



Barristers

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Dear Mr. Sims and Ms. Scott:

Re: Review of s. 11 of the *Competition Act*

You have asked us to review and provide an opinion on the Competition Bureau’s process for obtaining orders under s. 11 of the *Competition Act*, R.S.C. 1985, c. C-34 (the *Act*). We set out our findings and recommendations in the following opinion.

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1. Executive Summary

We conducted a review that focused on the Bureau’s process to obtain orders under s. 11 of the *Act* and the Commissioner of Competition’s duty of disclosure to the Court when applying for orders of this kind.

We have concluded that the Bureau conducts its role responsibly under s. 11 and it properly balances the burden on respondents, particularly third parties, against the need to obtain the information necessary for an inquiry.

During our consultations, it became apparent that the private competition law bar’s main criticism was levelled at the existence of a s. 11 power itself. In our view, however, there is no doubt that s. 11 is a necessary power to enable the Commissioner to effectively administer and enforce the *Act*. Our recommendations focus on improvements to the Bureau’s current practice in order to make the s. 11 process more efficient and less burdensome on respondents.

The Bureau recently implemented a new three-member review committee, to internally review all proposed s. 11 applications. We recommend that this review model remain in place and that the Bureau and the Department of Justice review its efficacy within two years.

In the past, a practice had developed before the Federal Court whereby the Bureau made its s. 11 applications in writing without the personal attendance of the Commissioner’s counsel. On the Commissioner’s most recent s. 11 application, counsel for the Commissioner attended before the Court in person.

We recommend that counsel personally attend on all s. 11 applications before the Court. Whenever possible, the Commissioner should apply to the same judge for all s. 11 orders obtained in a particular inquiry.

In order to obtain a s. 11 order, the Commissioner must satisfy two substantive requirements only: (i) that an inquiry under s. 10 has commenced, and (ii) that a person has or is likely to have information that is relevant to the inquiry. There has been a tendency on the part of the courts and counsel for respondents to attempt to read-in additional substantive requirements. This should be resisted. Parliament has clearly mandated that only two requirements need to be met under s. 11.

To this end, the substantive legal test under s. 11 and the duty of disclosure to the Court must be kept distinct. On all *ex parte* applications, the moving party is under an obligation to make full, frank, and fair disclosure to the Court. In the context of s. 11, this means that the Commissioner should state his or her case for obtaining a s. 11 order fairly and must inform the Court of any point of fact or law known to the Commissioner why the s. 11 order should not be granted. The standard of disclosure is the same whether the enforcement process ultimately invoked under the Act is civil or criminal.

The Bureau should engage in both a pre-application and post-service dialogue with respondents to s. 11 orders. This dialogue should be the norm. Nonetheless, there will be circumstances where the Bureau will need to make s. 11 applications without such dialogue, such as when there is urgency or when there is a concern that records in the possession of a respondent may be destroyed. The dialogue is voluntary and non-binding on the Bureau. If a respondent is recalcitrant or is delaying the process, the Bureau is under no obligation to continue the dialogue and should either proceed with its s. 11 application or, if a s. 11 order has already been obtained, move to enforce the order. In the merger context, the timelines for review impose significant pressure on the Commissioner to move expeditiously to obtain s. 11 orders in order to complete the inquiry before the waiting period lapses or the transaction closes. Even in the merger context, however, the Bureau should strive to implement a pre-application dialogue with the proposed respondents to s. 11 orders.

We anticipate that this dialogue process will reduce the burden of responding to s. 11 orders on respondents and make the s. 11 process more efficient. In this regard, the private competition law bar will have to move away from its current adversarial approach towards a more co-operative model.

In this vein, we also recommend that the Bureau and the private competition law bar continue to engage in more general discussions, particularly with a view to developing best practices.

We set out our findings and recommendations in greater detail below.

