

SECTION 11: GOOD, BAD AND AMBIGUOUS

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The Competition Bureau has recently implemented a policy of using its section 11 investigative powers to assist in all inquiries into reviewable practices. Section 11 orders can be a powerful investigative tool, but past experiences illustrate that this approach is not without downside. Section 11 can increase the litigiousness from the very beginning of a file and lead to protracted and expensive proceedings. It may also force the Bureau to disclose its allegations fairly early in the inquiry process, making it more challenging to adjust the scope and focus of the inquiry. In this note, we review some of the key cases relating to the Bureau's historical use of its section 11 powers and examine the implications of this new policy, and whether, on balance, it is likely to benefit the Bureau.

Le Bureau de la concurrence a récemment mis en œuvre une politique visant l'utilisation de ses pouvoirs de mener des enquêtes prévus par l'article 11 dans toutes les enquêtes relatives aux pratiques susceptibles d'examen. Les ordonnances prises en vertu de l'article 11 constituent un outil d'enquête puissant, mais les expériences antérieures démontrent que cette approche n'est pas sans inconvénient. L'article 11 peut accroître la judiciarisation dès le début du dossier et donner lieu à des procédures longues et coûteuses. Il pourrait également contraindre le Bureau à présenter ses allégations assez tôt dans le processus d'enquête, rendant plus difficile la détermination de la portée et de l'objet de l'enquête. Dans ce texte, nous analyserons certaines décisions clés portant sur l'historique de l'utilisation par le Bureau de ses pouvoirs prévus par l'article 11 et examinerons les implications de cette nouvelle politique, et si, tout bien considéré, elle est susceptible de représenter un avantage pour le Bureau.

A. Introduction

Section 11 of the *Competition Act* allows the Commissioner of Competition (Commissioner) to apply for court orders to gather information to assist in his or her Inquiries. The scope of

information which may be gathered under section 11 is broad and the Commissioner's powers are significant. Over the years various issues and disputes have arisen with respect to the Commissioner's use and attempted use of the section 11 powers, and these are explored below.

Recently, the Commissioner has implemented a policy of using section 11 powers to assist in all reviewable practice Inquiries which he undertakes. This is a new approach for the Competition Bureau (Bureau). Previously, section 11 powers had been used in some cases, but other information gathering techniques, including the voluntary production of information, have also been used fairly extensively as an alternative to use of formal section 11 powers. In this note we examine the implications of this new policy and whether, on balance, it is likely to benefit the Bureau in the long run.

B. Overview of Section 11 Powers

Section 11 of the *Competition Act*¹ (the *Act*) is one of the principal investigative tools available to the Commissioner. The other main tools include the ability to obtain search warrants (section 15 of the *Act*); search computer systems (section 16 of the *Act*); and intercept electronic communications (conduct wiretaps) with respect to certain offences under the *Act*.² While not unique, section 11 grants the Commissioner broad and, for the Commissioner, a very efficient mechanism to gather information.

Within section 11 the Commissioner is granted three broad investigative powers. One is to require attendance of persons to be examined under oath or affirmation with respect to matters relevant to an Inquiry which the Commissioner is undertaking (section 11(1)(a)). Secondly, section 11 allows for orders that persons produce records and documents specified in the order relevant to an Inquiry by the Commissioner (section 11(1)(b)). In addition to being required to produce records in the possession of a Canadian entity, section 11(2) provides that if records are sought from a corporation, the order can be extended to affiliates of the corporation, whether in Canada or abroad. This application of the provision has been subject to challenge³ but the issue remains undecided. Finally, pursuant to section 11(1)(c), persons may be ordered to provide a written return under oath or affirmation, answering questions relevant to the Commissioner's Inquiry.

Therefore, under section 11, a person who has information – but not necessarily, or even usually, the subject of an investigation – may be ordered to attend and answer questions under oath, provide relevant records, including records from affiliates abroad, and answer questions relevant to the Inquiry.

