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Information Bulletin on Sections 15 and 16 of the *Competition Act* (search warrants)

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Information Bulletin on Sections 15 and 16 of the *Competition Act* (search warrants)

I. GENERAL COMMENTS

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on the Draft *Information Bulletin: Sections 15 and 16 of the Competition Act.* The CBA Section supports the efforts of the Commissioner of Competition and the Competition Bureau to publish guidance on the application of provisions of the *Competition Act*. The Bureau's practice of issuing information bulletins and interpretation guidelines should increase transparency and predictability of the Commissioner's interpretation, administration and enforcement of the Act.

Given the invasive nature of search warrants and electronic searches, the CBA Section strongly supports the initiative to provide guidance regarding the circumstances in which the Commissioner will resort to sections 15 and 16 and the process used to secure the warrant, and its execution. The powers set out in sections 15 and 16 are necessary to the effective enforcement of the Act, but they are intrusive and may be highly burdensome on recipients of warrants. The exercise of these powers must be guided by measured discretion. It is particularly important for the Bulletin to reflect these considerations because it will be consulted and relied upon not only by domestic entities, but also by parties and their counsel in other jurisdictions who are unfamiliar with principles of Canadian search and seizure and the manner in which such tools are employed by the Bureau. For this reason, the CBA Section believes that the Commissioner, following consideration of any submissions made, should circulate a second draft for comment before the Bulletin is finalized.

The Draft Bulletin provides a useful overview of the legislation and some views on the state of the common law, but provides little guidance on the policy approach of the Commissioner when determining to exercise discretion to seek and execute a search warrant. For example,

the Bulletin should outline the circumstances the Commissioner views as appropriate or inappropriate to seek a search warrant, as opposed to reliance on other statutory investigative powers such as section 11, especially in the context of an inquiry under the reviewable conduct or merger provisions of the Act. In addition, the CBA Section would encourage the Bureau to consider the Bulletin as an opportunity to update and cross-reference its policy on the interception of confidential communications (including wiretaps).

The CBA Section would also encourage the Bureau to clearly indicate that the Bulletin does not necessarily reflect the current state of the law, but rather the Commissioner's views and policy. Clear delineation throughout the Bulletin between statements reflecting the Commissioner's practice and policy versus common law or statute would further the goal of transparency.

The CBA Section also believes it would be appropriate for the Bulletin to indicate that it is intended to apply only to the Commissioner's administration and enforcement of the Act, and not to other statutes administered and enforced by the Bureau (e.g., the *Textile Labelling Act* and the *Consumer Packaging and Labelling Act*).

The CBA Section's particular comments and suggestions are set out below. All section references correspond to the relevant section of the Draft Bulletin.

II. INTRODUCTION

The criteria, process and limits with respect to the Commissioner's discretion to seek a search warrant from a court ought to be more explicitly identified at the beginning of and throughout the Bulletin. The Draft Bulletin gives the impression that the Commissioner has "access to search and seizure powers" to obtain "all necessary information" "where circumstances warrant". The supervisory role of the court should be more clearly identified in this section of the Bulletin, particularly with respect to the determination of whether and when a search warrant is appropriate and the scope of a search.

The Draft Bulletin suggests that the Commissioner may seek to use search warrants in complex cases or cases involving sophisticated parties operating in a covert or fraudulent fashion. As a matter of law and policy, the use of search warrants is restricted to circumstances where alleged activity contrary to the Act can be shown, or where there is a reasonably founded fact-based risk of a potential loss of evidence or alleged obstruction activity. Complexity is not, in and of itself, a relevant consideration for the exercise of discretion to seek a section 15 search warrant. Complex cases should and may effectively be addressed through less intrusive means, such as voluntary production or an application for a section 11 order. This approach is consistent with the Supreme Court of Canada's "least intrusive means" test enunciated in *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145.

On a related issue, page 1 of the Draft Bulletin indicates that "[s]ome information, such as voluntary production, can be obtained without having to resort to a formal process." It would be helpful to clarify the considerations applied in the decision to rely on voluntary versus compulsory processes or a section 11 order versus a search warrant.

III. OBTAINING A SEARCH WARRANT UNDER SECTION 15

A. Authorization and Requirements

The Draft Bulletin identifies the "reasonable grounds" test explicitly set out in section 15 but does not discuss from which sources, or the process by which, the Bureau may establish the "reasonable grounds" threshold that an offence under Part VI or VII of the Act has been, or is about to be, committed (the most common basis for a section 15 warrant). The Draft Bulletin does not indicate the standards applied when assessing information obtained from confidential informants or other confidential sources. The Bulletin should stipulate that the Commissioner will comply with the requirements of established case law, particularly the collective decisions of the Ontario Court of Appeal and the Supreme Court of Canada in *R. v. Debot*[1] as to the requirements for indicia of reliability and for investigation and independent corroboration of allegations made by confidential sources.

