CT2007-003

COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an Interim Order pursuant to section s. 100 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an Inquiry pursuant to subsection 10(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, into the proposed acquisition by Labatt Brewing Company Limited of all of the outstanding units of Lakeport Brewing Income Fund.

B E T W E E N :

THE COMMISSIONER OF COMPETITION

Applicant

- and -

LABATT BREWING COMPANY LIMITED
LAKEPORT BREWING INCOME FUND
LAKEPORT BREWING LIMITED PARTNERSHIP
ROSETO INC.
TERESA CASCIOLI

Respondents

CONFIDENTIAL MEMORANDUM OF ARGUMENT OF THE RESPONDENT LABATT BREWING COMPANY LIMITED

PART I: FACTS

A. Overview

1. The Commissioner of Competition seeks an interim order pursuant to section 100 of the *Competition Act* (the "Act") enjoining Labatt Brewing Company Limited ("Labatt") from completing or implementing its acquisition of the Units of Lakeport Brewing Income Fund (the

"Fund"), which are publicly traded on the Toronto Stock Exchange, on March 29, 2007, pursuant to Labatt's Offering Circular dated February 21, 2007.

2. The application should be dismissed, for two reasons.

3. First, the Commissioner has failed to discharge the burden upon her to establish that in the absence of such an order Labatt "is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [s. 92 of the Act] because that action would be difficult to reverse," which is the test under s. 100 of the Act. The mere closing of the transaction does not in itself have such an effect. In order to assure this Tribunal that it will not take any action to implement the merger in a manner that would substantially impair this Tribunal's ability to later grant a s. 92 remedy, the President of Labatt undertakes to the Tribunal, on the authority of its Board of Directors to comply with the hold separate set out in his affidavit (or as may be ordered by the Tribunal) of the type granted by the Tribunal in the past under s. 100 in *Quebecor, infra,* registered with the Tribunal under ss. 100 and 105 in, for example, *Tolko, infra*, and granted under s. 104 of the Act in *Superior Propane, infra* and other cases. The undertaking is the procedure recommended by Justice Muldoon in *Fleet Aerospace, infra.*

Competition Act, R.S.C. 1985, c. C-34, s. 100

4. Second, even if this Tribunal finds that the Commissioner has satisfied her burden under s. 100, it should nevertheless exercise its discretion not to issue an order. The Commissioner does not require further time to investigate this transaction. This is the fourth in a series of inquiries into various beer industry transactions and issues over the past 3 1/2 years. Indeed, it is clear from the materials filed in this case that the Commissioner already has an opinion from Professor Don McFetridge, apparently obtained in one of these earlier inquiries (as it is dated April 2006), which deals, *inter alia,* with the relevant product market, barriers to entry and efficiencies. She has also retained an American economist who has given a 50-page affidavit setting out his conclusions, not only in respect of this application but in respect of the ultimate merits of the transaction. Labatt gave the Commissioner advance notice of this transaction on February 1, 2007, prior to its February 12, 2007 filing under s. 114 of the Act, effectively

extending the time period for her investigation beyond the formal 42 day statutory waiting period to an actual 54 days (indeed, it will be 57 days, a full 8 weeks, by the closing date of March 29).

5. Given that this is a public market transaction, any further delay would cause significant harm to Lakeport Unitholders. It will also cause harm to Labatt and Lakeport, as their competitors are taking advantage of the delay, particularly in the case of Brick which is running disparaging advertisements seeking to take share from Lakeport during this period of uncertainty, with text such as: "OUCH – Lakeport Announces Sale to One of the Big Boys. Will Value Drinkers Take a Hit? ... Laker: A Buck a Beer Today. A Buck a Beer Tomorrow."

6. In the alternative, if this Tribunal does issue a s. 100 order, it should be limited to 14 days (no later than April 10, 2007), which is one 12-clear day extension period of Labatt's bid on the Toronto Stock Exchange after the initial expiry date of March 29, 2007. The maximum 30 day period for a s. 100 order is obviously intended for the most complex of cases. Quite apart from the fact that the Commissioner had a significant head start in this case, as explained above, this is simply not a complex transaction. The beer industry is not a complex one. The post-merger market share of Labatt and Lakeport will only be in the range of 34% to 40%, much less than in many other more complex merger cases. Moreover, the merged company will remain smaller than Molson, the market share leader in Ontario and the brewer of the highest-selling discount beer in the province (Carling). The merged company will also continue to compete with 9 other competitors in the discount segment alone, in an industry with low barriers to entry, a profitable lowest legal minimum price, and at least one announced emergent entrant.

B. The Commissioner's Inaccurate or Misleading Allegations and Flawed Economic Analysis

7. The Commissioner's "facts" are rife with inaccuracies, omissions, inconsistencies, cherrypicking of documents and selective quoting from records. Only a few of the many examples of such inaccurate or misleading allegations are set out below.

8. In the Affidavit of Stephen Peters:

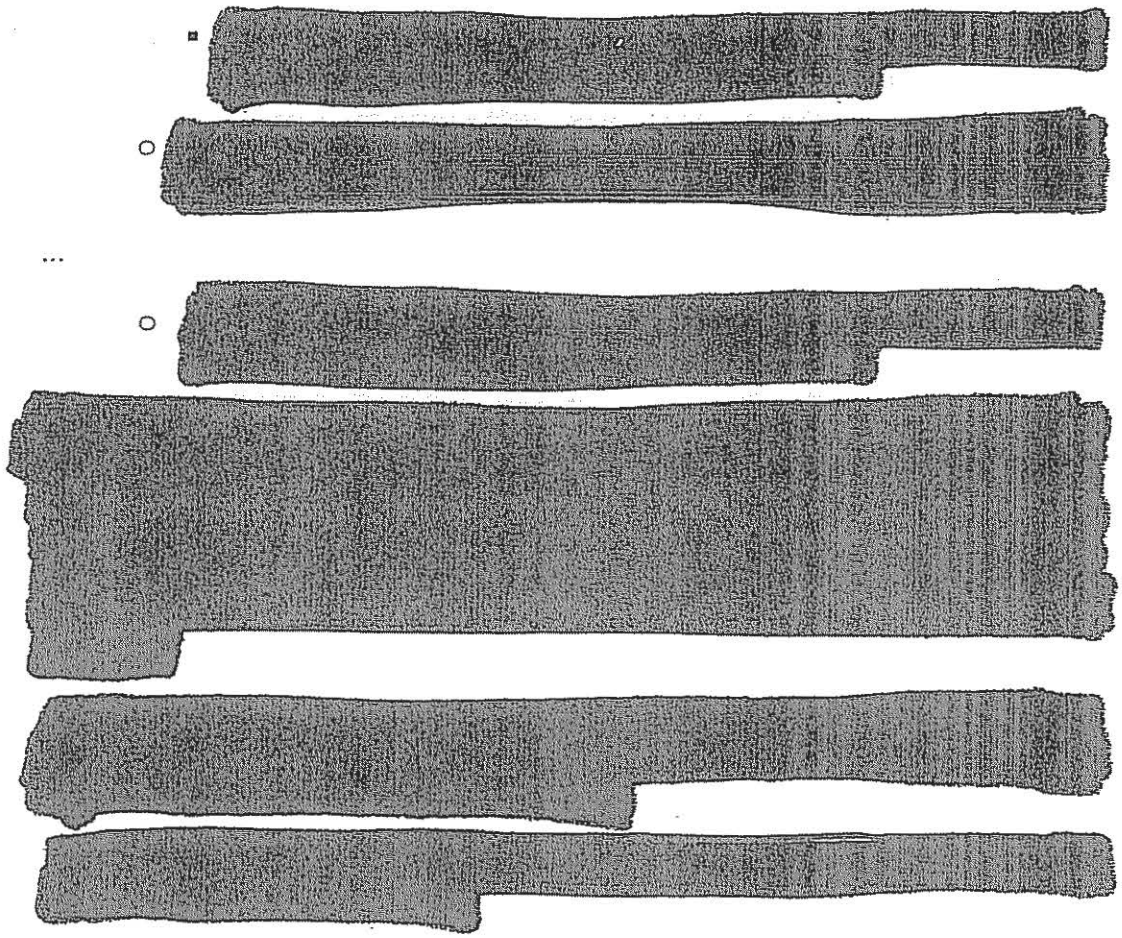
(a) At paragraph 21 he states that the Commissioner commenced her inquiry on February 15, 2007, yet this could only be accurate in the most formal of senses as it is clear from Exhibit 10 to his affidavit, a 12-page memorandum dated on February 14, that the Commissioner had in fact already done a great deal of work on this transaction prior to that date, including consulting an expert opinion on definition of the product market and efficiencies.

> Affidavit of Stephen Peters sworn March 21, 2007 ("the Peters Affidavit"), para. 21 [Commissioner's Record, Vol. 7, Tab E, p. 21]
>
> Memorandum from the Acting Deputy Commissioner of Competition, Mergers to the Commissioner of Competition dated February 14, 2007, Exhibit "10" to the Peters Affidavit [Commissioner's Record, Vol. 8, Tab E10]

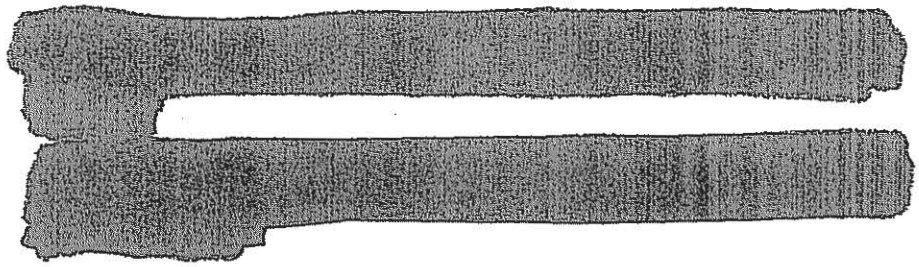
9. At paragraph 33 he states that the materials provided by Labatt to the Commissioner for purposes of its potential transaction with Sleeman in February and March 2006 is "stale" and "does not reflect the current competitive realities of the Ontario beer market," yet the memorandum at Exhibit 10 to his affidavit relies heavily on the April 2006 expert opinion of Professor Don McFetridge in respect of product markets, barriers to entry an efficiencies, an analysis which the Deputy Commissioner clearly does not consider to be stale-dated.

10. In the Affidavit of Philip B. Nelson:

(a) [redacted]



Affidavit of Philip B. Nelson Affidavit, sworn March 20, 2007 (the "Nelson Affidavit"), para. 37 [Commissioner's Record, Vol. 6, Tab D, at p. 1856]



See also: Affidavit of Margaret Sanderson sworn March 23, 2007 (the "Sanderson Affidavit"), para. 11 (citing multiple further examples of "cherry picking" by Mr. Nelson)

(b) At paragraph 76, he asserts: "Because Labatt has a duty to 'maintain the independent viability of Lakeport', Labatt is under a duty not to undertake any action that will 'adversely affect' the 'financial status of Lakeport' (see paragraph 15(e) of the proposed hold separate). This duty restricts Labatt's ability to compete aggressively with Lakeport."

