File No. EB-2017-0007

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

COST SUBMISSIONS OF THE OEB ENFORCEMENT TEAM

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I. OVERVIEW

1. On September 20, 2018, a Panel of the Ontario Energy Board ("**OEB**") issued its Decision and Order ("**Decision**") in this enforcement proceeding against Planet Energy (Ontario) Corp. ("**Planet Energy**").

2. In its decision, the OEB determined that almost all of the allegations set out in the Notice of Intention to Make and Order for Compliance, Restitution and Payment of an Administrative Penalty dated February 9, 2017 ("**Notice**") in this enforcement proceeding had been proven (with the exception of those allegations relating to gas contracts).

3. The OEB ordered Planet Energy to pay an administrative monetary penalty of $155,000, declared the electricity contracts sold by J.M. and K.N. void, and ordered Planet Energy to refund those consumers enrolled in electricity contracts by J.M. and K.N.

4. In response to the Panel's order and invitation to make submissions on costs, the OEB Enforcement Team ("**Enforcement Team**") seeks its costs of this proceeding in the amount of **$72,252.34**, which reflects 40% of the Enforcement Team's legal fees ($59,576), plus disbursements ($4,364.12) and HST ($8,312.22). The Enforcement Team submits that this amount represents a fair and proportionate costs award in the circumstances of this case.[1]

II. SUBMISSIONS

A. Costs of the proceeding are in the Panel's discretion

5. The OEB's power to award costs in this proceeding arises under section 30 of the *Ontario Energy Board Act, 1998* ("***Act***") and Rule 26.01 of the OEB's *Rules of Practice and Procedure for Enforcement Proceedings*. Those provisions give this Panel the discretion to make an order setting out "by whom and to whom any costs are to be paid" and "the amount of any costs to be paid or by whom any costs are to be assessed or allowed."

6. The OEB has ordered costs in favour of the Enforcement Team in the context of other enforcement proceedings, including in *Re Summitt* (EB-2010-0221).[2]

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[1] The Enforcement Team reserves its right to recover a higher percentage of costs in different circumstances.

[2] A copy of this decision is included at Tab "**A**" to these submissions.

7. At the same time, the Enforcement Team recognizes that the OEB has yet to provide guidance on how to analyze the appropriate quantum of a costs award following an enforcement proceeding. (In *Re Summitt,* costs were awarded without any detailed analysis.[3])

8. Cost requests in the context of enforcement proceedings present unique considerations, as compared to requests for costs in the context of other types of more polycentric OEB proceedings. In exercising Panel's discretion on costs in the context of an enforcement proceeding, the Enforcement Team submits that regard may be had to certain relevant factors, which are similar to those that govern a court's exercise of discretion over costs under Rule 57.01 of the *Rules of Civil Procedure*.[4] The relevant factors are canvassed below.[5]

B. The Enforcement Team was successful in this enforcement proceeding

9. The Enforcement Team was substantially successful in this enforcement proceeding. The fact that Panel did not find in the Enforcement Team's favour on every single allegation, or that the Enforcement Team did not secure the exact quantum of administrative monetary penalty it was seeking, does not undermine the Enforcement Team's entitlement to costs as the successful party.

10. In *Re Summitt,* for example, the OEB did not accept the Enforcement Team's position on every issue, allegation or request for relief[6] and it ultimately awarded an administrative monetary penalty approximately $100,000 lower than what the Enforcement Team was seeking.[7] Nevertheless, the OEB awarded the Enforcement Team costs of the hearing.[8]

C. Amount sought by The Enforcement Team is reasonable

11. The amount the Enforcement Team is seeking for costs is reasonable.

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[3] See Tab "**A**" at p. 55

[4] The Enforcement Team notes, however, that pursuant to s. 30(5) of the *Act*, in awarding costs the OEB is not limited to the considerations that govern awards of costs in court.

[5] The full text of Rule 57.01 is included at Tab "**B**" to these submissions.

[6] Tab "**A**" at pp. 13, 40, 49.

[7] The total administrative monetary penalty in *Re Summitt* was $234,000 (Tab "**A**" at p. 56). The Enforcement Team had sought an administrative monetary penalty of $335,000.

[8] Tab "**A**" at p. 55.

12. The Enforcement Team requests order that Planet Energy pay its costs on a partial indemnity scale. It seeks reimbursement from Planet Energy of only 40% of the actual legal fees incurred, together with out-of-pocket disbursements and HST.

13. To be clear, the Enforcement Team is not seeking any costs associated with Planet Energy's 'third party records' motion, heard on August 14, 2017, as the Enforcement Team submits that it is appropriate for each party to bear its own costs of that motion. Nor is the Enforcement Team seeking to recover any costs of OEB staff, or any costs incurred prior to issuing the Notice of Intention in this matter.

D. Proceeding was complex and raised important issues

14. The complexity and importance of this proceeding support the costs award sought by the Enforcement Team.

15. This was a complicated and consequential contested enforcement proceedings with significant consumer protection and public interest implications. It raised a number of important issues with consequences that extend well beyond this case – including, for example, whether Planet Energy's approach resulted in "internet agreements", whether a retailer is responsible for the conduct of its salespersons, and whether a mere "affirmation" click in an online training process is a sufficient control for the purposes of the *Codes*. This was also one the first enforcement proceedings to deal in any depth with making an administrative penalty under the framework set out in O. Reg. 51/16 (made under the *Act*).

16. Faced with these important issues, it was to be expected that the Enforcement Team would spend the necessary time and funds to bring a careful and thorough prosecution, to conduct legal research, and to present detailed written and oral submissions.

17. This proceeding also engaged issues of significant legal and factual complexity. The record was comprised of hundreds of pages of documentary evidence, hours of recorded phone conversations, and live testimony from six witnesses over five hearing days. Arguing the relevant legal and factual issues required written submissions totalling 150 pages between the parties, plus a half day appearance for oral submissions.

E. The Enforcement Team prosecuted this proceeding responsibly and efficiently

18. The Enforcement Team acted responsibly throughout this enforcement proceeding, including by taking steps to have it unfold as efficiently as possible. The parties worked together to reach an Agreed Statement of Facts (or Chronology), a Joint Document Book, agreed-upon call transcripts, and an agreement on the authenticity of other documents.

19. Part-way through the hearing, the Enforcement Team requested that certain allegations be withdrawn based on a fair assessment of the testimony that had emerged, thereby avoiding the need for Planet Energy to call responding evidence or address those allegations in its closing submissions.[9]

F. Amount sought accords with previous OEB cost awards

20. The only comparable OEB enforcement proceeding in terms of length and complexity is *Re Summitt*. That proceeding involved six days of testimony. In the result, a Panel of the OEB ordered Summitt to pay an administrative penalty of $234,000, as well as restitution to certain affected customers.

21. The costs award amount sought by the Enforcement Team in this proceeding is in line with the amount awarded in *Re Summitt*, where the Panel awarded costs to a ceiling of $65,000.[10] In 2018 dollars, the *Re Summitt* costs award amounts to approximately $75,000.[11] That is just slightly more than the $72,252.34 sought by the OEB Enforcement Team.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of October, 2018.

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Lawyer for the OEB Enforcement Team

[9] Decision at p. 2

[10] *Re Summitt* at p. 55, Schedule "B" to these submissions.

[11] See Bank of Canada inflation calculator, available at: https://www.bankofcanada.ca/rates/related/inflation-calculator/

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2010-0221

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance, Suspension and an Administrative Penalty against Summitt Energy Management Inc.

BEFORE: Paul Sommerville
Presiding Member

Marika Hare
Member

DECISION AND ORDER

Introduction

The Ontario Energy Board (the "Board"), issued a Notice of Intention to Make an Order for Compliance against Summitt Energy Management Inc. ("Summitt") under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") on June 17, 2010. On July 8, 2010, Summitt gave notice to the Board requiring the Board to hold a hearing on this matter. The Board assigned the proceeding file No. EB-2010-0221.

On July 9, 2010, the Board issued a Notice of Hearing and Procedural Order No. 2 which set the date for an oral hearing.

On August 23, 2010, the Board heard oral submissions on a request by the University of Western Ontario's Community Legal Services ("CLS") for intervenor status in this proceeding and a Motion by Summitt for an order of the Board requiring Compliance Staff to provide further disclosure, and seeking the scheduling of a number of pre-

hearing procedures. The Motion also sought an adjournment of the hearing to a later date. After hearing submissions, the Board made a decision on the Motion and denied CLS's application for intervenor status.

The Oral hearing commenced on August 30, 2010 and concluded on September 8, 2010. The parties filed final submissions in accordance with Procedural Order No. 4 which was issued on September 9, 2010.

In this proceeding Compliance Counsel is seeking to establish that during the relevant period (August 2008 to January 2010), Summitt contravened:

1. Subsections 88.4(2)(c) and 88.4(3)(c) of the Act in nineteen instances through the actions of five of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;

2. Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of five of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and

3. Subsection 88.9 (1) of the Act in ten instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

Compliance Counsel also seeks to establish that Summitt "is likely" to contravene these provisions again in respect of its ongoing door-to-door sales activities.

Compliance Counsel seeks the following Board Orders against Summitt:

1. an Order under section 112.3 of the Act, requiring Summitt to comply with all enforceable provisions, and to take such further actions as the Board may specify to remedy the contraventions and prevent further contraventions;

2. an Order under section 112.4 of the Act, suspending Summitt's door-to-door sales activities pending completion of an audit of its door-to-door sales process, and the implementation by Summitt of any recommendations resulting from the audit; and

3. an Order under section 112.5 of the Act, requiring Summitt to pay an administrative penalty in respect of each contravention found, in the amount set by the Board.

Background

This proceeding presents the Board with its first opportunity to hear, under oath, the testimony of customers of an energy retailer.

The advent of energy retailing in Ontario has had a troubled history. From its inception there have been waves of complaints respecting the practices of door-to-door retail salespersons in the industry. This has resulted in a series of legislative and regulatory changes, all designed to minimize the potential for misunderstanding, misrepresentation, and harm to consumers.

During this proceeding, the Board heard evidence that an in-depth investigation of consumer complaints relating to the conduct of Summitt and its retail salespersons began in the fall of 2009. The investigation examined and re-examined these complaints with a view to determining whether specific noncompliance situations could be identified. The investigation consisted of direct contact with complainants who had on their own motion contacted the Board to complain about one aspect or another of their contact with Summitt.

This investigation was undertaken in such a fashion so as to ensure that no person at the Board who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to the conduct or the fruits of the investigation. Board staff and legal counsel that were engaged in the investigation, referred to in this decision as “Compliance Staff” and “Compliance Counsel”, were effectively isolated from all other elements of the Board in this regard. Board staff as a whole had no knowledge of any of the aspects of the investigation leading up to the filing of the Notice, and the Board panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. From that time forward, all of the information that has been made available to or considered by the panel has been on the public record.

Organization of Summitt's Door-to-Door Sales Activity

Before dealing with the specific allegations outlined in the Notice of Intention to Make an Order for Compliance against Summitt (the "Notice"), the Board will provide some general background respecting the organization of the sales activity undertaken by Summitt during the period covered by the specific complaints.

It is necessary to appreciate various aspects of Summitt's door-to-door energy sales in order to understand the extent to which the individual retail salespersons met the statutory and regulatory obligations. There are several key components which have important implications for the Board's consideration of the allegations in this proceeding:

- the nature of Summitt's sales force;
- Summitt's two-part contract;
- the representation of comparative pricing;
- the representation of the "Provincial Benefit"; and
- the nature of and the role of the "reaffirmation" call.

Summitt's Sales Force

The retail salespersons whose actions are at the centre of this proceeding were employees or independent contractors of subcontractors to Summitt. These subcontractors provide sales forces to the various energy retailers and other sales companies from time to time.

The Board notes that a number of the salespersons involved in this case have at some time in their career sold contracts for an energy retailer other than Summitt. The transition of employees from one energy retailer to another seems to have been common and was often driven by a change in the subcontracting relationship between their employer and the energy retailer. A subcontractor who had been providing retail salespersons to one energy retailer this month, could well be providing retail salespersons to another energy retailer next month. Notably, while the salespersons whose conduct is at issue are no longer selling for Summitt, a number of them continue to work for the same subcontractor and are now selling other products door-to-door, such as rental contracts for waterheaters. This demonstrates that the move from one energy retailer to another (or to other door-to-door sales) is considered by the participants to be an easy transition.

When a retail salesperson begins selling Summitt's contract, they are required to take part in a training program. Summitt provides its subcontractors with training materials, but leaves the actual training of salespersons to the subcontractor. As a result, there did not appear to be a predictable, standard practice for retail salesperson training.

