Federal Court  Cour fédérale

Date: 20210907

Docket: T-999-21

Citation: 2021 FC 921

Ottawa, Ontario, September 7, 2021

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

(Responding party on Motion)

and

CANADA TAX REVIEWS INC.

Respondent

(Moving party on Motion)

ORDER AND REASONS

I. Introduction

[1] This motion to set aside and vary raises important issues pertaining to Orders issued *ex parte*, pursuant to section 11 of the *Competition Act*, RSC 1985, c C-34 [the **Act**]. Those issues include the Commissioner's duty of disclosure to the Court, the nature of the Commissioner's pre-application dialogue with respondents to such Orders, and the test for setting aside or varying

an Order under Rule 399(1)(a) of the *Federal Courts Rules*, SOR/98-106 [the **Rules**] in relation to an Order issued under section 11.

[2] In the section 11 context, the elevated duty of disclosure that applies is often satisfied by a combination of written representations and affidavit evidence. Such evidence may include a copy of any written submissions, including in email or other exchanges, sent by the respondent to the Commissioner. Where such written materials do not fully disclose the nature of any concerns expressed by the respondent, the Commissioner's duty can be satisfied by including notes of any meetings or other discussions that may have taken place, so long as those notes convey the essence of the respondent's concerns and do not materially mislead the Court. In the present proceeding, the combination of such notes, copies of written submissions from the respondent, written representations from the Commissioner and direct evidence from the Commissioner's affiant collectively satisfied the Commissioner's duty of disclosure.

[3] The nature and scope of the Commissioner's process of pre-application dialogue with respondents are matters that are entirely for the Commissioner to determine. Indeed, the Commissioner is under no legal obligation to engage in any such dialogue. However, where the Commissioner does not provide a respondent with a meaningful opportunity to provide feedback on a draft Order, including in relation to the relevance of all or some specifications in the draft Order, there may be increased scope for the Order to be set aside or varied in a subsequent motion under Rule 397 or Rule 399.

[4] The general test for having an Order set aside or varied on a motion under Rule 399(1)(a) is whether the respondent discloses a *prima facie* case why the Order should not have been made. For Orders issued under section 11 of the Act, this can be achieved by providing sufficient facts and law to justify one of the following conclusions, in the absence of a response from the Commissioner: (i) that the Commissioner did not satisfy the elevated duty of disclosure that applies in section 11 proceedings, (ii) that the Commissioner has not initiated a *bona fide* inquiry under section 10 of the Act, (iii) that some or all of the information that was ordered to be produced is irrelevant to the Commissioner's inquiry, or (iv) that some or all of such information would be excessive, disproportionate or unnecessarily burdensome. Even where a respondent demonstrates one or more of these things, the Court will afford the Commissioner an opportunity to be heard and will retain the discretion to dismiss the respondent's motion.

[5] For the reasons set forth below, I have concluded that, with some limited exceptions, the respondent, Canada Tax Reviews Inc. [**CTR**], has not satisfied the test under Rule 399(1)(a). Accordingly, this motion will be largely dismissed.

II. The parties

[6] The Commissioner is appointed under section 7 of the Act and is responsible for the enforcement and administration of the Act.

[7] CTR describes itself as a tax recovery specialist firm that advocates on behalf of its clients to the Canada Revenue Agency.

III. Background

[8] On June 17, 2021, the Commissioner filed an application pursuant to paragraphs 11(1)(b) and (c) of the Act for an Order requiring CTR to produce records and provide written returns of information. In that application, the Commissioner explained that an inquiry had been commenced under section 10 of the Act concerning certain of CTR's marketing practices.

[9] In a supporting affidavit affirmed by Antonio Perluzzo [the **Perluzzo Affidavit**], a Competition Law Officer with the Competition Bureau [the **Bureau**], the impugned marketing practices were described as being representations made by CTR to the public to promote its business of applying for financial relief benefits on behalf of consumers in the context of the global COVID-19 pandemic, including the Canada Emergency Response Benefit and the Canada Recovery Benefit [collectively, the **Covid Relief Benefits**].

[10] The Perluzzo Affidavit states that based on an assessment of the records and information gathered to date, the Commissioner has reason to believe that:

a. CTR has engaged in, and continues to engage in, deceptive marketing practices by making materially false or misleading representations to the public regarding its role in the administration of the Covid Relief Benefits, in the context of the COVID-19 pandemic, as well as regarding the fees it charges to Canadians;

b. CTR's representations create the false or misleading general impression that:

i. Canadians are applying directly for Covid Relief Benefits from the government entity administering such relief programs, when in fact they are dealing with CTR; and

ii. Covid Relief Benefits obtained through CTR are free of charge, when in fact CTR charges an 8% fee with respect to the Canada Emergency Response Benefit and a 10% fee with respect to the Canada Recovery Benefit, once benefits have been received; and

c. CTR's representations are material to consumers, as evidenced by information provided by complainants to the effect that they would not have used CTR's the services had they known that CTR is a third party company rather than the government entity administering the relief programs, and that CTR charges a fee for its services.

[11] Having regard to the foregoing, the Perluzzo Affidavit stated that the Commissioner has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act, specifically paragraph 74.01(1)(a) and subsection 74.011(1).

[12] The Perluzzo Affidavit summarized the information being sought in the Court's Order [as amended, the **Disputed Order**] as relating to the following matters under inquiry:

a. What are the representations made by CTR;

b. Where, when, why, and to whom the representations were made;

c. Who is the target audience for the representations;

d. The context in which the representations were made;

e. What is the nature of the services that are promoted via the representations;

f. The effects of the representations;

g. The truth or falsity of the representations;

h. Who makes the representations, who makes decisions about the representations, and how those decisions are made;

i. When changes are made to the representations, what changes are made, and why; and

j. What knowledge CTR has that the representations are potentially false or misleading and what actions, if any, does it take in response to that knowledge.

[13] As is now customary in proceedings under section 11 of the Act, the Perluzzo Affidavit provided information pertaining to the communications that took place between the Bureau's case team and CTR in relation to to what ultimately became the Disputed Order. Those communications followed exchanges that took place in July and August 2020. After an unexplained lapse of approximately seven months, counsel to the Commissioner informed CTR that the Commissioner had commenced the inquiry described above. A few days later, on March 9, 2021, CTR was informed that that the Commissioner would be seeking an Order under section 11. In that same communication, CTR was invited to participate in "pre-issuance dialogue," which was initially scheduled for March 18, 2021. Two days prior to that scheduled date, the Commissioner sent an initial draft of the Disputed Order to CTR.

[14] Ultimately, four meetings took place between the Bureau's case team and representatives of CTR. As a result of those meetings, substantial changes were made to the draft Order. Indeed, it appears to be common ground between the parties that the second version of the draft Order reflected a complete overhaul of the initial version. The third version, which was virtually identical to the version filed with the Court, also reflected fairly significant changes from the second version.

[15] The Perluzzo Affidavit provided a detailed description of the exchanges that took place at the four meetings between the case team and representatives of CTR. It also included, as exhibits, extensive notes of those meetings and copies of the written communications that had taken place between the Bureau's case team and representatives of CTR.

[16] A fair reading of those materials reflects a good faith effort by the case team to address the concerns raised by CTR, except in relation to the relevance of some of the specifications in the schedules to the Disputed Order. It does not reflect much of an effort on CTR's part to provide the Bureau with helpful information or to otherwise be of assistance. The distinct sense with which I was left was that CTR was focused primarily on whittling down the draft Order and forestalling its issuance, while conceding very little and adopting a very aggressive posture. To this date, approximately five months after the first pre-issuance dialogue meeting, CTR has provided very little cooperation. It is reasonable to infer that this has impeded the Commissioner's ability to investigate whether CTR has made false and misleading representations in relation to the Covid Relief Benefits. In the meantime, the pandemic has continued to evolve.

