

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.

**BETWEEN:**

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**  
CT-2007-003  
March 22, 2007

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 0005

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

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

Respondents

**AFFIDAVIT OF STEPHEN PETERS**

Sworn on March 21, 2007

I, **STEPHEN PETERS**, of the City of Ottawa, in the Province of Ontario, make oath and say as follows:

1. I am the Major Case Director and Strategic Policy Advisor for the Applicant and as such am an officer in the Mergers Branch of the Competition Bureau ("**Bureau**") in the Department of Industry Canada.
2. I hold a Master of Arts degree in economics from McMaster University (1983). I joined the Bureau in 1983 and have been responsible for a number of inquiries in the Mergers branch of the Bureau. I have sworn affidavits and provided evidence to Superior Courts and the Competition Tribunal in CT-1991-001(Hillsdown), and in CT-1996-002 (Canadian Pacific).
3. I have personal knowledge of the matters deposed to in this affidavit except that which has been obtained upon information and belief and where so stated, I believe that information to be true.

#### PARTIES

4. 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.
5. Lakeport Brewing Income Fund is an unincorporated open-ended limited purpose trust established under the laws of the Province of Ontario with headquarters in Hamilton ("**Lakeport Fund**").
6. 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**").
7. Roseto Inc. ("**Roseto**") is an Ontario corporation with headquarters in Hamilton and is one of the two founders of Lakeport.
8. Teresa Cascioli ("**Cascioli**") is the Chair and Chief Executive Officer of Lakeport and the Lakeport Fund. Cascioli is the other founder of Lakeport and has direct or indirect control over Roseto.

### THE PROPOSED MERGER

9. The Bureau first learned of the Proposed Merger on February 1, 2007, the date the Proposed Merger was announced publicly. The Proposed Merger consists of an unsolicited takeover by Labatt of the Lakeport Fund. The Lakeport Fund Board of Directors unanimously recommended that unitholders accept the Offer.

10. On January 31, 2007, Lakeport Fund had entered into a Support Agreement with Labatt in furtherance of the latter's desire to acquire all of the outstanding units of Lakeport Fund. Under the terms of the Support Agreement, Labatt would offer to acquire all of the issued and outstanding units of Lakeport Fund at a purchase price of \$28.00 per unit in cash for an aggregate price of approximately \$201.4 million. Concurrently, Labatt entered into a Founder's Agreement with Cascioli and Roseto. Under the terms of the Founder's Agreement, Cascioli will have her own and Roseto's interest in Lakeport converted into Lakeport Fund units and thereafter tender them pursuant to the terms of the Support Agreement. Pursuant to the terms of the Support Agreement, Labatt made a formal offer to unitholders on February 21, 2007. That offer is open until 5 pm (Toronto time) on March 29, 2007. On February 21, 2007 Lakeport Fund recommended acceptance of the offer.

11. Attached as **Exhibit "1"** is a true copy of the Support Agreement between Labatt and Lakeport Fund dated January 31, 2007, as **Exhibit "2"** is a true copy of the Founder's Agreement between Cascioli, Roseto and Labatt dated January 31, 2007, as **Exhibit "3"** is a copy of the Offer to Unitholders dated February 21, 2007 ("**Offer**"), and as **Exhibit "4"** is a copy of the Lakeport Fund recommendation to Unitholders to accept the offer dated February 21, 2007. I have obtained **Exhibits 1 - 4** from [www.sedar.com](http://www.sedar.com), the online "System for Electronic Document Analysis and Retrieval" used by the Canadian Securities Administrators, which provides public access to records filed with securities regulators such as the Ontario Securities Commission.

12. At the time of the announcement of the Proposed Merger, Lakeport Fund held an approximate 78.4% interest of Lakeport while the remaining approximate 21.6% was held by Cascioli in her personal capacity and by Roseto, which is wholly owned by Cascioli. (Pursuant to the Founder's Agreement, entered into by Labatt, Cascioli and Roseto on January 31, 2007,

the interest in Lakeport held by Cascioli and Roseto may have been or will be converted into Lakeport Fund units in furtherance of the Proposed Merger).

