Federal Court  Cour fédérale

Date: 20150820

Dockets: T-929-15
T-931-15
T-933-15
T-934-15
T-935-15
T-936-15
T-937-15
T-938-15

Citation: 2015 FC 990

Docket: T-929-15

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

SASKATCHEWAN TELECOMMUNICATIONS

Respondent

Docket: T-931-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

TBAYTEL

Respondent

Docket: T-933-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

ROGERS COMMUNICATIONS INC.

Respondent

Docket: T-934-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

VIDEOTRON LTD.

Respondent

Docket: T-935-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

BRAGG COMMUNICATIONS

Respondent

Docket: T-936-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

TELUS CORPORATION

Respondent

Docket: T-937-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

MTS INC.

Respondent

Docket: T-938-15

AND BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

BELL MOBILITY INC.

Respondent

REASONS FOR ORDER

CRAMPTON CJ

[1] These are the reasons for the Orders that I issued in these proceedings on June 18, 2015. With certain exceptions, those Orders reflect the relief sought by the Commissioner of Competition [the "**Commissioner**"] in eight consolidated *ex parte* applications for the delivery of written returns by the Respondents pursuant to paragraph 11(1)(*c*) of the *Competition Act*, RSC, 1985, c C-34 [the "**Act**"].

[2] The purpose of these reasons is to address five issues raised during the hearing of the Commissioner's applications. Those issues are: (i) the period of time over which the written returns were sought by the Commissioner [the "**Relevant Period**"]; (ii) the alleged inability of certain of the Respondents to respond to some of the specifications in Schedule 1 to the draft Orders; (iii) the period of time within which the Commissioner sought to compel the Respondents to respond to the draft Order; (iv) what constitutes an excessive, disproportionate or unnecessary burden on respondents to orders issued pursuant to section 11 of the Act; and (v) the

Competition Bureau's *Guidelines for the Production of Electronically Stored Information* (the "**E-Production Guidelines**").

I. Background

[3] Pursuant to paragraph 11(1)(c) of the Act, the Court may, on the *ex parte* application of the Commissioner, grant an order requiring a person to make and deliver to the Commissioner, within a period of time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is required by the order.

[4] Before such an order may be granted, the Court must be satisfied that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to an inquiry. (See generally *Canada (Commissioner of Competition) v Pearson Canada Inc*., 2014 FC 376, at paras 34-50 ["***Pearson***"].)

[5] According to affidavits sworn by Ms. Shannon Kack [the "**Kack Affidavits**"], a Competition Law Officer in the Competition Bureau, the Commissioner commenced an inquiry in March 2014 under subparagraph 10(1)(b)(ii) of the Act in respect of certain conduct by Apple Inc. ["**Apple**"] and Apple Canada Inc. ["**Apple Canada**"] that is reviewable under Part VIII of the Act.

[6] More specifically, the Kack Affidavits explained that the Commissioner's inquiry is focusing on the inclusion and use of certain contractual obligations in contracts between Apple

Canada and the Respondents, who resell its brand of handset devices, known as Apple iPhones [the "**iPhones**"].

[7] The Kack Affidavits noted that the above-mentioned contracts contain certain clauses that impose obligations on the Respondents regarding the sale and marketing of iPhones to consumers [the "**Contractual Obligations**"].

[8] Ms. Kack also expressed her belief, based on the investigation to date by the Commissioner, that the Contractual Obligations may have or may be likely to have the effect of lessening or preventing competition substantially in various ways. This includes foreclosing suppliers of competing handset devices from a market, reducing choice and innovation, and/or increasing the price Canadian consumers have paid, are paying or will pay for handset devices and/or wireless devices.

[9] Broadly speaking, the Commissioner seeks information that relates to matters including the following:

A. the markets in Canada in which Apple, Apple Canada and the Respondents operate;
B. the pricing of handset devices (particularly a subset of handset devices known as Smartphones) and wireless service plans in Canada; and
C. the actual or likely effects of the conduct of Apple and Apple Canada on competition in Canada.