[17] Late in the day on June 28, 2021, CTR sent a notice of motion together with an accompanying motion record to the Court. That motion requested various types of relief, including (i) an order adjourning the hearing of the application pending the determination of CTR's motion for directions granting it the right to make written and oral submissions on the application, and, in the alternative, (ii) an order permitting CTR to make oral submissions at the hearing that had previously been scheduled to take place the following day. I will pause to observe that, at paragraph 54 of that document, CTR acknowledged that it had not begun to gather information in response to the draft Order, ostensibly because so many changes had been made to it and CTR intended to challenge many of the specifications that remained.

[18] At the outset of the hearing of the Commissioner's application on June 29th, I informed counsel to CTR that I would not hear that motion. My refusal to hear the motion and my decision not to accept it for filing[1] were based on several considerations. These included the following:

i. my brief review of the motion record the prior evening did not disclose any good reason for departing from the *ex parte* process explicitly provided for by Parliament;

ii. the motion record was submitted on June 28th, and therefore was not in compliance with the Rules, did not provide the Commissioner adequate time to respond, and did not permit the Court to give it proper consideration; and

iii. the hearing was scheduled for June 29th after counsel to CTR requested, in a letter dated June 10, 2021, that the Commissioner's application not be scheduled prior to June 25th "in order to allow CTR necessary time to provide its position in writing regarding the Application to the Bureau so that it can be included with the Application material to be filed with the Court" (emphasis added).

[19] As reflected in CTR's June 10th letter, CTR was very well aware that "given the practice in respect of section 11 orders, it may be that the only opportunity afforded to CTR to have its

[1] After CTR suggested, during the hearing of the Commissioner's application, that I was denying CTR's right to make submissions in respect of a motion that was before the Court, I stated that I had not even accepted the motion for filing. I was then immediately informed by the Registry Officer that the Registry had inadvertently omitted to request directions from the Court before designating the motion record as having been "filed," in the Registry's recorded entries. After I inquired as to why the Registry would accept a document for filing that did not comply with the Rules, I was informed that the recorded entry would be changed to designate the document as "received" rather than filed.

views placed before the Court [at the hearing of the Commissioner's application] will be in the form of correspondence to the Bureau outlining CTR's position" (emphasis added).

[20] I will pause to observe in passing that the June 10th letter itself was seven pages, which is longer than most letters provided by respondents for the purposes of bringing their views to the attention of the Court.

[21] Notwithstanding the foregoing, I considered a number of CTR's objections to the Commissioner's draft Order (as set forth in the Commissioner's Application Record) to be legitimate. Accordingly, during the hearing of the Commissioner's application, I expressed concerns with respect to certain of the specifications that were included in Schedules I and II to the draft Order. After the Commissioner submitted a revised draft Order which addressed my concerns, I issued the Disputed Order on July 2, 2021.

[22] On August 6, 2021, CTR filed this Motion to Set Aside and Vary portions of the Disputed Order. In addition to requesting that various provisions in the Disputed Order either be set aside or varied, CTR requested that the Court grant a temporary stay pending the determination of this motion.

[23] At the outset of the hearing of the motion on August 18, 2021, CTR withdrew its request for a stay of the Disputed Order on the basis that the Commissioner had agreed to extend the deadline for compliance with that Order until October 8, 2021.

IV. Relevant Legislation

[24] This motion has been brought by CTR under Rule 399(1)(a). Rules 399(1) and (2) provide as follows:

Setting aside or variance	**Annulation sur preuve *prima facie***
399 (1) On motion, the Court may set aside or vary an order that was made	**399 (1)** La Cour peut, sur requête, annuler ou modifier l'une des ordonnances suivantes, si la partie contre laquelle elle a été rendue présente une preuve *prima facie* démontrant pourquoi elle n'aurait pas dû être rendue :
(a) *ex parte*; or	**a)** toute ordonnance rendue sur requête *ex parte*;
(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,	**b)** toute ordonnance rendue en l'absence d'une partie qui n'a pas comparu par suite d'un événement fortuit ou d'une erreur ou à cause d'un avis insuffisant de l'instance.
if the party against whom the order is made discloses a prima facie case why the order should not have been made.	
Setting aside or variance	**Annulation**
(2) On motion, the Court may set aside or vary an order	**(2)** La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or	**a)** des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

(b) where the order was obtained by fraud.	**b)** l'ordonnance a été obtenue par fraude.
Effect of order	**Effet de l'ordonnance**
(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.	**(3)** Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

[25] Pursuant to paragraph 10(1)(b) of the Act, the Commissioner may cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts, whenever the Commissioner has reason to believe that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act. Part VII.1 deals with deceptive marketing practices, including those that are the focus of the Commissioner's inquiry in the present matter. Part VIII is not relevant to this proceeding.

[26] Once an inquiry has been commenced, the formal investigative powers set forth in the Act may be exercised by the Commissioner, subject to judicial oversight. Those powers include the power to obtain, pursuant to paragraph 11(1)(b), an order for the production of "a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order." They also include the power to obtain, pursuant to paragraph 11(1)(c), an order for the making and delivery of "a written return under oath or solemn affirmation showing in detail such information as is by the order required." The "chapeau" language at the outset of subsection 11(1) provides the Court with the discretion to issue such orders on the *ex parte* application of

the Commissioner, upon being satisfied by information on oath or solemn affirmation of two things: first, that an inquiry is being made; and second, that the respondent has or is likely to have information that is relevant to the inquiry. The full text of subsection 11(1) of the Act is provided in Appendix 1 to these reasons.

[27] In the current proceeding, the Commissioner's inquiry is focused on paragraph 74.01(1)(a) and subsection 74.011(1). Those provisions provide as follows:

Misrepresentations to public	**Indications trompeuses**
74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,	**74.01 (1)** Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
(a) makes a representation to the public that is false or misleading in a material respect;	**a)** ou bien des indications fausses ou trompeuses sur un point important;
…	[…]
False or misleading representation — sender or subject matter information	**Indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet**
74.011 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.	**74.011 (1)** Est susceptible d'examen le comportement de quiconque envoie ou fait envoyer des indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet d'un message électronique aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage

d’un produit, soit des intérêts commerciaux quelconques.

V. Issue

[28] Given that CTR is not requesting that the Disputed Order be set aside in its entirety, the sole issue on this motion is whether the Disputed Order should be varied.

[29] This will require assessing the basis for the various amendments sought by CTR.

VI. Assessment

A. *Applicable legal principles*

(1) The test under Rule 399(1)(a) in proceedings under section 11 of the Act

[30] The general test for having an Order set aside or varied on a motion under Rule 399(1)(a) is whether the respondent has disclosed a *prima facie* case why the Order should not have been made. This requires the respondent to provide sufficient facts and law to justify a conclusion in its favour, in the absence of a response from the applicant: *Ont. Human Rights Commission v Simpsons-Sears Limited*, [1985] 2 SCR 536 at 558. For Orders issued under section 11 of the Act, this can be achieved by providing sufficient facts and law to justify one of the following conclusions: (i) that the Commissioner did not satisfy the elevated duty of disclosure that applies in such proceedings, (ii) that the Commissioner has not initiated a *bona fide* inquiry under section 10 of the Act, (iii) that some or all of the information that was ordered

to be produced is irrelevant to the Commissioner's inquiry, or (iv) that some or all of that information would be excessive, disproportionate or unnecessarily burdensome.

