**Focusing on What Matters: The Court Refuses to Grant Broad Section 11 Orders in the Commissioner’s Bell/MTS Inquiry**

**By: Emrys Davis and David Cassin[[1]](#footnote-1)**

***Introduction***

In May 2016, BCE Inc. (“Bell”) announced an agreement to acquire Manitoba Telecom Services for $3.9 billion. The Commissioner of Competition launched a nine-month inquiry into the anti-competitive effects Bell’s acquisition might have on mobile wireless services[[2]](#footnote-2) in Manitoba.

Using section 11 of the *Competition Act*,[[3]](#footnote-3) the Commissioner sought an order to compel Telus Corporation and Rogers Communication Inc., two of Canada’s largest mobile wireless services providers, to provide information concerning cost, demand, price and network quality of wireless services on a Canada-wide basis (the “Proposed Orders”).

The court refused to grant the Proposed Orders because the Commissioner had not established that Canada-wide information was relevant to his inquiry. Rather, the Proposed Orders had the “strong flavour” of a fishing expedition, were burdensome, and would likely result in production of unnecessary records.[[4]](#footnote-4) The court signaled a willingness to issue a narrower order and eventually required production of data relating to Alberta, Saskatchewan and Ontario.

The result should not surprise. Decisions over the last decade have confirmed that the court must guard against abuses of section 11, whether those abuses are unnecessary, overbroad production requests or material non-disclosure by the Commissioner. The *Telus/Rogers* decision fits squarely within this jurisprudence. By requiring that the Commissioner demonstrate the relevance of his broad request, the court carefully balanced the Commissioner’s statutory mandate to investigate and enforce the *Act* with the rights of private persons who should not bear the cost and burden of government production orders without reason.

This paper reviews section 11, the recent jurisprudence considering the court’s role in an application under section 11, and the court’s *Telus/Rogers* decision*.* It concludes with a call for the Commissioner to more carefully scrutinize the scope of production he requires when applying under section 11.

***Section 11***

Section 11 of the *Act* allows the Commissioner to apply to the court, *ex parte*, for an order to obtain information in support of his inquiries. It contains broad powers to compel: the attendance of a person for the purposes of examining them under oath;[[5]](#footnote-5) the production of records;[[6]](#footnote-6) and the delivery of written information under oath.[[7]](#footnote-7) It applies to anyone who is “likely to have information that is relevant” to the Commissioner’s inquiry.[[8]](#footnote-8) The Commissioner can – and regularly does – use section 11 to compel information from third parties not already the target of an inquiry.[[9]](#footnote-9)

The two-part test to obtain a section 11 order is similar to the test in the *Criminal Code* for a general production order. Both require some level of confidence that the law has been broken and that the target of the production order has relevant information. Under section 11, the Commissioner must establish that: (i) an inquiry is being made under section 10 of the *Act* (which generally occurs when the Commissioner hasreason to believe that the criminal or civil provisions of *Act* have been violated);[[10]](#footnote-10) and (ii) a person, including a corporation, has or is likely to have information relevant to the inquiry.[[11]](#footnote-11) Similarly, under the *Criminal Code*, the Crown must satisfy a judge that there are reasonable grounds to believe that (i) an offence has been or will be committed and (ii) the document or data sought is in the person’s possession or control and will afford evidence respecting the commission of the offence.[[12]](#footnote-12)

Compliance with orders made under section 11 is backed up by threat of a monetary penalty, imprisonment or both. Section 65 of the *Act* makes it a criminal offence to fail to comply with a section 11 order. Offenders face a fine of up to $100,000, imprisonment of up to two years, or both.[[13]](#footnote-13) More generally, section 64 of the *Act* prohibits obstruction of the Commissioner’s inquiry. Sanctions include a fine of up to $100,000, imprisonment of up to ten years, or both.[[14]](#footnote-14)

Complying with a section 11 order is costly. Employees spend significant time and resources collecting responsive documents and information. This distracts them from their ordinary responsibilities to the business' detriment. In addition, respondents often need external counsel and third party service providers to collect, review and produce documents. In one case, external production costs alone totaled $750,000.[[15]](#footnote-15) In another, professional fees to answer the Commissioner’s requests for information were estimated to be over $750,000.[[16]](#footnote-16)

***The Court’s Role in an Application under Section 11***

Over the last decade, the court has issued reasons in three cases concerning section 11 and the court’s supervisory role.[[17]](#footnote-17) In addition, because the court does not issue written reasons on every section 11 application, it makes available the transcript of the *ex parte* hearing for the benefit of the public and the profession. Three key principles have emerged from this jurisprudence.