In addition to the breadth of the information gathering available under section 11, and the fact that it applies not merely to those who are the subject or target of an Inquiry, but to anyone who is likely to have information relevant to the Inquiry, the circumstances under which section 11 orders may be issued by the court are also broad. Whenever the court is satisfied that the person has or is likely to have relevant information and that an Inquiry is being made under section 10 of the *Act*, the order may be granted. Under section 10, Inquiries must be initiated whenever any six persons resident in Canada apply for an Inquiry into a matter. Inquiries must also be initiated whenever the Minister of Industry directs the Commissioner to inquire into a matter. As well, Inquiries may be commenced whenever: (a) the Commissioner has reason to believe that a person has contravened an order under the *Act* (including orders prohibiting use of intellectual property rights (section 32), injunctions (section 33), prohibition orders in conjunction with convictions (section 34), or orders under Parts VII.I or VIII); (b) the Commissioner has reason to believe an offence under Parts V or VI of the *Act* (essentially, all the substantive offences) has been or is about to be committed; or (c) the Commissioner has reason to believe grounds exist for the making of an order under Part VII.I or VIII (the deceptive marketing practices and reviewable conduct provisions, including the merger provisions).

It is noteworthy that the Commissioner need not have reasonable and probable grounds to believe something – he or she merely has to have “reason to believe” that one of these three conditions exists. The Commissioner does not even have to have reason to believe that those circumstances have been met if there is a six person complaint, or if the Minister of Industry directs him or her to commence an Inquiry.

As a result of the foregoing, there is a broad ability to make orders under section 11. Such orders may affect a broad range of persons, and the information subject to production is broad.

As noted above, in addition to section 11 orders, the Commissioner also has the ability to apply for search warrants and to search computer systems. He or she also has the power to seek wiretaps – but that is limited to specific criminal offences. The ability to obtain search warrants or to search computer systems is co-extensive with the ability to apply for section 11 orders, by way of the conduct under the *Act* which triggers a possible application, but the test is slightly different. Here, a six person complaint or direction from the Minister does not suffice. The Commissioner has to satisfy the court that there are reasonable grounds to believe the relevant order has been contravened, or that grounds exist for the making of an order under Parts VII.I or VIII, or that an offence under Part VI or VII has been or is about to be committed, and that there are reasonable grounds to believe that there are records on the premises that will afford evidence of the above. By contrast, as noted above, all that needs to be shown for a section 11 order is that an Inquiry is being conducted and that a person is likely to have information relevant to the Inquiry. In order for an Inquiry to be made, the Commissioner need only have “reason to believe.” So, as noted, it is a slightly different and lesser formulation necessary to obtain a section 11 order than a search warrant.

Although section 11 orders are broadly similar to search warrants, at least with respect to the power to access records, section 11 orders have a great practical advantage over search warrants – and wiretaps – for the Commissioner. For returns of documents and of information (section 11 (1)(b) and 11(1)(c), as opposed to examination under oath – section 11(1)(a)), the costs of seeking information pursuant to a section 11 order are relatively modest for the Commissioner. They are, however, as noted in the *Labatt* case,⁴ potentially very high for the party subject to the order.

C. Issues over the Years

a) Judicial Challenges

Not surprisingly, given the issues involved and the stakes in many cases, there have been significant disputes over the years with regard to whether or not section 11 is contrary to the right against self-incrimination or unreasonable search or seizure, or whether it may constitute

an unconstitutional deprivation of liberty. Reasonably consistently, the courts have found that the section 11 powers are constitutional.⁵

Also over the years, various parties have sought to stay the execution of section 11 orders on various grounds – including that the commencement of a proceeding brings to an end an Inquiry under which section 11 orders may be sought; that the order is beyond the jurisdiction of the court; that the order constitutes an improper invasion of privacy; or that parties are improperly excluded from the very section 11 proceedings in which their information is sought.⁶ In these cases, the courts have generally found, in broad terms, that section 11 is an administrative and evidence gathering procedure but it does not determine the rights of persons, and therefore, generally, the courts have permitted the section 11 order information gathering to proceed. Similarly, the courts have been reasonably consistent that the Commissioner does not have to provide significant information as to the basis for commencing an Inquiry.⁷

As noted above, in order to commence an Inquiry – which is a predicate for seeking a section 11 order – the Commissioner does not have to have reasonable and probable grounds to believe that relevant conduct has been committed – he or she merely has to have “reason to believe.” This was confirmed in the case of *R.L. Crain Inc. v. Couture*,⁸ in which the court concluded that there is no requirement on the Commissioner to disclose the grounds for his or her suspicion “or even that the suspicion be reasonable.” That may go slightly beyond what the courts were comfortable with, however. In *Canada (Commissioner of Competition) v. Air Canada*,⁹ the court found that a section 11 order can be set aside if it is shown that the order was granted on the basis of misleading or incomplete facts. While the court in the *Air Canada* case refused to set aside the challenged section 11 order, it went somewhat further than the previous decisions, noting that granting of the order is discretionary, and does not authorize the issuing of an order on “a whim.” The court determined that the section 11 order would not be granted on the basis of a bald assertion that an Inquiry had been commenced, but rather that the court is likely to require some description of the nature of the alleged conduct and the basis of the Commissioner’s decision to commence an Inquiry. The court indicated that it would have been permitted to refuse to grant an order where there is insufficient evidence to support a conclusion that a *bona fide* Inquiry had been commenced.

