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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from Canada

3-4 September 2013, Lima, Peru

The attached document from Canada is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM CANADA

1. Overview of Sections 15 and 16 of the *Competition Act*: Introduction¹

1. The Competition Bureau (the "Bureau"), as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. The Bureau investigates anti-competitive practices and promotes compliance with the laws under its jurisdiction, namely the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act*.

2. The purpose of the *Competition Act* (the "Act") is to maintain and encourage competition in Canada. It is commonly referred to as a law of general application, and with limited exceptions, applies to all persons doing businesses in Canada. The Act contains provisions dealing with criminal offences and civil matters (including mergers). Criminal activities are subject to prosecution through the criminal courts, while civil matters are primarily reviewable by the Competition Tribunal, though some civil matters may go before the courts.

3. To effectively administer and enforce the Act, the Commissioner of Competition (the "Commissioner") requires accurate and complete information. This information comes from a variety of sources, including complainants, industry participants (such as competitors, suppliers or customers), industry experts, and Canadian or foreign law enforcement agencies.

4. The Commissioner, where circumstances warrant, has access to search and seizure powers which assist him in obtaining as much information as possible in order to best determine how to proceed with an investigation. As such, during the course of an investigation, whether civil or criminal, the Commissioner may apply to the courts for a search warrant under section 15 of the Act to facilitate the gathering of

¹ This overview includes extracts from the *Information Bulletin on Section 15 & 16 of the Competition Act*, available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02660.html. The Competition Bureau also has access to search warrants under the *Criminal Code*.

information. Section 16 is an important adjunct to section 15, as it sets out the Commissioner's powers to search computer systems.

2. Overview of Section 15

5. Section 15 of the Act outlines the Commissioner's powers of search and seizure. Search warrants issued under section 15 allow the Commissioner to gather relevant information, inculpatory and exculpatory, pertaining to an investigation in relation to either a criminal or civil matter in Canada. More specifically, section 15 provides that the Commissioner may apply to a judge of a superior or county court, *ex parte*, for a search warrant, authorizing the Commissioner or any person named in the search warrant to conduct a search of the identified premises and to copy or seize certain records or other things for examination or copying.

6. A judge, to whom the application for a search warrant has been presented, will determine whether the information submitted justifies the issuance of a search warrant. If satisfied, a judge may issue a search warrant authorizing the Commissioner to enter and search the premises, and to copy or seize any record described therein, for examination or copying. The information obtained pursuant to a search warrant may assist the Commissioner in making a decision whether to apply to the Competition Tribunal, refer the matter to the Director of Public Prosecution ("DPP") or discontinue an investigation or inquiry, as the case may be.

3. Overview of Section 16

7. Section 16 of the Act provides that a person authorized to search premises pursuant to subsection 15(1), may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, in order to search for records described in the search warrant. The records may be reproduced or they may be caused to be reproduced from the data in the form of a printout or other intelligible output. The printout or other output may be seized for examination or copying. In addition, data that are accessible via the computer system can be searched even if the data are not located on the premises.

4. Obtaining a Search Warrant under Section 15

4.1 Authorization and Requirements

8. Before granting a search warrant under section 15 of the Act, a judge of a superior or county court must be satisfied that there are reasonable grounds to believe that:

- a person has contravened any order made pursuant to the Act, an offence has been or is about to be committed, or grounds exist for the making of an order under the civil provisions of the Act; and
- there are, on the specific premises to be searched, records that will afford evidence relating to one of the three above specified situations.

4.2 Ex parte Application

9. In keeping with subsection 15(1), the Commissioner will apply to the court *ex parte* for a search warrant, which means that neither the person subject to the search warrant nor the person subject to the investigation is notified beforehand. This ensures that the information is found on the premises as is, and that records are not destroyed, removed or altered prior to the execution of the search warrant.

5. When the Commissioner will Seek a Section 15 Search Warrant

10. For certain investigations, a search warrant will be the investigative tool of choice. In fact, searches are one of the Bureau's most effective investigative tools to combat cartels and mass marketing fraud, as the element of surprise provided by the execution of a search warrant is deemed essential to obtaining the required information. In some cases, the serious and clandestine nature of the conduct in question, and the possibility that records could be altered, concealed or removed, can make searching the best means of securing the required information. In addition, a search warrant allows the Commissioner to establish exactly where the records are located on a premises and who may have been in possession of them. The Commissioner's decision to seek a search warrant is assessed on a case-by-case basis, with the specific fact situation of each case being examined on its own merits.

6. Executing Section 15 Search Warrants

11. The purpose of this section is to provide a brief overview of some of the issues that may arise during the execution of a search warrant by the Commissioner. It is important to note that this section does not purport to address all eventualities and investigative processes, nor is it to be viewed as a step-by-step guide to the execution of a search warrant carried out by the Commissioner.

6.1 *Prior to the Execution of a Search Warrant: Sealing of the Application*

12. The Supreme Court of Canada has clearly accepted and endorsed the principle that, once a warrant is executed and records are seized, the occupier of the premises searched and the public can have access to the related judicial documents. However, when applying for a search warrant, the Commissioner will seek a sealing order where there are sufficient grounds to believe that disclosure would subvert the ends of justice or unduly impair its proper administration. These grounds could include what is specified in paragraph 487.3(2)(a) of the *Criminal Code*. For example, if disclosure of the application were to compromise the identity of a confidential informant or compromise the nature and extent of an ongoing investigation, the Commissioner would seek a sealing order. Ultimately, the court will decide whether a sealing order will be granted or not. Taking into consideration the DPP's recommendation, the court will also determine the period of time applicable for the sealing order. A target may also apply to the court for a sealing order.