In most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were on their own with customers. It seems that no two of the retail salespersons experienced the same training regime. The energy market in Ontario is notoriously complex, containing many somewhat obscure elements that have implications for the price of the respective commodities. There have been important developments in the market over the last few years that have direct relevance for customers being asked to decide on whether to enter into long-term fixed price energy retail contracts. For electricity, the Provincial Benefit is one such development, Smart Meters and time of use rates are another. It was clear from the testimony of Summitt's salespersons that a few hours of training was not an adequate foundation for someone who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

Summitt's Two-part Contract

The contractual relationship relied upon by Summitt consisted of a two-part contract.

The initial contractual document was curiously entitled "Registration Form". This is the document that was signed by the prospective customer at the doorstep. In Summitt's view, the execution of this "Registration Form" creates a complete contractual nexus with the customer once the separate Customer Agreement with Terms and Conditions document was delivered. It is noteworthy that this initial document is ambiguous as to its status as a binding contractual document. Certainly the title of the document seems to create an impression that the prospective customer is merely registering for a program, or signing up to receive further information, rather than entering into a long-term fixed-price contract for the provision of electricity, natural gas, or both.

The Registration Form references the "Customer Agreement with Terms and Conditions" and directs the customer to this additional document. At other points, the Registration Form refers to itself as the "Agreement" as a defined term and then again as an "agreement" apparently not as a defined term. The Registration Form also refers to itself as the "Comprehensive Energy Price Protection Program" It would appear that

the “comprehensive” energy protection program is “comprehensive” even where it only applies to supply of one of the commodities, that is one of electricity or natural gas.

The “Customer Agreement with Terms and Conditions” that the Registration Form refers to is also presented in a very ambiguous manner. The document looks like a promotional brochure intended to encourage parties to enter into a contractual relationship, and not as an integral, indeed critical, element of an existing contractual relationship. There are numerous examples of “brochures” used over the relevant period in the record, but in every case the document appears to be more sales tool than contractual document. The exterior panels of the brochure contain the price comparison information relied upon by the retail salesperson to sell the customer on the attractiveness of Summitt’s product. Only when the customer unfolds the panels of the brochure will they find the terms and conditions written on an inside panel. It is the type of document that a customer could easily have discarded without realizing that it contained the terms and conditions.

This ambiguity was made even more pronounced when one considers the conduct of Summitt’s retail salespersons. From the evidence before the Board, it appears that the retail salespersons did not refer to the Registration Form as a binding contractual document when selling to customers and instead referred to it as an “application” or “registration”. The Board heard repeatedly that the retail salesperson would fill in all of the information on the form, often in advance of the door-to-door visit. In many cases, customers clearly had no appreciation of the impact of signing the Registration Form until well after their interaction with the retail salesperson was over. Moreover, the retail salespersons repeatedly described the document containing the terms and conditions as a “brochure” during their evidence and appear to have used that term when speaking with the customers. Most tellingly, none of the retail salespersons specifically referred the prospective customers to any of the specific terms or conditions contained in the “Customer Agreement with Terms and Conditions” even though it contained important details of the contractual arrangement, including terms relating to liquidated damages and termination of the contract that strongly favoured Summitt.

Standard form contracts, offered on a “take it or leave it” basis, are a pervasive and indispensible feature of modern commercial life but the basic principle concerning the incorporation of unsigned documents (such as the “brochure” proffered by Summitt

agents) was established long ago in the 19th century "ticket" cases.[1] The use of standard forms does give rise to a number of potential concerns as the forms are unlikely to be read, or if read, understood by the parties signing them and the classic model of *consensus ad idem* is lacking. Furthermore, there is the risk that such standard form contracts or "contracts of adhesion" may contain terms that are harsh or unfairly oppressive to the person who wishes to obtain a particular commodity or service. The common law has, to an extent, responded to the phenomenon of unfair terms in standard forms by refusing to incorporate written terms that may operate unfairly and to the surprise of one of the parties. [2]

In a case where the person receiving the document actually knows that the paper contains a set of conditions that the offering party intends to be the terms of their agreement, assent is easily established, whether or not the recipient actually reads the document and becomes familiar with the terms.[3] In other cases, where the recipient does not have actual knowledge of the nature of the document, the question is whether the person issuing the document can reasonably assume that the other party is aware that the document contains conditions either because of the nature of the transaction or because reasonable steps have been taken to give the other party notice of this fact.[4]

In cases where it is not obvious that the document is contractual in nature the test to be met is whether the party relying on the document has given sufficient notice to the other party that the document contains conditions. If the proffering party "did what was reasonably sufficient to give the plaintiff notice of the condition"[5] the parties would be bound by the conditions whether or not they took the trouble to read the document. However, if, in the circumstances of a particular case, the person receiving the document might reasonably assume that the document has some purpose other than communicating contractual terms, courts incline to the view that reasonable notice has not been given.[6]

In the present case, the organization of the sale by Summitt and the presentation of the contracts by the retail salespersons could be seen as falling short of reasonable notice

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[1] John D. McCamus, *The Law of Contracts,(Toronto: Irwin Law, 2005) at pp* 182-183
[2] McCamus, at 182-183
[3] *Harris v. Great Western Railway Co.* (1876), 1 Q.B.D. 515
[4] McCamus at 184
[5] *Parker v. South Eastern Railway Co.,* (1877), 2 C.P.D. 416 (C.A.)
[6] McCamus at 184

of the contents and significance of the documents that were presented to them as a Registration Form and “brochure”.

It is beyond the scope of this proceeding to make any specific determinations with respect to the actual contractual effect of the sales effort engaged in by the Summitt retail salespersons in the cases before us. Accordingly, the Board makes no finding as to whether the organization of the sales actually resulted in binding contractual relationships with the customers, or if some or all of the specific terms are enforceable.

It is certainly not necessarily the case that a two-part contract must inevitably be misleading. There are many contracts which are comprised of different parts, usually incorporated by reference. A two-part contract properly presented and described could create a clear and unequivocal contractual offer. However, the Board does consider this ambiguity with respect to the nature of the contractual documents as devised by Summitt as a factor in its consideration of the cases before it.

Representation of Prices

A key part of the sales exercise undertaken by the Summitt retail salespersons was the comparison of current market prices to the offering being made by Summitt.

Price comparisons were generally made using the brochure described earlier in this decision. The brochures, and there were a number of versions of them, typically presented on its glossy exterior a graphic representation of price trends for natural gas and electricity. In both instances the graphic representation showed steep increases. This trendline was pointed to by the retail salespersons as representing the likely direction either electricity or natural gas prices would follow. It may be the case that under the current legislative framework neither Summitt, nor its retail salespersons had any obligation to embark on any form of price comparison discussion as part of these sales. But they chose to do so, and in so doing took on a responsibility to ensure that their representation of price and pricing trends was accurate and not misleading.

The Board has serious concerns with the price representations contained in Summitt’s brochures. The trendlines in these brochures typically misrepresented the actual market price of the respective commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being

offered under Summitt's program. The result was that the price comparison dramatically overstated the potential benefit of a fixed price contract with Summitt.

The Provincial Benefit

Another shortcoming of Summitt's comparative pricing information is that it did not take into account the Provincial Benefit.

The Provincial Benefit is a creation of the provincial government which has had the effect of collecting from electricity consumers a variety of costs that are not recoverable through the wholesale market. The cost of the Provincial Benefit is included in the prices set by the Board under the Regulated Price Plan ("RPP"). Customers who are supplied electricity by their local distribution company are charged the RPP. When customers switch their electricity supply to a retailer such as Summitt, the Provincial Benefit is added on to their energy retailer contract price as a separate line item on their bill. While the Provincial Benefit can be either a debit or credit to customers, since 2007 there has been only been one month during which the Provincial Benefit operated as a credit to customers. On all other occasions it was a debit.

Therefore, a comparison of an RPP customer's electricity bill, which includes the Provincial Benefit, with a retailer's price offering which does not include any reference to the Provincial Benefit is inherently misleading. The most notable example of this appeared on some versions of Summitt's Registration Form, which set out Summitt's fixed price and the applicable RPP prices, but did not disclose that a customer would also have to pay the Provincial Benefit if they signed up with Summitt. In fact, some of the Registration Forms contained language that suggested that the customer might "…be entitled to the….Provincial Benefit Rebate. Under this program you keep these rebates, if any." Whatever else this language may convey, it does not alert the customer to the likelihood, or even the possibility, that the Provincial Benefit would <u>add</u> to the Customer's electricity bills.

From the evidence provided by a number of the complainants, it is apparent that Summitt's retail salespersons did not generally inform customers that they would have to pay the Provincial Benefit in addition to Summitt's fixed charge. This is supported by the evidence of two retail salespersons that they made no reasonable attempt to accurately represent the likely effect of the Provincial Benefit to their prospective customers. In one case, a complainant testified that the retail salesperson indicated that

she was now “eligible" for the Provincial Benefit and was misled into believing that the Provincial Benefit would have the effect of reducing her energy charges, when in fact during that period the Provincial Benefit operated to increase electricity bills. Only later when her bill from Summitt arrived did she learn that the Provincial Benefit for which she was now “eligible” actually added significantly to her expected household expense for energy.

The Reaffirmation Call

The Legislature has made provision in subsection 88.9 (4.1) of the Act for a cooling off period for energy contracts which consists of a 10 day period after which the customer can “reaffirm" the original contract.

Pursuant to subsection 88.9(3) of the Act, a contract ceases to have effect unless it is reaffirmed by the consumer before the 61st day following the day on which the written copy of the contract is delivered to the consumer. The consumer may not reaffirm a contract before the 10th day after a written copy of the contract is delivered to the consumer.(See 88.9(4.1) of the Act)

Ontario Regulation 200/02 prescribes the means by which a consumer can reaffirm a contract. Generally, a consumer may reaffirm a contract or give notice to not reaffirm a contract by giving written notice to the retailer of electricity or gas marketer. A consumer can reaffirm a contract by telephone only if a voice recording of the telephone call is made and given to the consumer on request.

Summitt utilizes a telephone reaffirmation process. Summitt calls the consumers who have signed the Registration Form within the prescribed timelines with the intent of having them reaffirm the contract for natural gas, electricity or both depending on what the consumer had signed at the door. As is required by Ontario Regulation 200/02, Summitt records the reaffirmation calls and the transcripts of these calls were filed as evidence in this proceeding by Summitt.

Interestingly, the reaffirmation call was characterized in a variety of ways by the retail salespersons when conducting door-to-door sales. In some instances the reaffirmation call was represented to be a confirmation that the retail salespersons had in fact attended at the house of the prospective customer. In other instances it was described as a quality assurance kind of exercise where the performance of the agent would be

vetted by the head office. It was rarely described as what it was intended to be – an opportunity for the consumer to review the contractual terms and reaffirm or not reaffirm a long term fixed price contract for the supply of electricity and/or natural gas.

It appears to the Board that the effectiveness of the reaffirmation call as a genuine cooling off device was fatally undermined by the fundamental misunderstanding created by the retail salesperson during the sale. Further, little or no effort was made during the reaffirmation call to determine if the customer understood its purpose and, where necessary, to correct any misconception. It is also noteworthy that in some instances the reaffirmation call appeared to be in the nature of a sales effort, and not a simple reaffirmation.

Further, the ambiguities in the contractual documents noted above infect the reaffirmation calls and make them of questionable value in a number of the cases before us.

For the reasons noted above, it is not clear to the Board that customers understood they had agreed to a fixed price contract or that the glossy brochure they had received contained detailed terms and conditions which they needed to review. When the transaction is viewed as a whole, it is understandable that customers receiving a brief reaffirmation call would often answer “yes” without truly appreciating the significance of what they were being asked.

Characterization of the Offences

Compliance Counsel and Summitt are sharply divided on how the enforceable provisions which are the subject matter of this proceeding ought to be characterized. Compliance counsel urges the Board to consider the offences to be offences of absolute liability, while Summitt contends that the proper characterization is that they are offences of strict liability.

The distinction is important. If the Board concludes that the offences are to be considered absolute liability offences there is effectively no defence open to Summitt once the facts establishing the *actus reus* of the offence have been proven. On this construction due diligence would only operate in possible mitigation of sentence. On the other hand, if the offences are strict liability offences, then Summitt would be entitled to have its defence of due diligence considered by the Board at the liability

stage. If the Board were to find that Summitt's defence of due diligence met the requisite standard, it would be entitled to be acquitted and would not be subject to any penalty.

The distinction between offences of strict liability and absolute liability respectively derives from the seminal Supreme Court of Canada decision in *R. v. Sault Ste Marie*[7].

