File No.

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an Interim Order pursuant to section 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

MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF COMPETITION

(Application for an Interim Order under s. 100 of the Competition Act returnable March 26, 2007)

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BETWEEN:

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COMMISSIONER'S MEMORANDUM OF ARGUMENT
(Application for an Interim Order Returnable March 26, 2007)

PART I -- THE APPLICATION

1. The Commissioner of Competition ("**Commissioner**") applies for an interim Order under s. 100 of the *Competition Act* ("***Act***") prohibiting the Respondents from closing or taking steps toward closing the proposed acquisition by Labatt Brewing Company Limited of all of the outstanding units ("**Units**") of the Lakeport Brewing Income Fund ("**Proposed Merger**").

2. The Commissioner has commenced an Inquiry into the Proposed Merger pursuant to section 10(1)(b) of the *Act* but, despite the diligent efforts of her staff, has simply not had enough time to inquire into all necessary matters. Absent an Order of this Tribunal, the

Respondents intend to close the Proposed Merger on March 29, 2007. If the Proposed Merger closes, it will be difficult to reverse and the Tribunal's powers to remedy its effects on competition will be substantially impaired. As such, the Commissioner seeks an additional 30 days in which to complete its inquiry and analyze the effect that the Proposed Merger might have on competition in the relevant markets.

PART II -- THE FACTS

(1)
THE PARTIES

3. Labatt Brewing Company Limited is a federally incorporated company with headquarters in Toronto ("**Labatt**"). Labatt is indirectly controlled by InBev S.A./N.V. ("**InBev**"). InBev is a publicly traded company based in Leuven, Belgium. Labatt is the second largest brewer in Ontario and the third largest participant in the discount segment.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 4

4. Lakeport Brewing Income Fund is an unincorporated open-ended limited purpose trust established under the laws of Ontario with headquarters in Hamilton ("**Lakeport Fund**").

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 5

5. Lakeport Brewing Limited Partnership is a limited partnership consisting of Lakeport Fund, Roseto Inc., and Teresa Cascioli and formed under the laws of the Province of Manitoba and is an indirect subsidiary of the Lakeport Fund ("**Lakeport**"). Lakeport is a brewer of nine proprietary types of beer which compete, amongst other things, as lower-priced alternatives to regular beer brands of other market participants. According to public reports, Lakeport is the third largest beer company in Ontario.

(i) Affidavit of Stephen Peters sworn March 21, 2007, paras 6 and 13

6. Roseto Inc. is an Ontario corporation with headquarters in Hamilton and is one of the two founders of Lakeport.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 7

7. Teresa Cascioli is the Chair and Chief Executive Officer of Lakeport and the Lakeport Fund. Ms. Cascioli is the other founder of Lakeport and has direct or indirect control over Roseto Inc.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 8

(2)
THE TRANSACTION

8. On February 1, 2007, Labatt made public its intention to acquire all of the outstanding Units of the Lakeport Fund pursuant to a Support Agreement between Labatt and Lakeport Fund dated January 31, 2007 ("**Support Agreement**"). The Offer was made official on February 21, 2007, with Labatt's filing of its Offer with the Ontario Securities Commission to take up and pay for all outstanding Units of the Lakeport Fund at a rate of $28.00 per Unit ("**Offer**").

(i) Support Agreement between Labatt and Lakeport Fund dated January 31, 2007, Exhibit "1" to the Affidavit of Stephen Peters sworn March 21, 2007

(ii) Offer to Unitholders, Exhibit "3" to the Affidavit of Stephen Peters sworn March 21, 2007

9. Labatt's Offer was accompanied by the Lakeport Fund's Trustee's Circular dated February 21, 2007, wherein the Board of Trustees of the Lakeport Fund unanimously recommended that unitholders of the Lakeport Fund accept Labatt's Offer by depositing their Units with Computershare Investor Services Inc. ("**Computershare**").

