Federal Court of Appeal | Cour d'appel fédérale

Date: 20260327

Docket: A-329-24

Citation: 2026 FCA 64

CORAM: **LEBLANC J.A.**
GOYETTE J.A.
BIRINGER J.A.

BETWEEN:

COMMISSIONER OF COMPETITION

Appellant

and

AMAZON.COM.CA, ULC AND AMZN MOBILE LLC

Respondents

Heard at Ottawa, Ontario, on September 3, 2025.
Post-hearing submissions dated November 19 and 24, 2025.

Judgment delivered at Ottawa, Ontario, on March 27, 2026.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: LEBLANC J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] The Commissioner of Competition applied to the Federal Court under section 11 of the *Competition Act*, R.S.C. 1985, c. C-34, for an order requiring the respondents to produce transaction data about certain products on their online store (the Data Request). Under section 11, if a court is satisfied that a person has or is likely to have information that is relevant to an inquiry by the Commissioner, the court may order the person to produce the information.

[2] For reasons delivered orally at the hearing, the Federal Court (*per* Crampton C.J., the Application Judge) dismissed the Commissioner's application: 2024 FC 1164 (Decision) (available online at <fct-cf.ca/Content/assets/pdf/base/T-1357-24-Transcript-of-Hearing-22-JUL-2024.pdf>).

[3] The Federal Court was satisfied that the respondents had or were likely to have information relevant to an inquiry that was underway but concluded that the Commissioner had inadequately justified the scope of the Data Request for the Court to exercise its discretion and grant the Commissioner's request. The Commissioner appeals from the Federal Court's order.

[4] For the reasons that follow, I would dismiss the appeal.

I. Background

[5] The respondents, Amazon.com.ca, ULC and Amzn Mobile LLC, operate an online retail platform. Products sold on the respondents' website can be reviewed by users. The Commissioner is investigating whether the respondents permit "fake reviews" purchased by product vendors to remain on the website. The Commissioner claims that this practice, if proven, could constitute deceptive marketing under paragraph 74.01(1)(a) of the *Competition Act*.

[6] On April 17, 2024, the Commissioner informed the respondents that they intended to seek an order under section 11 of the *Competition Act* requiring the respondents to produce several categories of information relating to product reviews. One category was the Data

Request, which would have required the respondents to produce "transaction data for products in the product categories Health and Personal Care, Home and Kitchen, Tools and Home Improvement, and Electronics, sold in Canada from the Amazon Platform": Appeal Book, Tab 6, pp. 486-87. On May 17, 2024, the respondents' lawyers replied to the Commissioner and objected that the request was "exceedingly broad, excessive, and unnecessarily burdensome", claiming that there were "billions of products offered in the four specified categories": Appeal Book, Tab 6, p. 493.

[7] On June 4, 2024, the Commissioner applied to the Federal Court for a production order under section 11 of the *Competition Act*. The Data Request was in Schedule III of the Commissioner's draft order.

[8] On June 7, 2024, the Commissioner's application was heard *ex parte*. The Application Judge approved Schedules I and II of the draft order but declined to approve Schedule III: *Commissioner of Competition v. Amazon.com.ca, ULC and Amzn Mobile LLC* (7 June 2024), Ottawa T-1357-24 (F.C.), Hearing Transcript, pp. 82-83 (June 7 Hearing Transcript), Appeal Book, Tab 9, pp. 776-77; see also Order, pp. 1-11, Appeal Book, Tab 12, pp. 880-90. The Application Judge adjourned the hearing and urged the Commissioner to consult the respondents to clarify the number of records that would need to be produced and to address the concerns raised in the May 17 letter: June 7 Hearing Transcript, pp. 67-68, 82-83, Appeal Book, Tab 9, pp. 761-62, 776-77.

[9] The Commissioner chose not to communicate further with the respondents. Instead, they filed additional affidavit evidence with the Federal Court to substantiate the Data Request. They also filed a second letter, dated July 19, 2024, from the respondents' counsel which was sent in reaction to the Commissioner's supplementary application record and which maintained that the Data Request was "unreasonable": Appeal Book, Tab 11, pp. 876-78.

[10] A second *ex parte* hearing before the Application Judge was held on July 22, 2024. At the start of the hearing, the Application Judge expressed uncertainty about "the reasonableness of seeking 36 data fields for 'billions of products,' which is what the Respondent[s] said was going to be captured by the Data Request": Decision, Hearing Transcript, p. 9. The Application Judge was concerned about whether the Data Request complied with the standard laid out in *Canada (Commissioner of Competition) v. Pearson Canada Inc.*, 2014 FC 376 [*Pearson*] and *Canada (Commissioner of Competition) v. Bell Mobility Inc.*, 2015 FC 990 [*Bell Mobility*]: Decision, Hearing Transcript, pp. 6-8.

