

Competition Tribunal Tribunal de la concurrence	
FILED / PRODUIT June 25, 2009 CT- 2009-009	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0001

CT-

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 commenced pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* into certain reviewable conduct;

AND IN THE MATTER of the filing and registration of a Consent Agreement pursuant to section 74.12 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

1327974 ALBERTA LTD. (dba DYNASTY SPA'S SASKATOON)

Respondent

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition (the "Commissioner") is responsible for the administration and the enforcement of the *Competition Act* (the "Act") including paragraphs 74.01(1)(a) and 74.01(1)(b);

AND WHEREAS the Respondent, 1327974 Alberta Ltd. (dba Dynasty Spa's Saskatoon), was incorporated under the laws of Alberta on the 6th day of June, 2007, with the corporate access number 2013279746, a trade partner name Dynasty Spa's Saskatoon (registration number TN13871199) and the registered office address #204, 2635 – 37 Avenue NE, Calgary, Alberta, T1Y 5Z6.

AND WHEREAS the Respondent promotes and/or sells the Spas and makes representations that create the general impression that the Spas and/or their insulation meet the criteria (the "ENERGY STAR Program") and are eligible to use the ENERGY STAR trademark and certification mark ("the Marks");

AND WHEREAS the Commissioner has been informed that the ENERGY STAR Program, administered by Natural Resources Canada (“NRCan”) through the Office of Energy Efficiency (“OEE”), a Department of the Canadian government, does not and has never recognized the Spas or any other spas or hot tubs, or any constituent element thereof, including insulation, as being ENERGY STAR rated, qualified, certified, endorsed and/or associated with the ENERGY STAR Program in any form whatsoever;

AND WHEREAS the Marks are material to consumers because of their association with high quality energy efficient products that provide reduced energy consumption, money savings and perceived environmental benefits compared to conventional models without the Marks;

AND WHEREAS a consumer is likely to prefer a product that has an association with the Marks over a competing product which is not associated with the Marks when making a purchase decision;

AND WHEREAS the Marks were used in verbal representations made by the Respondent, both directly and by employees, sales persons and agents of the Respondent (the “Representations”);

AND WHEREAS on February 19, 2009, the Commissioner commenced an inquiry (the “Inquiry”) pursuant to section 10 of the Act into certain alleged deceptive marketing practices of the Respondent and others, in connection with the Spas as aforesaid;

AND WHEREAS the Commissioner has concluded that from April 2008, at the earliest, and continuing to the present, the Respondent directly or indirectly, made or caused to be made, the Representations to the public for the purposes of promoting the Spas, which were false or misleading in a material respect, and thereby, engaged in reviewable conduct contrary to paragraph 74.01(1)(a) of the Act (“false or misleading representations”);

AND WHEREAS the Commissioner believes that these general impressions are materially false and/or misleading in that the Marks can only be used in connection with goods, services or wares which are eligible for the ENERGY STAR Program;

AND WHEREAS the Respondent failed to ensure that the Spas were eligible to make the Representations, or any other representation, about the Marks or the ENERGY STAR Program.

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Consent Agreement;

AND WHEREAS the Respondent is committed to comply with the Act generally, and the deceptive marketing practices provisions (Part VII.1) specifically, and that the Commissioner recognizes it is financially efficient and in the public interest to obtain redress for the Respondent’s reviewable conduct by entering into this Agreement;

AND WHEREAS the Commissioner and the Respondent agree that upon the signing of this Consent Agreement, the Parties shall file the Consent Agreement with the Competition Tribunal for immediate registration as an order thereof;

AND WHEREAS the Commissioner and the Respondent understand that upon registration, this Consent Agreement shall be enforceable as if it were an order rendered by the Competition Tribunal pursuant to section 74.12 of the Act;

NOW THEREFORE in order to resolve the Commissioner's Inquiry into certain alleged deceptive marketing practices of the Respondent, the Parties hereby agree as follows:

I. INTERPRETATIONS

1. For the purpose of the Agreement, the following definitions shall apply:
 - a. **"Affiliate"** shall have the meaning ascribed to it in the Act;
 - b. **"Agreement"** means this Consent Agreement entered into by the Respondent and the Commissioner of Competition including the preamble thereto;
 - c. **"Commissioner"** means the Commissioner of Competition, appointed pursuant to section 7 of the Act, and her/his authorised representatives;
 - d. **"Marks"** means the ENERGY STAR trademark (no. TMA541652) and certification mark (no. TMA553531) registered with the Canadian Intellectual Property Office (CIPO) by the US Environmental Protection Agency on February 27, 2001 and November 7, 2001, respectively.
 - e. **"Parties"** means the Commissioner of Competition and the Respondent;
 - f. **"Person"** means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity;
 - g. **"Related Person"** means the Respondent, their Affiliates, any present or future person under the control of the Respondent and their Affiliates;
 - h. **"Respondent"** means 1327974 Alberta Ltd. above described;
 - i. **"Spas"** means the Dynasty Spas brand of hot tubs and spas manufactured by Dynasty Spas Inc. in Athens, Tennessee, and also marketed as EcoSmart Spas;
 - j. **"Tribunal"** means the Competition Tribunal established by the *Competition Tribunal Act Canada*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

