"SIR"CHES AND SEIZURES: ARE SUPPLEMENTARY INFORMATION REQUESTS UNCONSTITUTIONAL?

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I. INTRODUCTION

This paper addresses a simple question: Is merger review by the Commissioner of Competition and the Competition Bureau so pressing and important that it justifies warrantless searches? In particular, the paper examines whether the legislation providing for the issuance by the Commissioner of supplemental information requests (SIRS) under s. 114(2) of the Competition Act (the "Act")[1] meets the standards for a constitutional search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms.[2] For a warrantless search to be constitutionally valid, it must be authorized by law and be reasonable. Based on a review of the constitutional law on unreasonable searches and seizures under s. 8 there are serious questions about whether the SIR process does, indeed, rise to those standards.

After the Commissioner issues an SIR, parties to a proposed transaction are precluded from closing their transaction until 30 days after the date on which they comply with the Commissioner's SIR. Non-compliance with the Commissioner's demand, coupled with a closing or even a likely closing of the proposed transaction, renders a person at risk of civil liability. A court could compel the defaulting party to comply with the SIR, issue an administrative monetary penalty, order the dissolution of the merger or grant other relief that the court considers appropriate.[3]

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1. Competition Act, R.S.C. 1985, c. C-34, s. 114(2):
   (2) The Commissioner or a person authorized by the Commissioner may, within 30 days after receiving the prescribed information, send a notice to the person who supplied the information requiring them to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction.
2. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
3. Competition Act, *supra*, footnote 1, s. 123.1.

The issues addressed in this paper are critical at this point in the development of Canadian competition law and policy for a number of reasons. First, the power to issue an SIR is new as of 2009,[4] and as such its constitutionality has not been considered by any Canadian courts or by Canadian scholars. Second, the SIR process is part of an overall shift toward a more administrative (as opposed to judicial) approach to merger review,[5] which has important implications for strategic and efficiency-enhancing mergers between competitors and the timing for their completion.[6] Third, the SIR process tests the limits of the protections afforded to businesses under the Charter. Yet, given the practical realities of merger review, the issue is unlikely to arise very often in a court setting, if at all.[7] Thus, an academic treatment of this topic is important at this point in time.

This paper does not adopt an all-or-nothing characterization of the SIR process as "constitutional or not" for two reasons. First, there is simply no traction in the jurisprudence at this time to advance this claim credibly before the courts.[8] The amount of jurisprudence that has upheld demands for business records without an underlying risk of criminal liability is considerable.[9]

4. Budget Implementation Act, 2009, S.C. 2009, c. 2.
5. See *e.g.*, Joe Sims and Deborah P. Herman, "The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation" (1997), 65 Antitrust L.J. 865.
6. See generally Howard I. Wetston, "Notifiable Transactions under the Canadian Competition Act" (1988), 57 Antitrust L.J. 907 (in which the author, a former head of the Competition Bureau, notes the importance of timing in merger review and not interfering unduly in capital markets).
7. See generally Neil Finkelstein, Brian A. Facey and Jonathan Finkelstein, "Game Theory and the Competition Act: Winners and Losers in Canadian Merger Review" (2009), 32 World Comp. 113.
8. The breadth of the Commissioner's discretion is also the reason why a claimant would have difficulty advancing an administrative law argument in the context of a particular search or seizure (*i.e.*, as opposed to a challenge to the validity of the legislation). Consider *Gauthier v. Canada (Director of Investigation & Research)* (1991), 139 N.R. 77, 29 A.C.W.S. (3d) 596 (F.C.A.) (where the court held that the Director's [now, the Commissioner's] refusal to order an investigation under s. 10(1)(b)(ii) of the Act is a purely administrative decision not required by law to be made on a judicial or quasi-judicial basis and is, therefore, not reviewable under s. 28 of the Federal Courts Act, R.S.C. 1985, c. F-7). Although it is unlikely that *Gauthier* remains good law in light of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* (2008), 291 D.L.R. (4th) 577, [2008] 1 S.C.R. 190, 2008 SCC 9, the case remains instructive on the nature of the Commissioner's discretion and thus, on the standard of review in an administrative law proceeding. See *Dunsmuir* at para. 54 and following.
9. Demands for production of business records are also subject to reduced standards of constitutional review. See *e.g.*, *British Columbia Securities Commission v. Branch* (1995), 123 D.L.R. (4th) 462, [1995] 2 S.C.R. 3 (where the Supreme

There would therefore have to be a significant shift in the jurisprudence for a more conventional legal approach to gain acceptance. That being said, there are several reasons why the SIR process differs basically from other demands for production and why, therefore, a departure from the jurisprudence may be appropriate. As discussed in more detail below, those reasons include the following:

- The impact on the privacy of businesses and their personnel is staggering in light of the scope of the SIR power, the number of people liable to be searched and the nature and number of documents required to be produced (including personal e-mail correspondence).

- Given the incentives for the negotiating parties to obtain a favourable review of the proposed merger as expeditiously as possible and to maintain a cooperative relationship with the Commissioner and the Bureau, s. 114(2) of the Act, or a request for information issued pursuant thereto, would be unlikely ever to face judicial review.

- The Commissioner can issue an SIR in the manner and form of her choosing.

- The Commissioner can rely on the procedure to gain time for her review rather than just information.

- Definitionally, targets of hostile takeover transactions do not consent to the merger (or merger review) process and may have no material interest in advancing the process. Rather, they could end up bearing the cost of compliance with an SIR even if the transaction is never completed.

Court upheld s. 128(1) of the provincial Securities Act, S.B.C. 1985, c. 83, which compelled corporate officers' attendance for examination under oath and which required them to produce all information and records in their possession relating to the company); see also *R. v. Jarvis* (2002), 219 D.L.R. (4th) 233, [2002] 3 S.C.R. 757, 2002 SCC 73 (where the Supreme Court upheld s. 231.2(1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (ITA), which allows auditors to inspect, audit or examine the books and records of a taxpayer); see further *R. v. Quesnel* (1985), 53 O.R. (2d) 338, 24 C.C.C. (3d) 78 (C.A.), leave to appeal to S.C.C. refused [1986] 1 S.C.R. xiii, 55 O.R. (2d) 543*n* (where the inspection of premises was held reasonable when conducted to determine if the owner was producing regulated products in violation of the Farm Products Marketing Act, R.S.O. 1980, c. 158).

Second, it is not necessary to make an all-or-nothing claim in order to expose the deficiencies in the process using a constitutional law lens. By considering the SIR process in light of the principles set out in s. 8 of the Charter, we can consider whether, as a policy-vehicle, the process accords with the protections that s. 8 aims to protect. More specifically, we consider whether it is appropriate to limit the scope of the protection afforded by the section to searches and seizures conducted only when life or liberty interests are in jeopardy. In essence, this paper adopts the position that unreasonable searches and seizures, which implicate privacy interests in an economic context, deserve at least *some* protection under s. 8. We also believe that the assumed absence of protection under s. 8 has allowed the pendulum to swing too far in the government’s favour by allowing the Commissioner to implement a search and seizure process that is broader than necessary, and yet is no more effective in achieving the purposes of the Competition Act.

