



Competition Bureau
Canada

Bureau de la concurrence
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Information Bulletin on Section 11 of the *Competition Act*

Competition Bureau

November 2005

Canada

IMPORTANT NOTICE

The Competition Bureau endeavours to be as transparent as possible in providing information to Canadians on the application of the *Competition Act* and labelling statutes that it enforces and administers. Please note however that this bulletin is a summary designed to give basic information regarding section 11 of the Act and is not a substitute for professional legal advice. As this bulletin avoids legal language wherever possible, there may be some generalizations about the application of the Act. Certain provisions of the Act are subject to important exceptions or qualifications. The Commissioner of Competition¹ will consider each specific factual situation on its own merits when determining how section 11 will be used in practice. The footnotes used in this document are for reference purposes only and are not intended to provide a complete citation of the relevant jurisprudence.

INTRODUCTION

The purpose of the Act is to promote and protect competition in the marketplace. It is commonly referred to as a law of general application, and with limited exceptions, applies to all persons, including businesses, in Canada. The Act contains provisions dealing with criminal offences and civil reviewable matters. Criminal activities are subject to prosecution through the criminal courts, while civil matters are reviewable by the Competition Tribunal and other competent courts which can issue orders to rectify anti-competitive practices.

The Bureau relies heavily on the timely receipt of accurate and complete information in order to ensure the effective enforcement and administration of the Act. The information required generally relates to the conduct of business affairs and more particularly to how purchasers choose the products that they purchase, how companies compete when offering their products for sale, and the accuracy of product information provided to consumers. This information allows the Bureau to determine whether to refer the matter to the Attorney General for prosecution, to apply to the Competition Tribunal for remedial orders, or to discontinue the inquiry.

¹ The term Commissioner encompasses all authorized Competition Bureau employees and agents.

The Bureau also recognizes that much of the information collected is confidential and therefore acts to ensure that such information is treated accordingly. Section 29 of the Act provides a framework for the protection of confidential information. For further information on this subject please consult the information bulletin on “*The Treatment of Confidential Information*”.

While the focus of this bulletin is on the use of section 11 orders, the method and process of receiving information varies. While much of the information that the Bureau receives is provided voluntarily, it is sometimes necessary for the Commissioner of Competition to apply to the courts for orders to aid the inquiry into the facts of the matter. The two types of orders most often sought are²;

- search warrants authorized by a judge under section 15 of the Act; and
- “subpoena” powers authorized by a judge under section 11 of the Act.

The Commissioner does not make an application for section 11 orders without careful consideration; balancing the responsibility to enforce and administer the *Act* with the interests of persons required to respond to a section 11 order.

This information bulletin provides general information on the practice of the Commissioner with respect to the use of section 11 of the *Act*.

OVERVIEW OF SECTION 11

Section 11 orders allow the Commissioner to obtain information from persons who have or are likely to have information that is relevant to a matter under inquiry pursuant to section 10 of the Act. In order for a section 11 order to be issued by a court, the Commissioner must first have initiated an inquiry under section 10 of the Act. The Commissioner may initiate an inquiry under the following circumstances:

² Note that the Commissioner has other information gathering powers. These include merger notification requirements, information gathering obligations under treaties with foreign governments, and statistical information from Canadian governmental statistics agencies. Other information gathering powers under the *Criminal Code* may also be used, such as wiretap orders and search warrants.

- on application by six Canadian residents under section 9 of the Act;
- when the Commissioner has reason to believe that:
 - a person has contravened an order made under the Act;
 - grounds exist for the making of an order under the Act;
 - an offence under the Act has been or is about to be committed.
- when directed by the Minister.

Information under a section 11 order may be obtained through the following processes:

- hearings involving the oral examination of individuals, under oath, on any matter that is relevant to the inquiry;
- the production of records³, including, for example, things such as minutes of meetings, sales reports, electronic records, or pricing and marketing plans; and
- written returns requiring a person to create or prepare detailed information under oath, and to deliver it to the Commissioner.

Section 11(2) also provides for an order requiring a Canadian corporation to produce records in the possession of the corporation's domestic or international affiliates, when the issuing judge is satisfied that such affiliate has records that are relevant to the inquiry.

