LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

Federal Court: Competition Bureau may seek s. 11 examinations as part of Rogers investigation

By **Karunjit Singh**

Law360 Canada (May 13, 2025, 6:05 PM EDT) -- The Federal Court has dismissed a motion to set aside an order compelling two individuals to be examined by the Competition Bureau in relation to an investigation into the marketing of Rogers Communications' infinite mobile data plans.

In *Canada (Commissioner of Competition) v. McGee*, 2025 FC 860, released on May 9, Justice Denis Gascon rejected arguments that the order should not have been granted as the commissioner's inquiry into Rogers effectively ended when proceedings against Rogers were initiated before the Competition Tribunal.

The judge cited *Canada (Director of Investigation and Research (Civil Matters), Competition Act) v. Warner Music Group Inc.,* [1997] F.C.J. No. 1348, in which the Federal Court held that nothing in the *Competition Act* indicates that investigative tools available to the commissioner are removed when civil proceedings under the Act are commenced.

"*Warner* recognized that the filing of a civil application is distinguishable from a criminal proceeding, and that the Commissioner's investigative tools are unaffected by the commencement of proceedings in the Tribunal," the judge wrote.

The bureau announced in December 2024 that it had initiated legal action against Rogers, alleging the company's advertisements falsely suggested its Infinite wireless plans offer unlimited data. The bureau noted that these plans in fact had data caps, which once reached led to data speeds being throttled by 99 per cent.

During its investigation, the bureau sought and obtained an order requiring Dig Insights Inc., a third-party market research firm retained by Rogers, to produce documents and submit written returns of information in connection with the inquiry.

In February, the applicant, the commissioner of competition, brought an application under s.11 of the Act against the respondent Rory McGee, a former employee of Dig, and Dominic Atkinson, a current employee of Dig, to compel them to be examined on matters relevant to the inquiry.

Rogers had objected to the commissioner's request for the examinations and filed a motion to obtain permission to make submissions on the s. 11 application, even though it was not a party to it.

Rogers had raised concerns that the commissioner was improperly trying to circumvent the tribunal's discovery rules, and that his request for examinations was not related to the inquiry because the inquiry ended once the commissioner filed his application against Rogers before the tribunal.

The Federal Court denied Rogers' motion and issued an order that the respondents be examined by the commissioner "on any matter that is relevant to the Inquiry."

Justice Gascon found that the inquiry was still ongoing and that there was no evidence of bad faith or that the commissioner's inquiry is not *bona fide*.

He also held that the examinations sought by the commissioner were not excessive, disproportionate or unnecessarily burdensome.

The judge concluded that filing a notice of application with the tribunal does not automatically indicate that the commissioner has ended the underlying inquiry.

He held that the commissioner may still make *ex parte* applications to the court under s. 11, as long as the inquiry is ongoing, even after a notice of application has been filed with the tribunal.

The respondents brought a motion under s. 399 of the *Federal Courts Rules*, arguing that the order should not have been made since the s. 11 application was not in furtherance of an ongoing *bona fide* inquiry into Rogers and that the order was excessive, disproportionate or unnecessarily burdensome.

They argued that the commissioner should not be permitted to invoke his extraordinary investigative powers under s. 11 of the Act indefinitely to build an evidentiary record against Rogers for use before the tribunal.

The judge noted that the respondents had simply repeated facts and legal arguments that he had thoroughly assessed in the order and rejected with detailed reasons.

Justice Gascon noted that in *Warner*, the Federal Court had generally stated that the filing of a notice of application before the tribunal does not in and of itself terminate a s. 10 inquiry.

He added that the respondents had not raised any new material facts or legal foundation that could lead him to set aside the order.

"If the Respondents were not satisfied with the Order, they could have appealed it before the Federal Court of Appeal. But a motion under Rule 399 is not a procedural vehicle where a party can ask the Court to revisit its decision because it is not happy with the result," the judge wrote.

The judge also rejected arguments that the order was excessive and overly broad as it required the respondents to be examined on "any matter that is relevant to the Inquiry."

The respondents had submitted that the s. 11 order requiring Dig to produce documents and provide written returns of information had provided the Commissioner with a mechanism to secure any necessary clarification from Dig regarding any record or written return of information.

The judge noted that the commissioner's examination topics extended beyond clarifying the context and meaning of Dig's records or written returns of information.

The court concluded that the respondents had failed to disclose any *prima facie* case why the order should not have been made and dismissed the motion.

The decision provides helpful jurisprudence regarding the bureau's ability to obtain such orders after filing a notice of application on a civil matter, said Marianne Blondin, a spokesperson for the Competition Bureau.

"We believe these examinations will help us advance our investigation into Rogers Communications Inc.," she told Law360 Canada in an email.

Counsel for the respondents was Scott Lemke of Massey LLP. He was not immediately available for comment.

Counsel for the Commissioner of Competition were Jonathan Hood, Tanis Halpape, Irene Cybulsky and Kendra Wilson of the Department of Justice Canada.

If you have any information, story ideas, or news tips for Law360 Canada on business-related law and litigation, including class actions, please contact Karunjit Singh at karunjit.singh@lexisnexis.ca or 905-415-5859.