The parties agree that the Supreme Court of Canada in that case established that a presumption exists in favour of the characterization of offences as strict liability offences. This presumption can be rebutted by reference to the language used by the legislature in the charging statute and consideration of a number of primary factors enumerated by the Supreme Court. Specifically, the Court said that the offences that will be held to be ones of absolute liability are those "in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act."[8] The court listed four factors that should be considered when making this determination:

- consideration of the overall regulatory pattern adopted by the Legislature;
- the subject matter of the legislation;
- the importance of the penalty; and
- the "precision of the language used" by the legislature.[9]

To rebut the presumption of strict liability, Compliance Counsel points to the language of subsections 88.4 (2) and (3), which read as follows:

> (2) A gas marketer **shall be deemed** to be engaging in an unfair practice if,
> (c) a salesperson acting on behalf of the gas marketer does or fails to do anything that would be an unfair practice if done or if failed to be done by the gas marketer.
> 88.4 (3) a retailer of electricity **shall be deemed** to be engaging in unfair practice if:
> (c) a sales person acting on behalf of the retailer of electricity does or fails to do anything that would be an unfair practice if done or failed to be done by the retailer. (Emphasis added)

[7] *R. v. Sault Ste. Marie,*[1978] S.C.R. 1299 (*"Sault Ste. Marie")*
[8] *Sault Ste. Marie at pp.1312*
[9] *Sault Ste. Marie at pp.1326*

Compliance Counsel argues that the emphasized language of these provisions establishes vicarious liability for the electricity retailer with respect to the actions of its retail salespersons and is determinative of the question as to how the offences ought to be characterized.

The Board agrees with Compliance Counsel that in this case the language of the provisions are of primary importance in the consideration of this issue and so will begin its analysis with the fourth factor of the *Sault Ste. Marie* test.

The Board does not agree with Compliance Counsel that the phrase ”shall be deemed” is a statutory direction that is determinative as to how these enforceable provisions ought to be characterized. The term “deem” is common in legislative drafting and has been the subject of considerable judicial scrutiny. In *Hickey v. Stalker*[10] an Ontario appeal court ruled the word “deem” may mean either "deemed conclusively" or "deemed until the contrary is proved." Similarly, in *St. Peter's Evangelical Lutheran Church v. Ottawa*, the Supreme Court of Canada recognized "that the words deemed' or deeming' do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned."[11] In the more recent case of *Manitoba Chiropractors Assn. v. Alevizos,* the court interpreted the phrase “shall be deemed” in the context of a professional misconduct case as providing a respondent with an opportunity in some circumstances to displace “the statutory presumption … by evidence to the contrary.”[12]

Further, while the provisions do establish that a retailer is vicariously liable for the actions of its sales persons as Compliance Counsel notes, that alone is not a definitive indication that the offences are absolute liability offences. A whole host of regulatory regimes including environmental protection, health and safety standards, and product liability are founded on the vicarious liability of corporations for the actions of their employees or agents. However, these regulatory regimes still allow for the advancement of due diligence defences in those cases.

The question therefore is whether the Legislature intended to create conclusive or rebuttable presumptions with the language of subsections 88.4(2) and (3). As noted above, this exercise requires a consideration of the “entire context of the statute

[10] [1924] 1 D.L.R. 440 at 442 (Ont. S.C. (A.D.)).
[11] [1982] 2 S.C.R. 616 at 629.
[12] 2003 MBCA 80.

concerned", which effectively encompasses the first two factors under the *Sault Ste. Marie* test.

In the Board's view, the overall legislative regime at issue in this case and its subject matter (the regulation of an economic, contractual activity) are not amenable to a finding of absolute liability. For good reason, many of the regulatory regimes governing important societal values such as environmental protection are notoriously strict liability regimes. Part of the regulatory architecture is the development by responsible companies of effective, comprehensive and evolutionary due diligence systems. It is thought by many regulators that the most important attribute within the regulatory regime is a strong incentive for regulated entities to develop and implement such due diligence systems. Such systems are particularly relevant when they can substantially limit or eliminate the contraventions of regulatory standards. In this way, the incentive of having the ability to defend oneself against charges through the use of a due diligence defence is considered an important element of overall public safety and the public interest.

By contrast, apart from traffic violations and technical noncompliance with licensing requirements, absolute liability tends to be imposed only in circumstances where the consequences of noncompliance can be extremely serious and hazardous. In that context, it may well be appropriate to impose absolute liability without recourse to a due diligence defence.

When subsections 88.4(2) and (3) are viewed in light of the entire regulatory regime and its subject matter, it is appears that the construct more closely resembles strict liability regulatory regimes than absolute liability regimes. This observation is not intended to disregard the harmful consequences that may ensue where consumers are improperly induced to enter into retail energy contracts which have the effect of increasing their household expenses significantly. There is no doubt that noncompliance can have devastating effects for families trying to make ends meet. But this kind of damage and consequence can be dealt with within the context of a strict liability regime.

The remaining factor of the *Sault Ste. Marie* test is the importance of the penalty. An important element of our system of justice is that serious penalties ought not to be imposed without a commensurate opportunity for the defendant to mount a defence. Not only are the monetary penalties in this case potentially very substantial, but the sanctions that can be imposed by the Board for contravention can include cancellation

of the retailer's license or suspension of its license privileges. The cancellation or suspension of a license effectively terminates the business for the company and all of its employees and subcontractors. It also places in doubt the ability of the company to continue to provide its service to its existing customers.

In the Board's view, absent precise direction from the Legislature, it would not be just to impose absolute liability on an energy retailer for the actions of its sales persons in light of the potentially significant consequences. Support for this view can be found in the jurisprudence on the interpretation of the word "deem", which provides that in the event of ambiguity where one construction will do injustice and the other will avoid the injustice, "it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions." [13]

It must also be noted that administrative expediency or convenience with respect to enforcement is not one of the factors enumerated in *Sault Ste. Marie*. While the ability of the regulatory body to enforce compliance is a consideration, it cannot be the governing factor in characterizing the nature of an offence.

In conclusion, it is the Board's view the presumption of strict liability enunciated by the Supreme Court in *Sault Ste. Marie* has not been rebutted with respect to the enforceable provisions engaged in this proceeding. Accordingly, the Board will apply a strict liability standard, and will consider the due diligence defence advanced by Summitt as a defence to liability per se.

Onus of Proof

It is not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance. Similarly, it is settled that the onus of establishing due diligence as a defence to the charges, or as a factor in mitigating symptoms lies with Summitt.

Due Diligence Defence

As indicated above, the Board will consider Summitt's due diligence defence in assessing its liability for the infractions of its retail salespersons. In addition to challenging the specific allegations of noncompliance on an incident-by-incident basis,

[13] *Hill v. East & West India Dock Co.*, (1884), 9 App. Cas. 448 at 456 (H.L.).

Summitt has sought to persuade the Board that the system that it had in place during the relevant period was sufficiently detailed, comprehensive, and effective in protecting the public from noncompliance with the legislation, the regulations, and the Codes. This system touches on the training of agents, response to complaints and the correction of errors among its retail salespersons.

The Supreme Court of Canada in the *Sault Ste. Marie* case emphasized that when a due diligence defence is raised the question is not simply whether the accused established "a proper system to prevent commission of the offence" but also whether it took "reasonable steps to ensure the effective operation of the system."[14] The standard when judging due diligence is whether the accused took reasonable care in the circumstances.

In order to meet the standard of reasonable care, a due diligence program must be responsive to the circumstances it is intended to address. This means where the activity sought to be controlled is complex, highly varied, and dynamic, the compliance plan, or the due diligence system, must be equally complex, varied, and dynamic. It must take into account the known weaknesses and areas for potential noncompliance and must deal with them aggressively and definitively.

The standard is also increased in a context where the consequences for customers may be serious. Entering into a long-term fixed priced energy retail contract is not a trivial event in the life of a household. The Board heard evidence to the effect that these contracts, and in some instances, the liquidated damages demanded to cancel them, represented hardship for families in meeting their day-to-day obligations. In this kind of context it is absolutely essential that in order to qualify as a competent and operational compliance plan the system must be very acute in avoiding misunderstandings and reducing the potential opportunities for misrepresentations by salespersons.

It is the Board's view that the company has failed in many respects in meeting the standard and the defence of due diligence is of no avail to Summitt in this proceeding.

One of the cornerstones of an effective due diligence defence is the proper training of employees and contractors. It is apparent that the structure of Summitt's training regime was simply not effective. As discussed above, there does not appear to have been a predictable, standard practice for retail salesperson training, but at best it

[14] *Sault Ste. Marie at pp.1331.*

amounted to a few hours of classroom instruction and some limited in-field observation. The amount of training required by Summitt was not an adequate foundation for a retail salesperson who is expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower prices.

Further, while on paper the training materials used by Summitt seemed adequate (with the one exception noted below), it is difficult to believe that materials could be adequately covered in a few hours. Indeed, one of Summitt's subcontractors acknowledged that while he received Summitt's training materials, he did not provide them to the retail salespersons he trained and did not expect them to review these materials in a four-hour training session. This highlights that the efforts to impart the relevant information to the retail salespersons was not consistent or predictable. Training was left to Summitt's subcontractors and the Board saw scant evidence of any steps taken by Summitt to monitor the effectiveness of this training either by observing training sessions or conducting in-field reviews of its agents. In the Board's view, in order to establish an effective and operational due diligence program the company needed to ensure that the prospective retail salespersons were well conversant with the fundamentals of the energy market in Ontario, especially if they were being directed to engage in price comparisons as part of their sales technique. The training required by Summitt was clearly inadequate.

The one exception referred to above concerns the fact that the Summitt training materials do not require the retail salespersons to clearly stipulate that the company they represent, that is Summitt Energy Management Inc., is an energy retailer which is not the consumer's natural gas or electricity distributor. This is inconsistent with Subsection 2.1 (a) of the Codes.

Summitt also adopted an organization for the sale of energy contracts which was predicated on at best ambiguous, and at worst misleading, contractual documents. No due diligence system would be complete or reasonable that did not emphasize the importance to the retail salespersons of ensuring that prospective customers understood unequivocally the nature of the arrangement they were entering into at the time they were entering into it. Having created a materially ambiguous context for the interaction with the customer through the use of the Registration Form and a "brochure", it was incumbent upon Summitt to ensure that the retail salespersons convincingly,

effectively, and in every case demonstrated to the prospective customer the nature of the arrangement that was being entered into.

In addition, as in the “ticket” cases discussed above, there was an obligation on the part of the retail salespersons, which Summitt was obliged to require and enforce, to ensure that particular terms of the arrangement were unequivocally brought to the attention of the prospective customers. In fact, the sales activity as sponsored by and created by Summitt's own organization of the sale obfuscated the nature of the contractual relationship and much of its detail. The effective operation of the compliance system could only be accomplished if this important element of the sales interaction was effectively scripted, monitored, and enforced by Summitt. This it failed to do.

As noted earlier in this decision, there were further deficiencies with respect to the price comparison materials provided by Summitt to its retail salespersons. It was incumbent upon Summitt to ensure that price comparison information was current, accurate, and appropriately nuanced to enable prospective customers to make informed decisions about retail energy contracts. In case after case before us the actual price of the natural gas commodity and the supply of electricity were misrepresented. In order for an effective compliance plan to qualify as a genuine due diligence effort, Summitt needed to demonstrate that it took its obligations with respect to price comparisons seriously. This would entail ensuring that the message delivered by its retail salespersons was clear, unequivocal and accurate as at the date of its utterance. In order to accomplish this, not only did it need to be communicating this information directly to the retail salespersons force on a current basis, but it also needed to monitor its sales force and its interaction with prospective customers to ensure that accurate comparisons were being represented. In this, Summitt failed.

As a subset of the price comparison strategy, Summitt needed to address, and ensure that its retail salespersons addressed, the role of the “Provincial Benefit” in the electricity market place. When making price comparisons in its sales materials and contractual documentation, Summitt had an obligation to ensure that the Provincial Benefit was properly disclosed. There was no evidence that Summitt took adequate steps to ensure that its retail salespersons understood the Provincial Benefit, described it accurately, and represented its effect on potential Summitt customers. An effective compliance plan would have ensured that the retail salespersons consistently expressed in an unequivocal and accurate way the likely effect of the Provincial Benefit on prospective electricity retail customers. This it did not do.

In the context of the fundamental misunderstanding experienced by customers as to the nature of the contractual relationship they had entered into, the reaffirmation call was in many instances meaningless and cannot be relied upon to support a due diligence defence. As noted above, not only was the implication and effect of the reaffirmation call misrepresented by the salesperson in many instances, it was fundamentally undermined by the completely understandable lack of appreciation of the prospective customers as to the kind of contractual relationship they were about to cement. Summitt has a positive obligation as part of its compliance plan to ensure that it's reaffirmation callers were alert to indications of misunderstanding on the part of the prospective customer, and that it really represented nothing more than a simple, unequivocal, and direct confirmation by the customer that the customer understood and accepted the complex contractual arrangement Summitt wished to rely upon.