The remainder of this paper proceeds in three parts. Part II reviews the procedure for supplemental quests for information (“Second Stage Review”) by comparing the procedures pre- and post-amendment. Part III provides an overview of s. 8 of the Charter and the two principal tests used by the courts to determine whether legislation authorizing a search or seizure, or a particular search or seizure, is constitutional. Part IV then assesses the constitutionality of the SIR process in light of s. 8 of the Charter and proposes changes to the SIR process to render it more Charter compliant.[10]

10. It is fair to note that the working relationship between the Competition Bar, the Commissioner and the Bureau has been relatively positive since the implementation of the SIR process in 2009. See *e.g.*, Melanie Aitken, “Remarks to CBA Spring Competition Law Conference” (Toronto, Competition Bureau, May 17, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03247.html>. Nevertheless, one of the problems with regulation that occurs outside the “shadow of the law” is that absent legal constraints on the conduct of the authorities, the potential for misuse of a procedure can arise. See Ashutosh Bhagwat, “Modes of Regulatory Enforcement and the Problem of Administrative Discretion” (1999), 50 Hastings L.J. 1275, at p. 1300. Therefore, this paper focuses on the regime created by the legislative provisions themselves and not on the conduct of the regulators since its implementation in 2009. Rather, this paper raises the spectre of the breach of a Charter right, both as the basis for making the constitutional claim and to support policy recommendations for future legislative amendment.

II. REQUESTS FOR INFORMATION

1. Pre-amendment

There was no administrative second request process in the Act prior to the 2009 amendments. Parties to a notifiable transaction were required to submit either a “short-form notification” or a “long-form notification” to the Commissioner pursuant to s. 114 of the Act and s. 16 and s. 17 of the Notifiable Transactions Regulations.[11] To give the Commissioner and the Bureau time to review the merger, s. 123 precluded the parties from completing the merger before the expiration of the applicable waiting period: 14 days for short-form or 42 days for long-form. During the 14-day waiting period, the Commissioner could exercise her discretion to request the parties that had filed a short-form notification to file a long-form one as well.[12]

The Act permitted the Commissioner to make supplemental requests for information only upon court order or consent. Indeed, this option was left unchanged following the 2009 amendments. The Commissioner may still commence an inquiry under s. 10 of the Act and then apply for orders for examination and production of written returns under s. 11. In the context of a merger review, the Commissioner may commence an inquiry when she has reason to believe that grounds exist for the making of an order under s. 92.[13] Section 92 empowers the Competition Tribunal to block a merger or dissolve a completed one when it determines that the transaction is likely to result in a substantial prevention or lessening of competition (SPLC).

Also left unchanged was the Commissioner’s authority to apply to the Tribunal for an interim order under either s. 100 or s. 104 (depending on the timing of the application).[14] Although rarely issued, a s. 100 or s. 104 order has the effect of delaying the merger.[15] However, in light of the 30-day initial waiting period, the

11. SOR/87-348, as am. SOR/2000-8, s. 7.
12. Competition Act, *supra*, footnote 1, s. 114(2) as it appeared on March 11, 2009.
13. Section 10(1)(b)(ii) provides that the Commissioner shall commence an inquiry whenever the Commissioner has reason to believe that grounds exist for the making of an order under Part VII.1 or Part VIII, meaning that the Commissioner could commence an inquiry in relation to orders issued pursuant to other sections of that Part as well.
14. For more discussion of this provision, see *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2007 Comp. Trib 9, affd 289 D.L.R. (4th) 500, 2008 FCA 22.
15. In *Labatt*, *ibid.*, the Federal Court of Appeal upheld a decision of the Tribunal

new SIR compliance period and the practice of entering into timing agreements,[16] the Commissioner will be less likely in the future to rely on judicially-authorized s. 11 orders to obtain documents or information in the merger context.

2. Post-amendment

All parties subject to notification requirements are now prohibited from closing their transaction for a uniform initial 30-day waiting period, which commences on the day following the Bureau's receipt of a completed merger notification. While information requests made on a voluntary basis at the first review stage may "minimize the need for, or scope of, a subsequent SIR,"[17] the Commissioner is empowered under the amended s. 114(2) of the Act to issue an SIR at any time during the initial waiting period for a notifiable transaction. The issuance of the SIR is subject to the Commissioner's sole discretion. The Commissioner need not commence an inquiry under s. 10 as a precondition to issuing an SIR.[18]

After the Commissioner issues an SIR, the parties are precluded from closing their proposed transaction until 30 days after the date on which they comply with the Commissioner's SIR. Publically

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dismissing the Commissioner's application for a stay. The Tribunal and Court of Appeal both determined that in light of the proposed hold-separate arrangement, the Tribunal's remedial powers under s. 92 to reverse the merger would not be impaired in the absence of an interim order.

Furthermore, in *Canada (Director of Investigation and Research) v. Superior Propane Inc.*, 1998 Comp. Trib. 2, the Tribunal dismissed the Director's application for an order under s. 100 to enjoin the respondents from closing the transaction at the close of the waiting period, but prior to the filing of a contested application to review the transaction. Rothstein J. (as he then was) determined that the Director failed to establish that the proposed transaction was "reasonably likely to prevent or lessen competition." (para. 7). He rejected the Director's narrower classification of the "propane" product market, and in turn, held that the respondents held only a small share of the larger "energy" market.

16. See Canada, Competition Bureau, *Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (November 1, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Final-Fees-Service-Handbook-Oct-2010-e.pdf/$FILE/Final-Fees-Service-Handbook-Oct-2010-e.pdf>, at p. 12.
17. Canada, Competition Bureau, *Merger Review Process Guidelines* (Gatineau, The Bureau, September 18, 2009), at p. 3, online: <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/merger_review_process-e.pdf/$FILE/merger_review_process-e.pdf>.
18. Section 116(3) also permits the Commissioner to require a person to supply information, even if that person has sworn or affirmed that the information was previously supplied or is not relevant to the assessment of the merger.

available information shows that compliance periods have ranged from five weeks to three months, which means that the issuance of an SIR significantly extends the waiting period before a transaction may legally close. Like the U.S. "second request" process, no judicial appeal process is available to the parties in Canada; however, unlike in the United States, judicial review of an SIR may be available.[19]

Non-compliance with the Commissioner's demand, coupled with a closing or even a likely closing of the proposed transaction, triggers a range of potential sanctions. A court could compel the defaulting party to comply with the SIR, issue an administrative monetary penalty, order the dissolution of the merger or grant other relief that the court considers appropriate.[20]

In virtually every merger there will be very little incentive to challenge an SIR. The pressure of "getting the deal done" and the costly and uncertain prospect of a legal challenge means that parties will almost never be in a position to roll the dice on compliance with an SIR. This has certainly been the U.S. experience where very few challenges to the second request process are even attempted.[21]

Aggregate figures compiled by a leading Canadian law firm suggest that, so far, the average timeframe for compliance is about seven weeks.[22] The quantity of documents reviewed ranged from approximately 100,000 in one case to over 2,000,000 in another. Documents submitted to the Bureau have also encompassed two extremes: with approximately 9,000 documents submitted in one case to well over 100,000 in another. Given that relatively few SIRs have been issued by the Commissioner, those figures lack statistical significance, but are fully consistent with U.S. studies, which suggest that the new regime imposes real costs on strategic mergers.

