Federal Court  Cour fédérale

Date: 20240528

Docket: T-848-24

Citation: 2024 FC 810

Ottawa, Ontario, May 28, 2024

PRESENT: THE CHIEF JUSTICE

BETWEEN:

EMPIRE COMPANY LIMITED and SOBEYS INC.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] These reasons concern a Motion to Strike brought by the Respondent, the Attorney General of Canada. The Motion relates to a Notice of Application filed by the Applicants (**"Empire and Sobeys"**) last month. In their Application, Empire and Sobeys seek judicial review of a decision by the Commissioner of Competition (the **"Commissioner"**) to commence an inquiry (the **"Inquiry"**) under the *Competition Act*, RSC 1985, c C-34 (the **"Act"**).

[2] The Inquiry was initiated under subparagraph 10(1)(b)(ii) of the Act after the Commissioner concluded that he has "reason to believe that grounds exist for the making of an Order under Part VIII of the Act." Those grounds pertain to the abuse of dominance provisions in section 79 of the Act. More specifically, the Inquiry seeks to determine the facts relating to the use of restrictive covenants and exclusivity clauses (collectively, **"Property Controls"**), in leases entered into by Empire and Sobeys in certain local markets in Canada, most notably the Halifax Regional Municipality.

[3] In their Application, Empire and Sobeys seek various types of relief, including an Order quashing or setting aside the Commissioner's decision to commence the Inquiry (the **"Decision"**), on the basis that it was invalid or unlawful.

[4] Empire and Sobeys make two principal arguments in support of their Application. The first is that the Commissioner could not have "reason to believe" that grounds exist for the making of an Order under section 79 of the Act, because he cannot have reason to believe that any of the elements of subsection 79(1) are met. Specifically, they assert that the Commissioner can have no "reason to believe" that (i) Empire and Sobeys have a dominant position in any properly defined relevant market; (ii) the Property Controls constitute a practice of anti-competitive acts; or (iii) that the Property Controls could prevent or lessen competition substantially. The second principal argument made by Empire and Sobeys is that the Decision appears to have been made for an improper purpose or based on irrelevant considerations. In this regard, Empire and Sobeys allege that they have a well-founded perception of being unfairly targeted by the Commissioner.

[5] In the present Motion to Strike, the Respondent advances three principal arguments. First, he maintains that the decision to commence an inquiry under section 10 of the Act is not a type of administrative action that gives rise to a right of judicial review. To support this contention, the Respondent states that the Decision does not affect the Applicants' rights, does not impose legal obligations on any of the targets of the Inquiry, and does not cause prejudicial effects on any of those persons. Second, the Respondent states that Empire and Sobeys have failed to allege or plead material facts regarding any affected legal rights, legal obligations or prejudicial effects resulting from the Decision to commence the Inquiry. Third, the Respondent states that the underlying Application is premature, because Empire and Sobeys have an adequate and effective recourse available under Rule 399 of the *Federal Courts Rules*, SOR/98-106 (the **"Rules"**).

[6] For the reasons that follow, I agree with the Respondent's principal submissions. Accordingly, this Motion to Strike will be granted.

II. The Parties

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

[8] Empire Company Limited (**"Empire"**) is a Canadian public company headquartered in Stellarton, Nova Scotia, which invests in businesses that operate primarily in the food retail and real estate sectors.

[9] Sobeys Inc. (**"Sobeys"**) is a wholly-owned subsidiary of Empire. Sobeys is a national supermarket chain that operates approximately 1,600 stores across Canada.

III. Relevant Legislation

[10] Pursuant to subparagraph 10(1)(b)(ii) 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 and is not relevant to this Application. Part VIII deals with civilly reviewable trade practices, including the abuse of dominant position provisions in section 79.

[11] Once an inquiry has been commenced, the formal investigative powers set forth in section 11 of the Act may be exercised by the Commissioner, subject to judicial oversight. Those powers include the powers that the Commissioner is seeking to obtain pursuant to a separate application against Empire that he has filed under paragraphs 11(1)(b) and (c) of the Act. The former provision permits "a judge of a superior or county court" to issue 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." Paragraph 11(1)(c) permits the judge to issue 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 judge 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.

[12] Pursuant to section 79 of the Act, the Competition Tribunal may prohibit a person or persons from engaging in a practice or conduct where it makes two findings. First, it must find that the person or persons in question substantially or completely control, throughout Canada or any area thereof, a class or species of business. Second, it must find that the person or persons in question have engaged in or are engaging in either (a) a practice of anti-competitive acts, or (b) conduct that has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest. In the latter case, the Tribunal must also find that the above-mentioned effect is not a result of superior competitive performance.