First, the court exercises independent judicial oversight of the investigative powers granted to the Commissioner under the *Act*.[[18]](#footnote-18) Even if the Commissioner has met section 11’s two-part test, the court is not a ‘rubber-stamp’; it must still exercise its discretion in granting an application.[[19]](#footnote-19) The court must also control its own processes and prevent their abuse. To this end, it may decline to grant an order under section 11, seek further information or clarification from the Commissioner, or require notice to be given to a responding party.[[20]](#footnote-20)

Second, the court must be satisfied that the information sought is “relevant to the inquiry in question”.[[21]](#footnote-21) The court assesses relevance using the Commissioner’s record since he must make full and frank disclosure of all the relevant circumstances surrounding the application.[[22]](#footnote-22) Although the court recognizes that the Commissioner is still investigating the facts, fishing expeditions are not permitted.[[23]](#footnote-23) Thus, in one case, the court questioned whether records about a respondent’s U.S. operations were relevant to an inquiry into competition in Canada. Although satisfied that the information was relevant in that instance, the court noted that courts must “remain vigilant in the future to ensure that information sought from respondents in respect of their U.S. operations is not disproportionate…relative to the scope of the respondents’ Canadian operations.”[[24]](#footnote-24) In the same case, the court also explained why information before and after the period of the alleged conduct can be relevant to the inquiry.[[25]](#footnote-25)

Third, the court will refuse to order production if it would be excessive, disproportionate or unnecessarily burdensome.[[26]](#footnote-26) To avoid this result, the court has encouraged the Commissioner to consider the burden that the order will impose on the respondent when formulating his request.[[27]](#footnote-27) Whether production is excessive, disproportionate or unnecessarily burdensome likely requires assessment of the relevance of the information sought. The more relevant the information, the more burden one would suspect the court will tolerate before declaring production unnecessarily burdensome.

***The Telus/Rogers Decision***

All three principles featured in the court’s decision in *Telus/Rogers*. In exercising its supervisory role, the court posed a straightforward question to test relevance and burden: Why did the Commissioner require information from *across Canada* to determine whether Bell’s acquisition of MTS substantially lessened or prevented competition *in Manitoba*?

In his response, the Commissioner focused on the investigative nature of the request. He wanted markets to compare to Manitoba. He believed that markets outside of Canada would not be useful comparators because of the different market conditions. But he believed market conditions across Canada were similar enough so that he might find useful comparators anywhere in Canada, although he could not say where. The Commissioner’s economist put it this way: he wanted to see data from all of the provinces to see “is there something there that is going to shed light on potentially how this transaction will change competitive conditions in Manitoba?”[[28]](#footnote-28) The Commissioner’s counsel argued that narrowing the request was impossible because there were many “unknown unknowns” and that Canada-wide data may uncover potential additional factors that may relate to the Commissioner’s inquiry.[[29]](#footnote-29) The Commissioner then attempted to place the burden on Telus and Rogers to establish that the Proposed Orders were burdensome.[[30]](#footnote-30)

The court recognized that the Commissioner requires latitude to investigate[[31]](#footnote-31) but could not endorse a broad production order given the Commissioner’s evidence that he did not know what he was looking for or whether it would be relevant; he simply hoped to find something relevant.[[32]](#footnote-32) The court described this as having “the strong flavour of a fishing expedition.”[[33]](#footnote-33) The court reiterated that it must be satisfied that the information sought is relevant.[[34]](#footnote-34) It is not enough for the Commissioner to argue that by obtaining the Canada-wide data, he may find something useful.[[35]](#footnote-35) Otherwise, there would be no bounds to what the Commissioner could obtain under section 11 and the statutory language of “relevance” would be meaningless.

While the court found that Telus and Rogers had established burden, it noted that regardless, the Commissioner had failed to persuade of the relevance of the information and records sought.[[36]](#footnote-36) The court’s reasoning implies that respondents may not need to demonstrate burden where the Commissioner cannot first establish relevance.

Despite denying the Proposed Orders, the court noted that a subset of information might be more obviously relevant and likely less burdensome. It invited the Commissioner to narrow his request, for example, to certain provinces that would serve as proxies to compare to data from Manitoba.[[37]](#footnote-37) The Commissioner did so and the court issued orders requiring production of information relating to Alberta, Saskatchewan, and Ontario.

***Focusing on what really matters, when it matters***

In denying the Proposed Orders, the court applied rather than expanded the existing jurisprudence. To use the phrase proposed by his counsel, the Commissioner did not demonstrate that he “reasonably required”[[38]](#footnote-38) Canada-wide data for his inquiry. Thus, the court was not satisfied that Canada-wide data was relevant and that its production would not be unnecessarily burdensome. It exercised its supervisory role and refused to grant the Proposed Orders.

