Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

97 310 058

T-1959-97

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to paragraph 10(1)(b) of the Competition Act relating to the refusal of Warner Music Group Inc. and its affiliates, WEA International Inc. and Warner Music Canada Ltd., to deal with BMG Direct Ltd.;

AND IN THE MATTER OF an Application by the Deputy Director of Investigation and Research (Civil Matters) under the Competition Act, for an Order requiring that The Columbia House Company or any of its affiliates within the meaning prescribed by subsection 2(2) of the Competition Act, produce certain records and make and deliver certain returns pursuant to paragraphs 11(1)(b), 11(1)(c) and subsection 11(2) of the Competition Act.

REASONS FOR ORDER

LUTFY J.:

The Columbia House Company is seeking the rescission of an order issued *ex parte* by this Court for the production of its records and a written return of information through one of its authorized representatives. The order was made as part of an inquiry by the Director of Investigation and Research[1] into the complaint by BMG Direct Ltd. of the refusal to deal by Warner Music Canada Ltd., Warner Music Group Inc. and WEA International Inc. concerning certain licences for the reproduction of and sale rights to recordings.

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[1] Reference will be made throughout these reasons to the Director even though others have acted on the Director's behalf in these matters.

The inquiry was commenced by the Director on December 19, 1996 pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act*[2]. A section 10 inquiry initiated under this subparagraph may lead to an application for an order from the Competition Tribunal for one of the civil remedies under Part VIII of the Act. The *ex parte* order was issued on September 9, 1997 pursuant to paragraphs 11(1)(b) and (c) of the Act and required compliance by October 21, 1997.

On September 30, 1997, a notice of application was filed by the Director before the Competition Tribunal seeking an order against the Warner companies pursuant to section 75 which is the "refusal to deal" provision of Part VIII of the Act. Warner Music Canada Ltd. is one of two partners of The Columbia House Company, an Ontario partnership. At present, Columbia House is not a party to the section 75 proceeding before the Tribunal and has yet to comply with the section 11 order of September 9, 1997.

Columbia House has moved to rescind the section 11 order on the grounds that the Director's filing of the notice of application before the Tribunal constitutes the end of the section 10 inquiry. If the inquiry is terminated, there is no continuing basis for the section 11 order. In the alternative, Columbia House requests that reasonable costs incurred in complying with the order be paid by the Director.

Counsel advise that only two cases have considered when a section 10 inquiry terminates. In the first decision, *TNT Canada Inc. v. Canada (Director*

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[2] R.S.C. 1985, c. C-34, (the Act).

of Investigation and Research),[3] it was held that where criminal charges pursuant to the conspiracy provisions of the Act result from a section 10 inquiry, the purpose of the inquiry has been attained and the inquiry will terminate upon the laying of the charges. Accordingly, section 11 orders that had been issued *ex parte* shortly before the criminal trial and some four years after the charges had been laid were rescinded. Section 23 provides that the Director may, "... at any stage of an inquiry under section 10, in addition or in lieu of continuing the inquiry ...", remit information to the Attorney General of Canada for consideration as to whether a criminal offence has been committed under the Act.

In the second decision, *Canadian Pacific Ltd. v. Canada (Director of Investigation and Research),*[4] it was held that the Director's filing of an application before the Tribunal pursuant to the merger provisions under Part VIII did not cause the termination of the section 10 inquiry. In reaching his conclusion, Farley J. may have distinguished the criminal proceedings launched in *TNT Canada Inc.* from the civil remedy being sought in *Canadian Pacific Ltd.* He ordered that section 11 examinations, previously adjourned *sine die*, could be completed even after the filing of the notice of application

In a third case, *Canada (Director of Investigation and Research) v. Washington,*[5] the Tribunal considered a number of procedural issues resulting

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[3] (1995), 60 C.P.R. (3d) 303 (F.C.T.D.).

[4] (1997), 74 C.P.R. (3d) 65 (Ont. Gen. Div.). On September 19, 1997, the Court of Appeal for Ontario (docket nos. C24933, C26918 and C26939) quashed the appeal on the basis that no right of appeal from this decision existed pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

[5] (1996), 71 C.P.R. (3d) 13. The section 11 *ex parte* order was issued in Federal Court file no. T-2308-96. The order was issued on October 21, 1996 on the basis of material which disclosed that the Tribunal had set a completion date for discoveries on October 30, 1996 and a hearing date for January 13, 1997.

from section 11 examinations, three of which were ordered almost seven months after the filing of a notice of application pursuant to the merger provisions in section 92. The procedural issues were resolved with none of the parties, nor the Tribunal itself, apparently questioning the legality of the three section 11 examinations ordered subsequent to the institution of proceedings before the Tribunal.