[13] Subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, permits an application for judicial review to be made to this Court by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. Pursuant to paragraph 18.1(3)(b), the Court may:

> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[14] Rule 221 of the Rules authorizes the Court, on motion, to order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on numerous grounds. These include that the pleading discloses no reasonable cause of action.

[15] Rule 399 provides for the setting aside or variance of an Order in certain circumstances. I will elaborate on this in Part V.D. of these reasons below.

[16] The full text of section 10, subsection 11(1) and subsection 79(1) of the Act is reproduced in Appendix 1 to these reasons. The full text of subsections 18.1(1) and (3) of the *Federal Courts Act* is reproduced in Appendix 2. The full text of Rules 221 and 399 is reproduced in Appendix 3.

IV. Issues

[17] This Motion raises three principal issues. They are as follows:

1. Is the Decision to commence the Inquiry reviewable by this Court?
2. If so, have Empire and Sobeys alleged sufficient material facts to survive a Motion to Strike?
3. Is the underlying Application premature?

V. Analysis

A. *General Principles*

[18] In requesting that the underlying Application be struck, the Respondent referenced Rule 221(1), which grants the Court the authority to order that a pleading be struck out, with or without leave to amend, on various grounds. One of the enumerated grounds is that the pleading discloses no reasonable cause of action or defence, as the case may be.

[19] However, the underlying proceeding is not an action. It is an application for judicial review. Consequently, Rule 221 does not apply. Instead, this Court's jurisdiction to strike the underlying Application is grounded "in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes": *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 at para 48 [***JP Morgan***].

[20] In this context, the applicable test is whether the underlying application is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of success": *JP Morgan*, at para 47; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 33 [***Wenham***], leave to appeal to SCC refused, 39518 (10 June 2021).

[21] In applying this test, "the facts alleged in the notice of application are taken to be true": *JP Morgan* at para 52. Moreover, that document must be read "holistically and practically without fastening onto matters of form": *JP Morgan*, at para 50; *Wenham*, at para 34.

[22] Nevertheless, there are limits to the presumption of truth that applies to facts alleged in a notice of application. In brief, that presumption does not apply where those alleged facts "are patently ridiculous, incapable of proof, or based on assumptions or speculations": *Vachon Estate v Canada (Attorney General)*, 2024 FC 709, at para 28(d). Moreover, as with motions to strike in other contexts, the facts alleged must not be "inconsistent with common sense, vague generalization[s], conjecture[s], bare allegations [or] bald conclusory legal statements […]" *Jensen v Samsung Electronics Co. Ltd*., 2023 FCA 89, at para 52(b), endorsing *Jensen v*

Samsung Electronics Co Ltd, 2021 FC 1185, at paras 81–82. See also *L'Oratoire Saint-Joseph du Mont-Royal v J.J.*, 2019 SCC 35, at paras 59–60.

[23] Likewise, "the bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of a material fact": *Canadian Olympic Association v USA Hockey, Inc.*, 1997 CanLII 5256 (FC); see also *Canada v John Doe*, 2016 FCA 191 at para 23, and *Dadoun c Canada (Procureur général)*, 2021 FC 461 at para 15.

B. *Is the Decision to commence the Inquiry reviewable by this Court?*

[24] The Respondent asserts that a fatal flaw with the underlying Application is that the Decision to commence the Inquiry does not affect any legal rights, impose any legal obligations on the targets of the Inquiry, or cause prejudicial effects. I agree.

[25] Empire and Sobeys state that the Decision to commence the Inquiry may be reviewed by this Court because (i) the Decision is "a decision, order, act or proceeding of a federal board, commission or other tribunal" within the meaning of paragraph 18.1(3)(b) of the *Federal Courts Act*; and (ii) they have been directly affected by that Decision, within the meaning of subsection 18.1(1) of that legislation: see paragraph 13 above.

[26] However, some types of administrative decisions described in paragraph 18.1(3)(b) are not subject to review. These include (i) decisions that are not justiciable, (ii) decisions that do not give rise to an adequate remedy, and (iii) decisions that do not affect rights, impose legal obligations, or cause prejudicial effects: *Canada (Attorney General) v Democracy Watch*, 2020

FCA 69, at para 19 [***Democracy Watch 2020***]; see also *Democracy Watch v Attorney General of Canada*, 2021 FCA 133, at paras 23 and 29, and *Wenham*, at para 36(i).

[27] In my view, the Decision to commence the Inquiry falls into the latter category, as it does not affect any rights of Empire or Sobeys, it does not impose legal obligations upon them, and it does not cause them any prejudicial effects (collectively, a **"Triggering Impact"**).