The Commissioner’s justification for his broad request amounted to little more than knowing that Telus and Rogers had Canada-wide data. But just because respondents have data does not make it relevant to the Commissioner’s inquiry. Numerous businesses sell multiple products. Because a business sells apples and oranges does not mean that its apple sales are relevant to the Commissioner’s inquiry into the market for oranges. Because a business operates nationally does not mean that sales in Newfoundland are relevant to an inquiry into competition in British Columbia. The Commissioner recognizes this principle in practice: he typically tailors his section 11 orders to specific product markets and geographies.

During the *Telus/Rogers* hearing, the Commissioner’s economist admitted that asking for information related to apples would be “clearly inapposite.”[[39]](#footnote-39) But he could not alleviate the court’s concern that asking for detailed information from Newfoundland might be just as inapposite when analyzing competition in Manitoba.

This is not to say that information about different products or broad geographies will never be relevant to the Commissioner’s inquiry. The precise scope of the relevant market may be in doubt. Another product or geographic market may present an obvious comparator. Maybe the market for apples is a good comparator to the market for oranges. But each example requires explanation. In *Indigo*, the court questioned why information about a respondent’s U.S. operations was relevant to an assessment of a substantial lessening or prevention of competition in Canada. The Commissioner explained that information from the U.S. market helped to assess the effects of the alleged conduct in Canada because the U.S. market had experienced the same alleged conduct as the Canadian market and had remedied it. The court was satisfied and ordered production.[[40]](#footnote-40)

In *Telus/Rogers*, the court invited similar explanations since the Commissioner sought information far beyond the obvious geographic market of Manitoba. In contrast to *Indigo*, the Commissioner’s explanation in *Telus/Rogers* proved inadequate. Rather than offering the cogent and compelling explanation that another market *was likely* a useful comparator because it had experienced the same alleged conduct and remedied it, in *Telus/Rogers* the Commissioner speculated that Canada-wide data *might reveal* a useful comparator market *somewhere* in Canada. The court was justifiably concerned that there would be no limit on the geographic scope of section 11 orders if the test was only that the Commissioner might find something useful, somewhere. A mountain of data may contain useful information, but that speculative possibility should not overcome the statutory requirement that the respondent likely have information *relevant to* the Commissioner’s inquiry.

Will this result prejudice the Commissioner’s inquiries? We doubt it. Admittedly, caution is required when using hindsight to assess relevance. When the Commissioner applies under section 11, no one can know precisely what information he will need to complete his inquiry, reach conclusions and agree to an effective remedy. But in the case of Bell's acquisition, the passage of time vindicated the court’s conclusion that Canada-wide data was not relevant. Even without that information, the Commissioner identified the relevant market, found anti-competitive effects, and agreed to a remedy to address those effects.[[41]](#footnote-41)

The Commissioner should take some comfort from this result. Where he cannot offer a cogent and compelling explanation for the relevance of the information sought, he should not seek it. Given the wide latitude the court provides, the Commissioner’s inability to explain the relevance of information to his inquiry suggests that the information will not be critical in the end.

That reality should encourage the Commissioner to even more carefully scrutinize the scope of the section 11 orders he seeks. No one is well served by overbroad section 11 orders. Businesses are burdened with production, the Commissioner and his staff are burdened with review, and the public pays the price.

The Commissioner will not be alone in scrutinizing his production requests. International antitrust enforcement agencies recognize the enormous burden that broad production requests place on targets and on the agencies themselves. For these reasons, the acting director of the U.S. Federal Trade Commission recently announced that the FTC is working to better identify the information it really needs so that it can minimize the information it seeks from third parties and thus reduce the burden it places on them.[[42]](#footnote-42) Just as important as scrutinizing the information needed is carefully identifying when the information is required. If a subset of information at an early stage may obviate the need for a broader production request in the future, there is no reason to ask for the moon at the beginning.

Especially when gathering information from third parties, the Commissioner could explain his objective and work with them to identify a limited data set to satisfy it. For example, perhaps the Commissioner could have explored with Telus and Rogers their perspectives on where he might find useful comparator markets. Although such discussion could occur before the Commissioner applies for the order, the current practice focuses that pre-issuance dialogue on technical issues and the availability of information. Typically, the Commissioner has already decided what information he believes he requires and will not negotiate the substance of his request.

Focusing section 11 orders on the information that really matters, when it matters, and adopting a cooperative approach where possible would be welcome in Canada and entirely consistent with the jurisprudence.

