

Search and seizure: Canada gets tough

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Canadian antitrust enforcement officials have a wide array of tools available to them to assist in their investigations. These tools range from the comparatively modest right to require written returns under oath (similar to interrogatories used in the United States) through mandatory testimony and document production to involuntary search and seizure. Despite the intrusive nature of the search and seizure powers, they have been used regularly — indeed, routinely — to investigate all criminal aspects of Canadian competition laws.

In late 1994, George Addy, the director of investigation and research (the director), Canada's chief antitrust enforcement official, signalled a more vigorous approach to investigations on the civil side of the law. The director indicated that he had begun to use some of his less intrusive mandatory formal powers (for example, court-ordered testimony and document production) in connection with civilly reviewable matters under the *Competition Act* "in select cases when the voluntary approach did not work." With cooperation previously having been the norm, this development came as something of a surprise to the Canadian antitrust bar. But few were prepared for what was to come.

Recently, and for the first time, search and seizure powers were used to authorize searches to assist the director's inquiry into an entirely non-criminal matter — the possible abuse of a dominant position. The warrants in question were exercised simultaneously in

seven different locations across Canada without prior notice and without prior indication to the corporations searched that their behaviour was under review. Moreover, there had been no prior request for information and the director had no reason to believe that there would have been obstruction had he used any of his less intrusive processes.

The use of search and seizure powers in these circumstances is unprecedented. It was previously thought that the director would reserve his search and seizure powers to traditional hardcore criminal cases (for example, conspiracy), and other cases where voluntary cooperation or other less intrusive investigative tools proved unsuccessful. The director's new willingness to use search warrants to obtain evidence in connection with a civil matter highlights the need for businesses that have offices in Canada to understand the Canadian search and seizure scheme and to be prepared to respond immediately to the exercise of a warrant on their premises.

The Canadian scheme

The director is the official responsible for the administration and enforcement of the *Competition Act*. He is supported by a staff of some 245 at the Bureau of Competition Policy.

The *Competition Act* includes a mixture of criminal offences, so-called reviewable practices, and private damage actions. Criminal offences include conspiracy, bid-rigging, predatory pricing, price maintenance, price discrimination, and misleading advertising. Non-criminal reviewable practices include mergers, abuse of dominant position, refusal to deal, and various vertical non-price restrictions. The conduct that is subject to examination under the reviewable practices provisions is considered

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to be entirely legal unless and until the Competition Tribunal determines that it has resulted in a substantial lessening of competition and, thus, should be subject to restraint or other remedial action. Only the director may initiate proceedings before the Competition Tribunal.

The director's tools

The director is obliged to commence a formal inquiry under the Act whenever he or she has reason to believe that a criminal offence has been or is about to be committed or that grounds exist for the Competition Tribunal to make an order regarding a reviewable practice. Three tools are provided to assist the director to obtain documents or other information.

First, the director may require a written return of information under oath where the director believes a person possesses information relevant to the inquiry (*Competition Act*, section 11(1)). Orders to produce documents may extend to records in the possession of affiliates of the persons thought to have information, whether the affiliate is located in or outside Canada (*Competition Act*, section 11(2)).

Second, individuals may be compelled to attend and be examined under oath on any matter relevant to the inquiry. In either case, the director must first obtain an order of the court compelling the production or attendance. No person may be excused from giving oral testimony or producing documents on the grounds that the evidence or documents might tend to incriminate the person. Production and testimony must be made, although no testimony given or document produced pursuant to an order may be used against an individual in any criminal proceedings (other than perjury) thereafter instituted against that individual (*Competition Act*, section 11(3)).

The third tool available to the director to compel production of evidence is the ability to seek a warrant for search and seizure.

Search and seizure

Canadian antitrust legislation, originally enacted in the late 19th century, is historically rooted in the criminal law. Early attempts by the federal Parliament to use a civil approach were rejected as an unconstitutional encroachment on provincial powers. Because evidence of the core offences (such as price fixing) was difficult to gather, search and seizure powers were present from the start and have been used regularly over the years. In 1984, however, the Supreme Court of Canada declared the director's search and seizure powers unconstitutional. The court determined that the powers were contrary to the *Canadian Charter of Rights and Freedoms* (the

Charter) because the law did not require court approval for the exercise of a warrant.

When Parliament revisited the *Competition Act* in 1986, it sought to "Charter-proof" the director's search and seizure powers by requiring judicial authorization to search in all but exceptional circumstances and constraining the types of documents that may be seized. At the same time, the 1986 amendments to the *Competition Act* significantly expanded the civil scope of the competition law beyond traditional, hard-core anticompetitive behaviour. Little thought was given at the time about the propriety of search and seizure in a non-criminal context.