[31] Even where a respondent demonstrates one or more of these things, the Court will afford the Commissioner an opportunity to be heard and will retain the discretion to dismiss the respondent's motion. For example, the respondent may disclose a *prima facie* case that the Commissioner did not meet the elevated duty of disclosure. However, after having considered any additional information provided by the Commissioner, the Court may remain satisfied that the information described in the Order is still relevant and is not excessive, disproportionate or unnecessarily burdensome. In such circumstances, the Court may exercise its discretion to deny the relief sought by the respondent.

(2) The Commissioner's duty of disclosure

[32] In *ex parte* applications under section 11 of the Act, the Commissioner is subject to a heavy burden to make full and frank disclosure of all of the relevant facts and circumstances surrounding the application: *Commissioner of Competition v Labatt Brewing Company Limited*, 2008 FC 59 at paras 22-23 [***Labatt***]; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50 at para 26 [***RBC***]. This burden is intended to achieve two fundamental things:

> …The first is ensuring that the Court is informed of "any points of fact or law known to it which favour the other side" (*United States of America v Friedland*, [1996] OJ No 4399, at para 27 (Ct J (Gen Div)) [***Friedland***]; *Labatt*, above, at paras 25-26; *Ruby v Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 SCR 3, at para 27). The second is ensuring that the Court is able to detect and redress abuses of its own processes (*RBC*, above, at paras 31-36).

> *The Commissioner of Competition v Pearson Canada Inc.*, 2014 FC 376 at para 44 [***Pearson***].

[33] In essence, this elevated duty of candour assists the Court to properly balance the competing interests at play in *ex parte* applications. To this end, it requires the Commissioner to ensure that the Court is not misled, whether through non-disclosure or misinformation, as to the potential relevance of the information for the inquiry in question. In addition:

> … the Commissioner is obliged to disclose the general nature and extent of any information already obtained from the respondent in the course of the inquiry and in the investigation leading up to the inquiry. If the respondent has provided significant information to the Commissioner in other contexts, such as a recent merger review, the Commissioner should also provide a general description of that information, together with an explanation of how that information differs from the information being sought in the section 11 application.
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> *Pearson*, above, at para 45.

[34] However, the Court ordinarily will not conclude that the Commissioner has failed to meet the duty of full and frank disclosure on the basis of a failure to disclose relatively inconsequential facts or due to other imperfections in the application record: *Friedland,* above, at para 31. Instead, "the defects complained of must be relevant and material to the discretion to be exercised by the Court": *Labatt*, above, at para 27. Stated differently, those defects must be such that they may well have led the issuing judge, had he or she known of them, to refuse to grant the order or certain of the specifications therein: *Labatt*, above, at para 35; *Canada (Commissioner of Competition) v Air Canada*, [2001] 1 FC 219, at para 13 [***Air Canada***].

[35] CTR maintains that the Commissioner's duty of full and frank disclosure is not discharged merely by including information in one of many exhibits to an affidavit. In support of this position, it relies on *Friedland*, above, which involved a motion for an *ex parte Mareva* injunction brought by the United States of America. However, the facts in that case are distinguishable from those in the present proceeding. There, the court observed that the inclusion of a proxy circular in one of a large number of exhibits to an affidavit could not be considered to have discharged the plaintiff's duty to disclose an important term in a share acquisition agreement: *Friedland*, above, at paras 166-167.

[36] By contrast, in applications under section 11 of the Act, the Commissioner's affiant generally provides a description of the principal concerns raised by the respondent, and then refers the Court to the correspondence in which those and other concerns have been raised. In this case, the Commissioner's affiant also provided an overview of the points discussed during each of the four "pre-issuance dialogue" meetings, and then referred the Court to the affiant's extensive notes of those meetings. A review of those notes and the copies of written communications between the Bureau's case team and respondents in section 11 applications are generally an important part of the Court's focus in considering such applications. While each case will necessarily have to be determined on its particular facts, this manner of proceeding ordinarily will suffice to discharge the Commissioner's burden, provided that the essence of a respondent's concerns has been conveyed to the Court and the Court has not been materially misled. As discussed in part VI.B.(1) below, that was achieved by the Commissioner's disclosure in this proceeding.

(3) The relevance of the information sought

[37] Pursuant to subsection 10(1) of the Act, the Commissioner may cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

[38] Applications under section 11 of the Act are generally brought at the "fact gathering" stage of the Commissioner's inquiry. At that stage, a certain degree of latitude will ordinarily be warranted in recognition of the fact that the Commissioner may well need sufficient information to be able to fully understand the context in which the impugned conduct has taken place, the nature and extent of that conduct, its underlying purpose, its actual or likely impact, and whether it may raise issues under additional sections of the Act.

[39] Stated differently: "Courts must, in the exercise of [their] discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the Courts is away from intervention": *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181 at 235.

[40] Accordingly, and subject to the comments immediately below, it is appropriate in proceedings under s. 11 of the Act to adopt a flexible and liberal approach to the determination of what is relevant to the Commissioner's inquiry.

(4) The scope of the information sought

[41] An important part of the Court's role in section 11 proceedings is to ensure that the information being sought by the Commissioner is not excessive, disproportionate or unnecessarily burdensome: *Pearson*, above, at para 42. In making this determination, the Court will have regard to information that the respondent may have already provided to the Commissioner: *Labatt*, above, at para 97; *Pearson*, above, at paras 46 and 68.

[42] The Court's assessment of whether a particular specification in a draft Order, or indeed the Order as a whole, is excessive, disproportionate or unnecessarily burdensome will generally need to have regard to the particular factual matrix of the case at hand. What may be excessive, disproportionate or unnecessarily burdensome in one set of circumstances may not be so in a different set of circumstances.

[43] However, it bears underscoring that the fact a draft Order, or a particular specification therein, may impose a significant burden on the respondent will not, on that ground alone, suffice to refuse the Commissioner's request: *Labatt*, above, at para 92. The Court ordinarily will not refuse the Commissioner's request unless it is unnecessarily burdensome, in the sense of imposing a burden on the respondent that is disproportionate to the potential value of the information in question to the Commissioner: *Canada (Commissioner of Competition) v Bell Mobility Inc.* , 2015 FC 990 at paras 53-56 [***Bell***].

[44] In exercising its supervisory role and attempting to fairly balance the competing interests of the parties, the Court will be alert, alive and sensitive to whether certain information sought by the Commissioner may not be relevant unless and until certain initial determinations have been

made. When information falls into this category, the Court may well exercise its discretion to refuse to grant the Commissioner's request to obtain such information until those initial determinations have been made. In other words, the Court may refuse to order the production of the information in question, while signalling its willingness to revisit the issue of the relevance of the information at a later point in time. Some of the amendments that were made to the Disputed Order following the hearing of the Commissioner's application in this proceeding fell into this category. These included the deletion of requirements in two specifications to provide information regarding revenues and profits, and the deletion of another specification that required all records relating to CTR's corporate compliance policy.

[45] I recognize that this type of two-stage approach may not be appropriate in time sensitive investigations, including the Commissioner's reviews of mergers. However, it is not uncommon for the Commissioner to inform the Court in an application under section 11 of the Act that subsequent applications pertaining to the inquiry, including in relation to the same respondent, may be made. Indeed, the Commissioner conveyed this to the Court in this proceeding, at paragraph 69 of his written representations.