[10] Again broadly speaking, the foregoing categories of information would appear to be relevant to the Commissioner's inquiry.

[11] In contrast to many applications made under section 11, in which the Commissioner requests an order under paragraph 11(1)(b) for the production of specified records as well as an order under paragraph 11(1)(c) requiring the making and delivery of written returns, the draft Orders requested in the current proceedings seek only the latter type of information.

II. **The Relevant Period**

[12] Upon initially reviewing the draft Orders sought by the Commissioner in these proceedings, I was concerned about the extent of the Relevant Period defined in certain of those draft Orders. For example, paragraph 2(c) of the draft Order addressed to Telus Corporation ("**Telus**") required Telus to produce written returns of information for the period from 1 January 2008 to the date of issuance of the Order, unless otherwise specified. That is a very long period of time – much longer than the period covered by most other orders issued under section 11. I was concerned that, for some of the larger Respondents, a Relevant Period of this nature could result in the draft Order being excessive, disproportionate or unnecessarily burdensome.

[13] In the Kack Affidavits, Ms. Kack stated that based on the Commissioner's preliminary investigation, she believed that the Contractual Obligations, or variants of some or all of them, have existed in the agreements under which the Respondents resell iPhones to consumers since approximately 14 March 2008, when Rogers Communications Inc. or its subsidiaries [collectively, "**Rogers**"] first began reselling iPhones to customers in this country. Ms. Kack

further stated that Rogers lost its exclusivity to sell iPhones in the summer of 2009, when certain other Respondents or their subsidiaries began to resell those handsets.

[14] Given the foregoing, Ms. Kack stated that the Commissioner sought information from Rogers and those Respondents covering the period from 1 January, 2008 to the date of the issuance of the Orders, to enable the Commissioner "to analyze the effect of Rogers reselling the iPhone, including customer switching, and the beginning of Apple's penetration into the Canadian market."

[15] In my view, it is typically not excessive, disproportionate or unnecessarily burdensome for the Commissioner to want relevant information concerning conduct that is the subject of an inquiry, for the full period that the conduct is believed to have occurred. That said, the Court will be vigilant to ensure that the information the Commissioner seeks is both relevant and not excessive, disproportionate or unnecessarily burdensome. This will be discussed further below.

[16] With respect to information pre-dating and/or post-dating the period that is the focus of an inquiry, the Court observed the following in *Canada (Commissioner of Competition) v Indigo Books & Music Inc*, 2015 FC 526, at paragraph 39:

> "[I]t is understandable that the Commissioner might require information pertaining to a reasonable period of time pre-dating and post-dating the period of time that is the focus of the Inquiry. Such information typically will be relevant to the Commissioner's assessment of the business context in which the conduct that is the subject of the Inquiry may have taken place and the extent to which, if at all, that conduct prevented or lessened competition, or is likely to prevent or lessen competition substantially, relative to the situation that would have existed "but for" that conduct (Pearson, above, at paras 77-79)."

[17] With the foregoing in mind, and given the nature of the Commissioner's inquiry, I was and remain satisfied that the Relevant Period set forth in the various draft Orders sought by the Commissioner in these proceedings would not result in any of those Orders being excessive, disproportionate or unnecessarily burdensome. In my view, it is entirely reasonable that the Commissioner would want to assess the information contemplated by the Orders that I issued, over a period of time that begins a few months prior to the time at which iPhones began to be sold in Canada, and extends to the present. For greater certainty, I am satisfied that the information being sought in each of the Orders issued in these proceedings is all relevant.

III. **The alleged inability to respond to certain specifications**

[18] In furtherance of the Commissioner's duty of full and frank disclosure, the Kack Affidavits addressed various concerns that were raised by the Respondents in what has become known as the "pre-issuance dialogue" between them and the Commissioner. For several of the Respondents, those concerns included that they would not be able to respond to certain of the specifications in the draft Orders.

