



Solmon Rothbart Goodman LLP
Barristers

August 18, 2009

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Attention: Board Secretary

Ontario Energy Savings L.P.
6345 Dixie Road
Suite 200
Mississauga, Ontario
L5T 2E6

Attention: Nola Ruzycki

Re: **IN THE MATTER OF AN APPLICATION by Ontario Energy Savings L.P.
("OES") to change its name to Just Energy Ontario L.P.**

**WRITTEN SUBMISSIONS OF SOLMON ROTHBART GOODMAN LLP ("SRG")
DATED AUGUST 18, 2009**

On June 30, 2009, OES made an application to the Ontario Energy Board ("OEB") to change its name as set out above. SRG submits this written representation in opposition to the proposed name change.

OVERVIEW

The position we advance on behalf of a client that is in the process of preparing a complaint against, OES, and all consumers of electricity in the Province of Ontario, is that the OES request for leave to change its name should be denied for reasons which include the following:

1. OES was effectively fined for fraudulent conduct of its agents in 2003.
2. OES has a significant record of complaints filed against it at the OEB.
3. Part of the OEB's Objectives and Visions are as follows:

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Randall M. Rothbart, B.A., LL.B.

Mark L. Goodman, B.A., LL.B.

Avrum D. Slodovnick, LL.B.

Nancy J. Tourgis, B.Sc.H., LL.B.

James P. McReynolds, B.Comm., LL.B.

Jonathon M. Kappy, B.Comm., LL.B.

Raffaele Sparano, B.A.(Hon.), LL.B.

Matthew Valitutti, B.A., LL.B.

Cameron J. Wetmore, B.A.C.S., LL.B.

Marina Stoeva, Hon. B.Sc., LL.B.

Member of the New York Bar **

FILE NUMBER EB-2009-0257

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- “To protect the interest of consumers with respect to prices and the adequacy, reliability and quality of electricity services.
 - The Board envisions a viable and efficient energy sector with informed consumers, and works towards this vision through regulation that is effective, fair and transparent.”
4. To permit this name change would permit OES to effectively bury its past convictions for fraud and the significant past complaints lodged by consumers as against it. As such, it is against the public interest.

OES Forgery Fines Imposed by OEB – 2003

In about 2003, OES was fined about \$75,000.00 for violating the Board’s code of conduct for marketers. Apparently there were a number of forged contracts signed by dishonest agents of OES. The OEB prepared a Press Release dated June 21, 2003. The event was newsworthy and reported in the Toronto Star on June 21, 2003 (**Tab 1**).

Notwithstanding that any company professes to have made various changes to its policy, there continue to be a very significant number of complaints made over time as against OES relating to its agents conduct and contract management. In fact, the trend seems to be increasing.

It is respectfully submitted that it is in the public’s best interest to ensure that OES not be permitted to change its name so that there will be continuity in respect of Ontario consumers ability to review the company’s past record and to determine whether they wish to engage the services, of OES and execute their energy contract.

It may be important for the Board to appreciate the fact that when an individual attempts to change its name under the *Change of Name Act* R.S.O, c. C. 7 (**Tab 2**), section 6(2) (g) (g.1) (h) (h.1) (h.2) of the statute provides that any past criminal convictions or even criminal charges as against the individual are a mandatory consideration in deciding whether in fact the change of name can be granted.

Neither a person or, in this instance, a corporation that is being regulated in an industry that is supposed to be transparent to the consumer, should be entitled to ignore or bury its past by attempting to change its name, even if it is under the umbrella of a “rebranding”.

Consumer Complaints as Against OES

It is submitted that the OEB certainly recognizes the fact that it is most important for energy consumers in Ontario to be able to look to a company’s past conduct and practices when deciding whether to engage the services of that company. This, of course, is the reason for the OEB’s tracking and reporting of complaints by consumers as against electricity retailers including OES. These can be found in comparison graphs on the OEB’s website (**see Tab 3**).

There appears to be a disturbing general increase in the number of complaints made by low volume consumers in respect of contract management and agent conduct as against OES, which itself appears to consistently be the second largest target of complaints by the energy consuming public

Ontario Civil Proceedings – Ontario Superior Court

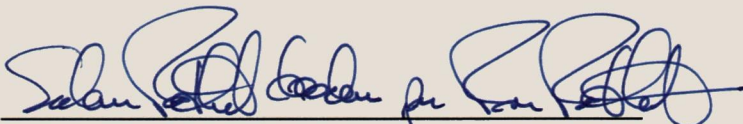
While OES has been involved in a number of civil proceedings relating to its contractual relations with customers (**Tab 4**), perhaps the most noteworthy case was recently reported as *767269 Ontario Ltd. v. Ontario Energy Savings L.P.* [2007] O.J. No. 3 No. 3211, Court File no. 07-CV-330164PD3 in the Ontario Superior Court of Justice (**Tab 5**). The decision of the Honourable Mr. Justice D. M. Brown (who apparently taught energy law and regulation prior to being appointed to the bench) is noteworthy given its interpretation of the yearly renewal provisions contained in the OES energy contracts. As indicated by His Honour, OES describes this mechanism as an “effortless renewal option” under which the customers contract would automatically renew for a year if the customer did not respond to the letter sent by OES. His Honour felt that this yearly contract renewal mechanism was “curious” and determined that it was in effect a “negative option”. He found that OES’ evidence throughout the proceeding shifted in relation to the renewal provision and finally held that it was not effectively credible or supportable. The case represents an important statement to the public about OES’ stance on its renewal provisions, how they interpret them and the length OES will go to in litigation to defend claims notwithstanding the fact OES was found not to have any credible evidence of the fact that any renewal notice was even sent by them. These are relevant consideration for consumers to review in terms of making an informed decision as to whether they wish to deal with this company.

We understand that this matter was appealed to the Court of Appeal and the appeal was dismissed (**Tab 5**).

Conclusion

Given the Board’s Objective and Vision of having informed energy consumers and a transparent process, it is respectfully submitted that the interests of public are best protected by ensuring that the name of OES is not permitted to be changed based upon a corporate rebranding program that has the effect of burying its past convictions, fines and complaints made by the public. OES’ interest in rebranding itself should not trump the interests of the Ontario energy consuming public whose best interests are clearly protected by OES being required to maintain its existing name.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Solmon Rothbart Goodman LLP

RMR/ngc

Tab 1

[Ontario Tenants Rights](#)[Ontario Hydro Issues](#)[Ontario Electricity Articles](#)[Web site search](#)

Click here for those who are looking for [Energy Saving Conservation Tips](#).

Energy marketers fined over forgeries

Phony signatures were detected on 31 contracts Companies question timing of penalties

Toronto Star - June 21, 2003
by John Spears — Business reporter

The two biggest energy marketers in Ontario have been fined a total of \$232,500 after investigators discovered a string of forged signatures on energy contracts.

The Ontario Energy Board, or OEB, has fined Direct Energy \$157,500 and Ontario Energy Savings Corp., or OESC, \$75,000 for violating the board's code of conduct for marketers.

The energy board has notified major police forces, including all forces in Greater Toronto, of the information it has should the police want to pursue a criminal investigation.

The board decided that 21 contracts sold by Direct Energy agents were forgeries, as were 10 OESC contracts.

Paul Massara, president of Direct Energy, said in an interview that all the forgeries took place between 14 and 24 months ago, and the company has worked hard in the meantime to clean out the bad apples in its sales force.

Brennan Mulcahy, president of OESC, said the forgeries cited by the energy board on his company's agents were dated in 2001 and early 2002.

Six of the seven agents who signed the customers to the forged contracts had already been identified as problem agents and

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terminated by OECS prior to the energy board investigation, he said.

Massara and Mulcahy questioned why the energy board had chosen to levy the fines so long after the forgeries were committed.

The province has since passed a law requiring marketers to confirm contract signings with a follow-up call, and giving customers up to 30 days after signing to change their minds and cancel a contract.

"It's somewhat peculiar that the OEB would levy fines a year and a half later when effectively the problem was dealt with" by the new law and the efforts of the retailers, Mulcahy said.

Mark Garner, director of licensing for the board, acknowledged that the marketers have made "significant efforts," including weeding out the bad agents, cancelling the forged contracts, reimbursing customers for losses and contacting other customers signed by the dishonest agents.

Garner said the delay occurred in part because, until about 18 months ago, complaints flowed in a haphazard stream to local police forces or the energy board. Then a protocol was signed where all complaints about energy marketers were funnelled to the energy board. It took time for the board to send suspected forgeries for examination by forensic experts, then track down customers and obtain signed statements from them.

At that point, Garner said, he made a judgment call that fines were needed despite the time lapse. "We couldn't ignore it," he said.

Door-to-door energy marketers blanketed many Ontario neighbourhoods as the province prepared to open its electricity market to competition in May, 2002. The marketers prompted a wave of consumer complaints about dishonest sales tactics.

