn installed in the hot tubs by the hot tubs’ manufacturer.

5. In reply, the Commissioner states that the manufacturers of both the insulation and the hot tubs in question are located outside Canada; they are based in the United States. Insofar as any of the allegations in paragraph 4 above are true, the Respondents are nonetheless liable for the false or misleading representations as Canadian importers of

the Dynasty Spas brand of hot tubs and spas, pursuant to subsection 74.03(2) of the Competition Act (the “Act”).

6. Further, the Respondents ignore the fact that, regardless of who printed the ENERGY STAR marks on the insulation, and who placed the insulation in the hot tubs, it was the Respondents who took steps to actively promote the products in association with the ENERGY STAR program, as described in paragraph 18 of the Application. When a person buys a hot tub, the insulation is encased in the hot tub and out of view. In order to promote the ENERGY STAR logo appearing on the insulation, the Respondents requested demonstration models with a portion of the casing removed, thus exposing the insulation in such a way as to emphasize the presence of the ENERGY STAR marks, which would otherwise be hidden from the buying public’s view. These steps are in addition to the other steps that are described in the Application.

(ii)

The insulation conveys messages about the hot tubs

7. At paragraphs 4(a), 10, 11 and 24 of the Response, and relied upon by reference in the response of Rochelle Marsall, the Respondents state that insofar as any representations were made regarding ENERGY STAR, such representations related strictly to the insulation, not to the hot tubs themselves. This characterization is inaccurate for four reasons.

8. First, as is set forth in paragraph 18 of the Application, the Respondents’ representations were not solely directed in regard to the insulation, but were also directed in regard to, and used in association with, the hot tubs themselves.

9. Second, the insulation is a component part of the hot tubs in question, and representations regarding the insulation convey material messages about the product in which the insulation is installed.

10. Third, the Respondents are in the business of selling hot tubs, spas and other recreational goods, not insulation. Their customers and potential customers are seeking information about hot tubs, and insofar as representations are made about specific components of the hot tubs, the representations are made in order to sell the hot tubs, not simply to sell the components.

11. Fourth, even if the representations were solely directed at the insulation, which is denied, the fact remains that in Canada, insulation does not qualify for ENERGY STAR designation. The Office of Energy Efficiency (the “OEE”), which administers the ENERGY STAR program in Canada, does not designate any insulation products for ENERGY STAR certification.

(iii)

**Using the ENERGY STAR marks conveys the message
that a product is ENERGY STAR designated**

12. As to the Respondents’ assertions, at paragraphs 4(d) and 17-20 of the Response, and relied upon by reference in the response of Rochelle Marsall, that no customers were misled, the Commissioner replies that the Respondents are conflating certain characteristics of the ENERGY STAR program with the program itself.

13. The ENERGY STAR program is an established program that is administered independently of manufacturers and retailers; it is a certification program that is provided by the OEE, an office of Natural Resources Canada.

14. The use of the ENERGY STAR mark on, or in conjunction with, a product conveys the general impression that the product in question meets the criteria and standards of the ENERGY STAR program. In order to obtain the ENERGY STAR designation, a party must apply to the OEE and supply the OEE with the information necessary to determine whether the product meets the criteria and standards for ENERGY STAR designation.

15. Even if the Respondents' products are more energy efficient and cost effective than other hot tubs, which is denied, the fact remains that the products did not meet the criteria and standards set by the program's administrators. It is indisputable that neither the insulation nor the hot tubs could meet the program's criteria or standards, for in Canada, hot tubs and insulation do not qualify for ENERGY STAR ratings at all. Despite this, the Respondents promoted their products in a false or misleading way, and attached an \$1,100 value to what they referred to as an ENERGY STAR "upgrade".

(iv)
"Small" is a relative term

16. In respect of the assertion that the Respondents are small businesses, the Commissioner replies that, during the relevant period, the Respondents imported, on a "value for duty" basis, between eight and ten million dollars (\$8,000,000 - \$10,000,000) worth of Dynasty Spas products for sale in Canada.

17. These imports were in addition to the other product lines that the Respondents sold and distributed.

18. To the extent that the size of the Respondents' businesses is a factor for the Competition Tribunal's assessment of the need for and size of Administrative Monetary Penalties ("AMP"), the Commissioner states that, when considered in light of all of the relevant factors, the size of the Respondents' businesses is significant, and warrants a significant AMP. For businesses the size of the Respondents', with multiple millions of dollars worth of products being sold annually, a nominal AMP could simply be absorbed by the Respondents as a cost of doing business.

19. Lastly, regardless of the size of the Respondents' businesses, a nominal AMP is inappropriate in circumstances where, no less than a year before the conduct in question, one of the Respondents signed a consent agreement agreeing to comply with the same parts of the Act that he then violated.

20. The Commissioner is not alleging 'guilt by association', as the Respondents state. Rather, the Commissioner is stating that this is an appropriate case for the Competition Tribunal to express its disapprobation: Mr. Marsall violated the Act within a year of having committed to comply with it, and he did so in the same industry as was the subject of the Commissioner's earlier investigation. If he and his co-Respondents were to be met with only a nominal AMP, the Respondents and other participants in this industry would be left with the impression that it can be worthwhile, and even profitable, to violate the Act and represent products as being something they are not.

DATED at Gatineau, QC, this 13th day of October, 2010.



Nikiforos Iatrou

Counsel to the Attorney General of Canada
& Commissioner of Competition

Competition Bureau Legal Services,
Department of Justice
22nd Floor
50 Victoria St
Gatineau, QC K1A 0C9

Telephone: (819) 956-6891
Facsimile: (819) 953-9267
Nikiforos.Iatrou@cb-bc.gc.ca

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 inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Brent Marsall (also known as Brent Marshall), also doing business in Alberta as Dynasty Spas and Games Room, Rochelle Marsall (also known as Rochelle Marshall), Dynasty Spas Inc., also doing business as EcoSmart Spas, and 1232466 Alberta Ltd., also doing business as Dynasty Spas;

AND IN THE MATTER of an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

BRENT MARSALL (also known as Brent Marshall), also doing business in Alberta as DYNASTY SPAS AND GAMES ROOM, ROCHELLE MARSALL (also known as Rochelle Marshall), DYNASTY SPAS INC., also doing business as ECOSMART SPAS, and 1232466 ALBERTA LTD., also doing business as DYNASTY SPAS

Respondents

REPLY

NIKIFOROS IATROU

Counsel

Department of Justice

Competition Law Division

Place du Portage, Phase 1

50 Victoria Street, 22nd Floor

Gatineau, Québec K1A 0C9

Tel: (819) 956-6891

Fax: (819) 953-9267

E-mail: Nikiforos.Iatrou@cb-bc.gc.ca

**Counsel to the Attorney General of Canada &
the Commissioner of Competition**