To facilitate the constitutional analysis, the next part of this paper provides an overview of s. 8 of the Charter, as well as the relevant leading case law. As noted below, although the courts

19. See Federal Courts Act, *supra*, footnote 8, s. 18.1. In the United States, no judicial review process is available. See *CableAmerica Corp. v. Federal Trade Commission*, 795 F.Supp. 1082 (N.D. Ala. 1992).

20. Competition Act, *supra*, footnote 1, s. 123.1.

21. See *e.g.*, *Federal Trade Commission v. Blockbuster Inc.*, Civil Action No. 1:05CV00463 (Dist. Ct. D.C. 2005), online: <http://www.ftc.gov/os/caselist/blockbuster/050311orderblockbuster.pdf>. The parties settled the case before it was decided on the merits.

22. The aggregate figures were provided by an internal calculation of a leading Canadian law firm and do not necessarily correspond to the Canadian average.

have imposed a more relaxed standard of review for legislation authorizing searches and seizures in the regulatory context, regulatory legislation is still subject to Charter scrutiny.

III. SECTION 8 OF THE CHARTER

1. Preliminary Considerations

Section 8 of the Charter reads as follows: "Everyone has the right to be secure against unreasonable search or seizure." Under Canadian law, "everyone" includes human persons and corporations.[23] Moreover, the courts have held that "or" disjoins search from seizure, meaning that the protection applies to either unlawful searches, seizures or both.[24]

It is an uncontroversial principle of Canadian constitutional law that a demand for the production of documents or information in this context constitutes a seizure that could be subject to constitutional scrutiny by the courts.[25] Although this threshold issue would likely not be challenged in an actual case, the extent of the seizure (and, in turn, the extent of the privacy breach) does raise questions about whether the SIR process rises to the level of unreasonableness.

In all search and seizure cases, when the courts assess a claim under s. 8, they begin by asking whether the complainant had a "reasonable expectation of privacy" to determine (i) whether constitutional review is permissible and (ii) the level of judicial scrutiny of what constitutes a reasonable search.[26] Only parties with a reasonable expectation of privacy can challenge the lawfulness of a search under s. 8 of the Charter. Even though a low expectation of privacy will militate against a finding of a

23. *R. v. Big M Drug Mart Ltd.* (1983), 5 C.R.R. 281, 25 Alta. L.R. (2d) 195 (Prov. Ct.) at paras. 88-89 *per* Stevenson Prov. Ct. J., affd 5 D.L.R. (4th) 121, 28 Alta. L.R. (2d) 289 (C.A.), affd 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295; *Southam Inc. v. Dir. of Inv. & Research, Combines Inv. Branch*, [1982] 4 W.W.R. 673 at pp. 681-682, 136 D.L.R. (3d) 133 *sub nom. Hunter v. Southam Inc.* (Alta. Q.B.), affd *Hunter v. Southam Inc.*, *infra*, footnote 26.
24. *R. v. Dyment* (1988), 55 D.L.R. (4th) 503, [1988] 2 S.C.R. 417 at pp. 430-431.
25. See *R. v. Mills* (1999), 180 D.L.R. (4th) 1, [1999] 3 S.C.R. 668 (where the Supreme Court held that an order for the production of records made pursuant to ss. 278.1 to 278.91 of the Criminal Code is a seizure within the meaning of s. 8 of the Charter). See also *Dyment*, *ibid.*
26. See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641. See also *R. v. Edwards* (1996), 132 D.L.R. (4th) 31, [1996] 1 S.C.R. 128.

Charter violation,[27] the decision of the court ultimately rests on the reasonableness of the search. Searches conducted even when the privacy expectation is low nevertheless can be found to be unreasonable under s. 8.

Given the nature of the search, the determination of what constitutes a reasonable expectation of privacy is not clear cut in the SIR process. In addition to highly confidential business records (reports, studies, surveys and strategic plans), the Commissioner can, and does, request that e-mail records be searched. These e-mails, which can contain very personal information, are reviewed first by counsel and, if they contain responsive material, by Bureau staff.[28]

Furthermore, while courts have recognized a diminished expectation of privacy in the case of business records,[29] as the Supreme Court of Canada noted in *143471 Canada Inc. v. Quebec (Attorney General)*, "there still remains some measure of privacy in commercial documents. They will inevitably reveal aspects of the business that the operator would rather have kept private."[30] A rule requiring mandatory disclosure of documents ought not to negate the privacy interest in them. If this were not the case, s. 8 could potentially be left with no scope of application over documents where Parliament provides for their mandatory production on request of a governmental agency.

Furthermore, the confidential and private nature of the documents produced in the context of an SIR goes well beyond the documents that accompany a notification.[31] They include very

27. Consider *R. v. Belnavis* (1997), 151 D.L.R. (4th) 443, [1997] 3 S.C.R. 341, at para. 40.
28. The Ontario Court of Appeal recognized that the accused in *R. v. Cole*, 2011 ONCA 218, had a reasonable expectation of privacy over the contents of his laptop, which was owned by the school board that employed him and which was issued for employment purposes. See also, *R. v. Little*, [2009] O.J. No. 3278, 87 W.C.B. (2d) 251 (S.C.J.).
29. See *e.g.*, *AGT Ltd. v. Canada (Attorney General)*, [1996] 3 F.C. 505, 44 Admin. L.R. (2d) 145 (T.D.) at para. 18, affd [1997] 2 F.C. 878, 70 A.C.W.S. (3d) 928 (C.A.), leave to appeal to S.C.C. refused 224 N.R. 396*n*. See also *Branch*, *supra*, footnote 9, at para. 58.
30. *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at p. 379, 90 C.C.C. (3d) 1, *per* Cory J., concurring.
31. Consider *R. v. Plant*, [1993] 3 S.C.R. 281, 84 C.C.C. (3d) 203, where the Supreme Court of Canada held that to determine the extent of a person's reasonable expectation of privacy over information, a court must consider: "... *the nature of the information itself*, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the

sensitive information about the business, including strategic marketing plans, business plans, and product and proprietary information.[32]

As discussed in more detail below, the merger review context is not one in which there is on-going supervision in the preparation and review of documents as is true in the securities, tax or employment contexts.[33] The parties are not normally expected, at a moment's notice, to open up their books for a full-scale examination of their business activities to protect the public interest. While Parliament has legislated the types of documents the parties must produce through the merger notification process, no such list applies to the SIR process. In any event, the basis of the constitutional argument advanced in this paper does not rest solely on the strength of the privacy interest. Rather, it focuses on the extent of the seizure power that could be invoked under s. 114(2) of the Act and the absence of Parliamentary guidance about the scope of that power.

The next section of this paper advances the argument that s. 114(2) is presumptively unreasonable, given the absence of a warrant requirement before the information is required to be disclosed. Part IV of the paper explains why that presumption may not be so easily rebutted in the context of the SIR process.

2. Search and Seizure

The Supreme Court of Canada laid out the analytical framework in a competition case, *Hunter v. Southam*,[34] to determine the constitutionality of the Crown's search and seizure powers. In *Hunter*, officers of the then Combines Investigation Branch (the predecessor agency to the Bureau) entered and searched the business premises of a news agency, Southam Inc., to examine company documents which, the Director contended, could contain evidence to support an inquiry under the Combines

seriousness of the crime being investigated . . . " (at p. 293 S.C.R.). Emphasis added.