By very selectively quoting from paragraph 15(e) the Hold Separate Arrangement, Mr. Nelson has completely mischaracterized its effect. Paragraph 15(e) of the Hold Separate Arrangement actually states:

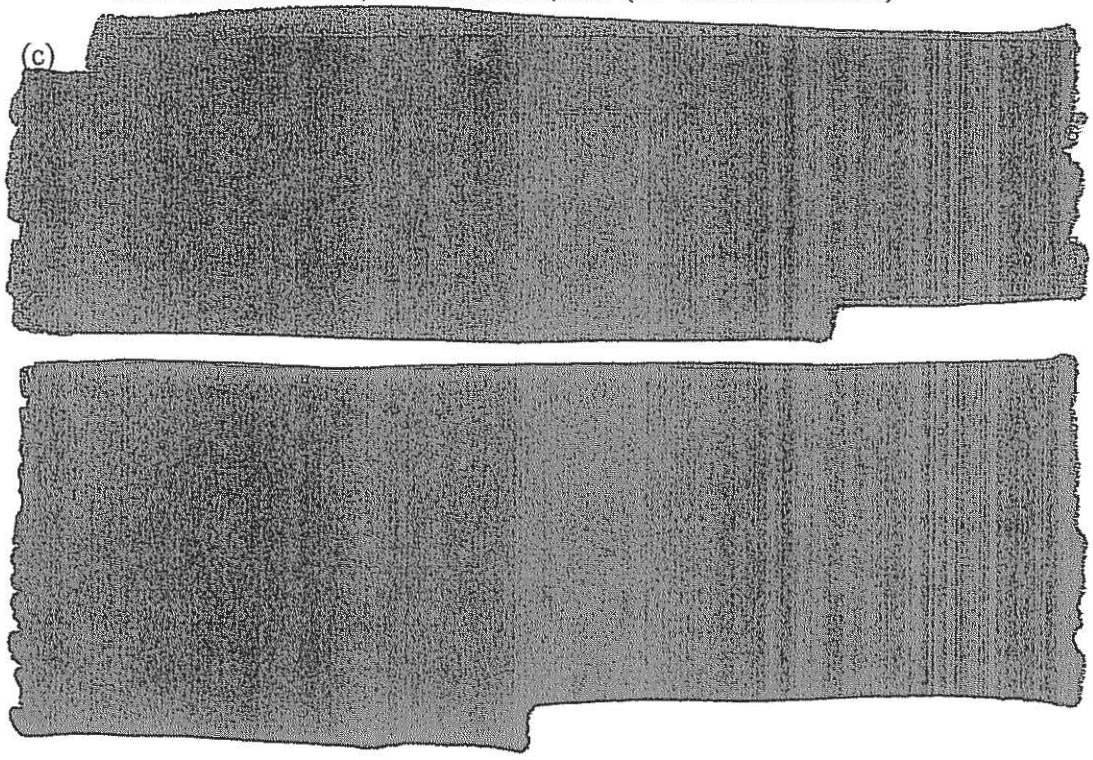
Labatt, to the extent permitted by this consent interim agreement, will cause Lakeport to, and Lakeport will, during the interim period: ...

> (e) not knowingly take any action that will adversely affect the competitiveness, assets, operations or financial status of Lakeport.

As is clear from the plain language of the Hold Separate Arrangement, paragraph 15(e) prevents Labatt from causing Lakeport to harm its own competitiveness, and prevents Lakeport from doing so on its own. It clearly does nothing to "restrict Labatt's ability to compete aggressively with Lakeport." Rather, it serves to ensure continued competition between the held separate companies during the Hold Separate Period.

Nelson Affidavit, para. 76 [Commissioner's Record, Vol. 6, Tab D, at p. 1878]

Hold Separate Arrangement, para. 15 (e), Exhibit 6 to the Affidavit of Miguel Nuno da Mata Patricio, sworn March 22, 2007 (the "Patricio Affidavit")



Nelson Affidavit, para. 23 [Commissioner's Record, pp. 1850-51]

Amended and Restated Preliminary Prospectus of Lakeport Brewing Income Fund (19 May 2005) at p. 36 [Commissioner's Record, p. 1331]

Hold Separate Arrangement, Exhibit 6 to the Patricio Affidavit, paras. 15 (d) and (f)

(d) Mr. Nelson also cherrypicks media quotes, noting only those that are negative, but not the following press coverage favourable to the Labatt/Lakeport, which the Commissioner was aware well before the affidavit was sworn.

- the head of Brick is quoted as saying, "No one's going to up Lakeport's price. If they did, another brewer will just fill that niche".

- M Partners Inc., a Toronto-based investment bank, in an analyst report dated February 2, 2007, noted: "...we see many other value beer brands providing sufficient competition to Labatt and Lakeport's combined market share in the segment."

- Similarly, Michael Krestell, an analyst with M Partners Inc., was quoted in a Canadian Press article, dated February 1, 2007, as saying: "[t]here are still other value beer brand competitors so it would be difficult for [Labatt] to come off the floor pricing in a significant way". According to Krestell, there is still room for the value beers to expand their market.

- A similar point regarding expansion was made by Peter Holden, an analyst with Veritas Investment Research, in a National Post article, dated February 2, 2007. In Holden's view, "... there's nothing to stop Brick and Big Rock from stepping into the shoes of Lakeport and increasing their discount brands."

- In fact, in response to the announcement of the Proposed Transaction, Mountain Crest, which already operates in Alberta and Manitoba, declared its intention to enter the Ontario beer industry in the spring. The Hamilton Spectator reported that Manjit Minhas, co-owner of Mountain Crest, "thinks the Lakeport sale leaves the discount market wide open," and, "is eyeing a move to the Ontario market this year." She is quoted as saying: "When I found out about the [Lakeport] sale the other day, I was pleasantly surprised."

Labatt ARC Submission, Exhibit "13" to the Schotel Affidavit

11. Furthermore, as is set out in detail in the Affidavit of Margaret Sanderson, head of the Global Competition Practice for CRA International and former Assistant Deputy Director of Investigation and Research within the Economics and International Affairs branch of the

Competition Bureau, who has extensive expertise in Canadian merger analysis and remedies under the *Competition Act*, the conclusions of Mr. Nelson:

> are not supported by the evidence that he presents in his affidavit. His conclusions are premised solely on the fact that certain Labatt brands compete against certain Lakeport brands. Most importantly, Mr. Nelson fails to consider the effectiveness of remaining rivals. In addition, Mr. Nelson does not take account of the fact that Labatt expects to keep (as opposed to divest) the Lakeport brands following the interim period of the hold separate, and as a result Labatt has no incentive to damage the Lakeport assets during the interim period. [emphasis added]
>
> Sanderson Affidavit, para. 4

12. Mr. Nelson's conclusion that this proposed transaction will have "immediate, irremediable interim anti-competitive effects" is based upon a flawed analysis for reasons which include the following:

(a) Mr. Nelson does not discuss documents referring to competitors other than Lakeport, or the effectiveness of any rival firms, not even Molson [redacted]

(b) Mr. Nelson does not address possible brand repositioning or ease of entry, [redacted] In particular, there are 10 rival brewers to Labatt and Lakeport in the discount segment, with most brewers selling multiple brands. A number of the current brands within the Ontario value segment are brands that were sold in other parts of the country as discount beers, such as Lucky by Labatt, James Ready by Moosehead, and Great West from Saskatchewan. Since the discount category was launched in 2002, there have been numerous line extensions by various brewers as consumers' taste preferences have been revealed. For example, there are 12 brands of light beer sold in the discount segment, and 10 brands of honey lager alone.

(c) The fact that two merging firms produce some products that some consumers consider substitutes is not sufficient to give rise to anti-competitive harm. Rather, anti-competitive harm can only arise when the merging firms are able to exercise market power, which necessarily depends on rival firms' and customers' reactions to any potential price increase. Mr. Nelson addresses neither rivals firms' not customers' reactions in his affidavit. [redacted]

(d) Mr. Nelson claims that Labatt has an incentive to divert customers from Lakeport brands to Labatt brands when Labatt earns a higher margin on its brands (notably its premium beer brands). However, Mr. Nelson presents no evidence that indicates that Labatt has any ability to effect such a strategy.

Sanderson Affidavit, paras. 7-16

13. In summary, even if the Hold Separate Arrangement gave Labatt "substantial control" over Lakeport, which it does not, the Commissioner's affiant has not established that it is likely that the transaction would substantially impair any remedy of this Tribunal. He has not established that any price increase is likely as a result of this transaction as a matter of economics (quite apart from the fact that Labatt has undertaken not to raise prices during the hold separate period).

Sanderson Affidavit, para. 16

Patricio Affidavit, para. 19

Nelson Affidavit, e.g. paras. 42, 57 [Commissioner's Record, Vol. 6, Tab D]

Labatt ARC Submission to the Commissioner, dated February 13, 2007, Exhibit 13 to the Schotel Affidavit

14. With respect to the long-term effects of the proposed transaction, it is noteworthy that Mr. Nelson does not conclude that a divestiture remedy is not feasible in this case should this Tribunal ultimately order such a remedy under s. 92 of the Act. Nor does he claim that a divestiture would not be effective or enforceable in removing any "substantial" lessening of competition that might hypothetically be found. His conclusion that he cannot "rule out" the "possibility" that Labatt will "scramble the eggs" or dismantle Lakeport during the hold separate period is wholly speculative and does not meet the test under s. 100

Sanderson Affidavit, paras. 18, 24

15. Moreover, Mr. Nelson ignores the fact that such acts would violate the Hold Separate Arrangement and Labatt's undertaking to this Tribunal. The completely baseless suggestion that Labatt might violate its undertaking even though it would face contempt proceedings in this Tribunal for doing so does not meet the s. 100 test. It is not "likely" to happen. Indeed, the suggestion that Labatt would do so is preposterous.

Sanderson Affidavit, para. 23

Hold Separate Arrangement, Exhibit 6 to the Patricio Affidavit

16. Mr. Nelson refers to several U.S. economic papers (some very dated) relating to U.S. divestiture experience as evidence that purchasers often alter acquired assets in ways that undermine the effectiveness of any subsequent divestiture relief. Most, if not all, of these articles deal with situations where partial divestitures are required following larger transactions, and the merged firm has no reasonable prospect for maintaining control over the assets to be divested. The fact that the firm undertaking the divestiture knows that it cannot keep the assets in the long run, fundamentally alters the firm's interests in maintaining the assets in good competitive condition during the hold separate period. This is not the situation here, where Labatt's interest is in preserving and advancing the Lakeport brands that it fully expects to be permitted to retain when the hold separate period ends, as it needs those brands to compete effectively with its rivals, including Molson, Brick, Sapporo/Sleeman and Moosehead.

Sanderson Affidavit, paras. 19-23

17. Furthermore, Mr. Nelson relied heavily in his conclusions regarding potential substitution of Labatt and Lakeport brands on the seriously flawed and internally inconsistent [redacted] study, even though that study explicitly states that it should not be used to draw conclusions regarding volume shares. [redacted]

Sanderson Affidavit, paras. 27-34

18. In summary, despite the extensive documents and evidence available to the Bureau to date, Mr. Nelson has used either selective or unreliable information to conclude that the transaction will lead to anti-competitive effects. As such, his conclusions should be given no weight by this Tribunal.