The most recent set of challenges to the section 11 powers arose in respect to their potential extraterritorial effect. This issue was raised in the series of *Toshiba* cases,¹⁰ and the recently abandoned *Royal Bank of Scotland* challenge¹¹ dealing with the use of section 11 orders to gather information from abroad. The *Toshiba* litigation was ongoing from the time the section 11 order was issued, on August 29, 2007, until the Bureau eventually discontinued the underlying Inquiry, after Toshiba was denied leave to appeal to the Supreme Court of Canada in December 2011.

b) The Labatt Case

The relatively recent case involving the purchase by Labatt of Lakeport Brewing¹² resulted in some excitement surrounding the section 11 process. In that case – somewhat surprisingly, given the deference which the courts have generally shown the Bureau in section 11 matters – the Federal Court was highly critical of the Bureau’s resort to a second section 11 order in the context of a merger examination. It noted, amongst other things, the heavy duty on an applicant for an *ex-parte* order to make full and frank disclosure and ensure that the court is apprised of all of the relevant facts, including informing the court of any points of fact or law known to it which favour the other side. The court explained that some latitude is frequently given in *ex-parte* situations when there is urgency, but in many cases – including that case – the Commissioner does not face urgency in bringing section 11 applications *ex-parte*.

The court noted that the applicant has a duty to place before the court all matters which are relevant to the court’s assessment of the application. In the *Labatt* case, the court found that the Commissioner had not met the burden. Amongst other things, she had not ensured that the representations which were made to the Justice granting the first section 11 order were brought to the court’s attention on the second application, including the representation that the information sought in the first order would likely be sufficient. The court specifically stated that it was not a “rubber stamp” and had a right of oversight regarding the question of whether the information sought was appropriate. The court also found that there was overlap between the two section 11 orders, a fact which it was not aware of when it made the second order. The court also criticized the Commissioner for failing to bring

before the court evidence of the Respondent's expressed concern with respect to the breadth of information demanded of it. Ultimately, the court concluded that the material put before the court on the section 11 application was "misleading, inaccurate and incomplete."¹³ The section 11 order was set aside.

The Commissioner did not appeal the decision. Instead, she commissioned an opinion on the Bureau's process for obtaining orders under section 11 from Mr. Brian Grover, a private practitioner (the Report).¹⁴ The Report extensively reviewed the section 11 powers and commented on them. Included in these comments were observations that the statute requires, or at least strongly encourages, *ex-parte* rather than on-notice applications. The Report commented adversely on the decisions in both *Air Canada* and *Labatt* that courts have more than a rubber stamp supervisory role in issuing section 11 orders. Somewhat extraordinarily, the Report offered the view that 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."¹⁵ The Report also critiqued the analysis of the Federal Court in the *Labatt* case in detail.

In response, the Canadian Bar Association, by letter dated September 4, 2008,¹⁶ provided a comment, including a refutation of the statement in the Report that it had been consulted, a correction of the Canadian Bar Association's stated position with respect to section 11 orders, and commentary respecting the criticism of the decision of the Federal Court in the *Labatt* case, amongst other things.

c) Practical Issues

In addition to the history of judicial challenges with respect to section 11, there have been notable practical – sometimes public – controversies with respect to its use. In the first such large scale issue, section 11 orders were used extensively in relation to the Bureau's film distribution Inquiry between 2000 and 2002.¹⁷ The Inquiry did not proceed but there was very substantial controversy with respect to what was alleged to be an overuse of section 11 powers. Estimates were that the cost of responding in this case likely exceeded \$20 million. The upshot

was commitment by the Bureau that a Senior Bureau officer – Mr. Peter Humber in that case – would oversee all future section 11 applications.

