>perspective

Report on Canadian Competition Bureau's Use of Subpoena Powers May Signal a More Consultative Approach for Future Investigations

Report's Commentary, Including on Role for Courts and Proposed Legislative Amendments, Is More Controversial

August 14, 2008

On January 28, 2008 a Federal Court judge set aside two Section 11 orders previously obtained against two Canadian brewing companies by the Commissioner of Competition as part of her ongoing inquiry into the Labatt/Lakeport beer merger. The judge found that the Commissioner's original applications were "misleading, inaccurate and incomplete". As a result of those decisions and a request for an investigation by the Minister of Industry, the Commissioner and the Deputy Minister of Justice appointed Brian Gover, a Toronto lawyer in private practice, to review and advise on the Competition Bureau's Section 11 order process.

Mr. Gover's report, although dated in June, was publicly released on August 12, 2008. While the report makes some encouraging and helpful recommendations, it also includes some questionable conclusions and, overall, falls short of a much needed objective review.

Competition & Foreign Investment Review Group

Also of interest:

- **Competition Policy Review Panel Recommends Dramatic Changes to Canada's Foreign Investment and Competition Law Regimes** (June 27, 2008)
- **Section 11 orders unfair** (February 6, 2008)
- **FORUM – Year in Review Magazine** (January 22, 2008)

Click here for more information about our Competition & Foreign Investment Review Group.

Background

Section 11 of the *Competition Act* allows the Commissioner to apply to a court for an order that is similar to a subpoena. Section 11 orders can be issued against anyone likely to have information relevant to an inquiry being conducted by the Commissioner. Section 11 orders are issued not just against merging parties or the targets of an investigation, but also against customers, suppliers and other third parties. The orders can require a company to produce documents, attend an oral examination, and answer questions in writing, often within a very short time.

Responding to Section 11 orders 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.

Section 11 orders impose significant costs on the Canadian businesses targeted by such orders in terms of diversion of scarce management resources and employee time and fees for lawyers and electronic data services, just as an example. In the recent *Labatt* decision, the judge noted that, under a previous Section 11 order, Labatt had produced thousands of documents and paid approximately $750,000 in external costs alone in order to comply with the order. It has been estimated that the cost of responding to the Section 11 orders obtained by the Commissioner in an inquiry into film distribution in 2000–2002 likely exceeded $20 million and involved the production of over 1,000 boxes of documents by the approximately 40 motion picture exhibitors and distributors that received such orders.

The business community and the competition law bar in Canada have, for many years, expressed concern about the Bureau's use of Section 11 orders. These concerns include: (a) the absence of notice to or prior consultation with the targets of Section 11 orders, (b) the over-breadth of such orders, and (c) whether the orders were even warranted at all in the circumstances of some particular inquiries.

Gover's Recommendations

Mr. Gover's report endorses and supports both the need for Section 11 orders and the Bureau's processes and practices in seeking them. However, the report does recommend the following specific practices that could, if implemented, help to alleviate some of the concerns about the use of Section 11 orders in the past:

- 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. However, Mr. Gover recommends that this consultation be entirely non-binding and in the Bureau's discretion.
- Section 11 orders should not be sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application.

- The Bureau should consider limiting the number of custodians whose documents must be searched in responding to a Section 11 order.
- Language should be included in draft orders allowing the Commissioner some flexibility to "read down" the scope of the production ordered where the target's production of less information or fewer documents adequately addresses the needs of the Commissioner's inquiry.
- Counsel for the Commissioner should personally attend on all Section 11 order applications before the court (rather than dealing with such applications on an "over-the-counter" basis) and, wherever possible, the Commissioner should apply to the same judge for all Section 11 orders obtained in a particular inquiry.

The Commissioner and the Minister of Justice have yet to publicly respond to Mr. Gover's report. Interestingly, following the harsh criticism of the Bureau's conduct in the *Labatt* decision, the Bureau has already put into practice a number of the recommendations.

According to the report, the Bureau has also recently adopted a new internal review process for Section 11 order applications which requires unanimous approval by a three-person committee comprised of two senior members of the Bureau and a senior delegate of the Attorney General who does not have carriage of the file.

Significantly, the report comments that the Commissioner should inform the court of any point of fact or law known to the Commissioner why a requested Section 11 order should not be granted, including facts that explain the target's position regarding the scope of a possible order and the relevance of the material sought. Presumably, this means that the Commissioner should draw to the attention of the court any facts or legal points raised by the proposed target in the course of any pre-application discussions.