[19] To some extent, the Commissioner responded to that concern by amending a prior version of draft Orders to remove or modify certain specifications.

[20] Nevertheless, a number of the Respondents continued to express a concern about their inability to comply with particular specifications that are included in the final Orders.

[21] Where a respondent has reason to believe that it "does not have information that is responsive to a Specification in [the] Order because the information never existed or no longer exists," paragraph 3 of most of the orders that are issued by the Court under section 11 of the Act (the "**Template Order**"] provides a mechanism for the respondent to deal with its concern. That paragraph, which was included in each of the Orders issued in these proceedings, enables a respondent to, upon the request of the Commissioner, "make and deliver a further written return of information explaining why the information or thing [specified in the Order] never existed or no longer exists." It is expected that this will provide a complete answer to a respondent's concern regarding its inability to provide information, on the ground that the information never existed or no longer exists.

[22] Where a respondent's concern regarding its inability to provide certain information is not based on this ground, but rather on the ground that it may be disproportionate, unnecessarily burdensome, or excessively costly to provide that information, paragraph 3 of the Template Order will not assist the respondent. In such cases, a different approach will be required.

[23] The Court encourages the Commissioner to discuss such concerns with respondents, with a view to modifying the scope of draft orders to ensure that they will not be excessive, disproportionate or unnecessarily burdensome (*Pearson*, above, at paras 42 – 46 and 98).

[24] However, where, following discussions with the Commissioner, a respondent continues to have such concerns, the Court encourages respondents to make those concerns known to the

Commissioner, so that they can be brought to the attention of the Court pursuant to the Commissioner's duty of full and frank disclosure (*Pearson*, above, at paras 44-46 and 94-5).

[25] In the current proceedings, some of the Respondents continued to have such concerns, which were brought to my attention. For example, Bell Mobility Inc. ["**Bell Mobility**"] expressed concerns that "[i]n order to interpret and extrapolate the limited raw data [available to Bell Mobility] into the form requested in the specifications, Bell Mobility would need to expend significant resources yet the accuracy and comprehensiveness of the resulting information would be limited, not to mention significantly subjective due to the amount of interpretation required on the part of Bell Mobility."

[26] Bell Mobility's proposed solution to this problem was to insert into several of the specifications in the draft Order the words "to the extent that the information is reasonably available." However, the Commissioner was not prepared to agree to this suggestion, which I considered to be reasonable.

[27] Instead, and in response to my expressed sympathy with the concerns raised by Bell Mobility and other Respondents, the Commissioner proposed to include the following language in the draft Orders:

> "The Commissioner may waive the requirement for the Respondent to fully comply with a Specification of this Order concerning the delivery of written returns of information where the Commissioner is satisfied that the Respondent has made all reasonable efforts to provide the information required by the Specification and provides a written return of information setting out a sufficient factual basis for the Commissioner to conclude that

> further production would be excessive, disproportionate or unnecessarily burdensome."

[28] I was not satisfied with the Commissioner's proposed solution, in part because the Commissioner would continue to retain the discretion to insist that the information be provided. This was of concern to me, in part because of the Commissioner's view of what constitutes an excessive, disproportionate or unnecessarily burdensome request for information. This will be further discussed below. I was also concerned that the Commissioner's proposed language might not be enforceable, at least in some cases.

[29] Accordingly, I indicated that I would not be prepared to issue the draft Orders with the language proposed by the Commissioner. Instead, I stated that I would be prepared to issue the Orders if they included the following language:

> "4. THIS COURT FURTHER ORDERS that the Respondent shall not be required to provide any information described in Schedule I to this Order where it certifies that it has made all reasonable efforts to provide the information required by the Specification and that additional efforts to provide the information would be excessive, disproportionate or unnecessarily burdensome. Such certification shall be accompanied by a statement that permits the Commissioner to assess the Respondent's position and, at the Commissioner's discretion, to challenge that position before this Court."

[30] The Commissioner agreed to include this language, which appears in each of the Orders issued in these proceedings.