(i) Lakeport Fund Recommendation to Unitholders to Accept the Offer Dated February 21, 2007, Exhibit "4" to the Affidavit of Stephen Peters sworn March 21, 2007

10. The Lakeport Fund owns an approximate 78% interest in Lakeport. The remaining 22% interest in Lakeport is owned by Ms. Cascioli and Roseto Inc. Pursuant to an agreement between Labatt, Ms. Cascioli and Roseto Inc. dated January 31, 2007 ("**Founder's**

Agreement") and filed with the Ontario Securities Commission, Ms. Cascioli and Roseto Inc. have agreed to convert their interest in Lakeport into Lakeport Fund Units and deposit those Units with Computershare before March 29, 2007 for Labatt to take up.

(i) *Founder's Agreement between Cascioli, Roseto and Labatt dated January 31, 2007, Exhibit "2" to the Affidavit of Stephen Peters sworn March 21, 2007*

11. Labatt's Offer is open for acceptance until March 29, 2007 ("**Expiry Date**"). Between the time of the offer and the Expiry Date, unitholders (including Ms. Cascioli and Roseto Inc.) may tender their Units by depositing them with Computershare. Once a Unit is deposited with Computershare, that Unit cannot be traded by the Unitholder.

(i) *Offer to Unitholders, Exhibit "3" to the Affidavit of Stephen Peters sworn March 21, 2007*

12. So long as the conditions of its Offer are met, the main condition being that 66.67% of the Units are tendered by the unitholders before March 29, 2007, Labatt is obligated to take up and pay for the Units deposited, no later than 3 days from March 29, 2007, i.e. April 3, 2007. Once deposited, Labatt for all intents and purposes, absent an Order of the Tribunal, will have acquired Lakeport.

(i) *Offer to Unitholders, Exhibit "3" to the Affidavit of Stephen Peters sworn March 21, 2007*

13. Receipt of payment by Computershare will be deemed to constitute receipt of payment by the unitholders and Computershare is obligated to pay out each former unitholder at that time.

(i) *Offer to Unitholders, Exhibit "3" to the Affidavit of Stephen Peters sworn March 21, 2007*

(3)
THE INQUIRY

14. On February 12, 2007, Labatt and Lakeport supplied the Commissioner with the prescribed long form information pursuant to section 114 of the *Act* and R. 17 of the *Notifiable Transactions Regulations*, SOR/87-348, as amended. The filings consisted of six bankers' boxes of documents consisting of over 10,000 pages of materials.

(i) The cover pages of Labatt's long form filing information, Exhibit "6" to the Affidavit of Stephen Peters sworn March 21, 2007

(ii) The cover pages of Lakeport's long form filing information, Exhibit "7" to the Affidavit of Stephen Peters sworn March 21, 2007

(iii) Affidavit of Stephen Peters sworn March 21, 2007, para. 16

15. On the basis of information and records received through the long form filings, as well as the Bureau's knowledge and information obtained in the course of examining other mergers in the beer industry, the Commissioner concluded that she had reason to believe that grounds existed for the making of an order under section 92 of the *Act*. Accordingly, an inquiry into the Proposed Merger was commenced by the Commissioner on February 15, 2007, pursuant to subparagraph 10(1)(b)(ii) of the *Act* ("**Inquiry**").

(i) Affidavit of Stephen Peters sworn March 21, 2007, para.21

16. In addition to commencing the Inquiry, the Commissioner classified the Proposed Merger as a "very complex" merger transaction pursuant to the Bureau's Fee and Service Standards Handbook ("**Handbook**"). The Proposed Merger was classified as a very complex merger transaction for a number of reasons, including the highly concentrated nature of the market, the fact that Lakeport has been a very vigorous and effective competitor in the Ontario market, and the barriers to entry that exist for other actors to step into the void that would be created by Lakeport's acquisition. As is set forth in the Handbook, very complex cases place enormous demands on the Bureau's resources:

> *Usually, very complex cases quickly progress to the formal inquiry stage and may involve the use of formal powers to obtain information. The volume of work necessitates the use of case teams consisting of three or more officers, economists from the Economic Policy and Enforcement Division, legal counsel as well as*

outside experts. Contracts for experts have to be prepared and, occasionally, requests justifying the need for outside counsel.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 37

(ii) Fee and Service Standards Handbook, dated December 2003, Exhibit "13" to the Affidavit of Stephen Peters sworn March 21, 2007

17. In this case, all of the factors set out in the excerpt above apply.

18. Since the public announcement of the Proposed Merger on February 1, 2007, an investigative team of competition law officers, economists and counsel has been actively and intensely engaged in the analysis of the consequences that the Proposed Merger is likely to have on competition ("**Investigatory Team**"). The Proposed Merger is being treated as a high priority, and throughout Bureau staff have acted expeditiously in conducting the Inquiry.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 29

19. In the course of the Inquiry, the Commissioner has obtained eleven (11) Orders pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Act,* whereby various participants in the beer market have been ordered to produce records and provide written returns of information ("**Section 11 Orders**").

