A missed opportunity

There has been a controversial report on the Canadian Competition Bureau's subpoena powers

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On 28 January 2008, a judge of Canada's Federal Court set aside two subpoenas obtained by the Competition Bureau against two Canadian brewing companies (Labatt and Lakeport) as part of the Bureau's ongoing inquiry into their beer merger. The judge found that the Competition Bureau's original applications for the orders (which were filed and considered on an ex parte basis) were "misleading, inaccurate and incomplete".

The judge's comments led the federal minister of industry to call for an investigation into the Bureau's conduct. Subsequently, the commissioner of competition (who heads the Bureau) and the deputy minister of justice appointed Brian Gover, a Toronto lawyer in private practice, to review and advise on the Competition Bureau's subpoena process, which is set out in section 11 of the Competition Act.

Mr Gover's report was released on 12 August 2008 and is available at *www.competitionbureau.gc.ca/ epic/ site/ cb-bc.nsf/ en/ 02709e.html*. While the report makes some helpful recommendations, it also includes some questionable conclusions and, overall, falls short of a much needed objective review of the section 11 subpoena process.

The section 11 process

Section 11 of the Competition Act allows the commissioner of competition to apply ex parte to a court for an order that is similar to a subpoena. Section 11 orders can require the production of documents, attendance at an oral examination under oath, and responses to written interrogatories under oath, often within a very short time frame.

Responding to section 11 orders can be an expensive and onerous proposition. It often requires production of massive volumes of documents and information, including extensive searches of computer records and electronic databases going back many years. These orders also frequently require the creation of new and costly types of reports or data streams.

The business community and the competition law bar in Canada have, for many years, expressed concerns about the Commissioner's use of section 11 orders. These concerns include: (1) the absence of notice to (or prior consultation with) the targets of section 11 orders, which can lead to demands that are over broad and irrelevant; and (2) the significant costs of compliance.

The Gover report

It had been hoped that the Gover report would address the above concerns in a detailed and even-handed fashion. Unfortunately, the report is very one-sided in favour of the Competition Bureau. It accepts the current statutory framework as a given and broadly endorses the Bureau's processes and practices in seeking section 11 orders (subject to certain recommendations, discussed below). In an unusual move, the report also contains a detailed critique of the Federal Court's decision in *Labatt/Lakeport* (even though the Bureau had declined to appeal), offering the view that courts should not overturn section 11 orders unless they involve an "abuse of process". In addition, the report suggests that a section 11 order should be allowed to require any information "potentially relating" to the Commissioner's inquiry (a very loose standard), and that a court should not consider the cost or burden of the order on the target in determining whether to issue the order.

The Gover report also blames the private competition law bar in Canada for the development of an "adversarial" relationship between the bar and the Bureau with respect to section 11 orders. These comments are surprising, given the perception among many at the private bar that any "adversarial" approach has resulted from the refusal, in most cases, by the Bureau to engage in pre-application dialogue, as well as the increased breadth and scope of section 11 orders.

A partial explanation of the report's one-sided tone lies in the very limited scope of Mr Gover's consultations. According to the report, Mr Gover principally consulted with sources in the Bureau and other antitrust authorities (including the antitrust division of the US Department of Justice). There was only limited consultation with private practitioners and – of most concern – no apparent attempt to speak to members of the business community who had been the subject of section 11 orders (including anyone from Labatt).

Despite its failings, the Gover report does offer several recommendations that could, if implemented, alleviate some of the concerns about the Commissioner's use of her section 11 powers. Most importantly, the report suggests that the Bureau should engage in both a pre-application and a post-service dialogue with targets of section 11 orders, except in unusual circumstances of urgency or where there is a concern that records in the possession of a target may be destroyed. Unfortunately, the report recommends that this consultation should be entirely non-binding and in the Bureau's discretion.

Conclusion

The Gover report represents a missed opportunity to deal with the important issues surrounding the Bureau's subpoena powers. It is particularly ironic that a purportedly independent report into the Bureau's use of ex parte orders should itself have relied so heavily on consultation with government representatives and failed to give a full hearing to the business and private bar perspectives that provided the impetus for the report in the first place.

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