13. According to Lakeport's 2006 Annual Report, Lakeport is a brewer of nine proprietary types of beer which compete as lower-priced alternatives to regular beer brands of other market participants. A small portion of Lakeport Fund's profitability is derived from the production of private label brands and from co-packing contracts for blending and packaging alternative alcoholic and non-alcoholic beverages. Lakeport is the third largest brewer of off-premise beer in the Province of Ontario. Attached as **Exhibit "5"** is a true copy of the Lakeport 2006 Annual Report.

14. Lakeport and Labatt are direct competitors in the Province of Ontario.

#### SECTION 114 FILING

15. On February 12, 2007, Labatt and Lakeport supplied the Commissioner with the prescribed long form information pursuant to paragraph 114 of the *Competition Act* ("**Act**") and section 17 of the *Notifiable Transactions Regulations*, SOR/87-348, as amended. The cover pages of the filing for Labatt are attached as **Exhibit "6"** and the cover pages of the filing for Lakeport are attached as **Exhibit "7"**.

16. The filing consisted of six bankers boxes and one binder of records totalling 10,916 pages.

17. The Proposed Merger is subject to statutory waiting periods under the Act and the *Securities Act* (Ontario). Under the Act the parties are forbidden to close the transaction before the expiration of 42 days from the date of filing their long form information. The 42-day period will be completed on March 26, 2007. Under the *Securities Act* the parties are forbidden from taking up the units before the termination of 35 days from the date of the Offer. The 35-day period will be completed on March 28, 2007.

18. The Respondents have stated in their public documents, and in correspondence to the Bureau, that they intend to close the Proposed Merger as soon as they are legally able, regardless of whether the Bureau has completed its review.

19. Labatt has consistently advised that, if necessary, it would enter into an interim "hold-separate" arrangement with the Bureau, to allow the Bureau 30 additional days to complete its review of the transaction. Labatt has proposed a form of draft interim hold-separate consent agreement. There is no provision under the Act for a hold-separate arrangement and the Bureau advised the Respondents soon after notification that a hold-separate arrangement would not be at all appropriate in the circumstances. The draft provided is entirely a construct created by the Respondents to enable them to close the transaction and secure their ability to exclusively transfer Lakeport to Labatt. In furtherance of its proposal, Labatt provided a list of three executives who could act as interim managers of Lakeport while the Commissioner's review continued, and/or the Proposed Merger was contested on its merits. Attached as **Exhibit "8"** is a true copy of the proposed Consent Interim Agreement in Relation to the Acquisition by Labatt Brewing Company Limited of Lakeport Brewing Income Fund, dated Draft, February 22, 2007, and as **Exhibit "9"** a true copy of an e-mail dated March 15, 2007 from Brian Facey to Bill Miller and Robert Levine identifying the three proposed interim managers of Lakeport.

#### AN INQUIRY UNDER SECTION 10 OF THE ACT IS ONGOING

20. Since the public announcement of the Proposed Merger, an investigative team of competition law officers, economists and counsel have been engaged in the analysis of the consequences that the Proposed Merger is likely to have on competition.

21. On the basis of information received, as well as the Bureau's knowledge and information obtained from public sources, industry participants and experts in the course of examining other proposed mergers in the beer industry, the Commissioner concluded that she had reason to believe that grounds exist 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. Attached as **Exhibit "10"** is a true copy of the Inquiry Commencement Memorandum dated February 14, 2007.

22. The information reviewed to date suggests that the Ontario beer market could be characterized as being highly concentrated and having significant barriers to entry. Information reviewed also suggests that Lakeport could be playing a meaningful role in disciplining the price of beer in Ontario.

#### ORDERS UNDER SECTION 11 OF THE ACT

23. On February 21, 2007 an *ex parte* Application was made by the Commissioner to the Federal Court for the issuance of Orders ("**Section 11 Orders**") requiring that nine (9) Respondents produce records and provide written returns of information pursuant to sections 11(1)(b) and 11(1)(c) of the Act. In addition two (2) other Respondents were ordered to provide records pursuant to section 11(1)(b).