[11] In *Pearson*, the Federal Court held that on a section 11 application the Court has a duty "to satisfy itself that the information being sought by the Commissioner is relevant to the inquiry in question, and is not excessive, disproportionate or unnecessarily burdensome": *Pearson* at para. 42. In *Bell Mobility*, the Federal Court elaborated that this test requires an application judge to balance (i) what the Commissioner reasonably requires to conduct the inquiry, and (ii) the burden that a draft order would likely impose upon the respondents: *Bell Mobility* at para. 50. The *Pearson/Bell Mobility* test has been applied by the Federal Court in numerous section 11 proceedings: see e.g. *Canada (Commissioner of Competition) v. Canada Tax Reviews Inc.*, 2021

FC 921 at para. 41 [*Canada Tax Reviews*]; *Canada (Commissioner of Competition) v. McGee*, 2025 FC 860 at para. 59 [*McGee*], under appeal, A-219-25 (F.C.A.); *Canada (Commissioner of Competition) v. Rogers Communications Inc.*, 2024 FC 239 at para. 37; *Commissioner of Competition v. George Weston Ltd.* (7 June 2024), Montréal T-1142-24 at pp. 2-3 (F.C.).

[12] Ultimately, the Federal Court dismissed the Commissioner's application regarding the Data Request. The Federal Court concluded that because the Commissioner had failed to sufficiently explain the scope of the request, the Court was unable to determine whether the request complied with the *Pearson/Bell Mobility* standard: Decision, Hearing Transcript, p. 74.

II. Issues

[13] This appeal raises three issues.

[14] In refusing to grant the production order requested by the Commissioner:

A. Did the Federal Court err by relying on factors inconsistent with section 11 of the *Competition Act* and section 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter)?

B. Did the Federal Court err by relying on letters from the respondents' counsel?

C. Did the Federal Court err by misconstruing the role of Rule 399(1) of the *Federal Courts Rules*, S.O.R./98-106 in a section 11 application?

III. Standard of Review

[15] The Federal Court's decision resulted from the exercise of discretion: *Canada (Commissioner of Competition) v. Air Canada*, [2001] 1 F.C. 219 at para. 31 (F.C.) [*Air Canada*]. Exercises of discretion are entitled to substantial deference on appeal: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 2, 79; *R. v. J.W.*, 2025 SCC 16 at para. 50; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 at paras. 31-32.

[16] However, if the exercise of discretion is tainted by an error of law, no deference is owed: *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48 at para. 41 [*Carroll-Byrne*]; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39 (S.C.C.); *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. Legal errors include where the lower court has failed to consider relevant factors, considered irrelevant factors, mischaracterized the factors governing the exercise of its discretion or improperly interpreted a statute: *Carroll-Byrne* at para. 41; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 at para. 97 [*CISSS A*]; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

[17] The parties do not dispute, and I agree, that the issues in this appeal raise questions of law, requiring review for correctness.

IV. Analysis

A. *Did the Federal Court Err by Relying on Factors Inconsistent with Section 11 of the Competition Act and Section 8 of the Charter?*

[18] The Commissioner submits that the Federal Court erred by relying on *Pearson* and *Bell Mobility*. The Commissioner says that the "excessive, disproportionate and unnecessarily burdensome" standard developed in those cases is inconsistent with section 11 of the *Competition Act* and section 8 of the Charter and inappropriately imports civil litigation concepts into the investigation stage of proceedings under the *Competition Act*. The Commissioner asks this Court to explicitly reject the approach taken in *Pearson* and *Bell Mobility*.

[19] In *Pearson*, the Federal Court (*per* Crampton C.J.) clarified the role of the Court on section 11 applications, including the criteria governing the exercise of the Court's discretion (see para. 2). The Court found that:

> [In] the typical proceedings initiated under section 11, the Court's focus will be on satisfying itself that (i) an inquiry is in fact being made; (ii) the Commissioner has provided full and frank disclosure; (iii) the information or records described in the order being sought are relevant to the inquiry in question; and (iv) the scope of such information or records is not excessive, disproportionate or unnecessarily burdensome.
>
> (*Pearson* at para. 4.)

[20] The Commissioner's application to the Federal Court in this proceeding was made pursuant to paragraphs 11(1)(b), 11(1)(c), 11(2)(a) and 11(2)(b) of the *Competition Act*. Paragraphs 11(1)(b) and 11(1)(c) include, respectively, the power to obtain an order for the production of a record, a copy thereof "or any other thing, specified in the order" and an order for the making and delivery of a written return or solemn affirmation showing "such information as is by the order required". Paragraphs 11(2)(a) and 11(2)(b) are corresponding provisions relating to records or information in the possession of an affiliate.

[21] Subsections 11(1) and 11(2) of the *Competition Act* provide:

Order for oral examination, production or written return	**Ordonnance exigeant une déposition orale ou une déclaration écrite**
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 or 10.1 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to	**11 (1)** Sur demande ex parte du commissaire ou de son représentant autorisé, un juge d'une cour supérieure ou d'une cour de comté peut, lorsqu'il est convaincu d'après une dénonciation faite sous serment ou affirmation solennelle qu'une enquête est menée en application des articles 10 ou 10.1 et qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question, ordonner à cette personne:
(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;	**a)** de comparaître, selon ce que prévoit l'ordonnance de sorte que, sous serment ou affirmation solennelle, elle puisse, concernant toute question pertinente à l'enquête, être interrogée par le commissaire ou son représentant autorisé devant une personne désignée dans l'ordonnance et qui, pour l'application du présent article

et des articles 12 à 14, est appelée «fonctionnaire d'instruction»;

(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

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l'ordonnance fait mention;

(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.

c) de préparer et de donner au commissaire ou à son représentant autorisé, dans le délai que prévoit l'ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l'ordonnance.