(5) The role of respondents in section 11 proceedings

[46] The role of respondents in section 11 proceedings was described in *Pearson*, above, as follows:

> [92] Pursuant to the express terms of section 11, applications are to be made on an *ex parte* basis. Accordingly, parties other than the Commissioner have no right to participate in the hearing, file evidence or cross-examine on the Commissioner's affidavit (*Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36,

> [2006] 2 SCR 189, at para 36); *Canada (Commissioner of Competition) v Toshiba of Canada Ltd*, 2010 ONSC 659, 100 OR (3d) 535, at paras 34-36; *Raimondo v Canada (Competition Act, Director of Investigation and Research)*, 61 CPR (3d) 142, 1995 CanLII 7316, at paras 12, 15 (Ont Sup Ct)).
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> [93] However, the Court may in certain circumstances require that notice be given to the party or parties named in the order being sought by the Commissioner, to provide an opportunity for the party or parties to seek leave to make written or oral submissions. The Court may provide a similar opportunity where, as in this application, the parties in question are aware of and attend the hearing.
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> [94] Given that Parliament can be taken to have deliberately decided that section 11 applications should ordinarily proceed on an *ex parte* basis, it should not be expected that requests for leave to make written or oral submissions will be routinely granted by the Court (*R v B (SA)*, 2001 ABCA 235, at para 61 (CanLII)). The more appropriate manner in which a respondent's concerns regarding the scope or potentially duplicative nature of the draft Order should be brought to the Court's attention is through the Commissioner, pursuant to the Commissioner's duty of full and frank disclosure (*Labatt*, above, at paras 100-107).
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> [95] In this regard, the Court generally will want to know whether one or more drafts of the order that is being sought have been discussed with representatives of the party or parties named in the order. Where such dialogue has taken place, the Court should be provided with a sense of the nature of any concerns that have been expressed by the party or parties in question, the basis for those concerns and whether the draft order was modified to reflect any of those concerns. In the current application, this was achieved by including the Respondents' prior correspondence with the Commissioner in the appendices to the initial affidavit that was filed on behalf of the Commissioner. The Commissioner's written submissions then explained how, if at all, the Respondents' concerns were addressed in subsequent drafts of the Order.

[47] CTR submits that it ought to have been provided an opportunity to make submissions during the hearing of the Commissioner's application because I asked the Commissioner's counsel about CTR's position in relation to several of the specifications in Schedules I and II to

the Disputed Order. CTR's counsel asserted that where a representative of the respondent is present at the hearing, the Court should make its enquiries directly to that individual, rather than to the Commissioner's counsel. CTR's counsel further suggested that respondents ought to be given the opportunity to be heard whenever they take the time to make written submissions to the Court, particularly where there is no indication that the application is urgent.

[48] I disagree. In brief, if these were the tests, it is reasonable to anticipate that respondents would routinely send a representative to the hearing of the application, as was the case several years ago. The same is true with respect to the making of written submissions to the Court. Granting respondents the right to make oral submissions whenever they send a representative to the hearing, or whenever they make written submissions to the Court, would frustrate Parliament's deliberate decision that applications under section 11 of the Act be made on an *ex parte* basis. In light of that clear expression of parliamentary intent, respondents should not expect to be granted leave to make written or oral representations during the hearing in the absence of exceptional or special circumstances. Examples of such circumstances may include (i) the failure of the Commissioner to meet the duty of full and frank disclosure, and (ii) where important issues of law are raised. However, even where such circumstances exist, the Court will retain its discretion to deny a request by a respondent to make written or oral submissions. In considering whether to exercise its discretion, the Court will consider the equities at play. That was certainly a factor in denying CTR's request to make submissions at the hearing of the Commissioner's application.

[49] During the hearing of this motion, CTR submitted that the process of "pre-issuance dialogue," also known as "pre-application dialogue," is flawed in many ways. These include the fact that the Commissioner unilaterally decides when to initiate the process, what to do with the feedback that has been provided by respondents, what can and cannot be discussed, and when sufficient dialogue has occurred. CTR emphasized that this results in serious procedural deficiencies, including the fact that respondents routinely are informed that the Bureau's case team is not prepared to discuss the relevance of the specifications in the schedules to the draft Order, and they often are not provided with sufficient time to provide meaningful input. CTR added that this is not in keeping with the spirit of a report by Mr. Brian Gover entitled *Review of s. 11 of the Competition Act* (August 12, 2008), available online at https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html [the **Gover Report**]. That report was commissioned after this Court's decision in *Labatt*, above.

[50] I agree that the Commissioner's failure to discuss the relevance of the specifications attached to a draft Order is not consistent with the spirit of the recommendations made in the Gover Report. The same would be true if the Commissioner did not provide respondents with sufficient time in which to provide a meaningful response. In my view, a response period of less than a week might well fall into this category.

[51] Nevertheless, as acknowledged by CTR, the Gover Report has no legal status. It simply served to make findings and recommendations regarding the process followed by the Competition Bureau in seeking orders under section 11 of the Act. To this end, it recommended,

among other things, that the Bureau should engage in both pre-application[2] and post-service "collaborative" dialogue with respondents to section 11 orders: Gover Report, at 3 and 35. It also recommended that the material facts disclosed to the Court by the Commissioner should include "[f]acts that may explain the respondent's position regarding the scope of the order and the relevance of the material sought, if known to the Commissioner": Gover Report, at 16. While recognizing that "there are strong incentives to timely cooperation" by respondents, it further recommended that where "the respondent proves uncooperative or recalcitrant, the Bureau should apply for the s. 11 order or, if one has already been granted, should seek to enforce the order": Gover Report, at 36.

[52] The Court has generally welcomed the Commissioner's reporting on feedback received from respondents during the process of pre-application dialogue: see e.g., *Pearson*, above, at paras 94-95; *Bell,* above, at para 23. The Court has also found written submissions sent to the Commissioner after the filing of a draft Order to have been very helpful. However, such submissions can be far less helpful where they are filed within 48 hours of the hearing. This is because the assigned judge may have already prepared for the hearing by that time and may have to deal with other pressing matters immediately prior to the hearing. Such submissions are also less helpful when they simply add to multiple prior written submissions, without assisting the Court to determine which specific issues remain in contention.

[53] The Commissioner's reporting on feedback received from respondents has greatly assisted the Court in conducting its supervisory function in section 11 proceedings. To ensure

[2] Unless there are "real concerns about meeting timelines or the destruction of documents by the respondent": Gover Report, at 35.

that respondents have the opportunity to understand that their concerns have been brought to the Court's attention, the Court has made a practice of ordering transcripts of its hearings and making them available to respondents. In turn, this appears to have had the salutary effect of significantly reducing the potential for respondents to bring a motion to vary or a motion to reconsider, as such motions are very rare. Overall, this has resulted in a process that is less time consuming and less costly for all concerned, relative to that which existed prior to *Labatt*, above.

[54] Notwithstanding the foregoing, the Court cannot direct the Commissioner to follow any particular process when engaging in pre-application dialogue. Indeed, the Court cannot direct the Commissioner to participate in pre-application dialogue at all. In my view, this is a necessary implication of Parliament's express decision to create an *ex parte* process in section 11 of the Act, and thereby override whatever procedural fairness rights respondents may otherwise have had at the pre-application stage of that process: *IWA v Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, at 323-324, quoting *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105, at 1113. (See also, *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 31, applying the same principle to another aspect of natural justice.)

[55] Consequently, I can simply observe that if respondents are not provided with a meaningful opportunity to provide feedback on a draft Order, including in relation to the relevance of schedules to the draft Order, there may be increased scope for the Order to be set aside or varied. This is because the Court may not have the benefit of the respondent's perspectives on that important issue. While the Court is ordinarily well placed to address issues

pertaining to relevance,[3] it remains possible that the respondent's perspectives may assist the Court to better appreciate why something may not be relevant.