2. Terms of Reference

On March 3, 2008, the Deputy Minister of Justice, John Sims, and the Commissioner of Competition, Sheridan Scott, appointed me to review and advise on the Competition Bureau's s. 11 process, and to prepare an opinion within three months. The terms of reference are to:

- Review and advise on the standard of disclosure required in *ex parte* applications under s. 11 of the *Act* with reference to litigated cases.
- Review and advise on the Bureau's s. 11 process with a view to ensuring that courts to which the Commissioner makes s. 11 applications obtain the information required to allow them to determine whether or not to issue orders under that section.
- Make recommendations to assist in ensuring that the Bureau makes adequate disclosure to the courts in making applications under s. 11 of the *Act* having regard to, among other things: the applicable legal principles pertaining to disclosure; the Commissioner's mandate under the *Act*; the operational exigencies, including time limits, which the Commissioner and the Competition Bureau must address; practices and procedures of counsel in obtaining s. 11 orders; and the need to ensure the efficacy of s. 11 orders as an effective investigative tool.

In conducting the review, I have been assisted by Owen Rees of this firm.

3. Consultations

In order to consider these issues fully, we carried out consultations with the Competition Bureau, the Department of Justice Canada, the United States Department of Justice – Antitrust Division, certain former Directors of Investigation and Research, the Canadian Bar Association – National Competition Law Section, and counsel representing a client in a constitutional challenge to s. 11 that is presently before the courts.

Within the Bureau, we held discussions with the Commissioner of Competition, Sheridan Scott; the Senior Deputy Commissioner of Competition, Mergers, Melanie Aitken; the Deputy Commissioner of Competition, Civil Matters, Richard Taylor; the Deputy Commissioner of Competition, Legislative and Parliamentary Affairs, Colette Downie; the Assistant Deputy Commissioner of Competition, Mergers, Ann Wallwork; and with members of the Competition Bureau and Department of Justice team for the Labatt-Lakeport merger: Competition Law Officer, Greg Lang; Senior Counsel, John Syme; and Counsel, Roger Nassrallah

Within the Department of Justice, we held discussions with the Assistant Deputy Attorney General, Litigation Branch, Donald Rennie; Senior Counsel, Office of the Deputy Minister of Justice, Simon Fothergill; and members of the Public Prosecution Service of Canada who prosecute *Competition Act* offences: Jim Sutton, Guy Pinsonnault, and Stéphane Hould. Throughout the review, we have been assisted by the Special Counsel to the Commissioner of Competition, Adam Fanaki.

In order to obtain a comparative perspective on investigatory orders in the United States, we met with the United States Assistant Attorney General, Antitrust Division, Tom Barnett; Deputy Assistant Attorney General for International, Policy and Appellate Matters, James J. O’Connell; Director of Operations, J. Robert Kramer, II; and Chief, Foreign Commerce Section, Edward T. Hand.

We also sought the input of the private competition law bar in a meeting with the outgoing and current chairs of the Canadian Bar Association – National Competition Law Section: James B.

Musgrove of Lang Michener LLP and Barry Zalmanowitz, Q.C. of Fraser Milner Casgrain LLP, who are practitioners at the private competition law bar.

Finally, we sought the views of certain former Directors of Investigation and Research. To this end, we interviewed George Addy, the Honourable Konrad von Finckenstein, Q.C., Calvin S. Goldman, Q.C., Lawson Hunter, Q.C., and the Honourable Howard Wetston, Q.C.

We provided the Bureau and the Department of Justice with executive briefings on May 29 and 30, 2008, respectively, and we provided an interim report on June 10, 2008.

4. Section 11 of the Act

The Commissioner may apply under s. 11 for an order requiring the respondent to: attend for an oral examination before a presiding officer (para. (1)(a)); produce records or any other thing (para. (1)(b)); and make and deliver a written return on information as required by the order (para. (1)(c)).