Records or information in possession of affiliate

(2) If the person against whom an order is sought under paragraph (1)(b) or (c) 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 or is likely to have records or information relevant to the inquiry, the judge may order the corporation to

Documents ou renseignements en possession d'une affiliée

(2) Lorsque, en rapport avec une enquête, la personne contre qui une ordonnance est demandée en application des alinéas (1)b) ou c) est une personne morale et que le juge à qui la demande est faite aux termes du paragraphe (1) est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'une affiliée de cette personne morale a ou a vraisemblablement des documents ou des renseignements qui sont pertinents à l'enquête, il peut, sans égard au fait que l'affiliée soit située au Canada ou ailleurs, ordonner à la personne morale :

(a) produce the records; or

a) de produire les documents en question;

(b) make and deliver a written

b) de préparer et de donner une déclaration écrite énonçant les

return of the information. renseignements.

[22] Section 11 of the *Competition Act* vests the power to issue production orders in superior court judges, including judges of the Federal Court. Section 11 envisions an *ex parte* proceeding where only the Commissioner appears. Parties other than the Commissioner, including the target of a production order, have no right to participate in the hearing, file evidence or cross-examine the affiant of any affidavit relied on by the Commissioner: *Pearson* at para. 92, citing *Commissioner of Competition v. Toshiba of Canada Limited*, 2010 ONSC 659 at paras. 34-36, leave to appeal ref'd 2011 ONSC 949 (Div. Ct.), leave to appeal ref'd 2011 CanLII 79175 (S.C.C.).

[23] While the application judge may, in certain circumstances, allow parties other than the Commissioner to attend the hearing or provide them with an opportunity to seek leave to make written or oral submissions, this should not be expected. Parliament has deliberately chosen that section 11 hearings should ordinarily proceed on an *ex parte* basis: *Canada Tax Reviews* at para. 48; *Pearson* at paras. 92-94, citing *R. v. S.A.B.*, 2001 ABCA 235 at para. 61. As addressed further below (see paras. 68-74), the more appropriate and common means for the target of the order to bring its concerns about the scope of the proposed order to the application judge's attention is through pre-hearing communications with the Commissioner, which are presented to the court pursuant to the Commissioner's duty of full, fair and frank disclosure. As also discussed further below, the target of the order may also move under Rule 399(1) to have a section 11 order set aside.

[24] At the hearing, the Commissioner must establish that an inquiry is being made under section 10 or 10.1 and that the target of the order has or is likely to have relevant information. If these conditions are met, the application judge "may" grant the production order. This permissive language reflects a residual discretion to refuse to issue the order or to include additional conditions: *Air Canada* at para. 31; *Canada (National Revenue) v. Derakhshani*, 2009 FCA 190 at para. 19 [*Derakhshani*]; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 11.

[25] The factors considered by an application judge in the exercise of discretion under section 11 of the *Competition Act* must be consistent with the legislature's intent in enacting the provision: see *Wilson v. Alharayeri*, 2017 SCC 39 at paras. 26-27; *R. v. Lavigne*, 2006 SCC 10 at paras. 22-37; *D.J.E. v. P.A.E.*, 2014 ABCA 403 at para. 18; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58 at para. 19. To discern legislative intent, the court examines the text, context and purpose of the provision: *CISSS A* at para. 23; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 (S.C.C.); Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022), § 2.01[4].

[26] The text of section 11 sets out two preconditions for the application judge's exercise of discretion: that there is an inquiry underway and that the target is likely to have information relevant to the inquiry. Otherwise, the text does not circumscribe the scope of the discretion.

[27] One essential purpose of section 11 is to enable the Commissioner to make inquiries into anti-competitive practices (under section 10) and the state of competition in a market or industry (under section 10.1). The investigatory purpose of section 11 furthers the general purpose of the

Competition Act to maintain and encourage competition in Canada (section 1.1). The critical importance of the Commissioner's investigative mandate is reflected in the serious penalties that may follow for failure to comply with a section 11 order—imprisonment of up to two years or a fine "in the discretion of the court": *Competition Act*, s. 65(1); *Commissioner of Competition v. Labatt Brewing Company Limited*, 2008 FC 59 at para. 20 [*Labatt*].

[28] Another purpose of section 11 is to grant the application judge sufficient authority to ensure that the Commissioner's investigative powers are exercised in compliance with section 8 of the Charter, protecting against unreasonable search or seizure.

[29] It is well established that compulsory production orders in a regulatory context, such as those under section 11 of the *Competition Act*, are "seizures" subject to section 8: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at pp. 442, 494, 505, 592 (S.C.C.) [*Thomson Newspapers*]; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at pp. 640-42 (S.C.C.) [*McKinlay Transport*]; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at paras. 59-60 (S.C.C.) [*Branch*]; *Binance Holdings Limited v. Ontario Securities Commission*, 2025 ONCA 751 at paras. 37-38 [*Binance*], leave to appeal requested, 42156 (S.C.C.).

