

STOCKWOODS

Barristers

Brian Gover
Direct Line: 416-593-2489
Direct Fax: 416-593-9345
briang@stockwoods.ca

June 19, 2008

PRIVILEGED AND CONFIDENTIAL
Delivered Via Email and Courier

John H. Sims
Deputy Minister of Justice
East Memorial Building, Room 4121
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Ms. Sheridan Scott
Commissioner of Competition
Competition Bureau
21st Floor
50 Victoria Street
Gatineau, Quebec
K1A 0C9

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.

Table of Contents

1.	Executive Summary	3
2.	Terms of Reference	5
3.	Consultations	6
4.	Section 11 of the <i>Act</i>	7
5.	The Legal Test Under s. 11	9
	A. "An inquiry under section 10 has commenced"	10
	B. "A person has or is likely to have information that is relevant to the inquiry"	12

C.	Cost of Compliance.....	13
6.	Applications to Vary	13
7.	Duty to Make Full, Frank, and Fair Disclosure	14
A.	<i>Ex Parte</i> Orders Generally.....	14
B.	The Duty on a s. 11 Application.....	17
8.	The <i>Labatt</i> Case.....	18
A.	The Factual Findings of the Court.....	18
B.	Failure to Mention the Representations Made to Noël J.....	20
C.	Degree of Overlap with Material Already Provided.....	22
D.	The Burdensome Nature of the Order.....	24
9.	The Bureau’s Internal Process	25
10.	Investigative Orders in the United States.....	26
A.	Second Requests	27
B.	Civil Investigative Demands.....	27
C.	Other Investigative Tools.....	28
11.	Issues and Recommendations	29
A.	The Bureau’s Use of s. 11 Orders.....	29
B.	The Bureau’s Internal Review Process.....	32
C.	Practices in Applying for s. 11 Orders.....	34
D.	Statutory Test for Obtaining s. 11 Orders.....	35
E.	Duty of Disclosure to the Court.....	37
F.	Material Already in the Possession of the Bureau.....	38
G.	Potentially Burdensome Nature of s. 11 Orders	39
H.	Section 11 in Criminal Inquiries.....	41

I.	Giving Formal Notice of s. 11 Applications.....	42
J.	General Dialogue with the Private Competition Law Bar.....	43
12.	Conclusion	43

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

-
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>
--	--

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>
---	--

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

-
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.

under s. 487 of the Criminal Code,¹⁵ with appropriate modifications for the statutory language under s. 11 of the *Act* and its purpose.

C. Cost of Compliance

The cost of compliance is not a factor in the test for obtaining a s. 11 order. It has been suggested, however, that a s. 11 order may be varied in exceptional circumstances to provide for the reimbursement of costs, particularly where compliance with an order may be compromised because of severe lack of resources.¹⁶ This suggestion has been cast into serious doubt by the Supreme Court of Canada's recent decision in the context of production orders under s. 487.012 of the *Criminal Code*.¹⁷ There is simply no statutory authority for the Court to order the reimbursement of costs to the respondent to a s. 11 order.

6. Applications to Vary

Section 11 applications brought in the Federal Court are governed by the Federal Court Rules. Rule 399(1), which applies to applications to vary *ex parte* orders, applies to s. 11 orders.¹⁸ Rule 399 provides:

399. (1) On motion, the Court may set aside or vary an order that was made

(a) *ex parte*; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

15. *R. v. Canadian Broadcasting Corporation* (1992), 77 C.C.C. (3d) 341 (Ont. Gen. Div.) per Moldaver J. (as he then was).

16. *Air Canada*, *supra* at ¶ 14.

17. *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, see esp. ¶ 67.

18. *Air Canada*, *supra* at ¶ 14.

(b) where the order was obtained by fraud.

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

Under Rule 399(1), a s. 11 order may be set aside where the party seeking to set aside or vary the order can establish that it was made on the basis of misleading, incomplete, or incorrect facts, or a willful omission or fraud by the Commissioner. The non-disclosure of errors in the evidence before the issuing judge must be of a nature such that had the issuing judge known of them, he or she would have refused to grant the order.¹⁹ Further, if the subject of the order can demonstrate that the documents or information sought by the order are irrelevant to the s. 10 inquiry, the portions of the order relating to their production can be vacated.²⁰

Rule 399(1) provides a mechanism whereby the subject of an *ex parte* order can enforce the obligation on a moving party to be scrupulously fair to the absent party. This obligation will be considered in the next section of this memorandum.

7. **Duty to Make Full, Frank, and Fair Disclosure**

A. ***Ex Parte* Orders Generally**

Ex parte hearings are a departure from the fundamental principle of procedural fairness: *audi alteram partem*.²¹ On a motion for *ex parte* relief, the party against whom the relief is sought is denied the opportunity to be heard and to present to the Court the case for why the requested relief should not be granted. Thus, the law imposes on the moving party an obligation to be scrupulously fair to the absent party by disclosing all material facts in a fair manner.

19. *Ibid.* at ¶ 13.

20. *Ibid.*

21. "Hear the other side".

The rationale for this obligation and for the consequences of a failure to meet this obligation is explained by Sharpe J. (as he then was) in the leading Ontario authority, *United States of America v. Friedland*.²²

It is a well established principle of our law that a party who seeks the extraordinary relief of an *ex parte* injunction must make full and frank disclosure of the case. The rationale for this rule is obvious. The judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently [in *Watson v. Slavik* [(1996), 65 A.C.W.S. (3d) 831 (B.C.S.C.)]]:

There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction.

For that reason, the law imposes an exceptional duty on the party who seeks *ex parte* relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

This principle is codified in rule 39.01(6) of the Ontario *Rules of Civil Procedure*, which provides:

Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

22. 1996 CarswellOnt 5566 (Ont. Gen. Div.) at ¶¶ 26-28. Adopted by Mactavish J. in *Labatt, supra* at ¶ 23. Note that Sharpe J.A. is a leading Canadian authority on the law of injunctions, whose publications on this subject include *Injunctions and Specific Performance*, 2d ed. (Toronto: Canada Law Book, 1992).

Although there is no similar provision codifying the requirement in the Federal Court Rules, the same duty has been imposed in the Federal Court on the moving party in applications for *ex parte* relief.²³ Rule 399(1), as applied by the Federal Court, also has this effect.