24. On February 22, 2007, the Federal Court issued the Section 11 Orders to be served upon Labatt, Lakeport, Molson Canada 2005, Sleeman Breweries Ltd, Brick Brewing Co. Limited, Mountain Crest Brewing Co. ("**Mountain Crest**"), Big Rock Brewery Ltd ("**Big Rock**"), Moosehead Ltd. ("**Moosehead**"), Brewers Retail Inc., Roseto, and Cascioli (collectively, the "**Section 11 Respondents**").

25. On February 22, 2007, the Section 11 Orders were served upon all of the Section 11 Respondents. The return date for the Section 11 Orders was March 15, 2007 for all parties except Moosehead which, due to the hour that service was effected, was March 16, 2007. A very short time for return, of three weeks, was sought and granted by the court.

26. One Respondent, Moosehead, sought an extension to the compliance date with the Section 11 Orders citing the short time allowed to provide the returns, the extent and complexity of the requests, and limited available human resources who could work on complying with the Order because of the time of year (e.g., March School Break, End of Fiscal Year Reporting and accounting responsibilities). While the Bureau initially expressed a willingness to provide a brief extension, it ultimately declined to consent to any request for extensions due to the intransigence of the Respondents regarding the closing at the end of March.

27. Two of the Section 11 Respondents, Big Rock and Mountain Crest, have yet to provide a return.

28. The records and information ordered to be produced will assist the Commissioner in determining:

- (a) The history of the growth of the discount beer segment in Ontario from 1990 to present and competition within and between the various segments and brands;
- (b) Market shares of market participants in Ontario;
- (c) An overview of the effective remaining competition should the proposed transaction proceed;
- (d) The likelihood that potential new entrants or expansion by current brewers would mitigate a substantial lessening of competition;
- (e) The likelihood of other brewers entering into the Ontario beer market;
- (f) The barriers to entry and expansion in the Ontario beer market including regulatory and non-regulatory barriers;
- (g) Lakeport's impact on beer pricing in the Ontario market;
- (h) The potential effects of removing Lakeport as a vigorous and effective competitor in the Ontario beer market;
- (i) Tax benefits available to smaller brewers and the impact these benefits may have on a given small brewer's plans to expand its operations;
- (j) The impact that the LCBO's "1st receipt" levy of \$16.40 per HL has on the ability of out-of-province brewers to effectively compete in the Ontario discount segment;
- (k) The extent, if any, to which beer prices in Ontario are affected by the pricing of other alcohol products; and

- (l) Whether consumers would shift consumption to other alcohol products in the face of a significant non-transitory price increase of beer in Ontario.

#### **MORE TIME IS REQUIRED TO COMPLETE THE INQUIRY**

29. Since the parties to the transaction have insisted that the Bureau provide them with a conclusion within the 42 day waiting period, the Bureau has treated since the outset, and continues to treat this proposed transaction as a high priority and Bureau staff continue to work seven days a week to reach a conclusion in this matter as quickly as possible. The Bureau is proceeding most expeditiously.

30. The records and information subject to the Section 11 Orders are required for the Bureau to conduct its analysis of the Proposed Merger. The Bureau has retained outside economists, an industry expert and a business valuator to assist in the review of this merger and this information is crucial to their analysis.

31. To date, in response to the Section 11 Orders, the Bureau has received six bankers boxes, and 61 data DVDs and CDs of records. Due to the concerns cited above in paragraph 28, while the vast majority of the information was provided on or before March 16, some of the Respondents have yet to perfect their productions and are continuing to provide the Commissioner with records and information. I am prepared to seek instructions from the Commissioner to instruct counsel to seek compliance orders from the court if necessary. However, I have not yet been able to properly assess the deficiencies. In this respect, the Bureau is still collecting information, not only from the Respondents but also others, and is seeking advice from its experts. Additional time is required to continue to collect further information and receive reports and analysis from the retained experts.