[28] During the hearing, Empire and Sobeys attempted to distinguish *Democracy Watch 2020* on the basis that the impugned decision there was a discretionary decision by the Commissioner of Lobbying not to conduct an investigation under the *Lobbying Act*, RSC 1985, c 44 (4th Supp.). However, in my view, the differences between the types of decisions challenged in that case and in the present proceeding do not have any bearing on the general principle that some decisions described in paragraph 18.1(3)(b) of the *Federal Courts Act* are not subject to review. These include decisions described in the two immediately preceding paragraphs above.

[29] The fact that subsection 10(1) of the Act articulates a specific and mandatory test to be applied by the Commissioner in determining whether to commence an inquiry does not change the fact that a decision to commence an inquiry is subject to the test articulated in *Democracy Watch 2020*: see paragraph 26 above.

[30] Without more, the Commissioner's decision to commence an inquiry is simply a procedural step that gives the Commissioner access to the formal investigative powers described

in subsection 11(1). [1] That decision, in and of itself, generally does not give rise to a Triggering Impact. At that stage of the Commissioner's investigation, the Commissioner is merely attempting to "determin[e] the facts": Act, paragraph 10(1).

[31] Ultimately, the Commissioner may decide to discontinue the inquiry, without ever having taken any action that might affect anyone's legal rights, impose legal obligations on anyone, or cause anyone prejudicial effects: Act, subsection 22(1). This is particularly so given that all inquiries under section 10 of the Act are required to be conducted in private: Act, subsection 10(3).

[32] If the Commissioner wishes to exercise the powers available under subsection 11(1), he or she must file an application to a superior court or a county court. It is only if and when a judge grants or partially grants the requested Order that a Triggering Impact on one or more of the targets of the inquiry *may* occur. In such circumstances, the respondents to the application would then have certain rights of recourse. I will return to this in Part V. D. of these reasons.

[33] Relying on *Moresby Explorers Ltd. v Canada (Attorney General)*, 2006 FCA 144, at paras 16–19 [***Moresby***], Empire and Sobeys state that they are entitled to seek judicial review in respect of the Decision to commence the Inquiry, because they are within "the intendment" or ambit of that Decision. However, *Moresby* is distinguishable. The disputed decisions there

[1] The decision to commence an inquiry also has other potential implications under the Act, which are not relevant for the present purposes. Among other things, the existence of an inquiry is a precondition to the ability of the Competition Tribunal to issue interim orders under subsections 100(1) and 103.3(1) of the Act. Likewise, the Governor in Council's jurisdiction under section 31 of the Act to remove or reduce customs duties is triggered by the results of "an inquiry under this Act, a judgment of a court or a decision of the [Competition] Tribunal." See also subsection 124.2(1), regarding references to the Competition Tribunal by the Commissioner and "a person who is the subject of an inquiry under section 10 or 10.1."

concerned licensing policies that were adopted by the Archipelago Management Board in British Columbia. One of those policies limited the number of clients a tour operator could bring into the park reserve to 22 per day. A second policy imposed a quota of 2,500 user-days/nights per year on tour operators. Despite the fact the appellants had never exceeded more than 1,850 quota units, the Federal Court of Appeal (**"FCA"**) found that they were within the "intendment" of the policy and therefore they did not have to wait until it caused them a loss before being able to challenge it: *Moresby*, at paras 16 and 19. That situation is distinguishable from a decision by the Commissioner to commence an inquiry, because the policies that limited the appellants' ability to grow their business had already been taken. By contrast, the mere decision to commence an inquiry, without more, does not affect any rights of Empire or Sobeys, does not impose any legal obligations on them, and does not cause them any prejudicial effects. No such consequences can arise unless and until the Commissioner takes further action.

[34] I recognize that, at the time Empire and Sobeys filed their underlying Application, they had already been informed that the Commissioner anticipated seeking, in the near future, an Order under section 11 of the Act. Indeed, the application for that Order was filed shortly before the hearing of this Motion. However, the decision being challenged in the underlying Application is the Decision to commence the Inquiry. It is not the decision to seek an Order under section 11 of the Act. Empire and Sobeys appear to be conflating the Decision to commence the Inquiry with a subsequent decision the Commissioner anticipated making.

[35] Empire and Sobeys also rely on *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FCA 101 [***Wheat Board***]. There, the disputed decision concerned the

federal government's decision to issue a directive regarding the election of directors to the Canadian Wheat Board. Among other things, that directive deprived the appellants of automatic inclusion in a voter's list, and thereby their right to automatically receive a voting package and ballot, in certain circumstances. In other words, the directive "changed the rights attached to holding a permit book and so directly affected all of the appellants, except for the Friends of the Canadian Wheat Board, which is not a permit book holder": *Wheat Board*, at para 22. The Court relied upon this change in existing rights to conclude that the appellants in question were directly affected. Although some of the appellants had not yet been adversely impacted by the impugned directive, they did not have to wait until such an impact occurred. The changing of their rights provided a sufficient basis upon which to conclude that they had been directly affected.