An *Anton Piller* order requires the defendant to permit a plaintiff to search the defendant's premises for evidence and retain it for litigation purposes, provided that certain conditions are met.²⁴ Where a party is seeking an *Anton Piller* order, a very high standard of disclosure is required:

[T]he plaintiff is required to disclose every fact within his or her knowledge relevant to the "weighing operation which the court has to make in deciding whether or not to grant the order" (*Thermax Ltd. v. Schott Industrial Glass Ltd.*, [1981] F.S.R. 289 at 298 (Ch. D.)). In *Columbia Picture Industries v. Robinson*, [1987] Ch. 38, [1986] F.S.R. 367 at 441 (Ch. D.), Scott J. held "that the affidavits in support of applicants for ['*Anton Piller*' orders] ought to err on the side of excessive disclosure. In the case of material falling into the grey area of possible relevance, the judge, not the plaintiffs' solicitors, should be the judge of relevance".²⁵

The relevant facts that a party seeking an *ex parte* order must disclose include facts that may explain the position of the respondent to the order, if known to the moving party.²⁶ Any fact that would be weighed or considered by the motions judge in deciding the issues, regardless of whether its disclosure would change the outcome, is material.²⁷

23. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28 [TMR].

24. These conditions are as follows:

- (a) the Plaintiff has a strong *prima facie* case;
- (b) the damage, potential or actual, must be very serious for the applicant; and
- (c) there must be clear evidence that the Defendant has in her possession incriminating evidence or things and there is a real possibility that she may destroy such material before any application *inter partes* may be made.

See also *Netbored Inc. v. Avery Holdings Inc.*, 2005 FC 1405.

25. *Lynian Ltd. v. Dubois* (1990), 45 C.P.C. (2d) 231 at p. 233 (Ont. Gen. Div.)

26. *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 at p. 519 (C.A.); *Coca-Cola Ltd. v. Pardhan*, 2003 FCA 11.

27. *Forestwood Co-operative Homes Inc. v. Pritz*, 2002 CarswellOnt 490 at para. 26 (Div. Ct.); *TMR*, *supra* at para. 65.

The duty to make full, frank, and fair disclosure applies to other *ex parte* investigatory processes, such as search warrants under the *Criminal Code*.²⁸ This standard does not vary depending on the nature of the process ultimately invoked, that is whether civil (e.g. matters reviewable by the Competition Tribunal under Part VIII of the *Act*) or criminal (e.g. offences under Part VI and VII of the *Act*).

B. The Duty on a s. 11 Application

What is the content of this duty to the Court on a s. 11 application? In our view, it is twofold: the Commissioner must (i) state his or her own case for obtaining a s. 11 order fairly and (ii) inform the Court of any points of fact or law known to the Commissioner why the s. 11 order should not be granted. The Federal Court's decision in *Labatt* (above) suggests that, at a minimum, the material facts the Commissioner should disclose include:

- Facts that may explain the respondent's position regarding the scope of the order and the relevance of the material sought, if known to the Commissioner.
- Whether, in the same s. 11 inquiry, previous orders have been sought and a general description of the information previously obtained in those orders.

It is sound practice to include reference to any fact that could reasonably be considered by the judge in deciding whether to grant the order.

However, it is important to keep distinct the statutory requirements of s. 11 on the one hand, and the duty of disclosure to the Court on the other. The duty of disclosure does not augment or impose additional *substantive* requirements that must be met in order to obtain a s. 11 order.

28. *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 46; *R. v. Church of Scientology (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at p. 528, leave to appeal refused [1987] 1 S.C.R. vii, 33 C.R.R. 384 (note) (S.C.C.).

8. The Labatt Case

In the *Labatt* case, Labatt Brewing Company Ltd. (“Labatt”) and Lakeport Brewing Income Fund (“Lakeport”) sought an order under Federal Court Rule 399 setting aside a s. 11 order.

The s. 11 order required Labatt and Lakeport to produce documents and written return information. Labatt and Lakeport argued that the information provided by the Commissioner on her *ex parte* application was misleading, inaccurate or incomplete, and the order should never have been made. They further argued that much of the information sought by the Commissioner had already been produced or was irrelevant to her inquiry into the competitive effect of Labatt’s acquisition of Lakeport.²⁹

The Court found that the disclosure made by the Commissioner on the *ex parte* application for a s. 11 order had been “misleading, inaccurate and incomplete”. The Court held that had it been provided with complete disclosure, it would not have granted the order that it did, in the form that it did. Therefore, the Court set aside the s. 11 order, without prejudice to the Commissioner bringing a fresh application for a s. 11 order, *on notice* to both Labatt and Lakeport.

A. **The Factual Findings of the Court**

The facts found by the Court in *Labatt* are, briefly, as follows:

- On January 31, 2007, Labatt agreed to acquire Lakeport. Labatt and Lakeport provided “extensive” information to the Commissioner regarding the competitive implications of the proposed acquisition, pursuant to s. 114 of the *Act*.
- On February 15, 2007, the Commissioner commenced an inquiry into the acquisition, pursuant to paragraph 10(1)(b) of the *Act*.

29. *Labatt, supra* at ¶¶ 1-3.

- Further to the inquiry, the Commissioner brought eleven *ex parte* applications for s. 11 orders against different respondents (the “February 2007 application”).³⁰ On February 22, 2007, Noël J. issued orders requiring Labatt and Lakeport, among others, to produce “extensive” records and written returns (the “February 2007 order”).
- In response to its s. 11 order, Labatt provided the Commissioner with 7,432 documents, consisting of over 138,620 pages. The production of the documents cost Labatt approximately \$750,000 in external costs alone.
- On March 26, 2007, the Commissioner applied to the Competition Tribunal for an order under s. 100 of the *Act*, enjoining the closing of the acquisition for 30 days. The Tribunal refused to grant the injunction. The acquisition closed on March 29, 2007.
- The Commissioner’s inquiry into the acquisition continued.
- On November 6, 2007, the Commissioner brought before Mactavish J. a second set of *ex parte* applications for s. 11 orders against fifteen respondents (the “November 2007 application”). These applications were made without a personal attendance by the Commissioner’s counsel. Eight of the fifteen respondents had been subject to the s. 11 orders previously granted by Noël J.
- On November 8, 2007, Mactavish J. granted the Commissioner’s second set of applications. These s. 11 orders required the production of “copious” records and “extensive” information (the “November 2007 order”).
- On November 23, 2007, Labatt and Lakeport brought a motion under Rule 399 to have Mactavish J.’s November 2007 order set aside or varied.