32. During the months of February and March 2007, the Bureau has conducted:

- (a) a detailed review of the long form information and competition analysis supplied by the parties and their submissions regarding an interim hold separate order;



- (b) contacts by telephone and in-person interviews with industry participants including current and former industry participants, industry associations, competitors and potential competitors;
- (c) a meeting with counsel and senior officials of the Respondents to provide the Respondents with the opportunity to explain the competitive implications of the transaction;
- (d) a partial review of the information returns and documents from the Section 11 Respondents;
- (e) a search of public information sources for relevant information;
- (f) a search for industry experts, economists, and business professionals; and
- (g) discussions with experts retained by the Bureau and, to the extent they have been able to provide, a review of their preliminary analyses.

33. The Bureau has also referred to materials and findings obtained from a previous investigation into an earlier proposed merger involving Sleeman. Those materials are helpful but are either focused upon different aspects of the industry, provide information that by now is "stale", or do not reflect the current competitive realities of the Ontario beer market.

34. The material responsive to the aforementioned Section 11 Orders is voluminous and profound and requires serious contemplation and consideration. The information on its face reveals that competition issues exist. Additional time is required in order for the Bureau to meaningfully review and analyze the information obtained pursuant to the Section 11 Orders.

35. The experts retained by the Bureau will need time to review and analyze the information obtained pursuant to the Section 11 Orders. Once all of the expert reports are submitted and synthesized into the Bureau's internal assessment, the Commissioner will be able to determine whether there are grounds to file an application pursuant to section 92 of the Act.

36. The Bureau will need to advise the Commissioner upon the following issues as outlined in the *Merger Enforcement Guidelines*, which is the Bureau's advice to the public and

the business community of the elements of its analysis of mergers under the Act: 1) Product market definition; 2) Geographic market definition; 3) Foreign and extra-provincial competition; 4) Barriers to entry; 4) Effective remaining competition; 5) The substitutability of other beverages; 6) Whether the merger removes a vigorous and effective competitor; 7) The nature of change and innovation in the relevant market; and 8) Any other factor that is relevant to competition in the affected market. Attached as **Exhibit "11"** is a copy of the *Merger Enforcement Guidelines* dated September 2004.

37. The Commissioner has classified this proposed transaction as "very complex" pursuant to the Bureau's published "Competition Bureau Fee and Service Standards Handbook." The proposed transaction was classified as very complex owing to, among other factors, the highly concentrated nature of the market, the fact that Lakeport has been a very vigorous and effective competitor, and the likely barriers to entry that exist. Attached as **Exhibit "12"** is a true copy of an e-mail from Charles Schwartzman to Brian Facey dated March 12, 2007 setting out this complexity designation. Attached as **Exhibit "13"** is a copy of the Fee and Service Standards Handbook, dated December 2003.

38. From 1999-2004 there was a total of 33 merger cases that were classified as "very complex". The average completion time for these 33 cases was 3.33 months. The Bureau continues to vigorously conduct its review but owing to the complexity of the transaction and the fact that all records under Section 11 Orders have yet to be received, the Bureau requires more time to complete its review. The Commissioner therefore seeks the thirty day extension allowed for under section 100 of the Act to complete her Inquiry. Attached as **Exhibit "14"** is a copy of the Competition Bureau Merger Review Performance Report dated October 2004 setting out these statistics.

#### PROPOSED HOLD-SEPARATE ARRANGEMENT

39. The parties have offered to close into a hold separate arrangement, whereby, for 30 days, the business operations of Lakeport would be held separate from Labatt following the take up of the units, in order to provide the Commissioner with an additional 30 days to conduct

her review of the proposed merger. In Response, the Bureau advised the Respondents that it did not consider that a hold separate arrangement would be at all appropriate in this matter.