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[1] (1986), 30 C.C.C. (3d) 207 (Ont. C.A.); aff'd 52 C.C.C. (3d) 193 (S.C.C.)

Section 15 provides that warrants may be sought where there are reasonable grounds to believe that an offence under Part VI or VII is about to be committed. The provision for an application for a search warrant in anticipation of the commission of offences differs from search warrants granted pursuant to *Criminal Code* section 487 (except for the limited purposes of section 487(1)(c) regarding offences against the person). The Bulletin should identify the circumstances under which the Commissioner would seek to use a warrant to obtain evidence where an offence is "about to be committed".

The Draft Bulletin distinguishes section 11 (which requires an inquiry to have commenced pursuant to section 10), and section 15 (which does not require that the Commissioner have commenced an inquiry prior to the application). Section 10 requires that the Commissioner have "reason to believe" that enumerated conduct has occurred or is about to occur in order to commence an inquiry. Section 15 requires that the Commissioner establish the existence of "reasonable grounds" that enumerated conduct has occurred or is likely to occur. The test for the issuance of a warrant by a court is more exacting than the test for the initiation of an inquiry by the Commissioner. The distinction drawn between section 11 and section 15 in the Draft Bulletin may inadvertently give the impression that there is a lower standard with respect to an application for a search warrant. More importantly, as a matter of policy, and except in extraordinary circumstances, the Commissioner should only be seeking search warrants when a formal inquiry has been initiated.

B. *Ex parte Application*

This section of the Draft Bulletin indicates that the Commissioner "will" (apparently, a statement of policy) apply *ex parte* for a search warrant, so that the person subject to the warrant is not notified beforehand. There may be appropriate cases to notify a party against whom a warrant is sought. For example, Immunity Program applicants or other cooperating parties have been notified in advance that a warrant is being sought against them as a matter of courtesy. The Bulletin should indicate that there may be exceptions to the policy to apply to a court *ex parte* in appropriate circumstances and identify those circumstances.

This section of the Draft Bulletin also states: "The element of surprise is essential to the success of the search itself." Compulsory powers should be a matter of last resort as they must meet the criterion of the "least intrusive means" articulated in *Hunter v. Southam*. It is not the element of surprise but rather the necessity to use intrusive compulsory powers to obtain or preserve evidence or avoid obstruction activity that is the policy goal. The Bulletin should reflect that the search warrant power is not one used as a matter of course.

With respect to reviewable matters, including a merger application, the Bulletin should indicate the circumstances where the Bureau would likely resort to a search warrant. The CBA Section believes that in such cases, reliance on a warrant should be extremely rare, and hope that the Bureau concurs in this view.

C. Venue of Application

The Draft Bulletin indicates that the Commissioner, "in all cases", retains the unfettered discretion to determine venue. It does not refer to the location of the target, the discretion of the Attorney General to determine where an indictment will be filed or the supervisory role of the court as factors to be considered in the exercise of the Commissioner's discretion. The Bulletin should indicate that the Commissioner will not — as indeed she does not — seek to use her discretion for tactical advantage, and should state that she will consider the venue most geographically convenient to the private party who is the subject of the application. This approach would be consistent with the policy of the former Federal Prosecution Service, now the Public Prosecution Service of Canada.

D. Warrantless Searches

The Draft Bulletin does not discuss what the Commissioner would consider to be "exigent circumstances". The Bulletin should provide more guidance on what the Bureau considers to be exigent circumstances. It would also be useful to indicate whether the Commissioner has ever used this power and in which circumstances.

IV. WHEN THE COMMISSIONER WILL SEEK A SECTION 15 SEARCH WARRANT

The Draft Bulletin focuses on the use of warrants against targets in the criminal context. It would be useful to provide guidance on the policy approach with respect to the use of search warrants in civil inquiries and against non-target third parties.

The intrusive nature of search warrants and the fundamental rights implicated require a discussion of when, if ever, the Commissioner views that it would be appropriate to use a search warrant in a civil inquiry. In particular, the Bulletin should include a discussion of the Commissioner's approach to the use of search warrants in the merger review process and should make it clear that warrants will not be used in civil inquiries unless there is a fear of loss of evidence or obstruction, or reasonable grounds to believe that a proposed transaction or arrangement is being used as a front for alleged criminal anti-competitive conduct.
The Bulletin should also address the circumstances in which search warrants will be sought to obtain information from third parties who are not the targets of an inquiry. The circumstances in which a search warrant will be sought should be distinguished from those in which the Commissioner will seek to gather information through voluntary production or a section 11 order. In circumstances where the Commissioner proposes to use a search warrant on a non-target, it may be appropriate to give notice so they can make representations as to why a warrant is, or is not, necessary. The CBA Section believes the only circumstances that would justify a search warrant against a non-target are reasonable grounds to believe that reliance on less intrusive means would result in non-compliance with a section 11 order or a loss and destruction of evidence.

