Kluwer Competition Law Blog

Responding to Compulsory Production Orders from the Competition Bureau: Federal Court of Canada Provides Practical Guidance (Co-Written with Anita Banicevic)

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Canada's Commissioner of Competition is armed with a variety of compulsory powers that he can use in pursuing investigations. One such power is the ability, with the permission of a court, to subpoena documents and information under section 11 of the Canadian Competition Act. Of late, the Commissioner has been using such orders quite extensively, against both targets of investigations and third parties. For instance, in two of his most recent investigations, the Commissioner obtained a total of 20 compulsory production orders against third parties, in addition to orders against the targets of the investigations themselves.

The Competition Act allows the Commissioner to apply for orders under section 11 on an ex parte basis, meaning that the recipients of the order are typically not represented before the court at the time of issuance. Section 11 orders are usually granted by the courts without the benefit of accompanying reasons and without significant changes to the terms sought by the Commissioner. In August, however, the Chief Justice of Canada's Federal Court, the Honourable Justice Paul Crampton, issued detailed reasons with respect to the issuance of section 11 orders sought by the Commissioner in connection with his ongoing inquiry into Apple's contracting practices in Canada.

Justice Crampton's decision provides practical guidance for parties faced with responding to compulsory production orders from the Bureau. We outline below some key points and practical implications of Chief Justice Crampton's decision.

Key Points

1. Time to respond

Generally, section 11 orders often give parties only 30 days to respond, subject to the right to obtain extensions. In this case, the Commissioner had initially asked for all of the requested information to be provided within 30 days, and then offered an extension to 75 days. However, Justice Crampton decided that 75 days was likely to be insufficient and allowed the recipients up to 90 days to respond. In reaching this determination, Justice Crampton took into account the complexity of the order (which requested information dating back to 2008) as well as the timing concerns that were raised by certain recipients during the customary consultation between the Commissioner and individual recipients before the issuance of the order (referred to as "pre-

issuance dialogue”).

Justice Crampton also provided some general guidance regarding the time to respond to future orders, stating that parties should expect to be allowed up to 90 days to respond for complex orders, but that 30 days would not be an unreasonable time period for responding to non-complex orders. In this context, it should be noted that the Apple matter involves an investigation into trade practices. A court may be relatively more willing to impose shorter time periods for compliance in the context of merger investigations in which the Commissioner faces statutory deadlines for determining whether to challenge a proposed transaction.

2. Avoiding an “excessive, disproportionate or unnecessary burden”

During pre-issuance consultation in the Apple inquiry, certain of the third parties had also raised concerns that responding to the order in its entirety would impose an excessive burden on them. Justice Crampton expressed sympathy for this concern and inserted language into the order that allowed the recipients to certify that they had made reasonable efforts to collect the responsive information and that further efforts to collect the information would be “excessive, disproportionate or unnecessarily burdensome”. However, Justice Crampton also provided the Commissioner with the ability to challenge a party’s position regarding the burden if the Commissioner disagreed.

In adopting this approach, Justice Crampton rejected the argument advanced by the Commissioner’s counsel that if information was relevant and went to the “core” of the Bureau’s case, by definition it could not be considered excessively burdensome to collect. Indeed, Justice Crampton noted that for certain aspects of the order, it should be sufficient for the Commissioner to receive a reasonable and reliable sampling of the information requested (rather than requiring the parties to collect all responsive documents dating back seven years).

3. Incorporation of the Bureau’s E-Production Guidelines

The Commissioner sought to incorporate the requirements of the recently issued guidelines for the Production of Electronically Stored Information (E-Production Guidelines) into the section 11 orders at issue. The E-Production Guidelines, which were released in April of this year, provide the Competition Bureau’s “preferred approach” to receiving electronically stored information (ESI). For instance, the E-Production Guidelines state that the Bureau prefers to receive responsive ESI on portable storage media (e.g., hard drives, USB keys) as opposed to via email or secure FTP site.

This case marks the first time that the Commissioner has sought to incorporate the E-Production Guidelines into a section 11 order. Justice Crampton approved the incorporation of these guidelines on the basis that the recipients had not raised any concerns regarding the E-Production Guidelines during the pre-issuance dialogue.

Practical Implications

Justice Crampton’s careful review and consideration of the recipients’ concerns regarding section 11 orders in this case are welcome and encouraging. His decision confirms that the Commissioner does not have the “final word” on what section 11 production orders will look like. Here are three particular lessons to draw from this case.

1. Review draft orders carefully and raise concerns before issuance

Parties and their counsel should take advantage of the opportunities available to seek amendments to provisions of section 11 orders that are unreasonable and burdensome. In particular, parties, assisted by counsel, should carefully review draft orders and raise specific concerns (including with respect to possible burdens and technical requirements) before issuance. Raising such concerns (preferably in writing) will help the court evaluate the necessity of any changes even if the Commissioner does not agree to the proposed changes during the pre-issuance dialogue.

2. Time to respond

Justice Crampton's decision indicates that courts should carefully assess the reasonableness of the time periods given to parties to respond and that 30 days should not be considered the "default" time period. To assess what is reasonable for them, parties and their counsel should consult with relevant custodians so that they can properly estimate how long it will take them to respond and whether an amendment to the proposed order is reasonable and necessary.

3. Consider Implications of E-Production Guidelines

If the Commissioner seeks to incorporate the E-Production Guidelines into any future section 11 order, it would be prudent for parties to review and consider the format and approach that is reflected in the guidelines and raise any concerns (such as security concerns regarding providing sensitive data on portable media) before the issuance of the order. In the end, these are guidelines only and it should be open for parties to suggest why it is appropriate to depart from the guidelines in certain circumstances.

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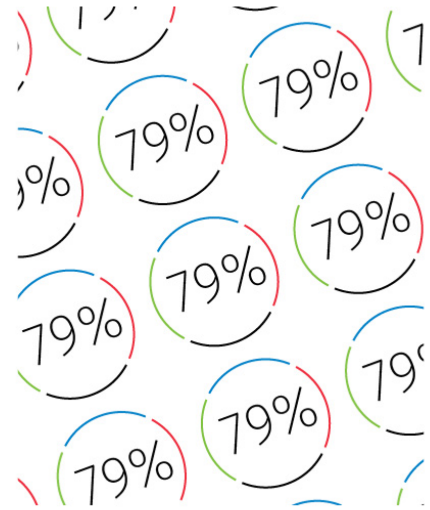

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