The Court appears to have applied a higher standard to the Commissioner’s affidavit materials than would be usual on an *ex parte* application, because the Court held that the usual reason why

30. The application materials contained a statement that would later prove problematic, see pages 20-21, below.

latitude is given to a moving party on an *ex parte* application—that such applications are brought on an emergency basis—was absent in this case. It found that the Commissioner’s application for a s. 11 order was not urgent and the inquiry had been ongoing for months.

The Court found that the Commissioner’s disclosure was “misleading, inaccurate or incomplete in several material respects.” It also found that the information required in the proposed order was duplicative of information already in the possession of the Commissioner. The Court made no finding as to the relevance of the information sought.

Commentary

In our respectful view, the conclusions of the Federal Court in *Labatt* were not warranted and the Court erred in exercising its discretion to vacate the November 2007 s. 11 order. Nevertheless, the decision was a discretionary one and, as such, the prospects of overturning the decision at the Federal Court of Appeal were not favourable.

B. Failure to Mention the Representations Made to Noël J.

Court’s Findings

The Commissioner’s affidavit material before Mactavish J. for the November 2007 application did not refer to the statement of the Commissioner’s authorized representative in an affidavit before Noël J. in February 2007 that “[t]he Commissioner believes that the responses to these questions from the Brewers will be sufficient for the purposes of her inquiry.”³¹

The Court held that had it known of the Commissioner’s representation to the Court that the extensive information sought in the February 2007 s. 11 orders “would likely be sufficient” for the purposes of the inquiry, it would not have made the November 2007 order without an explanation from the Commissioner as to why additional information was required. It was,

31. *Labatt, supra* at ¶ 42.

according to the Court, a material omission that justified setting aside the November 2007 order.³²

The Court held that the Commissioner was obliged to advise the Court of any representations that may have been made to the Court as to whether the information previously sought would suffice for the purposes of the inquiry.³³

The Court further held that in order to properly exercise its discretion under subsection 11(1) and to properly control its own processes, the Court must be “fully apprised of the relevant circumstances” surrounding a s. 11 order. It explained that, depending on the circumstances, the Court may decline to grant the order, seek further information or clarification from the Commissioner, or require notice to be given to the proposed subject of the order so that the affected party may be heard *before* an order is made.³⁴

Commentary

In our respectful view, it should have been plain to the Court that the statement in the Bureau’s affidavit on the earlier s. 11 application was not intended as a warranty that no further order would be necessary. It is simply not possible to know at the investigative stage—which is necessarily fluid—whether the information sought will be obtained and, if obtained, whether it will be adequate for the purposes of an inquiry.

Where the Commissioner makes representations to the Court on an earlier s. 11 application in the same inquiry, those representations should be put before the Court on any subsequent s. 11 application in the same inquiry.

We agree with the Court’s conclusion that the Commissioner must fully apprise the Court of the circumstances relevant to the s. 11 application, and that the Court may decline to grant the order, or seek further information or clarification from the Commissioner. Moreover, as an incident of

32. *Ibid.* at ¶ 46.

33. *Ibid.* at ¶¶ 49-50.

34. *Ibid.* at ¶¶ 50-52.

the Court's control over its own process, the Court may require that notice be given to the proposed respondent to the order so that the affected party may be heard before an order is made.

C. Degree of Overlap with Material Already Provided

Court's Findings

Significant information had already been provided to the Commissioner in response to the February 2007 order. The Court held that it was "disingenuous and misleading" that the Commissioner's written submissions on the November 2007 application stated that "[n]one of the records or information sought has previously been requested from the respondents." To the contrary, the Court found that there was "considerable overlap" with information previously given to the Commissioner.³⁵

The Court stated that it was inadequate for the Commissioner simply to have included a copy of the February 2007 order in the materials submitted on the November 2007 application given the volume of material before the Court.³⁶

The Court also held that the failure of the Commissioner to draw the Court's attention to documents in the Commissioner's possession that had been produced as part of a 2004 inquiry into the Standard Mould Bottle Agreement, which had been entered into by a number of breweries in the province, was material as there were a number of areas of overlap with the information sought on the November 2007 application.³⁷ Similarly, the Court appeared to view as material the omission of any mention of the information filed by Labatt and Lakeport in compliance with s. 114 of the *Act* and s. 17 of the *Notifiable Transactions Regulations*.³⁸

35. *Ibid.* at ¶ 70.

36. *Ibid.* at ¶¶ 67-69.

37. *Ibid.* at ¶ 78.

38. *Ibid.* at ¶¶ 88-91.

Commentary

In our respectful view, it was plain from the draft order sought, as well as from a fair reading of the supporting affidavit, that the Bureau was not seeking to duplicate information provided by the respondents in compliance with the earlier s. 11 order. In the draft order on the November 2007 application, the Commissioner had included the following paragraph immediately preceding the list of records required to be produced by the respondent:

Certain of the Records hereinafter required may already have been previously provided to the Commissioner. The Respondent is not required to produce a second copy of such Records in response to this Order, provided that the Respondent:

- (i) Identifies to the Commissioner's satisfaction any Records in the possession of the Commissioner which are responsive to the Order;
- (ii) Agrees that such Records shall be deemed to have been provided to the Commissioner pursuant to this Order; and
- (iii) Receives confirmation from the Commissioner that the Records are in the Commissioner's possession.

The Court selected a handful of examples of potential overlap in the information sought, without taking into account that the information previously produced to the Bureau was not necessarily in the form relevant to the continuing inquiry. There would be no utility for the Bureau to seek duplicative information.

The Court's reliance on Sharpe J.'s observation in *Friedland*—that “the fact that a document is before the Court, given the volume of exhibits and the time which an *ex parte* judge has to deal with such matters, does not relieve the moving party of its duty to make full and fair disclosure”—was misplaced in *Labatt*. A review of the record on the November 2007 application shows that it is not correct to suggest that the record was voluminous, as is often the case when *ex parte* injunctive relief is sought. The application record was approximately 75 pages.³⁹ It was no burdensome matter for the Court to have reviewed the materials. Nor was the information relevant to the exercise of the Court's function under s. 11 buried in the material. The February 2007 order could easily have been reviewed by the Court.