[30] Section 11 of the *Competition Act* was enacted in 1986 by Bill C-91 in response to *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.) [*Hunter*]. In *Hunter*, the Supreme Court of Canada struck down investigatory powers held by the Director of the Restrictive Trade Practices Commission (RTPC) under section 10 of the *Combines Investigation Act*, R.S.C. 1970,

c. C-23. The *Combines Investigation Act* was the predecessor of the *Competition Act* and the Director of the RTPC was the predecessor of the Commissioner. The Court found that the statutory provision violated section 8 of the Charter, which provides:

Search or seizure	**Fouilles, perquisitions ou saisies**
8 Everyone has the right to be secure against unreasonable search or seizure.	**8** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

[31] The responsible minister for Bill C-91, Michel Côté, explained to the House of Commons that the investigative powers under the new *Competition Act* were designed to comply with *Hunter*, and would "protect the individual rights enshrined in the Canadian Charter of Rights and Freedoms while providing the tools provided to enforce the law properly": Canada, *House of Commons Debates*, 33rd Parl., 1st Sess., Vol. 8, p. 11930 (7 April 1986); see also Michel Côté, *Competition Law Amendments: A Guide* (Ottawa: Consumer and Corporate Affairs Canada, 1985) at pp. 13-14.

[32] The text and the legislative history of section 11 demonstrate that the application judge's discretion must be exercised consistently with the provision's dual purpose: empowering the Commissioner to investigate and enforce competition law and protecting the section 8 Charter rights of those under investigation.

[33] The reasonableness of a search and seizure under section 8 is evaluated by reference to the subject's expectation of privacy: *Hunter* at p. 159; *McKinlay Transport* at p. 642; *R. v. Singer*, 2026 SCC 8 at para. 36. Section 8 mandates that judges retain the discretion to refuse

production orders to preserve the privacy interests of targeted parties: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paras. 21-23 [*RBC*]; *Derakhshani* at para. 19, citing *Baron v. Canada*, [1993] 1 S.C.R. 416 at p. 443 (S.C.C.) [*Baron*].

[34] There is no single list of factors to test the reasonableness of a search or seizure: *Baron* at pp. 435-37; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at p. 478 (S.C.C.) [*CBC*]; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 57 [*Goodwin*]; *Canada (Attorney General) v. Canadian Civil Liberties Association*, 2026 FCA 6 at para. 438 [*CCLA*]. However, relevant considerations include the nature and the purpose of the governing legislative scheme, the mechanism employed, the potential intrusiveness of the search or seizure, and the availability of judicial supervision: *Goodwin* at para. 57, citing *Del Zotto v. Canada*, [1997] 3 F.C. 40 at para. 13 (F.C.A.) (*per* Strayer J.A., dissenting), adopted by the Supreme Court of Canada, [1999] 1 S.C.R. 3 at p. 4 (S.C.C.); see also *Power Workers' Union v. Canada (Attorney General)*, 2024 FCA 182 at para. 106 and *Binance* at paras. 57-62.

[35] Applying this contextual approach, three factors support relaxation of the reasonableness standard for production orders under section 11. First, a diminished expectation of privacy attaches to business records, because they do not normally deal with the intimate aspects of personal identity which the right of privacy is intended to protect: *Thomson Newspapers* at pp. 517-18 (*per* La Forest J.); *McKinlay Transport* at p. 649. Second, the reasonableness standard is generally more flexible under regulatory statutes than in criminal law: *McKinlay Transport* at pp. 645-46; *Baron* at pp. 435-37; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2

S.C.R. 406 at pp. 420-21 (S.C.C.); *R. v. Jarvis*, 2002 SCC 73 at paras. 71-72. Third, a production order is much less intrusive than a physical entry onto property or the search of a person's body, both of which require more stringent judicial oversight: *Baron* at pp. 444-45; see also *Thomson Newspapers* at pp. 520-22 (*per* La Forest J.); *McKinlay Transport* at pp. 649-50; *Binance* at para. 40, citing *Branch* at paras. 58, 60-61.

[36] Nonetheless, section 8 meaningfully constrains regulators' ability to require the production of business records. Commercial documents are protected under section 8 because they possess an informational privacy interest—they inevitably reveal aspects of the business that the operator would rather keep private: *R. v. Law*, 2002 SCC 10 at para. 16; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at p. 379 (S.C.C.) (*per* Cory J., for the majority on this point); see also *McKinlay Transport* at p. 642. *Binance*, a recent decision applying section 8 to the production of business records, considered a provision empowering the Ontario Securities Commission to order the production of documents: *Securities Act*, R.S.O. 1990, c. S.5, s. 13(1). While no relevance standard had been written into the statutory provision, the Court of Appeal for Ontario found that section 8 required the regulator to have a "reasoned basis for believing" the records sought "may be relevant" to an investigation: *Binance* at paras. 89-98. The Court determined that the summons issued by the Commission was overbroad and contravened section 8 because it purported to compel the target to produce documents that the Commission had no foundation to believe might be relevant to its investigation.