The power

The amended powers are considered generally to satisfy the Supreme Court of Canada's earlier constitutional concerns about procedural fairness. Except in exigent circumstances, the director may not enter premises and search for documents without a court order to do so. Such an order, which may be obtained on ex parte application to a judge, must be supported by written information on oath or affirmation that there are reasonable grounds to believe that a criminal offence under the *Competition Act* has been committed or grounds exist for the Competition Tribunal to make an order in respect of a reviewable matter. The director must also believe that there are on the premises records or other things that will afford evidence of the offence or support the making of an order. If satisfied that these grounds exist, the judge may issue a warrant authorizing the director or any other person to enter the premises, search for any record or other thing, and copy it or seize it for examination or copying.

The warrant must identify the manner in which it is issued, the persons authorized to conduct the search, the premises to be searched, and the record or other thing, or the class of records or other things, for which the authorized persons are searching.

Execution of the warrant

Persons in possession or control of any premises or record or other thing in respect of which a warrant is issued must, on presentation of the warrant, permit the persons named in the warrant to enter the premises, search them, and examine the record or other thing and to copy it and seize it (*Competition Act*, section 15(5)). Where access is denied, or if the director believes on reasonable grounds that access will be refused, the judge who issued the warrant may authorize the police to assist the director in obtaining access (*Competition Act*, section 15(6)).

Access to databases – the use of computer systems

The *Competition Act* specifically contemplates the search of electronic databases by providing for access to computer systems during a search of premises. Any person authorized to search premises may "use or cause to be used" during the search any computer system on the premises "to search any data in or available to the computer system." The possibility to reach beyond national borders for data lodged on distant mainframes is very real. The bureau believes it is entitled to do so, although this extraterritorial dimension of the search power has yet to be tested. Data found in the computer system may be reproduced in the form of a printout or other intelligible output, which may be seized (*Competition Act*, section 16(1)).

The *Competition Act* imposes a duty on persons in possession or control of the premises to permit any person named in the warrant to use, or cause to be used, the computer system to search for data from which a record that that person is authorized to search for may be produced, to obtain a physical copy of the data and to seize it (*Competition Act*, section 16(2)). The director or person in possession or control of the computer system may apply to a judge for an order specifying the individuals who may operate the system and setting out other terms and conditions on which the system may be operated (*Competition Act*, section 16(3)).

Despite the 10-year history of the provision, there is little case law in which the scope of the computer search powers has been considered. It is thus

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So what really happens when the bureau comes knocking?

A search warrant obtained by the director typically specifies the names of 10 to 15 commerce officers in the Bureau of Competition Policy and/or Royal Canadian Mounted Police who are authorized to enter the premises and search for specified records. The warrant gives a general indication about the offence or matter being investigated and the types of documents being sought. The particular facts relied on for issuance of the warrant will be set out in the information filed by the director with the court that issued the warrant. The information does not form part of the warrant, and a copy of it typically must be obtained from the court or counsel to the director.

The search team (all or some of the individuals named in the warrant) arrives at the premises to be searched unannounced, at the start of business. The team is headed by a specific individual who presents the warrant and requests admittance. The team leader is the communication interface between the target (and its counsel) and the search team. The team usually allows the target to contact its counsel and delays the search until legal counsel for the target arrives, provided that counsel can get to the scene quickly.

Search teams are usually well prepared and know the individuals files most likely to contain relevant information. Team members act professionally and reasonably, and recognize that

their activities intrude on day-to-day business activities. Unless they have reason to suspect that they are being misled, the team accepts the direction of knowledgeable persons on the premises about the location of records being sought, and confine their search to those areas. They also give counsel an opportunity to first review documents to ascertain whether claims of privilege might be made over any of them. Alternatively, an arrangement might be agreed on that documents can be culled from files without prior review by counsel on the basis that review of the documents by the search team will not impair the targets' right to claim privilege over any of them.

Members of the search team do not engage in a discussion about the reasons for the search, relevance of documents seized, or merits of privilege claims. Issues about the scope of the warrant and whether any document seized could be seized under the warrant are reserved to be dealt with by the appropriate court if proceedings are brought against the target.

Once the search team has gathered the records it wishes to seize, each page is stamped for identification. Bureau staff try to accommodate requests by the target to make a copy of all documents being seized (but this might depend on timing and the breadth of the seizure), and, generally, do not take the only copy of documents that the target needs to run its business. ■

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not clear whether the statutory duty to permit a person named in the warrant to "use or caused to be used any computer system" imposes an obligation to provide assistance — for example, to log onto the computer system, to provide a password, or to show investigators how the system works. The director's staff have taken the position in the course of a search that "causing" a computer system to be used can extend to logging on and providing a password. However, there is a sound legal basis to refuse a request for a computer password because persons who are subject to a search have no obligation generally to assist investigators in their search for evidence.