V. EXECUTING SECTION 15 SEARCH WARRANTS

A. Prior to Execution of a Search Warrant: Sealing of the Application

The Bulletin should reflect the fact that sealing orders are not generally in the public interest, and as such it is not the Bureau's general practice. See, for example, section 39.4 of the *Federal Prosecution Service Deskbook*, which states:

> Applications [for sealing orders] should be reserved for cases where Crown counsel is satisfied that disclosing the information sought to be sealed would be contrary to the public interest. To minimize the need for sealing orders, search warrant information and other requests for court authorization should, where possible, be drafted so that sealing orders are not necessary.

The statement in the Draft Bulletin that the grounds for seeking a sealing order "could include, but are not limited to, what is specified in subsection 487.3(2)(a) of the *Criminal Code*" should be explained. In particular, the Bulletin should provide examples of possible grounds beyond those enumerated in *Criminal Code* section 487.3(2)(a) on which a sealing order could be sought, and to explain why the Bureau believes it can extend the grounds.

In circumstances where a sealing order is obtained, the Bulletin should state that the target of the warrant will be provided with a copy of the Information to Obtain ("ITO") either as an exemption to the sealing order or as a matter of policy. Since the ITO is necessary to evaluate a possible challenge to a warrant, providing the target with a copy should be the Bureau's general practice. This is supported by a number of recent sealing orders which have provided an exemption in the form of discretion on the part of the Attorney General or Public Prosecution Service of Canada to release a copy of the ITO to the target of the search. Where the release of an unedited copy of the ITO would compromise the identity of a "confidential informant" (as that phrase is defined by the courts), the Bulletin should indicate that the Bureau's general practice is to provide the target with a redacted copy of the ITO and that redactions will be limited to those portions of the ITO necessary to preserve the identity of the informant. See, for example, section 39.4 of the *Federal Prosecution Service Deskbook*, which states that an ITO should be drafted "so that the judge hearing an application for access to the information can easily edit out any 'prejudicial information' without making the information legally insufficient".

B. Search Team

Section 15(1) states that a judge of a superior court may issue a warrant authorizing "the Commissioner or any other person named in the warrant" to execute a search warrant. However, the Draft Bulletin states that not all members of the search team need be specifically named in the warrant. The Bulletin should clarify the legal basis upon which individuals not specified in the warrant are authorized to take part in its execution.

The Bulletin should also elaborate on the reference to the "other authorized persons" who may be present at the execution of a search warrant. For example, this should not be intended to authorize the participation of representatives of foreign competition or antitrust agencies not named in the warrant. The Bulletin should clarify the legal and policy bases upon which "other authorized persons" are able to take part in the execution of a warrant.

C. Premises

Given that a search of a private residence is regarded as a highly intrusive process, the Bulletin should outline the circumstances in which the Bureau would seek a warrant to search a private residence.

D. Securing the Premises and Commencing the Search

The Draft Bulletin states that a "team leader may accommodate a request to delay a search for a reasonable period of time until the arrival of a senior corporate official and/or counsel". The Bureau's practice of waiting for the arrival of corporate officials and counsel is commendable, and the Bulletin should not give the impression that the Bureau intends to be less cooperative on this issue in the future. The Bulletin should confirm the Bureau's general practice to accommodate a request to delay a search for a reasonable period of time until the arrival of a corporate official or counsel in the absence of other circumstances that would interfere with the execution of the search warrant.

E. Searching for Electronic Records

The Draft Bulletin indicates that section 16 permits a search of data accessible via a computer system at the site that is the subject of an order, even if the data is not located on the premises. The "accessibility" issue articulates a position untested in the courts and could encompass extraterritorial searches. The Bulletin should articulate the policy and corresponding legal foundation with respect to off-site and extraterritorial electronic searches. Similarly, there has been no judicial determination on the devises within the definition of computer or data storage system. The CBA Section recommends that the Bulletin reflect that it is the Commissioner's view that the definition in *Criminal Code* section 342.1(2) includes the devises listed along with "any other device".

The Bulletin should provide greater detail on the Bureau's policies on the treatment of electronic records. In particular, the Bulletin should address the circumstances in which: the Bureau will seek to remove a computer system from the search premises; records will be removed from the search premises for copying, as opposed to having copies made on-site; and an attempt will be made, through use of a target's computer system, to obtain documents located off-site, including outside of Canada.