[37] Here, unlike the statutory provision at issue in *Binance*, subsections 11(1) and 11(2) of the *Competition Act* prescribe a minimum standard of relevance. However, even where the

records are relevant to the Commissioner's inquiry, the application judge retains a residual discretion to refuse the requested production order. The contours of this discretion are defined by section 8. Authorizing judges must evaluate the impact on the subject of the search or the seizure and determine whether "in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the [subject's] privacy in order to advance its goals": *Hunter* at pp. 157-60; see also *R. v. Dyment*, [1988] 2 S.C.R. 417 at p. 428 (S.C.C.) [*Dyment*].

[38] With these principles in mind, I turn to address the Federal Court's reasons for refusing to grant an order for the Data Request.

[39] The Commissioner submits that the Federal Court erred by relying on the "excessive, disproportionate or unnecessarily burdensome" test in *Pearson* and *Bell Mobility*. They say that it is inconsistent with section 8 and relies on principles relating to discovery in civil proceedings, conflating investigation with litigation. The Commissioner also submits that *Pearson* and *Bell Mobility* improperly require the section 11 application judge to assess the burden imposed by a proposed production order on the targeted party which, they submit, is not a protection afforded by section 8 of the Charter.

[40] The Federal Court's reasons in this case were delivered orally during the hearing. On appeal, oral reasons must be read holistically and in the context of the entire proceeding: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 50 (S.C.C.) (*per* L'Heureux-Dubé & McLachlin JJ.); *R. v.*

Khan, 2024 ONCA 296 at para. 26; *Aullaluk c. R.*, 2022 QCCA 1081 at para. 59; *University Hill Holdings Inc. (589918 B.C. Ltd.) v. Canada*, 2017 FCA 232 at para. 79.

[41] Reading the Federal Court's reasons as a whole, I am unconvinced that the Application Judge committed any of the errors alleged by the Commissioner.

[42] The Commissioner's first submission is that the Application Judge inappropriately relied on principles exclusive to discovery in civil proceedings, conflating investigation with litigation. The Commissioner relies on this Court's decision in *Canada (National Revenue) v. Cameco Corporation*, 2019 FCA 67 as authority for the proposition that proportionality principles relevant to civil discovery do not apply to investigations.

[43] The Commissioner is correct that concepts arising from discovery in civil litigation cannot be imported without qualification or modification into the investigative process under section 11 of the *Competition Act.* These are fundamentally different processes which have different purposes, governing rules and outcomes. Discovery in civil litigation allows for the production of information and documents relevant to the matters at issue, defined by reference to the pleadings: see *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 at para. 17; *AstraZeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301 at para. 6 [*AstraZeneca*]. Material is relevant if it facilitates proof of the case of the party seeking discovery or will assist in undermining that of the adversary; again, determined by reference to the pleadings: *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19 at paras. 22-23, citing *Canada v. Lehigh*

Cement Limited, 2011 FCA 120 at paras. 24-25, 34-36; *AstraZeneca* at para. 12, citing *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2008 FCA 287 at paras. 56, 63-64.

[44] Section 11 orders become available to the Commissioner at the investigatory stage, and are often issued before the Commissioner has applied for an order under one of the substantive provisions of Part VII.1 or VIII of the *Competition Act*: *Pearson* at para. 47. A section 11 application requires only that an inquiry is underway and that the target likely has relevant information. The reason to cause an inquiry under subsection 10(1) is with "a view of determining the facts". Applying discovery principles to limit what goes into a production order would undermine one of the fundamental purposes of section 11, which is to allow the Commissioner to collect relevant information as part of their enforcement powers.

[45] That being said, the Federal Court did not apply civil litigation concepts, including proportionality, to the investigative process under section 11. The reasons in *Pearson* and the transcript of the hearing in this matter, viewed in their entirety, make clear that the Application Judge directed himself to the investigative stage of the proceedings and appropriate principles under section 8 of the Charter.

[46] In civil litigation, proportionality means that the processes employed, including discovery, must be proportionate to the claim, determined with reference to "the nature of the issues engaged; the amount of money involved; the time reasonably necessary to resolve the issue; the complexity of the issues and the overall cost of the litigation": *Szeto v. Dwyer*, 2010 NLCA 36 at paras. 53-54, cited in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 31 [*Hryniak*]; see

also *Federal Courts Rules*, s. 3(b) and *Viiv Healthcare Company v. Gilead Sciences Canada, Inc.*, 2021 FCA 122 at para. 18.

[47] The Application Judge did indeed express concerns with the Data Request not being "proportionate", quoting paragraph 32 of *Hryniak*, which called for a culture shift in civil litigation requiring judges to "actively manage the legal process in line with the principle of proportionality": Decision, Hearing Transcript, p. 7. *Hryniak* concerned efficiency and access to justice in civil litigation, not investigative orders or regulatory law.