[Visit the Toronto Star newspaper today](#)

Read a 5 parts series about Direct Energy:

- [Province told of Direct Energy consumer concerns in U.S.](#), Introduction, Calgary Herald, May 16, 2004
- [From Texas to Ontario, energy consumers have been stung](#), Part 1, Calgary Herald, May 16, 2004
- [Direct Energy Part Two: "Get the hell off my porch"](#), Part

2, Calgary Herald, May 16, 2004

- [Direct Energy says it reacts to consumer complaints swiftly](#), Part 3, Calgary Herald, May 16, 2004
- [Alberta government welcomes Direct Energy](#), Part 4, Calgary Herald, May 16, 2004

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<u>Ontario Landlord and Tenant Q&A</u>		<u>Housing and poverty reports</u>		<u>US Housing Information</u>
<u>Tenant rights and social justice</u>		<u>Renters municipal issues</u>		<u>Tenant help & lobbying</u>
<u>Apartment safety & security</u>		<u>Tenant health: Toxic mold, cockroaches</u>		<u>Consumer Information</u>
<u>Tenant association organizing</u>		<u>Utility costs: Ontario hydro, natural gas</u>		<u>Ontario MPP list</u>

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FOR IMMEDIATE RELEASE

June 20, 2003

ELECTRICITY RETAILERS AND GAS MARKETERS PENALIZED FOR LICENSING VIOLATIONS

Toronto – As a result of investigations carried out by the Ontario Energy Board's director of licensing, administrative penalties were levied today against Direct Energy Marketing Limited (Direct Energy) and Ontario Energy Savings Corp. (OESC). The two companies were served notices of an administrative penalty for contravening licensing requirements and were fined a total of \$232,500. The director imposed a penalty of \$157,500 to Direct Energy for 21 contraventions and a penalty of \$75,000 to OESC for 10 contraventions.

The penalties were levied against Direct Energy and OESC for violations to section 2.1.4 of the Electricity Retailer Code of Conduct and Code of Conduct for Gas Marketers. These sections require marketers and retailers to obtain a consumer's written permission to switch energy suppliers. In the director's opinion, the energy contracts in question did not contain the signatures of the consumers. The signatures on the contracts purporting to be that of consumers have now been determined to be forgeries. The penalty applied to each licence violation is \$7,500.

In July 2002, the director of licensing and various police services announced a protocol to deal with complaints regarding the marketing of energy supply contracts and allegations of forgery by retail agents. The director has also developed a protocol to be followed by energy marketers and retailers when a forgery is found to have occurred.

"Both Direct Energy and OESC have made significant efforts to comply with the protocol including removing the agents in question from service, cancelling the contracts in dispute and contacting other customers that were signed up by the agent to confirm the validity of their contracts," says Mark Garner, director of licensing for the Board.

"However, our investigations led us to conclude that the size of the problem was unacceptable and was undermining consumer confidence in Ontario's retail energy markets," continued Garner. "While both Direct Energy and OESC have made significant progress to address this issue, consumers have told the OEB that there must be accountability in this market. And I agree."

Police forces have been informed of the findings of the director.

Both Direct Energy and OESC are entitled to a hearing before the Board on the decision of the director.

The Ontario Energy Board is an independent, quasi-judicial agency of the Government of Ontario responsible for regulating Ontario's natural gas and electricity sectors. Operating as a regulatory, adjudicative tribunal, the Board, amongst other things, sets rates for monopoly gas and electricity utilities, licenses all electricity market participants and low volume gas marketers, authorizes the construction of electricity transmission lines and natural gas pipelines, approves the terms and conditions of gas franchise agreements and monitors the competitive electricity market.

For further information contact:

Tom Park
Ontario Energy Board
(416) 440-7697

Tab 2

Français

Change of Name Act

R.S.O. 1990, CHAPTER C.7

Consolidation Period: From May 14, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 11, ss. 1, 2.

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Definitions**1.** In this Act,

“change” means any change by way of alteration, substitution, addition or abandonment;
 (“changement”)

“child” means a person under the age of eighteen years; (“enfant”)

“court” means the Ontario Court of Justice; (“tribunal”)

“file” means file in the office of the Registrar General; (“déposer”)

“joint declaration” means the declaration referred to in subsection 3 (6); (“déclaration
 commune”)

“prescribed” means prescribed by the regulations made under this Act; (“prescrit”)

“Registrar General” means the Registrar General under the *Vital Statistics Act*; (“registraire
 général”)

c. C.7, s. 5 (4).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 5 is amended by adding the following subsection:

Same

(4.1) If the consent that cannot be obtained or is refused is the consent required under subsection (2.1), the application under subsection (4) may be made to the Ontario Court of Justice, the Family Court or the Superior Court of Justice. 2009, c. 11, s. 2 (2).

See: 2009, c. 11, ss. 2 (2), 53 (2).

How application determined

(5) The court shall determine an application under subsection (4) in accordance with the best interests of the child. R.S.O. 1990, c. C.7, s. 5 (5).

Notice to persons with access

(6) The applicant under subsection (1) shall give notice of the application to every person who is lawfully entitled to access to the child. R.S.O. 1990, c. C.7, s. 5 (6).

Notice to spouse, etc.

(7) An applicant who proposes to change the child's surname to the surname of the applicant's spouse or of a person with whom the applicant has filed a joint declaration that has not been revoked shall give the spouse or other person notice of the application. R.S.O. 1990, c. C.7, s. 5 (7).

PROCEDURE

Application

Definition

6. (1) In this section,

“application” means an application made under subsection 4 (1) or 5 (1). R.S.O. 1990, c. C.7, s. 6 (1).

Contents of application

(2) An application shall be in the prescribed form and shall state, by way of statutory declaration, in respect of the person to whose name the application relates,

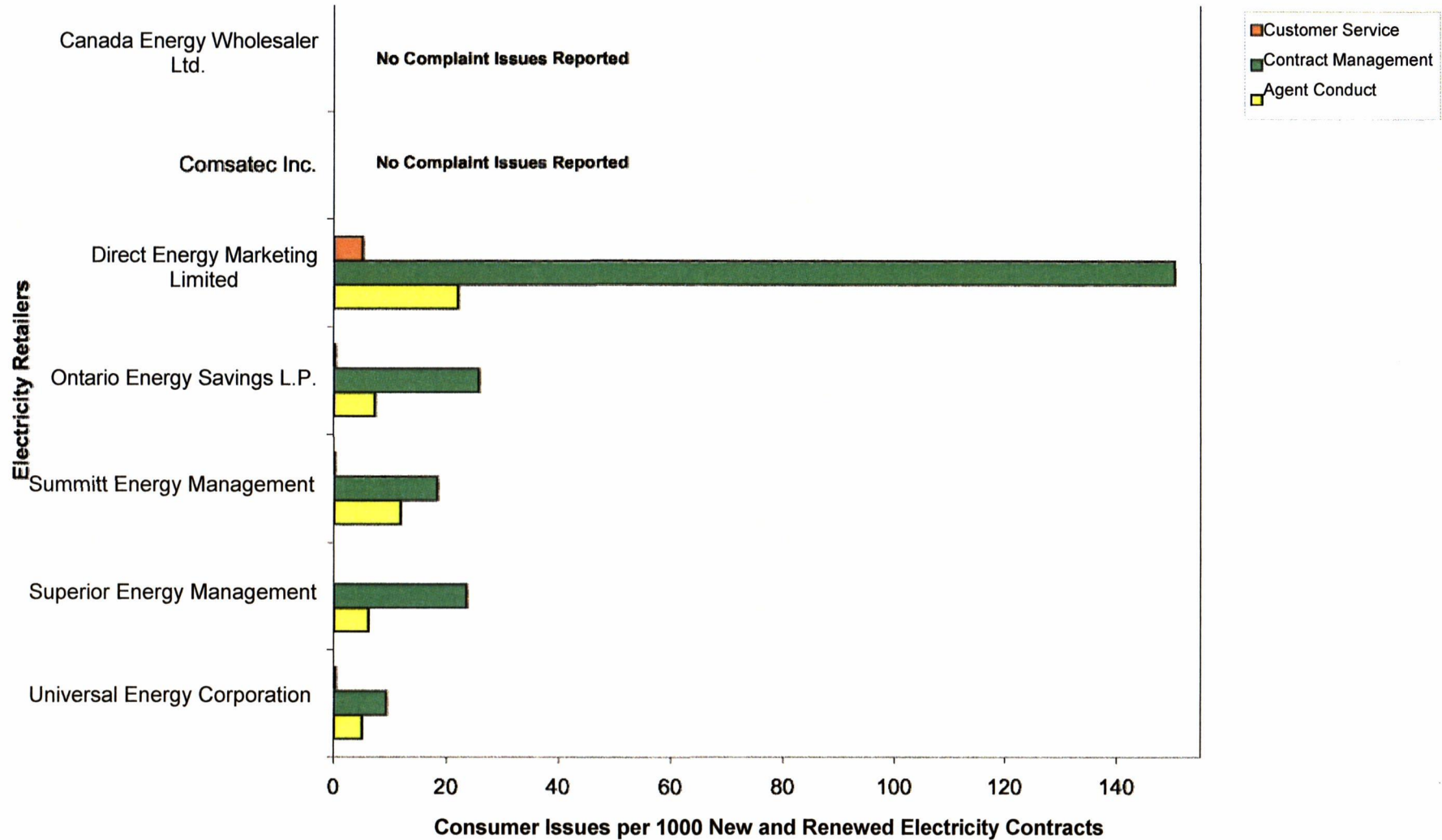
- (a) the person's date and place of birth;
- (b) if the person is married, the full name, before marriage, of the person's spouse and the date and place of the marriage;
- (c) if the person has filed a joint declaration that has not been revoked, the full name of the other person who made the joint declaration, its date and the place where it was made;
- (d) the full names, and all former names, if known, of the person's father and mother;
- (e) the length of the person's residence in Ontario, and the person's current address;
- (f) in the case of an application under subsection 5 (1),
 - (i) that the applicant has lawful custody of the child,

- (ii) that no court order or separation agreement prohibits the change of name that is sought,
- (iii) whether a court order or separation agreement provides that the child's name shall not be changed without a person's consent and, if so, particulars of the order or agreement;
- (g) particulars of every criminal offence of which the person has been convicted, except an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada);
- (g.1) particulars of every criminal offence of which the person has been found guilty and has been discharged, except an offence in respect of which the *Criminal Records Act* (Canada) requires that the record be purged;
- (h) particulars of every offence of which the person has been found guilty and for which an adult sentence has been imposed under the *Youth Criminal Justice Act* (Canada), as described in section 117 of that Act;
- (h.1) particulars of every outstanding law enforcement order against the person, including a warrant, prohibition order, restraining order, driver's licence suspension, probation order and parole order, of which he or she is aware;
- (h.2) particulars of every pending criminal charge against the person of which he or she is aware;
- (i) particulars of every unsatisfied order for payment of money, unsatisfied execution and pending court proceeding, other than a proceeding referred to in clause (h.2), against the person of which he or she is aware;
- (j) particulars of every,
 - (i) lien against or security interest in the person's personal property, and
 - (ii) financing statement that is registered under the *Personal Property Security Act* and names the person as debtor,of which he or she is aware;
- (k) whether the person is an undischarged bankrupt and, if so, particulars of the bankruptcy;
- (l) particulars of any change of name made before the current application;
- (m) the proposed name;
- (n) the reasons for the change of name;
- (o) that every consent required for the application has been given or has been dispensed with by the court;
- (p) that every person entitled to notice of the application has been given notice;
- (q) that the application is not made for an improper purpose; and
- (r) any other information that is prescribed. R.S.O. 1990, c. C.7, s. 6 (2); 1997, c. 17, s. 2 (1-3); 2006, c. 19, Sched. D, s. 1 (1, 2).