In order to ensure that the Bureau receives all relevant information, section 11(3) states that persons are not excused from complying with an order on the grounds that such testimony, records, or written returns may incriminate them. However, consistent with the *Canadian Charter of Rights and Freedoms*, any testimony provided by an individual under section 11(1)(a) or returns made by an individual under section 11(1)(c), cannot be used against such individual in any criminal proceeding against that individual. Such protection however is not available when the person has committed an act of perjury or has intentionally given misleading evidence and is facing prosecution under sections 132 or 136 of the *Criminal Code*.

³ The use of the term "records" in this document is defined in section 2(1) of the *Act* and also includes "records and other things" as described in section 11(1)(b) of the *Act*.

In addition to section 11 itself, the following sections of the Act contain relevant information relating to the information gathering process:

- section 2: provides the definition of a record and a business enterprise, including an affiliate;
- section 10: states the requirements for the commencement of an inquiry;
- section 12: establishes who is a compellable witness, the fees to be paid to the witness, and the witness's right to representation by counsel. It also allows for the persons whose conduct is being inquired into to be present at the hearing;
- sections 13 and 14: establishes the position and powers of a Presiding Officer for oral examinations under section 11(1)(a) of the Act;
- section 18: deals with requirement for the Commissioner to take reasonable care with the records produced when responding to an order, the ability of the Commissioner to make copies, and rules for the return of the records;
- section 19: deals with the procedure to raise claims of solicitor-client privilege in order to avoid producing certain documents in response to a Section 11 order;
- section 20: provides the Commissioner the right to inspect the records and things; s. 20(2) makes copies admissible as evidence;
- section 29: deals with confidentiality;
- sections 64 and 65: relates to penalties for obstructing an inquiry and failing to comply with an order under Section 11; and
- section 69: concerns the use of records as prima facie evidence.

ORDERS UNDER SECTION 11

Requirements

Before granting an order under section 11, a judge of the Federal court, superior or county court must be satisfied that a bona fide inquiry is being conducted by the Commissioner under section 10 and that the person subject to the order has or is likely to have information that is relevant to

the inquiry. Note that section 11 does not provide the court with the ability to conduct a review of the Commissioner's decision to commence an inquiry under section 10 of the Act.

Ex Parte Nature

In accordance with section 11(1), the Commissioner typically applies to the court "*ex parte*" for a section 11 order, meaning that neither the person subject to the order nor the person subject to the inquiry will be notified beforehand. This approach is consistent with the approach used in other law enforcement statutes for other important investigative tools⁴, such as subpoenas and search warrants.

Venue of Application

The court venue for applications is normally determined by the location in which subsequent proceedings are likely to be held. For section 11 applications in civil matters where further proceedings would be held at the Competition Tribunal, the Bureau will normally use the Federal Court of Canada as the default venue. For criminal matters, the default venue is the jurisdiction where charges, if any were to result from the inquiry, would be laid. For criminal matters that involve persons in multiple jurisdictions, the venue will depend on the specific circumstances of the matter.

Service of Section 11 Orders

Service of section 11 orders on the persons required to respond will always be made in compliance with the requirements of the issuing court. Where possible, the Bureau will try to arrange for the person's counsel to accept service or for the use of facsimile or other electronic means to accept service.

Where the Commissioner seeks an order for a third party under Section 11(1)(a), the Bureau will notify the person(s) whose conduct is being inquired into of the time, date, and location of the

⁴ Thompson Newspapers Ltd. V. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, 29 C.P.R. (3d) 97, 67 D.L.R. (4th) 161

examination of a third party and whether the Bureau intends to oppose the attendance of the person at the examination. However, where the Bureau concludes that the provision of such notice would compromise the integrity of the inquiry, such notice will not be provided. Even in matters where notice is provided, the Bureau often requests that the presiding officer exclude the person(s) whose conduct is being inquired into from the examination of a third party.

Fulfilling the Order

In general, the Bureau will not negotiate with persons receiving an order about the content of section 11 orders that have been issued by a court. Staff or counsel on behalf of the Bureau may however engage in discussions after the issuance of the order to assist in the clarification of the contents of an order. In these cases, written advice from the Bureau or counsel is sufficient for clarification.⁵ It is important to note that the Bureau will not provide legal advice to persons receiving an order and that any discussions are not for the purposes of providing legal advice.