C. <u>The Proposed Merger</u>

19. On January 31, 2007, Labatt entered into a Support Agreement with Lakeport Brewing Income Fund (together with its affiliates, "Lakeport") to acquire all units in the capital of

Lakeport Brewing Income Fund at a purchase price of C$28.00 per unit in cash. That represented a premium of 36% over the pre-bid trading price of $20.57.

> Affidavit of Ronald S. Lloyd, sworn March 20, 2007 (the "Lloyd Affidavit"), paras. 6-8
>
> Support Agreement between Labatt and Lakeport dated January 31, 2007, Exhibit "A" to the Lloyd Affidavit

20. On February 21, 2007, Labatt made an offer pursuant to an Offer to Purchase and Take-over Bid Circular (the "Offer") to acquire all of the Units.

> Lloyd Affidavit, para. 8
>
> Labatt letter to Unitholders of Lakeport dated February 21, 2007, Exhibit "D" to the Lloyd Affidavit
>
> Labatt Offering Circular dated February 21, 2007, Exhibit "E" to the Lloyd Affidavit

21. The Offer is open for acceptance until 5:00 p.m. (Toronto time) on March 29, 2007, unless extended or withdrawn. By the terms of the Support Agreement, without the consent of Lakeport, any such extension by the Offeror cannot exceed 12 days per extension period. The March 29th closing date is based upon the requirement of Ontario securities laws that an offer be open no less than 35 days.

> Lloyd Affidavit, para. 9

D. Background

22. Within the Ontario beer industry, products are often discussed as being in three segments: specialty, premium (also known as mainstream), and discount.

> Patricio Affidavit, para. 9

23. The discount segment has grown significantly over the past 10 years. Within the discount segment, there is a further sub-segment consisting of beer that is sold at the lowest price allowed by the Liquor Control Board of Ontario, called the Minimum Social Reference Price (the "MSRP"). This sub-segment is sometimes referred to as the deep discount sub-segment, or the floor price sub-segment, of the Ontario beer industry.

Patricio Affidavit, para. 10

24. [redacted] This rapid expansion was accompanied by an equally rapid proliferation of brewers and brands competing in this product space. While in January 2005 there were five (5) beer producers marketing 12 brands of beer at or very close to the MSRP, by the start of 2007, there had been three (3) new entrants for a total of eight (8) beer producers marketing at least 30 brands of beer at the MSRP.

Patricio Affidavit, para. 11

[redacted]

E. Rationale for this Transaction

25. [redacted]

Patricio Affidavit, para. 12

26. [redacted]

Patricio Affidavit, para. 13

27. [redacted]

Patricio Affidavit, para. 14

[redacted]

28. Labatt needs to be in the discount beer business and needs to grow in the discount segment [redacted] Lakeport is a natural fit for Labatt in this regard. Lakeport only sells discount beer. Lakeport has nine brands of beer and sells all of them at or around the MSRP. The rationale for this transaction, therefore, is for Labatt to participate and grow in the discount segment and take advantage of Lakeport's brand equity.

Patricio Affidavit, paras. 15-16

29. Labatt advised the Competition Bureau on February 1, 2007 of the proposed transaction and described its rationale for the transaction (i.e., to better compete in the discount segment of the Ontario beer market and take advantage of Lakeport's brand equity). During that call the Competition Bureau was made aware that: (1) Labatt and Lakeport Brewing Income Fund ("Lakeport") had executed the Support Agreement between itself and Lakeport; (2) the transaction was being announced that day; (3) in response to a question from Ms. Aitken of the Bureau, that the reason for the transaction was that Labatt sought to take advantage of the Lakeport brand equity in order to better participate in the discount segment of the Ontario beer industry; and (4) that Labatt would agree to a hold separate arrangement to facilitate closing at the end of the 42-day waiting period, if in fact the Bureau needed more time.

Schotel Affidavit, para. 9

30. [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Patricio Affidavit, para. 17

31. Lakeport's brand equity will enable Labatt to better compete against its competitors, including Molson [redacted] Sapporo/Sleeman, Brick, Moosehead, and others by continuing to sell Lakeport beer in the discount segment.

Patricio Affidavit, paras. 15-18

32. Labatt believes that if it tried to raise Lakeport's prices or to discontinue Lakeport's brands, it would simply lose sales to Molson, Sapporo/Sleeman, Brick, Moosehead, and other beer competitors. There are now 53 brands and 10 brewers in the discount segment alone excluding Labatt and Lakeport listed in The Beer Store. Moreover, Labatt does not have any plans to shut down the Lakeport facilities.

Patricio Affidavit, para. 19

The Beer Store Listing of Brands, Exhibit "5" to the Patricio Affidavit

33. Labatt does not intend to take any irreversible actions that would substantially impair competition should it be permitted to take up and pay for the units of Lakeport Brewing Income Fund, as currently scheduled on March 29, 2007.

Patricio Affidavit, para. 21

34. [redacted]

Patricio Affidavit, para. 21

F. Labatt's Hold Separate Arrangement Undertaking

35. As this is a public takeover bid, certainty of timing is important. Labatt indicated on February 1, 2007 to the Bureau that, should the Bureau require more time to review this transaction, Labatt will hold the operations of Lakeport separate to allow the Bureau to complete its review of this matter. This would permit certainty of closing to the Lakeport shareholders and the capital markets. Labatt remains willing to do so on the terms provided to the Bureau on February 22, 2007 (the "Hold Separate Arrangement"), and in subsequent e-mail correspondence wherein Labatt also proposed a list of interim managers to run the Lakeport business pursuant to the Hold Separate Arrangement.

Patricio Affidavit, para. 22

Proposed Consent Interim Agreement (the "Hold Separate Arrangement"), Exhibit "6" to the Patricio Affidavit

[redacted]

36. Notwithstanding that Labatt does not intend to take any action that would substantially impair the Tribunal's remedies and be difficult to reverse, Labatt's President, North America Zone, Miguel Nuno da Mata Patricio, has sworn an affidavit in this proceeding which he

undertakes on behalf of Labatt, as authorized by Labatt's Board of Directors, that Labatt will abide by the terms of the Hold Separate Arrangement set out in the affidavit. The undertaking provides that if this section 100 application is dismissed and there is no order of the Tribunal preventing completion of the transaction on March 29, 2007, Labatt will complete the transaction and comply with the terms of the Hold Separate Arrangement for a period of 60 days (the "Interim Period"). During the Interim Period, Labatt will not take any actions contrary to the terms of the Hold Separate Arrangement. Labatt further undertakes that it shall abide by any amendments to the Hold Separate Arrangement or any hold separate order made by this Tribunal, (subject to the terms of the Support Agreement).

Patricio Affidavit, paras. 3, 24 and 25

Resolution of the Board of Directors of Labatt, Exhibit "1" to the Patricio Affidavit

37. In summary, Labatt's undertaking includes, among other things:

- causing Lakeport to:
  - carry on its business in the ordinary course in accordance with generally prevailing industry standards;
  - use best efforts to preserve and enhance the goodwill of Lakeport;
  - use best efforts to maintain Lakeport at least to the same level of competition as existed prior to the closing date;
  - use best efforts to enhance the competitiveness of Lakeport without regard to whether its competitor is Labatt or any of its affiliates;
  - not knowingly take any action that will adversely affect the competitiveness, assets, operations or financial status of Lakeport; and
  - use best efforts to take any other actions which are consistent with improving the value and competitiveness of the business of Lakeport;
- not taking any steps toward integrating the assets, management, operations or books and records of Lakeport with those of Labatt or any other person;
- subject to the terms of the Hold Separate Arrangement, not exerting or attempting to exert any control over the operations of Lakeport, including with respect to all

operations, sales, distribution and marketing decisions, except as necessary to ensure compliance with the terms of the Hold Separate Arrangement;

- ensuring that interim managers appointed to run Lakeport during the Interim Period and new members appointed to any Lakeport Board of Directors or Board of Trustees sever all connections to Labatt or any of its affiliates and enter into employment agreements with Lakeport;

- subject to the terms of the Hold Separate Arrangement, ensuring that the interim managers do not disclose any confidential information relating to Lakeport to any other person not directly involved in the management or operations of Lakeport, and to Labatt or any of its affiliates in particular; and

- subject to the terms of the Hold Separate Arrangement, ensuring that Labatt and its affiliates do not directly or indirectly receive, have access to, or use any confidential information relating to Lakeport.

Patricio Affidavit, paras. 24-26

Hold Separate Arrangement, Exhibit "6" to the Patricio Affidavit

[redacted]

G. The Commissioner Does Not Require More Time to Review this Transaction

38. Labatt has already put forward evidence that this is a straightforward transaction that is not difficult for the Bureau to review, particularly in its long form filing on February 12, 2007, its ARC submission of February 13, 2007, its Powerpoint presentation to the Bureau on February 28, 2007, and a March 19, 2007 letter to the Bureau (the "Deep Discount Sub-Segment Letter"). This evidence demonstrates that:

(a) The growth in the number of deep discount beer brewers and brands over the last two years means any attempt to raise prices will simply result in lost sales to Molson, Brick, Sapporo/Sleeman, Moosehead, Cool, Lakes of Muskoka and others. Labatt estimates that in January of 2003, brands available for $24 or less for 24 bottles represented less than 1.5% of all beer sales in Ontario. This share volume increased to 9% in March 2004, to 22% in March of 2006 and to more than 25% in February 2007. [redacted]

[redacted] While in January 2005 there were five beer producers marketing 12 brands of beer at or very close to the MSRP, by the start of 2007 there were eight beer producers marketing at least 30 brands of beer at the MSRP.

(b) The central comparative feature of deep discount beer is price. A typical consumer buying, for example, a case of 24 bottles of beer previously priced at $24 would immediately notice a price increase. As this is the most price-sensitive sub-segment of the beer industry, with customers who have low brand loyalty in the face of a price increase, Labatt would destroy its investment in Lakeport if it were to try to raise prices post-merger. Sales would quickly divert to the ever growing list of other discount competitors and brands. Today, more than ever, no brewer alone or collectively has the ability to affect prices; indeed, increasing the price simply moves a product out of a sub-segment in which Ontario customers now insist on being served, and thus would be expected to result in an immediate loss of sales.

(c) [redacted]

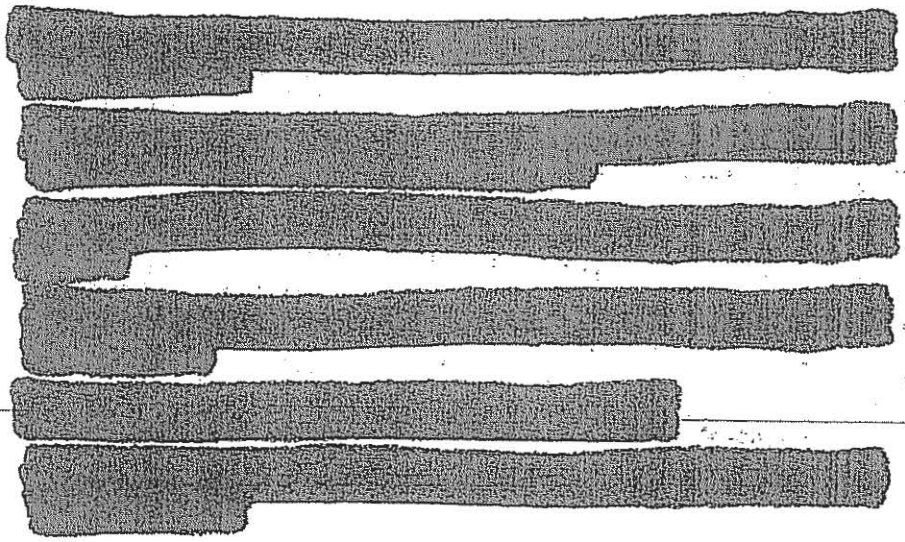
(d) Brewers of all sizes can brew beer and compete profitably in this sub-segment, which is a result of the open distribution system, the MSRP, the favourable tax treatment available to smaller brewers, and the low barriers to entry and expansion in the industry generally.