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 23

20. The return dates for the Section 11 Orders were March 15 or 16, 2007, depending on when the various Orders were served. To date, the Section 11 Orders have generated six additional bankers' boxes of documents and 61 data DVD's and compact discs of records.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 31

21. The Commissioner expects to receive more documents pursuant to the Section 11 Orders in the coming weeks as some of the subjects of the Section 11 Orders have yet to fully comply with the terms of the Orders.

(i) Affidavit of Stephen Peters sworn March 21, 2007, para. 27

(4)
WHAT REMAINS TO BE DONE

22. The Inquiry is not yet complete, and the steps that remain include the following:

(a) First, and most importantly, the Commissioner needs to obtain the outstanding returns from those people and entities that have yet to comply with the Section 11 Orders. The Bureau then has to review and analyze the returns.

(b) Second, the Commissioner needs to receive and consider the advice of experts in order to determine whether there are grounds for a section 92 Application.

(c) Third, once its position is determined, the Commissioner would normally discuss matters with counsel and senior officials of the Respondents in order to provide the Respondents with the opportunity to explain and/or address the potential competitive implications of the transaction.

(d) Finally, if, at the end of that process, the Commissioner is of the view that the Proposed Merger is likely to result in a substantial lessening or prevention of competition, it will be open to the Commissioner to bring an application pursuant to section 92 of the *Act* to remedy the likely anti-competitive effects.

(i) Affidavit of Stephen Peters sworn March 21, 2007, paras. 31-38

23. At this point, however, the Inquiry process is not yet complete. The Commissioner has not yet had the opportunity to adequately obtain, review, or analyze the information in order to determine what steps, if any, she ought to take from here on.

24. The volume of information is large, and despite the best efforts of the Investigatory Team, the length of time between the Bureau's receipt of these returns and the date upon which the Proposed Merger is scheduled to close is simply too short. Without more time to review and analyze these returns, the Commissioner will be unable to decide whether a s. 92 application is warranted, until it is too late.

25. As set forth above, the Proposed Merger raises serious concerns about competition issues that deserve further investigation.

See also:

(i) Affidavit of Philip B. Nelson sworn March 20, 2007, paras. 6-15

(ii) Affidavit of Stephen Peters sworn March 21, 2007, paras.21, 22, 34, 37, and 44(a)

(5)
HOLD SEPARATE

26. As part of Proposed Acquisition, Labatt has proposed to the Commissioner terms upon which it is prepared to hold separate the assets it will acquire under the Proposed Merger ("**Proposed HSA**"). Pursuant to the Proposed HSA, following the take up of the units, the business operations of Lakeport would be held separate from Labatt to allow the Commissioner an additional thirty days to review the proposed transaction.

(i) Proposed Consent Interim Agreement in Relation to the Acquisition by Labatt Brewing Company Limited of Lakeport Brewing Income Fund, dated Draft, February 22, 2007, Exhibit "8" to the Affidavit of Stephen Peters sworn March 21, 2007

27. The details of the Proposed HSA are further elaborated upon below at paragraphs 45-50.

PART III -- THE LAW

(1)
THE PURPOSE OF THE AMENDED SECTION 100

28. Prior to 1999, the wording of section 100(1) of the *Act* was such that it was impossible for the Commissioner to obtain an Interim Order without embarking on a review of the merits and risks associated with a proposed merger. At that time, the section read as follows:

> *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*
>
> ...
>
> *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.* [Emphasis added.]