[36] Once again, *Wheat Board* is distinguishable on the basis that the disputed decision changed existing rights, whereas the Commissioner's Decision to commence the Inquiry did not affect any rights of Empire or Sobeys, or have any other Triggering Impact.

[37] I pause to add that *Moresby* and *Wheat Board* each concerned the appellants' standing to challenge the disputed decision. By contrast, the issue in the present proceeding is not whether Empire and Sobeys have standing to challenge the Decision to commence an Inquiry, but rather whether they have experienced, or are likely to experience, a Triggering Impact solely as a result of the Commissioner's Decision to commence the Inquiry.

[38] Empire and Sobeys also rely on *Cinémas Guzzo Inc v Canada (Attorney General)*, 2005 FC 691 [***Guzzo***], aff'd 2006 FCA 160 [***Guzzo FCA***]. The disputed decision there concerned the

Commissioner's discontinuance of an inquiry into the distribution of motion pictures in Canada. As with the Inquiry being challenged in the present proceeding, the inquiry there had been commenced under subparagraph 10(1)(b)(ii) of the Act. It was discontinued after the Commissioner found no evidence of anti-competitive practices. The applicant then sought judicial review on the basis that the Commissioner had failed to carry out his duties under the Act, and had not acted fairly.

[39] Ultimately, the Court concluded that the Commissioner's decision to discontinue the inquiry was simply a discretionary "administrative act" that did not affect rights or obligations, or require a hearing: *Guzzo*, at para 40. The Court then added that the duty of fairness was minimal and that "[t]he Commissioner enjoys a high degree of latitude in conducting an inquiry and […] has broad discretion under subsection 22(4) to discontinue one": *Guzzo*, at para 45. The Court proceeded to assess the applicant's procedural fairness arguments and concluded that the applicant had failed to show that the Court's intervention was warranted: *Guzzo*, at para 57.

[40] In a very short ruling issued from the bench, the FCA upheld this Court's findings. In the course of doing so, it observed that "the issue of an order to continue an investigation is discretionary": *Guzzo FCA*, at para 6. It added that this Court's comments on the issue of procedural fairness were "mere *obiter*, considering that it was so obvious on the one hand that there was no breach whatsoever of procedural fairness, and on the other hand no serious debate was undertaken concerning the correctness and the application of *Warner*": *Guzzo FCA*, at para 7.

[41] In my view, *Guzzo* is of limited utility for the present purposes. This is so for at least three distinct reasons. First, the decision under review concerned a decision by the Commissioner to discontinue an inquiry, rather than a decision to commence an inquiry. Second, this Court applied jurisprudence that interpreted a prior version of section 28 of the *Federal Courts Act*. It was for that reason that the Court focused on whether the decision was purely "administrative" or was required to be made on a "judicial or quasi-judicial basis."[2] Third, the decisions by this Court and by the FCA are not entirely clear regarding whether the decision under review was subject to judicial review.

[42] It nevertheless remains noteworthy that this Court made a clear finding that the Commissioner's decision to discontinue the inquiry in question did not affect rights or obligations: *Guzzo*, at para 40. This is consistent with my view that the Decision to commence the Inquiry does not affect any legal rights of Empire or Sobeys, and does not impose any legal obligations upon them.

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1. The version of section 28 that was applied in the jurisprudence quoted by the Court stated as follows:

> *28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal;*
>
> *(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;*
>
> *(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or*
>
> *(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.*

[43] Empire and Sobeys also rely on *Charette v Commissioner of Competition*, 2003 FCA 426 [***Charette***]. There, the dispute concerned whether the Commissioner was required to initiate a formal inquiry into a complaint filed by the appellant pursuant to section 9 of the Act. The Commissioner did not do so, despite the fact that paragraph 10(1)(a) specifically requires an inquiry to be commenced upon receipt of an application under section 9. The Commissioner took that position because he had already conducted a detailed inquiry into precisely the same complaints made by the appellant. That inquiry was conducted under paragraph 10(1)(b) of the Act. As a result of that inquiry, the Commissioner concluded that there was no reason to believe the Act had been contravened.

[44] At first instance, this Court agreed with the Commissioner on the basis that he had already performed the legal duty that he owed to Mr. Charette under the Act, namely, to investigate the appellant's complaint. On appeal, the FCA reached the same conclusion after adopting a purposive analysis of section 10. It reasoned that "the Commissioner is not required to initiate a formal inquiry under paragraph 10(1)(a) into complaints that he has already thoroughly investigated and found not to warrant a formal inquiry under paragraph 10(1)(b)": *Charette*, at para 50.