The Bureau endeavours to focus the requests as precisely as possible. Each matter, however, is unique. Therefore, some section 11 orders may be broader than others. It is important to emphasize that the Bureau requires detailed information in order to properly assess a matter and that the complexity and time frame of a matter may require significant amounts of information.

When served with a Section 11 order, the order itself will contain important information regarding the due date for records to be provided, the location to attend for examination under Section 11(1)(a) if required, and details regarding the procedures for responding to the order. Such details will include how to produce electronic records, any indexing which may be required and how to provide certified copies instead of originals. It is recommended that those served with an order contact the Bureau as soon as possible to discuss the logistics concerning responding to the order.

⁵ Raimondo v. Canada (Competition Act, Director of Investigation and Research) (1995), 61 C.P.R. (3d) 142 (Ont. Ct. (Gen Div.))

Application for the Variation of Section 11 Orders

At times, persons that are served with an order request that the Bureau consider changes to the return date or the requests themselves. While minor questions of interpretation may sometimes be resolved by an exchange of letters between counsel for the Commissioner and the person receiving the order, any variation of a section 11 order, such as a change of return date or the removal of a request, must be sought from and authorized by the issuing court. It is the responsibility of the party who wants a variation to apply to the court. When requesting a variation of an order, respondents are encouraged to advise the Bureau of the reasons for the application in advance of applying as the Bureau will, when it is satisfied that a variation is warranted, consent to the application before the court.

Role of the Presiding Officer During Examinations

For orders that are made under section 11(1)(a), individuals are required to appear and be questioned by the Commissioner or an authorized representative of the Commissioner. In these cases the examination is presided over by an independent presiding officer named by the court on application by the Bureau. The role of the presiding officer is to:

- ensure that the section 11 examination is conducted in an orderly manner;
- rule on objections to any questions;
- determine who may be present at the examinations;
- determine the timing and adjournment of examinations; and
- decide any other matters related to the conduct of the examination.

The person served with a section 11(1)(a) order is entitled under section 12(3) to be represented by counsel, as is the person(s) whose conduct is being inquired into.⁶ Section 12(4) also entitles the person(s) whose conduct is being inquired into to attend the examination of a third party unless the presiding officer decides to exclude that person(s) on the grounds that their presence

⁶ North American Van Lines Limited v. Canada (Director of Investigation and Research, Competition Act) (1997) 78 C.P.R. (3d) 221, F.C.J. No. 1314, 136 F.T.R. 16, 4 Admin. L.R. (3d) 123

would be prejudicial to the effective conduct of the examination or inquiry, or, for reasons of confidentiality.

Failure to Comply With a Section 11 Order

Section 65 creates an offence for failure to comply with an order under section 11 or for the destruction or alteration of any record that is required to be produced under section 11. When a corporation fails to comply with an order, any officer, director or agent of the corporation who directed or otherwise participated in the decision to not comply or to destroy/alter records may be charged and, if found guilty, be subject to a fine and/or imprisonment.

Assurance of Consistency

The Bureau believes that a consistent and reasoned approach to the use of the section 11 orders is important to the integrity and control of the evidence gathering process. As a result, Bureau officers and counsel work together to determine the need for section 11 orders and to produce orders that are clear and focussed. In addition, all applications under section 11 are vetted through an internal review mechanism that has been mandated directly from the Commissioner in order to ensure that the Bureau's approach is consistent and that questions are clear and focussed on the relevant issues raised in an inquiry. All section 11 applications must be approved through this process before they are allowed to proceed to court.

When the Bureau Will Seek an Order

As stated before, it is important to note that the Bureau views section 11 as an essential evidence gathering mechanism in the conduct of inquiries under the Act. Matters subject to inquiry must be fully and appropriately examined in as timely a manner as possible to ensure the proper enforcement of the Act. This requires that the Bureau obtain and review relevant information in the most effective manner possible. Of course, it must be recognized that relative to the Bureau's overall caseload, the use of section 11 has been infrequent.

The information that the Bureau generally requires is that which shows how the respective markets and companies operate and how these companies compete. This type of information is

generally found in records resulting from the day-to-day operation and management of companies. Note that the Bureau may require information from a number of participants in a market and not just those that are the targets of the inquiry. While the specific types of information required varies from case to case and it is not possible to precisely list all possible types of information in this document, a typical section 11 order requires companies to provide information on sales, marketing, distribution, planning, market history, etc.