39. There were fifteen orders sought with virtually identical supporting material.

With respect to the 2004 inquiry into the Standard Mould Bottle Agreement, it is a surprising suggestion that information produced in an earlier and unrelated inquiry should be retained by the Bureau, reviewed, and used in a later inquiry. It is far from clear that it is permissible for the Commissioner to retain information or documents obtained on a s. 11 inquiry for use outside of the inquiry in which they were obtained.⁴⁰ Quite apart from the question of statutory authority, information obtained on the Standard Mould Bottle Agreement inquiry in 2004 was potentially stale, irrelevant, or produced in a form unsuitable to the Labatt-Lakeport merger inquiry.

Finally, regarding the information filed by Labatt and Lakeport in compliance with s. 114 of the *Act* and s. 17 of the *Notifiable Transactions Regulations*, their compliance with statutory obligations ought to be presumed by the Court, and would not necessarily be material to the exercise of the Court's function under s. 11 of the *Act*.

D. The Burdensome Nature of the Order

Although the Court observed that a s. 11 order will not be refused only because it imposes a heavy burden on the respondent to the order, the Court found that the burdensome nature of the order and the potential for duplicative requests are relevant factors in the exercise of the Court's discretion whether to grant a s. 11 application. In this respect, the Commissioner has a duty to disclose the concerns expressed by a respondent to a proposed order in complying with the Commissioner's prior demands.⁴¹

Commentary

Subsequent to the Federal Court's decision in *Labatt*, the Supreme Court of Canada released its decision in *Tele-Mobile* (above) in which it held that the issuing judge could not make

40. Section 18 of the *Act* provides that a "record or other thing" produced pursuant to s. 11 shall be returned to the person by whom it was produced not later than 60 days after it was produced, unless the person who produced it consents to its further detention, the judge who ordered its production orders it further detention for a specified period, or proceedings are instituted in which it may be required: subs. 18(4). However, the Commissioner need not return a copy of a record produced pursuant to s. 11 (subs. 18(1.1)) and may cause copies of records to be made before returning the originals and may retain the copies: subs. 18(3).

41. *Labatt, supra* at ¶¶ 92-100.

compensation to the respondent a term of a production order under s. 487.012 of the *Criminal Code*. The Court observed that there was a general moral and social duty on citizens to assist the State in the administration of justice.⁴²

Parliament has recognized that *Criminal Code* production orders potentially represent an unreasonable burden, by providing for an exemption from the order in those circumstances set out in s. 487.015(4).⁴³ In *Tele-Mobile*, the Court held that in order to obtain an exemption, the respondent would have to establish that the financial consequences of compliance must be so burdensome that it would be unreasonable in the circumstances to expect compliance.⁴⁴

The exemption from a *Criminal Code* production order is rooted in statutory language. By contrast, Parliament has not mandated that an exemption from compliance be available under s. 11 of the *Act*. Can a respondent to a s. 11 order obtain similar relief? In our view, the Court has the inherent authority to protect its process from abuse. In the absence of a statutory exemption, we suggest that a respondent to a s. 11 order would have to demonstrate that the burden of compliance in the circumstances rises to the level of an abuse of process. Cases in which this can be established will be very rare.

9. The Bureau's Internal Process

Before applying to a Court for a s. 11 order, the Bureau follows an internal approval process. Over time, the process has varied.

In merger cases, for example, applications for s. 11 orders are prepared by the team assigned to the merger, in consultation with counsel from the Competition Law Division and could include a representative of the Economic Policy and Enforcement Branch ("EP&E"). In certain circumstances, the team may consult an outside economic expert and outside counsel.

42. *Tele-Mobile, supra* at ¶ 50 ff.

43. "The judge may grant the exemption if satisfied that [...] (b) it is unreasonable to require the applicant to produce the document, data or information".

44. *Ibid.* at ¶ 67.

Historically, all s. 11 applications were reviewed internally by a Strategic Policy Advisor in the Compliance and Coordination Branch who had accumulated expertise. However, this process was discontinued in February 2007 for three reasons. First, there was a general process of streamlining the organization of the Bureau. Second, the Bureau determined that it was unreasonable and ineffective to ask a single individual who was not involved in the particular inquiry to approve or refuse the application, where that individual did not have adequate information about the inquiry. Finally, the Bureau determined that it would instil greater discipline and accountability in the team seeking the s. 11 order for it to bear the responsibility to review and approve of the s. 11 application. The Bureau's decision in this respect was reasonable.

Prior to the November 2007 s. 11 application in Labatt-Lakeport, the Bureau conducted a Red Team/Green Team exercise, in which two teams within the Bureau mooted the merits of challenging the merger before senior management of the Bureau and the Commissioner. Through that process, it became clear to the Bureau that further information was needed before a decision whether to challenge the merger could be made.

Subsequent to the Federal Court's decision in *Labatt*, the Bureau implemented a new approval process. A three-member review committee has been established to review proposed s. 11 applications. It is composed of the Assistant Deputy Commissioner responsible for the case, a Senior Counsel, Competition Law Division (LA2B or higher) who does not have carriage of the file, and the Special Economic Advisor to the Commissioner (or his or her designate). Each member must approve the application before it can be filed.

10. Investigative Orders in the United States

The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) have a wider range of investigatory tools available to them in investigating antitrust matters than does the Bureau. The variety of tools in the antitrust enforcement context reflects the variety of investigatory tools across the spectrum of U.S. federal regulatory agencies.

A. Second Requests

In the merger context, after the initial *Hart-Scott-Rodino Antitrust Improvements Act* (“*HSR Act*”) filing with the FTC or DOJ, a 30-day waiting period must be observed before closing a transaction.⁴⁵ If substantive antitrust issues cannot be resolved during that period, the FTC or DOJ may issue a Second Request to each party to the transaction. The FTC or DOJ (but not both) may issue a Second Request seeking additional documents from the parties to a proposed merger.⁴⁶

The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-days waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition... or from any officer, director, partner, agent or employee of such person.

A Second Request is issued by the FTC or DOJ without judicial pre-authorization. However, enforcement of a Second Request requires an order from the United States District Court.⁴⁷ Further, the respondent to a Second Request may seek an internal review of the Second Request by the FTC or DOJ on the basis that it is “unreasonably cumulative, unduly burdensome, or duplicative.”⁴⁸

Issuance of a Second Request extends the HSR waiting period, typically until 30 days after certification of “substantial compliance” with the Second Request.⁴⁹

B. Civil Investigative Demands

The DOJ and the FTC may obtain documents or compel testimony through Civil Investigative Demands (CIDs). CIDs are authorized under s. 1312 of the *Antitrust Civil Process Act*:⁵⁰

45. For cash tender offers, the initial HSR waiting period is only 15 days: 15 U.S.C. § 18a(b)(1)(B).

46. 15 U.S.C. § 18a (e)(1)(A).