[45] I pause to observe in passing that, in the course of reaching that conclusion, the Court added that "the purpose behind section 10 of the Act is for the Commissioner to gather information to determine whether there are grounds to either bring a civil case before the Competition Tribunal or present evidence to the Attorney General of Canada that a criminal case should be prosecuted": *Charette*, at para 50.

[46] Empire and Sobeys maintain that *Charette* supports their view that this Court may review decisions made by the Commissioner as to whether or not to initiate an inquiry. In this regard, they place particular importance on the fact that the FCA observed that "[t]he investigation actually undertaken by the Commissioner must be examined": *Charette*, at para 56.

[47] In my view, *Charette* is distinguishable on the basis that it concerned the application of paragraph 10(1)(a) in the very unique circumstances in which the Commissioner had already conducted an investigation under paragraph 10(1)(b). In that context, the FCA's view that the latter investigation must be examined before any conclusion can be reached regarding the application of paragraph 10(1)(a) is entirely understandable. However, it does not in any way imply that this Court has any authority to review a decision by the Commissioner *to commence* an inquiry under paragraph 10(1)(b).

[48] In summary, for the reasons set forth above, I agree with the Respondent that the Decision to commence the Inquiry is not reviewable by this Court because that decision, in and of itself, does not affect any rights of Empire or Sobeys, does not impose legal obligations upon them, and does not cause them any prejudicial effects. I also agree with the Respondent that the underlying Application is therefore "doomed to fail."

[49] My conclusion on this issue provides a sufficient basis upon which to grant this Motion to Strike. However, given the assertion by Empire and Sobeys that this conclusion would effectively immunize the Commissioner's exercise of statutory powers from review, I will proceed to address the two other principal issues raised on this Motion.

C. *Have Empire and Sobeys alleged sufficient material facts to survive a Motion to Strike?*

[50] The Respondent maintains that the underlying Application is also doomed to fail because it does not even allege that the Decision to commence the Inquiry (i) affects any legal rights of Empire or Sobeys, (ii) imposes any legal obligations on them, or (iii) causes them any prejudicial effects.

[51] I agree. The various allegations made in the underlying Application are entirely directed towards two principal submissions. The first is the Applicants' position that the Commissioner could not have "reason to believe" that grounds exist for the making of an order under section 79 of the Act, because he cannot have reason to believe that any of the elements of subsection 79(1) are met: see paragraph 4 above and paragraphs 11 to 26 and 30 of the underlying Application. The second principal submission advanced is that the Decision appears to have been made for an improper purpose or based on irrelevant considerations: see paragraphs 27 to 30 of the underlying Application.

[52] For greater certainty, the underlying Application does not make any allegations whatsoever regarding the actual or potential impact of the Decision on any legal rights of Empire or Sobeys. Likewise, it does not allege that the Decision imposes legal obligations on them, or that it causes any prejudicial effects.

[53] This is a second, distinct, reason why the underlying Application is doomed to fail.

[54] Empire and Sobeys maintain that it is readily apparent that they will suffer prejudice as soon as the Commissioner seeks an Order under section 11 of the Act. They make this assertion on the basis that courts have recognized the substantial financial and management time burden that compliance with such Orders imposes on respondents to applications granted under section 11. Empire and Sobeys add that further, reputational, prejudice can reasonably be expected to flow from the fact that the Commissioner often issues a news release after obtaining an Order under section 11.

[55] After the Respondent reiterated that there was no allegation of this or any other prejudice in the underlying Application, Empire and Sobeys requested leave to amend their Application to address the issue of prejudice.

[56] However, granting such leave would not change the fact that the underlying Application challenges the Decision to commence the Inquiry. It does not challenge the Commissioner's subsequent decision to seek an Order under section 11 of the Act. The prejudice described by Empire and Sobeys would flow from the latter decision, and any further decision the Commissioner might make to issue a press release. It would not flow from the Decision to commence the Inquiry, in and of itself. Accordingly, I decline to grant the requested leave to amend the underlying Application.

D. *Is the underlying Application premature?*

[57] The Respondent asserts that the underlying Application is premature, because an adequate, effective recourse is available elsewhere: *JP Morgan* at paragraph 84; *Wenham*, at para

36(I); *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, at para 22. Specifically, the Respondent states that a motion brought pursuant to Rule 399 is the proper mechanism for Empire and Sobeys to challenge the Decision to commence the Inquiry. The Respondent adds that such a motion would provide Empire and Sobeys with meaningful rights to raise issues regarding the prejudice they allege they would suffer in relation to the *ex parte* application the Commissioner has filed under section 11 of the Act.

[58] I agree. For convenience, I will reproduce the part of Rule 399 that is relevant for the present purposes:

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*; […]
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.

