COMMENT

Competition law desperately needs reform

By Mark Katz

According to T.S. Eliot, "April is the cruellest month". But for Canada's Competition Bureau ("Bureau"), January 2008 wasn't so great either. In that month, the Bureau suffered two stinging setbacks in decisions issued by the Federal Court, both relating to the Bureau's review of Labatt's acquisition of Lakeport Brewing. The decisions also highlight some major problems with the Canadian merger review process.

In the first decision, the Federal Court of Appeal (FCA) upheld a March 2007 ruling of the Competition Tribunal ("Tribunal") denying the Bureau's application for an interim injunction to prohibit Labatt from acquiring Lakeport pending completion of the Bureau's review process. The Bureau sought the temporary injunction because, although the statutory 42-day waiting period triggered by Labatt's pre-merger notification was set to expire, the Bureau said that it required additional time to complete its substantive review of the proposed acquisition (the Bureau's substantive review of mergers is conducted pursuant to a separate, and not necessarily consistent, timetable from the waiting periods triggered by pre-merger notifications).

The Tribunal denied the Bureau's request for an interim injunction because it did not agree that allowing the transaction to proceed would impede the Tribunal's ability to order relief if the Bureau decided to challenge the merger post-closing (the Bureau has the power to challenge a merger up to three years following closing). The Bureau appealed to the FCA, essentially arguing that interim injunctions should be granted automatically unless the merging parties can show that the Bureau's application constitutes an abuse of process.

The FCA rejected the Bureau's argument on Jan. 22, stating that "[w]e do not agree that Parliament intended the role of the Tribunal to be so limited." The FCA also outlined the type of evidence it considers necessary to show that an interim order is required to preserve the Tribunal's remedial powers post-merger.

Having succeeded initially in defeating the Bureau's application for a temporary injunction, Labatt pressed ahead with its acquisition of Lakeport on March 29, 2007. But matters did not conclude there. The Bureau continued to review the transaction and, in November 2007, obtained a series of *ex parte* orders under s. 11 of the *Competition Act* requiring Labatt, Lakeport and other industry participants to produce extensive documentation for the purposes of its investigation. Labatt then brought a motion to set aside the orders granted against itself and Lakeport. On Jan. 28, Justice Mactavish of the Federal Court Trial Division upheld Labatt's motion and set aside the orders.

In a harshly-worded rebuke of the Bureau, Justice Mactavish held that it had failed in its obligation to make full and frank disclosure of all material facts in its applications before her. In particular, the Bureau had not disclosed that it already had in its possession a "voluminous and profound" amount of information regarding the Canadian beer industry, including information secured as a result of previous orders obtained against Labatt and Lakeport. Using strong words not often heard in the genteel world of Canadian competition law, Justice Mactavish characterized the Bureau's application materials as "misleading", "inaccurate", "incomplete" and "disingenuous", and said that she would not have issued the s. 11 orders had proper disclosure been made.

The Bureau has since defended its disclosure practices, but the very strong language employed by Justice Mactavish caused the Minister of Industry to take the unusual step of publicly expressing his disappointment with the Bureau and his intention to investigate what had happened.

The two *Labatt* decisions come at an opportune time. A panel appointed by the federal government is currently conducting a review of Canadian competition and foreign investment policies. While foreign investment issues are likely to take up a significant part of the panel's deliberations, the *Labatt* decisions underscore how aspects of Canada's merger review process are in need of reform.

For one, it is time to put an end to the curious dichotomy between the *Competition Act*'s statutory waiting periods and the Bureau's substantive merger review process. This dichotomy makes it difficult to advise clients about when the Bureau will complete its review, unless the transaction is a proverbial "no-brainer". It also can lead to the type of dilemma faced by Labatt — proceed to close at the expiry of the waiting period, and risk the Bureau seeking an interim injunction, or delay closing and hope that the Bureau will take a reasonable time to conclude its review in accordance with the non-binding "service standard periods".

The Canadian merger review process should instead incorporate a definitive timetable that offers merging parties certainty about timing while giving the Bureau reasonable time in which to conclude its review. This is the model followed by many other jurisdictions, which generally provide for an initial review period of limited duration triggered by pre-merger notification (e.g., 30 days), followed by the possibility of a longer – but time limited – "second phase" review for more complex transactions.

Reform of the s. 11 order application process is also necessary. Practitioners have long complained about the extraordinary costs that clients must incur in responding to these orders, which can require the production of massive amounts of documents and information going back many years. The burden is particularly onerous for non-parties, who are equally obliged to produce information even though they are not directly involved in the transaction.

The biggest problem with the s. 11 application process is its *ex parte* nature. No one is disputing that the Bureau needs industry information to conduct its merger reviews. But s. 11 orders are often unfocussed and overly broad, largely because they are drafted by Bureau officers and government lawyers who are lacking in industry expertise. And s. 11 orders are rarely so urgent that applications without notice are required. That is why organizations such as the Canadian Bar Association have recommended that the Bureau be required to give prior notice of s. 11 applications except where it can be demonstrated that this would impair the integrity of an investigation. Indeed, it would be helpful to require the Bureau to consult with parties even *before* proceeding to court for an order, unless that would somehow prejudice the investigation.

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The *Labatt* decisions confirm that – although the *Competition Act* is often tilted in the Bureau's favour – the courts and the Tribunal will not tolerate being treated as "rubber stamps" for Bureau enforcement actions. Even more importantly, the decisions point to failings in the Canadian merger review process that need to be addressed. The ongoing panel review process offers an excellent opportunity for advancing such reform.

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