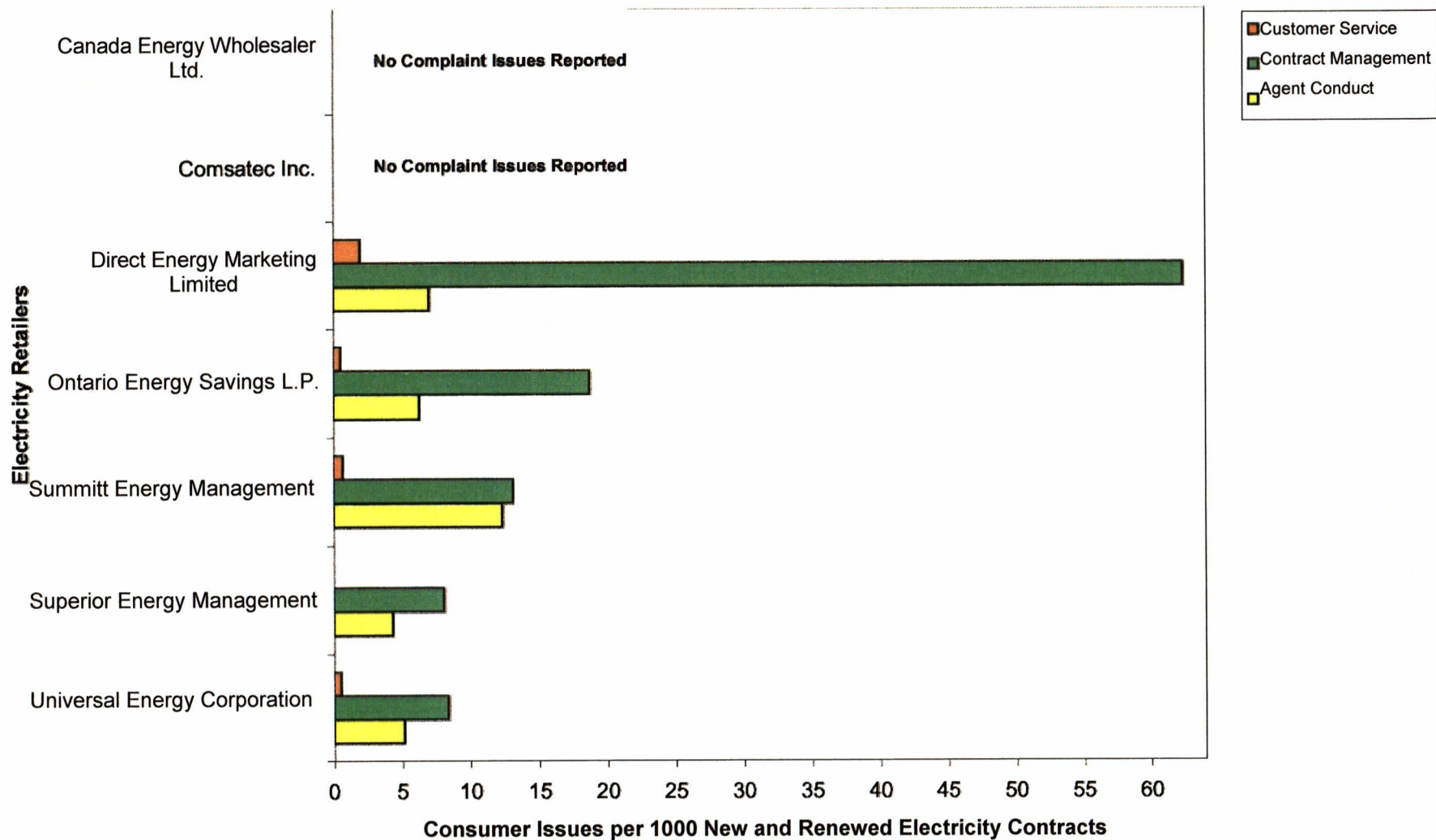
Accompanying statement

Tab 3

**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of Electricity Retailers
April 1 - June 30, 2009**



**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of
Electricity Retailers
January 1 - March 31, 2009**



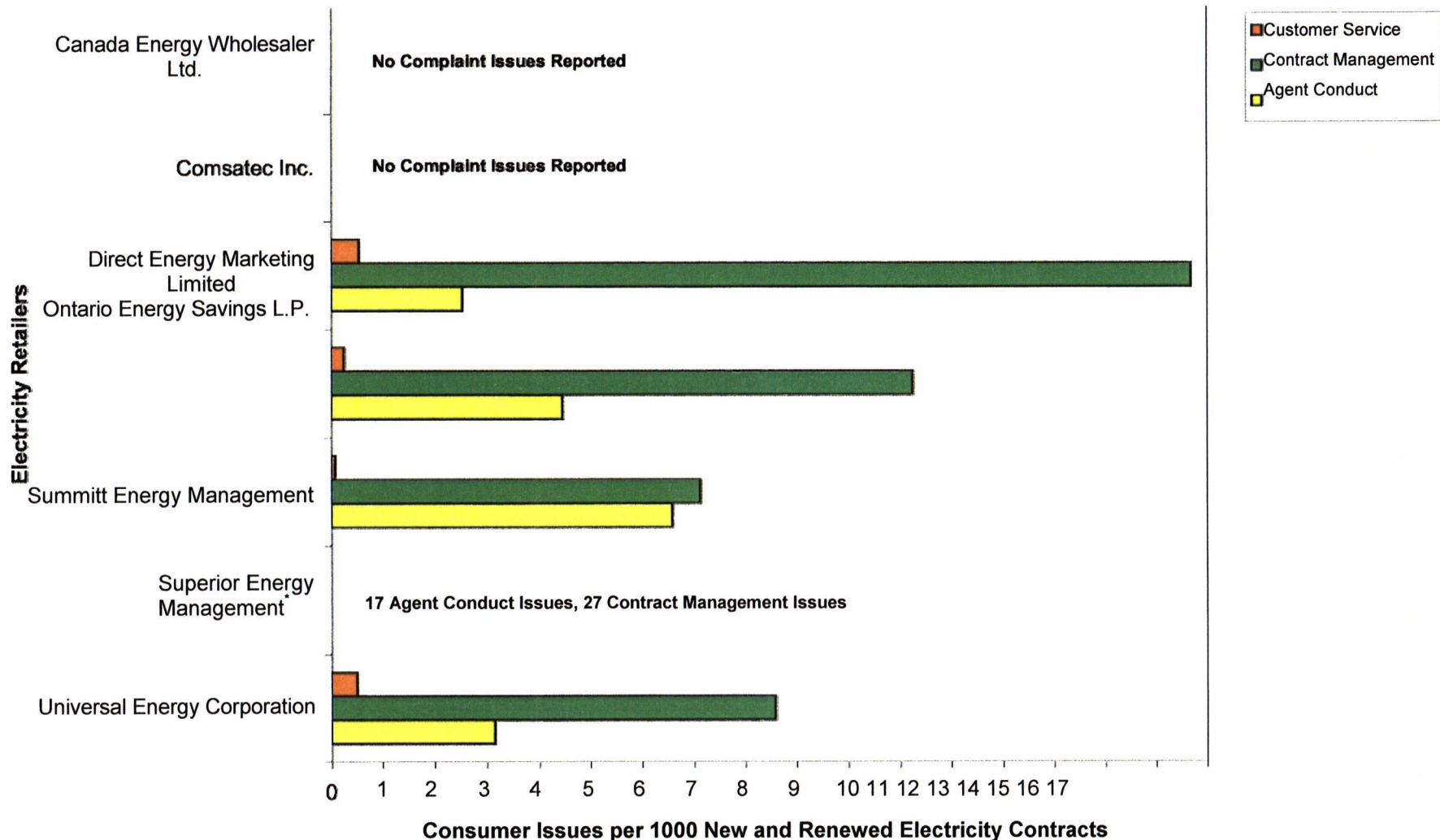
If Data is Not Submitted by the Retailer/Marketer

* Please note that the number of issues reflects the total issues received by the OEB in relation to the business activities of this retailer or marketer and not the number of issues per 1000 new enrollments and renewals. Information relating to the number of new enrollments and renewals was not made available by this retailer or marketer.

If the Retailer/Marketer was not Active in Enrolling Customers in the Reporting Period

**Please note that the number of issues reflects the total issues received by the OEB in relation to the business activities of this retailer or marketer and not the number of issues per 1000 new enrollments and renewal. This retailer/marketer had no enrollments or renewals in the reporting period.