B. *Analysis*

(1) The Commissioner's duty of disclosure

[56] CTR maintains that the Commissioner failed to make full and frank disclosure regarding his case and CTR's concerns, and failed to make a balanced presentation of the issues. It asserts that the Commissioner's failure to make such disclosure and to state the case fairly included the characterization of the process leading up to the section 11 hearing, the issues CTR raised with numerous specifications in the Section 11 Order, and the description that was provided of the governing case law.

[57] I disagree.

[58] As acknowledged at paragraph 6(a) of CTR's written representations, the Commissioner provided the Court with "a lengthy narrative of the 'pre-application dialogue'" that took place. As also recognized by CTR in the following paragraph of those representations, Mr. Perluzzo's notes of the four meetings that took place between the Bureau's case team and CTR's representatives provided further information, including in respect of CTR's objections to a number of the specifications. Those notes were the most extensive that I have ever seen in this type of proceeding. In addition, the Commissioner included in the application record copies of

[3] The Court generally endeavours to assign section 11 applications to a judge with a strong background in competition law. However, due to pre-existing schedules and conflicts, this isn't always possible.

the written exchanges that had taken place between the case team and CTR. This included the lengthy letter dated June 10th, which is discussed at paragraphs 18-20 above. The Commissioner also specifically addressed the concerns set forth in that letter, as well as many of CTR's other concerns, in the written representations that were included with the application record.

[59] In my view, those materials, collectively, gave the Court a very good sense of the essence of CTR's concerns. Indeed, they led me to share some of those concerns and to take the position that I would not issue the draft Order unless it was amended to address several of them.

[60] Consistent with the Court's typical practice in these types of proceedings, I also took the opportunity to confirm the nature of CTR's concerns, and to request any clarifications that I considered to be necessary during the hearing. I found the Commissioner's responses to have been forthright and helpful. I was not left with any sense that the Commissioner had not fully met the elevated duty of disclosure that applies in *ex parte* proceedings.

[61] I remained of this view after having reviewed the motion record for the present motion, as well as the motion record that CTR filed on the eve of the hearing of the Commissioner's application.

[62] CTR submits that the Commissioner failed to bring the Court's attention to the various shortcomings of the "pre-application dialogue," including (i) the "wholesale redrafting" of the draft Order two months into the pre-application dialogue; (ii) giving CTR "inadequate time" to

provide its position on the Disputed Order; and (iii) refusing to address the issue of relevance in the pre-application dialogue.

[63] However, the Commissioner's application record appropriately disclosed the extent of the changes that were made. This was addressed at paragraph 61 of the Perluzzo Affidavit and at paragraphs 66 and 85 of the Commissioner's written representations, which explicitly invited the Court to compare the prior drafts of the Disputed Order. The Perluzzo Affidavit also informed the Court that, upon sending the third version of the draft Order to CTR on June 3, 2021, CTR was asked to provide comments by June 10, 2021. That affidavit also disclosed that CTR had requested additional time to provide a written response. In addition, a copy of the Bureau's exchange with CTR in relation to that issue was attached to the Perluzzo Affidavit. In my view, the one-week period provided to CTR on June 3rd did not constitute inadequate time, particularly given the fact that CTR was already very familiar with the issues, as well as the essence of what the Commissioner was seeking. In the circumstances, the Commissioner was under no obligation to say anything further about the issue. As to the Commissioner's refusal to discuss the relevance of the specifications, this was explicitly stated in the Commissioner's letter dated March 16, 2021, which was attached as Exhibit W to the Perluzzo Affidavit and was explicitly referenced at paragraph 54 of the Perluzzo Affidavit. This position of the Commissioner is also longstanding and well-known to the Court.

[64] Having regard to all of the foregoing, and contrary to CTR's submissions, it was not misleading of the Commissioner to have represented to the Court that the pre-application

dialogue had "gone well beyond what is required in the process contemplated in Pearson and the Gover Report."

[65] CTR also submits that the Commissioner failed to disclose its positions with respect to the alleged lack of relevance or the excessive, disproportionate or unnecessarily burdensome nature of some of the specifications in the schedules to the Disputed Order. CTR challenges the vast majority of the provisions in the Disputed Order on one of these grounds. In addition, CTR maintains that the Commissioner ought to have specifically disclosed that the Disputed Order had not been modified to reflect CTR's positions.

[66] However, I was very well aware of CTR's general position in this regard, and indeed of many of its specific positions. This information was disclosed in the Perluzzo Affidavit, the extensive notes on the meetings between the case team and CTR's representatives, the written exchanges between the Commissioner and CTR, and/or the Commissioner's written representations. To the extent that I considered that it might be helpful to obtain confirmation, elaboration or clarification with respect to CTR's positions, I raised those issues with the Commissioner during the hearing of the application, in accordance with the Court's well-known practice.

[67] I will pause to observe that CTR had ample opportunity, both during the week following its receipt of the final draft of the Disputed Order (on June 3, 2021) and indeed right up until early in week of the hearing of the Commissioner's application (on June 29, 2021), to ensure that its views were placed before the Court. To the extent that it considered that it might be helpful

for the Court to have additional information beyond that which it provided in its letter dated June 10, 2021, it had the opportunity to provide that information, in accordance with the established practice in these types of hearings. I recognize that one of CTR's counsel of record was on holiday for a period of time in June. However, there were two other counsel of record.

[68] It bears emphasizing that alleged defects in the Commissioner's disclosure must be such that they may well have led the Court to have refused to grant the Order in question, or certain of the specifications therein: *Labatt*, above, at para 35; *Air Canada*, above, at para 13. None of the defects that CTR has identified rise to that level, either individually or in aggregate. As I have stated, I had a very good appreciation of CTR's position from the materials mentioned above. Contrary to CTR's position, I was not misled by any aspect of the Commissioner's disclosure.

[69] In summary, for the reasons I have set forth above, I conclude that the Commissioner did not fail to meet the elevated duty of full and frank disclosure that applies in *ex parte* proceedings under section 11 of the Act.

(2) The relevance of the information sought

(a) *Invoices, collections and reporting to Equifax*

[70] CTR objects to several specifications that require information pertaining to its collections on invoices, its reporting of accounts to Equifax, and records sent to Equifax.[4] It maintains that this information is not relevant to the issues of whether it made materially false or misleading

[4] The specifications in question are I.1.b, I.7.b, I.7.c and I.8.

representations to the public regarding its role in the administration of Covid Relief Benefits or regarding the fees for its services.

[71] I was well aware of CTR's concerns regarding these particular specifications and I pressed the Commissioner's counsel regarding them during the hearing. In response, counsel stated that the case team had obtained information which suggested that CTR makes threats regarding collections, reporting to Equifax and the effect this may have on its customers' credit rating. Counsel explained that the Commissioner is investigating whether the threats themselves are misleading. Based on that response, I concluded and I remain of the view that these specifications are indeed relevant to the Commissioner's inquiry into whether CTR made false or misleading representations, as contemplated by paragraph 74.01(1)(a) and subsection 74.011(1) of the Act.

(b) *Audiences, geographic areas and demographic information*

[72] CTR also asserts that specifications 1.2.b and I.1.b, which seek records and information regarding the audiences and geographic areas targeted by its Online Representations, are irrelevant to the issue of whether it made false or misleading representations, as described immediately above. It takes the same position regarding (i) specification 1.9, which requires the production of all reports relating to the characteristics of clients (including "demographics such as age, education income and English language fluency"); and (ii) specification II.4, which requires CTR to identify the demographics and audience characteristics associated with lists used to send emails in relation to the Covid Relief Benefits.

[73] I disagree.