A few years later, a similar controversy arose in connection with the Bureau's investigation of the proposed merger between *CHUM and CTV*.¹⁸ In that case, over thirty (30) section 11 orders were served on a multitude of advertisers, broadcasters and advertising agencies, creating a huge amount of work by these entities in responding, yet the Bureau closed its merger investigation prior to receiving responses to the section 11 orders. This again provoked a significant outcry with respect to the use, and alleged abuse, of the section 11 powers.

In November 2005, the Bureau issued an Information Bulletin on section 11¹⁹ dealing with, amongst other things, the *ex-parte* nature of the proceeding, the scope of information subject to the orders, the court's function in issuing orders, the right of the person subject to Inquiry, service of the orders, the court from which orders would be sought, the approach to compliance with the order – including whether or not its scope could be negotiated with the Bureau. This Bulletin was released without any public consultation by the Bureau. The National Competition Law Section of the Canadian Bar Association responded by letter dated February 6, 2007.²⁰ That response took issue with a number of aspects of the Bulletin, including the ability to seek documents from abroad, whether the issuing court's role is broader than that of a mere functionary, whether or not the order should always be sought on an *ex-parte* basis, the appropriate venue for the application, service of section 11 orders, the right of a person whose conduct is inquired into to attend legal examinations, the ability to agree between the parties and the Commissioner as to whether an order has been complied with, and the issue of sealing court documents, amongst other things – in other words, the issues which have formed the basis of much of the litigation and controversy surrounding section 11 over the years.

D. The Recent Policy Change

In light of this background respecting the breadth and use of section 11 orders, we now turn to the policy announcement which is the subject of this brief comment.

a) The Policy

On January 30, 2013, the Commissioner gave a speech²¹ in which he announced that the Bureau's new policy in conducting non-merger civil Inquiries²² would be to use section 11 as the evidence gathering mechanism more or less without exception. He indicated that while, previously, the Bureau had sometimes used section 11 and sometimes relied on voluntary production of information in conducting such Inquiries, the Bureau would move away from the use of voluntary information requests for a number of reasons, which he articulated as including:

- Parties may be using the voluntary information request process for their own strategic purposes, resulting in undue delays in obtaining information and potentially compromising the investigative process.
- In the absence of court orders, parties may provide less than complete responses to information requests.

As noted above, there is no debate that Parliament has granted the Bureau broad section 11 investigative powers that it may choose to use in a variety of circumstances, including where it is conducting an Inquiry into reviewable conduct. The question is whether the decision to use them universally is a wise one? A number of commentators spoke positively about the development shortly after the Commissioner's speech.²³ We are not quite as sanguine.

With respect to the stated reason for the change in policy, being, essentially, that voluntary compliance may be slow and incomplete, it is not obvious that this problem justifies doing away with voluntary production of information across the board. No doubt voluntary production has been slow and incomplete, and will be so from time to time, but it is not the universal rule. Indeed, we note, as counsel on the Bureau's largest civil practice case in recent years, the credit card proceeding,²⁴ that the Bureau did not use compulsory section 11 powers to gather evidence. Instead, it used voluntary information requests and the Competition Tribunal (Tribunal) discovery process. There was absolutely no allegation in that proceeding either of delay or of incomplete production of information.

While inappropriate delay, or failure to produce relevant information, can occur with voluntary information production – and where it does, surely the Bureau is justified in moving to section 11 powers quickly – section 11 itself is not free of that risk. In addition, use of section 11 powers gives rise to other risks and concerns. We explore these issues below.

b) Some Concerns Regarding The New Policy

This brief – and far from comprehensive – review of the recent history of section 11 is undertaken to illustrate that use of section 11 orders, both in theory and application, is far from uncontroversial. Indeed, as explored above, it has been a point of controversy for years.

In light of the background, the question is whether the Bureau's recent decision to employ section 11 in all civil non-merger Inquiries is likely to be beneficial – either for the Bureau, or the Canadian competition law process more generally. Our view, as may be surmised, is that it likely will not be universally the case for two or three reasons in addition to the fact that it may not guarantee the expedition which the Bureau seeks.

(i) Increased Litigiousness from the Beginning of the File

A section 11 order will frequently result in a confrontational process, sometimes where a party would have been willing to cooperate without confrontation. It, by definition, increases litigiousness from the very beginning of a file. Of course, some matters are confrontational from the beginning whether or not section 11 orders are used, but that is not necessarily the case.