Finally, the report proposes that the *Competition Act* be amended to provide the Commissioner with a "second request" power, similar to the process under the U.S. *Hart-Scott-Rodino Antitrust Improvements Act*, that would delay expiry of merger notification waiting periods pending receipt by the Bureau of requested information and documents. This is similar to the recommendation of the Competition Policy Review Panel in its report issued on June 26, 2008, which called for the adoption of a U.S.–style merger review system in Canada. (See Perspective – Competition Policy Review Panel Recommends Dramatic Changes to Canada's Foreign Investment and Competition Law Regimes for additional information about the Panel's report.) However, the Gover report fails to link the use of such powers by authorities in the United States to their long-standing practice of extensive pre-issuance consultations with merger parties and their acknowledgement that use of such investigative tools is inappropriate once formal proceedings have been initiated. Neither of these positions has been acceptable to the Bureau.

Gover's Commentary

In his report, Mr. Gover states that courts should have only a very limited scope to decline to issue Section 11 orders requested by the Commissioner. While not expressly within his mandate, and having stated that any appeal of the *Labatt* decision would not likely have

been successful, Mr. Gover nevertheless discussed the *Labatt* decision at some length and expressly disagreed with the decision in that case, as well as some other Federal Court decisions.

In particular, Mr. Gover argues that a court would have to find an abuse of process by the Commissioner before declining to issue or vacating a Section 11 order. (Interestingly, having endorsed the *ex parte* (without notice) approach to applications for Section 11 orders and asserted that the burden is on the target to demonstrate an abuse of process, it may be that the only time the issue could be argued pursuant to Mr. Gover's position is on a motion to vacate an existing order since the target would not be present at the hearing to consider the issuance of an order.) Mr. Gover's view is that a Section 11 order can appropriately require any information potentially relating to the Commissioner's inquiry and the cost or burden of the order on the target is not a valid consideration for the court in determining whether to issue the order. Undoubtedly, the Bureau will cite this report in future proceedings (and possibly in advocating amendments to the *Competition Act*), but hopefully Canadian courts will maintain a more vigilant review of Section 11 order applications than the limited role for judicial oversight advocated by Mr. Gover. Arguably, in the context of the *Competition Act*, Parliament intended a greater discretionary role for the court in deciding whether to issue Section 11 orders – otherwise it is difficult to see the utility of prior judicial review and authorization of a Section 11 order sought by the Commissioner.

Mr. Gover's apparent position that the Commissioner has no choice but to apply to a court on an *ex parte* basis is also questionable. However, he does acknowledge that, at least in unspecified "special circumstances", a court considering a Section 11 application may make a "special order" to permit the target to attend and make submissions before any decision is made on the issuance of the order.

Additional Criticisms of the Report

The Gover report appears to be very one-sided in favour of the Competition Bureau. Mr. Gover broadly endorses the Bureau's practices with regard to Section 11 orders without discussing in any detail the long-standing concerns about over-breadth of Section 11 orders. In addition, apart from the *Labatt* decision, Gover makes no reference to recent cases that have raised concerns about the Bureau's use of Section 11 orders, including the over 30 orders the Bureau obtained without notice in 2007 against advertisers and competitors in connection with the Bureau's review of the Bell Globemedia Inc./CHUM Ltd. merger, only to have the Bureau close its investigation (without seeking any remedies) prior to the return date of most of those orders, but not before the targets had expended considerable resources in preparing responses.

As noted above, the report contains a lengthy critique of the Federal Court's decision in *Labatt*, effectively arguing an appeal on the Bureau's behalf. The appropriateness of this critique is questionable given that the Bureau commissioned the report and chose not to appeal.

Mr. Gover's 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

voluntary information requests. These comments are surprising given the very limited consultation by Mr. Gover with private practitioners in preparing his report. Indeed, the perception among many in the private bar is 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.

The report provides a list of persons consulted by Mr. Gover. Most are Canadian or U.S. government representatives, including members of the Bureau's (but not Labatt's) case team in *Labatt*. Surprisingly, the list does not include any Canadian businesses that have been forced to respond to Section 11 orders. Often the scope and burden of a Section 11 order is not immediately apparent from the order itself. Even a short paragraph in an order requiring production of "all records relating to" a particular issue or matter during the last five or 10 years can impose a tremendous burden on a business. This is precisely why prior notice and an opportunity to appear before the judge considering the issuance of a Section 11 order is appropriate in most cases. It is 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 gave rise to the need for the report in the first place.

It will be interesting to see how the Government reacts to Mr. Gover's suggestion for amendments to the *Competition Act* given the recent recommendation of the Competition Policy Review Panel that responsibility for competition advocacy (presumably including proposed amendments to the *Competition Act*) be moved from the Competition Bureau to a new Canadian Competitiveness Council and that the Bureau's focus should be limited to enforcement activities.

Mr. Gover's report on Section 11 orders is available on the Competition Bureau's website at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html.

If you have any questions regarding the foregoing, please contact George Addy, John Bodrug, Mark Katz, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at (416) 863-0900 (Toronto) or (514) 841-6400 (Montréal).

Davies Ward Phillips & Vineberg LLP, with over 235 lawyers, practises nationally and internationally from offices in Toronto, Montréal, New York and an affiliate in Paris and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.