[74] During the pre-application dialogue process, counsel to the Commissioner explained that these matters are relevant both to the issue of whether CTR has made false or misleading representations as well as to the issue of the Commissioner's consideration of whether to seek an administrative monetary penalty [**AMP**] in respect of the impugned conduct: Application Record, at 250. The Commissioner's counsel explained that the Commissioner is interested in inquiring into whether specific geographic areas, age groups, income groups, lower education or other audiences have been targeted by CTR: Application Record, at 250 and 260.

[75] The Perluzzo Affidavit elaborated on this by explaining that the Organization for Economic Co-operation and Development [**OECD**] has recognized the existence of personal dimensions of vulnerability with respect to targeted representations. In this regard, the affidavit stated:

> … For example, a consumer may be more vulnerable due to their age, race, ethnicity or gender; low education or literacy; limitations with the native language; mental health problems; physical disabilities; geographical remoteness/living in a low-density region; unemployment or low income. Personal characteristics such as being credulous, impulsive, risk averse, having poor computational skills, and being less trusting of people can also make a consumer more vulnerable. The OECD has defined "vulnerable consumers" as consumers who are susceptible to detriment at a particular point in time, owing to the characteristics of the market for a particular product, the product's qualities, the nature of a transaction or the consumer's attributes or circumstances …
>
> Perluzzo Affidavit, at para 41, citing OECD, *Challenges to Consumer Policy in the Digital Age* (2019) (Attached at Exhibit R to the affidavit).

[76] In written submissions, the Commissioner further explained that the specifications seeking information regarding geographic areas, audiences and demographics will assist the Commissioner to understand to whom CTR's representations were targeted. The Commissioner maintained that this information is relevant to the factual matrix in which the representations were made. The Commissioner underscored that if CTR is in fact targeting vulnerable groups, this would unambiguously be relevant to his inquiry.

[77] I agree that this information is relevant to the issue of whether CTR has made false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of a product, or any business interest, as contemplated by paragraph 74.01(1)(a) and subsection 74.011(1) of the Act.

[78] When asked during one of the pre-application dialogue meetings whether the Commissioner was relying on *Canada (Competition Bureau) v Chatr Wireless Inc.*, 2013 ONSC 5315 [***Chatr***] as support for the position that targeted representations are within the purview of paragraph 74.01(1)(a) or section 74.011(1), counsel replied in the affirmative: Application Record, at 250. During the hearing of the Commissioner's application, counsel to the Commissioner added that, based on *Chatr* and *Richard v Time Inc.*, 2012 SCC 8 [***Richard***], the consumer or the person to whom a representation is targeted is a relevant consideration in determining whether the representation is misleading: Application Hearing Transcript, at 28.

[79] CTR maintains that neither *Chatr* nor *Richard* supports this proposition, and that it was misleading of the Commissioner to suggest otherwise. CTR adds that the Supreme Court of

Canada's guidance in *Richard* precludes any consideration of the position, experience or characteristics of particular consumers or subsets of consumers.

[80] I disagree.

[81] *Richard* concerned an appeal by an individual (Mr. Richard) who claimed to have been misled by a document, entitled "Official Sweepstakes Notification," that had been mailed to members of the general public. Mr. Richard maintained that the Quebec Court of Appeal had erred in defining the "average consumer" for the purposes of the *Consumer Protection Act*, RSQ, c P-40.1 [the **C.P.A.**]. That legislation appears to have been modelled on the federal legislation at issue in this proceeding.

[82] In the course of allowing Mr. Richard's appeal in part, the Supreme Court of Canada made the following observations:

- "…[T]he "general impression" conveyed by a representation must be analysed in the abstract, that is, without considering the personal attributes of the consumer who has instituted proceedings against the merchant": *Richard*, above, at para 49 (emphasis added);

- "The courts must therefore be able to sanction any representation that, from an objective standpoint, constitutes a prohibited practice. Whether a commercial representation did or did not cause prejudice to one or more consumers is not relevant to the determination of whether a merchant engaged in a prohibited practice within the meaning of Title II of the C.P.A.": *Richard*, above, at para 50 (emphasis added);

- The consumer contemplated by the C.P.A. is the "average consumer … [who] is the product of a legal fiction personified by an imaginary consumer to whom a level of sophistication

that reflects the purpose of the C.P.A. is attributed": *Richard*, above, at para 62.

- This person is "someone who is not particularly experienced at detecting falsehoods or subtleties found in commercial representations," and may be described as being "credulous and inexperienced": *Richard*, above, at paras 71-72.

- "This description of the average consumer is consistent with the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques": *Richard*, above, at para 72.

- The "abstract analysis" required by the C.P.A. precludes a consideration of "whether the consumer exercising the recourse was in fact misled": *Richard*, above, at para 75 (emphasis added);

[83] Assuming, solely for the present purposes, that the foregoing teachings would apply equally to the interpretation of paragraph 74.01(1)(a) and subsection 74.011(1) of the Act, I do not read the foregoing passages as excluding from the purview of those provisions representations that are targeted at objectively defined sub-groups of the general public. In my view, the underlined words identified immediately above stand for the proposition that the persons who may have been misled by a representation must be defined in objective terms, so as to avoid a subjective determination of whether a particular person or group of persons was in fact misled.

[84] It would be completely contrary to Parliament's goal of protecting people from deceptive marketing practices to permit persons to specifically target particularly vulnerable groups in society, whether they be located in specific geographic areas or have particular attributes, such as those that have been identified by the Commissioner. In my view, the information being sought

by the Commissioner in this regard is very relevant to a determination of whether CTR's representations have been false or misleading, as contemplated by the inquiry being conducted in respect of paragraph 74.01(1)(a) and subsection 74.011(1) of the Act. I will leave for another day whether it is also appropriate for the Commissioner to seek such information for reasons related to a potential AMP that may be sought.

[85] I do not consider anything in *Chatr*, above, to be inconsistent with this interpretation of the purview of paragraph 74.01(1)(a) and subsection 74.011(1). Indeed, the court there considered the advertisements in question from the perspective of the average consumer to whom they were targeted. After distinguishing *Richard*, where the representations in question were made to the public at large, the court defined the average consumer as being "a person wanting unlimited talking and texting wireless services, as well as cost certainty": *Chatr*, above, at para 129.

(c) *Effects on consumer behaviour*

[86] Specification I.2.e. requires CTR to provide all records relating to the "expected, estimated or actual effects of Online Representations on consumer behaviour on [CTR's] Online Platforms." CTR submits that this information is irrelevant to the Commissioner's inquiry into whether its representations were false or misleading. In this regard, it maintains that such information does not tend to make it more or less likely that its representations were false or misleading, rather than simply more compelling.

[87] During the hearing of the application, counsel to the Commissioner stated that the Bureau is aware that companies estimate and monitor the actual effects of what different representations they make do, and that this can be an indirect indicator of whether the representations are false or misleading. At the hearing of this motion, counsel added that if CTR engaged in testing different versions of its website to see which version consumers were more likely to click on, this is clearly relevant to the inquiry. Moreover, if the requested records show that CTR had knowledge of the likely effects, this would also be relevant to the inquiry.

[88] I agree. I will add in passing that I do not accept CTR's position that it did not have the opportunity to comment on this specification, because its discussions with the Bureau's case team focused on other language in the specification. CTR clearly had its opportunity to make its views known on this aspect of the specification at the same time that it did so in relation to the other language in the specification. Its failure to do so cannot now be laid at the Commissioner's door.