32. See Matthew S. Bailey, "The Hart-Scott-Rodino Act: Needing a Second Opinion about Second Requests" (2006), 67 Ohio St. L.J. 433, at p. 452.

33. Compare *Branch*, *supra*, footnote 9. Compare also *Jarvis*, *supra*, footnote 9. Compare *Potash*, *infra*, footnote 56.

34. *Hunter v. Southam Inc.*, *supra*, footnote 26.

Investigation Act.[35] The search was authorized pursuant to s. 10(1) of the Act and the authorization was certified by a member of the Restrictive Trade Practices Commission under s. 10(3) of that statute. The Supreme Court held those provisions to be inconsistent with s. 8 of the Charter because they failed (i) to specify the appropriate standard for the issuance of warrants, and (ii) to designate an impartial arbiter authorized to issue the warrants.

Summarizing the criteria used to assess the constitutionality of a search and seizure regime in *Hunter*, the Supreme Court, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (another competition law case), noted that a constitutionally valid search and seizure regime must satisfy the following four requirements:

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
>
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established upon oath, to believe that an offence has been committed;
>
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
>
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.[36]

Over time, the Supreme Court narrowed the applicability of the *Hunter* test mainly to statutorily-authorized searches in criminal cases. However, in *Hunter*, Dickson J. (as he then was) was careful to note that:

> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior

35. See *Hunter* (Alta. Q.B.), *supra*, footnote 23. Combines Investigation Act, R.S.C. 1970, c. C-23.
36. *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at p. 506, 67 D.L.R. (4th) 161.

authorization, I would hold that such authorization is a precondition for a valid search and seizure.[37]

La Forest J. elaborated on that point in *Thomson* where he described the existence of a continuum of protection from the criminal to regulatory contexts.[38] Indeed, La Forest J. departed from the *Hunter* criteria in the *Thomson* case and applied the more flexible *Collins* factors instead. In *Thomson*, the Supreme Court determined that the Director's powers to subpoena officers of a corporation under investigation (to be examined under oath and to produce documents) were constitutional.

Judges do not always agree about the strictness of the reasonableness standard in a given search and seizure case. For example, Wilson J. would have applied *Hunter* in the *Thomson* case, noting that the standards in *Hunter* should be departed from only in "exceedingly rare" instances.[39] Furthermore, the *Hunter* principles frequently inform the courts' analyses of what constitutes a "reasonable" search or seizure in other cases.

3. The Collins Test

The Supreme Court of Canada held in *Collins* that warrantless searches are presumptively unreasonable, although the court set out a three-part test to rebut the presumption of unreasonableness: "A search will be reasonable if it is authorized by law, *if the law itself is reasonable* and if the manner in which the search was carried out is reasonable."[40]

The *Collins* test generally applies to warrantless searches in the criminal context as well as to searches undertaken in the regulatory context (such as subpoenas, inspections and productions),

37. *Hunter v. Southam Inc.*, *supra*, footnote 26, at p. 161 (S.C.R.).
38. *Thomson*, *supra*, footnote 36, at p. 506 (S.C.R.).

    The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8.

39. *Thomson*, *ibid.*, at p. 496 (S.C.R.).
40. *R. v. Collins*, [1987] 1 S.C.R. 265 at p. 278, 38 D.L.R. (4th) 508, (emphasis added). In *Collins*, police officers approached a suspect under surveillance and subjected her to a warrantless search. The officers threw Ms. Collins to the ground, choked her and discovered that she was in possession of a heroin balloon. The Supreme Court of Canada excluded the evidence because the officers lacked reasonable and probable grounds for believing that the accused had heroin on her.

including those authorized by statute.[41] This paper adopts the position that, as in *Thomson*, the *Collins* test also applies to determine the constitutionality of the SIR process.[42] Although the *Hunter* test was developed in the context of a statutory provision authorizing a search and seizure, the non-criminal nature of s. 114(2) is sufficient to justify a departure from the stricter *Hunter* standard in the case of SIRs.

While it is clear that the SIR process under s. 114(2) meets the first threshold (authorized by law), as is discussed below, the reasonableness of s. 114(2) is what is in issue. The remainder of this paper will focus on whether the SIR process satisfies the "reasonableness of law" element of the *Collins* test, drawing closely from the concepts developed in *Hunter* and other search and seizure cases to inform this discussion.

IV. IS SECTION 114(2) OF THE COMPETITION ACT REASONABLE?

The SIR process lacks two elements that would otherwise render it in strict conformity with s. 8 of the Charter under *Collins* and therefore satisfy the reasonableness test. First, there is no judicial supervision over the SIR process. Second, the provision is arguably not "minimally intrusive" of the merging parties' privacy rights as required under s. 8. Each of these issues is addressed in turn below.

1. Absence of Judicial Supervision

The courts have held repeatedly that, where applicable, searches must conform to the principles laid out in *Hunter* even if a court assesses the constitutionality of a search provision using the *Collins* factors.[43] If the *Hunter* principles do not strictly apply to the SIR process, nevertheless the Crown must still explain why a departure from those principles is necessary.[44] From that perspective, at least

41. The *Collins* test referenced in this paper refers to the three-part test in relation to Section 8, not the three-part test developed by the Supreme Court of Canada in the same case in relation to s. 24(2). The latest iteration of that test can be found in the Supreme Court's decision in *R. v. Grant*, [2009] 2 S.C.R. 353, 309 D.L.R. (4th) 1, 2009 SCC 32.
42. It is clear from the discussion below that, if the stricter *Hunter* test were to apply, the provision would likely be unconstitutional.
43. *Thomson*, *supra*, footnote 36, at p. 496 (S.C.R.). See also *Arkinstall v. Surrey (City)* (2010), 319 D.L.R. (4th) 512, 2010 BCCA 250; See also *C.E. Jamieson & Co. (Dominion) Ltd. v. Canada (Attorney General)*, [1988] 1 F.C. 590, 46 D.L.R. (4th) 582 (T.D.).
44. See *e.g.*, *R. v. Colarusso*, [1994] 1 S.C.R. 20, 110 D.L.R. (4th) 297, at para. 40. See

some judicial control by a neutral arbiter is required to ensure that the Commissioner does not abuse her discretion in the SIR process.[45] Three arguments are advanced below to support that proposition.

(i) The "Regulatory" Characterization of Merger Review is not Determinative of the Reasonableness Standard

Simply because the merger review process could be characterized as "regulatory" does not mean that judicial supervision is not constitutionally mandated. The very issuance of an SIR imposes significant financial and logistical burdens on the parties by requiring them to produce a significant amount of information about themselves and their employees, officers and directors. From the perspective of a company being searched, the SIR requires the production of hundreds of thousands of documents, in the custody of several people, at an exorbitant cost (materially different from other contexts in which cost arguments were raised).[46] Not only are the company's documents searched in the context of an SIR, but so too are the e-mails of the custodians who are selected for a search. This is not a context in which a party is required to turn over a single document or limited set of documents. The scope of production is massive.

Indeed, the intrusiveness of the SIR process is entirely independent from the burden that the parties may bear if the Commissioner files an application to contest the transaction.

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also *Canada (Attorney General) (Re)* (2009), 186 L.A.C. (4th) 353, 2009 FCA 234, leave to appeal to S.C.C. refused 2010 CanLII 11390, [2010] 1 S.C.R. x.