For example (although it is the cartel context), in the Commissioner's Inquiry into an alleged cartel to unduly lessen competition in the manufacture, supply and sale of cathode ray tubes in/to/from Canada, as touched on above (*Toshiba*), there were numerous proceedings before the courts as the company subject to the section 11 order sought to vary or appeal aspects of the order. The Commissioner began an Inquiry under section 10(1)(b)(iii) of the *Act* on August 20, 2007.²⁵ On August 29, 2007, it obtained an *ex parte* order from the Ontario Superior Court of Justice, under sections 11(1)(b) and 11(2) of the *Act*, requiring Toshiba

of Canada Limited (Toshiba Canada) to produce certain records.²⁶ On February 6, 2008, the order was varied, pursuant to a joint application by Toshiba Canada and the Commissioner.²⁷ Toshiba Canada also brought a motion to set aside the *ex parte* order.²⁸ In support of that motion, it brought an interlocutory motion seeking an order for production of records in the possession or control of the Commissioner, as well as an order to cross-examine the affiant in the *ex parte* order.²⁹ This supporting motion was heard in December of 2009 and a judgment was released January 27, 2010.³⁰ The motion was denied³¹ and Toshiba Canada sought leave to appeal the decision.³² Leave to appeal was denied by the Ontario Superior Court of Justice (Divisional Court) in April 2011³³ and leave to appeal to the Supreme Court of Canada was denied in December 2011,³⁴ over four years after the initial section 11 order was obtained. Ultimately, the Commissioner's Inquiry was discontinued before the order bore fruit. A similar, although less protracted, section 11 order battle recently occurred with respect to the Bureau's LIBOR Inquiry, which the Bureau discontinued at the beginning of 2014.³⁵

Furthermore, the Federal Court decision in *Labatt* affirmed that the court's role is not limited to approving or declining to grant the order sought.³⁶ The court may also seek further information, obtain clarification from the Commissioner, require notice be given to the party affected by the order, or give the party a right to be heard before an order is issued.³⁷ While the court cannot conduct a full-fledged review of the Commissioner's decision, depending on the circumstances of the case, the court's powers to control its own processes may arguably create a more confrontational process at the outset.

The various other cases noted above also illustrate that section 11 can move a cooperative relationship to a confrontational process, and that, whatever else section 11 powers may guarantee, they do not guarantee expedition.

(ii) Early Public Disclosure of the Bureau's Allegations

Section 11 applications are supported by affidavit evidence from a Bureau officer. In the alleged predatory pricing and abuse of dominance case against Air Canada, the Federal Court held that a judge has residual discretion in deciding whether to issue a section 11 order.³⁸

This was confirmed in *Labatt*.³⁹ In addition to showing that an Inquiry has commenced under section 10 and that the person against whom the order is sought has relevant information, the Commissioner will likely also be required to provide a description of the alleged conduct being investigated, some basis for the Commissioner's decision to commence an Inquiry, and his/her reasons for believing that such alleged conduct has occurred.⁴⁰

Furthermore, in *ex parte* orders, the Commissioner's "full and frank disclosure" obligation requires it to ensure that the court is apprised of all the relevant facts.⁴¹ This goes beyond simply presenting its own case in the best possible light, but also requires the Commissioner to "inform the court of any points of fact or law known to it which favour the other side."⁴²

These obligations may require the Bureau to "show its hand" before it has had a chance to do much investigation, or fully develop its theory of the case. This is especially problematic in cases where section 11 orders are sought immediately. As mentioned earlier, in the *Toshiba* case, the Commissioner started the formal Inquiry on August 20, 2007, and obtained the section 11 order a little over a week later, on August 29.⁴³ In *Air Canada*, the Commissioner commenced an Inquiry pursuant to section 10 on May 8, 2000, and applied for a section 11 order a month later on June 12, 2000.⁴⁴ While it may be possible to seal information confidentially, at least for a time, the open court principle⁴⁵ requires reasonable transparency.