47. 15 U.S.C. § 18a (g)(2).

48. 15 U.S.C. § 18a (e)(1)(B)(i).

49. 15 U.S.C. § 18a(g)(2). For cash tender offers, the time period is 15 days after substantial compliance by the acquiring company: 15 U.S.C. § 18a(e)(2).

Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation... he may, prior to the institution of a civil or criminal proceeding by the United States thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony.

The availability of CIDs is not restricted to the merger context, but they are frequently used in the merger context. They may be directed against true third parties. Unlike Second Requests, CIDs do not have the effect of suspending or extending the applicable merger waiting period. Like a Second Request, CIDs are issued without judicial authorization but do require an order from the United States District Court to be enforced. There is express statutory provision for a petition to modify or set aside the demand.

CIDs are not available once a civil or criminal process has been launched, nor may compliance be enforced after that time.

C. Other Investigative Tools

There are other tools available to U.S. antitrust authorities in investigating antitrust matters: investigative subpoenas and the grand jury process.

The FTC uses investigatory subpoenas to compel oral testimony or the production of documents. Section 49 of the *Federal Trade Commission Act* provides:

[...T]he Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

In criminal matters, the DOJ also has resort to the grand jury process. Grand juries use subpoenas to gather the evidence they need to use in deciding whether a federal crime has been committed. They can subpoena documents and physical evidence and they can subpoena witnesses to testify before them.

11. Issues and Recommendations

A. The Bureau's Use of s. 11 Orders

During our consultations, the private competition law bar was generally critical of the Bureau's use of s. 11 of the *Act*, particularly in the merger context. The Canadian Bar Association – National Competition Law Section was concerned that, in the merger context, the Bureau relied on s. 11 as a matter of course rather than relying on voluntary information requests of parties to a merger, with resort to s. 11 only when the parties were not cooperating, when the Bureau believed that parties were withholding information, or when there was a risk of destruction of documents. Nonetheless, the Canadian Bar Association – National Competition Law Section recognized that there must be a compulsory method of obtaining information from parties to a merger, as well as in civil and criminal inquiries.

The Bureau expressed grave concerns about its ability to adequately carry out its merger review function without the use of s. 11 orders. Based on past experience, the Bureau's view was that parties to a merger would not fully comply with voluntary disclosure requests. Further, there was little if any incentive on third parties to voluntarily disclose information. The overriding concern of the Bureau in the merger context is the ability to complete merger review inquiries within the merger waiting periods for notifiable transactions under s. 123 of the *Act*⁵¹ or before

51. Subsection 123(1) of the Act provides:

123. (1) A proposed transaction referred to in section 114 shall not be completed before the expiration of

(a) fourteen days after the day on which information required under section 114 has been received by the Commissioner, where the information is prescribed short form information and the Commissioner has not, within that time, required prescribed long form information to be supplied under that section,

closing of the transaction. The Bureau expressed concern that making voluntary information requests first, followed by s. 11 applications as a last resort, would inevitably put the Bureau on the other side of the statutory waiting periods or the time for closing transactions.

Voluntary information requests were the norm in the merger context until the early to mid-1990s. The Bureau has resorted to s. 11 orders more frequently since then. While parties to a merger continue to make voluntary disclosure, there appears to be an increasingly adversarial relationship and less cooperation between the Bureau and the private competition law bar with respect to voluntary information requests. Responsibility for this adversarial relationship rests, in part, with the private competition law bar.

The following table summarizes the s. 11 orders obtained by the Bureau in the period between 2003 and 2007:

Branch	Mergers Reviewed or Complaints Received	Number of Inquiries	Number of Inquiries Where Orders Obtained	Total number of orders
Mergers	1,393 Mergers	27	18	166
Civil	5,020 Complaints	17	4	41
Criminal	1,275 Complaints	37	15	127

(b) except as provided in paragraph (c), forty-two days after the day on which information required under section 114 has been received by the Commissioner, where the information is prescribed long form information, or

(c) where the proposed transaction is an acquisition of voting shares that is to be effected through the facilities of a stock exchange in Canada and the information supplied is prescribed long form information, twenty-one trading days, or such longer period of time, not exceeding forty-two days, as may be allowed by the rules of the stock exchange before shares must be taken up, after the day on which the information required under section 114 has been received by the Commissioner,

unless the Commissioner or a person authorized by the Commissioner, before the expiration of that time, notifies the persons who are required to give notice and supply information that the Commissioner does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.

Fair Business Practices	68,478 Complaints	52	17	78 ⁵²
Bureau	76,166	133	54	412

The number of orders sought per inquiry varies widely, from a high of 34 orders to one order. Inquiries differ significantly in terms of their scope and complexity, and the variation in the number of s. 11 orders sought per inquiry reflects their context-specific nature. The Mergers Branch obtained s. 11 orders with the greatest frequency, in two thirds of inquiries. By contrast, the Civil Matters Branch relied on s. 11 orders in only 23.5% of inquiries. Given the fact-specific nature of inquiries, it is not clear what conclusions may properly be drawn from these statistics. But it can be said that the Bureau relies on s. 11 orders with less frequency than is suggested anecdotally by the private competition law bar.

Recommendations

In our view, s. 11 orders are—and should remain—an essential tool for the Commissioner to gather the information necessary for an inquiry. The Commissioner would be impeded significantly in administering and enforcing the *Act* if s. 11 orders were unavailable.

The Bureau would be assisted considerably in carrying out merger review if it had at its disposal an investigative tool similar to a Second Request for obtaining information from the parties to the proposed merger, which would automatically extend the waiting period for closing the transaction. This could also serve to attenuate some of the Merger Branch's concerns regarding making voluntary information requests prior to seeking s. 11 orders.

The private competition law bar and certain former Directors of Investigation and Research called for pre-application dialogue with the proposed respondents of s. 11 orders. The purpose of this dialogue would be to obtain some voluntary disclosure and to tailor the proposed s. 11

52. Includes 34 production orders issued under the *Criminal Code*.

order. Even in the context of a compulsory process there is scope for cooperation by respondents.