**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of
Electricity Retailers
October 1, 2008 - December 31, 2008**



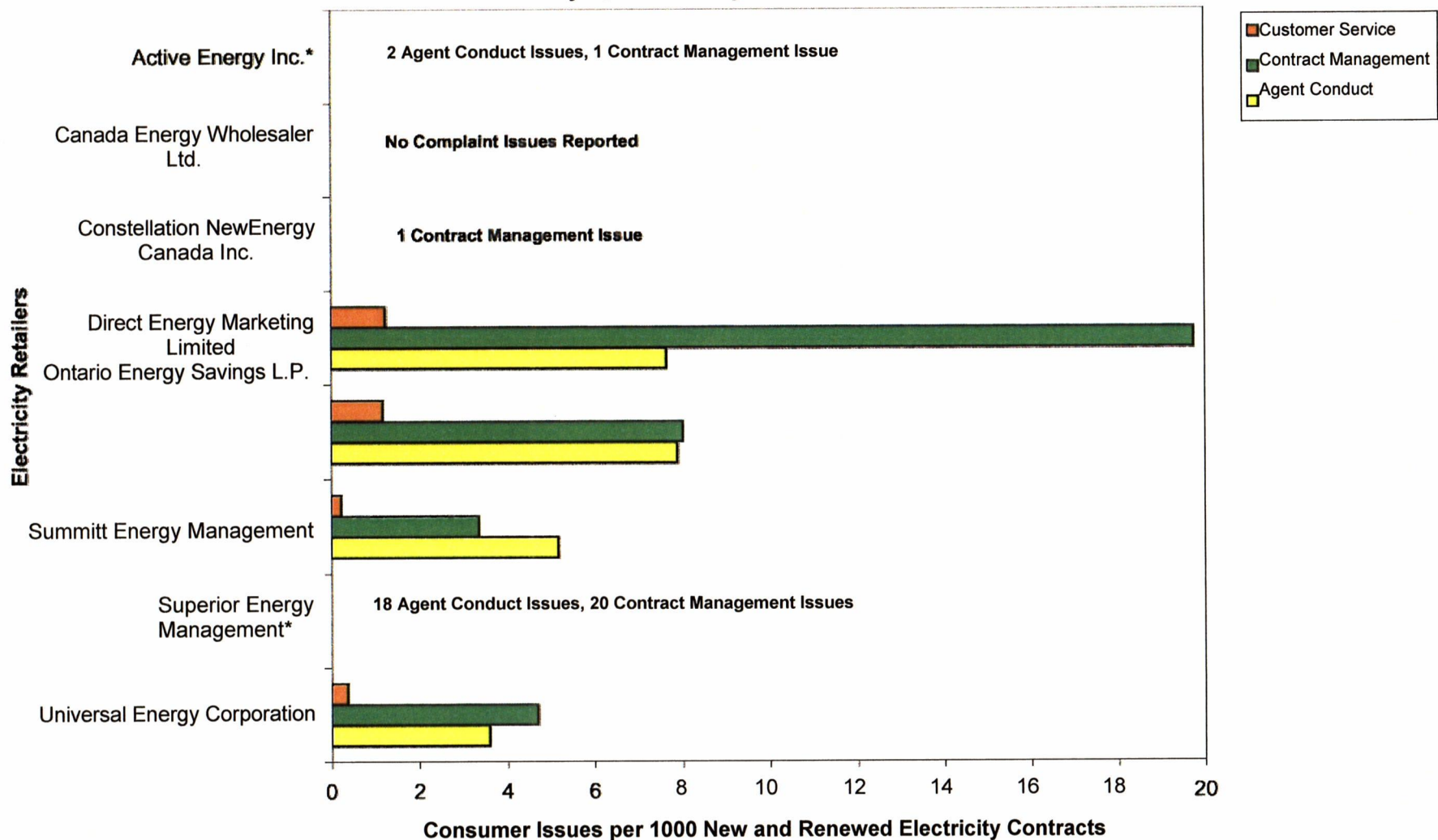
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**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of
Electricity Retailers
July 1, 2008 - September 30, 2008**



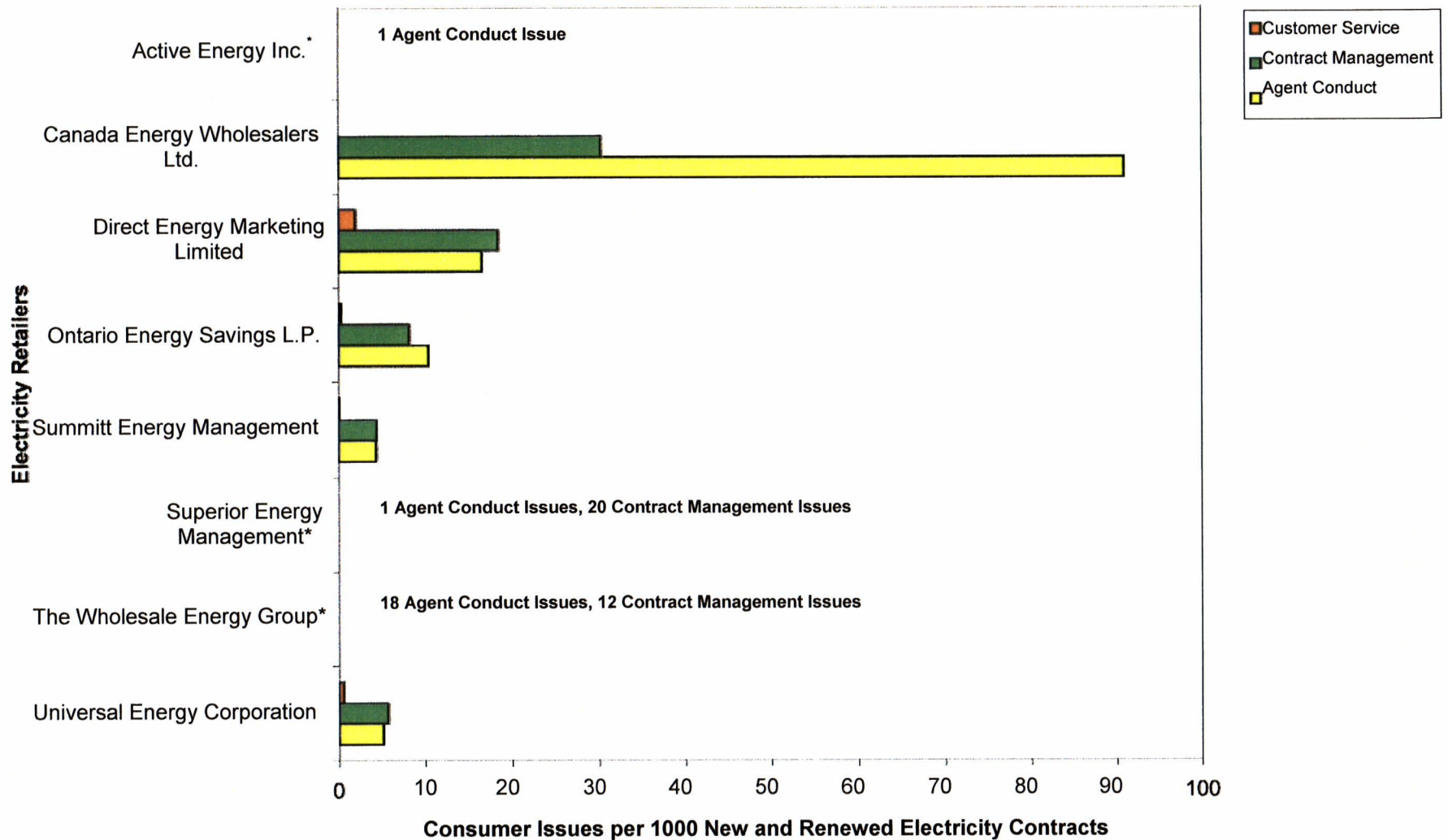
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Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of Electricity Retailers April 1, 2008 - June 30, 2008