(d) *Search engine optimization/marketing, web analytics*

[89] CTR maintains that two specifications[5] relating to the matters described in this sub-heading are not relevant. In support of its position, CTR stated the following:

> Whether CTR optimized its ads for driving traffic to its website versus increasing sales, selected keywords such as "CERB" or "job loss", or chose to target ads more locally or globally does not make it more or less likely that its ads were false or misleading in a material respect. Whether the ads were misleading depends on the general impression the ads themselves conveyed.

[5] Specifications I.2.f and II.12. Specification I.3 was initially part of this group. However, CTR represented that it has already provided its response to this specification to the Commissioner.

CTR's Written Representations at para 104.

[90] In the Disputed Order, the term Search Engine Optimization is defined to mean "the process of optimizing a website to achieve a higher ranking in search engines [*sic*] organic results to gain or increase unpaid traffic to a website or to improve the quality of unpaid traffic to a website." The term Search Engine Marketing is defined to mean "the process of displaying ads via search engines, such as Google, Yahoo and Bing to gain or increase website traffic or to improve the quality of website traffic." The term "Web Analytics" is defined to mean:

> … any analysis and information related to the activity on a web page or website, including analysis and information about frequency of visits, referral domain from which a web page is accessed, time spent on a web page or website, A/B testing, click tracking, click-through rates, impressions, unique visits, bounce rates, conversion rates, Google Analytics reports, Google Ads reports, Google AdWords reports.

[91] During the hearing of the Commissioner's application, the Commissioner's counsel explained the relevance of this information in the following terms:

> And so the ads, we've observed them to appear ahead of the government website. So search engine optimization and search engine marketing relates to how these representations are made, relates to how they're targeted and it's relevant to assess the factual matrix of these representations. These are online representations which, you know, Google advertises in Exhibit A, that can be made, can be targeted. And so these records are those that will identify how they're targeted, which informs the audience that is aimed at, the audience that is reached, because search engines pull in people who are searching for certain things.
>
> So if I search for "Apply for CERB", the Respondent is able to -- you know, if they're skilled, they're able to ensure that that link appears at the top. And so then I, who am looking for CERB, click on that link, and that informs how I interact with the website that it brings me to. And that's what we've been hearing from consumers.

> "I clicked on that link thinking it was the Canada Revenue Agency or government entity that was administering these benefits.
>
> Application Hearing Transcript, at 43-44.

[92] With respect to web analytics, the Commissioner's counsel explained that "this is essentially performance testing of how ads or representations work": Application Hearing Transcript, at 49.

[93] In written submissions on this motion, at paragraph 66, the Commissioner further explained that his inquiry:

> … is still in the fact-finding stage. Therefore, it would be premature and inappropriate at this stage to conjecture what relevance the analytics reports might have in a future hypothetical litigation, since the Commissioner will not be in a position to assess the relevance until he has reviewed the facts and made a determination as to whether to proceed.

[94] Having regard to all of the foregoing, I concluded, and remain of the view, that specification I.2.f., which pertains to search engine optimization, search engine marketing and web analytics, is in fact relevant to the Commissioner's inquiry. This is particularly so given that the Commissioner must be given a certain degree of latitude at this stage of his inquiry, when he has still not obtained much information from CTR: see the jurisprudence cited at paragraph 39, above. I do not agree with CTR's assertion that the reports that it has already provided to the Commissioner pertaining to web analytics make it readily apparent that this information has no relevance to the inquiry. I also disagree with CTR's position that the disputed specifications would impose an excessive, disproportionate or unnecessary burden on CTR.

[95] However, I agree with CTR that the information described in specification II.12 ought to be deleted from the Disputed Order. The information described in that specification is of marginal relevance. More importantly, given the information required by specification I.2.f, the information in specification II.12 is excessive in nature.

(3) The scope of the information sought

[96] CTR submits that many of the specifications in the schedules to the Disputed Order would impose an excessive, disproportionate and unnecessary burden on CTR.

(a) *Non-identical online representations and duplication*

[97] CTR asserts that specifications I.1.a and II.1, which require information with respect to "non-identical Online Representations," would impose an unnecessary burden and would by definition be irrelevant to the issue of whether CTR has made materially misleading representations.

[98] I was very well aware of CTR's position regarding the potentially burdensome nature of these specifications. Those positions were described at paragraphs 63 and 64 of the Perluzzo Affidavit and in Mr. Perluzzo's notes of the pre-issuance dialogue: Application Record, at 248 and 260-261. I was also aware of CTR's position that these specifications, and indeed others, were unnecessarily burdensome because of their duplicative nature: Application Record, at 24, 213-214, 218 and 221. After pressing the Commissioner on this during the hearing, I satisfied myself that these specifications (as well as specification II.1) were relevant and were not

unnecessarily burdensome, either because of their potential scope or their allegedly duplicative nature. I remain of that view. Moreover, I agree with the Commissioner that the alternate language proposed by CTR would leave too much subjective discretion with CTR to determine what constitutes a "materially different" Online Representation. I also agree with the Commissioner that CTR has not provided any evidence regarding the alleged burden to which these specifications would give rise.

(b) *Requirements to produce all "records"*

[99] CTR submits that certain specifications[6] requiring it to produce "all records" pertaining to certain matters are "massively overbroad and unnecessarily burdensome."

[100] Given the extensive definition of the term "record" in section 2 of the Act, the Court is generally very sensitive to specifications which would require the production of "all records" pertaining particular matters. I was no less so in this proceeding, and I was very well aware of CTR's position regarding this language. Consequently, I suggested that one of those specifications (I.2.a) be limited to records that were prepared for or prepared by Senior Officers of CTR. Ultimately that change was made to the Disputed Order. However, I was satisfied that the remaining provisions requiring the production of "all records" were not excessive, disproportionate or unnecessarily burdensome. I remain of that view, except with respect to specification 2.d. On reflection, given that this specification deals with "approvals," I consider that it should be limited in the same manner as specification I.2.a, namely, to records prepared for or prepared by Senior Officers.

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[6] Specifications I.2, I.4 and 1.8.

[101] Despite the fact that I narrowed specification I.2.a in the manner described immediately above, CTR maintains that it should be eliminated. This specification requires the production of "all records relating to the purpose for promoting the Relevant Benefits using Online Representations, including but not limited to business and marketing plans, and that were prepared for or prepared by Senior Officers." In the alternative, CTR submits that the words "all records" should be replaced by "all reports."

[102] I disagree. Particularly given that the "purpose" of a representation is a specific element in subsection 74.01(1) and section 74.011(1), I remain persuaded that the records contemplated by specification I.2.a are relevant to the Commissioner's inquiry and would not impose an excessive, disproportionate or unnecessary burden on CTR. I will add in passing that I am sympathetic to the Commissioner's position that CTR's apparent failure to provide any evidence of the format in which its records are kept makes it very difficult to assess its assertion that its records are not readily amenable to electronic searching.

(c) *Information concerning complaints*

[103] CTR submits that three specifications (I.4, II.7 and II.8) requiring information pertaining to complaints are overbroad, unnecessarily burdensome and irrelevant. It also maintains that the Commissioner failed to disclose its position in this regard to the Court.

[104] I was very well aware of CTR's position on these matters. This led me to press the Commissioner's counsel on these specifications during the hearing of the application. In

response, the Commissioner's counsel explained (with respect to specification I.4) that complaints often come in the form of:

> … someone saying, "I was told x and in fact y." The x part is what was the representation. The y is was x false or misleading. Were these individual applicants or clients misled. Complaints will tell us about, you know, how often, how many people, how often, where and when these representations were made. They will tell us about how -- the effect of the representations.
>
> Application Hearing Transcript, at 51.