29. The deficiencies in the test to be met under the pre-1999 version of section 100 were identified by Rothstein J. (as he then was) in *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [1998] C.C.T.D. No. 20:

> *It is apparent that to find that the proposed merger is reasonably likely to prevent or lessen competition substantially requires the Tribunal to embark upon a consideration, at least to some extent, of the merits of the Director's position. It is insufficient for the Tribunal to simply be satisfied that there is a serious issue or that the matter is not frivolous or vexatious as in the case of ordinary interlocutory or injunctive relief and therefore, as would be the case under section 104. On the other hand, the Tribunal is not making a final determination and need only find that the proposed merger is reasonably likely to prevent or lessen competition substantially. Therefore, the standard of proof to be met by the*

Director is less than applicable after a full hearing of an application under section 92, but higher than that required under section 104.

It is not entirely clear why a higher standard than that applicable in injunction proceedings, i.e., serious issue, is mandated by Parliament under section 100. The interim order that may be granted is for a maximum of 21 days. One would think that such a limited interim order would justify a low threshold. Further applications under section 100 are brought on relatively short notice, or even ex parte. The Tribunal will likely have little time to consider the matter. [Emphasis in the original.]

(i) *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [1998] C.C.T.D. No. 20 at paras. 7-8

30. The overly onerous threshold under section 100 as it then stood was also noted by Parliament. In 1998, *Bill C-20 An Act to Amend the Competition Act* was introduced for second reading in the House of Commons. When he introduced the Bill, the Honourable John Manley specifically highlighted the importance of giving the Commissioner enough time to complete his or her inquiries and the need to relax the conditions for obtaining Interim Orders:

[The Bill's] other most important changes concern prenotification of mergers, regular price claims and prohibition orders. For mergers an effective prenotification process is essential to allow the competition bureau to determine in advance whether a transaction would have a negative effect on competition. The proposed amendments will make the prenotification process more efficient and clarify the law concerning certain types of acquisition.

Information requirements would be revised and outlined in the regulations instead of in the act. There would be greater flexibility to waive the requirement for prenotification or for some of the information required under certain circumstances. Longer waiting periods will provide sufficient time to review proposed transactions thoroughly. ***Conditions for obtaining interim orders will be relaxed so that the commissioner will be able to delay the closing of a merger that raises competition issues until an inquiry can be completed.*** [Emphasis added.]

(i) *House of Commons Debates,* 074 (16 March 1998) at 4481-4482 (Hon. John Manley)

31. Similarly, the Legislative Summary prepared by the House of Commons staff to explain the rationale behind the *Act's* amendment echoed the need to relax the requirements to be met by the Commissioner when seeking to delay the closing of a merger transaction:

Deficiencies in the interim order provision (section 100) would be corrected to give the Commissioner sufficient time to pursue an inquiry under section 10. Conditions for obtaining interim orders would be relaxed so that the Commissioner could, while conducting an examination, seek to delay the closing of a merger transaction that gave rise to serious concerns. The interim order provision would be amended to allow such orders to be obtained in circumstances where serious concerns existed, but it had not yet become clear whether or not the Commissioner had, or would have, grounds to challenge the transaction.

(i) Canada, Parliament, *Legislative Summary: Bill C-20: an Act to Amend the Competition Act and to Make Consequential and Related Amendments to other Acts* (27 November 1997; Revised 9 March 1999),

32. Thus, section 100 of the *Act* was amended to increase the availability of Interim Orders in circumstances where, as here, the Commissioner identifies the need for more time in which to complete the Inquiry. This amendment is consistent with the objective of the *Act*: it would run against the purpose of the *Act* to make enormous demands on the Commissioner on a section 100 Application, i.e. in circumstances where the Commissioner has already identified the need for more time to complete the Inquiry. The Tribunal should adopt a purposive interpretation of section 100 and take its legislative history into consideration when applying it.

(2)
THE TEST TODAY

33. The current test for obtaining an Interim Order is set out in section 100(1)(a), which now reads 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;....

(i) Competition Act, R.S.C. 1985, c. C-34 as amended

34. The requirement to embark upon a consideration of the merits of the case identified by Rothstein J. in *Superior Propane* is no longer a requirement under section 100. Only three criteria must be satisfied. **First**, the Commissioner must certify that a section 10(1)(b) Inquiry is being made. **Second**, the Commissioner must certify that more time is required to complete the Inquiry. **Third**, the Tribunal must find that 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 section 92 of the *Act* because that action would be difficult to reverse.