45. The Federal Court of Appeal recently affirmed the importance of judicial oversight over the investigatory processes under the Act. In *Labatt*, the Federal Court of Appeal rejected the Commissioner's contention that it should issue interim orders automatically under s. 100 when the Commissioner requires additional time to complete her review:

> The Commissioner suggests that the only limitation on obtaining of an interim order in such a case would be the Competition Tribunal's residual discretion to refuse an order if the Commissioner has acted in a patently unreasonable manner or is not acting in good faith, or if the application for an interim order is an abuse of process. We do not agree that Parliament intended the role of the Competition Tribunal to be so limited.

Labatt, *supra*, footnote 14, at para. 16.

46. See *e.g.*, *Ipsco Recycling Inc. v. Canada (Minister of Environment)* (1998), 158 F.T.R. 278, 82 A.C.W.S. (3d) 927 (T.D.) (where the court denied the applicant's petition for an injunction to require it to move 10,000 tons of materials that were stockpiled over the material that had to be inspected on the basis of inconvenience).

Wilson J., who spoke for the majority in *R. v. McKinlay Transport*, noted:

> The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required.[47]

The Supreme Court in *McKinlay Transport Ltd.* held that warrantless "spot-checks" in the form of audits were necessary and integral to the effective regulation of self-reporting taxpayers and it upheld the provision. It is highly questionable whether a production of hundreds of thousands of documents is necessary for the implementation of the merger review process, particularly since neither the Commissioner nor the Bureau has the resources to review them all within the 30-day waiting period.

There are also examples in the case law where warrantless search and seizure provisions in the regulatory context have been invalidated when, for example, the search was not integral to the effectiveness of the regulatory scheme,[48] or where the privacy interests at stake are heightened (such as a search of a person's home).[49] As the nature of the privacy interests were already canvassed above, it only remains to discuss below the issues of necessity and integrity to the effective regulation of the particular administrative process.

(ii) The Conduct in Issue Does not Require Warrantless Supervision

The context in which the warrantless search power is exercised will dictate whether judicial pre-authorization ought to be required. As Dickson J. (as he then was) noted in *Hunter*:

> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior

47. *R. v. McKinlay Transport Ltd.* (1990), 68 D.L.R. (4th) 568, [1990] 1 S.C.R. 627, [1990] S.C.J. No. 25, at para. 34. In *R. v. McKinlay Transport Ltd.*, Revenue Canada served McKinlay Transport with letters demanding the production of documents during the course of an income tax audit. Revenue Canada served the letters pursuant to s. 231(3) of the Income Tax Act, S.C. 1970-71-72, c. 63. While the Supreme Court found that the letters constituted a "seizure," for the reasons given in *Thomson*, the Supreme Court found the seizure to be reasonable.
48. See *e.g.*, *Nightengale Galleries Ltd. v. Ontario (Director of Theatres Branch)* (1984), 48 O.R. (2d) 21, 15 C.C.C. (3d) 398 (Co. Ct.).
49. See *e.g.*, *Arkinstall*, *supra*, footnote 43.

> authorization, I would hold that such authorization is a precondition for a valid search and seizure.[50]

As noted above, the courts have repeatedly recognized that the regulatory context is often one where it is not feasible for enforcement officials to obtain judicial pre-authorization. Nevertheless, in the author's view, whether a merger is likely to give rise to an SPLC does not fall in the same class of pressing objectives on which the courts have relied to diminish the reasonableness standard.[51] The conduct in issue is not immediately "dangerous" (as is true, for example, in a search which is incidental to arrest),[52] or in cases requiring immediate supervision (*e.g.*, health and safety monitoring)[53] or in cases involving unannounced compliance monitoring (*e.g.*, a tax audit),[54] where the courts have otherwise justified warrantless searches.

Dispensing with a judicial supervision requirement in the merger review context is not essential to ensure the protection of the public interest, unlike the situation that faced the Crown in *R. v. Bertram S. Miller Ltd.* In that case, the Federal Court of Appeal held that:

> [T]here is clearly a category of public health-and safety-related inspections carried out in commercial or industrial premises where a warrantless search and seizure is not only reasonable but essential for the protection of the public good.[55]

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50. *Hunter v. Southam Inc.*, *supra*, footnote 26, at p. 161 (S.C.R.).
51. *Thomson*, *supra*, footnote 36, at pp. 506-507 (S.C.R.):

    In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises.
52. *R. v. Morrison* (1987), 20 O.A.C. 230, 35 C.C.C. (3d) 437 (C.A.).
53. *Eagle Disposal Systems Ltd. v. Ontario (Minister of the Environment)* (1983), 44 O.R. (2d) 518, 5 D.L.R. (4th) 70 (H.C.J.), affd 47 O.R. (2d) 332*n* (C.A.).
54. *Belgoma Transportation Ltd. v. Ontario (Director of Employment Standards)* (1984), 6 O.A.C. 307, 11 D.L.R. (4th) 442 (Div. Ct.), affd 20 D.L.R. (4th) 156, 10 O.A.C. 11 (C.A.).
55. See *R. v. Bertram S. Miller Ltd.* (1986), 28 C.C.C. (3d) 263, [1986] 3 F.C. 291 (C.A.) at p. 342 (F.C.), leave to appeal to S.C.C. refused 75 N.R. 159*n*.

In *Miller*, inspectors entered the plaintiff's premises and destroyed the plaintiff's imported stock of trees suspected of being contaminated by larvae.

Neither competitors nor consumers are immediately vulnerable if two companies merge — unlike the test applied by the Supreme Court in an employment context in *Comité Paritaire de l'Industrie de la Chemise v. Potash; Comité Paritaire de l'Industrie de la Chemise v. Sélection Milton*.[56] In that case, an inspector attempted to enter the premises of a particular business due to complaints about employees not receiving their wages. The Supreme Court of Canada held that the search did not infringe s. 8 of the Charter noting,

> [t]he ACAD is a regulatory statute whose purpose is to ensure decent working conditions in certain sectors of industry where employees are among the most vulnerable[57]

and that the powers of the inspectors were "essential" to ensure compliance with the Act.[58]

The Commissioner simply has no need for an immediate power of production akin to the SIR process. At the point of second stage review, the public interest is not being threatened and no immediate supervision or compliance monitoring is necessary to protect the regulatory scheme; there is no pressing timing issue, particularly if the parties agree to a "hold separate agreement" in the interim period;[59] and bypassing the judicial process is not necessary to protect the integrity of the merger review scheme. Even if a merger were to result immediately in an SPLC that could not be reversed, the Commissioner has the authority to apply under s. 100 or s. 104 for interim relief to gain more time to review the merger or to enjoin the parties from completing the merger.

56. *Comité Paritaire de l'Industrie de la Chemise v. Potash; Comité Paritaire de l'Industrie de la Chemise v. Sélection Milton*, [1994] 2 S.C.R. 406, 115 D.L.R. (4th) 702.
57. *Potash*, *ibid*., at p. 408 (S.C.R. headnote).
58. *Potash*, *ibid*., at p. 442.
59. See *Labatt*, *supra*, footnote 14, at para. 42:

> With respect to the restoration of pre-merger conditions, Linden J.A. in *The Director of Investigation and Research v. Superior Propane et al.* in the context of a section 104 application, addressed how applicable the "scrambled eggs" analogy is. Justice Linden held that a merger is not like scrambled eggs. A merger can be broken up, competition can be restored, though it may be difficult to do and inconvenient. [Citations omitted]

(iii) Second Stage Merger Review is Tantamount to a Full-Fledged Investigation

As the Supreme Court of Canada held in *R. v. Jarvis*, when a mere audit or inquiry turns into an investigation, greater protections under the Charter are engaged.[60] An investigation that is initiated for the purpose of an audit may turn into an investigation, at which point, judicial authorization or supervision should be required before the search is continued. At issue in the present context is whether parties to a merger and the Commissioner are in an "adversarial" relationship once the SIR is issued.