In deciding whether to apply for a section 11 order, the Commissioner considers, among other factors:

- the seriousness of the matter;
- the type of information required and the burden the order will impose on the respondents;
- the completeness of information obtained through other means, including voluntary production;
- the time frame of the inquiry;
- the need for a complete and accurate record;
- whether third parties or other persons would prefer to provide information to the Bureau under a court ordered process instead of voluntarily;
- the likelihood that the information sought may be destroyed, refused to be provided or provided on unacceptable terms;
- any privacy interests of the respondents to an order.

The Bureau makes every effort to construct the requests for both records and written returns as narrowly as possible, having regard to its need for as complete a set of information as possible on which to make decisions regarding the ultimate disposition of an inquiry.

While diligence and timeliness is required in all inquiries, the short time frames in many merger matters, and the published service standards for merger review, demand that application for section 11 orders be made by the Bureau as early in the inquiry process as possible. For this and other reasons, it is important that merging parties make their intentions to merge known to the Bureau at the earliest possible moment.

INFORMATION RECEIVED UNDER SECTION 11 ORDERS

Sealing

The Bureau normally requests, when making an application under section 11, that the court records be sealed and remain sealed until criminal charges are laid or an application is made to the Competition Tribunal in respect of the matter.⁷ This practice is to protect the integrity of the inquiry, the requirement under section 10 of the Act to conduct inquiries in private, and to comply with strict confidentiality provisions outlined in section 29 of the Act. However, as a matter of policy, the Bureau will request, in its application, that the recipients of the orders be permitted to receive a copy or a redacted copy of the court record that pertains to the specific recipient, upon written request to the Bureau. In inquiries where criminal charges are not laid or where no application is made to the Competition Tribunal, the court record will remain sealed, subject to orders of the court.

Protection

The Bureau must always balance its commitment to act transparently with its obligation to abide by the confidentiality provisions of the Act. Section 29 of the Act provides confidentiality protection for information obtained under section 11. Section 29 states that no person who performs or who has performed duties pursuant to the enforcement and administration of the Act shall communicate any information received (under section 11), including identities,⁸ to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act. Section 29 does not apply, however, when information has already been made public or when the person providing the information authorizes its communication. For further information on the Bureau's policy on confidentiality please refer to the publication "*The Treatment of Confidential Information*".

⁷ Canada (Director of Investigation and Research) v. Thomson Corp (1998) 84 C.P.R. (3d) 888 (F.C.T.D.)

⁸ Canada (Director of Investigation and Research) v. Washington (1996), 71 C.P.R. (3d) 13 (Comp. Trib.)

Related to the notion of confidentiality is that of solicitor-client privilege, a claim that protects certain information from being used by the Bureau. Section 19 provides the legislative scheme for dealing with claims of solicitor-client privilege. It is up to a judge, upon application, to decide whether information is subject to solicitor-client privilege. Where a claim of solicitor-client privilege is made, the information is to be placed by the person making the claim into a package, sealed, and placed in the custody of a person deemed acceptable under section 19(3) of the Act.

Overall, the combined effect of sections 11, 19 and 29 is that information not protected by section 19 can be used by the Commissioner in pursuing a matter under the Act. Furthermore, anyone providing voluntary information or information ordered under section 11, must recognize that it can be used by the Bureau for the purpose of the administration or enforcement of any provision of the *Act* subject to certain exceptions provided by law.

Care and Access

Section 18 provides for the reasonable care, access to, copying, detention and return of information obtained under section 11. It is the Bureau's responsibility to preserve original records until they are returned to the person responding to the order. The Bureau also has the right to make copies of records that are provided pursuant to section 11 orders. Any record, other than certified copies provided by the person responding to the order in lieu of originals, must be returned within 60 days after they have been provided, except if the person agrees to their detention, the Bureau applies for a detention order, or if court or Competition Tribunal proceedings have been initiated where the record may be required. Furthermore, the person producing the record is entitled, within certain conditions, to inspect the record while it is in the Bureau's possession.

CONCLUSION

This bulletin outlines the practice of the Bureau with respect to the use of section 11 orders. As a law enforcement organization, the Bureau relies heavily on information to ensure the effective enforcement of the Act. Section 11 is considered by the Bureau to be an important enforcement tool, which will be used as required and in a responsible manner.