Not only does this public disclosure require the Bureau to tip its hand and go on record with an outline of the case before it may be entirely appropriate for it to do so, official public disclosure can prejudice the Respondents in respect of private class actions. This is true not only in cartel cases but even in civil cases. Within one week of the Bureau filing its civil case against *MasterCard* and *Visa*⁴⁶ in December of 2010 (recalling that the Bureau did not use section 11 powers, so the filing of the case was the first fulsome statement of the Bureau's views), a private class action was launched in Quebec, virtually parroting the Bureau's claims – even though they were under Section 76, which does not give rise to private right of action.⁴⁷

(iii) Difficulty for the Bureau to Adjust the Scope
and Focus of the Case

While not a legal constraint, the significant practical reality is that once the Bureau has formulated an approach and position and sworn affidavits to obtain a section 11 order, it becomes difficult for the Bureau – as indeed it becomes difficult for any organization once publicly committed – to move away from that formulation. It is difficult to alter the position to become more, or less, concerned with the conduct in issue, or to take a different view of the character of the conduct. That is just the reality, both of the litigation process and of taking public positions. It applies to all persons and is in no way a criticism of the Bureau.

A related concern is that the more invested the Bureau is in a matter, both by way of public statements and by way of resources, the harder it is for it – or any organization – to back away from a concern. Investing resources early and publicly creates momentum for the continuation of investigations. That is not optimal, given that a key aspect of success in the Bureau's work is being able and willing to close Inquiries promptly when it concludes that they are unlikely to result in Tribunal orders.

E. Conclusion

Our thesis is not that the use of the section 11 powers by the Bureau is broadly inappropriate. Parliament has granted these powers and the Bureau has a statutory right to employ them. Our argument is, rather, that a policy of employing section 11 investigative techniques universally, in order to achieve the goals the Bureau seeks – in particular, expedition and completeness of responses – may or may not assist the Bureau. In some cases it likely will, but in others it will not. It is not obvious why a sworn voluntary production of information risks being more inaccurate than a sworn section 11 response. Certainly, as illustrated above, section 11 litigation can become quite protracted. We think that the Bureau's ends would be better served by using its judgment and discretion as to when to employ section 11 powers and when to refrain.

In addition to not necessarily achieving the Bureau's goals, there are other consequences to resorting to section 11 including, as

noted, increased litigiousness and acrimony on files which might otherwise be quite cooperative; publication of information which may be inappropriate and prejudicial to the Respondent and/or the Bureau; commitment of significant Bureau resources to the litigation process at an early stage; and entrenchment of positions, perhaps at an unreasonably early stage in the process.

These concerns will not be relevant in every case, and even where they are relevant, will not outweigh the appropriateness of using section 11 powers in every case. Our point, however, is that the reverse is also true. Section 11 powers will not be appropriate in every case, and some of these negative implications will be significant. A Bureau policy of universally employing section 11 powers fails to take into account this reality.

There is a somewhat broader consideration as well. Historically, the Canadian competition community has prided itself on its cooperative approach. Of course, cooperation does not mean the Bureau does not zealously enforce the law, nor that private parties and their counsel do not zealously defend their rights. It can mean, however, that both parties recognize that there is a more and a less contentious way of reaching the same destination. The less contentious way can, sometimes, be more efficient and effective. It is not always appropriate – but sometimes it is. A resort to the use of formal investigative powers by the Bureau at an early stage undermines that approach.

There are only so many resources available to the Bureau. Section 11 procedures have meaningful costs both in financial and personnel resources – as well as, potentially, very significant litigation costs and potential for delay. If default use of section 11 powers undermines the cooperative approach which has thus far characterized many, if not most, dealings between the business community and the Bureau, while the Bureau may end up obtaining more information where it uses section 11 powers (although, as noted above, it may not), it is likely to receive less information than it now does when it does not use those powers. As noted, in a world of limited resources, section 11 orders can only be used so often. Ultimately, it is submitted, this policy of always using section 11 powers is likely to leave the Bureau with less rather than more information overall.

Endnotes

¹ RSC 1985, c C-34, s 11.

² *Ibid*, ss 15-16; *Criminal Code*, RSC 1985 c C-46, s 183-184.

³ See *infra* notes 10 and 11.

⁴ *Canada (Commissioner of Competition) v Labatt Brewing Co*, 2008 FC 59, 323 FTR 115 [*Labatt*]. Compliance with the initial section 11 order cost Labatt approximately \$750,000 in external costs alone.