[31] That language was intended to address the very specific circumstances of this case. In the absence of similar circumstances in subsequent applications that have been brought by the

Commissioner under section 11 of the Act, the Court has not sought to add such language to the Orders that were ultimately issued in those proceedings.

IV. **The period to respond**

[32] The initial version of the draft Orders sent to the Respondents required the written returns to be completed within 30 days of the service of the Order. Several of the Respondents expressed a concern that this period was too short, largely because of the substantial scope of the specifications that were attached to the draft Orders. Some of the Respondents also expressed the concern that it would be difficult to complete the written returns within 30 days, because some or all of the persons most able to assemble the information would be on their summer holidays.

[33] In response to these concerns, the Commissioner agreed to extend the response period for some of the larger Respondents to 75 days.

[34] However, some of those Respondents continued to maintain that they would require at least 90 days to provide the information set forth in the Orders.

[35] During the hearing of these applications, I expressed sympathy with the Respondents' position on this issue for the following reasons: (i) the information that those Respondents would be required to assemble would be very substantial; (ii) staff who would be required to gather that information would be on holidays during the period covered by the Order; and (iii) the Commissioner initiated his inquiry approximately 15 months prior to filing the applications in these proceedings.

[36] In response, counsel to the Commissioner stated that there may be good reasons, related to the internal workings of the inquiry, why the Commissioner might be reluctant to explain the basis for insisting upon a shorter period than what is being requested by a respondent to a draft order. Counsel added that the case team in these proceedings "made a judgment call not to do so."

[37] Counsel then submitted that the appropriate manner in which to approach the assessment of the requested period for production "is to look at whether or not [that period] is an appropriate one."

[38] I agree. Based on my personal experience in responding to orders issued under section 11 of the Act when I was a member of the bar, a 90 day period within which to respond to the Orders appears to be entirely appropriate and reasonable in this case, given the nature and extent of the information described therein.

[39] Counsel also observed that the Commissioner does not have an effective way to test submissions of respondents regarding the time required to assemble and submit information that is set forth in draft orders.

[40] I disagree. That is one of the functions that the Court is expected to perform. In assessing whether to exercise its discretion to issue a draft order sought under section 11, one of the things the Court will assess is whether the time period within which the information set forth in that order must be produced to the Commissioner is reasonable. In making this assessment, the Court

will assess all of the relevant circumstances, including the nature and extent of the information being requested, and whether a holiday period will fall within the period for production.

[41] That said, the Court recognizes the desirability of achieving greater certainty, predictability and certainty with respect to the production periods set forth in orders sought under section 11. In a more recent proceeding, I invited counsel to the Commissioner to make submissions on this issue at some point in the future.

[42] In the meantime, broadly speaking, and for guidance purposes only, I am prepared to indicate that a period of 30 days would not ordinarily be inappropriate for orders that fall towards the more limited end of the spectrum, in terms of the nature and extent of information being requested and the difficulty required to assemble the information. This assumes that the production period does not fall within a holiday period and that other extenuating circumstances do not exist.

[43] Subject to the same proviso, periods of 60 and 90 days would ordinarily not be inappropriate for orders falling towards the middle and more onerous parts of the spectrum, again in terms of the nature and extent of information being requested and the difficulty required to assemble the information. However, orders may contemplate a rolling production process pursuant to which responses to certain specifications might be required earlier.

[44] Of course, there may well be cases, involving much more extensive requests for information, in which a longer period may be appropriate.

[45] In assessing where a draft order falls on the above-described spectrum, the Commissioner and counsel in the bar are encouraged to have regard to other orders that have been issued by the Court in recent years.

V. **What constitutes an excessive, disproportionate or unnecessary burden**

[46] During the hearing of these applications, counsel to the Commissioner took the position that a disproportionate burden is one that is "undue." In turn, counsel submitted that an "undue" burden is one that extends beyond "the particular burden to" a respondent to an application under section 11, and has "a more general public detriment." Stated differently, counsel submitted that, in assessing whether the burden associated with a draft order is likely to be "undue" the Court must look beyond the respondent, and consider the broader public interest.