The issue likely is moot in most cases because investigators have developed technologies to gain access to virtually any computer system. The director recognizes the benefits of searching computer systems, and has invested heavily in developing and learning advanced search technologies. With the flick of a switch, bureau officials are often able to download and seize data available to the system, including earlier versions of documents that users thought had been deleted but, in fact, were still stored electronically. These sophisticated tools are now used as a matter of course and there is authority that their use is permissible.

Privileged documents

The director, or his or her representatives, may not examine, copy, or seize documents pursuant to a warrant without affording a reasonable opportunity for claims of solicitor-client privilege to be made (*Competition Act*, section 19(7)).

Under the *Competition Act*, privileged claims may be made over a document sought to be seized by placing the document into a sealed package that is put into the custody of a judicial officer or other person agreed to by the director. If a claim for solicitor-client privilege is made in respect of a document about to be examined, copied, or seized, the director's representative must desist from examining or copying the record and from seizing it. Notes made by the representative in respect of the document over which privilege is claimed must be placed with the document in the sealed package (*Competition Act*, section 19(2)).

A judge may determine whether documents over which privilege is claimed are properly the subject of solicitor-client privilege. The party making the privilege claim must apply for that determination within 30 days of the documents' being placed into judicial custody. Failure to make the application within the 30-day period entitles the director, on ex parte application, to seek an order that the docu-

ments be unsealed and delivered to him or her (*Competition Act*, section 19(5)).

Obstruction

The *Competition Act* makes it an offence for any person in possession or control of premises or computer systems that are to be searched to fail to make the premises or system available as required under the Act. A person found guilty of this offence may, on conviction, be subject to a fine not exceeding \$5,000, imprisonment for a period not exceeding two years, or both (*Competition Act*, section 65(1)). In addition, an offence is committed by any person who destroys or alters records or other things required to be produced under a search warrant. On conviction, offenders are liable to a fine of up to \$50,000, imprisonment for five years, or both (*Competition Act*, section 65(3)). Directors, officers, or agents of corporations who direct, acquiesce, or participate in the commission of an obstruction offence are deemed a party to and guilty of the offence (*Competition Act*, section 65(4)).

The obstruction offences created under the *Competition Act* have received little judicial consideration. Analogous provisions in Canada's *Criminal Code* have been interpreted to require a positive act of obstruction (rather than a mere failure to assist) to be a requisite element of the offence.

Issues relating to the execution of the search warrant

Although the *Competition Act* sets out a fairly comprehensive code of the search and seizure power, issues do exist around use of the powers, particularly in the light of exercise of the search and seizure power in the non-criminal context.

Charter rights

Questions remain about the constitutionality of certain substantive aspects of the search and seizure powers under the *Competition Act*. Because the conduct underlying a reviewable practice (for example, mergers and abuse of dominant position) is not illegal, there is a strong case to be made that the use of search and seizure to advance an inquiry into a reviewable practice is an unreasonable intrusion into a person's right to privacy and is, therefore, contrary to the Charter. The Supreme Court of Canada has recognized that corporations as well as individuals have significant privacy interests subject to protection under the Charter, but it has not yet been provided with an opportunity to consider whether search and seizure outside of a criminal or regulatory context is substantively reasonable.

Extraterritoriality

There is also the question whether section 16 of the *Competition Act* is overly broad in that it allows Canadian investigators access to non-Canadian-located data and records. The director takes the view that section 16 of the Act, which permits the search and seizure of all data "contained in or available to" a computer system, authorizes seizure of data or records whether physically located in Canada or elsewhere. Investigators have searched and seized downloaded versions of data stored in the United States and in other countries because it was available for viewing on a screen, or could be retrieved from a computer terminal, located in Canada. Query whether these records are located in Canada (and, thus, subject to seizure under the *Competition Act*) or outside of Canada. There is scope to argue that the Canadian government cannot authorize searches beyond its territorial borders, and that searches of records in foreign jurisdictions are permissible only if permitted and conducted in accordance with laws of those jurisdictions.

Other Canada-US Issues

Use of computer search powers under the *Competition Act* also raises a host of issues in the context of Canada-US antitrust enforcement. Under arrangements agreed with the United States this past summer regarding application of Canadian and US competition laws, Canada agreed to give notice to the United States in the event that it engages in activities that involve seeking information located in the United States. It is not known whether the director has been giving the US Department of Justice and the Federal Trade Commission notice of seizures involving computer search of records physically stored in the United States.

Perhaps it is more important that under the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT), Canada and the United States agreed to a mechanism whereby one nation may request the assistance of the other relating to the investigation of criminal offences, including antitrust offences. Under the MLAT, if Canada seeks to obtain "documents, records, or other articles" known to be located in the United States, it must request assistance pursuant to the treaty. Assistance may be refused if execution of the request is contrary to the public interest of the requested state. This caveat permits the United States, for example, to refuse a request from Canada for assistance unless it is satisfied that Canadian investigators have in place appropriate safeguards to protect the confidentiality of documents seized in the United States and sent to Canada.