In relying on its due diligence defence, Summitt references a series of cases which can be generally characterized as “rogue employee” cases and points to its compliance program and the compliance measures taken against the five salespersons involved in this case. The basic proposition is that notwithstanding that a company has an acute and effective compliance program, there will always be rogue employees who refuse to comply with the company’s requirements.

The Board does not find this is to be a case of five rogue agents. As detailed above, a substantial contributor to the misunderstanding of prospective customers about the true nature of the contractual arrangement they were entering was not rooted in the actions of the retail salespersons, but rather directly in the organization of the sale devised and designed by Summitt itself.

Further, the Board finds that while Summitt may have had, on paper, a compliance program, in all of the circumstances it fell far short of any reasonable standard in its operation. The company’s compliance plan substantially failed to provide for appropriate re-training, monitoring, scripting, correction, sanction, and redress. Given the absence of forceful and direct engagement by Summitt to ensure that the necessary elements were addressed on a door-to-door basis, it cannot rely on the failure of its retail salespersons to respond to a compliance plan that was inadequate and poorly enforced. The claw-back of commission for noncompliance was only imposed in one case. It also appears from the cases that so long as Summitt was able to cull “yes” answers from the customer on the reaffirmation call, the company felt that all was well with the sale. This approach completely overlooked the possibility that the reaffirmation

call had been substantially undermined through misrepresentation by the retail salesperson as to its effect.

To this point we have described what we have found to be deficiencies in the Summitt due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.

To identify the components of such a program we need look no farther than the proposal made by Summitt at the conclusion of the hearing, referred to as its “14 Point Program”. In the Board’s view with the exception of the deficiency highlighted above with respect to the retail salespersons’ obligation to state that Summitt is not the consumer’s natural gas or electricity distributor, it is the Board’s view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.

The 14 Point Program provides for the following incidents surrounding door-to-door sales. In providing this description of the 14 points, the Board has purposely omitted language such as “continuation” or “continued” which was used in Summit’s description of the program.

1. Summit will issue to each energy salesperson a business card that incorporates its own EB license numbers, Summitt energy's name, the name of the sales person, the salesperson ID number, Summitt's toll-free number, and Summitt's website address. Summit agrees to adopt recommendations of the Board with respect to the sizing of the business card.

2. Summitt will issue to its salespersons and will require them to wear an ID badge that includes, in addition to the information currently reflected on the badge, a statement that Summitt Energy does not represent the local distribution gas or electricity utility, a yearly expiry date, and the issuance of a new ID badge will be dependent upon the completion of annual recertification training and the test. This means of course that each salesperson would be subject to annual recertification training.

3. Summitt will employ a point-of-sale quality assurance call program, identical to the one that it put in place on June 30, 2010 in response to the Board's interim

compliance order. Pursuant to this quality assurance call program, the customer must positively confirm all the points on the call in order for the contract to be sent for reaffirmation and processed for enrollment with the utility. The points covered by the call include the following: confirmation that the representative was wearing a Summitt energy ID badge and had identified him or herself as being from Summitt energy, not the local distribution utility, the government or the Board. Further, the call must confirm that the customer has been provided with a copy of the agreement. In addition the call needs to elicit a response from the customer that the price and duration of the agreement is understood by the customer and a clear, unequivocal statement of understanding by the customer that the contract provides for price stability and does not guarantee cost savings. Finally the quality assurance call program will confirm that the contract has been entered into voluntarily, that the customer is not a minor, and that if the customer is a senior that additional disclosure will be provided to ensure that the customer appreciates the nature of the arrangement entered into. This quality assurance call is to be made at the time of sale.

4. Summitt will employ a revised reaffirmation call script which will include each of the applicable topics proposed in attachment D to the OEB's August 12, 2010 proposed code of conduct amendments.[15]

5. Summitt will employ a revised disclosure form, which was implemented in response to the Board's interim compliance order on June 30, 2010. The customer signature as an acknowledgment on that disclosure form is required before the contract will be processed. That disclosure form acknowledgment that must be signed by the customer confirms the customer’s understanding that the agreement entered into is with Summitt Energy not with the local gas or electricity utility, the Ontario government or the OEB, that the agreement is being entered into voluntarily and that the customer will continue to be supplied with natural gas and or electricity even if they don't sign the agreement. In addition, the disclosure form acknowledgment confirms that the customer appreciates that the disclosure of the global adjustment, formerly known as the Provincial Benefit, as a separate line on the utility bill and that it may be either a credit or charge, and that consistently since 2007 it has resulted in a charge to electricity customers. The disclosure form shall also confirm the customer’s understanding that the customer may be required to pay Summitt Energy

[15] Implementation of Consumer Protection (Retailer/Marketer) Provisions of the Energy Consumer Protection Act, 2010 (EB-2010-0245.

exit fees for early termination of the agreement, and that the price quoted is for the commodity only and the other regulated charges will be required to be paid. Summitt will further revise its disclosure form to include the applicable topics listed in attachment C (proposed disclosure statements) to the OEB's August 12, 2010 Proposed Code of Conduct Amendments.

6. In response to the Board's interim compliance order, Summitt Energy implemented the use of a new combined agreement format on June 30, 2010 that incorporates the registration form and the terms and conditions (the “brochure”) into one agreement. In addition this new format discontinues use of a natural gas AECO price chart, and includes a statement that a global adjustment charge or credit may apply, that Summitt energy is not affiliated with the utility, the government or the Board, and that financial savings are not guaranteed.

7. Summitt agrees to cancel its contract without an exit fee if a customer is already on a contract with an existing retailer.

8. Summitt agrees to implement new code of conduct training for all its salespersons consistent with its response to the Board's interim compliance order. Summitt agrees to further redesign its training and testing modules to ensure that they meet the requirements of section 5 of the OEB's new proposed code of conduct as reflected in the August 12, 2010 Proposed Code of Conduct Amendments.

9. Summitt agrees to enhance its training and testing modules with respect to reaffirmation agent training to meet the requirements of sections 4 and 5 of the August 12, 2010 Proposed Code of Conduct Amendments.

10. Summitt agrees to cause amendments to be made to its contractual arrangements with its sales agency and salesperson independent contractor agreements. These amendments will outline a specific sales agent compliance monitoring program which will be further described below, and a definitive remedial action schedule.

11. Summitt agrees to enhance its process and procedures respecting the management and handling of low-volume consumer agent conduct complaints by implementing the requirement appearing in section 7.2 of the proposed OEB August 12, 2010 Proposed Code of Conduct Amendments. These amendments provide that if a

complaint is not resolved to the consumer's satisfaction, Summitt Energy will provide to the consumer the OEB's Consumer Relations Center contact information.

12. In addition to its current practice, Summitt agrees to augment its compliance monitoring program by developing a new agent complaint point system; and to employ an agent complaint system report and a complementary remedial action schedule. The agent complaint point system consists of assigning points to the number of complaints and type of agent complaints in order to identify trends. In addition, Summitt agrees to include in its compliance monitoring program a requirement that salespersons sign off and review each low-volume consumer complaint report alleging agent misconduct respecting the individual sales person involved. In addition, Summitt agrees to automate the process of the distribution of the weekly agent complaint reports to facilitate their early consideration by management. Once a salesperson reaches any of the remedial action phases identified in the remedial schedule, the sales person will be subject to complete retraining with one of Summitt's compliance department employees.

13. Summitt agrees to conduct a process audit, and to implement the recommendations of that process audit. Summitt's proposal in this regard relates specifically to the allegations of noncompliance made in this proceeding. The Board construes Summit's proposal to include its acceptance of the need for periodic process audits respecting the sales activities of its sales force, with a view to ensuring that the rest of the 14 Point Program is having the desired effect with respect to compliance.

14. Summitt agrees to provide the Board with quarterly reports confirming its adherence to any Board order issued in this proceeding, which confirmation is to be made by way of certificate executed by a senior officer of the company.

The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that Summitt was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the

actions of the retail salespersons described in this proceeding was, or should have been, known to Summitt to be deficient in its content and its operationality.

It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as are expected to be implemented in the near future will require a re-examination and possible re-calibration of the due diligence program.

Credibility and Reliability

Before beginning a review of each of the 19 complainants at issue in this case, it is helpful to make some general observations and findings that are relevant for all of the cases advanced by Compliance Staff.

Much of the hearing before the Board focused on the credibility of witnesses. While the Board will, as necessary, address specific issues of credibility in its consideration of each of the 19 complaints, the Board's focus on this aspect of the proceeding is generally on the reliability of the respective testimony of the witnesses, not their credibility. In assessing the witnesses' reliability the Board has taken into account the following findings.

The Board considers it to be significant in its consideration of the reliability of the evidence of the respective witnesses that none of the retail salespersons had specific recollection of any of the instances giving rise to the alleged contraventions. In each case, the complainants were able to provide a significant amount of detail in their narrative of the interaction with the retail salesperson. By contrast, the retail salespersons had no such recollection, and cast their evidence on the basis of what they would "normally" or "typically" have done in a door-to-door sales effort. To some extent, this is understandable, given that the retail salespersons made a significant number of contacts within the relevant period. However, it is also somewhat surprising that the retail salespersons were unable to remember even a single case. In some cases the retail salespersons were alerted by Summitt of the complaints which form part of this proceeding and were subject to retraining as a result of the complaint. One would have expected that the retail salespersons would have been able to provide a more detailed, precise and non-generic response to at least some of those allegations.

It is also apparent that the evidence of the diverse complainants with respect to the individual retail salespersons seems to establish similar noncompliant behavior on the part of the respective retail salespersons. For example, more than one complainant testified that a specific retail salesperson had not identified himself unequivocally as the retail salesperson of Summitt, an energy retailer. In other cases, diverse complainants described similar nonconforming behavior by a retail salesperson. This corroboration by unrelated witnesses tends to support the testimony of the complainants where it differs from that of the retail salesperson. It should be noted that witnesses were subject to a sequestration rule which kept them out of the hearing room while the testimony of other complainants was being given.

The Board also notes that in a couple of cases, two complainants were present at the door-to-door encounter and gave substantially the same evidence respecting it. This testimony was given in a forthright and direct manner, and was not seriously impugned during cross-examination.

There is no evidence of any kind that any of the complainants had been offered any inducements to provide their evidence or to sustain their complaints. A number of them had travelled considerable distances to attend and give their evidence. In some cases, Summitt had unilaterally canceled the contractual arrangements without penalty or liquidated damages, meaning the complainants had no incentive of any kind to maintain their complaint. Many of the complainant witnesses testified that their motivation for testifying was simply to try to protect other consumers from the treatment they asserted they had experienced with Summitt.

For these reasons, the Board finds the complainants' testimony to be consistently preferable to that of the retail salespersons who were only able to provide the most generic and unconvincing rebuttals.

The Conduct of the Investigation

During the course of the proceeding and in its submissions, Summitt expressed concerns respecting the fairness of the Board's investigation itself. The tone of this complaint was rooted in a sense that Summitt was unfairly targeted for an in-depth investigation by Compliance Staff, and that in the course of the investigation Compliance Staff "framed" the complainants evidence by asking specific questions about whether a salesperson wore a uniform, badges, left a business card, etc.

The Board was not convinced that Compliance Staff acted in any way inappropriately in conducting this investigation. Summitt suggests that it was singled out for investigation because of the number of complaints made respecting its sales effort without regard to the overall proportionality of complaints to the number of contracts entered into. While that may be so, each complaint has its own history, and unless obviously frivolous, deserves to be explored, understood, and where necessary, acted upon.

Further, there is simply no evidence to the effect that Compliance Staff did anything that was inappropriate in trying to investigate the complaints which form the basis of this proceeding. In seeking detail from complainants, it was necessary to ask specific questions rooted in the regulatory requirements. It would have been strange for Compliance Staff to have proceeded in any other way. It was clear that none of the witnesses felt as though they had been cajoled or even encouraged by Compliance Staff into making their complaints or amplifying them in any way. Counsel for Summitt sought this kind of evidence through cross-examination, but it did not materialize.

Summitt also appeared to be concerned about the possibility that the respective complainants had been influenced in their testimony or even the motivation to bring a complaint by certain Internet sites which have become dedicated to consumer discontent with Summitt and energy retailers in general. While counsel for Summitt probed aggressively on this point during the cross-examination, the Board is not convinced that there is any meaningful or inappropriate influence from this source.

Relevant Statutory Provisions

It is worthwhile to outline the specific statutory provisions which Summitt has allegedly breached through the actions of its retail salespersons.