35. The Commissioner has certified that a section 10(1)(b) Inquiry is being made and that more time is required to complete the Inquiry. The first two criteria of the section 100 test have therefore been met.

(i) Commissioner's Application Record, Tab B

36. It is important to note that the powers of the Tribunal under section 100 are narrowly defined. Section 100 grants the Tribunal the power to issue an interim order "forbidding any person named in the application from doing any act or thing [...] directed toward the completion or implementation of a proposed merger". The limited jurisdiction of the Tribunal under section 100 was recognized by Rothstein J. in *Superior Propane*:

The focus is on forbidding any act or thing that may constitute or be directed toward the completion or implementation of the proposed merger. In this case, the closing on December 7, 1998 is certainly such an act or thing. ***While a hold-separate order might be a preferred course of action for the respondents, I do not think it is open to the Tribunal to make such an order on this application. To do so would be to make an order that allows an act or thing that is directed toward completion or implementation of the proposed merger, but subject to conditions.*** *Given the nature of the interim order, i.e., for a maximum of 21 days, and the fact that no section 92 application has been filed and no relief yet claimed by the Director, I do not read section 100 to contemplate the type of hold-separate order put forward by the respondents.* ***The intent of Parliament is to***

preserve the pre-merger status quo and all the remedies provided under section 92, not to allow the merger subject to conditions.

The respondents refer to paragraph 100(4)(a) which provides that:

> *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;*

I agree that this provision provides some discretion to the Tribunal to impose terms with respect to the order sought by the Director. However, I think that the words of paragraph 100(4)(a) must be read in the context of the nature of the order described in subsection 100(1). The order must still be an order forbidding an act or thing that is directed toward the completion or implementation of a proposed merger. ***Paragraph 100(4)(a) is not an open invitation to the Tribunal to make whatever order it considers appropriate in the circumstances.*** *In this respect, the words of subsection 100(1) are to be contrasted with the words of subsection 104(1) where the Tribunal "may issue such interim order as it considers appropriate." If that would have been Parliament's intention in section 100, it could have easily used these words. It did not do so and it is not open to the Tribunal to deviate from the words Parliament used.* [Emphasis added]

(i) *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [1998] C.C.T.D. No. 20 at paras. 16-18

37. Rothstein J.'s interpretation of section 100 is consistent with the purpose of this provision, which is simply to maintain the *status quo* while the Commissioner is given more time to complete her Inquiry. Given that the additional time granted to the Commissioner under section 100 is short (thirty days), the crafting of detailed orders that contain complex terms and conditions that could have significant implications for the parties and the public is not appropriate.

(3)
THE PROPOSED MERGER WOULD BE DIFFICULT TO REVERSE

38. In light of the fact that the Tribunal lacks the jurisdiction to impose the Proposed HSA, the Tribunal must nonetheless decide whether Labatt's Proposed Acquisition of Lakeport on March 29 will constitute 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.**" [Emphasis Added.]

39. To answer this question, the Tribunal must presume that the Proposed Acquisition will result in some anti-competitive effects that could, upon later application to the Tribunal, be found to warrant a remedy under section 92 of the *Act*. As discussed above, a review of the merits of the case is no longer warranted under section 100.

40. The test is not whether the action contemplated by the parties would have irreparable effects or be impossible to remedy. Rather, the test is whether the action contemplated by the parties would be difficult to reverse and thus substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition (again, presuming that the merger will have a negative effect on competition).

41. The action that the Respondents propose to take on March 29, 2007 is the closing of the transaction and the merging of the companies. The closing of the transaction, i.e. the sale and purchase of thousands of units in Lakeport, would clearly be "difficult to reverse". In fact, virtually impossible. Further, if the closing of the transaction proceeds, the ability of the Tribunal to remedy the effect of the proposed merger will disappear in that it will no longer be able to make an order under section 92(1)(f) of the *Act*, which sets out the remedies available to the Tribunal in the case of a proposed merger. Such remedies include ordering the parties not to proceed with the merger and ordering the parties not to proceed with a part of the merger. As stated by Rothstein J. in *Superior Propane*, the Tribunal should not foreclose any of the remedies under section 92 at this stage of the proceedings.