[48] However, in both this proceeding and *Pearson*, the Application Judge also referred to this Court's decision in *RBC*, a case discussing investigative powers under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.): Decision, Hearing Transcript, p. 8; *Pearson* at para. 42. In the cited paragraphs of *RBC*, this Court noted that the statutory provisions at issue served the dual purpose of empowering the Minister to verify taxpayers' compliance and ensuring "the fair and proper treatment of persons subjected to the Minister's investigative powers", consistent with those persons' rights under section 8: *RBC* at para. 22, citing *M.N.R. v. Sand Exploration Limited*, [1995] 3 F.C. 44 at p. 53 (F.C.) and *Derakhshani* at para. 19.

[49] Moreover, the Federal Court in *Pearson* was fully alive to the considerations specific to judicial oversight of law enforcement investigations, properly observing that a certain degree of latitude was warranted on a section 11 application to avoid unduly constraining the Commissioner (at para. 48). The Court also noted that the judiciary must "remain alert to the danger of unduly burdening and complicating the law enforcement investigative process",

particularly where that process is "in embryonic form engaged in the gathering of the raw material for further consideration": *Pearson* at para. 48, quoting *SGL Canada Inc. v. Canada (Director of Investigation and Research)*, 1999 CanLII 7595 at para. 11 (F.C.), quoting *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at p. 235 (S.C.C.).

> From this, it is apparent that the Application Judge's use of the term "disproportionate" did not mean that he was applying the rulebook applicable to discovery in civil litigation. Indeed, the "excessive, disproportionate or unnecessarily burdensome" test in *Pearson* and *Bell Mobility* must be understood in light of the context of those decisions, which were also section 11 applications within ongoing investigations. Further, the term "proportionality" is not alien to the section 8 context and has been applied, for example, in assessing the reasonableness of police physical searches: see e.g. *R. v. Golden*, 2001 SCC 83 at para. 116; *R. v. Fearon*, 2014 SCC 77 at para. 152 (*per* Karakatsanis J., dissenting); *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 14 (S.C.C.), citing *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 at p. 186 (S.C.C.).

[50] As discussed above, section 8 requires the application judge, in the exercise of the highly flexible discretion conferred by section 11, to balance the state interest in the search or seizure against the privacy interests of the target: *Hunter* at pp. 157-60; *Dyment* at p. 428; *CBC* at p. 476; *Baron* at pp. 435-37. When issuing a section 11 order, the court should assess whether the information requested by the Commissioner exceeds what is reasonably required for purposes of the inquiry and is overbroad given the nature of the inquiry or unjustifiably intrudes on the privacy interests of the target.

[51] In my view, this approach corresponds with the "excessive" and "disproportionate" components of the test set out in *Pearson* and *Bell Mobility*. Assessing what is reasonably required by the Commissioner and considering whether the request is excessive or disproportionate to the inquiry in light of the privacy interests of the target—even though these interests are minimal for business records—is part of the section 8 balancing exercise.

[52] Next, contrary to the appellant's allegation, the Federal Court did not require the Commissioner to establish relevance of the documents and information in the Data Request by reference to the case to be presented at trial, as in civil litigation, where documentary production must be relevant to the pleaded case. Section 11 requires that the material or information sought be relevant to the inquiry and the *Pearson/Bell Mobility* test asks the court to consider "what the Commissioner reasonably requires to conduct the inquiry in question": see *Bell Mobility* at para. 50. At the hearing, the Application Judge specifically and repeatedly emphasized uncertainty about the scope of the order and whether the documents requested exceeded what was needed for the Commissioner's inquiry: Decision, Hearing Transcript, pp. 9, 31, 35, 41-43, 62, 64, 73-74.

[53] The Commissioner also submits that *Pearson* and *Bell Mobility* improperly require the section 11 application judge to assess the burden imposed by a proposed production order—the "unnecessarily burdensome" aspect of the test. The Commissioner claims that assessing burden on the target is not an appropriate consideration for the application judge under section 11 and is not supported by section 8 of the Charter.

[54] In *Pearson*, the Federal Court held that to approve the Commissioner's requested production, the Court needed to satisfy itself that the burden imposed by past requests, together with the additional time and expense that would be associated with responding to the proposed order, would not be "excessive, disproportionate or unnecessarily burdensome" (at para. 68). In *Bell Mobility*, the Federal Court went further, stating that once relevance of the information sought is established, if the efforts required to provide the information would be "excessive,

disproportionate or unnecessarily burdensome", the target should not have to provide all of the information, but only what can be assembled through "reasonable efforts" (at para. 54).

[55] Other courts have used the language of "burden" under section 8 of the Charter when discussing whether the scope of the search or seizure exceeds what is relevant to the government's inquiry. For example, in *Thomson Newspapers* at p. 532, Justice La Forest likened the burdensomeness of a search or seizure to its potential "overbreadth" or whether "documents not relevant to the inquiry in progress are being demanded" (see also *Binance* at para. 99). However, in my view, *Bell Mobility* went too far in suggesting that production orders should be limited by the "burden"—meaning "reasonable efforts" or costs—imposed on the target: see *Bell Mobility* at paras. 50-51. These considerations are not supported by the section 8 jurisprudence, which focusses on the privacy interests of the target of the search or seizure, not the difficulty of responding to a production order or the target's economic interests: see e.g. *Hunter* at pp. 159-60; *R. v. Plant*, [1993] 3 S.C.R. 281 at p. 292 (S.C.C.); *R. v. Tessling*, 2004 SCC 67 at paras. 20-23; *R. v. A.M.*, 2008 SCC 19 at para. 33; *R. v. Ahmad*, 2020 SCC 11 at para. 38; *CCLA* at paras. 409-10, 416, citing *Goodwin* at para. 55.