⁵ See *Canada (Director of Investigation and Research) v Canada (Restrictive Trade Practices Commission)* (1985), 4 CPR (3d) 59, 18 DLR (4th) 750; *Canada (Commissioner of Competition) v Air Canada*, [2001] 1 FC 219, 8 C.P.R. (4th) 372 (FCTD) [*Air Canada*]; *Ravenshoe Services Ltd. v Canada* (2001) 15 CPR (4th) 543, 90 CRR (2d) 363 (Ont Sup Ct). Canadian courts have also found the predecessor to section 11, section 17 of the *Combines Investigation Act*, RSC 1970, c C-24, to be constitutional: see *Transpacific Tours Ltd. (Canadian Pacific Air Holidays) v Canada (Director of Investigation and Research)* (1986), 8 CPR (3d) 325, 25 DLR (4th) 202 (BCSC); *Thompson Newspapers Ltd. v Canada (Director of Investigation and Research)*, [1990] 1 SCR 425, JE 90-575; *Stelco Inc. v Canada (Attorney General)*, [1990] 1 SCR 617, 68 DLR (4th) 518; *Samson v Canada*, [1995] 3 FC 306, 64 CPR (3d) 417 (FCA). Note, however, the exception of *R.L. Crain Inc. v Couture*, (1983), 10 CCC (3d) 119, 6 DLR (4th) 478.

⁶ See, for example, *Director of Investigation and Research v Warner Music Group Inc.* (1997), 78 CPR (3d) 125, 141 FTR 26 (FCTD); *Canadian Pacific Limited v Canada (Director of Investigation and Research)* (1995), 61 CPR (3d) 137, 1995 CarswellOnt 2283 (Ont Ct J (Gen. Div)); *North American Van Lines Canada Ltd. v Canada (Director of Investigation and Research)* (1997), 136 FTR 16, 78 CPR (3d) 221 (FCTD); *SGL Canada Inc. v Canada (Director of Investigation and Research)* (1998), 86 ACWS (3d) 74, 1998 CarswellNat 2747 (FCTD) [*SGL Canada*].

⁷ See *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181, 15 CPR (3d) 289; *Samuel, Son & Co. v Canada (Restrictive Trade Practices Commission)*, [1988] 2 FC 523, 48 DLR (4th) 77 (FCTD).

⁸ (1983), 10 CCC (3d) 119, 6 DLR (4th) 478 (Sask QB). Note, however that the observation was in the context of a case which found the use of section 11 powers to be unconstitutional.

⁹ *Air Canada*, *supra* note 5; see also *Re Softkey Software Products Inc.* (1994), 84 FTR 153, 57 CPR (3d) 480 (FCTD) at para 5.

¹⁰ *Canada (Commissioner of Competition) v Toshiba of Canada Ltd.*, 2010 ONSC 659, 100 OR (3d) 535 [*Toshiba*], leave to appeal refused by 2011 ONSC 94, 278 OAC 71 [*Toshiba Appeal*], leave to appeal to the SCC refused by 430 NR 394 (note), 2011 CarswellNat 5074 [*Toshiba Application to Appeal to SCC*].

¹¹ See *Royal Bank of Scotland v Commissioner of Competition* (30 November 2011), Court File 13010-11 (Ont Sup Ct, East Region) Quigley J. [*RBS*];

Competition Bureau, Announcement, “Competition Bureau Issues Statement Correcting Inaccurate Statement Made by the RBS Group” (14 November 2012), online: Competition Bureau <<http://www.competitionbureau.gc.ca>> [“CCB Corrects RBS Statement”]; Randall Palmer, “Britain may refuse to produce RBS Libor documents, Canada argues,” *Reuters* (25 January 2010), online: Reuters <<http://www.reuters.com>>.

¹² *Labatt, supra* note 4.

¹³ *Ibid* at para 108.

¹⁴ Brian Grover, “Review of s. 11 of the *Competition Act*” (12 August 2008), online: Competition Bureau <<http://www.competitionbureau.gc.ca>>.

¹⁵ *Ibid* at part 8A.

¹⁶ Letter from Barry Zalmanowitz, Past Chair of the National Competition Law Section to Sheridan Scott, Commissioner of Competition and John H. Sims, Deputy Minister of Justice (4 September 2008), RE: Review of Section 11 of the *Competition Act*, online: Canadian Bar Association <<http://www.cba.org>>.

¹⁷ House of Commons, *Evidence of the Standing Committee on Canadian Heritage*, 38th Parl, 1st Sess, No 37 (10 May 2005), online: Parliament of Canada <<http://www.parl.gc.ca>>.