(i) Section 92(1)(f) of the *Act*

(ii) *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [1998] C.C.T.D. No. 20 at para. 14

42. Further, the difficulty in achieving an effective remedy after a merger has been completed, i.e. the "unscrambling the eggs" problem, is well documented. The *Act* attempts to avoid this problem by, among other things, having a regime for pre-notification of mergers and allowing the Commissioner to apply for relief before the merger takes place. Divestiture orders

often lead to unsatisfactory results in that such orders fail to restore competition to its pre-merger state (e.g. when the acquiring party allows the assets of the acquired party to deteriorate after the merger was consummated). In addition, this type of order fails to remedy the harm caused to competition during the investigation and litigation. In the present case, for instance, price increases that could result from Labatt's control over Lakeport would not be remedied by a divestiture order, and consumers who paid a supra-competitive price for beer prior to such order being made would not be compensated .

(i) *Affidavit of Philip B. Nelson sworn March 20, 2007, paras. 44, 45-53*

(ii) *Canada (Director of Investigation and Research)* v. *Southam* (1991), 36 C.P.R. (3d) 22

43. In light of the above, the third criterion of the test under section 100 is met, and the Commissioner's Application should be granted.

(4)
THE PROPOSED HOLD SEPARATE ALSO LEADS TO A SUBSTANTIAL IMPAIRMENT OF THE ABILITY TO REMEDY THE EFFECT OF THE PROPOSED MERGER

44. Should the Tribunal conclude that it has the jurisdiction to make a hold-separate order under section 100 of the *Act*, it is the Commissioner's submission that such an order should not be made in this case and that the terms of the Proposed HSA are inadequate to preserve competition.

45. The Bureau recently published an "Information Bulletin on Merger Remedies in Canada". This Bulletin confirms the Bureau's general policy that, while the Bureau may approve a hold-separate arrangement in the context of allowing a company to fulfill its commitment to divest assets, the Bureau will not normally agree to hold-separate provisions pending completion of a merger investigation. There are, of course, exceptions to this rule, but none apply here. As noted by Rowley & Baker in *International Mergers: The Antitrust Process*, hold-separate commitments are not a common feature of Canadian merger practice, and "will only be accepted where special circumstances necessitate that all or part of the transaction close and where the Commissioner can be satisfied that the commitment will permit no part of the merger to proceed in a manner that will make it impossible to undo later."

(i) *Exhibit "15" to the Affidavit of Stephen Peters sworn March 21, 2007*

(ii) Rowley & Baker, *International Mergers: The Antitrust Process* (Thomson, 2006) at § 9.097

(iii) *Affidavit of Stephen Peters sworn March 21, 2007, paras. 39-45*

46. Hold-separate arrangements have not been the subject of meaningful judicial discussion in Canada, but they have been in the United States. The leading case on this issue is *Federal Trade Commission* v. *Weyerhaeuser*. In this case, the majority of the Court of Appeals for the District of Columbia recognized that even if all or part of an acquired company was held separate from the acquiring company, competition between the two firms would not retain the vigor that it had prior to the merger. The Court identified a number of considerations that weighed against the granting of a hold-separate order, including the following:

(a) where there is a risk of transfer of confidential information from the acquired company to the acquiring company;

(b) where unique management personnel serve the acquired company;

(c) where the competitiveness of firms in a particular industry turns in large part on aggressive or innovative management initiatives; or

(d) where the acquired company was planning prior to the acquisition to embark on a new-pro-competitive venture.

(i) *Federal Trade Commission* v. *Weyerhaeuser*, 665 F.2d 1072 at 1085-1086 (D.C. Cir. 1981)

See also:

(ii) *Federal Trade Commission* v. *PPG Industries Inc.*, 798 F.2d 1500 (D.C. Cir. 1986)

47. These four considerations are present in this case, as discussed in the affidavit of Philip B. Nelson sworn March 20, 2007. Consequently, this is not an appropriate case for a hold-separate arrangement.