(e) For example, Mountain Crest (a deep discounter in Alberta and Manitoba) has announced plans to enter Ontario.

(f) Moreover, Brick, which brews deep discount brands Laker Lager, Laker Red, Laker Light, Laker Honey Lager, PC 2.5, PC Genuine Lager, PC Honey Red, PC Light, PC Pilsner and PC Dry, is competing aggressively to expand and capture Lakeport and Labatt customers. Brick has announced that it expects 2007 to be the last year that it qualifies for favourable tax treatment as a small brewer.

To prepare itself for this transition, as is reported in its 2006 Annual Report, Brick has undertaken a "comprehensive manufacturing strategy" which has involved building a new central distribution warehouse, expanding its brewing capacity at several breweries, increasing its TBS distribution capacity, and building a new high-speed bottling line with the capacity to bottle 400,000 hL annually, all in order to reduce variable costs and remain competitive. In order to take advantage of this capital outlay, it is critical for Brick to maximize output growth and production levels. As a result, Brick has a strong incentive to be as aggressive as possible in the marketplace.

Brick, which has been advertising that it will sell for "a buck a beer today, a buck a beer tomorrow," has trademarked the phrase "Buck a Beer" as identifying its products, and cannot in any event afford to lose volume as it loses its favourable tax status and expands its production capacity, is highly motivated to continue to price its deep discount brands at the minimum legal price.



Brick Brewing Company 2006 Annual Report, Exhibit 7 to the Schotel Affidavit

PART II: ARGUMENT

A. Overview of s. 100 Analysis

39. The relevant portions of s. 100 of the *Competition Act* read as follows:

100. (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed

merger in respect of which an application has not been made under section 92 or previously under this section, where

> (a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse ...

(4) An interim order issued under subsection (1)

> (a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and
>
> (b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.

(5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.

...

(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger. [emphasis added]

Competition Act, *supra*, s. 100

40. For comparison, we set out below both the current s. 100 and s. 100 as it read at the time of the decision of Justice Rothstein in *Superior Propane*:

Previous s. 100	Current s. 100
100.(1) Where, on application by the Director, the Tribunal finds, in respect of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, that (a) the proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because that action would be difficult to reverse; or (b) there has been a failure to comply with section 114 in respect of the proposed merger, the Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of the proposed merger	100.(1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where (a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or (b) the Tribunal finds, on application by the Commissioner, that there has been a contravention of section 114 in respect of the proposed merger.
(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Director to each person against whom the order is sought.	(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Commissioner to each person against whom the order is sought.
(3) Where the Tribunal is satisfied, in respect of an application made under subsection (1), that (a) subsection (2) cannot reasonably be complied with, or (b) the urgency of the situation is such that service of notice in accordance with	(3) Where the Tribunal is satisfied, in respect of an application for an interim order under paragraph (1)(b), that (a) subsection (2) cannot reasonably be complied with, or (b) the urgency of the situation is such that

subsection (2) would not be in the public interest, may proceed with the application *ex parte*..	service of notice in accordance with subsection (2) would not be in the public interest,
(4) An interim order issued under subsection (1)	it may proceed with the application *ex parte*.
(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and	(4) An interim order issued under subsection (1)
(b) subject to subsection (5), shall have effect for such period of time as is specified therein.	(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and
(5) An interim order issued under subsection (1) in respect of a proposed merger shall cease to have effect	(b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.
(a) in the case of an interim order issued on *ex parte* application, not later than ten days, or	(5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.
(b) in any other case, not later than twenty-one days,	(6) The duration of an interim order issued under paragraph (1)(b) shall not exceed
after the interim order comes into effect or, in the circumstances referred to in paragraph ~~(1)(b), after section 114 is complied with.~~	(a) ten days after section 114 is complied with, in the case of an interim order issued on *ex parte* application; or
(6) Where an interim order is issued under paragraph (1)(a), the Director shall proceed as expeditiously as possible to commence and complete proceedings under section 92 in respect of the proposed merger.	(b) thirty days after section 114 is complied with, in any other case.
	(7) Where the Tribunal finds, on application made by the Commissioner on forty-eight hours notice to each person to whom an interim order is directed, that the Commissioner is unable to complete an inquiry within the period specified in the order because of circumstances beyond the control of the Commissioner, the Tribunal may extend the duration of the order to a day not more than sixty days after the order takes effect.
	(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in

	respect of the proposed merger. [emphasis added]

Director of Investigation and Research v. Superior Propane Inc. ("*Superior #1*") (6 December 1998) at para. 19 (Comp. Trib.) (per Rothstein J.)

41. Before making any order under s. 100 of the Act, the Tribunal must engage in a three-step analysis:

(a) First, the Tribunal must determine whether it has jurisdiction to make any interim order under s. 100 of the Act. To do so, it must find as a precondition to granting relief:

(i) the Commissioner has certified that an inquiry is being made under paragraph 10(1)(b);

(ii) in the Commissioner's opinion, more time is required to complete the inquiry;

(iii) if the order is not granted, a person is likely to take an action that would substantially impair the Tribunal's ability to remedy the effect of the proposed merger on competition because that action would be difficult to reverse.

If any of these three preconditions is not satisfied, the Tribunal has no discretion to issue an interim order.

(b) Second, even if these three conditions are satisfied, the Tribunal "may" (i.e., not "must") issue an order. The Tribunal has a discretion not to issue an interim order even where the three preconditions are satisfied. Accordingly, if the Tribunal concludes that it has jurisdiction to make a s. 100 order, it must then consider all relevant factors to determine whether it should exercise its discretion to make such an order.

(c) Third, if the Tribunal decides that it has jurisdiction to grant an interim order and exercises its discretion to do so, it must determine which terms and conditions of the order are "necessary and sufficient to meet the circumstances of the case" pursuant to s. 100(4)of the Act and, as well, determine the length of time, up to 30 days, for which the s. 100 order should be in effect.

Competition Act, *supra*, s. 100

42. Labatt submits that the Tribunal does not have jurisdiction to make a s. 100 order in this case. As explained in detail in Part B below, in light of Labatt's undertaking to the Tribunal to

hold Lakeport separate for 60 days, the Commissioner has not established the third precondition, that "in the absence of an interim order [Labatt] is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [s. 92 of the Act] because that action would be difficult to reverse."

Patricio Affidavit, paras. 3, 24-26

Resolution of the Labatt Board of Directors, Exhibit "1" to the Patricio Affidavit

Hold Separate Arrangement, Exhibit "6" to the Patricio Affidavit

43. In the alternative, for the reasons given below, Labatt submits that the Tribunal should exercise its discretion to refuse to grant an interim order in this case, even if the three preconditions have been met (which Labatt denies), because such an order is not "necessary" in this case.

44. In the further alternative, Labatt submits that if an interim order is granted, it should be limited in duration to 14 days (i.e. no later than April 10, 2007). As explained in detail in Part C below, the following "circumstances of the case," or factors, should guide the Tribunal's exercise of discretion in this case:

(a) this a public takeover, which is significant in at least two respects:

(i) the Tribunal should take into account the scheme of the *Ontario Securities Act* under which the usual wait period for taking up the shares or units of the target is only 35 days, and any extension is for minimum of 10 days and the practice is to extend for 10 days unless the contract provides for some greater number (here, the maximum period under the Support Agreement is 12 days); and

(ii) the Tribunal should also consider the harm to Lakeport and its Unitholders if this transaction is delayed beyond the usual 35 day period;

(b) the Commissioner has already received volumes of very strong evidence of the competitive dynamics of this transaction, and performed a comprehensive review of the industry within the last year [redacted]

(c) the Commissioner does not require more than the 54 days it has already had to analyze this transaction, in light of the following facts:

(i) [redacted] a mere 2 days after Labatt made its long form filing of February 12, 2007, and a full 2 weeks after first being advised of the transaction, that the Commissioner was well acquainted with the industry already and, indeed, already had an opinion from an economist, Professor Don McFetridge, who is well known to this Tribunal, about the antitrust issues in the Ontario beer industry relevant to this transaction, including the relevant product market, geographical market, and potential barriers to entry;

(ii) this transaction is not difficult to analyze. There are no complicated supply agreements. There are no complicated interconnection issues as there may be in other industries. There are no complex intellectual property issues. There are no barriers to entry regarding distribution, because it is done through Brewers Retail Inc. Accordingly, it is not surprising that the Bureau had a significant amount of the work it would need to do to complete its inquiry done by February 14;

(iii) this proposed merger is not complex, given that the combined market share of Labatt and Lakeport will only be [redacted] in contrast with, e.g.: a) 84% of the traffic through the port of Montreal in *CP Ships*; b) 70% to 100% in *Superior Propane*; c) 65% in *Hillsdown*; d) 100% of daily newspapers in the relevant geographical market and a substantial number of the community newspapers in *Southam*. [redacted] These facts also distinguish this proposed merger is only a medium-sized transaction as compared to other takeovers of Canadian targets listed on the Toronto Stock Exchange;

(iv) the expert relied upon by the Commissioner in this motion, Philip Nelson, has given a 50 page affidavit in which he has already given his conclusions not only with respect to this motion, but on the merits of the transaction. While his conclusions on the merits are not supported by the evidence he presents (as explained in the Sanderson Affidavit), the Nelson Affidavit demonstrates the extensive analysis already conducted on behalf of the Commissioner to date;

(v) in addition to the 54 days spent analyzing the Labatt/Lakeport transaction, the Bureau also spent more than 6 months analyzing a proposed merger of [redacted] 3 months analyzing the merger of Sapporo and Sleeman, and 3 years analyzing the Industry Standard Bottle Agreement in

the beer industry. All of these investigations were very recent; they all ended within the last year.

(d) Labatt has advised the Bureau on numerous occasions of its willingness to enter into an interim hold separate agreement under which it would take up and pay for the Units of Lakeport but would not integrate the Labatt and Lakeport businesses. This hold separate order follows that in *Superior Propane*, where Superior and ICG merged to a 70% market share and no other dominant competitor remained post-merger (as opposed to here, where Molson remains [redacted]

(e) the Bureau has failed to provide an undertaking as to damages; and

(f) the product in issue here is not a necessity like the life-saving drug referred to in *Hillsdown*.

[redacted]

Decision No. 30-W-1005 (C,P Containers (Bermuda) Limited (20 January 1995) (Canadian Transportation Agency)

Notice of Application, *Director of Investigation and Research v. Canadian Pacific Limited* (20 December 1996) at para. 5

Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385 (Comp. Trib.) (*per* Nadon J.), at para. 206

Canada (Director of Investigation and Research, Competition Act), v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) (*per* Reed J.) at p. 24

Canada (Director of Investigation and Research, Competition Act), v. Southam Inc. (1992), 43 C.P.R (3d) 161 (Comp. Trib.)