[59] Empire and Sobeys maintain that the existing jurisprudence under section 11 of the Act and Rule 399 does not provide them with adequate, effective recourse.

[60] In this regard, they begin by noting that, in *Commissioner of Competition v Pearson Canada Inc.*, 2014 FC 376 at para 37 [***Pearson***], this Court stated that, in determining whether to grant an application brought under section 11 of the Act, the Court is not required to consider whether there is reason to believe that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act (see also *Canadian Pacific Ltd. v Canada (Director of Investigation and Research)*, 1995 CanLII 7315 (ON SC), at para 8). However, Empire and Sobeys fail to recognize that the Court in *Pearson* proceeded to qualify that statement. It did so in the following passages:

> [41] […] I do not accept the respondents' position that the Commissioner is required to provide some evidence to explain why there is reason to believe that the grounds set forth in subparagraph 10(1)(b)(ii) exist. I am not aware of any other authority that would support this view. That being said, as a practical matter, it may be difficult for the Court to satisfy itself that a respondent has or is likely to have information that is relevant to the Commissioner's inquiry, as required by subsection 11(1), *without some contextual evidence of this nature*. In the present application, the Commissioner amply satisfied the Court in this regard.
>
> [42] In my view, the Commissioner's evidentiary obligations on an application under section 11 are not rooted in his reasons to believe that those grounds exist, but rather in (i) the duty of full and frank

> disclosure that exists on an *ex parte* application, and (ii) the Court's duty to satisfy itself that the information being sought by the Commissioner is relevant to the inquiry in question, and is not excessive, disproportionate or unnecessarily burdensome (*Hryniak v Mauldin*, 2014 SCC 7, at para 32; RBC, above, at paras 21–23).
>
> [43] It is now well established that, as a statutory authority responsible for the administration and enforcement of the Act, the Commissioner benefits from a presumption that actions taken pursuant to the Act are bona fide and in the public interest [citations omitted]. *Accordingly, in the absence of evidence of bad faith or other evidence that the Commissioner's inquiry is not a bona fide inquiry,* it will be presumed to be so.
>
> [Emphasis added.]

[61] The Court in *Pearson* proceeded to add that it "will be vigilant to ensure that the Commissioner is not embarking on a 'fishing expedition'": *Pearson*, at para 49.

[62] It is also relevant to note that *Pearson* addressed the Court's role on an application brought under section 11 of the Act. It did not address the Court's role in a motion brought under Rule 399.

[63] Empire and Sobeys maintain that, in *Canada (Commissioner of Competition) v Canada Tax Reviews Inc.*, 2021 FC 921, at para 30 [***CTR***], this Court articulated a test for Rule 399 motions that would appear to significantly limit a respondent's ability to challenge the basis for the Commissioner's decision to commence an inquiry.

[64] Paragraph 30 of *CTR* states as follows:

> [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.

[65] I acknowledge that the foregoing test limits a respondent's ability to challenge the basis for the Commissioner's decision to commence an inquiry. However, that test nevertheless provides adequate, effective recourse to Empire and Sobeys.

[66] Among other things, the test would enable Empire and Sobeys to seek to have any Order that may be issued against them under section 11 set aside or varied on the basis that the Inquiry was initiated as a result of political pressure, rather than on the grounds set forth in subparagraph 10(1)(b)(ii) of the Act, as they have alleged. Of course, in considering any such argument, it may be relevant for the Court to consider the Minister's ability to direct the Commissioner to inquire into the existence of circumstances described in paragraph 10(1)(b), as set forth in paragraph 10(1)(c).

[67] In addition, this test would enable Empire and Sobeys to challenge the disclosure made by the Commissioner, in the application for an Order under section 11 of the Act. Given the *ex parte* nature of such applications, the Commissioner is required to inform the court of "any points of fact or law known to it which favour the other side": *Pearson*, at para 44. The elevated

duty of disclosure that applies in section 11 applications also requires the Commissioner to share with the Court "the essence of a respondent's concerns," as identified in exchanges with the Commissioner during the pre-issuance dialogue process, "to ensure that the Court is not misled": *CTR*, at paras 33 and 36. Moreover, as a practical matter, the Commissioner is expected to provide "some contextual evidence" regarding the basis for the inquiry: *Pearson*, at para 41.

[68] Empire and Sobeys would also be free to lead evidence to demonstrate that the Commissioner acted on a "whim" in initiating the inquiry, or was simply embarking on a "fishing expedition": *Pearson*, at paras 40 and 49.

[69] Collectively, these areas of potential challenge in a motion under Rule 399 provide meaningful and effective scope to seek to set aside any Order that might be issued under section 11 of the Act, on the basis that the Inquiry was improperly initiated under paragraph 10(1)(b)(ii).