### *Background*

40. It is important to appreciate that hold separate arrangements, whereby an agreement is entered into between merging parties and the antitrust authority, are just that, voluntary "agreements" (which the Commissioner may choose to formalize with the Tribunal). As the Commissioner must consider all relevant factors in determining how to most effectively discharge her statutory mandate, the choice to enter a hold separate must depend on all the circumstances of the particular case. In this case, for the principal reasons detailed below, the Commissioner does not believe that a hold separate agreement is appropriate.

41. Moreover, the context in which hold separate agreements are typically used is different in kind from this case. It is important that these two different contexts not be confused. Specifically, the Commissioner, and indeed some of our foreign counterparts, use hold separate agreements quite often to hold assets separate *pending* the implementation of an agreed upon remedy to resolve the anti-competitive concerns. In such circumstances, the Commissioner's investigation is complete (the Commissioner having had sufficient time to complete her work), and the parties have agreed to divest assets (and/or take other steps considered necessary) to resolve the substantial lessening or prevention of competition considered by the Commissioner to likely otherwise be caused by the merger.

42. That is not this case.

43. Quite different from the above situation, and in addition, the Commissioner has on several occasions exercised her discretion to enter into an agreement with merging parties prior to completing her investigation. The Commissioner considers that, while generally such hold separate arrangements, pre-resolution, are not effective in adequately protecting competition, there can be circumstances where they are something that the Commissioner would consider. For example, as was the case in most such hold separate arrangements the Commissioner has entered into, if the Commissioner's concern focussed on a discrete part of the overlapping business, and particularly if that portion accounted for a relatively small volume of

commerce, and if the assets involved are such that they form a viable, self-supporting unit, it may be appropriate to consider a hold separate arrangement, keeping that (or those) assets discrete, while allowing the balance of the transaction to proceed. It would always be important for the Commissioner to assess the appropriateness of a hold separate agreement against all relevant factors, including the nature of the industry in question and the source of competitive vigour in the particular market(s), to name a few.

### *The Proposed Merger*

44. As to the specific reasons for the Commissioner's conclusion in this case that a hold separate would not be at all appropriate, which conclusion was conveyed to the parties early on, they include the following.

- (a) First and foremost, a hold separate, in these circumstances in particular, would not preserve the competitive vigour or independent competitive integrity of Lakeport. Today, a particularly vigorous and effective competitor, Lakeport would be constrained from playing that role under a hold-separate, and indeed quite possibly so damaged that it could not exert a competitive influence in the future.
- (b) Second, it is important to appreciate that past hold-separate arrangements have typically been agreed to by the Commissioner only in contexts where the Commissioner was concerned to try to facilitate a significant non-problematic part of the transaction proceeding while determining what might need to be done with respect to the rest. In the current matter, the entire transaction may be problematic.
- (c) Third, based on my experience, a hold-separate can inhibit the effectiveness of the Commissioner's inquiry. For example, in a number of prior matters I have been told by industry participants that they were reluctant to provide information since they perceived that the hold-separate reflected a "done deal".

(d) Fourth, significant resources would necessarily be diverted from the pressing substantive review in order to ensure that the hold-separate was properly implemented and properly monitored.

45. Consistent with these reasons, Bureau policy as articulated in the "Information Bulletin on Merger Remedies in Canada", which is attached as **Exhibit "15"**, is that "the Bureau will not normally agree to hold-separate provisions pending completion of a merger investigation." This policy, released on September 22, 2006, was developed after substantial consultation with stakeholders and is similar to that adopted in other jurisdictions, for good reason. It promotes the goal of ensuring that assets remain viable and the market(s) remain as competitive as possible pending the completion of the Commissioner's inquiry.

46. This affidavit is sworn in support of an application for an extension of 30 days under section 100 of the Act to enable the Commissioner to complete the Inquiry and for no improper purpose.

SWORN before me at the City of <sup>*Etouville*</sup> ~~Toronto~~,  
this 21st day of March, 2007.

  
Commissioner For Taking Affidavits

  
STEPHEN PETERS

Bernard Chénier  
Commissioner to take and administer  
oaths in Canada. Commissaire pour recevoir  
et administrer des serments au Canada.  
P.C./C.P. 1992-1327