Nelson Affidavit, paras. 5, 91 [Commissioner's Record, Vol. 6, Tab D]

B. Labatt's Hold Separate Arrangement Undertaking Preserves the Tribunal's Remedies

45. The Hold Separate Arrangement to which Labatt has committed itself preserves the Tribunal's remedies if the Commissioner ultimately brings an application under s. 92 of the Act, and the Tribunal is satisfied that a remedy under that provision is appropriate required.

46. It should be noted that the burden of proving the three elements of the s. 100 test lies with the Commissioner. She claims, at paragraph 39 of her factum that there is a reverse onus, and all persons against whom she brings a s. 100 application are presumed to be likely to take an action substantially impairing this Tribunal's remedies. This is inconsistent with the wording of the statute. It does not state that the Tribunal presumes a likely action, but that the Tribunal must "find" such action to be likely. The Commissioner must establish, therefore, by evidence, that an action substantially impairing the Tribunal's remedies is likely is to be taken.

> Compare: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 36, 78, 79 and *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 100 at paras. 31, 34, 35 (the burden of proof in an application for an interlocutory injunction is on the applicant)

47. In *Superior Propane*, Justice Rothstein, then of this Tribunal, stated in *obiter* that the previous language of s. 100 (which has now been amended) did not give the Tribunal authority to order a hold separate arrangement.

> *Superior #1, supra* at para. 19 (*per* Rothstein J.)

48. Several points should be noted here.

49. First, Justice Rothstein's statement was *obiter dicta*, because he ultimately refused to issue a s. 100 order.

50. Second, Justice Rothstein's statements pre-dated the Federal Court of Appeal's decision (*per* Linden J.A.) on interim orders under the *Competition Act* in *Superior Propane* (discussed below).

51. Third, Justice Rothstein did not consider the issued raised here by Labatt that the Commissioner's application must be dismissed because she has failed to prove that Labatt is

likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse, which is one of the preconditions to any s. 100 order.

52. By its undertaking to comply with the Hold Separate Arrangement, Labatt has bound itself not to take any action that would "substantially impair" the ability of the Tribunal to remedy the effect of the proposed merger on competition.

53. *Canada (Attorney General) v. Fleet Aerospace Corp.* is instructive. The Attorney General sought an interim injunction under s. 29.1 of the Act (now s. 33), to restrain Fleet Aerospace from closing a takeover of Fathom Oceanology Limited. At that time, being a party to the formation of a merger was an indictable offence. Like Justice Rothstein in *Superior Propane*, Justice Muldoon in *Fleet Aerospace* found that the Act only permitted him to grant or not grant the injunction. However, he noted that Fleet could resolve the matter by giving an undertaking not to lessen competition in the interim period and that, if that undertaking was given, no injunction would be necessary. Justice Muldoon explained:

> In logic, it would seem that if Fathom were to come under the complete control of Fleet, as in about 45 days it could, then such competition as there is between them would be lessened, that is unless Fleet were to accord Fathom some real autonomy. Fleet's President and Chief Executive Officer, Anthony George Dragone, reiterates in his affidavit the text of the "Purpose of the Offer and Plans of Fleet" in its offering circular. No changes are immediately planned. Later, after conducting a review of Fathom's situation, "Fleet may consider proposing changes to Fathom's business." That could be ominous in terms of the embryonic or potential competition between these corporations, or not, depending on the intentions, which one attributes to Fleet. In any event, it seems that if the Attorney General moves with diligence and determination under s-s. 30(2), Fathom's position in the market will not be irrevocably prejudiced, if at all, before the issue can be litigated, or at least before the commencement of the litigation. On the material before the court, it is more speculative than reasonable and probable that the acquisition of shares will lessen competition in the near future.
>
> Mr. Dragone's affidavit is the nearest offering to an undertaking by Fleet which is before the court. It is, of course, no undertaking at all. An appropriate undertaking, if Fleet were minded in its sole discretion to give one, might have resolved the issue here to be determined without the necessity of lively litigation. The formulation of section 29.1 of the Act permits the court either to issue the injunction or to decline to do so. In such circumstances, the court is not

> empowered to make an order nisi conditional upon an undertaking. [emphasis added]
>
> *Canada (Attorney General) v. Fleet Aerospace Corp.* (1985), 21 C.C.C. (3d) 180 at 189 (F.C.T.D.)

54. Here, Labatt has not only said no changes are planned, it has gone even further than Fleet did, and has given an undertaking to comply with the Hold Separate Arrangement during the interim period while the Commissioner completes her inquiry, which ensures that Lakeport's position in the marketplace will not be prejudiced. Given that the maximum time that a s. 100 order can be in place is 60 days (which is analogous to the "near future" referred to *Fleet*), it is clearly unreasonable in these circumstances that Labatt is likely to take an action that that will substantially impair the Tribunal's powers, let alone one that would lessen competition substantially.

55. As Neil Campbell has noted in his text on *Merger Law:*

> Assuming "likely" is assigned the same meaning in this context as it carries elsewhere in the merger provisions (i.e. probable), this prerequisite could restrict the availability of Time-Limited Merger Orders [s. 100 orders] significantly.
>
> N. Campbell, *Merger Law and Practice: The Regulation of Mergers under the Competition Act* (Scarborough: Carswell, 1997), at 353

56. "Likely" clearly does mean "probable," its usual meaning generally and specifically under the Act.

57. In light of Labatt's undertaking to implement the Hold Separate Agreement, it is not "likely" pursuant to s. 100 that it will take any action inconsistent with that plan, and as such the pre-conditions for making a s. 100 order are not present. Justice Rothstein's decision in *Sulco Industries* is instructive. In *Sulco*, the plaintiff sought an interlocutory injunction restraining the defendants from making allegedly false and misleading statements that the plaintiffs were infringing the defendants' patent. The president of one of the defendants and counsel for the defendants swore affidavits stating that the defendants did not intend to communicate such statements to the defendants' customers or potential customers. Justice Rothstein refused to issue the injunction in light of these affidavits, holding:

These affidavits are stated to be made bona fide in opposition to the plaintiff's motion for an interlocutory injunction. The consequences for misleading the Court or swearing a false affidavit are serious, as the personal defendant and counsel for the defendants are well aware. In the absence of evidence indicating that the affidavits are untrue, I am prepared to take the sworn statements at their face value ... [emphasis added]

> *Sulco Industries Ltd. v. Jim Scharf Holdings Ltd.* (1996), 68 C.P.R. (3d) 170 at 173 (F.C.T.D.)
>
> See also: *Tele-Mobile Co. v. Bell Mobility Inc.* (2006), 46 C.P.R. (4th) 146 (B.C.S.C.)
>
> *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, [2003] N.S.J. No. 48 (S.C.) at para. 23 (affidavit stating that the defendant did not intend to re-publish allegedly false or misleading advertisements reduced the prospect of continued harm to "mere speculation")

58. As is set out in *Halsburys*:

> An undertaking given to the court by a person or corporation in pending proceedings by a person or corporation ... on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt.
>
> *Halsburys Laws of England*, 4th ed., 1998 Reissue, Vol. 9(1) (London: Butterworths, 2000) at 482

59. This proposition has been cited with approval in, *inter alia*, *Williams Information Services* and *Canplas Industries*.

> *Williams Information Services Corp. v Williams Telecommunications Corp.* (1998), 142 F.T.R. 76 (T.D.) at para. 16, aff'd (1999), 250 N.R. 67 (C.A.)
>
> *Canplas Industries Ltd. v. Novik Inc.*, [2002] F.C.J. No. 165 (T.D.) at para. 45

60. By giving its hold separate undertaking to this Tribunal, Labatt has exposed itself to the contempt power of this Tribunal if it fails to honour its commitment. Section 8 of the *Competition Tribunal Act* provides:

> 8.(1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

> (2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders **and other matters necessary or proper for the due exercise of its jurisdiction**, all such powers, rights and privileges as are vested in a superior court of record.
>
> (3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances. [emphasis added]
>
> *Competition Tribunal Act*, R.S.C. 1985 c. 19 (2nd Supp.), s. 8

61. It is not "likely" under s 100 of the Act that Labatt would engage in any act that is inconsistent with its undertaking. Labatt will honour its commitments set out in its affidavit.

> *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8 (s. 8 of the *Competition Tribunal Act* confers jurisdiction on the Tribunal to hear contempt proceedings with respect to breaches of its orders)
>
> *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394

62. The Commissioner's American expert, Mr. Nelson, alleges that Labatt-selected interim managers would underhandedly promote Labatt's interests and limit the growth of Lakeport. This Tribunal should reject such baseless accusations. There is no reason to expect that the interim managers would shirk their duties under the Hold Separate Arrangement to preserve and enhance the competitiveness of Lakeport. Indeed, the evidence is that Labatt has every reason to encourage the interim managers to continue to build on Lakeport's success. [redacted] Considering that the President of Labatt has given sworn evidence that the purpose of this transaction was so that Labatt could take advantage of Lakeport's brand equity to compete more vigorously in the discount beer segment, it is not "likely" that the interim managers it appoints would erode or fail to grow those brands.

> Nelson Affidavit, paras. 6(a) (table showing Labatt losing share), 7, 25 [Commissioner's Record, para. 25]
>
> Patricio Affidavit, paras. 15-19

63. Moreover, he questions the ability of this Tribunal to enforce "best efforts" obligations. This legal standard is well-recognized in Canadian law and there is no reason to doubt the effectiveness of this Tribunal in enforcing it.

Nelson Affidavit, paras. 21-25

64. As is addressed in detail in the Affidavit of Steven Cole, the undertakings contained in the Labatt Affidavit ensure that competition will be effectively preserved during any hold separate period and that the Tribunal will be able to effectively design and implement a remedy in this matter if such a remedy is ultimately required.

Affidavit of Stephen R. Cole sworn March 23, 2007 (the "Cole Affidavit"), para. 19

65. In particular, the concerns raised at paragraph 48 of the Commissioner's Memorandum of Argument are negated by the Hold Separate Arrangement. Specifically, and for greater certainty, the Hold Separate Arrangement has the effect of preserving the following aspects of Lakeport:

a) Commercially sensitive areas;

b) Senior and Strategic management; a

c) Overlapping products;

d) Lakeport brands;

e) The Hamilton facility; and

f) Logistics, distribution and information technology.

Cole Affidavit, paras. 29-37

66. It is also significant that by operation of the Founder's Agreement between Teresa Cascioli, Roseto Inc. and Labatt Brewing Company Limited dated January 31, 2007, Ms. Cascioli and Labatt have agreed that she will be retained in a consulting capacity and therefore available to Labatt in this regard.

Cole Affidavit, para. 36

67. Moreover, contrary to the speculative concerns raised by the Nelson Affidavit, Labatt has strong incentives to preserve Lakeport's Hamilton brewery.

Sanderson Affidavit, paras. 21, 23

68. Given the possibility that this Tribunal could eventually require the sale of Lakeport, and the fact that its Hamilton facility would be desirable to some potential purchasers, Labatt has an incentive (in addition to its obligations under the Hold Separate Arrangement) to preserve the brewery.