[70] As Empire and Sobeys recognized during the hearing of this Motion, it would likely be rare that a respondent named in a section 11 Order would be able to demonstrate that the Commissioner had engaged in such improper conduct.

[71] This is in part because the "reason to believe" standard set forth in subsection 10(1) of the Act is a relatively low bar to clear. Although there is scant jurisprudence regarding that standard in the context of section 10 of the Act, there is jurisprudence interpreting the same standard, as it appears in subsection 103.1(7) of the Act. That jurisprudence has interpreted the "reason to believe" standard as requiring "sufficient credible evidence to give rise to a bona fide belief":

Bank of Nova Scotia v B-Filer Inc., 2006 FCA 232, at para 2; *Symbol Technologies Canada ULC v Barcode Systems Inc*., 2004 FCA 339, at para 16; *National Capital News Canada v Milliken*, 2002 CACT 41 at para 14.

[72] The fact that Parliament chose to adopt the "reason to believe" standard in subsections 10(1) and 103.1(7) of the Act, while embracing the "reasonable grounds to believe" standard elsewhere in the Act,[3] implies that Parliament considers those two standards to be different.

[73] The "reasonable grounds to believe" standard has been interpreted to contemplate "an objective basis for the belief which is based on compelling and credible information": *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 114. I consider this to be a higher standard than what has been held to be contemplated by the "reason to believe" standard. In my view, a lower threshold for the latter standard makes eminent sense in the context of section 10 of the Act, given that it is often invoked at an early stage of the investigatory process, "with the view of determining the facts": Act, subsection 10(1).

[74] In any event, it must be borne in mind that the Commissioner benefits from a presumption "that actions taken pursuant to the Act are *bona fide* and in the public interest": *Pearson*, at para 43.

[75] Consequently, "[a]bsent evidence of bad faith or the existence of other exceptional circumstances … the Court should refrain from making determinations at this fact finding stage which essentially reach final conclusions regarding the substantive merits of an inquiry":

[3] See, for example, sections 15, 30.06, 30.11, 30.16 and 66.1 of the Act.

Pearson, at para 90, citing *Irvine v Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), at para 87.

[76] While this principle would preclude garden variety challenges to the Commissioner's "reason to believe" that grounds exist for the making of an order under Part VII.1 or Part VIII of the Act, as contemplated by subsection 10(1) of the Act, it would not preclude a challenge based on robust evidence that such grounds could not reasonably exist in the circumstances.

[77] However, such evidence would have to consist of more than bald and unsupported statements regarding the absence of such grounds. In addition, where the inquiry is focused on the abuse of dominance provisions of the Act, it may not suffice to simply adduce evidence that the Respondent could not possibly "substantially or completely control a class or species of business." This would not account for any reasonable possibility of a situation of joint substantial control that may be of concern. This is one apparent shortcoming in the submissions made by Empire and Sobeys in the present Motion.

[78] Likewise, it generally would not suffice to simply lead evidence of a clear pro-competitive purpose underlying the conduct being investigated. This is because the test for what constitutes an "anti-competitive act" requires a balancing of any legitimate business justifications that may have been advanced by a respondent, against "any subjectively intended and/or reasonably foreseeable predatory, exclusionary or disciplinary negative effects on a competitor" that ultimately may be established: *The Commissioner of Competition v Vancouver Airport Authority*, 2019 CACT 6, at paras 516–520. Once again, this is something that was not addressed

by Empire and Sobeys in support of their submission that the Property Controls are not a practice of anti-competitive acts, within the meaning of subsection 79(1) of the Act.

[79] I pause to observe that any robust allegations of improper conduct on the part of the Commissioner that may be made during the pre-issuance dialogue process would be relevant to the exercise of the Court's discretion to issue an Order under section 11 of the Act. The judicial oversight provided at the stage of considering an application under section 11 provides a further safeguard against the improper exercise of the Commissioner's powers under section 10, at least when respondents avail themselves of their opportunity to raise robust concerns in this regard during their pre-issuance dialogue with the Commissioner.

[80] In summary, in the exceptional or rare case in which there is evidence that the Commissioner may have initiated an inquiry on improper grounds, it would be open to a Respondent to seek to have an Order issued under section 11 of the Act set aside or varied on that basis. However, this would require the Respondent to demonstrate such improper grounds on a balance of probabilities. In my view, this ability to seek to set aside or vary any Order that may be issued under section 11 constitutes adequate and effective alternative recourse available to Empire and Sobeys. This is because the only plausible prejudice or other Triggering Impact they have identified in this proceeding would flow from such an Order, rather than from the Commissioner's Decision to commence the Inquiry.