Section 10 mandates the Director to inquire "with the view of determining the facts." In filing a notice of application before the Tribunal, the Director will have concluded that there exists sufficient information to initiate Part VIII proceedings. This does not necessarily mean that the Director has yet "determined the facts". As in other litigation, all parties to the application can continue to obtain information in support of their case prior to the hearing.

Counsel for Columbia House suggests that the Director can obtain his client's information through the issuance of a subpoena for the hearing before the Tribunal. That cannot be a complete answer. The information the Director is now seeking from Columbia House may be of use during the discovery process before the Tribunal. It may be of other assistance in the furtherance of civil remedy. There is no reason, in my view, to require the Director to wait until the Tribunal hearing for the production of information now subject to the order of this Court. I have reached this conclusion even though no provision similar to section 23 exists where a civil remedy is sought. None is required where the Director acts alone with no involvement of the Attorney General of Canada, which is one distinguishing feature among others between criminal proceedings and a Part VIII application. There is nothing in the Act which indicates that the

investigative tools made available to the Director through section 11 are removed because the Part VIII proceedings have commenced. The Director may not as yet have determined the facts, within the meaning of section 10, upon the filing of the application.

The Director need not disclose to the parties the reasons for issuing the notice of application prior to the expiry of the time limit for the compliance by Columbia House of the section 11 order.[6] One can speculate that time may be of the essence, particularly in a matter relating to refusal to deal. Section 11 orders may lend themselves to protracted motions where the information being sought is said to be subject to solicitor-client privilege. The Director may need to seek interim relief from the Tribunal, even prior to section 11 orders having been fully complied with. In my view, it would be contrary to the spirit of the Act to require the Director to await full compliance with the section 11 order before launching a civil remedy before the Tribunal.

Counsel for Columbia House has aptly noted that section 11 orders are extraordinary measures. These are matters, however, mandated by Parliament and under the jurisdiction and supervision of the superior courts. Also, the chairman of the Tribunal has stated that "... where legitimate allegations that the Director's conduct of his inquiry has led to an abuse of the Tribunal's process are made, I am satisfied that through subsection 8(1) of the *Competition Tribunal Act*,

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[6] It is essential, of course, that there be full and frank disclosure on an *ex parte* application. In this motion, the Director's affiant has deposed: "Subsequent to the issuance of the s. 11 Order, the Competition Bureau were *(sic)* advised of facts about the complainant's business which led to the conclusion that it was urgent to proceed with the Application, even though compliance with the s. 11 Order had not been achieved."

the Tribunal would be competent to deal with those allegations."[7]

In summary, I conclude that the Director's filing on September 30, 1997 of a notice of application seeking a section 75 order against the Warner companies does not affect this Court's order of September 9, 1997 requiring Columbia House to produce records and a written return by October 21, 1997. In my opinion, the Director's inquiry has not yet terminated, at least not at this time with respect to the section 11 order against Columbia House.

The issue of when a section 10 inquiry directed to a Part VIII civil remedy definitively ends or when its purpose has been attained need not be decided in this case. However, I am satisfied that the filing of a notice of application before the Tribunal does not in and of itself terminate a section 10 inquiry.

Concerning the alternative remedy sought by Columbia House, there may be exceptional circumstances where a section 11 order might be varied to provide for the reimbursement of costs, particularly where compliance with an order to produce voluminous material might be compromised because of a severe lack of resources. This is not a case, however, where the section 11 order requires any variations for the reimbursement of the costs incurred by Columbia House in marshalling and delivering the information to the Director.

For these reasons, the relief sought by Columbia House will be denied. On consent, the section 11 order will be varied concerning other issues raised in the notice of motion but not argued before me. There will be no order as to costs

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[7] *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 55 at 60.

with respect to this motion.

"A. Lutfy"
Judge

Toronto, Ontario
October 15, 1997

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO:	T-1959-97
STYLE OF CAUSE:	**IN THE MATTER OF** the Competition Act, R.S.C. 1985, c. C-34, as amended; **AND IN THE MATTER OF** an inquiry pursuant to paragraph 10(1)(b) of the Competition Act relating to the refusal of Warner Music Group Inc. and its affiliates, WEA International Inc. and Warner Music Canada Ltd., to deal with BMG Direct Ltd.; **AND IN THE MATTER OF** an Application by the Deputy Director of Investigation and Research (Civil Matters) under the Competition Act, for an Order requiring that The Columbia House Company or any of its affiliates within the meaning prescribed by subsection 2(2) of the Competition Act, produce certain records and make and deliver certain returns pursuant to paragraphs 11(1)(b), 11(1)(c) and subsection 11(2) of the Competition Act.
DATE OF HEARING:	OCTOBER 9, 1997
PLACE OF HEARING:	OTTAWA, ONTARIO
REASONS FOR ORDER BY:	LUTFY, J.
DATED:	OCTOBER 15, 1997

APPEARANCES:

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