Within the Bureau, there appears to be a variety of approaches to pre-application dialogue, with the Mergers Branch expressing reluctance to engage in pre-application dialogue and thus water down the efficacy of the *ex parte* process and jeopardize obtaining information within the merger waiting periods set out in s. 123 of the *Act* or before closing of the transaction. By contrast, in civil matters the Bureau will often engage in pre-application dialogue with third parties who are cooperating in the inquiry; often, the Bureau will require testimony from these third parties. In criminal matters, some counsel engage in pre-application dialogue, but this practice is not uniform.

In our view, as a matter of best practice, the Bureau should engage in pre-application dialogue with the respondent of a proposed s. 11 order. The Bureau will need to make s. 11 applications without pre-application dialogue when faced with time constraints, when there are concerns about the destruction of documents, or when the Bureau is coordinating a “dawn raid” with other jurisdictions.

This pre-application dialogue should be voluntary and non-binding on the Bureau. If respondents prove to be recalcitrant or delay the process, the Bureau is under no obligation to continue the dialogue and should proceed with its application under s. 11.

B. The Bureau’s Internal Review Process

The private competition law bar has the impression that there are few internal controls within the Bureau before it makes a s. 11 application. On our review, it became apparent that the opposite is true. The Bureau takes seriously its responsibility to properly vet proposed s. 11 applications before applying to a Court. Over time, the Bureau has adopted different models to ensure accountability and oversight of the s. 11 application process. Regardless of the process, the Bureau scrutinizes whether a s. 11 order is truly necessary in a particular inquiry, whether it should seek a s. 11 order against third parties, and in each case whether the scope of the draft

order is sufficiently tailored to balance the burden of compliance against the need for the information sought.

Subsequent to the Federal Court's decision in *Labatt*, the Bureau adopted a new review process. As discussed above, a review committee of two senior members of the Bureau and a senior delegate of the Attorney General who does not have carriage of the file has been established to review proposed s. 11 applications. The committee works on a consensus model, requiring the approval of all committee members.

Recommendations

In our opinion, the Bureau should retain the new committee model. It should also continue to require the consensus of the entire committee before seeking a s. 11 order. The goal should be to maintain discipline and accountability within the team seeking the s. 11 application, while providing an internal check on s. 11 applications.

We considered whether the Senior Counsel, Competition Law Division who sits on the review committee should be replaced by a Senior Counsel within the Department of Justice with significant experience in obtaining other forms of *ex parte* orders. Our concern was the possibility that co-located counsel may not have sufficient independence from their client to adequately perform the review function. Ultimately, however, we do not recommend this substitution. In practice, Senior Counsel, Competition Law Division possesses the necessary degree of independence to carefully scrutinize proposed s. 11 applications. Moreover, a certain level of accumulated expertise in competition law is necessary to effectively review proposed s. 11 applications.

The new model is too new to assess its efficacy in practice. But, in principle, its approach is sound. We recommend that, within two years, the Bureau and the Department of Justice perform an assessment of the new model's efficacy in scrutinizing s. 11 applications.

C. Practices in Applying for s. 11 Orders

In the past, the Bureau made s. 11 applications to the Federal Court in writing; the Commissioner's counsel did not attend in person before the issuing judge. It was not that the Bureau was unwilling to appear in person; rather, a practice at the Federal Court had developed whereby s. 11 applications did not require the personal attendance of counsel and the person who swore the affidavit in support of the application.

In the first s. 11 application following the *Labatt* case, counsel for the Commissioner and the affiant personally attended before the Court.

Where the Bureau seeks a s. 11 order from a provincial Superior Court, it follows the practice of that Court as to whether the application should be made in writing only or by attendance in person before the issuing judge.

The Bureau typically applies to the provincial Superior Court in which criminal proceedings may ultimately be commenced, and for civil matters to the Federal Court. Section 11 applications are not assigned to the judges of the Federal Court who are designated to sit on the Competition Tribunal in order to avoid disqualifying judges from sitting on the Tribunal to hear the same matter in which the applications were made.

Recommendations

We endorse the move away from making applications in writing without a personal attendance of counsel for the Commissioner. As a rule, counsel should attend before the Court with the person who swore the affidavit. This attendance could be in chambers or *in camera* before the Court, at the discretion of the judge. Counsel and the person who swore the affidavit are there to provide clarification based on the affidavit. Where the trial judge elicits information not in the affidavit, the affiant should swear a supplementary affidavit, if the additional information is minor, or withdraw the application in order to amend the affidavit, if the additional information is more significant. In any event, the basis for the Court's decision to grant the s. 11 application should be found within the four corners of the record before the Court.

Personal attendance should go some way towards addressing the concern that the Federal Court is used as a “rubber stamp” on s. 11 applications.

We considered recommending that when a s. 11 application is made to the Federal Court, it should be made to one of the judges designated to sit on the Competition Tribunal. Their expertise in competition law matters would be valuable in reviewing s. 11 applications. Applying to this group of judges may create consistency in practice. The problem of disqualification from eventual Competition Tribunal proceedings could be addressed by applying for all s. 11 applications in a particular inquiry to the same judge. But only six judges may be appointed to the Competition Tribunal⁵³ and it would require the cooperation of the Federal Court. As such, there would likely not be adequate judicial resources to review s. 11 applications in a timely way. For this reason, we do not advance this recommendation.

Whenever possible, all s. 11 applications in a particular inquiry should be made to the same judge. This will promote full, frank, and fair disclosure and a concomitant thorough understanding of the facts and issues by the judge hearing the application. We recognize that scarce judicial resources may require the Bureau to depart from this practice on occasion in order to obtain a s. 11 order in a timely way.

D. Statutory Test for Obtaining s. 11 Orders

There is a tendency among members of the private competition law bar to conflate the requirements of s. 11 and s. 15 (search warrants) of the *Act*. The Federal Court has also sought to read in additional requirements to the statutory test in s. 11. For example, the Federal Court in *Air Canada* (above), in order to give content to the residual discretion of the Court, read in the requirement that the Commissioner must provide “[sufficient] evidence to support a conclusion that a *bona fide* inquiry has been commenced.”⁵⁴

53. *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 3(2)(a).

54. At ¶ 31.

Recommendations

There are two, and only two, requirements to obtain a s. 11 order. It is necessary that the Court be satisfied, 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. As we have observed, there is a residual discretion to refuse to grant the s. 11 order. However, where these two conditions are satisfied, the order should issue unless it would be an abuse of the Court's process.