In *Jarvis*, the Supreme Court invalidated a search by income tax authorities since they had relied on their warrantless audit powers even though their search was found to be in furtherance of a criminal tax evasion investigation.[61] In that case, the Supreme Court was concerned with the distinction between auditing and the determination of penal liability. Articulated in *Jarvis*, however, was the notion that in an investigative context, the state and the individual's interests are adversarial.[62] In the author's view, a two-stage review process (*i.e.*, where judicial control is feasible), in which the latter stage is predicated upon a decision by a state official that will significantly impact privacy rights, is the archetypal context in which the Supreme Court's decisions in *Jarvis* and *Hunter* regarding judicial supervision ought to apply.

This approach has not resonated in the jurisprudence. Since the decision in *Jarvis*, parties have been unsuccessful in their attempts to extend the Supreme Court's reasoning outside the criminal context, where other forms of two-stage review occur.[63] In *Jackson v. Vaughan (City)*,[64] for example, the court relied on the Supreme Court's decision in *R. v. Fitzpatrick*[65] to reject the claim on the

60. The Supreme Court in *Jarvis*, *supra*, footnote 9, recognized that a veritable divide (the "Rubicon") exists between searches or seizures for criminal law purposes, which (subject to certain limited exceptions) always require *ex ante* justification (*e.g.*, a warrant), and those for purely auditing purposes (*e.g.*, to foster compliance with a statute of public order, health and safety), which do not.
61. *Jarvis*, *ibid*.
62. *Jarvis*, *ibid*, at paras. 84-88.
63. See *e.g.*, *Jackson v. Vaughan (City)*, [2009] O.J. No. 1057, 176 A.C.W.S. (3d) 384 (S.C.J.), affd 208 C.R.R. (2d) 16, 2010 ONCA 118.
64. See *Jackson*, *ibid*.
65. *R. v. Fitzpatrick* (1995), 129 D.L.R. (4th) 129, [1995] 4 S.C.R. 154 (where the Supreme Court denied the application to exclude certain logs and reports created by the defendant on grounds that they were self-incriminating pursuant to s. 7 of the Charter).

basis that no adversarial relationship existed since Jackson was not in immediate jeopardy of incarceration. The court also held that Jackson had acceded to the regulatory scheme by presenting herself as a candidate for office. As noted above, there is a basis for departing from this reasoning, particularly in light of the breadth and extent of the Commissioner's search and seizure powers under s. 114(2) of the Act.

Unlike the situations in *Fitzpatrick* or in *Jackson*, the accumulation of information during the SIR process occurs precisely for the purpose of using that information against the parties. There is no other regulatory purpose for collecting this information.

Moreover, by the time of the second stage review, the Commissioner has had up to 30 days to develop a working theory of the case based on other prescribed categories of information received from the parties (through the filings that accompany their notifications) and from discussions with market contacts and competitors. The specific documents and information requested through the SIR process will either support or refute the possible allegations that the merger is likely to result in an SPLC. At this stage, the Commissioner is effectively engaged in a discovery-like process to confirm whether or not the merger is likely to cause an SPLC.

The SIR process has, in practice, replaced the formal powers of examination under s. 11 of the Act, the very purpose of which is to gather evidence to support an inquiry or investigation into whether, for example, grounds exist for the making of an order to unwind a merger.[66] Unlike s. 11 orders, however, the SIR process effectively allows the Commissioner to obtain any information relevant to the assessment of the merger without providing any basis for the request or satisfying a court that the merging parties are even likely to have the relevant information.

Regarding the issue of consent, the merger review process is not analogous to a licensing regime in which the parties attorn to the jurisdiction of the regulatory agency to monitor their conduct. The operation of a business in Canada does not amount to a consent-to-be-searched. Simply being a "legal entity" pursuant to an incorporating statute does not mean that a corporation is "licensed" and "regulated" in the manner envisaged in the key constitutional cases on regulatory searches.[67]

66. *Canada (Commissioner of Competition) v. Air Canada* (2000), 8 C.P.R. (4th) 372, [2001] 1 F.C. 219 (T.D.).

The consent argument becomes even more tenuous in light of the fact that only parties to a notifiable transaction under ss. 109 and 110 can be subjected to an SIR.[68] Parties to a merger that exceeds the notification thresholds no more consent to the application of the merger review provisions than do other parties. In fact, the Commissioner recently applied to the Tribunal to unwind a merger that was not notifiable on the basis that the merger is likely to result in an SPLC.[69]

The issue of compulsion is more apparent in two particular contexts. First, in the context of a hostile transaction, the entity being acquired does not choose to participate in the merger review process. Nevertheless, by virtue of s. 114(3)(b), it is required to notify the Bureau when the transaction exceeds the thresholds set out in the Act. Section 114(2) does not limit the Commissioner's SIR powers to request documents or information from the acquiring entity only.[70] Indeed, to make an accurate assessment of the likely impact of a merger on the market, information from both entities, as well as from independent sources such as market contacts, is required. The target of a hostile transaction could be compelled to comply with an SIR even if the merger never materializes.

The Bureau's silence on this issue in a recently published information bulletin on hostile transactions is telling.[71] On one reading of the enforcement provision under s. 123.1 of the Act,[72] even in the context of a hostile transaction, the Commissioner may

67. Furthermore, it is possible that a human being (who never chose to incorporate) could exceed the thresholds set out in s. 110 of the Act and be personally subject to the search (*e.g.*, by virtue of an asset-acquisition under s. 110(2)).

68. In general, the Bureau must be notified in advance of proposed mergers and acquisitions when the assets or revenues of the target firm in Canada exceed $73 million and when the combined assets or revenues of the parties and their respective affiliates in Canada exceed $400 million.

69. See *The Commissioner of Competition v. CCS Corporation*, CT-2011-002.

70. The provision states "send a notice to the person who supplied the information," which targets are required to do under s. 114(3) of the Act.

71. Canada, Competition Bureau, "Hostile Transactions: Bureau Policy on Disclosure of Information" (June 2, 2010), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03243.html>.

72. Section 123.1 provides,

> If, on application by the Commissioner, the court determines that a *person*, without good and sufficient cause, the proof of which lies on the person, *has completed or is likely to complete a proposed transaction by the end of the applicable period referred to in section 123*. (Emphasis added.)

According to s. 123(1)(b), the applicable period spans "30 days after the day on which the information required under subsection 114(2) has been received by the Commissioner."

be able to obtain a court order requiring the target to comply with an SIR or risk a civil remedy. If an acquirer complies with its SIR and purports to close the transaction (which s. 123(3) would permit it to do), the target might not have complied with the SIR by that time, thus triggering the application of s. 123.1. To avoid putting the parties in a position where the target's non-compliance could jeopardize the closing, it might be preferable for the Bureau to rely on s. 11 orders to obtain the required information from the target. However, if a judicially supervised process is appropriate in that context, then one could argue that a judicially supervised process is also appropriate for supplemental requests for information for all parties.

