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Ms. Sheridan Scott
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Competition Bureau
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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.

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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
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> > (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.
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> (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.
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> (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.
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> (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
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> (a) on application made under section 9,
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> (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
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> (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,
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> 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 Commissioner[1] 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

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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*:

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**	**15.** (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 (*a*) that **there are reasonable grounds to believe**

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.

relevant to the inquiry, the judge may order the person to [...] [Emphasis added]	that (i) **a person has contravened an order** made pursuant to section 32, 33 or 34, or Part VII.1 or VIII, (ii) **grounds exist for the making of an order** under Part VII.1 or VIII, or (iii) **an offence under Part VI or VII has been or is about to be committed**, and (*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, the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to [...] [Emphasis added]

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

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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

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

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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.

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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.)]:
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> > 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.
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> 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.

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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]

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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.

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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*.

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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

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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,

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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

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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]

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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.

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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

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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.