In our respectful opinion, the Federal Court erred in suggesting that the onus is on the Commissioner to present sufficient evidence that the inquiry has been commenced in good faith. A Court should not second-guess the Commissioner's decision to commence an inquiry. The Commissioner acts in the public interest and, as such, good faith should be presumed. The burden is properly on the responding party to establish bad faith on an application to vary or set aside a s. 11 order.

The Bureau should continue to resist the imposition of further substantive requirements being read in to s. 11. In the materials for a s. 11 application, it may be useful to draw attention to the significant differences between s. 11 and s. 15 of the *Act* as a clear illustration of Parliament's intent that the Commissioner need not demonstrate on a s. 11 application that there are reasonable grounds to believe that a breach of the *Act* has occurred.

Certain members of the private competition law bar suggested that the proper reading of s. 11 requires the Court to read in what they suggested was the requirement in s. 10 that the Commissioner have "reasonable grounds to believe". This interpretation is not correct. First, the statutory language of s. 10 is "reason to believe", which does not require that the belief be objectively reasonable. The Commissioner need only have an honestly held belief that a person has contravened an order made under the *Act* (subpara. (1)(b)(i)); that grounds exist for the making of an order under the *Act* (subpara. (1)(b)(ii)); or that an offence under the *Act* has been or is about to be committed (subpara. (1)(b)(iii)). Second, s. 10 also requires the Commissioner to commence an inquiry on the application of six Canadian residents under s. 9 of the *Act* (subpara. 10(1)(a)) or when directed by the Minister (para. 10(c)). None of these triggers for an inquiry imports a reasonable belief requirement.

Finally, when a search warrant is challenged by the respondent, the courts usually accord the applicant a certain degree of deference on the basis that the warrant is an investigative tool typically obtained at an early stage.⁵⁵ It is proper for the Court to give a similar measure of deference to the Commissioner on a s. 11 order, particularly with respect to the relevance and scope of the material sought and whether additional s. 11 orders are required against the same respondents. These are *investigative* orders and, as such, the Commissioner—who is charged with administering and enforcing the *Act*—is in the best position to determine relevance and scope, and whether additional s. 11 orders are needed for the inquiry.

E. Duty of Disclosure to the Court

The Commissioner is under a duty to make full, frank, and fair disclosure to the Court. The Commissioner should state his or her own case for obtaining a s. 11 order fairly and must inform the Court of any points of fact or law known to the Commissioner as to 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.

Recommendations

When an earlier s. 11 order has been sought against a respondent in the same inquiry, the record should include the order previously sought against the respondent. The affidavit material should include a general description of the information previously obtained in those orders and should explain why additional information is sought. The affidavit should address the issue of potential duplication between earlier and later orders. The affidavit should generally explain the terms of the draft order. The draft order should include the Bureau's standard provision regarding duplication, and this provision and its purpose should be set out in the affidavit.

55. See e.g. *Times Square Book Store and The Queen (Re)* (1985), 21 C.C.C. (3d) 503 at p. 512 (Ont. C.A.).

When the Bureau has engaged in a pre-application dialogue with the respondent, this should be disclosed to the Court. So too should any facts known to the Bureau, particularly as a result of this dialogue, that may explain the respondent's position regarding the scope of the order and the relevance of the material sought.

The Commissioner should not actually or apparently warrant to the Court that no further orders would be required for the purposes of an inquiry.

The Bureau should have a standard affidavit for s. 11 applications, which would be tailored to the circumstances. The standard affidavit should refer to the three-member review committee and its decision to approve the application.

F. Material Already in the Possession of the Bureau

It was suggested by the Federal Court in *Labatt* that the Bureau should be required to review all material in its possession from a previous inquiry in order to avoid duplication in a s. 11 order in a later inquiry.

Recommendations

In our opinion, it is not clear whether the Commissioner has the statutory authority to retain information obtained pursuant to an inquiry once the inquiry has concluded and the Commissioner has decided not to institute proceedings. Moreover, the Bureau should consider whether it is proper to use the information obtained pursuant to one inquiry on a different inquiry. Although s. 18(3) authorizes the Commissioner to make and retain a copy of any record produced under s. 11 (among other provisions) it is not clear whether this section authorizes the indefinite retention of information by the Commissioner.

Quite apart from the propriety of retaining this information, information produced years earlier (or even a few months earlier where it is a highly dynamic market) on a different inquiry may be stale or of limited utility because it was not produced in a form relevant to the later inquiry.

Moreover, the volume of material collected by the Commissioner on inquiry makes it unduly burdensome on the Bureau to identify and review information produced on an earlier and unrelated inquiry for the purpose of advising the Court on a s. 11 application of material already in the Commissioner's possession and to avoid duplication of information sought in the proposed order. The most efficient and practical method of avoiding duplication is to require the respondent to identify any records it previously produced that are in the possession of the Commissioner, subject to confirmation that the records are in the Commissioner's possession.

G. Potentially Burdensome Nature of s. 11 Orders

The private competition law bar expressed concern with the burden s. 11 orders impose, particularly on true third parties to mergers, civil and criminal inquiries. The Bureau is sensitive to the potentially burdensome nature of s. 11 orders.

Recommendations

In deciding whether to apply for a s. 11 order, the Bureau should continue to weigh the burden of a s. 11 order on a respondent against the need to obtain the information necessary to conduct an inquiry. However, there is a social and moral duty on respondents, including third parties, to assist the Commissioner in the administration and enforcement of the *Act*.

As a matter of best practice, the Bureau should collaborate with the respondent both *before* applying for a s. 11 order and *after* obtaining it. As we discussed above, pre-application dialogue will not be appropriate where there are real concerns about meeting timelines or the destruction of documents by the respondent. Nonetheless, dialogue with the respondent after service of the s. 11 order should be the norm.

The Bureau and the respondent should adopt a collaborative approach, in order to:

- tailor the scope of the order;
- determine the respondent's record-keeping practices;

- identify the respondent's custodians for records and information and seek to limit the number of custodians who are required to search for records and information to a manageable size, while still providing the Commissioner with the information necessary for the inquiry; and
- limit the relevant period for which records and information are required.

Again, this process of dialogue is entirely voluntary on the part of the Bureau and the respondent. Where the respondent proves uncooperative or recalcitrant, the Bureau should apply for the s. 11 order or, if one has already been granted, should seek to enforce the order. For their part, respondents should recognize that there are strong incentives to timely cooperation.

The Bureau expressed a desire to have the ability to accept less information or fewer documents than are directed to be produced in the s. 11 order ("reading down"), where the respondent's productions adequately address the needs of the inquiry. The Bureau also expressed a desire to have the ability to accept voluntarily produced information or documents in substitution for information or documents directed to be produced in the s. 11 order ("reading across").