[47] The word "unduly," used as part of the test for assessing the nature and extent of information set forth in draft orders requested under section 11, appears to come from paragraph 46 of *Pearson*, above, where I stated that the Court must be satisfied that information sought by the Commissioner must not be "excessive, disproportionate or unduly burdensome." At paragraph 48 of that decision, I also quoted from *SGL Canada Inc v Canada (Director of Investigation and Research)*, [1998] FCJ No 1951, at para 11 (TD), where this Court observed: "Courts must, in the exercise of [their] discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process." Those were the only two references to the word "unduly" in *Pearson*, above. At paragraphs 4, 42, 59, 68 and 98 of that decision, I phrased the test in terms of whether the information being sought by the Commissioner is "excessive, disproportionate or unnecessarily burdensome" (emphasis added).

[48] I recognize that I also used the words "unduly burdensome" as part of this test in *Indigo*, above, at paragraph 38. However, at paragraphs 24 and 57 of that case, I instead used the words "unnecessarily burdensome."

[49] Going forward, I will endeavour to avoid using the word "unduly" in describing the test, and to use instead the words "excessive, disproportionate or unnecessarily burdensome." Among other things, this will hopefully assist to avoid what happened in these proceedings, where counsel of the Commission sought to interpret the word "undue" by reference to jurisprudence that is not particularly helpful. This includes the case law under the former conspiracy provisions that were set forth in section 45 of the Act and its predecessors, as well as under certain provisions of the *Combines Investigation Act*, RSC, 1970, c C-23 which required that a merger, monopoly or conspiracy be demonstrated to operate "to the detriment or against the interest of the public."

[50] In any event, I categorically reject the Commissioner's position that, in assessing whether the nature and extent of the information sought in a draft order is disproportionate or unduly burdensome, the Court must look beyond the burden likely to be imposed on the respondent, and assess whether there is a more general public detriment. In my view, the appropriate focus in assessing whether the information being sought is likely to be excessive, disproportionate or unnecessarily burdensome, is to balance two things. These are (i) what the Commissioner reasonably requires to conduct the inquiry in question, and (ii) the burden that a draft order would likely impose upon the respondents. In some cases, the latter consideration will inform the Court's assessment of the former, namely, whether it is reasonable for the Commissioner to

require certain information, or certain information in a particular format, notwithstanding that it may be relevant. In conducting this balancing process, the Court will keep in mind whether the respondent is a target of the Commissioner's inquiry or is simply an unrelated third party, as this may have a bearing on the Court's assessment of whether the information being sought is excessive, disproportionate or unnecessarily burdensome.

[51] It bears underscoring that when a statutory entity such as the Commissioner, who is part of the apparatus of the state, seeks an intrusive order that may impose a significant cost or other burden on individuals or businesses who are named as respondents in proceedings under section 11, the Court will carefully balance the legitimate needs of that entity against any *bona fide* concerns of the respondent(s) that what is being sought may be excessive, disproportionate or unnecessarily burdensome.

[52] Counsel to the Commissioner repeatedly submitted that because the information being requested was relevant and went to the "core" of the Commissioner's inquiry, it could not be disproportionate in nature.

[53] I disagree. Even if a particular type of information is relevant, the extent of that information being requested may be disproportionate, excessive or unnecessarily burdensome. For example, in these proceedings, the Orders require the descriptions of the identity and value of any promotions on any Smartphones, any monthly discounts relating to any type of Smartphone and any Original Equipment Manufacturer ("**OEM**") funded sales incentives and marketing allowances paid to the Respondent, all over the entire Relevant Period.