The CBA Section strongly urges the Bureau to state that it is its practice to provide the target with an electronic copy of the records identified by the Bureau through use of keyword searches. At present, the target may not be aware of the particular electronic records seized because the Bureau may only seize a copy of the hard drive or other technology, on which they subsequently run keyword searches off-site. Without a copy of the seized electronic records, the target is unable to determine precisely which particular electronic records were seized. Obtaining a copy of the electronic records seized can currently be negotiated with the Bureau. It should be the general practice and is consistent with the Bureau's practice with respect to paper records.

Where targets agree to participate in an informal privilege review procedure (see below) for electronic records, the Bureau should identify its final selection of electronic records prior to commencement of the review. A target should not be faced with multiple serial selections of records which may occur months after the initial imaging of its computer system pursuant to the search, and may not be authorized by law.

F. Solicitor-Client Privilege

The Bulletin should reflect the fact that, in most cases, issues surrounding privilege are generally resolved without the need to resort to a formal court process. In most, though not all cases, the Bureau has been willing to minimize the need for a formal, judicial process to screen privileged from non-privileged records. This approach is commendable for its efficiency, cost-effectiveness and fairness. The Bulletin should identify the Bureau's general willingness to deal "informally" with issues of privilege through a screening process, where necessary by utilizing a neutral referee (e.g., an outside lawyer not involved

in the investigation), without prejudice to a claimant's or the Commissioner's right to proceed with an application for a court determination.

G. Talking to and Questioning Individuals

The Draft Bulletin states that "[i]n certain circumstances, a caution will be issued which will ensure the person is aware of his/her rights and that any information he/she provides can be used as evidence". While the Commissioner has the right to speak to representatives of a target for purposes of locating items specified in a warrant, unless otherwise set out in the warrant the Commissioner does not have the right to question those individuals on substantive issues. As such, the Bulletin should state that individuals who may be present on the searched premises will be told that they have no obligation to respond to questions relating to substantive issues and that any information provided can be used as evidence..

H. Seizure

The Bulletin should include a discussion of the Bureau's policy in circumstances where, during its final selection of records, there is disagreement as to whether a particular record falls within the scope of the warrant.

I. Making Copies of Records

The Draft Bulletin infers that only requests for copies of "essential working records" may be granted by the Bureau. Subject to the availability of adequate photocopying facilities or any unusual circumstances, the Bureau's policy should be to provide, upon request, copies of all records seized during the execution of a search warrant. Copies of seized documents are crucial to assist the target of an inquiry in assessing the situation and determining its position. In view of the Bureau's policy on immunity and leniency, time is of the essence and targets cannot afford to wait for the return of the documents before they have a chance to review the seized records internally. The right to make copies on the premises, at a relatively low cost, should be curtailed only in very exceptional circumstances.

J. Plain View

Given their importance, the limits to the "plain view doctrine" should be set out in the body of the Bulletin, rather than in a footnote as is the case in the Draft Bulletin. The Bulletin should also discuss the powers and limits to the execution of search warrants under *Criminal Code* section 489, which the Bureau has invoked in past instances.

VI. FAILURE TO COMPLY WITH A SECTION 15 SEARCH WARRANT

A. Impeding an Inquiry, Refusing Access and Destruction of Records

The Bulletin should limit the reference to the use of section 64 of the Act to circumstances where an "inquiry" has been commenced, since the term "examination" is not defined in the Act (and as such, resort to section 64 in circumstances of an "examination" would potentially result in a challenge under the *Canadian Charter of Rights and Freedoms*). This would also ensure consistency with the treatment of confidential information in the Draft Bulletin, which refers only to inquiries and not examinations.

VII. RECORDS OBTAINED UNDER A SECTION 15 SEARCH WARRANT

A. Confidentiality

The Bulletin should provide more guidance as to when the Bureau considers that an inquiry or the execution of a search warrant has become public knowledge. For example, would a call from a journalist suffice to render an inquiry public knowledge, or will the Bureau wait for a more formal statement to be issued by a target of the inquiry.

B. Copies, Return of Records, Care and Access

The Bulletin should make reference to the general record retention obligations of the federal government (for example, under the *Official Records Act*), and specify the statutory basis on which it continues to retain both paper and electronic records beyond the completion of an inquiry. The Bulletin should further state that the Bureau will endeavor to return any original records seized as soon as possible.

VIII. CONCLUSION

The CBA Section appreciates the opportunity to provide comments on the Draft Bulletin. We would be pleased to discuss our comments with the Bureau and to comment on a further draft of the Bulletin.