II. APPLICATION

2. The provisions of the Agreement shall apply to:
 - a. the Respondent, all corporations (including the principals thereof), partnerships or persons under legal or contractual obligation of the Respondent or who, in connection with the marketing or sale of the Spas, act for, on behalf of or in concert with the Respondent, including the directors, officers and employees of the Respondent, their respective successors and assignees, and other persons including agents, representatives and associates of the Respondent; and
 - b. the Commissioner.

A. NO FALSE OR MISLEADING STATEMENTS

3. In the marketing of products and services, the Respondent shall comply with the Misleading Advertising and Deceptive Marketing Practices provisions of the Act, which provide:

“74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty, or guarantee of the performance, efficacy or length of life of a product that is not based on adequate and proper test thereof, the proof of which lies on the person making the representation”

4. Neither the Respondent nor any Related Person shall make, cause to be made, or permit to be made on their behalf, any representation whatsoever in Canada or available to consumers in Canada by any means whatsoever which is false or misleading in a material respect.
5. Neither the Respondent nor any Related Person shall make, cause to be made, or permit to be made on their behalf, any representation whatsoever in Canada or available to consumers in Canada by any means whatsoever in the form of a statement, warranty, or guarantee of the performance, efficacy or length of life of a product that is not based on adequate and proper tests including, but not limited to, claims of energy efficiency, energy consumption and/or costs of operation. When making such representations, the Respondent shall obtain proof of adequate and proper testing prior to making the representations. Copies of these tests shall be provided upon request to the

Commissioner within 10 days by the Respondent in order to determine whether the tests are adequate and proper.

B. CORRECTIVE ACTIONS

6. The Respondent shall take the following corrective actions:
 - a. Shall remove and deliver up to the Commissioner all copies of the Marks, whether in actual use or application in the Representations or not, in the possession, control or power of the Respondent;
 - b. Shall take all necessary and expeditious steps to remove all advertising, copy, media or other forms of representation of the Marks with respect to the Spas or at all and shall provide copies of any correspondence, diarized entries of efforts made and steps taken to remove such advertising, whether on Internet or websites or in printed copy, advertising or media;
 - c. Shall immediately provide written instructions to all sales persons, personnel and other employees, purchasers of, or persons supplied the Spas for resale of the fact of this Agreement, and that any use of the Marks in any way whatsoever and the underlying ENERGY STAR Program is forbidden; and
 - d. Shall prominently display a corrective notice regarding the heretofore use of the Marks in all captive locations including, but not limited to, the home pages for any and all websites owned, operated or controlled by the Respondent which advertise, promote, or in any other way reference, hot tubs or spas. Such notice shall be sent to any purchasers of the Spas from April 2008 to the date this Agreement was registered; sent to any person supplied with Spas for resale during this time; and given to each purchaser of a hot tub or spa that includes, or which the Respondent believe to include, insulation, or any other part or element, displaying the Marks.
 - i. The notice (the "Notice") shall state the following:

We own and operate a spa and hot tub store located in Saskatoon, Saskatchewan. The Commissioner of Competition has informed us that verbal representations made both directly and by store employees and agents have raised concerns under section 74.01 of the Competition Act. These concerns are related to representations that the *Dynasty Spas* and *EcoSmart Spas* product lines and/or their insulation are associated with the ENERGY STAR program. The Commissioner has alleged that these representations created the false or misleading general impression that these hot tubs and/or their insulation met the criteria and were therefore eligible to use the ENERGY STAR trademark and certification mark. Hot tubs,

including their insulation, do not qualify for any form of ENERGY STAR consideration, certification, and/or endorsement.