The SIR process will have added implications when the acquired entity is a failing firm, since the additional waiting period may be too long for the entity to remain solvent.[73] It might be contrary to the very stated purpose of the Act — "to promote the efficiency and adaptability of the Canadian economy" — to issue an SIR when a firm is likely to fail during the waiting period.[74] In light of the foregoing, the issue of consent in the context of hostile and failing firm takeovers is one that should receive greater policy attention from the Bureau, particularly in light of the onerous obligations imposed on the parties to the merger at the second stage of review.

(iv) Conclusions on Judicial Supervision

There is simply no reason why the Commissioner's concerns regarding an SPLC could not be articulated before a neutral judicial arbiter if one of the parties complains about the scope of the request, much like adversaries in a civil litigation context. Even if, as La Forest J. noted in *Thomson Newspapers*, *ex post* judicial review could insulate searches in some cases, given the tight timeframes of the merger review context, that procedure would simply take too long to preserve the *status quo ante*.[75] The Tribunal should be empowered, at any time, to review the scope of an SIR, as well as whether the Commissioner has received the required information (i.e., the parties have complied with the request). The parties should not have to risk non-compliance and

73. Richard Elliot and Jim Dinning, "Failing Firm Analysis in Canadian Merger Review" (Ottawa, Canadian Bar Association, 2009), online: <http://www.cba.org/cba/cle/PDF/SpComp09_Elliott_paper.pdf>.
74. Competition Act, *supra*, footnote 1, s. 1.1.
75. But see Federal Courts Act, *supra*, footnote 8, s. 18.4.

an application by the Commissioner under s. 123.1 to obtain a judicial determination that they have met their obligations under s. 114(2) and s. 123.

2. The Breadth of s. 114(2) May be Unreasonable

Regulatory searches should not amount to a fishing expedition and, therefore, there must be some limitations on the nature of the information to be searched or seized (referring back to the "strictly relevant" standard as set out in *Hunter*). The extent of the Commissioner's discretion to ask for any relevant document, to create documents and to deliver documents in the form of her choosing, could be characterized as unreasonable. Three arguments support the proposition that the breadth of s. 114(2) might be unreasonable under the *Collins* test.

(i) Standardless Sweeps are Unreasonable

No search or seizure should amount to a standardless sweep for information.[76] Indeed, the Supreme Court of Canada has repeatedly emphasized the importance of adopting the "least intrusive means" of conducting searches and seizures to ensure that they are Charter-compliant.[77] The Supreme Court has, therefore, imposed a minimal impairment requirement on warrantless searches and seizures.

The SIR process is not the least intrusive means of obtaining the relevant information for a merger review. First and foremost, the Commissioner's power to request documents and information is not *expressly* circumscribed by a list of factors in s. 93 of the Act (such as the Tribunal will use to assess the likelihood of an SPLC).

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76. "The authorization has a breathtaking sweep; it is tantamount to a licence to roam at large on the premises of Southam Inc. at the stated address 'and elsewhere in Canada'." *Hunter v. Southam Inc.*, *supra*, footnote 26, at p. 150 (S.C.R.).
77. For example, in *McKinlay Transport*, the Supreme Court held that the provision at issue authorizing the seizure of documents pursuant to an ITA compliance audit was "the least intrusive means by which effective monitoring of compliance with the Income Tax Act can be effected." *McKinlay Transport*, *supra*, footnote 47, at para. 35 (cited to Quicklaw). The Supreme Court reiterated that view in *Branch*, *supra*, footnote 9, at para. 60, when it upheld a provision authorizing the production of records pursuant to an inquiry into a breach of the Securities Act, *supra*, footnote 9. While the Supreme Court found that the provisions authorizing the production of documents to be the least intrusive means in those cases, the SIR context is sufficiently distinguishable from the above-noted cases given the scope and volume of the production involved, as well as the depth and complexity of the government's review of the impugned conduct.

Parliament has offered no guidance as to whether it is appropriate for the Commissioner to request information strictly related to the parties' defence (*e.g.*, efficiencies claims) at the SIR stage of the merger review process.

The Commissioner could issue an SIR in any notifiable transaction, irrespective of the complexity of the transaction. The complexity classifications are set out in non-binding guidelines and not in the Act.[78] Thus, they have no legal bearing on the risk to the parties that the Commissioner will issue an SIR.[79] This has created unnecessary uncertainty for merging parties, particularly in the context of non-complex transactions. The only constraint on the exercise of that discretion is the generalized principle that the Commissioner exercise her powers and fulfil her duties in good faith and on the basis of relevant considerations.[80] Nevertheless, the Commissioner could issue an SIR in any transaction to gain time, rather than information.

The Act does not require the Commissioner and the parties to negotiate a production plan, which would be less intrusive than simply allowing the Commissioner to make a demand for production at her discretion. Such a plan would help narrow down the documents that are "relevant" to the assessment of the merger. Discovery/production plans are now required under the Rules of Civil Procedure in Ontario.[81] Plans in that jurisdiction must be in writing and must indicate the intended scope of documentary discovery, "taking into account relevance, costs and the importance and complexity of the issues in the particular action."[82] The implementation of this change in procedure speaks to the necessity in minimizing unneeded production due to the burden imposed on the parties and on the courts. In light of that legislative change, the Supreme Court of Canada's jurisprudence that upheld other regulatory seizure processes on minimal

78. See Competition Bureau, *Handbook*, *supra*, footnote 16. See also *Merger Review Process Guidelines*, *supra*, footnote 17, at p. 4.
79. See *e.g.*, Blake, Cassels & Graydon LLP, "Merger Timing Guidelines Released for Comment: Something Old, Something New" (Blake, Cassels & Graydon LLP, June 4, 2010), online <http://www.blakes.com/english/view_bulletin.asp?ID=4003>; Susan M. Hutton and Michael Kilby, "Canada's new US-style merger review process may increase burdens for more complicated transactions" (Stikeman Elliot LLP (October 30, 2009), online: <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/13178.htm>.
80. See Guy Régimbald, *Canadian Administrative Law* (Markham, Ontario, LexisNexis Butterworths, 2008), at p. 183.
81. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 29.1.
82. Rules of Civil Procedure, *ibid.*, rule 29.1.03(3)(a).

impairment grounds is, therefore, of diminished significance.[83] The Supreme Court has never considered whether a discovery/ production plan, in a context similar to the SIR process, is required to limit any impairment of the right to be free of unreasonable searches and seizures under s. 8 of the Charter.

