>perspective

Commissioner of Competition Fails to Block Closing of Beer Merger

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On March 28, 2007, the Competition Tribunal dismissed the Commissioner of Competition's application for an interim order pursuant to section 100 of the *Competition Act* (the "Act") to prohibit Labatt Brewing Company Limited from acquiring all of the outstanding units of the Lakeport Brewing Income Fund. The Tribunal's reasons were released on March 30, 2007 and are available at http://www.ct-tc.gc.ca. The Commissioner announced on April 11, 2007 that she will appeal the Tribunal's decision to the Federal Court of Appeal.

The Tribunal's decision in *Labatt/Lakeport* marks the first time that the Tribunal has considered the current version of section 100, which permits the Commissioner to apply to the Tribunal for an interim injunction to prohibit the closing of a merger where the Competition Bureau has not yet completed its review of the transaction. If upheld on appeal, the *Labatt/Lakeport* decision will make it more difficult for the Commissioner to obtain interim injunctions under section 100 because it sets a high standard for obtaining such relief. In the result, merging parties who are willing to risk a potential post-closing challenge to their transactions should find it easier to proceed to closing even if the Bureau has not yet finished its review.

Background

On February 1, 2007, Labatt announced its intention to buy all of the outstanding units of Lakeport Brewing Income Fund and thereby acquire the operations of Lakeport Brewing Limited Partnership ("Lakeport"). Lakeport beer is marketed as a lower-priced alternative to other brands of beer. Labatt is the second largest brewer in Canada and the third largest participant in the discount beer segment.

On February 12, 2007, Labatt and Lakeport filed a "long form" notification with the Bureau pursuant to the Act's pre-merger notification provisions. Long form notifications are generally filed in connection with transactions that are considered to raise substantive competition issues.

The filing of a long form notification triggers a 42-day waiting period within which the parties to the merger are prohibited from implementing their transaction. Under Canada's merger review system, however, expiry of the 42-day statutory waiting period does not represent substantive clearance. Instead, the Bureau's substantive review runs on a separate and parallel track that is governed by different (and non-binding) time frames (called "service standard periods"). For example, the Bureau normally takes longer than the 42-day waiting period to review transactions that raise significant competition issues. (Bureau guidelines state that such a merger may take up to five months to review.)

In the *Labatt/Lakeport* case, the 42-day waiting period triggered by the parties' long form filing was set to expire on March 26, 2007. The Bureau advised the parties that it would not complete its review by that date because it believed the transaction raised potentially significant issues (e.g., the Bureau characterized Lakeport as a "maverick" in the market whose removal might prevent or lessen competition substantially). Labatt nevertheless proposed to close the Lakeport acquisition shortly after the expiry of the waiting period. However, Labatt also offered to implement a "hold separate" arrangement that would delay integration of the Lakeport business for 30 days to allow the Bureau more time to complete its review. The Commissioner declined to accept this proposal and on March 22, 2007 filed an application with the Tribunal for a temporary injunction under section 100.

The Tribunal's Decision

In order to obtain relief under section 100, the Commissioner must demonstrate that (i) she is "on inquiry" (i.e., formally investigating the competitive effects of the proposed transaction), (ii) she requires more time to complete her review of the transaction and (iii) failure to prevent a party to the merger from taking "an action" (e.g., closing the transaction) would "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition… because the action would be difficult to reverse".

The central issue before the Tribunal was whether allowing the transaction to close would "impair" the Tribunal's ability to remedy the effect on competition post-merger if the transaction were successfully challenged.

The Commissioner argued that, because the Act provides the Tribunal with fewer remedies where a merger has already been completed, permitting the acquisition to close would impair the Tribunal's ability to order an appropriate post-merger remedy. The Commissioner also argued that, once a merger has been closed, it is often difficult to achieve an effective remedy after the acquired assets have been integrated into the operations of the acquirer. Labatt and Lakeport responded that there was no evidence to

demonstrate that the merger would impair the Tribunal's ability to order dissolution or divestiture, especially given that they had offered to comply with a hold separate arrangement of the type that the Tribunal had endorsed in the past.

The Tribunal held that the relevant question to be answered under section 100 is whether allowing the transaction to close would substantially impair the Tribunal's ability to order a post-merger remedy 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". The Tribunal concluded that the Commissioner had failed to adduce sufficient evidence to meet this test and dismissed the Commissioner's application. The Tribunal also did not consider it necessary to order that a hold separate arrangement be put in place to temporarily preserve its remedial authority post-merger. Indeed, the Tribunal held that it lacked the jurisdiction to impose a hold separate arrangement under section 100.

In the result, Labatt and Lakeport were permitted to close their transaction without any restraint on their ability to integrate the two businesses. However, the Commissioner still has the ability under the Act to challenge the transaction at any time within three years of closing. The Bureau is continuing its review of the transaction.

Implications of the Tribunal's Decision

When section 100 was amended in 1999, the prevailing view was that the threshold for relief was relatively low. In particular, it was thought that the prospect of post-merger integration ("scrambling the eggs") would be sufficient in most cases for the Tribunal to hold that the failure to issue an interim injunction would substantially impair its remedial authority. If upheld on appeal, the *Labatt/Lakeport* decision signals that the Commissioner will face more significant hurdles than previously anticipated in seeking a temporary injunction under section 100. For one, merging parties may not be required to offer up a hold separate arrangement in order to advance their case.

The impact of the Tribunal's decision upon the Bureau's merger review process is likely to become clearer over the next few months. Subject to what happens on appeal, it is conceivable that the Tribunal's decision will lead more parties to close their transactions once the applicable waiting period expires, even if the Bureau has yet to complete its review. However, before merging parties rush to close a transaction that raises significant competition issues in Canada, they should consider the following:

- The Commissioner will still retain the right to challenge the merger within three years of closing.
- If the Commissioner challenges the merger and establishes that it is likely to substantially prevent or lessen competition, the Tribunal could order significant asset or share divestitures, which may have to occur within a short time frame at fire-sale

prices. Furthermore, the Tribunal could order post-closing divestitures that go beyond the acquired assets if required to eliminate the substantial lessening of competition.

- In future section 100 proceedings, the Commissioner may lead more focussed evidence of how permitting closing to take place could result in the dissipation of critical assets or personnel, such that closing would likely substantially impair the ability of the Tribunal to effectively remedy any competition concerns raised by the transaction.
- In cases that raise particularly serious issues, the Commissioner may be prepared to proceed straight to a substantive merger challenge, even within the 42-day waiting period, and seek an injunction to prevent closing pursuant to the usual criteria (i.e., determination of a serious issue to be tried, irreparable harm if the injunction is not issued, and balance of convenience).

In the past, the Bureau has often responded to litigation setbacks by proposing legislative amendments. Thus, even if the Tribunal's decision is upheld on appeal, the Commissioner could propose amendments to the Act to (i) give the Bureau substantially more time to review transactions, or (ii) alter the evidentiary threshold under section 100 to make it easier to secure injunctive relief.

The foregoing is a summary of a recent development in competition law. If you would like additional information about this topic or any aspect of Canadian competition law, please contact George Addy, Anita Banicevic, John Bodrug, Richard Elliott, Mark Katz, Hillel Rosen or any other member of the Competition and Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at (416) 863-0900 (Toronto) or (514) 841-6400 (Montréal).

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