We undertake to ensure that all future promotions contain accurate and relevant information and do not create a false or misleading general impression. This notice has been published pursuant to the Consent Agreement between the Commissioner of Competition and 1327974 Alberta Ltd. (dba Dynasty Spas Saskatoon), copies of which can be found at the Competition Tribunal's website (www.ct-tc.gc.ca)

C. COMPLIANCE

7. The Respondent shall implement a compliance program and conduct its business in a manner consistent with the Commissioner's Information Bulletin on "Corporate Compliance Programs" published on September 10, 2008 (a copy of which is attached hereto).
8. In the marketing of products and services the Respondent shall conduct their business in a manner consistent with the new advertising guidelines published jointly by the Canadian Standards Association (CSA) and the Commissioner in June 2008, entitled *Environmental claims: A guide for industry and advertisers* (a copy of which is attached hereto), in particular, but not limited to, the following clauses:
 - a. **Clause 4.4 (Vague & Non-Specific Claims)** – *"If vague claims relating to the environment are used as slogans and are not based on real environmental protection and/or benefit, they could be considered false or misleading. Such claims must be based on adequate and proper tests undertaken prior to making such representations to the public, if they relate or refer to the environmental performance or efficacy of a product. Environmental claims that are vague, non-specific, incomplete, or irrelevant and that cannot be supported through verifiable test methods should not be used."*
 - b. **Clause 5.10 (False Third Party Certification Claims)** – *"Self-declared environmental claims, including any explanatory statements, shall be presented in a manner which does not imply that the product is endorsed or certified by an independent third-party organization [such as the ENERGY STAR Program] when it is not."*
 - c. **Clause 8.1 (Responsibilities of the Claimant)** – *"The intended purpose of self-declared environmental claims is to allow organizations to make claims without the requirement to hire a third party to award a seal or logo. However, this does not lessen the responsibility of the manufacturer, distributor, dealer, retailer, importer, or anyone in the supply chain making the claim to be able to support it with accurate data...it is the sole responsibility of the claimant to produce and provide data necessary to support the claim being made."*

9. Thirty days following the registration of this Agreement, the Respondent shall provide a written report to the Competition Bureau advising in detail the steps taken to ensure that they have complied and are complying with this Agreement including, but not limited to, the corrective actions outlined in section B (“Corrective Actions”).
10. Upon written request of the Deputy Commissioner of Competition, Fair Business Practices Branch, the Respondent shall submit a written report on 30 days notice, with respect to any aspect of this Agreement.

D. AGREEMENT TO COOPERATE

11. The Respondent agrees to the following:
 - a. To act in good faith at all times when dealing with the Commissioner;
 - b. To provide complete, timely and ongoing cooperation with the Commissioner in connection with the Inquiry into the misuse of the Marks by other retailers, distributors and/or manufacturers of the Spas;
 - c. To provide disclosure and cooperation to the Commissioner, including but not limited to all non-privileged evidence, information and records in the Respondent’s possession or control, wherever located, that in any manner relates to the Inquiry; and
 - d. To make him/herself available to the Commissioner for interviews, depositions and other occasions to provide evidence whether under oath or not.

E. FAILURE TO COMPLY

12. A failure to comply with the terms of this Agreement by the Respondent, their Affiliates or any Related Person shall be deemed to be a breach of this Agreement by the Respondent and is subject to such remedies as this Tribunal may impose.

F. TERM OF AGREEMENT

13. Unless otherwise specified, this Agreement shall be binding upon the Respondent and any Related Person as defined herein for a period of ten (10) years following the date of registration of this Agreement.

III. NOTICES

14. Notices pursuant to the Agreement shall be given to the Parties at the following addresses or facsimile numbers:

(a) The Commissioner

Andrea Rosen
Deputy Commissioner of Competition
Fair Business Practices Branch, Competition Bureau
Place du Portage, Phase I, 50 Victoria Street
Gatineau (QC) K1A 0C9

Telephone: (819) 997-1231 Facsimile: (819) 953-4792

With copies to:

William Miller
General Counsel
Department of Justice
Competition Bureau Legal Services
Place du Portage, Phase I, 50 Victoria Street
Gatineau (QC) K1A 0C9

Telephone: (819) 953-3903 Facsimile: (819) 953-9267

(b) The Respondent

1327974 Alberta Ltd. dba Dynasty Spa's Saskatoon
19 - 510 Circle Drive East
Saskatoon, Saskatchewan, S7K 7C7

IV. GENERAL

15. The Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
16. The Agreement shall be governed by and interpreted in accordance with the laws of Canada applicable therein.
17. For greater certainty, the Competition Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or the Respondent to rescind or vary any of the provisions of the Agreement in the event of a change of circumstances or otherwise pursuant to section 74.13 of the Act, or with respect to any issue concerning the Agreement.

The undersigned hereby agree to the registration of this Consent Agreement.

DATED at Saskatoon, in the Province of Saskatchewan, this 6th day of April 2009.

[original signed by Timothy Simonson]

Respondent, **1327974 Alberta Ltd.** per Timothy Simonson – Director, 1327974 Alberta Ltd.
(dba Dynasty Spa's Saskatoon)

DATED at Gatineau, in the Province of Quebec, this 17th day of June 2009.

[original signed by Andrea Rosen]

Andrea Rosen, Deputy Commissioner of Competition, Fair Business Practices Branch,
Competition Bureau