The important interests intended to be protected

by the MLAT are sidestepped by the director when he uses the *Competition Act* powers to search computer systems to retrieve, print, and seize records physically located in the United States. The seized records are not subject to the US protections against third-party access (for example, US Federal Rule of Criminal Procedure 6(e)) and, instead, are subject to the more lenient Canadian protections. Arguably, Canada has been circumventing the procedures agreed with the United States under the MLAT for obtaining access to documents located in the United States.

CBA task force to consider issues

These and other issues will likely be dealt with by a Computer Records Task Force recently established by the Enforcement Practices and Procedures Committee. Search and seizure, page 96

Summary response checklist if the bureau comes knocking:

1. Ask to see the search warrant.
2. Ask the person in possession of the warrant to identify himself or herself and all those with him or her and to indicate whether those persons are authorized to aid in the execution of the warrant.
3. Request time to review the warrant and to obtain advice with respect to the appropriate course of conduct.
4. Read the warrant carefully to determine
 - the premises covered,
 - the specific documents or objects it covers, and
 - the alleged offence(s) that is (are) subject of the warrant.
5. At the same time that the warrant is being reviewed, instruct someone to make calls (if not already made) to
 - legal counsel;
 - individuals named in the warrant whose offices are to be searched — each should be advised that the search is pending and cautioned that they must not remove, alter, or destroy any documents or other material in their offices; and
 - head/foreign offices.
6. Do not "agree" that the search can be expanded beyond the limits described in the warrant.
7. Do not answer any substantive questions.

just for medical products. Where the exception applies, the manufacturer may satisfy its duty by warning the intermediary of the risks inherent in the use of the product, and a warning to the ultimate consumer will not be necessary. The exception is applicable, according to the court, where

1. a product is highly technical in nature and is intended to be used only under the supervision of experts; or
2. the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product; and
3. an intermediate inspection of the product is anticipated; or
4. a consumer is placing primary reliance on the judgment of the "learned intermediary" and not the manufacturer.

Accordingly, Dow Corning could discharge its duty to the ultimate consumer by giving the treating surgeon clear, complete, and current information concerning any general and specific risks arising from the ordinary use of the implant. The court went on to state, however, that the learned intermediary exception presumes that the intermediary is fully apprised of the risks and will provide "shelter" to the manufacturer only where it has taken adequate steps to ensure that the intermediary's knowledge of the risks approximates its own.

Subjective versus objective causation

In a 1982 medical malpractice case, the Supreme Court of Canada held that in order to prove that a plaintiff's injuries were caused by a defendant's inadequate warning, the plaintiff must prove that a reasonable person in his or her particular circumstances would not have consented to the surgery if he or she had received adequate warning of all of the material risks. This objective test was applied because of the inherent unreliability of a plaintiff's self-serving assertions that he or she would not personally have gone through the surgery had they known of the risks involved.

The majority in *Hollis*, however, distinguished medical malpractice cases and held that a subjective test applies in litigation against a manufacturer for failure to warn. The plaintiff need only prove that he or she would not have used the product if given adequate warning, not what a reasonable consumer would have done.

Underlying the majority's distinction between manufacturers and doctors is an apparent faith in

the professionalism of doctors and their duty to "give the best medical advice and service they can give to a particular patient in a specific context," and a belief that manufacturers can be expected to act in a more self-interested, as opposed to corporately responsible, manner. Whether justified or not, manufacturers are left in a position where they will have significant difficulties in challenging the assertions of plaintiffs that they would not personally have used the product if adequately warned.

Causation and the learned intermediary

As noted by Justice Sopinka in his dissenting reasons, a fundamental requirement of tort law is that the plaintiff must establish that the defendant's negligence caused her injury, in order to prove the defendant's liability. One would ordinarily expect that Ms Hollis would have to demonstrate not only that Dow Corning provided an inadequate warning to the learned intermediary doctor but also that, had adequate warning been provided, the doctor would have passed such a warning on to her. On the contrary, however, the majority held not only that Ms Hollis need not prove this fact, but also that, even if Dow Corning had been able to prove that the doctor probably would not have passed on the adequate warning, it would in no way absolve the manufacturer from liability. Accordingly, although the learned intermediary exception provides a means by which a manufacturer can discharge its duty, if it fails to provide the intermediary with sufficient information, it cannot raise as a defence that the intermediary would probably not have passed the information on to the consumer.

Conclusion

The burden on manufacturers to provide clear and complete warnings is very onerous in Canada. As the title of this article suggests — be forewarned. If warnings are inadequate, the burden on the injured consumer to prove that the inadequate warning caused him or her injury will be very light and Canadian courts may award damages to the consumer, regardless of traditional defences. ■