Granted, the Commissioner and the merging parties frequently engage in pre- and post-issuance dialogue to narrow down the scope of an SIR.[84] The parties could also negotiate a remedy to avoid or to end the SIR process. Nevertheless, the Commissioner ultimately decides how the second stage of the merger review process will unfold. To prolong the process (and possibly extract a remedy), she can order that the parties provide any relevant information to the assessment of the merger. Less intrusive standards of production, such as "necessary and relevant" or "strictly relevant," would remove some of this authority, yet would still achieve the same legislative objectives. The necessity test is the standard applied in the Investment Canada Act, the sibling statute to the Act.[85]

(ii) The Principle of Proportionality Should Apply

To avoid a search becoming standardless, a principle of proportionality should be applied to the enabling provision.[86] The production process in both criminal and civil proceedings is constrained by the proportionality principle.[87]

Following the publication of the Osborne Report,[88] which recommended several changes to the discovery rules, the Ontario Legislature amended the Rules of Civil Procedure to implement

83. Consider *Branch*, *supra*, footnote 9. Consider also *McKinlay Transport*, *supra*, footnote 47.
84. See *Merger Review Process Guidelines*, *supra*, footnote 17, at p. 8.
85. See Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 17(3).
86. See *R. v. Heywood* (1994), 120 D.L.R. (4th) 348, [1994] 3 S.C.R. 761 (where the court invalidated s. 179(1)(*b*) of the Criminal Code, R.S.C. 1985, c. C-46, under s. 7 of the Charter due to the overbreadth of the provision).
87. In criminal matters, for example, the searching party must establish reasonable and probable grounds of an offence, and furthermore, the evidence to be seized must be related to the alleged crime. See *e.g.*, Criminal Code, *ibid.*, s. 487.01. In addition, discovery plans, which circumscribe the scope of production, are now a matter of civil procedure in civil proceedings in Ontario. Rules of Civil Procedure, *supra*, footnote 81. No principle of proportionality, however, is in place to control the scope of searches under s. 114(2).
88. Hon. Coulter Osborne, "Civil Justice Reform Project: Summary of Findings & Recommendations" (Toronto, Ministry of the Attorney General, November 2007), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> ("Osborne Report").

those recommendations. As noted above, the Rules now require that parties to an action agree on a discovery/production plan. The amended Rules also require the parties to consult the Sedona Canada Principles Addressing Electronic Discovery when preparing their plan.[89] Those guidelines were developed to ground electronic discovery processes in the principle of proportionality.[90]

Again, in the absence of some judicial pre-authorization standard (such as reasonable and probable grounds), it is troubling that there is no statutory or other legal mechanism to govern the proportionality of SIR searches. It is of particular concern given the impetus for the incorporation of the Sedona Canada Principles into other civil discovery practices; principles that alleviate the potentially prohibitive burden imposed by electronic discovery in light of a "relevance" standard for production.[91] Although the recommendations in the Osborne Report applied to purely private actions, the recognition that more tailored standards exist for the production of documents is nevertheless instructive when assessing whether the SIR process is reasonable.

89. Sedona Conference, "The Sedona Canada Principles Addressing Electronic Discovery" (Sedona, Arizona, Sedona Conference, January 2008), online: <http://www.lexum.com/e-discovery/documents/SedonaCanadaPrinciples01-08.pdf>.

90. The most relevant of the principles include:

> 2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information
>
> . . . . .
>
> 5. The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.
>
> 6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information.

91. The Osborne Report and the Discovery Task Force pointed to the meaninglessness of the "relevance standard" as one of the most prominent areas of concern, not only for adding delay to already lengthy procedures, but also for adding unnecessary expense. See Osborne Report, *supra*, footnote 88, at pp. 85-86. See also Ontario, Superior Court of Justice and Ministry of the Attorney General, "Report of the Task Force on Discovery Process" (November 2003), online: <http://www.ontariocourts.on.ca/scj/en/reports/discoveryreview/index.htm>, at p. 59.

A U.S. study of Verizon's response to an onerous second request in 2005 also found that there was ample opportunity to reduce the associated burden without sacrificing the efficacy of the review. Some commentators noted that the study's recommendations dovetail with the Sedona Canada Principles and could support their application in the merger review process.[92] That position seems sensible indeed.

(iii) Limitations Set Out by Guidelines are Non-Binding on the Commissioner

Although the Bureau has published guidelines that suggest limitations on (i) the number of custodians to be searched; (ii) the responsive period for the production of documents; and (iii) the requirement to search and produce information from backup storage media, those guidelines are not legal constraints on the exercise of the Commissioner's discretion.[93] Strict compliance with guidelines would anyway render them *ultra vires* for fettering discretion.[94] As Ratushny J. so aptly noted in *O'Neill v. Canada (A.G.)*, even the judicious use of discretion is not a cure for constitutionally defective legislation:[95] "[O]ur goal should be the rule of law, not the rule of individual."[96] Again, this reflects the importance of the separation of powers and judicial supervision over the executive branch and the bureaucracy; principles that are fundamental to our legal order.

In any event, the Commissioner and the Bureau take the position that the Act authorizes them to request the creation, organization and delivery of information in the manner or format of their choosing,[97] based presumably on a broader interpretation

92. Patrick Oot, Anne Kershaw, and Herbert L. Roitblat, "Mandating Reasonableness in a Reasonable Inquiry" (2010), 87 Denv. U.L. Rev. 533, at p. 552.
93. See *Merger Review Process Guidelines*, *supra*, footnote 17, at pp. 8-15.
94. See Régimbald, *supra*, footnote 80, at pp. 193-196; See also *Maple Lodge Farms Ltd. v. Canada* (1980), 114 D.L.R. (3d) 634 at p. 645, [1981] 1 F.C. 500 (C.A.), affd 137 D.L.R. (3d) 558, [1982] 2 S.C.R. 2.
95. *O'Neill v. Canada (Attorney General)* (2006), 272 D.L.R. (4th) 193, 82 O.R. (3d) 241, 213 C.C.C. (3d) 389 (S.C.J.), at para. 59. See also *Herman v. Canada (Minister of Citizenship and Immigration)* (2010), 190 A.C.W.S. (3d) 232, 2010 FC 629, at para. 28, *per* Crampton J., "More generally, administrative guidelines are not binding and cannot be applied in a manner that unduly fetters a decision maker's discretion" [Citations omitted].
96. Submissions of the Appellant, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 234 D.L.R. (4th) 257, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 63, cited in *O'Neill*, *ibid.*
97. See *Merger Review Process Guidelines*, *supra*, footnote 17.

of the term "supply additional information." The term "information" is also not defined in the Act. The exercise of discretion to compel production or information far exceeds the minimally intrusive standard discussed above and could, in the author's view, amount to a standardless sweep.

(iv) Conclusions on the Scope of Discretion

In light of the above discussion, it is submitted that the Charter requires the Commissioner to do more than simply to issue the request. It may require the Commissioner to provide reasons for the information requested, to tailor the request so that it is minimally intrusive and to negotiate a plan for production in keeping with the standard of reasonableness discussed above.

V. CONCLUSION

In summary, the case presented in this paper for finding the SIR process unconstitutional is based on whether it is "reasonable," not on whether the Commissioner's prior requests have been so. Canadian law does not provide any mechanism for judicial control over the SIR process apart from *ex post* judicial review, nor does it meaningfully limit the scope of the Commissioner's discretion under s. 114(2). The absence of some judicial control over the SIR process and the scope of the Commissioner's powers to demand information and documents highlight the discordance between s. 114(2) of the Act and s. 8 of the Charter. It is problematic that legislative amendments, which altered procedures that had worked well for nearly a quarter century, have done so to such a degree that they have cast the constitutionality, and indeed the legitimacy, of those new procedures in doubt. Accordingly, in the author's view, further analysis, policy discussion and legislative review is appropriate to ensure that the merger review process allows Canadian businesses and consumers to maximize the benefits that strategic mergers can offer.