[105] I agree that, to the extent that complaints can shed light on whether consumers were in fact misled by representations, this is relevant to an assessment of whether, from an objective perspective, those misrepresentations may be found to have been false or misleading, as contemplated by paragraph 74.01(1)(a) and subsection 74.011(1) of the Act. Moreover, I do not consider the requirement to provide "all Records of and relating to complaints, including Records setting out Complaint handling procedures" to be overly broad or unnecessarily burdensome. Furthermore, the fact that some information about complaints may be available from other sources, such as the Canadian Anti-Fraud Centre, the Better Business Bureau or Google's online reviews, does not preclude the Commissioner from requesting such information directly from CTR.

[106] With respect to specification II.7, which deals with the internal reporting of complaints within CTR, the Commissioner's counsel stated that this information is relevant because:

> … If a company makes representations and receives complaints, it's relevant to, you know, whether the company makes -- receives those complaints and makes adjustments to their representations in order to not mislead consumers. That would be a relevant fact to take into account in assessing the conduct.

Application Hearing Transcript, at 86.

[107] Given this explanation, I agree that information regarding the internal reporting of complaints is also relevant to the Commissioner's inquiry. In addition, I do not consider such information to be overbroad, unnecessarily burdensome or duplicative.

[108] Regarding specification II.8, which deals with actions taken in response to complaints, I agree with the Commissioner that this information is also relevant. In brief, knowing whether any changes were made to representations following the receipt of complaints, gaining insights into why changes may have been made to representations, and learning whether any further complaints were received after changes were made can have an important bearing on the Commissioner's assessment of whether the representations were false or misleading. As with the other specifications discussed above, I do not consider specification II.8 to be overbroad, unnecessarily burdensome or duplicative.

(d) *Information about individuals at CTR*

[109] CTR submits that two specifications that require information about its managers and employees are irrelevant and unnecessarily burdensome.

[110] One of these specifications is II.13, which requires an organizational chart identifying each person involved in the marketing or provision of services that CTR promotes using online representations, including any collection steps in respect of such services. This specification also

requires CTR to provide the person's full name, aliases (if any), title, roles and responsibilities, as well as direct and indirect reporting relationships.

[111] The Commissioner maintains that this specification is relevant because the information in question would help the Commissioner to understand the roles and seniority of persons identified in emails, correspondence and other records obtained in response to the Disputed Order, or through other sources during the inquiry. This, in turn, can have a bearing on the probative value of the record, because something that a senior executive may have said will likely be of greater significance than something said by a junior employee.

[112] I agree. Not having access to this information would inordinately complicate the Commissioner's inquiry and could make it very difficult to ascertain the probative value of particular records.

[113] The second specification in this category is II.5. Among other things, this specification would require CTR to identify the title and position of each individual within CTR who was or is involved in various tasks. It would also require CTR to explain the role and responsibilities of every such individual in CTR's internal decision-making process, including the period when the individual had the role or responsibilities in question.

[114] Given that the Commissioner will be receiving the information described in specification II.13 and discussed immediately above, I consider that specification II.5 would be excessive and unnecessarily burdensome.

(4) Conclusion

[115] For the reasons set forth in part VI.B.(1) above, I have concluded that the Commissioner did not fail to meet the elevated duty of full and frank disclosure that applies in *ex parte* proceedings under section 11 of the Act.

[116] I am sympathetic to CTR's concerns regarding the Commissioner's refusal to discuss, during the pre-issuance dialogue process, the relevance of some of the specifications in the Disputed Order. This is not consistent with the recommendations in the Gover Report. Had the Commissioner done so, CTR may not have felt so aggrieved by that process, and the spirit of collaboration discussed in the Gover Report may well have materialized, at least to a greater degree than occurred. In turn, this could have reduced the considerable time that CTR, the Commissioner and the Court have spent dealing with the Disputed Order. That time has far exceeded anything that I have ever seen.

[117] It is now more than five months since the first pre-application dialogue meeting took place. In the meantime, very little information has been provided by CTR to the Commissioner. This too is inconsistent with the recommendations in the Gover Report. Indeed, it is reasonable to infer that this has significantly impeded the Commissioner's ability to investigate whether CTR has made false and misleading representations in relation to the Covid Relief Benefits. It is high time that this changes, particularly given the pandemic has continued to evolve.

[118] The Commissioner is under no legal obligation to discuss with a respondent the relevance of one or more aspects of a draft Order during the process of pre-application dialogue. Indeed, the Commissioner is under no obligation to engage in such a process at all: see paragraph 54 above. However, where the Commissioner fails to engage in meaningful pre-application dialogue, there may be increased scope for an Order issued under section 11 of the Act to be set aside or varied in a subsequent motion under Rule 397 or Rule 399.

[119] CTR's remaining concerns regarding the process of pre-issuance dialogue and the *ex parte* nature of section 11 are matters for Parliament, not the Court.

[120] For the reasons set forth in part VI.B.(2) above, I have concluded that the information described in the specifications of the schedules to the Disputed Order is all relevant to the Commissioner's inquiry into whether CTR has made false or misleading representations, as contemplated by paragraph 74.01(1)(a) and subsection 74.011(1) of the Act.

[121] For the reasons set forth in part VI.B.(3) above, I have concluded that, with the limited exceptions described at paragraphs 95, 100 and 114 above, the information described in the specifications of the schedules to the Disputed Order is not excessive, disproportionate or unnecessarily burdensome.

VII. Costs

[122] Given that the Commissioner has largely prevailed on this motion, I consider it appropriate to award lump sum costs in his favour, in the amount of $5,000.

[123] In reaching my conclusion on this issue, I have also considered the nature and complexity of the issues raised and the amount of work that appears to have been required by the parties in relation to the motion. Although I consider that CTR could well have streamlined its submissions on this motion, I have exercised my discretion to refrain from increasing the lump sum award in the Commissioner's favour to reflect this consideration.

ORDER in T-999-21

THIS COURT ORDERS that:

1. This motion to set aside and vary certain provisions in this Court's order in the within proceeding, dated July 2, 2021 [the **Order**], is dismissed, with the following exceptions:

    a. Specification 1.d of Schedule I to the order is amended to read as follows: "Provide all Records that were prepared for or by one or more Senior Officers, relating to the expected, estimated or actual effects of Online Representations on consumer behaviour on Tax Reviews' Online Platforms."

    b. The following sentence in specification 5 of Schedule II to the Order is deleted: "As part of this response, identify the title and position of each individual within Tax Reviews who was or is involved in the above tasks, and explain his or her role and responsibilities in the decision-making process, including the period when he or she had such role or responsibility."

    c. Specification 12 of Schedule II to the Order is deleted.

    d. Upon the consent of the parties, the following words are deleted from specification 6 of Schedule I to the Order: "… the following Clients: In responding to this Specification, the Respondent shall select."

e. Upon the consent of the parties, the words “within 75 calendar days of the service of this Order”, as set forth in paragraph 14 of the Order, are substituted by the words “before the close of business on October 8, 2021.”

2. Canada Tax Reviews Inc. shall pay to the Commissioner of Competition lump sum costs in the amount of $5,000.

"Paul S. Crampton"
Chief Justice

APPENDIX 1

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 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 de l'article 10 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	**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

any other thing, specified in the order; or

(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.

choses dont l'ordonnance fait mention;

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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-999-21
STYLE OF CAUSE:	THE COMMISSIONER OF COMPETITION v CANADA TAX REVIEWS INC.
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE (TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	AUGUST 18, 2021
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	SEPTEMBER 7, 2021

APPEARANCES:

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Katherine L. Kay Sinziana R. Hennig	FOR THE RESPONDENT
Calvin Goldman, Q.C.	FOR THE RESPONDENT

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