[56] Notwithstanding these reservations about this aspect of the *Pearson/Bell Mobility* test, I do not conclude that the Application Judge erred. The Application Judge did not reject the Commissioner's Data Request based on the effort or cost that would be imposed on the respondents. When the Application Judge's reasons are read as a whole, the decisive factors in the exercise of his discretion were uncertainty about the scope of the Data Request and a concern that the request was excessive to what the Commissioner reasonably needed for the inquiry.

[57] The Application Judge repeatedly expressed uncertainty about the scope of what the Commissioner was requesting: see Decision, Hearing Transcript, pp. 9, 31, 35, 41-43, 62, 64, 73-74. For example, after reviewing the additional evidence submitted by the Commissioner at the July 22 hearing, the Application Judge said that he kept "wondering about the extent to which this is excessive. And you can't tell me because you haven't yet been able to tell me how many products. You haven't even given me a range. So I'm sitting here not knowing what the scope of the Order is that you want me to issue": Decision, Hearing Transcript, p. 62. And, at the conclusion of the hearing, the Application Judge said that he did not "have a good feel for the extent of this Order, and I should have a better feel than I do about the scope of it before I exercise my discretion to go ahead and grant it. […] I just don't feel like I have what I need to exercise my discretion in your favour, I'm sorry": Decision, Hearing Transcript, p. 74.

[58] On the factual record before it, the Federal Court did not make a reviewable error when it declined to order the production requested by the Commissioner. An application judge cannot conduct the balancing exercise required by section 8—determining whether the intrusiveness of the production order is justified by the state's interest in law enforcement—if they do not know the extent of what the state seeks to have produced.

[59] For these reasons, this ground of appeal is rejected.

B. *Did the Federal Court Err by Relying on Letters from the Respondents' Counsel?*

[60] The Commissioner submits that the Federal Court erred by accepting untested assertions made by the respondents' counsel in letters to the Commissioner during the pre-issuance dialogue. The letters were included in the application record filed by the Commissioner with the Federal Court. The Commissioner submits that the Application Judge was not entitled to refer to the letters and erred by relying on them for the truth of their contents.

[61] Section 11 applications are heard *ex parte*. During an *ex parte* proceeding, the ordinary checks and balances of the adversarial system are not operative, and the judge and the absent party are "literally at the mercy" of the applicant: *United States of America v. Friedland*, 1996 CarswellOnt 5566 (WL) at paras. 27-28, [1996] O.J. No. 4399 (QL) (Ont. C.J. (Gen. Div.)) [*Friedland*]. Accordingly, the applicant must "make full, fair and frank disclosure of all material facts", including any fact that would have been considered by the judge in deciding the issues: *Canadian Security Intelligence Service Act (Re)*, 2021 FCA 92 at paras. 120, 127; *Forestwood Co-operative Homes Inc. v. Pritz*, 2002 CarswellOnt 490 (WL) at para. 26, 156 O.A.C. 359 (Ont. S.C.J. (Div. Ct.)); *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at para. 27. This exceptional duty on the party seeking *ex parte* relief mitigates against the obvious risk of injustice inherent in a one-party hearing.

[62] Regarding the Commissioner's first concern, the letters were properly before the Federal Court pursuant to the Commissioner's duty of disclosure and the Court was entitled to consider them. If nothing else, the letters informed the Application Judge about the dialogue between the

Commissioner and the respondents and provided an explanation for why the respondents had not voluntarily provided the materials sought by the Commissioner. The concerns raised by the respondents in the letters were clearly relevant to the Federal Court's exercise of discretion: *Canada Tax Reviews* at para. 36; *Pearson* at paras. 94-95; *Labatt* at paras. 104-07.

[63] Contrary to the Commissioner's allegation, the Application Judge did not rely on the letters for the truth of their contents regarding how many records would be subject to the Data Request. Indeed, the Application Judge repeatedly expressed uncertainty about the scope of the Data Request, requested more information and stated explicitly that he was not making a finding of fact about how many products could be captured by the Data Request: Decision, Hearing Transcript, pp. 31, 35, 43, 49, 59-61. In the end, the Application Judge rejected the Data Request because of a lack of information from the Commissioner and not because he accepted untested assertions made by the respondents' counsel: Decision, Hearing Transcript, pp. 73-74. Accordingly, this ground of appeal is also rejected.

C. *Did the Federal Court Err by Misconstruing the Role of Rule 399(1) in a Section 11 Application?*

[64] The Commissioner submits that the Federal Court misconstrued the role of Rule 399(1) in a section 11 application, relieving the respondents of their burden to set aside or vary the section 11 order, if granted, under Rule 399(1). In the Commissioner's view, obtaining a section 11 order is a two-step process. First, at the *ex parte* section 11 hearing, the Commissioner must establish that the statutory requirements for the order have been met. Second, at the *inter partes*

Rule 399(1) hearing, the onus shifts to the respondent to vary or set aside the order. I disagree with the Commissioner's construct of a process entailing two steps.