(i) *Affidavit of Philip B, Nelson sworn March 20, 2007, paras. 9-14, 29, 69-70, 72-75*

(ii) *Affidavit of Stephen Peters sworn March 21, 2007, para. 44*

48. Further, and in any event, the terms of the Proposed HSA are inadequate to preserve competition, and would likely have anti-competitive effects that would be difficult to reverse. This is because the Proposed HSA does not prevent Labatt from obtaining significant control over Lakeport. The following are some of the problems associated with the Proposed HSA:

(a) The Proposed HSA allows Labatt to appoint the interim managers of Lakeport who will have substantial discretion over key competitive decisions. Such appointees can be previous Labatt employees who will expect to return to Labatt at the end of the hold-separate period. The Proposed HSA does not contain any concrete standard against which to measure the performance of the Labatt-appointed managers, and one would expect Labatt-selected managers to use the vagueness of the standards in the Proposed HSA to promote Labatt's interests. The Proposed HSA also allows Labatt's President to have input into Lakeport's operations.

(i) *Affidavit of Philip B. Nelson sworn March 21, 2007, paras. 19-26, 30-31*

(b) Under the Proposed HSA, Labatt appoints Lakeport's board of trustees and directors, which have control over important decisions that affect competitive conduct by Lakeport.

(i) *Affidavit of Philip B. Nelson sworn March 21, 2007, paras. 27-29*

(c) The Proposed HSA gives Labatt direct control over many decisions, i.e. in situations where there is consideration in excess of $250,000 in respect of a single transaction, and in situations where there is consideration in excess of $500,000 in aggregate in respect of any series of such transactions. These monetary thresholds are low enough that they will capture important competitive decisions that occur on a regular basis.

(i) Affidavit of Philip B. Nelson sworn March 21, 2007, paras. 32-36

(d) Labatt will receive competitively sensitive information during the interim period, which it will be able to use against Lakeport both during the interim period and after such period in the event the merger is ordered to be dissolved under section 92 of the *Act*.

(i) Affidavit of Philip B. Nelson sworn March 21, 2007, paras. 72-75

(e) The "protective" covenants in the Proposed HSA are toothless and only incorporate vague standards that are impossible or very difficult to enforce (e.g. "best efforts", "except in the ordinary course of business or having regard for market conditions").

49. Thus, even if there existed the jurisdiction to impose the Proposed HSA, such an approach should be rejected.

PART IV -- ORDER REQUESTED

50. That an Order be made prohibiting the Respondents from closing or taking steps toward closing the Proposed Merger, and for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

BRYAN FINLAY

MARIE-ANDRÉE VERMETTE

NIKIFOROS IATROU

LIST OF AUTHORITIES

1. *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [1998] C.C.T.D. No. 20

2. *House of Commons Debates,* 074 (16 March 1998) at 4481-4482 (Hon. John Manley)

3. Canada, Parliament, *Legislative Summary: Bill C-20: an Act to Amend the Competition Act and to Make Consequential and Related Amendments to other Acts* (27 November 1997; Revised 9 March 1999)

4. *Canada (Director of Investigation and Research)* v. *Southam* (1991), 36 C.P.R. (3d) 22

5. Rowley & Baker, *International Mergers: The Antitrust Process* (Thomson, 2006)

6. *Federal Trade Commission* v. *Weyerhaeuser*, 665 F.2d 1072 (D.C. Cir. 1981)

7. *Federal Trade Commission* v. *PPG Industries Inc.*, 798 F.2d 1500 (D.C. Cir. 1986)

STATUTORY PROVISIONS

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

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

(*a*) in a trade, industry or profession,

(*b*) among the sources from which a trade, industry or profession obtains a product,

(*c*) among the outlets through which a trade, industry or profession disposes of a product, or

(*d*) otherwise than as described in paragraphs (*a*) to (*c*),

the Tribunal may, subject to sections 94 to 96,

(*e*) in the case of a completed merger, order any party to the merger or any other person

(i) to dissolve the merger in such manner as the Tribunal directs,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(*f*) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

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 Commissioner to each person against whom the order is sought.

(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 service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

(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.

(6) The duration of an interim order issued under paragraph (1)(*b*) shall not exceed

(*a*) ten days after section 114 is complied with, in the case of an interim order issued on *ex parte* application; or

(*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.

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104. (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

File No.

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an Interim Order pursuant to section 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
Respondent

MEMORANDUM OF ARGUMENT OF THE COMMISSIONER OF COMPETITION

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