

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Direct Energy Marketing Limited)
) Paul Le Vay and Justin Safayeni, for the
Applicant/Responding Party) Applicant/Responding Party
)
- and -)
)
National Energy Corporation) Brad Teplitsky for the Respondent/Moving
) Party
Respondent/Moving Party)
)
)
)
) HEARD: July 3, 2013

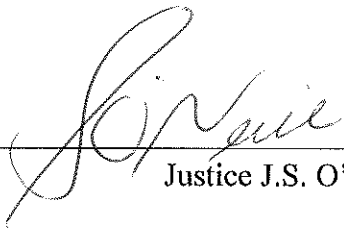
O'NEILL, J

Reasons on Motion

- [1] This is a motion by National Energy Corporation pursuant to Rule 59.06(2) to set aside this court's decision of July 17, 212 on the basis of newly discovered evidence.
- [2] On such a motion, National must establish that the new evidence would probably have altered the outcome of the application, and that the new evidence could not have been discovered sooner with reasonable diligence.
- [3] National founds its motion on "a program of illegal outbound calling to customers disparaging National", a program of calls with respect to which National was unaware.
- [4] For the reasons which follow, I would dismiss National's motion with costs:
- [5] i. National has cited the endorsement of Justice Roberts dated January 27, 2010 as a precedent for the ruling it is seeking. But the Robert's Order was with respect to mutual contempt motions made by both parties in relation to breaches of the Strathy Order of 2009. In that motion, there was no claim to set aside an order and no consideration of the test required for such a motion.

- [6] ii. On June 26, 2012 Anila Malik swore an affidavit in support of a motion brought by National and a second plaintiff for an Anton Piller order against Enercare. That affidavit includes many of the same allegations as does the Channer-Williams affidavit, relating to door to door activities of Ecosmart and Enercare. Further, there is an outstanding Federal Court of Canada Action (May 9, 2013) seeking various orders and declarations against various parties, including Direct Energy Marketing Limited. That action includes references to the customer awareness program of 2012, as described in para. 35 of the Federal Court of Canada Statement of Claim. That claim remains before the court.
- [7] iii. My order of July 17, 2012 dealt with the contents of a brochure that was published and distributed by National in 2010 and 2011. National alleges in this motion that Direct Energy committed breaches of the Strathy order and the *Competition Act* in 2012 by way of a calling campaign and a canvassing campaign. But I accept Direct Energy's submission in para. 5 of its factum that "no aspect of this court's reasoning on the application is affected by the unrelated allegations of misconduct that National" now brings against Direct Energy in the within motion to set aside.
- [8] iv. A substantial ground relied on by National relates to the email exchange allegedly between Jason Frost and Mike Kowalski (May 8th and 9th, 2012). In these emails, Mr. Frost appears to ignore the Strathy Order, based on an alleged conversation between Mr. Frost and Len Dipock. On June 11, 2013, I released my reasons on the motion brought by National for an order appointing a computer forensic expert to examine the computer systems of Direct Energy and Jason Frost. In those reasons, I dealt in depth with the issue surrounding the emails of May 8th and 9th, 2012. In this regard, I accept generally Direct Energy's summary of the evidence relating to authenticity, as set out in para. 48 of Direct Energy's factum.
- [9] I conclude, for the purpose of this motion, that except for a single phone call transcript, the affidavit from an employee with no relationship to Direct Energy, and the subject emails, whose authenticity remains in serious doubt, National has not persuaded me that Direct Energy has breached the Strathy Order sufficient to invoke the court's jurisdiction herein to set aside its order of July 17, 2012.
- [10] v. Finally, with respect to National's submissions and reliance upon equity for the relief it is requesting, even if I accept that the doctrine of clean hands is a live consideration in this case, I accept Direct Energy's submission that it is inapplicable on this motion, for the reasons more particularly set out in para 93 of Direct Energy's factum.
- [11] Accordingly, for the reasons herein set out, National's motion is dismissed, with costs to be fixed and finalized as follows:
- i) Direct Energy shall file a Bill of Costs, together with cost submissions with the Trial Coordinator at Parry Sound by August 14 , 2013.
 - ii) National may respond to such cost submissions, by filing a response with the Trial Coordinator by August 28, 2013.

[12] Order accordingly.



Justice J.S. O'Neill

Released: July 30, 2013

CITATION: Direct Energy Marketing Ltd v. National Energy Corp., 2013 ONSC 5024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Direct Energy Marketing Limited

Applicant/Responding Party

– and –

National Energy Corporation

Respondent/Moving Party

REASONS ON MOTION

Justice J.S. O'Neill

Released: July 30, 2013