First, section 88.4 of the Act makes it an offence for a retailer of electricity or a gas marketer to engage in an unfair practice. The section goes on to say that an unfair practice is a practice that is prescribed by regulation. Section 88.4 also provides that the actions of a salesperson acting on behalf of the retailer or marketer are attributable to the retailer and marketer. The most directly relevant regulation is Ontario regulation 200/02 under the Act (Consumer Protection). This regulation provides a list of practices which are to be considered unfair practices for the purposes of the Act, including section 88.4.

Of very direct relevance is section 2 of Ontario Regulation 200/02 which provides that it is an unfair practice to make any false, misleading or deceptive statements to the public or to consumers. It then goes on to provide examples of subject matters related to the retailing and marketing function which could give rise to an unfair practice through the use of false misleading or deceptive statements. These include statements respecting the rate for the distribution of electricity or gas or the total price of electricity or gas, the difference between any price charged for the provision of electricity or gas by any retailer of electricity or gas marketer including a distributor, the amount of money to be saved by a consumer expressed in any manner if the consumer were to choose one retailer of electricity or gas marketer over another, including the local distribution companies, and the failure to disclose information about the products, services or business of a retailer of electricity or gas marketer if the failure has the effect of deceiving or misleading a consumer or if the retailer of electricity or gas marketer knows, or ought to know, that the failure has the capacity or tendency to deceive or mislead a consumer.

In addition to the provisions of section 88.4 and the requirements of Ontario Regulation 200/02, section 88.9 of the Act makes it an offence for a retailer of electricity or gas marketer to fail to deliver a written copy of the contract to the consumer within the time prescribed by regulation. Section 88.9 also deals with the reaffirmation process.

Contraventions of these statutory provisions are subject to the order and penalty provisions contained in Sections 112.1, 112.2, 112.3, 112.4, and 112.5. Penalty provisions include suspension or revocation of licenses and administrative, that is monetary, penalties, which are particularized in Ontario Regulation 331/03.

It is also a contravention if the electricity retailer or gas marketer fails to adhere to the requirements of the Codes of Conduct for those respective businesses. The Codes are documents produced by the Ontario Energy Board, and compliance with the respective Codes is a license condition for electricity retailers and gas marketers. Failure to conform to the requirements of the respective Codes is a violation of license conditions. The respective Codes contain provisions which include the obligations of the retail salespersons respecting the utterance of false or misleading statements to consumers, the identification of the sales person to the consumer and the positive stipulation that the retailer or gas marketer, as the case may be, is not the consumer's distributor. The respective Codes also explicitly require the retailer of electricity or marketer of gas, as

the case might be, to ensure that their respective salespersons adhere to the requirements set out in the Codes.

Breaches of the respective Codes can lead to license suspension or revocation.

Specific Alleged Contraventions

Considerable argument was advanced respecting the "scope" of this proceeding, directed to the meaning or significance that should be attached to complaints delineated in the Notice, but for which there was no supporting evidence. The Board considers that these allegations which have not been proven, and for which no evidence was provided, should play no role whatsoever in the Board's determination of liability, or with respect to the imposition of sentence. In arriving at its findings in this case, the Board has paid no regard to these allegations. The allegations to which this applies are from complainants R.C., P.R., J.S., J.F., A.B., B.D., C.H., H.G., and J.L**.**

What follows is a consideration and determination of the specific allegations for which evidence was provided.

Retail Salesperson M.G.

Five of the 19 complaints for which evidence was submitted relate to the behavior of M.G. and his sales technique.
In four cases, the complainants reported that M.G. had not identified himself as a representative of Summitt, but rather had either identified himself as an agent of the gas distributor, another retailer, or was unclear and unspecific as to whose agent he really was.

In all five cases, the price to be paid by the customer under the plan for natural gas and/or electricity was either misrepresented or not stated at all. In fact, in three cases, the complainants testified that the electricity portion of the Registration Form was checked off, even though there had been no discussion respecting electricity supply with M.G.

Furthermore, in three cases, the complainants testified that they were not provided with a copy of the “brochure”.

It was J.W.'s testimony that M.G. identified himself as being associated with the Ontario Energy Board and that he did not explicitly identify himself as a retail salesperson of an energy retailer, specifically Summitt Energy Management Inc. The thrust of M.G.'s sales pitch with respect to electricity supply was that smart meters were going to create a situation in which the price J.W. was going to be paying for electricity was going to be somehow unfair. With respect to gas, M.G. indicated that he would be sending a chart to J.W. showing the increase in gas prices over the last period so that the customer could verify for himself that the price comparison suggested by M.G. was accurate. That chart was never received by J.W., nor did M.G. testify that he had followed through on this offer of further information.

J.W. testified that he had read the registration form before signing it. However, this evidence must be considered in the context of the rest of J.W.'s testimony. J.W. testified that M.G. represented the Registration Form as a confirmation that he had in fact met with J.W. that he had explained the situation to him and that it was necessary documentation for him, that is M.G., to get paid. It is clear from his testimony that J.W. regarded this contact with M.G. as in the nature of a survey respecting the adequacy of service of his utility companies.

With respect to the reaffirmation call, J.W. indicated that M.G. told him that someone would be calling in the next little while, that this was a mere formality, intended to confirm that M.G. was at the house and that his confirmation was necessary in order for M.G. to get paid. When he received the reaffirmation call J.W. answered all the questions in the affirmative. J.W. testified that he did so because he thought that he was simply confirming what he had been told at the door by M.G. This misapprehension was shared by other complainants.

Summitt placed a great deal of importance on the reaffirmation call as a genuine confirmation that the customer had unequivocally entered into a contractual arrangement with Summitt. As discussed earlier in this decision, for the reaffirmation call to be genuinely effective it needed to be more sensitive to misunderstanding and misapprehension on the part of the customer than it was. Summitt's due diligence program, in order to be effective and operational, needed to have these attributes in order to provide a defence to the allegation of non-compliance.

For J.W. the next event of consequence was the receipt in July of a utility bill which seemed to be extremely high. When J.W. called the gas company he was told that he

was now a customer of an energy retailer and that the cost of supply of natural gas had accordingly increased. At this point J.W. formulated a complaint. In the end, his contract with Summitt was canceled without liquidated damages or any other form of penalty.

The fact that the complaint was not made until some months after the contract was actually signed comes as no surprise in these circumstances. J.W. did not believe that he had entered into a long-term fixed-price contract for the supply of natural gas or electricity on February 24, 2009. This circumstance was only brought home to him when he received his sharply increased utility bill in July of 2009. This lag, which is common to all of the cases because of the time it took to effect a transfer of the account to Summitt, is important. It means that Summitt should have had in place a much more rigorous process for assuring itself that its retail salespersons were conducting the sales calls in a manner that was consistent with the legal requirements. There should have been a scripted sales presentation, aggressive contemporaneous monitoring of the sales call and a more nuanced interaction with the customer to ensure that the prospective customer understood the nature of the relationship Summitt was going to rely upon. This is in fact the kind of approach adopted in the 14 Point Program implemented by Summitt in June 2010.

With respect to the complaints of D.B. and J.T., M.G. identified himself as a Summitt representative offering a price cap for natural gas. Specifically, it was D.B.'s testimony that M.G. offered them a contract for their natural gas supply at 35 cents per cubic meter and told them that the price would go down if gas prices went down but would never go above 35 cents per cubic meter . M.G. misrepresented the price to be paid under the contract. While it is true that under a fixed price contract, the price should not go above the contracted price for the term of the contract, M.G.'s statement that the "price would go down if gas prices went down" was false and misleading. The only means whereby that could occur was if the customer invoked a one-time adjustment described in the contract as the "Blend and Extend" option. Like every other term and condition appearing in the "brochure", the salesperson made no effort to disclose to the customer how this mechanism might work.

D.B. further testified that M.G. told them that the price of gas at that time was around 41 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 23.5 cents per cubic meter.

D.B. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with them. During the reaffirmation call, D.B. advised the reaffirmation agent that M.G. had not spoken to them about electricity and as a result the electricity contract was cancelled by the reaffirmation agent. A copy of the brochure was not provided to D.B. and J.T.

After filing a complaint with the Better Business Bureau and the Ontario Energy Board, D.B. and J.T.'s natural gas contract with Summitt was cancelled without penalty.

To the complainants A.H. and C.S., M.G. was unclear as to the entity for whom he was working. In their testimony, A.G. and C.S. were clear that M.G. told them that the purpose of his visit was to offer them better prices on gas and electricity. C.S. remembered that M.G. told them that Milton Hydro's (their local electricity distribution company) rates were guaranteed to increase within a very short period of time. A.H. signed the Registration Form based on M.G.'s presentation that they would save money on their bill. When she received the reaffirmation call, like J.W., A.H. answered all the questions in the affirmative not understanding that she was confirming a five year contract for the supply of natural gas and electricity with Summitt.

After receiving their bill with Summitt, A.H. and C.S. tried to cancel the contract for the supply of natural gas and electricity with Summitt. However, Summitt was only willing to cancel the contract upon payment of the liquidated damages assessed by Summitt. C.S. testified that he was not aware that cancellation charges would apply at the time of his encounter with M.G. and that they couldn't pay the liquidated damages assessed by Summitt. A.H. and C.S. are still under contract with Summitt for the supply of their natural gas and electricity.

To the complainant D.M., M.G. identified himself as being from "the energy company" and appeared to be wearing a Reliance Energy badge. D.M. testified that M.G. told her that the previous home owners had paid for a five year fixed rate plan and that D.M. could use the last three years and that the price under the plan was 32 cents per cubic meter. D.M. testified that M.G. told her that the price would go down if gas prices went down. D.M.'s testimony is consistent with the testimony of D.B. with respect to M.G.'s representation of the price to be paid under the plan. D.M. further testified that M.G. told her that the price of gas at that time was 39 cents per cubic meter. This information is also inaccurate and misleading as the utility's price at that time was around 20.5 cents per cubic meter.

Like D.B., D.M. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

M.G. told D.M. that she was “eligible” for the Provincial Benefit and someone would contact her about that. In fact, when she received the reaffirmation call, D.M. did inquire about the Provincial Benefit but didn’t get a clear response from Summitt’s agent.

When D.M. noticed Summitt as her energy provider on her bills, she called Union Gas and was told that Summitt was her supplier. She then contacted Summitt to cancel the contract and was told by Summitt that liquidated damages would apply. D.M.’s husband contacted the Ontario Energy Board and they sent an e-mail to Ellen Roseman, a Toronto Star journalist seeking help. D.M. received an email from Summitt stating Summitt was willing to cancel her contract as a customer service gesture.

To the complainant A.S., M.G. identified himself as a supervisor from Union Gas and indicated that he was there to discuss energy saving programs with her. A.S. testified that she signed the Registration Form thinking she was registering for a Union Gas energy saving program. A.S. testified that M.G. advised her to call Union Gas in a few months to get her security deposit back.

Like D.B. and D.M., A.S. testified that the electricity portion of the registration form was checked off even though M.G. did not discuss electricity with her and that she was not provided with a copy of the brochure.

A.S. testified that when she received the reaffirmation call, she did not know it was Summitt and she misunderstood what was being discussed.

A.S. testified that when she called Union Gas a few months after the encounter with M.G. to get her security deposit back, she was told that M.G. was not from Union Gas. A.S. then called Summitt to cancel her contract but was told that cancellation fees would apply. A.S. complained to the Ontario Energy Board. After receiving an income verification letter from A.S., Summitt cancelled the contract for natural gas and electricity supply without penalty.

In the Board's view the testimony of complainants with respect to M.G. establishes that there have been numerous contraventions of the requirements of the Act, Ontario Regulation 200/02, and the Codes.

First, it is apparent that M.G. failed to explicitly identify himself as a representative of an energy retailer on four occasions. In three cases, he had actually identified himself or caused himself to be identified as an employee or agent of someone other than Summitt.

As noted elsewhere in this decision M.G. was unable to provide any specific rebuttal relating to these complaints, and could not specifically deny any of the allegations made by these complainants. M.G.'s general statement that he always identified himself as a Summitt representative cannot be preferred in the face of the complainants' quite specific recollections, especially when they appear to be corroborative of each other. It must also be noted that Summitt's training materials do not appear to have dealt with the obligation of the salesperson to positively stipulate that he did not represent the local distribution company. It is perhaps then not surprising that M.G. failed to meet this standard.

The Board finds therefore that there are four contraventions of section 2.1 of the Codes which requires the retail salesperson to immediately provide the name of the retailer and marketer he represents to the respective customers.