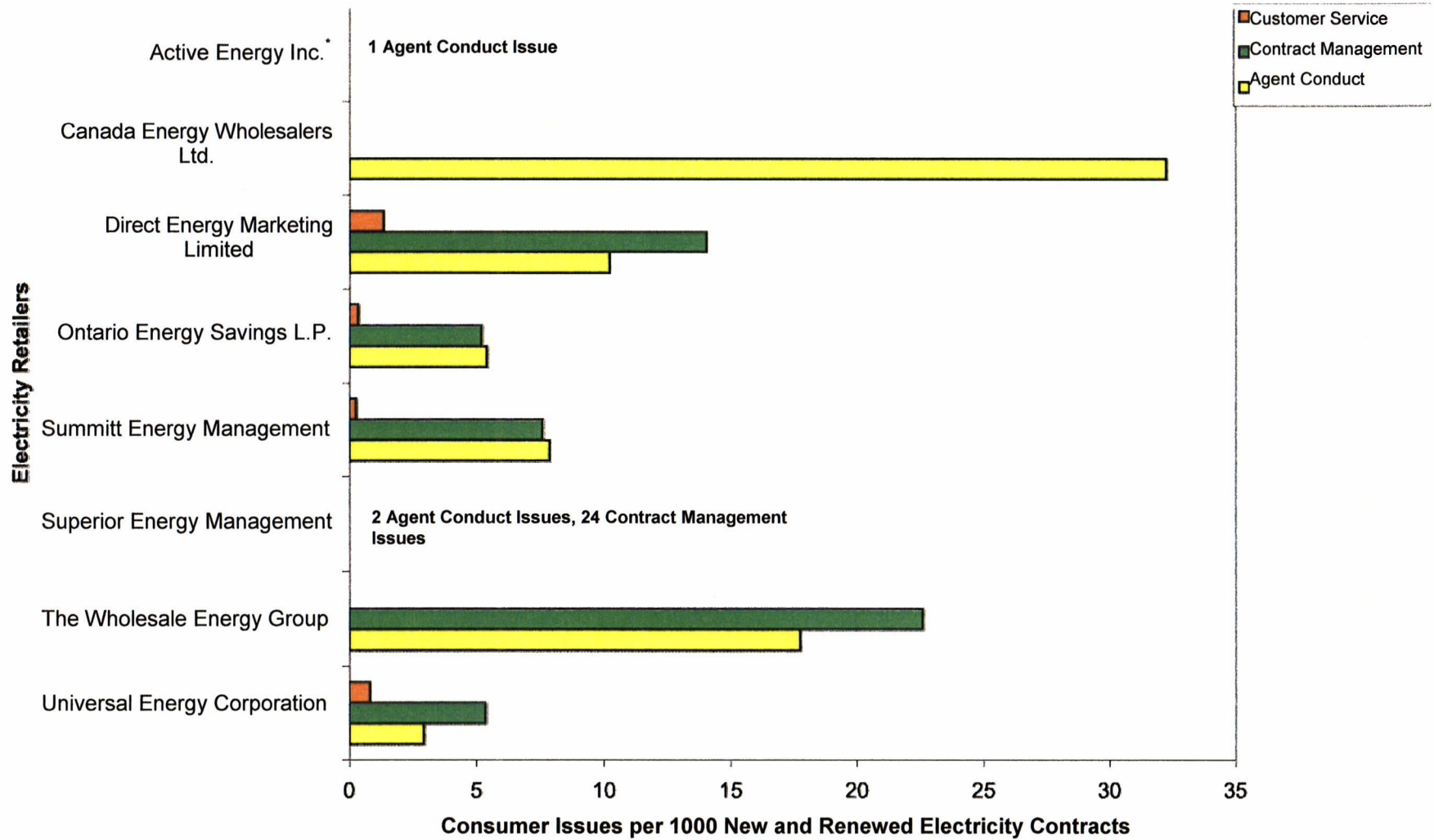
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**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of
Electricity Retailers
(January 1 - March 31, 2008)**



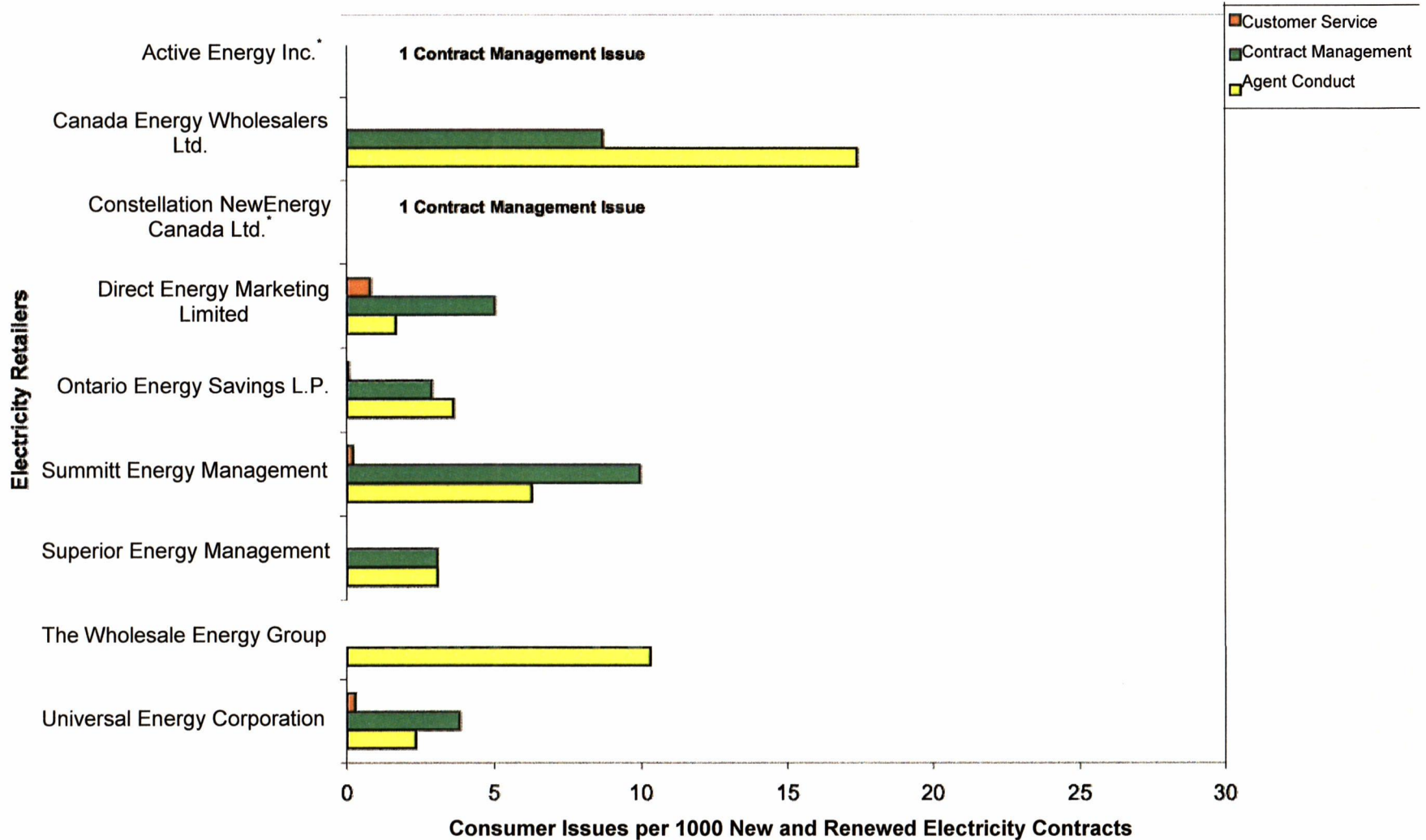
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**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of
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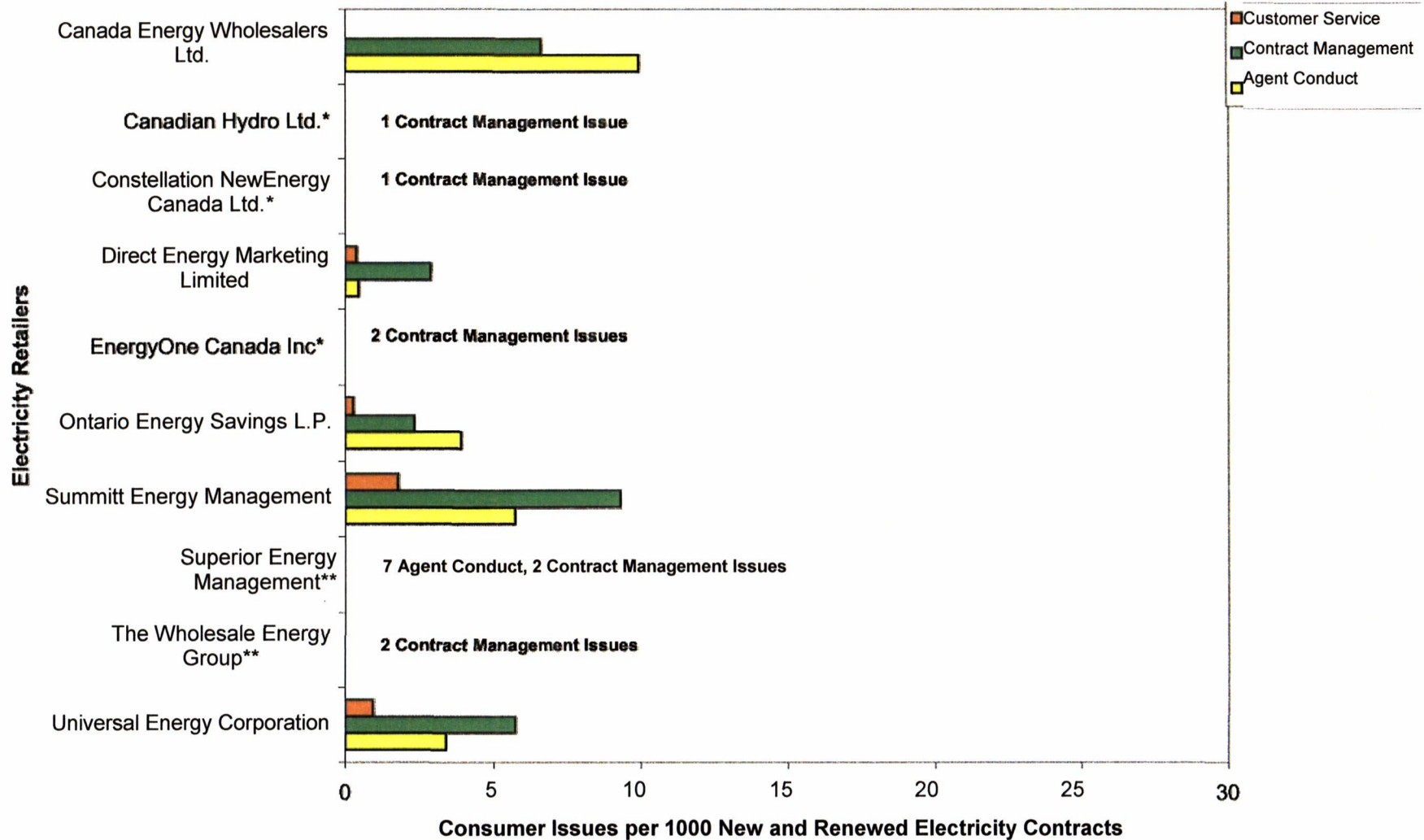
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(July 1 - Sept 30, 2007)**