[54] This type of information is unquestionably relevant to the Commissioner's inquiry. And if it is readily available, it should be provided to the Commissioner. But if the efforts required to provide all or virtually all of that information would be excessive, disproportionate or unnecessarily burdensome, the Respondents should not have to provide the full extent information. It should only have to provide what the Court considers is reasonably required by the Commissioner and what can be assembled by the Respondents through reasonable efforts. If the parties cannot agree on what constitutes "reasonable efforts" or what would be "excessive, disproportionate or unnecessarily burdensome," they can return it to the Court. That is why I insisted on adding paragraph 4 to the Orders issued in these proceedings.

[55] In my view, in order to establish that a particular type of reviewable conduct has substantially prevented or lessened competition, or is likely to do so, it may not be necessary for the Commissioner to have evidence with respect to every single promotion, discount or OEM funded sales initiative and marketing allowance paid to a respondent over the entire period covered by an inquiry. This is particularly so where, as in the present case, that period extends over many years. The same is true where the full amount of the information sought is not reasonably available to the respondent, and would require a substantial burden to assemble.

[56] In such cases, it is not immediately apparent to me why a reliable, representative amount of such information would not be sufficient to enable the Commissioner to demonstrate that a particular type of reviewable conduct has had, or is likely to have, the anticompetitive effect described in the Act. In my view, this would enable an appropriate balance to be struck between, on the one hand, the Commissioner's responsibility to investigate and pursue enforcement

proceedings under the Act in respect of alleged anticompetitive conduct, and on the other hand, the Commissioner's use of intrusive powers to obtain the information required to determine whether such proceedings are warranted.

VI. **The E-Production Guidelines**

[57] Paragraph 2(d) of the Orders issued in these proceedings requires the Respondents to produce all written returns of information in accordance with the Competition Bureau's E-Production Guidelines, which are attached at Schedule II to the Orders.

[58] Pursuant to paragraph 2(h) of those Orders, a duly authorized representative of the Respondents is required, before written returns are produced pursuant thereto, to contact Ms. Kack to provide particulars regarding how the Respondent will comply with the E-Production Guidelines. That same paragraph also requires the Respondents to make reasonable efforts to address any additional technical requirements the Commissioner may have relating to its production in accordance with the E-Production Guidelines.

[59] It appears that this was the first case in which provisions pertaining to the E-Production Guidelines were included in a draft Order sought by the Commissioner. Those provisions have since been incorporated into several subsequent orders that have been sought by the Commissioner and granted by this Court.

[60] In the hearing of these applications, and in response to a question that I posed, counsel to the Commissioner stated that none of the Respondents had raised an issue in respect of the E-

Production Guidelines. A similar representation was made in two subsequent hearings of other applications brought by the Commissioner under section 11 of the Act.

[61] Counsel also represented that the E-Production Guidelines were the subject of public consultation between August and October 2014, and that such consultation included input from the Competition Law Section of the Canadian Bar Association ["**CBA**"]. Counsel invited the Court to infer from the fact that "not a lot of comments [were] received following the consultation with the CBA," that the E-Production Guidelines are not contentious.

[62] In the absence of any evidence that any of the respondents to draft Orders that have included the above-described provisions have raised issues regarding the E-Production Guidelines, the Court has not independently raised such issues.

VII. **Conclusion**

[63] The purpose of these reasons was to address five issues discussed above, so that the public could be aware of the Court's evolving approach to applications brought by the Commissioner under section 11 of the Act.

[64] In the interests of fostering greater transparency, certainty and predictability in respect of this area of the law, the Court will continue to give reasons for orders issued pursuant to section 11 as and when appropriate.

"Paul S. Crampton"
Chief Justice

Ottawa, Ontario
August 20, 2015

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-929-15, T-931-15, T-933-15, T-934-15, T-935-15, T-936-15, T-937-15 AND T-938-15
DOCKET:	T-929-15
STYLE OF CAUSE:	COMMISSIONER OF COMPETITION v SASKATCHEWAN TELECOMMUNICATIONS
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PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 10, 2015

REASONS FOR ORDER: CRAMPTON C.J.

DATED: AUGUST 20, 2015

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