Section 11 sets out the criteria for obtaining the order (subs. (1)). As will be discussed below, these criteria are minimal and have resulted in the contention that courts to which applications for s. 11 orders are made are relegated to the role of "rubber stamps". Section 11 also addresses the production of documents in the possession of affiliate corporations (subs. (2)), use immunity (subs. (3)), and the territorial effect of an order (subs. (4)). Section 11 provides:

11. (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

(2) Where the person against whom an order is sought under paragraph (1)(b) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the Criminal Code.

(4) An order made under this section has effect anywhere in Canada.

Subsection 11(1) establishes a precondition for obtaining a s. 11 order, namely that the Commissioner has commenced an inquiry under s. 10 of the *Act*. Subsection 10(1) provides:

10. (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

The Commissioner is required to commence an inquiry on the application of six Canadian residents under s. 9 of the *Act* (subpara. 10(1)(a)); when the Commissioner has *reason to believe* that a person has contravened an order made under the *Act* (subpara. (1)(b)(i)), grounds exist for

the making of an order under the *Act* (subpara. (1)(b)(ii)), or an offence under the *Act* has been or is about to be committed (subpara. (1)(b)(iii)); or when directed by the Minister (para. 10(c)).

5. The Legal Test Under s. 11

A distinction must be drawn between the statutory test under s. 11 of the *Act* and the duty of disclosure owed by an applicant to the Court on any *ex parte* proceeding. In this section, we will consider the statutory test for obtaining a s. 11 order; in the section that follows, we will examine the duty of “full, frank, and fair” disclosure owed by the Commissioner to the Court on a s. 11 application.

In order to obtain a s. 11 order, the Commissioner¹ must satisfy the Court, by affidavit evidence, (i) that an inquiry under s. 10 has commenced, and (ii) that a person has or is likely to have information that is relevant to the inquiry.² These are the *only* substantive requirements under s. 11. Where these requirements are met, a judge may issue an order. There remains, however, a residual discretion with the Court to determine whether to make a s. 11 order.³

The proposed subject of the order is not a party to the application. The application under subs. 11(1) is to be made *ex parte* by the Commissioner. Section 11 does not provide that there should be any material before the Court apart from that filed by Commissioner. The two-part test may be decided on the basis of affidavit evidence provided in the Commissioner’s application.⁴

In the course of the review, the question arose whether s. 11 requires the Commissioner to apply *ex parte* or whether it is merely permissive. In our view, s. 11 contemplates that the Commissioner will apply *ex parte*. Nonetheless, in special circumstances, the Court considering

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1. Or his or her authorized representative. For brevity, we will refer to the Commissioner throughout.
 2. *Canadian Pacific Ltd. v. Canadian (Director of Investigation and Research under the Competition Act)*, [1995] O.J. No. 709 (Ont. Gen. Div.) [CP], per Farley J, at ¶ 7; *Commissioner of Competition c. Xerox Canada Ltd.* (2002), Court File No. 550-05-010175-011 (Qc. S.C.) at p. 3.
 3. *Canada (Commissioner of Competition) v. Air Canada* (2000), 8 C.P.R. (4th) 372 (F.C.T.D.) [Air Canada], at ¶ 31.
 4. *Raimondo v. Canada (Competition Act, Director of Investigation and Research)* (1995), 61 C.P.R. (3d) 142 (Ont. Gen. Div.) [Raimondo].

a s. 11 application may make a special order to permit the respondent to the s. 11 application to attend and make submissions before any decision is made on the issuance of the order.⁵ These special circumstances will be considered below.