6.2 *Search Team*

13. Searches are conducted by Bureau staff. Depending on the circumstances, the presence of other persons, such as peace officers, may be required. Unless specifically authorized, the search team will not normally include employees from non-Canadian authorities or other foreign representatives. Typically, a minimum of two staff members execute a search warrant at a given premises. At times, a large number of Bureau staff and/or other persons may be present, although not all need be specifically named in the warrant. Some search members may be on the premises during the entire search, others may leave or new search team members may be added.

6.3 *Premises*

14. Pursuant to subsection 15(4) of the Act, a search warrant can be executed anywhere in Canada.

15. That being said, searching certain premises may merit special attention. The Bureau will exercise particular care when searching sensitive premises, such as a media establishment, a law office or a private residence. The Commissioner will seek a separate search warrant for each premises unless several buildings or places are located at the same address, such as a house and its garage or outbuildings.

6.4 *Entry, Identification and Presentation of a Search Warrant*

16. On the day the search warrant is to be executed, the search team will arrive at the premises to be searched. The team leader, accompanied by the search team or a portion thereof, will enter the premises. Once inside the premises, the team leader will present the search warrant to the person in control of the premises. Depending on the exigencies, an explanation of the search warrant will ensue and the team leader will typically advise the person to whom the search warrant is being presented that they may contact legal counsel. The team leader will outline how the search will unfold before beginning the search. A tour of the premises may be requested by the team leader and arrangements may be made to have a designated work area for the search team (e.g. a vacant office or a conference room). In certain circumstances, searching may occur immediately (i.e. once inside the premises), without taking the above-noted steps, where delay may cause the removal or destruction of records.

6.5 *Selection and Review of Paper Records*

17. Once the search has commenced, the search team will begin a preliminary selection of paper records. The paper records to be seized are described or referred to in the search warrant. Further review and culling of paper records is usually done by the team leader subsequent to the preliminary selection of paper records. This review may reveal that some records are not required. In such cases, these records will be returned to the location where they were selected.

6.6 *Searching for Electronic Records*

18. The Bureau has on staff trained electronic evidence officers. They have specialized knowledge and skills which allow them to access computer systems to search for, examine, retrieve, reproduce and seize electronic data. They adhere to accepted forensic practices and procedures designed to ensure the integrity of the evidentiary process for obtaining and maintaining electronic records, and the integrity of electronic media from which they are sourced, while attempting to minimize the impact on business functions.

6.7 *Solicitor-Client Privilege*

19. Records which are subject to claims of solicitor-client privilege may be found on the premises subject to a search warrant. Section 19 of the Act sets out detailed procedures for dealing with claims of solicitor-client privilege. More specifically, subsection 19(2) of the Act provides that where there is a claim of solicitor-client privilege regarding records that may be subject to examination pursuant to sections 15 or 16, the records in question must be placed in a package, sealed, identified, and placed in the custody of a person as provided in subsection 19(3) of the Act. It is up to a judge, upon application, to decide whether the information is subject to solicitor-client privilege. However, issues of privilege have often been resolved without the need to resort to a formal court process.

20. The Bureau is willing to minimize the need for such a formal, judicial process to screen privileged from non-privileged records on a case-by-case basis.

6.8 *Seizure*

21. The final selection of records to be seized is usually undertaken by the team leader following the examination and review of preselected records. In the case of electronic records, it is the electronic evidence officer who will make the final selection. The team leader or electronic evidence officer will make the decision to seize those records that meet or come within the ambit of the search warrant and which may be legally taken from the premises. In most cases, prior to removing the records from the premises, the records will be coded with an alpha-numeric code. The actual seizure of records will be

conducted by either the team leader or another search team member and an electronic evidence officer named in the warrant.

6.9 *Additional Search Warrants*

22. During the course of a search, it may be necessary to obtain additional search warrants. This may occur in a variety of circumstances. For example, it may be determined that the records sought are located at another premises.

6.10 *Plain View*

23. If during the execution of a search warrant, Bureau staff come across records indicating evidence of a new violation of the law (i.e. one that is different than that outlined in the search warrant being executed), Bureau staff may seize the records not described in the search warrant if they are in plain view, or if there is reason to believe the records might be destroyed during the time it would take to obtain a new search warrant. This power is circumscribed. The record must be in plain view while the Bureau staff member is in a place where he/she is entitled by the search warrant to be; the record must be discovered inadvertently, without knowing in advance of its location, and without having the intention to seize it.

7. *Conclusion*

24. The Commissioner is committed to the effective use of sections 15 and 16. Search warrants are a crucial investigative tool which allow the Commissioner to obtain the information necessary to make a fully informed decision as to how best to proceed with an investigation. A strong and reasoned approach to the use of section 15 and 16 search warrants is important to the integrity and control of the information gathering process in the effective administration and enforcement of the Act.