Cole Affidavit, paras. 40-43

69. Furthermore, under the Hold Separate Arrangement, Lakeport will preserve its infrastructure, including the processing, administrative and finance functions and distribution in order to allow for the continuation of the existing level of competition. The distribution function and related logistics are neither unique to Lakeport nor complicated as all product is sold through either TBS or the LCBO. The same is true of the finance and administrative functions.

Cole Affidavit, para. 44

70. As is set out in detail in the Cole Affidavit, at the end of the hold separate period, the Lakeport business would be saleable to a third party.

Cole Affidavit, paras. 47-55

71. The following is particularly significant in this regard:

(a) The Lakeport Business is financially strong and is a growing business and there is every reason to believe that it will continue to grow and be financially strong, including while managed by Labatt;

(b) The existing Lakeport brands will not be negatively affected during the Interim Period;

(c) Labatt has and will have the financial ability and other strengths to successfully divest of Lakeport should it need to do so;

(d) A general understanding of the possible evolution in the financial and beer markets over the foreseeable future and the likely impact of these markets on Lakeport, its saleability including the level of interest of prospective purchasers a business as successful as Lakeport;

(e) A general understanding of the private equity markets and the likely interest of these markets in a financially strong and growing business such as Lakeport; and

(f) The business of Lakeport is unlikely to erode on account of the Labatt ownership. To the contrary, Labatt would be motivated to maintain or improve the business of Lakeport either for its own account or to make sure it maximizes sale proceeds should it be required to divest of the business. Indeed it has undertaken to do so in the Labatt affidavit.

(g) The existence of numerous potential strategic and financial buyers [redacted]

Cole Affidavit, paras. 48-53

72. Lastly, Lakeport could be sold into the public markets. Lakeport went public in a successful Initial Public Offering ("IPO") in June 2005. Since the IPO, the Lakeport business has continued to grow and could likely, if need be, once again, successfully be sold through a public offering.

Cole Affidavit, para. 54

73. Consequently, Lakeport, with its brands and operations intact, could easily either be sold to any number of possible in-market buyers (in which case new managers would likely not be required) or to private equity firms, or returned to public company status, particularly as it went public as recently as 2005 with great success. The identity of its owners is not, in my opinion, of any consequence to the ability of the Tribunal to order an effective remedy should the Tribunal ultimately find an adverse effect on competition.

Cole Affidavit, para. 55

74. Given Labatt's undertaking, the Commissioner has not established the third element of the s. 100 test. Should Labatt close the transaction but not implement it (i.e., in that it would hold the entirety of the Lakeport business separate as set out in its undertaking in the Labatt Affidavit which is on terms similar to those imposed by the Tribunal in *Superior Propane*), it is clear that the Tribunal could remedy the effect of the Transaction on competition as it could very easily restore the status quo.

Cole Affidavit, para. 46

75. The Commissioner refers at paragraph 42 of her Memorandum of Argument to the "unscrambling the eggs problem." However, Justice Linden of the Federal Court of Appeal held in *Superior Propane* that there is no such problem under Canadian law. Labatt's Hold Separate Arrangement exceeds what is required to preserve this Tribunal's remedies, as Justice Linden concluded that such remedies are effective even if the merged companies have been integrated. As he put it: "a merged company is not exactly like scrambled eggs. It can be broken up, though it is maybe difficult to do so. Competition can be restored." Justice Linden's decision is of course binding on the Tribunal.

Canada (Commissioner of Competition) v. Superior Propane Inc. [2000] F.C.J. No. 1518 (F.C.A.) at para. 13

76. As the Cole Affidavit explains, Labatt has thus gone far beyond what is necessary to avoid "substantial impairment" of competition. Even if the distribution, logistics and finance and administrative functions of Labatt and Lakeport were integrated, the operations could nevertheless be reconstituted and a separable, standalone, business created if an order were made for divestiture.

The Director of Investigation and Research v. Quebecor Printing Inc., (16 January 1995) (Comp. Trib.)

Cole Affidavit, para. 45

77. Labatt has chosen not to undertake such integration, even through it could do so and still preserve this Tribunal's remedies. Instead, Labatt has offered more than is necessary under the

test in the Federal Court of Appeal's decision in *Superior, supra* and has carefully replicated the hold separate precedents that this Tribunal has ordered under s. 100 of the Act in *Quebecor* and s. 104 of the Act in *Superior Propane* and *Southam*, and has registered as consent agreements under ss. 100 and 105 (which it can only do if it has jurisdiction to make such an order under s. 100: s. 105(2) of the Act).

> Compare: Consent Interim Order of W.P. McKeown dated March 25, 1997 in *The Director of Investigation and Research v. ADM Agri-Industries, Ltd.*
>
> Consent Interim Order of W.P. McKeown dated April 28, 2000 in *The Commissioner of Competition v. Canadian Waste Services Holdings Inc., Canadian Waste Services Inc., Waste Management, Inc.*
>
> Consent Interim Order dated July 5, 2001 in *The Commissioner of Competition v. Canadian Crude Separators Inc.*
>
> Consent Interim Order of W.P. McKeown dated July 19, 2001 in *The Commissioner of Competition v. Lafarge S.A.*
>
> Consent Interim Order dated November 12, 2004 in *The Commissioner of Competition v. Tolko Industries Ltd.*
>
> Consent Interim Hold Separate Order dated December 11, 1998 in *Director of Investigation and Research v. Superior Propane Inc.*
>
> Consent Interim Hold Separate Order dated March 18, 1991 in *Director of Investigation and Research v. Southam*
>
> *Southam, supra*
>
> *Superior Propane* (F.C.A.), *supra* (*per* Linden J.A.)

78. The Commissioner further claims at paragraph 42 of her Memorandum of Argument that a hold separate that may be followed by a divestiture order "fails[s] to restore competition to its pre-merger state." However, that is not the test for a merger remedy in Canada, as it is in the U.S. The purpose of a remedy under s. 92 of the Act, as the Supreme Court of Canada unanimously held in *Canada (Director of Investigation and Research) v. Southam*, is not "whether it restores the parties to the pre-merger competitive situation"; rather, "the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" [emphasis added].

> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 84-85

See also: *Superior Propane* (F.C.A.), *supra* (*per* Linden J.A.)

79. This fundamental error permeates the Commissioner's evidence and submissions relating to Labatt's Hold Separate Arrangement, as it is based upon an affidavit from an American economist and numerous American journal articles. In the United States, the test for merger remedies is the one rejected by the Supreme Court of Canada: full restoration of the pre-merger status of competition. Nowhere in the Affidavit of Philip Nelson presented on behalf of the Commissioner is there any evidence that a Hold Separate Arrangement of the type Labatt has undertaken to implement would substantially impair the ability of the Tribunal to order a remedy under s. 92 of the *Competition Act* that would "restore competition to the point at which it can no longer be said to be substantially less than it was before the merger." His evidence is directed at whether the pre-merger *status quo* can be restored, which is irrelevant.

Nelson Affidavit [Commissioner's Record, Vol. 6, Tab D]

United States v. E.I. du Pont de Nemours & Co. (1961), 366 U.S. 316 at 330-31

Bureau of Competition, *A Study of the Commission's Divestiture Process* (Federal Trade Commission, 1999)

80. For example, Mr. Nelson relies upon a study of U.S. merger cases to draw conclusions about this transaction. At paragraph 50 of his affidavit he states:

> Another study of 86 merger cases brought by the Antitrust Division of the U.S. Department of Justice during 1990-2003 also found that post-merger divestitures were generally inadequate. Specifically, this study found that settlements involving structural remedies frequently result in 'compromise' or less-than-full removal of the competitive overlap argued to be the source of harm to competition.

Nelson Affidavit, para. 50 [Commissioner Record, Vol. 6, Tab D]

81. However, this study is explicitly based upon the test for merger remedies in U.S. law, which is whether the proposed remedy will "restore competition." The study notes:

> Structural relief or asset divestiture is recognized as the preferred method of resolving potential anticompetitive problems in section 7 cases. Studies by ... revealed that nonstructural remedies - court orders prohibiting certain conduct, for example - are often ineffective as ways of restoring competition in affected (product and geographic) markets. [emphasis added]

> M.S. Kouliavtsev, "Measuring the Extent of Structural Remedy in Section 7 Settlements: Was the US DOJ Successful in the 1990s", *Review of Industrial Organization* (forthcoming) at p. 1, Exhibit 10 to the Nelson Affidavit [Commissioner's Record, Vol. 6, Tab D10]

82. The academic materials that forms the basis for Mr. Nelson's evidence are thus based upon the very test rejected by the Supreme Court of Canada in *Southam, supra*.

83. Similarly, the Commissioner relies, at paragraph 46 of her factum on American case law, but again it is irrelevant to this application as the test for a remedy under American law is different.

84. The Hold Separate Arrangement ensures that the Tribunal can, if necessary, restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.

85. Indeed, when Parliament amended s. 100 of the Act, adopting the current language (as a result of Justice Rothstein's decision in *Superior Propane*), it did so on the basis of the then Commissioner's testimony that the new section permitted closure into a hold separate arrangement, which would preserve the Tribunal's remedies. This was explicitly described to Parliament by then Commissioner Konrad von Finckenstein in his testimony before the House of Commons Standing Committee on Industry as follows:

> ... it is very hard to undo a merger once it has proceeded, the people have integrated their operations, moved and integrated their information systems. ...
>
> The act will now give us permission to apply to the court and say, "Please issue an order that this merger not go ahead." If they go ahead, they must keep it separate and apart to give us 60 more days or 30 more days, whatever it happens to be, to come to a conclusion. Then if we come to you and ask that this merger be disallowed, it is not a fait accompli. There is not already an integrated entity that has to be pulled apart. That's the situation we are envisaging. [emphasis added]
>
> House of Commons, Standing Committee on Industry, *Minutes of Proceeding and Evidence*, 36th Parl. 1st, Sess., No. 29 (31 March 1998)

86. As this testimony highlighted to Parliament, the closing of an acquisition does not in itself substantially impair competition. Rather, it is the implementation or integration of the

businesses of two previous competitors that may substantially impair competition. Here, the Hold Separate Arrangement precludes Labatt from integrating its operations with Lakeport's in a manner that would cause such substantial impairment.

87. Section 100 must be interpreted consistently with the purpose of the Act, which is set out in s. 1.1 as follows:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.
>
> *Competition Act*, *supra*, s. 1.1

88. Merely closing an acquisition does not substantially impair the maintenance or encouragement of competition in Canada.

Cole Affidavit, para. 45

89. In light of the foregoing, the Tribunal has no jurisdiction to make any order under s. 100 of the Act, as the Commissioner has failed to satisfy the burden upon her of establishing that Labatt is "likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under [s. 92 of the Act] because that action would be difficult to reverse."

C. The Tribunal Should Exercise Its Discretion to Make No Order or Limit Its Duration

90. Even if the Tribunal has jurisdiction to issue an order under s. 100 of the Act (which is denied for the reasons given in Part B above), it should exercise its discretion not to do so here, for three reasons. First, any further delay in closing this transaction will harm Labatt, Lakeport, Lakeport Unitholders, public markets and competition within the beer industry. Second, the Commissioner has already had sufficient time to review this proposed acquisition. Third, Labatt has adduced evidence that this proposed merger would not result in a substantial lessening of

competition. Fourth, Labatt has undertaken to comply with the Hold Separate Arrangement or any hold separate order the Tribunal may make and the Commissioner's intransigence in refusing to discuss a hold separate should not be visited on Labatt and Lakeport.