A balance has to be struck between the use of s. 11 as a compulsory court order and the need for flexibility and accommodation to reduce the burden on respondents. Language should be included in the draft order allowing the Commissioner some flexibility to "read down" the scope of the production ordered. However, because a s. 11 order is a Court order, there must be a clear limit on this "reading down"; otherwise, an impermissible delegation of the judicial function would result. The Commissioner should not unilaterally vary the order by "reading across". If, after post-service dialogue, a respondent voluntarily discloses information or a document that better fits the needs of the inquiry in substitution for the information or documents directed by the order, the Commissioner should, on consent, apply to vary that part of the s. 11 order. There are obvious incentives to respondents to consent to these variations, and they can be applied for and obtained in writing from the Court.

Because of the burdensome nature of s. 11 orders and the potential need to vary them, we considered whether a date to re-attend before the Court (either in person or by teleconference)

should be included in draft orders. This would comport with the practice in relation to *Anton Piller* orders and be consistent with the greater degree of judicial supervision implied by the decision in the *Labatt* case. Ultimately, however, we concluded that resorting to this practice is not warranted at this time. Our view is that including a date for re-attendance in the draft order could actually impair post-issuance dialogue and result in hardening of positions. It would also impact on limited judicial resources. Nevertheless, if further problems arise in the s. 11 application process, further consideration should be given to the return date concept.

H. Section 11 in Criminal Inquiries

Section 11 orders are used in criminal and dual-track inquiries. The Commissioner generally applies for s. 11 orders to the Superior Court of the jurisdiction in which the prosecution is likely to occur. Generally, counsel appear in person before the issuing judge where the s.11 application is made on a criminal inquiry.

Recommendations

Counsel should continue to attend before the issuing judge with the person who swears the affidavit. Likewise, the Commissioner should continue to apply to the Superior Court of the jurisdiction in which the prosecution is likely to occur. Where possible, all applications for s. 11 orders on a particular criminal inquiry should be made to the same judge.

As discussed above, the same standard of full, frank, and fair disclosure applies to both criminal and civil inquiries.

We would advise against seeking s. 11 orders, in furtherance of a criminal inquiry, against a person who is a suspect at the time of the s. 11 application. Where s. 11 is used to compel a suspect to produce documents, give testimony under oath, or prepare a written return for the

purpose of building a criminal case against him or her, it is questionable whether this would comply with ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*.⁵⁶

I. Giving Formal Notice of s. 11 Applications

As a general rule, the Commissioner does not give formal notice of a s. 11 application. The question arises, when (if at all) is formal notice appropriate?

Recommendations

The Bureau expressed a concern that engaging in pre-application dialogue would require the Bureau to give respondents formal notice of s. 11 applications and thus lead to regular challenges to s. 11 applications. For pre-application dialogue to prove practicable, it will require an attitudinal shift by the private competition law bar. There are strong incentives for the respondent to a proposed s. 11 order to cooperate with the Bureau in tailoring the scope of the order, and limiting the number of custodians who must search for information, the relevant period for the search, and the nature of the information sought.

In our view, pre-application dialogue does not create the obligation on the Bureau to give formal notice to a respondent, nor does it give a respondent a right of audience on the s. 11 application. Section 11 contemplates an *ex parte* application process. This should be the norm. Concerns regarding disclosure of the pre-application dialogue are best addressed (and should be addressed) in the Commissioner's affidavit material put before the Court on the s. 11 application.

In our opinion, formal notice of a s. 11 application should be given to a respondent where a previous s. 11 order has been successfully varied or set aside in the same inquiry. Moreover, consideration should be given to providing formal notice where there is a previous s. 11 order against the same respondent and a challenge to a further s. 11 order is likely.

56. See *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Colarusso*, [1994] 1 S.C.R. 20; *R. v. R.J.S.*, [1995] 1 S.C.R. 451; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3; *R. v. Z.(L.)* (2001), 54 O.R. (3d) 97 (Ont. C.A.); *R. v. Jarvis*, [2002] 3 S.C.R. 757.

Providing formal notice does not necessarily entitle the respondent to appear before the issuing Court. It is within the discretion of the Court to grant or refuse the respondent audience on the s. 11 application.

J. General Dialogue with the Private Competition Law Bar

The Bureau has a general dialogue with the private competition law bar, through a working group with the Canadian Bar Association – National Competition Law Section, as well as by meeting with the outgoing and current presidents of the Section. The Bureau is keen to continue this dialogue, as is the private competition law bar.

Recommendations

The Bureau should continue this general dialogue. It would be a useful method of discussing possible merger review practice reforms. For example, the Bureau and the bar could discuss whether it is possible to import the innovations developed by the FTC in the United States, such as:

- Developing a presumption regarding the number of custodians who should be required to search their files, provided the parties to a merger fulfil certain pre-requisites; and
- Developing a presumption regarding the relevant time period for documents and information requests.

12. Conclusion

It is clear from our review of the Bureau's s. 11 application process that the Bureau conducts its role responsibly. The burden on respondents, particularly third parties, is at the forefront of the Bureau's mind when weighing whether to seek a s. 11 order.

We have no doubt that s. 11 is an essential investigative tool for the Commissioner to effectively fulfil her mandate. Indeed, in the merger context, a legislative power similar to the U.S. Second Request (which automatically extends the merger waiting period) would be a salutary amendment to the *Act*.

The recommendations we have made seek to address the concerns expressed by the Federal Court, the private competition law bar, and the Bureau. We found that both the Bureau and the bar sought to reduce the adversarial nature of the s. 11 process and to improve cooperation in responding to s. 11 orders. It is our hope that pre-application and post-service dialogue will address this.

The Bureau should continue to resist attempts by respondents and the courts to read in additional requirements to s. 11. To obtain a s. 11 order, Parliament has clearly mandated that the Commissioner need satisfy only two requirements: (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.

Finally, we have suggested best practices to ensure that the Bureau continues to meet the standard of full, frank, and fair disclosure to the Court on s. 11 applications. We will soon provide a template affidavit and draft order to assist the Bureau.

If you have any questions, or would like to discuss our opinion, please do not hesitate to contact me.

Yours very truly,

A handwritten signature in black ink that reads "Brian Gover". The signature is written in a cursive, flowing style.

Brian Gover
BG/or