Second, the Board finds that M.G. provided false, misleading and deceptive statements to each of the complainants and thereby engaged in an unfair practice contrary to section 88.4 of the Act. These misleading and deceptive statements touched on several aspects of the sale. The price comparison offered by M.G. was inaccurate. M.G. testified that he showed prospective customers their current gas prices as shown on their gas bills, and compared them to Summitt's gas prices and historic gas prices. He testified that he explained to customers that the utility price of gas went almost to 42 cents per cubic meter in 2008. This information was inaccurate and misleading. The effective price of the commodity had not risen to 42 cents per cubic meter in 2008. It had ranged between 24 .5 cents and 38.1 cents. At the time of the sales call, the price of natural gas was less than 30 cents.

M.G. indicated that he would be providing comparative data to J.W. with respect to the historic price of natural gas at the household. The Board finds that there was no

intention on M.G's part to follow through with that promise, and that it therefore was false and misleading statement. To D.M., M.G. indicated that she was "eligible" for the Provincial Benefit and that someone would be contacting her with respect to that. The clear implication to D.M. was that she would be receiving a benefit of some kind associated with the Provincial Benefit. In fact, the Provincial Benefit, as was known, or should have been known by M.G., would result in significantly higher electricity charges for D.M. Further, the Board finds that there was no intention on the part of M.G. that he would take any steps to ensure that someone called D.M. to clarify this issue.

In addition, the Board finds that M.G.'s characterization of the reaffirmation call was intended to mislead these complainants into a misunderstanding respecting the meaning of and implications of the reaffirmation call.

The Board finds that in representing that the "comprehensive energy price protection plan" would result in energy savings, M.G. made false and misleading statements to these prospective customers. The plan, at least to the extent that it covered gas supply, could reasonably be described as a device which could minimize volatility in the customers' energy supply cost. But to describe it as a cost saving tool, without a more complete and nuanced description, is misleading.

The Board considers that enrolling customers in the electricity protection plan when there had been no discussion of that arrangement nor assent of any kind by the customer is an unfair practice contrary to section 88.4 of the Act.

In summary, the Board considers that the evidence with respect to M.G. establishes on a balance of probabilities the following contraventions of the Act and the Codes. Specifically the Board finds that:

1. M.G. provided false, misleading and deceptive statements to all five complaints: D.B. and J.T., A.H. and C.S., D.M., A.S. and J.W. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. M.G. did not provide a copy of the terms and conditions of the contract nor were they delivered to D.B. and J.T., D.M. or A.S. contrary to section 88.9 (1) of the Act.

3. M.G. breached section 2.1 of the Codes in all five cases :

a. during the encounter with D.B. and J.T., by failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

b. during the encounters with A.H. and C.S., D.M., A.S. and J.W., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract.

Retail Salesperson G.W.

Three of the complaints concerned the sales presentation of G.W.

In two of these cases the complainants testified that G.W. either explicitly misrepresented who he worked for or did not say who he was representing.

With respect to the complainant C.L., it is clear that this customer was extremely reluctant to enter into any arrangement that did not result in immediate cost savings. In response to this G.W. represented that he was selling electricity at a discounted rate and that C.L. would save money on his hydro bill if he was to sign up with Summitt. A substantial portion of the sales effort by G.W. was directed to the effect that smart meters would have on C.L.'s electricity bill. He represented that C.L. would save money in the New Year, once the smart meters were installed. In the end C.L. paid $448 as liquidated damages to cancel this arrangement.

In this case, it appears that G.W. did identify himself as a retail salesperson associated with Summitt. It also appears that it was clear to the customer that there was no relationship between Summitt and the local distribution company. However, the promise of discounted rates related to the advent of smart meters in the New Year was a false or misleading statement. This is so because the actual date of the implementation of the smart meter program, which involves not merely the installation of the smart meter itself, but also the enrollment of the local distribution company in the Time of Use regime operated by the Smart Metering Entity was certainly unknown to G.W. It served his purpose in making the sale to assert that the Time of Use regime would be in place "in the New Year", and also that that regime would necessarily result

in electricity prices higher than those currently experienced by the customer, and higher than those provided for in the Summitt offering. There was no factual basis for this assertion. The advent of the Time of Use regime can have widely varying effects on customers depending on their respective energy usage patterns.

In addition, in so far as the salesperson had embarked on a pointed price comparison, it was incumbent upon him to also factor in the effect of the Provincial Benefit, which would have been to increase the amount payable under the Summitt offering, to the extent of the Provincial Benefit.

Not only did the customer's recollection of the sales call not touch on any such discussion, these nuances would very likely have caused him to reject the Summitt package because it did not meet his immediate stated goal: an unequivocal reduction in electricity prices in the new year. The saleperson's recollection of his generic sales technique, which is his only rebuttal, certainly did not contain any mention of the kind of discussion outlined above. In the Board's view this is precisely the kind of exchange that Section 88.4 of the Act and Regulation 200/02 were intended to prohibit.

The complainant Z.P. believed that G.W. was the representative of the gas company. Z.P. indicated that he only had an interest in one very specific product under offer. That product was described as a "Green Energy Contract" at a cost of $12.99 per month. It was Z.P.'s testimony which the Board finds to be credible and reliable that at no time did he discuss enrollment in any other product respecting the supply of electricity or natural gas. His sole interest was in participating in the Green Energy Contract. The customer also indicated that he was subject to a one-year lease and would have no interest in any contract that had a term longer than that. He clearly did not appreciate that he was entering into a five-year fixed term contract for the supply of electricity and natural gas, and would not have done so had he known. The customer also testified that he did not receive copies of any of the forms he had signed, and did not recall receiving the "brochure" at all.

At the time of the reaffirmation call, the customer expected to be confirming his interest in establishing the Green Energy Contract, but nothing else. Summitt apparently repeatedly tried to procure from the customer his utility account information which he refused to provide. When the customer's lease term concluded and the customer's name was removed from the utility account by the landlord he received a letter from

Summitt demanding payment of $611 apparently as liquidated damages for the closing of his natural gas account. The status of this demand is unknown to the Board.

In the Board's view, this interaction resulted in a violations of Section 88.9 of the Act through the failure of the salesperson to provide a copy of the brochure, a violation of Section 88.4, by the enrollment of the customer in the price protection program against his stated wishes, and a violation of the Code of Conduct for Gas Marketers as a result of G.W.'s failure to unequivocally identify himself to the customer as a salesperson for Summitt, without any affiliation with Enbridge Gas, the local distribution company.

With respect to the complainant A.G., G.W. represented himself as an employee of Hydro One. This is significant because the customer had a number of relatives who work for Hydro One, and she had a generally positive attitude respecting that company. G.W. indicated that if she signed up for the electricity supply program through Hydro One, her electricity prices would never rise for five years. This would not appear to be accurate given that the Terms and Conditions contained in the "brochure" make provision for a Pool Balancing Adjustment which could result in the upward adjustment of the Summitt contractual price by up to one cent per kWh for the total volume over the term of the Agreement. At no time did G.W. indicate that he was a representative of Summitt.

When the reaffirmation call occurred, the customer testified that she believed that she was being contacted by Hydro One and was confirming an arrangement with that company. It was only after a subsequent family visit where she had described the contact from Hydro One (as she thought it was) that she began to have doubts about the arrangement. Her family members indicated that she had probably entered into a long-term fixed-price contract with an energy retailer. When she checked the documentation she realized that this was the case and took steps to try to cancel her contract. The response from Summitt was a claim for over a thousand dollars in liquidated damages, which the customer could not afford to pay. As of the date of writing this customer is still a customer of Summitt.

G.W.'s rebuttal of these claims is very unconvincing. He had no specific recollection of any of these customers. His evidence was limited to a general denial based on what he "always" or "typically" did. The fact that two of the three complainants asserted unequivocally that he had not identified himself as an agent of Summitt makes it hard to attach any credibility to his general denial. He suggested that customers had a

misconception, but his testimony suggested that he knew that the customers may not have understood the true nature of the arrangements they were entering into because of "inattention". Under the circumstances it is the Board's view that the agent has a positive responsibility to ensure that the customers clearly understand the nature of the contractual arrangements they are entering into. The Board also considers that it is the responsibility of Summitt to ensure not only that the salespersons understand that responsibility but that they have the appropriate scripts and tools necessary to discharge it. This standard reflects the Board's view that Summitt had a responsibility to ensure that the communication to the customers was clear and unequivocal given the inherent ambiguity created by the overall organization of the sale.

The Board considers that the testimony respecting the sales activity of G.W. in this case results in numerous contraventions of the Act and the applicable Codes. Specifically, the Board finds that the following contraventions have been proven on a balance of probabilities.

1. G.W. provided false, misleading and deceptive statements to all three complainants: A.G., C.L. and Z.P. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.W. did not provide a copy of the terms and conditions of the contract nor were they delivered to Z.P. contrary to section 88.9 (1) of the Act.

3. G.W. breached section 2.1 of the Electricity Retailers Code of Conduct in two cases:

    a. during the encounter with A.G., by failing to give the name of the retailer (Summitt) to the consumer and failing to advise A.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer; and

    b. during the encounter with C.L., by failing to state the price to be paid under the contract for the supply of electricity, and making representations or statements that were false or likely to mislead a consumer.

4. G.W. breached section 2.1 of the Code of Conduct for Gas Marketers by failing to give the name of the marketer (Summitt) to the consumer and failing to advise Z.P.

that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson G.S.

Three of the 19 complaints concern the conduct and sales technique of G.S. In each case, it was the testimony of the complainants that G.S. failed to identify himself as a representative of Summitt, an energy retailer, and actually either wore clothing associated with local distribution companies or otherwise represented himself as being their agent.

With respect to the complainant W.G., it appears as though G.S. specifically identified himself as an agent of the local distribution company, Oakville Hydro. The Complainant testified that G.S. did not appear to be wearing any identifiable clothing or logos. Part of his sales effort included the suggestion that W.G. was particularly lucky to be living in Oakville because "they" were offering, at no extra cost, a price protection program. According to her testimony he also represented to W.G. that were she to sign up for the price protection program the electricity price would not increase, and also that she would not be tied in to any contractual obligation. This would appear to be consistent with the evidence of G.S. himself where he indicated that he did represent to customers that they were not jumping into anything. W.G. also indicated that G.S. represented to her that in signing the registration form she was doing nothing more than confirming her name and address and indicating that she was in fact responsible for the electricity bill. W.G. understood that signing the registration form would enable her to get more information about the price protection plan. It was not her understanding that they had entered into a contract of any kind with anyone at this stage.

W.G.'s husband participated in the reaffirmation call, but W.G. confirmed in her testimony that it was not in their understanding that this was a confirmation of a five-year fixed-price contract for the supply of electricity and natural gas.

When she received an electricity bill that was much higher than expected she contacted Oakville Hydro to complain. After this, she became aware that she had entered into a five-year fixed price contract for electricity and natural gas. W.G. paid almost $1000 to cancel the comprehensive price protection plan.

G.S.'s rebuttal of the complaint associated with W.G. is unconvincing. In fact, some of his testimony corroborated elements of her complaint. He testified that he referred to the Registration Form as an ”application”, not as the contractual document it actually was. He also asserted that he did indicate to customers that they were not jumping into anything in executing the "application", that is the registration form which is a contractual document. Again, he suggested that he had no specific knowledge of any of the complaints, and could only rely on what he normally did. To the extent that G.S.’s evidence is not corroborative of the complainant’s evidence, it is not reliable in the face of the clear and distinct recollection of the complainant.

The complainants K.S. and R.S. testified that G.S. represented himself as a sales agent associated with Kitchener Wilmot Hydro. His sales pitch was linked to the installation of smart meters. It was their testimony that G.S. advised them that in order to have the smart meter "take effect" it was necessary for them to sign the Registration Form which he had described as an application.

In the course of their testimony, K.S. and R.S. asserted that the signature on the registration form had been forged and was not genuine. The Board has received such complaints in the past, and has developed a methodology to assess the authenticity of signatures. The so-called "forgery package" is made available to complainants who assert that the signature has been forged. Recourse to this process was offered to K S and R.S., but they have not availed themselves of it. As a result, the board is unable to conduct an assessment of the authenticity of the signature as part of this proceeding.

K.S. and R.S. also asserted that the reaffirmation call, which was introduced in the proceeding both as a sound recording and a transcript, had been materially altered. In the Board's view, in order to sustain such an allegation it was necessary for these complainants or Compliance Counsel to provide evidence in support. This was not done, and the assessment of the completeness and authenticity of the reaffirmation call is beyond the scope of this proceeding.

The Board is concerned, however, with these unsubstantiated assertions, and considers that they have implications for the credibility and reliability of these witnesses. Accordingly, the Board will make no finding with respect to the allegations of K.S. and R.S. with respect to their interaction with G.S.