[65] Rule 399(1) is a procedural rule of general application that enables an affected party to challenge any *ex parte* order. Rule 399(1) provides that such an order may be varied or set aside if the party against whom the order was made discloses a *prima facie* case why the order should not have been made: *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28 at para. 31; *Babis (Domenic Pub) v. Premium Sports Broadcasting Inc.*, 2013 FCA 288 at paras. 5-6 [*Babis*]. A *prima facie* case features sufficient facts and law to justify a conclusion in a party's favour unless rebutted by the opposing party: *Canada Tax Reviews* at para. 30, citing *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at p. 558 (S.C.C.).

[66] Setting aside a court order, even one made *ex parte*, is not done lightly. On review of an order issued *ex parte*, the reviewing judge may not "substitute his discretion" for that of the original issuing judge: *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at p. 608 (S.C.C.). Rather, as the Federal Court observed in *Air Canada* at para. 13, cited in *Labatt* at para. 30: "The non-disclosure or errors, in the evidence placed before the issuing judge, must be such as to have caused the issuing judge, had he or she known of them, to have refused to grant the order".

[67] Rule 399(1) provides the target of a production order obtained by the Commissioner with a remedy for procedural unfairness that may arise by virtue of the hearing being held *ex parte*: *Friedland* at paras. 26-28. Where a section 11 order is issued *ex parte*, the respondent may move under Rule 399(1) to have the order set aside and file affidavit evidence in support of the motion:

see e.g. *Babis* at paras. 11-12. On the Rule 399(1) motion, it is open to the respondent to argue, for example, that: (1) the Commissioner failed to meet its elevated duty of disclosure; (2) the Commissioner has not initiated a *bona fide* inquiry under section 10 or 10.1; (3) some or all of the information sought is irrelevant to the inquiry or (4) the section 11 order is unreasonable under section 8 of the Charter: *Canada Tax Reviews* at para. 30; *Labatt* at paras. 97-98; *Empire Company Limited v. Canada (Attorney General),* 2024 FC 810 at paras. 63-69.

[68] However, the availability of a Rule 399(1) motion does not alter the application judge's function at the section 11 hearing: to ensure that the statutory criteria for issuing the order are satisfied and to exercise their discretion in light of section 8 of the Charter. Even at the *ex parte* hearing, the Court as part of its plenary powers has the power to investigate, detect and redress abuses of its own process, such as a failure to make full, frank and fair disclosure: *RBC* at paras. 31-36. Given the Commissioner's burden of full and frank disclosure, the target of a proposed order can express concerns about the scope of a draft order to the section 11 judge indirectly, by conveying their position to the Commissioner in advance of the hearing: *McGee* at para. 34, citing *Canada Tax Reviews* at para. 46; *Pearson* at para. 7. They need not wait and bring a motion under Rule 399(1) to assert their position.

[69] Indeed, the idea that a judge should issue an *ex parte* order under section 11 on the expectation of a second hearing undermines the Commissioner's burden of establishing that the proposed order is reasonable. It is also antithetical to the purpose of prior authorization, which is to balance the parties' interests *before* the government intrusion occurs and not attempt to

remedy things after the fact: *Hunter* at p. 160; *Dyment* at p. 430. After all, "[p]rivacy, once breached, cannot be restored": *R. v. Bykovets*, 2024 SCC 6 at para. 6.

[70] Finally, the appellant's submission that the *Competition Act* should be interpreted as incorporating and requiring a second stage proceeding under the *Federal Courts Rules*, which are regulations enacted under the *Federal Courts Act*, R.S.C. 1985, c. F-7, must also fail.

[71] There is no indication in the *Competition Act* or the *Federal Courts Rules* of the interdependency that the appellant suggests. Section 11 applications may be brought before any superior court in Canada, and not only the Federal Court. While subsection 34(1) of the *Competition Tribunal Rules*, S.O.R./2008-141, allows the Competition Tribunal to refer to the *Federal Courts Rules* to resolve questions of practice and procedure, this is of no consequence, as section 11 applications are not made to the Competition Tribunal.

[72] The Federal Court did not err by exercising its discretion under section 11 without regard to a possible second hearing, brought under Rule 399(1).

V. Conclusion

[73] For the foregoing reasons, I conclude that the Federal Court did not commit an error requiring this Court's intervention. I would dismiss the appeal with costs.

"Monica Biringer"
J.A.

"I agree.
René LeBlanc J.A."

"I agree.
Nathalie Goyette J.A

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-329-24
STYLE OF CAUSE:	COMMISSIONER OF COMPETITION v. AMAZON.COM.CA, ULC AND AMZN MOBILE LLC
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 3, 2025
REASONS FOR JUDGMENT BY:	BIRINGER J.A.
CONCURRED IN BY:	LEBLANC J.A. GOYETTE J.A.
DATED:	MARCH 27, 2026

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