As with other *ex parte* applications, it is essential that there be full, frank, and fair disclosure on a s. 11 application.⁶

A. “An inquiry under section 10 has commenced”

The Federal Court has suggested that there are additional requirements that the Commissioner must meet on an application for a s. 11 order. The Federal Court has suggested that a bald assertion that an inquiry has commenced is not enough. The Court held that the Commissioner should provide:

- “some description” of the nature of the alleged conduct that is the subject of the inquiry;
- the basis of the Commissioner’s decision to commence an inquiry; and
- the Commissioner’s reason(s) for believing that conduct to which the inquiry is addressed has occurred.⁷

In our view, courts should guard against departing from the Parliamentary-mandated requirements for obtaining a s. 11 order. Parliament deliberately intended the requirements under s. 11 to be minimal. This is clear when s. 11 is compared to the search warrant provision found in s. 15 of the *Act*:

<p>11. (1) If, on the <i>ex parte</i> application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is</p>	<p>15. (1) If, on the <i>ex parte</i> application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation</p> <p>(a) that there are reasonable grounds to believe</p>
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5. See for e.g. the law relevant to DNA warrants under s. 487.05 of the Criminal Code: *R. v. F(S.)* (2000), 141 C.C.C. (3d) 225 (Ont. C.A.).

6. *Air Canada, supra* at note 6 therein.

7. *Ibid.* at ¶ 31.

<p>relevant to the inquiry, the judge may order the person to [...]</p> <p>[Emphasis added]</p>	<p>that</p> <p>(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,</p> <p>(ii) grounds exist for the making of an order under Part VII.1 or VIII, or</p> <p>(iii) an offence under Part VI or VII has been or is about to be committed, and</p> <p>(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,</p> <p>the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to [...]</p> <p>[Emphasis added]</p>
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On a s. 11 application, it is not for a Court to determine whether the Commissioner had reasonable grounds to cause an inquiry to be made.⁸ Nonetheless, it would be sound practice for the Commissioner to include the following in the affidavit material on s. 11 application:

- A brief description of the nature of the alleged conduct that is the subject of the inquiry. The description of the conduct need not be detailed. But it should be adequate for the Court to judge the relevance of the information sought in the proposed order.
- A statement whether the inquiry was commenced under s. 10(a), (b)(i), (b)(ii), (b)(iii), and/or (c).

Contrary to the suggestion by the learned judge in *Air Canada*,⁹ the burden should not lie on the Commissioner to satisfy the Court of his or her good faith in carrying out an inquiry. The

8. *Raimondo, supra* at p. 6 (QL version).

9. *Air Canada, supra* at ¶ 31.

Commissioner is a public officer with a statutory obligation to act fairly and in the public interest. As a result, the Commissioner's good faith is properly presumed by the Court.¹⁰ It should be for the respondent to a s. 11 order to bear the burden of establishing bad faith. The approach we suggest is consistent with general public law principles.¹¹

B. "A person has or is likely to have information that is relevant to the inquiry"

In selecting a respondent to a s. 11 order, the Commissioner is entitled to choose between alternative sources of information. By implication, it is not for the Court to determine whether there is another source that would be more effective or efficient.¹² The Commissioner must provide the Court with "cogent material" to show the "person has or is likely to have information that is relevant to the inquiry".¹³

Surprisingly little consideration has been given to the "relevance" requirement. In determining "relevance" under s. 11, the statutory context of s. 11 is important. The Federal Court has cautioned that "the order relates to the production of information and documents for the purpose of an inquiry, not for the purpose of the prosecution of a criminal offence."¹⁴ This context is relevant in determining whether the Commissioner has met his or her burden on an application under s. 11. At the investigative stage, "relevance" must be judged by a more relaxed standard than it would were one considering the admissibility of evidence at trial or even the standard applied at the discovery stage of civil proceedings.

In our view, a document or information should be considered "relevant" if it reasonably *could* afford information, taken by itself or in relation to other documents or information, concerning the subject matter of the inquiry. This proposed standard draws on the test for search warrants

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10. See e.g. *Commissioner of Competition v. Canada Pipe Company*, 2004 CACT 2, 29 C.P.R. (4th) 530 (Comp. Trib.) at ¶ 61.
 11. Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Canvasback Publishers) § 15:3314.
 12. *Raimondo*, *supra* at p. 6 (QL version).
 13. *Raimondo*, *supra* at p. 5 (QL version).
 14. *Air Canada*, *supra* at ¶ 19.