The third complainant associated with G.S. was P.K. While P.K. offered her evidence in a straightforward and confident manner, evidence was introduced challenging her capacity to definitively recall the relevant events. Accordingly, the Board will make no finding with respect to P.K.'s allegations with respect to her interaction with G.S.

The Board considers that the evidence with respect to G.S. establishes on a balance of probabilities a number of contraventions of the Act and the Codes. Specifically the Board finds:

1. G.S. provided false, misleading and deceptive statements to W.G. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. G.S. did not provide a copy of the terms and conditions of the contract nor were they delivered to W.G., contrary to section 88.9 (1) of the Act.

3. G.S. also breached section 2.1 of the Codes by failing to give the name of the retailer (Summitt) to the consumer and failing to advise W.G. that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.B.

Four of the 19 complaints relate to the conduct and sales technique of A.B.

In all four of the cases the complainants testified that A.B. had not clearly represented himself as a representative of Summitt, an energy retailer. In fact, in three cases the complainants testified that he had misrepresented himself as being a representative of the local utility, variously Enersource and Veridian . According to the testimony of two of the complainants A.B. represented that he was there at their doorstep having installed a smart meter. The Registration Form, which he also referred to as an "application" was needed, he said, to acknowledge the installation of the smart meter. Of course, this was a complete fabrication. In fact, the fabrications respecting smart meters made during these sales calls were manifold. It appears to be consistent throughout most of the testimony of these complainants that A.B. made no attempt to actually or accurately describe the implications of signing the Registration Form. It appears as though he

consistently misrepresented the form as being in the nature of an acknowledgment respecting the smart meter.

As to the complainant P.S., she testified that A.B. had told her that he was there to get her to sign documentation to set up a smart meter at her premises. Her recollection was particularly detailed in so far as she recalled that he advised her that the previous owners of the property, who had recently moved out, did not want smart meters and he had therefore waited for the new occupant, that is P.S., to sign the necessary documentation. She indicated that A.B. referred to a newspaper article respecting the upward pressure on electricity prices after smart meters were implemented. She testified that there was no specific discussion whatsoever with respect to a fixed price five-year contract for the supply of gas or electricity. Her account is further corroborated by her evidence to the effect that she had the documents left with her by A.B. and after reading them she realized that they were of very different effect than he had represented. She immediately contacted Summitt to cancel the arrangement. She then filed a complaint with the Ontario energy Board. In the Board's view this series and chronology of events lend support to her version of events.

It was the evidence of complainant V.T. that A.B. represented himself to be an agent of Enersource, the local distribution company. According to her testimony, he referred to a newspaper article which suggested that there is considerable discontent surrounding the implementation of smart meters. According to her testimony, A.B. represented that if she “locked in”, she would be saving money. It was her belief that when she signed the registration form that she was signing to receive more information about the price protection program that she believed the local utility was offering. She did not appreciate that she had signed a contractual document for a five-year fixed price contract for the supply of electricity. She indicated that A.B. had not provided her with a copy of the brochure.

The reliability of V.T.’s version of events is supported by her next steps. Shortly after the reaffirmation call, which she did not appreciate to be a confirmation of the fixed-price contract, she contacted her local utility Enersource to reconfirm everything that happened on the phone during the course of that call. She learned that the call was not from her local utility. It was at that point that she called Summitt to cancel the contract. Up until this time it was her belief that the only long-term contract that was in issue was for the supply of electricity. But sometime after this it became apparent that she had also been enrolled in a gas supply arrangement. She complained to Summitt and to the

Ontario Energy Board. Initially the Board considered that insofar as she had answered “yes” to all of the questions during the reaffirmation call that she was bound to the contract. Finally, she paid the liquidated damages assessed by Summitt to cancel the gas contract.

With respect to the misrepresentation by A.B. of his identity, the complainant T.V.’s evidence with respect to her exchange with A.B. was quite similar to that described by V.T. According to her evidence A.B. had represented himself to be an agent of Veridian, the local distribution company, who had just replaced her meter. It was her evidence that A.B. was actually wearing a Veridian jacket. According to her testimony she was asked to sign a form to acknowledge the agent's presence at her home. There was no discussion whatsoever with respect to natural gas. It was her evidence that she did not receive any documents from A.B. or from Summitt with the exception of the signed registration form, which she believed to be a mere acknowledgment of his visit. It appears that a reaffirmation call was made to the residence and a man answered in the affirmative to all of the questions. About two weeks after this, she found the registration form, discussed it with her husband and then called the number on the form thinking that it was Veridian’s number with the intention to switch back to system supply. This action is supportive of her testimony that she believed at all times that she was dealing with Veridian, her local distribution company. In fact, the number was Summitt’s number and she was advised that if she wanted to cancel the contract she would be required to pay a sum in liquidated damages. She has not paid liquidated damages and at the present time she does not know the status of her "account" with Summitt.

As to the complainant Z.A., her evidence is strikingly similar to the evidence of the other two complainants who had dealings with A.B. Her testimony is to the effect that A.B. identified himself as an agent for Veridian, the local distribution company and that he was there with respect to smart meters. Once again, according to the evidence of this complainant there was no explicit discussion of the electricity or gas supply contracts. She testified that A.B. presented her with the registration form and indicated that it needed to be signed in order for the smart meter to be installed. He did not indicate that it was a contract for the supply of natural gas and electricity. A.B. did indicate that she would receive a telephone call that was in the nature of a credit check designed to enable the utility to set up an account. Z.A. indicated that she called Veridian two days after the visit from A.B. and learned that A.B. did not represent her local distribution company. Z.A. then called Summitt to cancel the contract. Her contract was canceled by Summitt without penalty.

A.B.'s rebuttal of these complaints is utterly unconvincing. Not only are there substantial areas of consistency in the evidence of the complainants, he had no specific recollection of any of these sales. The consistent modus operandi reflected in the testimony of these witnesses lends their testimony reliability and credibility. The Board considers it noteworthy that even customers whose contracts have been canceled without penalty or liquidated damages wanted to pursue their complaints in the public interest. This is the case for example with Z.A., who persisted with her complaint notwithstanding that Summitt had canceled her contract. This certainly lends reliability to her evidence and her complaint, which was made without any prospect of gain.

Accordingly the Board finds that the following contraventions of the Act and the Codes have been proven on the balance of probabilities with respect to the sales activity of A.B.:

1. A.B. provided false, misleading and deceptive statements to all four complainants: Z.A., P.S., V.T. and T.V. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.B. did not provide a copy of the terms and conditions of the contract nor were they delivered to V.T. or T.V. contrary to section 88.9 (1) of the Act.

3. A.B. breached section 2.1 of the Codes in all four cases by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Retail Salesperson A.T.

Four of the 19 complaints are attributable to the conduct and sales technique of A.T. In three of the cases the complainants testified that A.T. represented that it was necessary to sign the Registration Form in order to ensure continued gas service at their homes. This of course was completely inaccurate.

Two complainants testified that A.T. made specific representations respecting the price of natural gas. Their testimony was consistent in describing his sales pitch as including either a general statement respecting the upward pressure on natural gas prices or very specific representations that the price of gas would rise, for example, to 42 cents per cubic meter in the near term. At the time the representation respecting the 42 cents per cubic meter price was made the actual rate charged by Enbridge gas for the supply of natural gas was between 17 and 23 cents per cubic meter.

In three of the cases, the prospective customers canceled any relationship with Summitt very shortly after A.T.'s visit. This means two things: first that the misrepresentations made by this retail salesperson were so obvious that customers knew almost immediately that there was something fundamentally wrong with this sales call. Second, it means that these complainants had nothing whatsoever to gain by pursuing their complaints. They did so in the public interest, which lends credibility and reliability to their testimony.

In the fourth case, Summitt made a demand for about $1000 in liquidated damages in order to cancel the contract ostensibly entered into by J.M. J.M. testified that she could not afford to pay that amount, and she continues to be bound to the Summitt Price Protection Plan.

As to complainant J.M., her testimony was to the effect that A.T. identified himself as being "from the gas company" and believed that he was wearing a shirt bearing the logo of either Direct Energy or Enbridge, Enbridge being the local distribution company. She testified that A.T. specifically asked her if she wanted to continue receiving gas services at the home. When presented with the registration form, she believed it to be a continuation of her account with the local distribution company, and not a fixed-price contract for the supply of gas and electricity. She indicated that there had been no discussion whatsoever about electricity with A.T.

J.M. acknowledged receiving a reaffirmation call, believing it to be a confirmation that she wanted to continue gas supply at her home. Shortly after the reaffirmation call, she started to receive several calls a day requesting that she provide the caller with her electricity account number. At this point, she contacted Enbridge to complain. This supports her in her evidence that she believed that she merely arranged a continuation of gas supply from her local distribution company. Enbridge advised her to contact Summitt or the Ontario Energy Board, which she did. She was advised by Summitt that

in order to cancel the contract she would be required to pay liquidated damages. At the time of this decision she continues to be bound to the price protection plan.

Complainant J.M(1) testified that A.T. did identify himself as an agent of Summitt. According to his testimony he was told by A.T. that because the previous owners had a contract for gas supply with Summitt that he was obliged to do so as well, and could not choose to not enter into the arrangement. It was his impression that his gas supply would be terminated if he did not enter into the arrangement. This element is consistent with that described by J.M. where a similar suggestion about termination of gas service was reported. This complainant did receive a copy of both the registration form and the brochure. Shortly after the visit, this complainant reviewed the documentation more carefully and realized that he had executed what appeared to be a fixed-price contract for the supply of gas and electricity. Shortly thereafter, after doing some online research, he contacted Summitt to cancel the arrangement. His contract was canceled without penalty, but J.M. (1) has persisted with his complaint.

The testimony of the complainant L.M. is strikingly similar to that of J.M.(1). L.M. testified that A.T. did identify himself as an agent from Summitt and was wearing the Summitt logo. He was also advised in a manner similar to that reported by J.M. and J.M. (1) that he had no choice but to continue an arrangement with Summitt that had begun with the previous occupant of the home. L.M. testified that he specifically asked the salesperson if he had a choice to deal directly with his local distribution company for the supply of gas, and was advised by A.T. that he did not have a choice. He signed the registration form in order to get A.T. to leave his house, but immediately felt that there was something fundamentally wrong with the representations made by A.T. Accordingly, L.M. called Summitt to cancel the contract. Like J.M. (1) L.M. has persisted in his complaint, even though there is no prospect of any advantage to him in doing so.

The complainant A.Z. testified that A.T. identified himself as a Summitt agent at his doorstep. According to this witness, A.T.’s sales pitch was directed primarily to price comparison. A.T. told the witness that the price of natural gas would be rising to over 42 cents per cubic meter but that Summitt was offering price protection at 38 cents per cubic meter. The witness indicated that there was no discussion whatsoever with respect to electricity supply. A short time later, A.Z. actually compared the price offering from Summitt with the current Enbridge rate which was between 17 and 23 cents per cubic meter. At that point A.Z. contacted Summitt to cancel the arrangement which was accomplished without penalty. Like L.M. and J.M. (1) A.Z. has persisted in his

complaint. The signal event in this exchange from a regulatory point of view is the price comparison.

A.T.’s rebuttal of these complaints is not convincing. His representation of the price trend for natural gas was particularly telling. It was clear that A.T. did not have an accurate appreciation of the current natural gas pricing in the market. It appears that his knowledge of natural gas pricing was gleaned almost exclusively from the graphic presentation on the brochure, which was not designed to provide accurate information respecting natural gas prices prevailing at the time of sale.

The consistency of the testimony of these complainants respecting A.T.’s representation that they had really no choice but to enter into the price protection program lends credibility and reliability to the complaints.

It was clear from the testimony of the witnesses, and A.T. himself, that new homeowners were specifically targeted in these sales efforts. One can only conclude that the retail salespersons and their employers saw a specific advantage in targeting this category of prospective customers. While there is no evidence to the effect that Summitt knew about this focus on new homebuyers, it would certainly have been aware of it if had monitored the retail salespersons effectively. Such customers would have no reliable information respecting the utility costs associated with the properties, the nature of any arrangements made by their predecessors at the property, or the binding nature of those arrangements on themselves. In such circumstances, the Board finds that it was incumbent upon Summitt to ensure that the sales technique used by its representatives took this into account in a manner that was sensitive to this deficiency. In fact, it appears that the sales effort was focused on these customers specifically because they would be more likely to be confused about the true state of affairs of their utility supply. This has implications for the adequacy of Summitt's due diligence defence. In order to be effective, its due diligence system should have addressed this issue forthrightly, and provided its sales agents with appropriate scripts and information necessary to ensure that customers understood the nature of the arrangements they were entering into.

The Board finds that with respect to A.T.’s sales the following contraventions of the Act and Codes have been proven on the balance of probabilities.