1. Lawyers at Bennett Jones LLP. [↑](#footnote-ref-1)
2. Described by the Commissioner as "the voice and data services included in [a] cell phone plan, such as texting and internet access", Competition Bureau’s statement regarding Bell’s Acquisition of MTS, (15 February 2017), online: < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html> (“Backgrounder”). [↑](#footnote-ref-2)
3. *Competition Act*,RSC 1985, c C-34. [↑](#footnote-ref-3)
4. *Commissioner of Competition v Telus Communications* (Court File No. t-1387-16) and *Commissioner of Competition v Rogers Communication Inc.* (Court File No. T-1388-16) (e*x Parte* motion proceedings) at p 44; 52-53 (“Written Reasons”). [↑](#footnote-ref-4)
5. *Competition Act*, s 11(1)(a). [↑](#footnote-ref-5)
6. *Competition Act*, s 11(1)(b). Note that “record” is broadly defined under section 2(1) of the *Act* as “a medium on which information is registered or marked”. [↑](#footnote-ref-6)
7. *Competition Act*, s 11(1)(c). [↑](#footnote-ref-7)
8. *Competition Act*, s 11(1). [↑](#footnote-ref-8)
9. See for example: *Canada (Commissioner of Competition) v Saskatchewan Telecommunications*, 2015 FC 990. [↑](#footnote-ref-9)
10. Section 10 of the *Act* provides:

    10 (1) The Commissioner shall

    (a) on application made under section 9,

    (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

    (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,

    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. [↑](#footnote-ref-10)
11. *Competition Act*, s 11(1). [↑](#footnote-ref-11)
12. *Criminal Code*, RSC 1985 c C-46, s 487.014(2). [↑](#footnote-ref-12)
13. *Competition Act*, s 65(1)(a)(b). [↑](#footnote-ref-13)
14. *Competition Act*, s 64(2)(a)(b). [↑](#footnote-ref-14)
15. *(Canada) Commissioner of Competition v Labatt Brewing Company Limited, et al*,2008 FC 59 at para 12 [*Labatt*]. [↑](#footnote-ref-15)
16. *(Canada) Competition Commissioner v Pearson Canada Inc. and Penguin Canada Books Inc.*, 2014 FC 376 at para 63 [*Pearson*]. [↑](#footnote-ref-16)
17. *Labatt*; *Pearson*; and *(Canada) Commissioner of Competition v Indigo Books & Music Inc.*, 2015 FC 256 [*Indigo*]. [↑](#footnote-ref-17)
18. *Labatt* at para 50; *Pearson* at para 24. [↑](#footnote-ref-18)
19. *Labatt* at para 50. [↑](#footnote-ref-19)
20. *Labatt* at para 51. [↑](#footnote-ref-20)
21. *Pearson* at para 42. [↑](#footnote-ref-21)
22. *Pearson* at paras 44-46. [↑](#footnote-ref-22)
23. *Pearson* at para 49; *Indigo* at para 24. [↑](#footnote-ref-23)
24. *Indigo* at para 56. [↑](#footnote-ref-24)
25. *Pearson* at paras 38-39. [↑](#footnote-ref-25)
26. *Pearson* at para 42. [↑](#footnote-ref-26)
27. *Labatt* at para 96. [↑](#footnote-ref-27)
28. Written Reasons at pp 42-43. [↑](#footnote-ref-28)
29. Written Reasons at pp 13-14. [↑](#footnote-ref-29)
30. Written Reasons at pp 18-19. [↑](#footnote-ref-30)
31. Written Reasons at p 44. [↑](#footnote-ref-31)
32. Written Reasons at p 43. [↑](#footnote-ref-32)
33. Written Reasons at p 43. [↑](#footnote-ref-33)
34. Written Reasons at pp 32; 34-35. [↑](#footnote-ref-34)
35. Written Reasons at p 33. [↑](#footnote-ref-35)
36. Written Reasons at p 35. [↑](#footnote-ref-36)
37. Written Reasons at pp 38-39; 44-45. [↑](#footnote-ref-37)
38. Written Reasons at p 6. [↑](#footnote-ref-38)
39. Written Reasons at p 42. [↑](#footnote-ref-39)
40. *Indigo* at paras 53-55. [↑](#footnote-ref-40)
41. Backgrounder. [↑](#footnote-ref-41)
42. “Lipsky outlines principles for US FTC reforms”, *Global Competition Review*, (19 April 2017), online: <http://globalcompetitionreview.com/article/1139801/lipsky-outlines-principles-for-us-ftc-reforms?utm\_source=Law%20Business%20Research&utm\_medium=email&utm\_campaign=8213503\_GCR%20Headlines%2019%2F04%2F2017&dm\_i=1KSF,4W1KV,HCARIN,IIMEQ,1>. [↑](#footnote-ref-42)