¹⁸ For more information, see Competition Bureau, Technical Backgrounder, “BGM/CHUM Technical Backgrounder” (28 November 2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca>>; see also *Commissioner of Competition v Bell Globemedia Inc. and CHUM Limited and John D. McKellar C.M., Q.C.* (1 September 2006), CT-2006-008 (Comp Trib), online: Competition Tribunal <<http://www.ct-tc.gc.ca>> (Registered Consent Interim Agreement).

¹⁹ Competition Bureau, Bulletin, “Information Bulletin on Section 11 of the *Competition Act*” (November 2005), online: Competition Bureau <<http://www.competitionbureau.gc.ca>>.

²⁰ Letter from James Musgrove, Chair of the National Competition Law Section to Sheridan Scott, Commissioner of Competition (6 February 2007) RE: Information Bulletin on Section 11 of the *Competition Act*, online: Canadian Bar Association <<http://www.cba.org>>.

²¹ John Pecman, “Remarks by John Pecman, Interim Commissioner of Competition,” Speech (30 January 2013), online: Competition Bureau <<http://www.competitionbureau.gc.ca>>.

²² Primarily inquires under the Price Maintenance, Refusal to Deal, Exclusive Dealing, Tied Selling, Market Restriction and Abuse of Dominance provisions, as well as the new section 90.1 involving agreements between competitors.

²³ See “Canada to Abandon Voluntary Inquiries in Antitrust Cases,” *Global Competition Review* (1 February 2013) online: GCR <<http://www.globalcompetitionreview.com>>.

²⁴ See proceedings in *Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated et al*, CT-2010-010, online:

Competition Tribunal <<http://www.ct-tc.gc.ca>>.

²⁵ *Toshiba Appeal*, *supra* note 10 at para 3.

²⁶ *Ibid* at para 6.

²⁷ *Ibid* at para 11.

²⁸ *Ibid* at paras 20–28. The motion to vary or quash was based on four grounds: (i) that section 11 or alternatively, section 11(2), is unconstitutional; (ii) that the applicants rights under section 8 of the *Canadian Charter of Rights and Freedoms*, and the rights of its directors and officers under section 7, have been breached; (iii) that the Commissioner obtained the *ex parte* order on the basis of inadequate and misleading disclosure; and (iv) that the Commissioner's actions constitute an abuse of process, because it is attempting to use section 11 inappropriately to gather foreign documents that cannot be obtained under treaties.

²⁹ *Toshiba*, *supra* note 10.

³⁰ *Ibid*.

³¹ *Ibid* at para 42.

³² *Toshiba Appeal*, *supra* note 10.

³³ *Ibid* at para 123.

³⁴ *Toshiba Application to Appeal to SCC*, *supra* note 10.

³⁵ See *RBS*, *supra* note 11; “CCB Corrects RBS Statement,” *supra* note 11; Competition Bureau, Announcement, “Competition Bureau Discontinues Its LIBOR Investigation” (3 January 2014), online: Competition Bureau <<http://www.competitionbureau.gc.ca>>.

³⁶ *Labatt*, *supra* note 4 at paras 50–54.

³⁷ *Ibid* at para 52.

³⁸ *Air Canada*, *supra* note 5 at para 31.

³⁹ *Labatt*, *supra* note 4 at paras 50–51.

⁴⁰ *Air Canada*, *supra* note 5 at para 31.

⁴¹ *Labatt*, *supra* note 4 at paras 22–23, 51.

⁴² *Ibid* at paras 25 and 104.

⁴³ *Toshiba Appeal*, *supra* note 10 at paras 3, 6.

⁴⁴ *Air Canada*, *supra* note 5 at para 16.

⁴⁵ See e.g. *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41, [2005] 2 SCR 188; *Re Vancouver Sun*, 2004 SCC 43, [2004] 2 SCR 332; *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 120 DLR (4th) 12; *R. v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442.

⁴⁶ See Notice of Application in *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated et al* (15 December 2010), CT-2010-010, online: Competition Tribunal <<http://www.ct-tc.gc.ca>>.

⁴⁷ See motion to authorize the bringing of a class action in *9085-4886 Quebec Inc. And P. Bakopanos v Visa Canada Corporation and MasterCard International Incorporated* (17 December 2010), Montreal No 500-06-000549-101 (Qc Sup Ct), online: Consumer Law Group <<http://www.clg.org>>.



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