[81] Given the availability of this adequate, effective recourse under Rule 399, I agree with the Commissioner that the underlying Application is doomed to fail on the basis of the doctrine of prematurity. This is a third, distinct, basis upon which I will grant this Motion to Strike.

VI. Conclusion

[82] There are three distinct reasons why this Motion to Strike will be granted. First, for the reasons provided in part V. B. above, the Decision to commence the Inquiry is not reviewable by this Court because that decision, in and of itself, does not affect any rights of Empire or Sobeys, does not impose legal obligations upon them, and does not cause them any prejudicial effects.

[83] Second, as discussed in Part V. C. above, the underlying Application *does not make any allegations whatsoever* regarding the actual or potential impact of the Decision on any legal rights of Empire or Sobeys. Likewise, it does not allege that the Decision imposes legal obligations on them, or that it causes any prejudicial effects.

[84] Third, for the reasons set forth in Part V. D. above, the underlying application is premature. In brief, this is because Empire and Sobeys have adequate, effective recourse under Rule 399.

[85] Having regard to the factors set forth in Rule 400(3), particularly the result of this Motion, the importance and complexity of the issues, and the amount of work that was involved, I will fix costs payable by Empire and Sobeys at a lump sum amount of $5,000.00.

Order in T-848-24

THIS COURT ORDERS THAT:

1. The Attorney General of Canada's request that the Court strike the Applicants' Notice of Application, dated April 12, 2024, in its entirety is granted without leave to amend.
2. The Applicants shall pay to the Attorney General of Canada costs fixed in the lump sum amount of $5,000.00.

"Paul S. Crampton"
Chief Justice

Appendix 1

Competition Act, RSC 1985, c C-34

Inquiry by Commissioner

10 (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

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.

Enquête par le commissaire

10 (1) Le commissaire fait étudier, dans l'un ou l'autre des cas suivants, toutes questions qui, d'après lui, nécessitent une enquête en vue de déterminer les faits :

a) sur demande faite en vertu de l'article 9;

b) chaque fois qu'il a des raisons de croire :

(i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,

(ii) soit qu'il existe des motifs justifiant une ordonnance en vertu des parties VII.1 ou VIII,

(iii) soit qu'une infraction visée à la partie VI ou VII a été perpétrée ou est sur le point de l'être;

c) chaque fois que le ministre lui ordonne de déterminer au moyen d'une enquête si l'un des faits visés aux sous-alinéas b)(i) à (iii) existe.

Information on inquiry

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

Renseignements concernant les enquêtes

(2) À la demande écrite d'une personne dont les activités font l'objet d'une enquête en application de la présente loi ou d'une personne qui a demandé une enquête conformément à l'article 9, le commissaire instruit ou fait instruire cette personne de l'état du déroulement de l'enquête.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

Enquêtes en privé

(3) Les enquêtes visées au présent article sont conduites en privé.

Order for oral examination, production or written return

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 or 10.1 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

Ordonnance exigeant une déposition orale ou une déclaration écrite

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 des articles 10 ou 10.1 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

b) de produire auprès du commissaire ou de son représentant

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 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.

autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres 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.

Prohibition if abuse of dominant position

79 (1) On application by the Commissioner or a person granted leave under section 103.1, if the Tribunal finds that one or more persons substantially or completely control a class or species of business throughout Canada or any area of Canada, it may make an order prohibiting the person or persons from engaging in a practice or conduct if it finds that the person or persons have engaged in or are engaging in

(a) a practice of anti-competitive acts; or

(b) conduct

(i) that had, is having or is likely to have the effect of preventing or lessening competition substantially in a market in which the person or persons have a plausible competitive interest, and

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, il conclut qu'une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions et adoptent ou ont adopté une pratique ou un comportement ci-après, le Tribunal peut rendre une ordonnance leur interdisant d'adopter la pratique ou le comportement :

a) une pratique d'agissements anti-concurrentiels;

b) un comportement qui a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché dans lequel la personne ou les personnes ont un intérêt concurrentiel valable, cet effet ne résultant pas d'un rendement concurrentiel supérieur.

(ii) the effect is not a result of superior competitive performance.

Appendix 2

Federal Courts Act, RSC 1985, c F-7

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Appendix 3

Federal Courts Rules, SOR/98-106

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

Evidence

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

Setting aside or variance

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

e) qu'il diverge d'un acte de procédure antérieur;

f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

Preuve

(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

Annulation sur preuve prima facie

399 (1) On motion, the Court may set aside or vary an order that was made

(a) ex parte; or

(b) in the absence of a party who failed to appear by accident or mistake or by reason of insufficient notice of the proceeding,

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

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Effect of order

(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.

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) toute ordonnance rendue sur requête ex parte;

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.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

Effet de l'ordonnance

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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