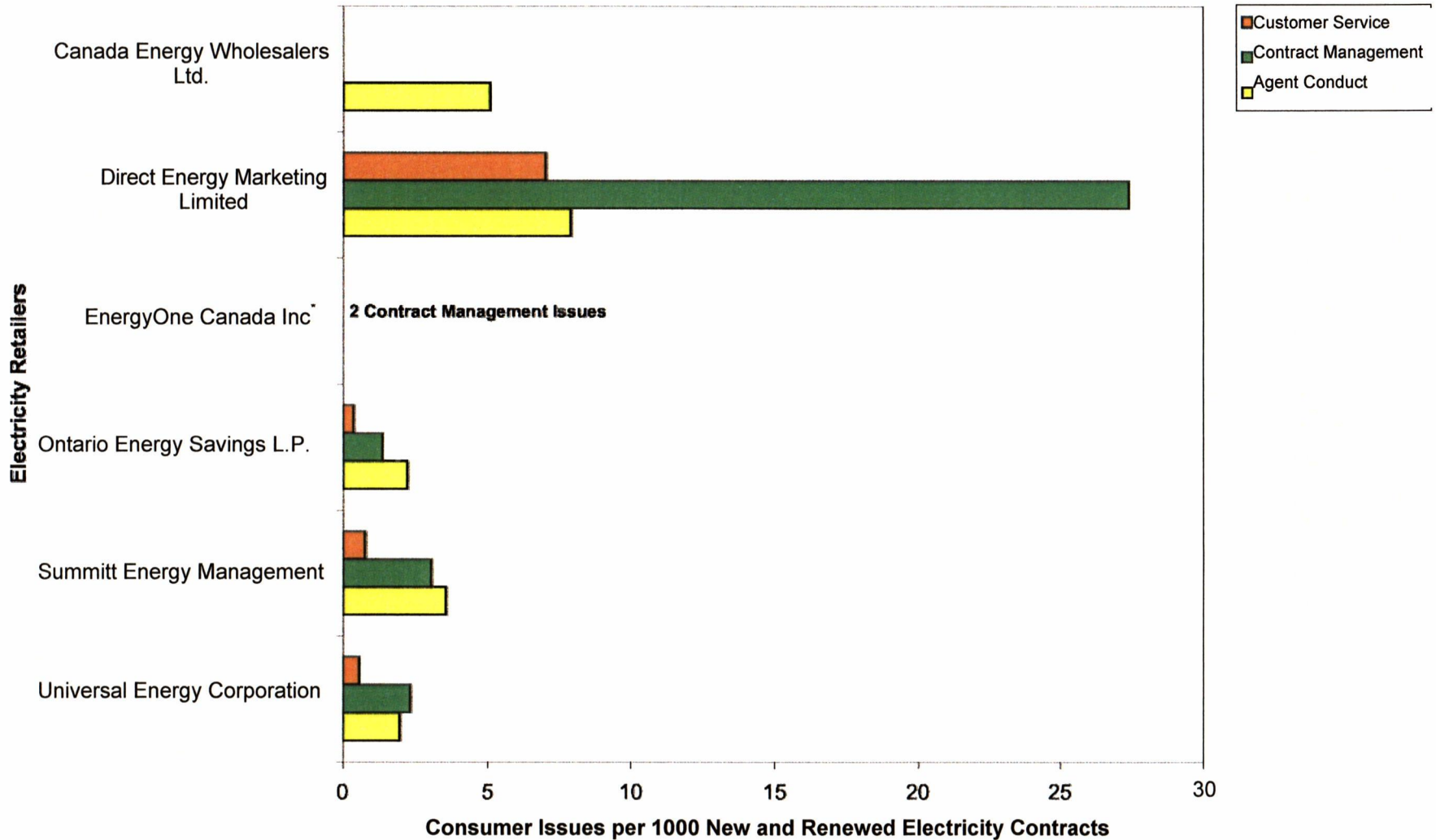
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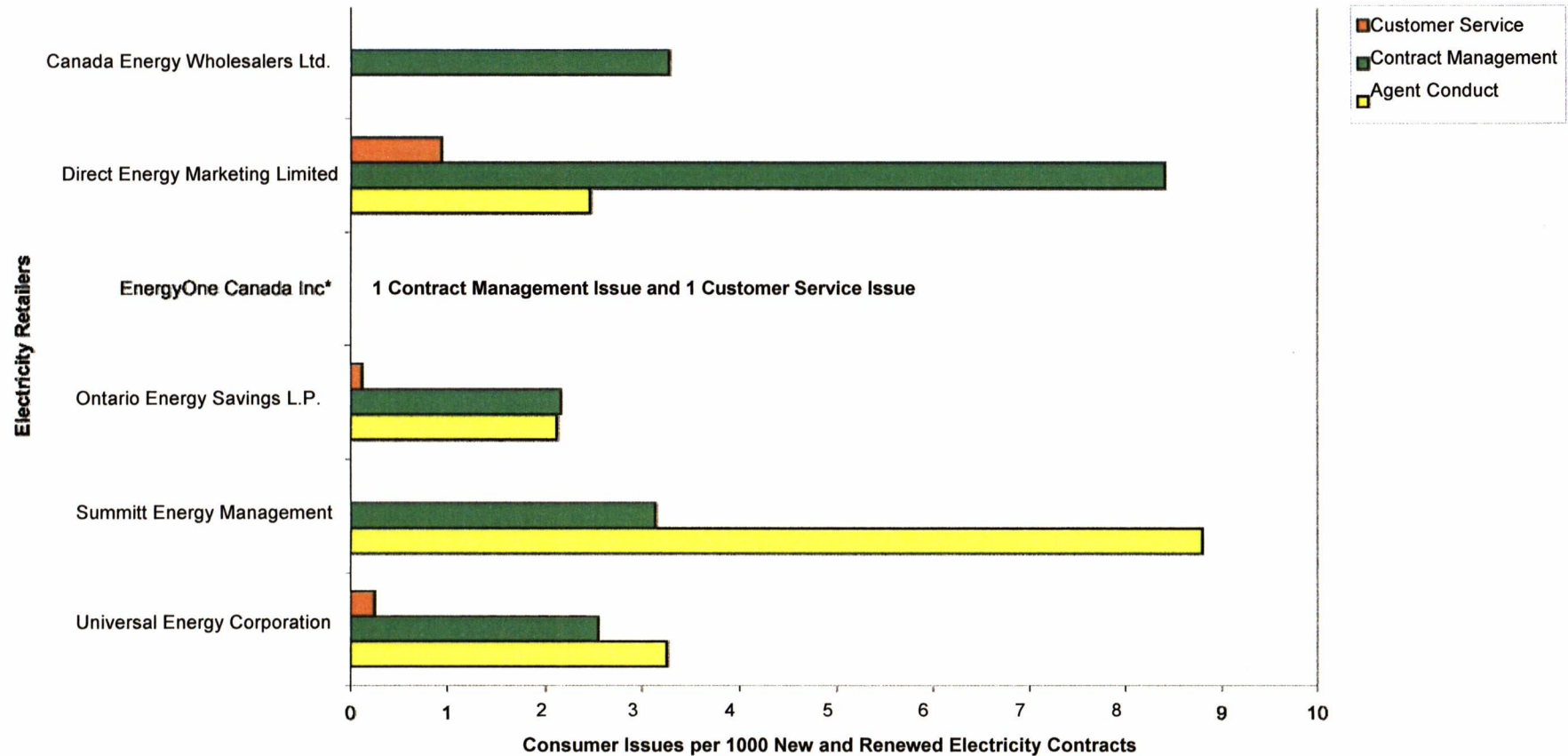
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If Data is Not Submitted by the Retailer/Marketer

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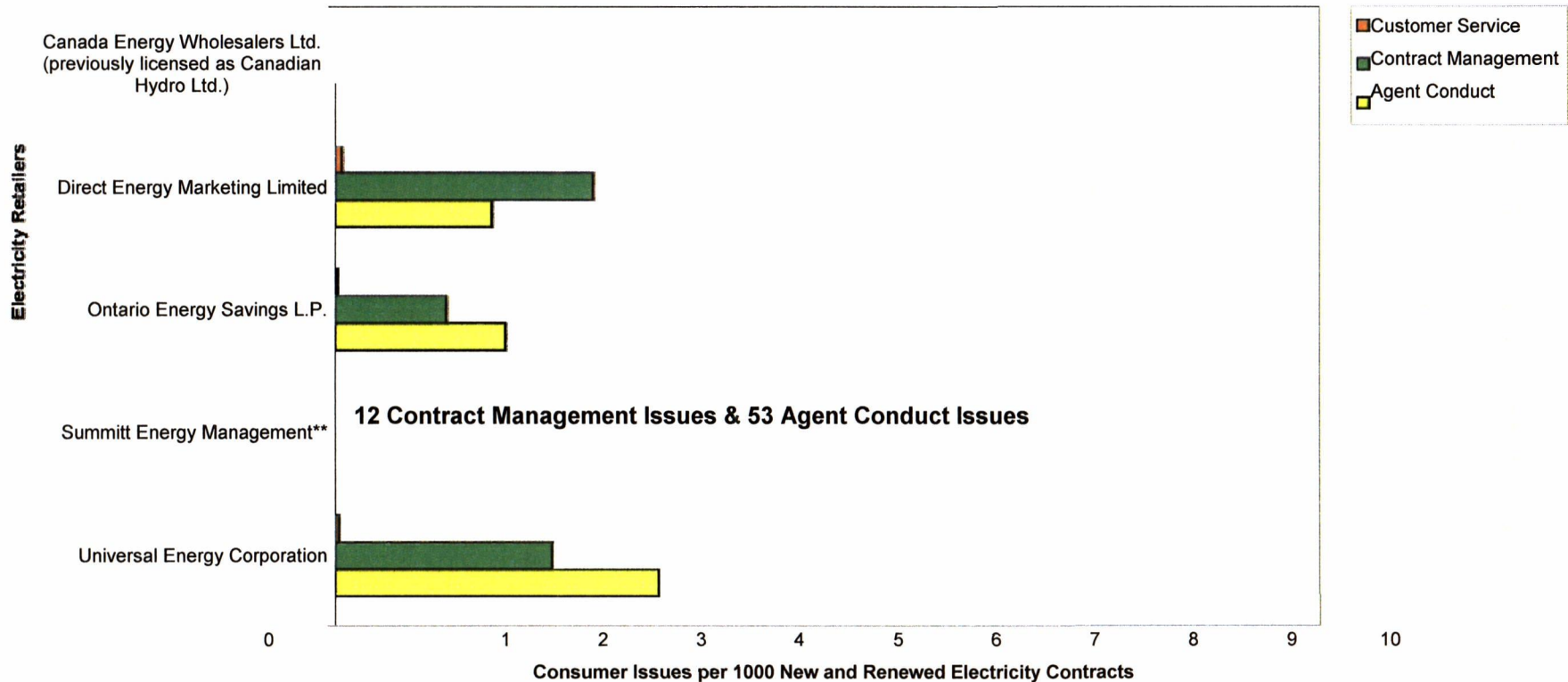
Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of Electricity Retailers (January 1 - March 31, 2007)