91. Alternatively, for the same four reasons, even if the Tribunal finds that the Commissioner requires some further time to complete her inquiry, it should be no more than, at a maximum, 14 days. The power to delay closing is an extraordinary one. The Tribunal is not a rubber stamp for the Commissioner's request for additional time. Her inquiry is subject to the supervision of this Tribunal, including, in particular, with respect to the duration of that inquiry.

92. In *Superior Propane*, Justice Rothstein confirmed that this Tribunal has discretion to refuse to issue an order under s. 100 of the Act, even if the Commissioner has established all elements of the s. 100 test, holding:

> Finally, there is a question of what additional considerations the Tribunal may take into account beyond those set forth in paragraph 100(1)(a). Subsection 100(1) is worded in a form of a code whereby, if certain conditions are met, the order sought may be granted. The Director argues that once the conditions are met, the Tribunal should grant the order sought. While the jurisdiction being exercised by the Tribunal is statutory, it is an extraordinary type of jurisdiction in that it grants the Director a form of relief, not only before trial, but before his pleadings have been filed. The word "may" in subsection 100(1) indicates that the decision to be made is discretionary. In other words, even if the Tribunal is satisfied that the conditions under paragraph 100(1)(a) are met by the Director, the Tribunal may still reject the application. I do not think Parliament intended to deprive the Tribunal of discretion in considering whether or not to make an order under section 100. [emphasis added]
>
> *Superior Propane #1, supra* at para. 19
>
> See also: *Canada (Director of Investigation and Research) v. Southam Inc.* (10 December 1992) (Comp. Trib.) (*per* Teitelbaum J.), at 246 (rejecting the Director's argument that the Tribunal lacks discretion to refuse to issue an order under s. 92 of the Act, even when it has found a substantial lessening of competition)

93. Justice Rothstein acknowledged that the Director (now the Commissioner) is presumed to act in the public interest. However, as Justice Reed held in *Air Canada:* "It is clear that the Tribunals' constituent legislation does not contemplate that the Tribunal will be a mere rubber stamp."

Superior Propane #1, supra at para. 19

Canada (Director of Investigation and Research, Competition Act) v. Air Canada (1989), 27 C.P.R. (3d) 476 at 512 (Comp. Trib.)

94. The Tribunal must exercise its discretion under s. 100 in a manner that is consistent with the general purposes of the Act, the specific purposes of the provisions of the Act relating to proposed mergers, and the protection of the public interest in competition.

RONA Inc. v. Canada (Commissioner of Competition) (30 May 2005) (Comp. Trib.) (*per* Blais J.) at para. 91 ("in exercising its discretion, the Tribunal must be guided by the purposes of the *Competition Act*)

Canada (Director of Investigation and Research, Competition Act) v. Air Canada (1 December 1993) (Comp. Trib.) (*per* Strayer J.) at 149 ("our primary concern in deciding whether or not to issue an order under section 92 must be the protection of the public interest in competition")

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2 at 7 (statutory discretion must be exercised in good faith, in accordance with the principles of natural justice and on the basis of considerations that are relevant in light of the statutory purpose)

95. Particularly significant here are the purposes of the specific provisions in the Act that relate to proposed mergers. As Howard Wetston, then Senior Deputy Director of Investigation and Research explains, these purposes are as follows:

> In drafting the notifiable transactions provisions, a number of other objectives were kept in mind. For example:
>
> (1) Application of provisions only to those transactions that have the greatest risk of raising ex post competition concerns.
>
> (2) Specific thresholds to identify clearly and precisely the transactions to be reported.
>
> (3) To limit the information requirements to information that is both necessary to assess the transaction ("tombstone" data) and readily available in company records.
>
> (4) Minimal interference with the efficient functioning of capital markets, in particular the stock exchanges.
>
> (5) To remove any discretion of the Director to extend waiting periods by limiting them to fixed maximum time periods that could

> not be extended, except by an order of the Tribunal pursuant to Sections 100 or 104.
>
> (6) That parties to a proposed merger should determine, by filing, when the waiting period would start and should be allowed to proceed with the merger as soon as the waiting period was over. [emphasis added]
>
> Howard I. Wetston, "Notifiable Transactions under the Canadian *Competition Act* (1988) 57 Antitrust L.J. 907 at 908-909

96. Parliament's concern about delays caused by the Commissioner is not surprising given the very significant harm caused by such delays.

97. In particular, as Mr. Wetston noted, Parliament was especially concerned about the potential for interference with stock exchanges.

> Howard I. Wetston, "Notifiable Transactions under the Canadian *Competition Act, supra* at 908

98. The wait period for taking up shares under the Ontario *Securities Act* is 35 days (one week less than the 42-day wait period imposed by s. 123(1)(b) of the *Competition Act*). Any prohibition on closing granted under s. 100 of the Act thus forces a variation of the terms of the takeover bid to extend the period during which securities may be deposited thereunder (the "Regulatory Delay").

> *Securities Act*, R.S.O. 1990, c. S.5, ss. 95(2) and (3) and 98(5) and (6)

99. Such Regulatory Delay is inconsistent with both the *Competition Act*, as noted in Mr. Wetston's article, and with the intent of the *Securities Act*, under which the ordinary wait period is only 35 days. As the Committee to Review Take-Over Bid Time Limits explained in recommending the 35-day period that Ontario adopted:

> The Committee recognizes that the rules must strike a balance between targets and bidders. Thus the minimum deposit period must not be so long as to act as a deterrent nor so short as to impede maximization of value. Take-over bid rules must primarily serve the interests of shareholders, be they large institutional or small retail investors. In the Committee's view, shareholder interests can best be served by a statutory scheme which does not unduly deter initial unsolicited bids and which optimizes shareholder choice when a change of corporate control is proposed. [emphasis added]

Investment Dealers Association of Canada, *Report of the Committee to Review Take-Over Bid Time Limits*, (Ontario Securities Commission, 1996) at 4

100. If the Regulatory Delay sought by the Commissioner is granted, the balance which the Province carefully crafted will be undermined. This Tribunal has recognized in other contexts, such as the regulated conduct doctrine, that valid provincial legislation is in the public interest and should be respected.

See e.g. *Regina v. Canadian Breweries*, [1960] O.R. 601 (H.C.J.)

Reference re: Farm Products Marketing Act (Ontario), [1957] S.C.R. 198

101. In this particular case, Regulatory Delay is detrimental to Lakeport and its Unitholders in three key respects.

Affidavit of Ronald S. Lloyd, sworn March 20, 2007 (the "Lloyd Affidavit"), para. 15

102. First, if the expiry date for the Offer must be extended beyond March 29, 2007 by reason of a Regulatory Delay, that delay would create uncertainty in the market. [redacted]

Lloyd Affidavit, para. 16

103. Second, if Labatt's offer is unsuccessful, and no other bidder comes forward, it will become plain that there is no other buyer willing to offer a premium for Lakeport at this time. Whereas the price of Lakeport Units prior to the Labatt bid would have contained a potential takeover bid premium, this may no longer be the case.

Lloyd Affidavit, para. 17

104. Third, the uncertainty created by the Regulatory Delay may also have an impact on the business of Lakeport itself. For example, employees and managers who experience a delay during which the future ownership of the company is uncertain are more likely to seek alternative employment than if the Offer were permitted to close on March 29, 2007.

Lloyd Affidavit, para. 18

105. Moreover, competitors are already exploiting the uncertainty created by the Commissioner's lengthy review of this proposed transaction and seeking to erode Lakeport's market share. For example, Brick initiated a wave of print and radio advertising, directly referencing Labatt's acquisition of Lakeport, assuring consumers that Brick will continue to sell for "a buck a beer today, a buck a beer tomorrow," and inviting them to switch from Lakeport to Brick.

E-mail from counsel for Lakeport attaching Brick ads, Exhibit 36 to the Schotel Affidavit

106. The Commissioner's delay imposes heavy costs on Labatt, Lakeport, and the Unitholders, employees and suppliers of Lakeport. Yet, she has not made any undertaking to pay damages to the Respondents. In *Superior Propane*, *supra* Justice Linden found the absence of such an undertaking to be significant in deciding to permit Superior to proceed with its merger without further delay.

107. It is particularly inequitable for the Respondents and the public to suffer such harms with no undertaking of compensation when the Commissioner does not, in fact, require more time for her inquiry.

108. At the time that Justice Rothstein gave his decision in *Superior Propane*, the wait period for a merger for which a "long form" had been filed was 21 days, and the maximum interim order under s. 100 of the Act was a further 21 days, which could not be extended (a total of 42 days). On March 26, the Commissioner will already have had a full 42 days to examine this proposed merger (indeed, she will actually have 54 days, as counsel for Labatt advised the Bureau of the proposed transaction as soon as it became public on February 1, 2007, and she had conducted a detailed analysis by February 14, 2007.) Nevertheless, she seeks a further 30 days

to conduct her inquiry, and can then, pursuant to s. 100(7) of the Act, seek a further 30 days. She has already, by an email from Charlie Schwrtzman of her office, advised Labatt that she intends to continue her inquiry beyond the maximum statutory period, for a total of 5 months.

> Email from C. Schwartzman of the Competition Bureau to B. Facey dated March 12, 2007
>
> Memorandum dated February 14, 2006, Exhibit "10" to the Peters Affidavit [Commissioner's Record, Vol. 8, Tab 10]
>
> *Competition Act*, R.S.C. 1985 c. C-34, s. 100 [eff December 12, 1988 to March 17, 1999]

109. The primary reason that the Commissioner gives for failing to complete her inquiry is that some recipients of s. 11 orders have failed to comply with them. All of the respondents to the proceeding have complied, and should not be prejudiced because others have not done so and the Commissioner has not enforced the orders. It would be particularly unfair to punish the Lakeport Unitholders and Labatt for the Commissioner's delays and others' failure to comply with s. 11 orders that were not necessary in the first place, and were unfocussed and overly broad.

110. The Commissioner has been studying the Ontario beer industry continuously since October 21, 2003, when she commenced her three-year inquiry into the "Standard Mould Bottle Agreement" (which she eventually discontinued in August 2006). In the meantime, she also received a great deal of information about the Ontario beer industry and about Labatt in particular in connection with [redacted]. Over a five month period, Labatt provided information about the Ontario beer industry and about its own status and plans within that industry [redacted]. The Bureau also met with other industry participants during that inquiry. [redacted]

> Competition Bureau, "Beer Bottles" (14 September 2006), Exhibit 6 to the Schotel Affidavit

111. As is noted at paragraph 14 of the Commissioner's Memorandum of Argument, on February 12, 2007, the Respondents filed their "long form filings" under s. 114 of the Act (which triggered the 42 waiting period under s. 123 of the Act). These filings consisted of more than 10,000 pages of materials falling with the categories specified by the *Notifiable Transactions Regulations,* which mandate filing of the information that the Commissioner needs to assess a proposed merger.