1. A.T. provided false, misleading and deceptive statements to all four complainants: J.M., J.M.(1), L.M. and A.Z. and thereby engaged in an unfair practice contrary to section 88.4 of the Act.

2. A.T. did not provide a copy of the terms and conditions of the contract nor were they delivered to J.M. contrary to section 88.9 (1) of the Act.
3. A.T. breached section 2.1 of the Codes in all four cases as follows:

    a. during the encounter with J.M., by failing to immediately and truthfully give the name of the retailer and marketer (Summitt) to the consumer, failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer;

    b. during the encounters with J.M.(1), L.M. and A.Z., by failing to advise the consumer that Summitt was offering a contract for the supply of natural gas and electricity and that Summitt is not the consumer's distributor, failing to state the price to be paid under the contract for the supply of natural gas and electricity, and making representations or statements that were false or likely to mislead a consumer.

Issuance of an Order, Corrective Orders and Penalties

The Board has made a number of findings above that Summitt through its retail salespersons has contravened the Act and the Codes.

The Board's authority to issue an order respecting compliance derives from sections 112.3 and 112.4 of the Act. The Board's authority to impose monetary penalties, which are referred to as administrative penalties in the Act, derives from section 112.5 of the Act. In addition, the imposition of any administrative penalty is governed by Ontario Regulation 331/03.

In determining the appropriate remedy in this case, the Board has been guided by the "protective and preventive" aim of regulatory provisions identified by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*:

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[16]

Suspension and Audit

In its submissions, Compliance Counsel urges the Board to make an order suspending Summitt's door-to-door sales activities immediately pending completion of an audit of its operations and processes relating to these activities and the implementation of any other recommendations the Board may make.

Summitt, while denying liability with respect to all of the allegations, argues in the alternative that the Board ought not to impose a suspension of its door-to-door activities. In its view, such an order would have the effect of imposing sanctions on persons not responsible for the contraventions, and is otherwise inappropriate given the circumstances illuminated during the course of this proceeding.

It is the Board's view that it certainly has the authority pursuant to section 112.3 and 112.4 of the Act to make an order suspending the door-to-door sales activity of Summitt. Section 112.3 provides the Board with broad authority to prevent further contraventions and section 112.4 permits the Board to grant "an order suspending or revoking" a person's licence.

However, the Board does not believe that suspension of Summitt's door-to-door sales activities is the appropriate approach in this case. As indicated by the introduction of its 14 Point Program on June 30, 2010, Summitt appears to recognize that some of its past practices were deficient and that improvement is needed. In light of this development,

[16] *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 219.

the Board will require Summitt to procure a review and audit of the sales practices of its retail salespersons in accordance with the following terms:

- The review and audit shall involve a review of 20 transactions entered into between September 1 and September 30, 2010 chosen at random.
- The entity undertaking the review and audit shall be an independent third-party recognized as an expert in conducting such activities.
- The review and audit will assess compliance by Summitt and its agents in the conduct of these transactions, in light of the 14 Point Program described elsewhere in this Decision.
- The product of that review and audit will be a report which will be filed with the Board and Compliance Staff.
- The review and audit will contain a conclusion respecting the extent to which Summitt and its sales agents have substantially complied with the 14 Point Program.

If the conclusion of the review and audit is that Summitt and its agents have substantially complied with the 14 Point Program, the Board will take no further action with respect to this aspect of its decision. On the other hand, if the conclusion of the third-party review and audit is that Summitt was not in substantial compliance with the 14 Point Program, the Board will then reconvene to receive submissions from Summitt and Compliance Staff respecting next steps. In such circumstances, suspension or revocation of Summitt’s door-to-door sales activity will be at issue, in addition to any other remedial direction the Board may impose.

Compensatory and Restitutionary Remedy

Compliance Staff also urged the Board to make orders requiring Summitt to provide “restitution” to customers who have been harmed by contraventions found to have been proven in this case.

Summitt argues that the Board has no such power and that any order providing for restitution of any form for affected customers is beyond the Board's authority. Summitt's position on the subject is rooted in its view that unless the Board had been given he

specific power to grant a compensatory or restitutionary remedy it is beyond its jurisdiction to do so. Summitt points to sections in the Act that direct retailers or marketers to provide restitution to customers as indicating that if the legislature had intended to provide a broader power to the Board, it would have done so. It also suggests that a proposed amendment to the Act giving authority to the Superior Court, not the Board, to make compensatory and restitutionary orders upon conviction of an offence as indicating that it was not the legislature's intention to bestow that power on the Board under the current legislation.

The Board finds that subsection 112.3 of the Act is sufficiently broad and clear in its effect to permit the Board to make orders to remedy a contravention by providing compensation and restitution to parties affected by the contravention. That section reads as follows:

> 112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to ….
> (a) remedy a contravention that has occurred:

In the Board's view, this provision was intended to provide the Board with significant flexibility in crafting an appropriate order to remedy a contravention. This approach is consistent with the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* where the Court found that a similar broadly worded provision of the Canada Labour Code provided "the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the Code and to fulfil its purposes and objectives."[17]

In the Board's view, it would be very odd and inconsistent with the "purposes and objectives" of the Act if the Board were to find, as it has, that specific contraventions of the statute have been committed by Summitt but be unable to remedy those breaches by ordering compensation and restitution, particularly where the breach resulted in material and quantifiable costs to innocent consumers.

The evidence in this case shows that customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer.

[17] *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369 at paras. 64-65.

To permit Summitt to retain that money is inappropriate by any measure. Clearly, if the Board was precluded from making such orders, or if section 112.3 of the Act was less clear than it seems to be, the Board would have no option but to ignore this aspect of the circumstances arising in this case. But it is our view that section 112.3 of the Act does contemplate the making of compensatory and restitutionary orders.

Accordingly, the Board directs that:

- In cases where the Board made a finding of non-compliance, the Board directs Summitt to cancel without any penalty or cost whatsoever the electricity or natural gas supply contracts entered into by each of the complainants where it has not already done so, and to compensate the customers who have been subject to those contracts an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing RPP prices, in the case of electricity supply contracts, and system gas prices, in the case of gas supply contracts over the period, together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order . This aspect of our order affects D.B. and J.T., A.H.and C.S., D.M., A.S., J.W., A.G., C.L., Z.P., W.G., Z.A., P.S., V.T., T.V., J.M., J.M.(1), L.M., and A.Z.

- In cases where the Board made a finding of non-compliance and the customer was required to pay liquidated damages to cancel their electricity and/or natural gas supply contracts, Summitt shall repay each of the complainants the amount of those liquidated damages together with interest on that amount equal to the prime rate charged by Summitt's bank within 90 days of the date of this Decision and Order. This aspect of our Decision affects C.L., W.G., and V.T.

- There were a couple of complainants that testified their status with Summitt was unclear. The Board directs Summitt to provide a letter to those complainants indicating unequivocally that Summitt has no outstanding claim with respect to these customers. To the extent that Summitt may have referred some matters affecting complainants who testified in this proceeding to collection agencies, Summitt is directed to terminate all such proceedings and to take all steps necessary to ensure that the credit rating of the affected customers does not reflect any outstanding claim from Summitt. This aspect of our decision affects Z.P. and T.V.

Compliance Staff should ensure that all of the complainants entitled to restitution receive a copy of this decision.

Administrative Penalty

As noted above, the imposition of administrative penalties arises through the operation of section 112.5 of the Act as informed by Ontario Regulation 331/03.

Pursuant to Regulation 331/03 the Board is required to make a determination as to the extent of the deviation from the requirements of the respective enforceable provisions. The regulation provides a schedule which categorizes contraventions as major moderate or minor, and provides a range of penalty for each category.

In making this determination the Board is also required to take into account the extent to which the adverse effects of the contravention have been mitigated by the person who committed the contravention, whether the person who committed the contravention has previously contravened any enforceable provision, and whether the person who committed the contravention derived any economic benefit from the contravention. The Board is also empowered to take into account any other criteria that it considers relevant in this determination of the extent of deviation.

The Board has never before had to engage in this characterization of contraventions, and accordingly there is no guidance for the panel from previous decisions. Nor does the Board consider it particularly useful for the purposes of this case to review the amounts of fine imposed in other jurisdictions for like contraventions. It is the Board's view that the imposition of administrative penalties pursuant to section 112.5 of the Act is a matter that needs to be determined within the context of this marketplace and its rather unique circumstances.

Compliance Counsel argues that the contraventions in this case were consistently in the major category. In its view, the use of unfair practices designed to ensnare consumers into contractual arrangements they would not otherwise have entered into is a serious, hence major, contravention.

Summitt argues that these contraventions fall within the minor or moderate category of severity. It based this view on several factors. First, it suggests that the complaint- to-registration ratio for the retail salespersons is very low. This means in its submission

that the contraventions should be dealt with as isolated events of sales agent conduct for which Summitt Energy exercised an appropriate degree of due diligence. Summitt also suggests that the effect of the contravention in a number of the instances is minor. It bases this submission on the observation that a number of the customers terminated the agreement during the statutory cooling off period or prior to the reaffirmation call. In other cases, Summitt unilaterally released the customers from their presumed contractual obligations.

These contraventions were clearly committed with a view to economic gain both on the part of the retail salespersons and Summitt itself. The consequences of entering into a long-term fixed-price contract can be very serious. This element of household expense can be virtually doubled as a result of the energy price protection plans, especially those respecting the supply of electricity.

On the other hand, the Board notes that there were a number of occasions where Summitt appeared to recognize that something very seriously had gone wrong with the particular sale and cancelled the contract unilaterally, without penalty.

It is the Board’s intention that Summitt will be denied any economic benefit from these transactions as a result of the Board’s restitutionary order under section 112.3. of the Act.

The Board does not consider Summitt’s due diligence program in place during the relevant period to be in any degree in mitigation of penalty. The due diligence program was inadequate for the purposes of avoiding liability and is also inadequate in providing mitigation of sentence. The due diligence program did not adequately take into account the dynamic and complex nature of the market, and the potential for confusion by customers, a confusion materially contributed to by the organization of the sale devised by Summitt.

However, with a few exceptions the Board is of the view that the contraventions proven in this case fall into the high end of the moderate category both with respect to the effect of the contravention, and the nature of the contravention.

The exceptions relate to the representations made by retail salespersons to the effect that continued service from the local distribution utility was contingent upon signing the contract. In the Board's view, these unfair practices achieve a higher level of turpitude,

and fall within the major category with respect to the nature of the contravention, and the moderate category with respect to the effect of the contravention. It is not determinative of this analysis that some customers avoided binding contractual relations. It was certainly the intention of the retail salespersons that the sale would be effective, notwithstanding that it had been procured through a seriously improper representation. Further, the Regulation stipulates that it is the "potential" for adverse effects on consumers, not actual effects that should govern the characterization of the contraventions.

This assessment leads to our finding that for 15 of the violations of Section 88.4 of the Act found to have occurred the administrative penalty should be set at $9,000 per contravention. For the two contraventions which the Board considers to be Major the penalty is set at $13,500.

In addition, the Board has found there to be eight contraventions of Section 88.9 of the Act. The Board considers each of these to fall into the moderate category for both potential to adversely affect consumers and the extent of deviation from the requirement. Accordingly, the administrative penalty for these violations is set at $9,000 for each contravention.

The Board considers the violations of the respective Codes to be subsumed in the contraventions of the Act delineated above.

Costs

The Board will require Summitt to pay the costs associated with the prosecution of the Notice to a ceiling of $65,000.

Implementation

This panel will remain seized of this case for the purposes of the audit process, and to provide the parties with guidance with respect to the implementation of any aspect of this Decision.

IT IS THEREFORE ORDERED THAT:

1. Summitt shall take all necessary step to ensure compliance with sections 88.4 (2) (c), 88.4 (3) (c) and 88.9 (1) of the Act and section 2.1 of the Codes.

2. Summitt shall pay an administrative penalty in the amount of $234,000.

3. Summitt shall procure a review and audit of the sales practices of its retail salespersons in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

4. Summitt shall file the result of the review and audit ordered in item No. 3 above with Board by January 15, 2011.

5. Summitt shall remedy the individual contraventions found by the Board in accordance with all of the terms and conditions contained in the Decision portion of this Decision and Order.

6. Summitt shall pay the Board's costs of and incidental to, this proceeding including the costs incurred by Compliance Counsel to a ceiling of $65,000 immediately upon receipt of the Board's invoice.

7. In the event of a dispute over the terms of this Order, including the interpretation of any of the provisions of this Order, Summitt or Compliance Counsel may apply to the Board to adjudicate the dispute.

DATED at Toronto, November 18, 2010
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

File No. EB-2017-0007

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

ONTARIO ENERGY BOARD

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