If Data is Not Submitted by the Retailer/Marketer

* Please note that the number of issues reflects the total issues received by the OEB in relation to the business activities of this retailer or marketer and not the number of issues per 1000 new enrollments and renewals. Information relating to the number of new enrollments and renewals was not made available by this retailer or marketer.

**Low Volume Consumer Issues Received by the OEB in Relation to the Business Activities of Electricity Retailers
(October 1 - December 31, 2006)**



If Data is Not Submitted by the Retailer/Marketer

* Please note that the number of issues reflects the total issues received by the OEB in relation to the business activities of this retailer or marketer and not the number of issues per 1000 new enrollments and renewals. Information relating to the number of new enrollments and renewals was not made available by this retailer or marketer.

If the Retailer/Marketer becomes Active in Enrolling Customers in the Reporting Period

**Please note that the number of issues reflects the total issues received by the OEB in relation to the business activities of this retailer or marketer and not the number of issues per 1000 new enrollments and renewal. This retailer/marketer became active in enrolling customers in the reporting period.

Tab 4

Public View Terminals

Today is: Aug-18-2009

Court Name: Toronto
Court Address: 393 University Av 10th fl, Toronto, ON, M5G1E6



The following information is not available on the Public View Terminal.

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- *Adoptions (FA)* cases
- *Young Offenders Act or Youth Criminal Justice Act (YOA & YCJA)* cases
- *Child and Family Services Act (CFSA)* cases
- Any case sealed, or partially sealed by order of the court
- Any case where a publication ban is mandatory and / or has been ordered by the court

If you wish information on the types of cases listed above, you must go to the public counter.

20 case(s) found.

Case Number	Case Title	Surname/Business	Given Name
CV00CV1904330000	Wal-Mart Canada Inc vs. Ontario Energy Savings Corporation	Ontario Energy Savings Corporation	
CV03CV2454920000	Samuel Property Mgmt. Ltd. vs. Ontario Energy Savings Corp.	Ontario Energy Savings Corporation	
CV03CV2454930000	Samuel Property Mgmt Ltd. vs. Ontario Energy Savings Corpora	Ontario Energy Savings Corporation	
CV03CV2598770000	TRIVEST DEV. CORP VS ONTARIO ENERGY SAVINGS CORP	Ontario Energy Savings Corp.	
CV03CV2603650000	GREATER TORONTO AIRPORTS VS ONTARIO ENERGY SAVINGS	Ontario Energy Savings Corporation	
CV04CV2623630000	IKEA CANADA LIMITED VS. ONTARIO ENTERGY SAVINGS CORP.		

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CV04CV2634380000TORONTO CONDO CORP #1496 ET AL VS ONT ENERGY SAVINGS ET AL
Ontario Energy Savings Corp.

CV04CV2737620000SHEPHERD VILLAGE INC. VS. TORONTO HYDRO ENERGY ET AL
Ontario Energy Savings Corp.

CV07CV3268100000Avcan Management Inc. v. G6 Energy Corp. et al
Ontario Energy Savings Corp.
Ontario Energy Savings L.P.

CV07CV3301640000767269 ONTARIO LTD. VS ONTARIO ENERGY SAVINGS L.P. ET AL
Ontario Energy Savings L.P.

CV07CV3432030000DOUBLESWEET INVESTMENTS LIMITED v. Ontario Energy Savings L.P.
Ontario Energy Savings L.P.

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02-CV-343203

STREAMLINE FOODS (BELLEVILLE) LTD. v. ONTARIO ENERGY SAVINGS L.P. et al

ONTARIO ENERGY SAVINGS L.P.

CV0800358232000AONTARIO ENERGY SAVINGS L.P. et al

ONTARIO ENERGY SAVINGS L.P.

CV08CV3526810000STANDARD PRODUCTS INC. v. ONTARIO ENERGY SAVINGS CORP. et al

ONTARIO ENERGY SAVINGS CORP.

ONTARIO ENERGY SAVINGS L.P.

CV08CV3534390000Bjorkman v. Ontario Energy Savings Corp.

Ontario Energy Savings Corp.

CV09003718060000BEST RANK INVESTMENTS INC. v. ONTARIO ENERGY SAVINGS CORP. et al

ONTARIO ENERGY SAVINGS CORP.

CV-09-372175

ONTARIO ENERGY SAVINGS L.P. v. 2152458 ONTARIO LTD

ONTARIO ENERGY SAVINGS L.P.

CV09003765060000 Ontario Energy Savings L.P. et al v. ARDEN HOLDINGS INC/LES PLACEMENTS
ARDEN INC

ONTARIO ENERGY SAVINGS CORP.

Ontario Energy Savings L.P.

CV09003837480000 ONTARIO ENERGY SAVINGS L.P. v. ROSEN et al
ONTARIO ENERGY SAVINGS L.P.

CV98CV1436550000 ALLIANCE GAS MANAGEMENT VS MACDONALD
Ontario Energy Savings Corp.

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Tab 5

Case Name:
767269 Ontario Ltd. v. Ontario Energy Savings L.P.

**RE: 767269 Ontario Ltd., and
Ontario Energy Savings L.P. et al.**

[2007] O.J. No. 3211

Court File No. 07-CV-330164PD3

Ontario Superior Court of Justice

D.M. Brown J.

Heard: August 22, 2007.
Judgment: August 27, 2007.

(22 paras.)

Counsel:

David Winer, for the Applicant.

Richard Lanni, for the Respondent, Ontario Energy Savings L.P.

No one appearing for the Respondent, Enersource Hydro Mississauga.

ENDORSEMENT

D.M. BROWN J.:--

I. Introduction

1 Upon the opening of the competitive retail electricity market in May, 2002 the applicant, 767269 Ontario Ltd., contracted with a retailer, First Source Energy Corp., to purchase electricity for its apartment building. The Contract contained an initial term of three years, and enabled the retailer to renew the Contract if it followed a specified process. Ontario Energy Savings L.P. ("OES") purchased the Contract (and others) from First Source in May, 2003.

2 While a number of issues divide the parties, this application turns on a determination of one key issue: did OES renew the Contract in accordance with its terms before it expired on July 9, 2005? The applicant maintains that the Contract was not renewed and applies for the return from OES of monies which it contends were improperly billed following the termination of the Contract. OES argues that the Contract was renewed, and asks that the application be dismissed or, alternatively, that a trial of an issue be directed because material facts are in dispute.

3 For the reasons given below, I grant the application.

II. Was the Contract renewed in 2005 in accordance with its terms?

A. Facts

4 A competitive retail market for electricity opened in Ontario in May, 2002. Instead of purchasing electricity from their local regulated distributor, customers - big and small - could buy their energy from retailers, which their distributor would deliver to their premises.

5 The Applicant owned a multi-unit residential apartment building in Mississauga. Upon the opening of the retail power market, it entered into a contract dated May 7, 2002 with First Source, an affiliate of the co-respondent, Enersource Hydro Mississauga. The Contract was for an initial term of three years, at a fixed price of 5.65 cents/kwh.

6 The Contract's term commenced on the date of completion of Enersource's retail engagement process for the applicant; it is common ground that occurred on July 9, 2002. As a result, the Contract's initial three-year term ran from that date until July 9, 2005.

7 The Contract contained the following renewal provision:

Provided that I receive advance written notice of renewal no more than one hundred twenty (120) calendar days before the date of renewal, and provided that I have at least thirty (30) calendar days from the receipt of such notice prior to the date of renewal to cancel the renewal, the Retailer has the right to renew this Agreement for successive terms of the same duration as the Initial Term on the same terms and conditions, or for successive one (1) year terms on such changed terms including price, contained in the notice of renewal.

8 Mr. Winkler, a representative of the Applicant, deposed that the Applicant did not receive a renewal notice from OES in 2005.

9 OES' evidence regarding the renewal of the Contract shifted over the course of the proceeding. In its initial responding affidavit OES stated that it mailed a renewal notice to the Applicant on May 1, 2005, but due to having changed printing houses it had not been able to locate a true copy of the notice. In a subsequent affidavit OES stated that a renewal notice went out on May 16, 2005. However, by the end of the cross-examination of OES' representative, the company's evidence was reduced to the following:

- (i) in 2005 OES used the services of Corvison, a printing house, to prepare and mail out renewal notices to customers;
- (ii) OES cannot produce a copy of the form of renewal notice which it contends would have been sent to the applicant;
- (iii) OES does not know the exact date a renewal notice was sent to the Applicant;
- (iv) OES cannot produce any evidence, either from its own records or those of Corvison, that a renewal notice was sent to the Applicant;
- (v) OES cannot produce any evidence, either from its own records or those of Corvison, that a renewal notice was received by the Applicant; and,
- (vi) OES produced a mail tracker document in respect of the Applicant's account, but it did not contain any information as to whether a renewal notice had been sent to the Applicant.