Notifiable Transactions Regulations, SOR/87-348, s. 17

112. In light of the Commissioner's intensive study of the Ontario beer industry for 3 1/2 years, the investigations made and expert opinions received since February 1, 2007, and receipt of 10,000 pages in respect of this specific transaction on February 12, 2007, it was not necessary for her to exercise her extraordinary power to obtain *ex parte* orders for production under s. 11 of the *Competition Act*.

113. Even if she did require limited further information (which is denied), it was certainly not necessary to obtain the vague, broad orders that the Respondents were required to comply with. For example, the orders against the Respondents, Brewers Retail Inc. ("BRI"), Big Rock Brewery Ltd., Brick Brewing Co. Limited, Moosehead Breweries Limited, Molson Canada 2005, Mountain Crest Brewing Company and Sleeman Breweries Ltd. all required production of "All records relating to the Proposed Transaction." In contrast, in another recent inquiry, the Commissioner's *ex parte* s. 11 order was much more targeted, requiring only:

> all records prepared for or by executive officers of your firm or board of directors that refer to:
>
> - potential efficiencies that relate to the proposed transaction
> - the potential impact of the proposed transaction
> - strategic plans for the integration of the target into the acquiror with respect to specified matters

Fax from R. Nassrallah, counsel to the Commissioner of Competition, to J. Holsten of Bell Globemedia on February 1, 2007, enclosing an order pursuant to s. 11 of the *Competition Act*. ,Exhibit "8" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Brewers Retail Inc, Exhibit "22" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Roseto Inc., Exhibit "23" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Sleeman Breweries Ltd., Exhibit "24" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Mountain Crest Brewing Co. (also known as Lakeshore Creek Craft Brewing Company Inc.), Exhibit "25" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Lakeport Brewing Limited Partnership, Exhibit "26" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Big Rock Brewery Ltd. , Exhibit "27" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Moosehead Breweries Limited, Exhibit "28" to the Schotel Affidavit

Order dated February 22, 2007 pursuant to s. 11 of the Competition Act, between the Commissioner of Competition and Molson Canada 2005, Exhibit "29" to the Schotel Affidavit

114. The section 11 orders in this case further required BRI and all of the brewers listed above to produce all their records (including electronic records such as email) since January 1, 2004 "relating to competition among Discount Beer brands" and "all records relating to competition between the Discount Segment and the Premium/Imported Segment," which obviously comprises a very significant proportion of the business records of a brewer. Lakeport is not even in the premium/imported segment. It is extremely likely that the non-compliance is due in very large part to the overbroad nature of the s. 11 orders obtained by the Commissioner, a problem that Labatt drew to the Commissioner's attention immediately upon receipt of the order and on numerous occasions thereafter.

The Beer Store Listing of Brands, Exhibit "5" to the Patricio Affidavit

115. In any event, this is not a complex transaction that requires more than the statutory wait period for the Commissioner to complete her inquiry, and certainly not the most complex of cases that would require the maximum 30-day extension period.

116. [redacted]

Statistics Canada, "The Control and Sale of Alcoholic Beverages in Canada – Fiscal Year ended March 31, 2005", Catalogue # 63-202 (Ottawa: Ministry of Industry, 2006), at p. 44 [redacted]

117. [redacted] As noted in the Bureau's Merger Enforcement Guidelines, effective competition may come from individual competitors and the collective influence of a number of fringe competitors, as is the case here.

[redacted]

Competition Bureau, "Merger Enforcement Guidelines" (September 2004)

118. Combined, Labatt (37) and Lakeport (9) will have 46 brands or only 13% of the total brands sold in Ontario. At present, there are more than 80 different brewers with products listed

in TBS, which together account for approximately 350 different brands of beer. In the Ontario discount segment alone there are now some 71 brands competing.

The Beer Store Listing, Appendix B to the Labatt ARC Submission, Exhibit 13 to the Schotel Affidavit

119. In contrast, in other merger cases considered by this Tribunal, the post-merger market share was 84% in *CP Ships, supra*; 70% in *Superior Propane, supra*; 66% in *Hillsdown, supra*, and similar shares in *Southam, supra*, and no other dominant competitor was left, as Molson is here. It is noteworthy that the Bureau challenged each of those transactions in the Tribunal, thus causing delays of 3 to 7 years and millions of dollars, and still lost all four cases.

120. The Labatt/Lakeport transaction is not nearly as complex as other takeovers. The value of the Labatt/Lakeport transaction is $201.4 million. In contrast, the average deal size of the 253 public take-over transactions since January 1, 2004, of a Canadian target listed on the Toronto Stock Exchange was $924 million, more than 4.5 times the size of the Labatt/Lakeport transaction. The median deal size of the Toronto Stock Exchange takeover transactions analyzed in the Lloyd Affidavit was $198 million, the ranking of the Labatt/Lakeport transaction among the 253 deals was 136, i.e. 135 takeovers were bigger. This is accordingly a small deal, which is a factor for this Tribunal to consider in relation to the time the Commissioner seeks over and above the 54 days she has already has. This transaction clearly does not reach the scale of merger that would require the longest possible inquiry period for the Commissioner.

Lloyd Affidavit at para. 19 and Exhibit "H"

121. Furthermore, it is significant that Labatt has been offering to close into a hold separate since it first advised the Bureau of this transaction on February 1, 1997. The Bureau has refused to even discuss it, or to propose an alternative form of hold separate. Instead, the Commissioner has waited until serving her Memorandum of Argument in this motion to set out for the very first time her concerns about the hold separate that Labatt proposed more than a month ago. For the reasons given above, the Commissioner's arguments criticizing Labatt's Hold Separate Arrangement are untenable. Nevertheless, the parties may well have been able to reach an expedient, non-litigious resolution to this issue if the Commissioner had been prepared to discuss

the proposal that Labatt put forward. Indeed, Labatt would be willing to have this discussion now should the Commissioner be willing to do so.

122. It is also relevant that the product in issue here, beer, is a consumer product and not a necessity. As Justice Reed noted in Hillsdown, a necessity like a life-saving drug may be treated differently in an analysis under the Act as compared to other products.

Hillsdown, supra at 343

123. In light of the foregoing, the Tribunal should exercise its discretion not to make any order under s. 100 of the Act. The Commissioner does not require further time to examine this proposed transaction, and any delay would cause significant harm to the Respondents, Lakeport's Unitholders and employees, the public markets and the public interest.

D. If an Order is Granted, it Should be Limited to 14 Days

124. In the alternative, the factors set out in paragraphs 44 and 90-123 above are relevant to the terms and conditions this Tribunal would set under s. 100(4) and (5) of the Act. For convenience, these are set out again below:

> (4) An interim order issued under subsection (1)
>
> (a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and
>
> (b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.
>
> (5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.
>
> ...
>
> (8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.

125. As Justice Strayer noted in the *Air Canada* case, the Tribunal's orders should be "on terms that are the least harmful to all parties consistently with protecting the public interest in competition."

> *Canada (Director of Investigation and Research, Competition Act) v. Air Canada* (1993), 51 C.P.R. (3d) 143 at 149

126. Similarly, in considering the interim hold separate proceedings under s. 104 of the *Competition Act* in *Southam*, Justice Teitelbaum held: "The Tribunal must look to balancing the equities between the parties by canvassing the alternative forms of interim relief. If an interim order is to issue, it should be adequate to its purpose but not any more intrusive or restrictive than is absolutely necessary" [emphasis added].

> *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* (1996), 36 C.P.R. (3d) 22 at p. 26 (Comp. Trib.)

127. If the Tribunal decides to grant such an order, its duration should be limited to 14 days, i.e. no later than April 10, 2007. It is noteworthy that the Commissioner, Ms. Sheridan Scott, "certifies" that in her opinion she needs more time to investigate. However, she does not say how much more time she needs. Further, this is an issue which must be determined under s. 100 by the Tribunal, not the Commissioner.

128. Given the current closing date for Labatt's Offer of March 29, 2007, the longest period for which it can extend its Offer under the Support Agreement is to April 10, 2007. If more time than that is given to the Commissioner, Labatt will be required by the Ontario *Securities Act* to extend its Offer yet again, for at least ten days. In light of all of the circumstances set out above, such prejudice to the Respondents and to Lakeport Unitholders is not outweighed by the Commissioner's desire for "more time," to examine this transaction. The public interest favours closing of the transaction now without an extension under s. 100.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of March, 2007.

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PART III: AUTHORITIES

1. *Director of Investigation and Research v. Superior Propane Inc.* (6 December 1998) (Comp. Trib.) (per Rothstein J.)

2. *Decision No. 30-W-1005 (C.P. Containers (Bermuda) Limited* (20 January 1995) (Canadian Transportation Agency)

3. Notice of Application, *Director of Investigation and Research v. Canadian Pacific Limited* (20 December 1996)

4. *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.) (per Nadon J.)

5. *Canada (Director of Investigation and Research, Competition Act), v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) (per Reed J.)

6. *Canada (Director of Investigation and Research, Competition Act), v. Southam Inc.* (1992), 43 C.P.R (3d) 161 (Comp. Trib.)

7. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

8. *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 100

9. *Canada (Attorney General) v. Fleet Aerospace Corp.* (1985), 21 C.C.C. (3d) 180 (F.C.T.D.)

10. *Sulco Industries Ltd. v. Jim Scharf Holdings Ltd.* (1996), 68 C.P.R. (3d) 170 (F.C.T.D.)

11. *Tele-Mobile Co. v. Bell Mobility Inc.* (2006), 46 C.P.R. (4th) 146 (B.C.S.C.)

12. *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, [2003] N.S.J. No. 48 (S.C.)

13. *Williams Information Services Corp. v Williams Telecommunications Corp.* (1998), 142 F.T.R. 76, aff'd (1999), 250 N.R. 67 (F.C.A.)

14. *Canplas Industries Ltd. v. Novik Inc.*, [2002] F.C.J. No. 165 (T.D.)

15. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394

16. *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2000] F.C.J. No. 1518 (C.A.)

17. *The Director of Investigation and Research v. Quebecor Printing Inc.*, (16 January 1995) (Comp. Trib.)

18. Consent Interim Order of W.P. McKeown dated March 25, 1997 in *The Director of Investigation and Research v. ADM Agri-Industries, Ltd.*

19. Consent Interim Order of W.P. McKeown dated April 28, 2000 in *The Commissioner of Competition v. Canadian Waste Services Holdings Inc., Canadian Waste Services Inc., Waste Management, Inc.*

20. Consent Interim Order dated July 5, 2001 in *The Commissioner of Competition v. Canadian Crude Separators Inc.*

21. Consent Interim Order of W.P. McKeown dated July 19, 2001 in *The Commissioner of Competition v. Lafarge S.A.*

22. Consent Interim Order dated November 12, 2004 in *The Commissioner of Competition v. Tolko Industries Ltd.*

23. Consent Interim Hold Separate Order dated December 11, 1998 in *Director of Investigation and Research v. Superior Propane Inc.*

24. Consent Interim Hold Separate Order dated March 18, 1991 in *Director of Investigation and Research v. Southam*

25. *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748

26. *United States v. E.I. du Pont de Nemours & Co.* (1961), 366 U.S. 316

27. *Canada (Director of Investigation and Research) v. Southam Inc.* (10 December 1992) (Com p. Trib.) (per Teitelbaum J.)

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