B. Analysis

10 OES cannot demonstrate, on the evidence, that a renewal notice was sent to, or received by, the applicant in accordance with the renewal provision in the Contract. OES, however, pointed to other evidence in support of its contention that the Contract was renewed in 2005. First, it submitted that the electricity bills sent to the applicant after July, 2005 still showed OES as the provider of electricity. While that is true, the appearance of OES' name on the bills is as consistent with OES' failure to notify the distributor that the Contract had come to an end as it was that the Contract had been renewed.

11 Second, OES submitted that since the applicant acknowledged receiving a further renewal notice from OES dated May 9, 2006 that referred to a "current agreement" with OES, the Contract must have been renewed in July, 2005 for a further one year. This argument, in my view, is nothing more than a boot-strap one, primarily due to the presence in the Ontario electricity retail market of a common, but curious, contract renewal mechanism - negative options. OES, in its renewal letter of May, 2006, described this mechanism as an "effortless renewal option" under which the customer's contract would automatically renew for a year if the customer did not respond to the letter. The applicant did not respond to the May, 2006 letter. It explained that since it thought its Contract with OES was at an end by that time, it ignored the letter, viewing it as a solicitation letter - not an unreasonable reaction. In fact, when the applicant did not respond, OES notified Enersource that the applicant had renewed for a further year with OES. Enersource then billed the applicant the higher electricity price of 9.70 cents/kwh on its September, 2006 bill, at which point the applicant protested and this dispute began.

12 Under these circumstances, the lack of response by the applicant to a negative option letter in 2006 can hardly constitute affirmative evidence that OES properly renewed the Contract in 2005. If OES cannot demonstrate that the Contract was renewed in 2005, it matters little what further renewal notices it sent to the applicant in 2006 and whether the applicant responded to them or not.

13 Finally, in its second responding affidavit OES pointed to a June 14, 2005 email to Enersource as evidence that the Contract was renewed for a year. In that email OES notified Enersource of the renewal of certain contracts. However, the email did not expressly identify the applicant's Contract as one of the renewals. Further, the email stated that it concerned contract renewals for the week ended June 14, 2005. In that affidavit OES contended that the Contract renewal notice was sent to the applicant on May 16, 2005. Given that the Contract required the applicant to have "at least thirty (30) calendar days from the receipt of such notice prior to the date of renewal to cancel the renewal", at least thirty days had not elapsed between the purported May 16, 2005 notice sending date and the notification of the purported renewal to the distributor on June 14, 2005.

14 OES bears the onus of proving that the Contract was renewed in 2005 in accordance with its renewal provision: *Affiliated Realty Corp. Ltd. v. Sam Berger Restaurant Ltd.* (1974), 2 O.R. (2d) 147 (H.C.J.), at page 151. OES has not discharged that onus. A renewal of the Contract would only be effective if the applicant received a renewal notice. OES has not adduced any evidence that in 2005 a renewal notice was sent to the applicant, let alone received by the applicant, as required by the terms of the Contract.

15 OES argued that I should direct a trial of the renewal issue because material facts were in dispute. In my opinion, this is not a case where material facts on the key, determinative issue are in dispute. On her cross-examination OES' representative conceded that what evidence OES put forward on this application about the 2005 renewal is all that it has (Transcript of Ms. Zovic, Q. 157). There is nothing to leave for a trial.

16 As a result, I find that OES did not comply with the renewal provisions of the Contract and the

Contract expired on July 8, 2005 in accordance with its terms.

17 The applicant did not enter into any subsequent contract with OES. Accordingly, OES's purported renewal of the Contract in 2006 was of no legal effect.

III. Remedy

18 Pursuant to Rule 14.05(3)(g) of the Rules of Civil Procedure, the applicant is entitled to declaration that the Contract expired on July 8, 2005.

19 The Applicant seeks the return of an overpayment of \$50,934.39 it made to Enersource, which billed that amount of behalf of OES, representing the difference between OES' 2006 renewal price of 9.70 cents/kwh and the provincially-regulated electricity rate for the period September, 2006 until February, 2007. At the hearing OES' counsel disputed that amount, submitting that his client's review of the applicant's supporting documents led it to believe that the overpayment was only \$45,609.00. OES filed no evidence on the point; it stated that it did not because it had only received the supporting information from the Applicant on the eve of the hearing.

20 I certainly will not direct a trial over a \$5,000.00 dispute. I would encourage the parties to attempt to resolve their differences regarding the amount of the overpayment. If they cannot, I will entertain further written submissions on the issue. The applicant has already filed its calculation of the overpayment. OES may serve and file with my office written submissions on this issue, including an affidavit of calculation, by Friday, September 7, 2007. The applicant may serve and file responding materials, including a responding affidavit, by Friday, September 21, 2007. After reviewing the submissions, I will issue a judgment for the amount I determine OES over-billed the applicant.

21 I understand than an issue may remain about how to deal with bills sent by Enersource to the applicant for the months of March and (perhaps) April, 2007. If after reviewing my endorsement any issue remains amongst the parties on that matter, they can address it in their written submissions.

IV. Costs

22 I would encourage the parties to attempt to agree on costs. If they cannot, the applicant may serve and file with my office written cost submissions, together with a Costs Outline, by Friday, September 7, 2007. OES may serve and file responding submissions by Friday, September 21, 2007. Since Enersource did not appear on the return of the application, I assume that it will not be seeking costs. If I am wrong, it should serve and file written cost submissions by September 7, 2007. Written cost submissions, excluding the Costs Outline, should not exceed three (3) pages in length.

D.M. BROWN J.

cp/e/qlbxr/qlmxt

Case Name:
767269 Ontario Ltd. v. Ontario Energy Savings L.P.

Between
Ontario Energy Savings L.P., Appellant, and
767269 Ontario Ltd. and Enersource Hydro Mississauga a
division of Enersource Corporation, Respondents

[2008] O.J. No. 1711

2008 ONCA 350

165 A.C.W.S. (3d) 836

Docket: C47721

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., D. Watt J.A. and C.T.
Hackland J. (ad hoc)

Heard: April 30, 2008.
Oral judgment: April 30, 2008.
Released: May 5, 2008.

(7 paras.)

Civil litigation -- Civil procedure -- Appeals -- Hearing new issues -- Estoppel -- Appeal by applicant Ontario Energy Savings from dismissal of its claim for payments under renewal notice dismissed -- Application judge found that contract between parties was not renewed in 2005 and thus renewal notice in 2006 was not contractually binding -- On appeal, applicant raised for the first time argument that respondent was estopped from claiming reimbursement of higher amounts set out in 2006 renewal notice because of its failure to respond to notice within 30 days -- Applicant not entitled to raise estoppel issue on appeal.

Contracts -- Formation -- Express terms -- Renewal clauses -- Appeal by applicant Ontario Energy Savings from dismissal of its claim for payments under renewal notice dismissed -- Application judge found that contract between parties was not renewed in 2005 and thus renewal notice in 2006 was not contractually binding -- On appeal, applicant raised for the first time argument that

respondent was estopped from claiming reimbursement of higher amounts set out in 2006 renewal notice because of its failure to respond to notice within 30 days -- Applicant not entitled to raise estoppel issue on appeal.

Appeal From:

On appeal from the judgment of Justice D. Brown of Superior Court of Justice dated August 27, 2007.

Counsel:

Alan J. Lenczner, Q.C. and Michael Hunziker for the appellant.

David Winer for the respondents.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- The application judge found that the contract between the parties was not renewed in 2005 and thus the renewal notice in 2006 was not contractually binding. Accordingly, the application judge dismissed the appellant's claim for payments under the renewal notice.

2 The appellant raises for the first time on appeal an argument that the respondent is estopped from claiming reimbursement of the higher amounts set out in the 2006 renewal notice because of its failure to respond to the notice within thirty days.

3 In *Ross v. Ross* (1999), 181 N.S.R. (2d) 22, the Nova Scotia Court of Appeal set out the test concerning receiving arguments for the first time on appeal. The court said that such an argument, "should only be entertained if the court of appeal is persuaded that all of the facts necessary to address the point are before the court as fully as if the issue had been raised at trial". The rationale for the principle is that it is unfair to permit a new argument on appeal in relation to which evidence might have been led at trial had it been known the issue would be raised.

4 In our view, the appellant has not met the test set out in *Ross*.

5 The elements of the plea of estoppel are well-established. Among others, they include the need to prove detrimental reliance and also to show that it would not be right to allow the alleged representor, by act or omission, to resile from the belief or expectation he or she engendered in the other: see *Ryan v. Moore*, [2005] 2 S.C.R. 53.

6 In our view, had estoppel been raised by the appellant in the application below, it would be reasonable to expect that the parties would have developed a more fulsome record with respect to the detriment, if any, suffered by the appellant and the fairness in the circumstances of this case of attaching consequences to the respondents' failure to respond to the 2006 renewal notice.

7 For these reasons, we do not consider this an appropriate case to allow the appellant to raise the issue of estoppel on this appeal. Accordingly, the appeal is dismissed. Costs to the respondents are fixed in the amount of \$7,500, inclusive of disbursements and GST.

D.R. O'CONNOR A.C.J.O.

D. WATT J.A.

C.T. HACKLAND J. (ad hoc)

cp/e/qlbxx/qlpxm/qlcxm