

LEGAL BUSINESS

Competition decision set to substantially decrease delays in mergers

By John Jaffey
Toronto

The Competition Tribunal has released a landmark decision that will be of great interest to the mergers and acquisitions Bar.

In *Commissioner of Competition v. Labatt Brewing Company Limited et al.*, released March 30, Justice Michael Phelan refused to extend the time for the Competition Bureau to investigate Labatt's acquisition of the outstanding units of the Lakeport Brewing Income Fund.

Justice Phelan wrote, "The Commissioner must establish that



Neil Finkelstein

the impairment to the Tribunal's ability to remedy is substantial. The nature and level of proof will be dictated by the circumstances of the case, but it is not sufficient to say that pre-merger conditions cannot be restored or compensated. The Commissioner must establish that absent an order, the Tribunal's remedies post-merger would not be effective to eliminate the SLC [substantial lessening of competition].

"On the record before me, I am not satisfied that the Commissioner has met this threshold. Much of the evidence before the Tribunal was addressed to whether the Hold Separate Agreement ("HSA") proposed by the Respondents was appropriate or adequate. It is generally not for this Tribunal

to force the Commissioner to enter into agreements. The Tribunal can only address the facts as they are – not as a party might like them to be."

Neil Finkelstein and Brian Facey of Blake Cassels & Graydon LLP led Labatt's competition law team.

Finkelstein told *The Lawyers Weekly*, "I would say the *Labatt* decision creates a whole new world for the way the Competition Bureau is going to have to process mergers in the future. The Bureau's approach has been to routinely insist that they require five months to review mergers the Bureau unilaterally classifies as very complex. That five-month administrative requirement has no grounding in the statute and indeed no relationship whatsoever to the 42 free days given to the Bureau under the *Competition Act*. Furthermore, the Bureau has routinely refused to even consider permitting parties to close mergers until their months-long investigations have been completed, even into a hold-separate.

"The Competitions Tribunal's decision in *Labatt* is an enormous wake-up call to the Competition Bureau, which indicates that the Bureau's administrative objectives will no longer be able to trump merging parties' statutory rights. Except in exceptional circumstances, and I cannot imagine what those might be, parties will now be able to close after 42 days at least on hold-separate undertakings. The burden on the Bureau to justify refusing hold-separates as it did in *Labatt* will be enormous."

Blakes' competition law team also included partners Cathy Beagan Flood, Navin Joneja and Jason Dudofsky; and associates Anne Glover, Micah Wood, Gregory Sullivan, Maurizio Romano and Tara Cochrane. The corporate and securities team was led by Craig Thorburn, with associates

David Shaw and German Morales.

Lakeport was represented by Stikeman Elliott LLP, whose competition team was led by Shawn Neylan.

Neylan called the decision "big news." He said, "The thinking before was that the Commissioner

the decision to appeal "will probably be moot because the transaction has closed."

Stikemans' Katherine Kay and Michael Kilby argued the case at the Competition Tribunal. The corporate team was led by Rod Barrett and David Weinberger.

"This decision means that parties contemplating transactions that are competitively complex, are much more likely to still be able to get them done within their contemplated time frame."

would likely be able to get extra time to review transactions as a matter of course. And for deals that raise potential competition issues, that can be a real disincentive to move forward with the transaction – simply because there are transactions that won't withstand regulatory delay.

"This decision means that parties contemplating transactions that are competitively complex, are much more likely to still be able to



Shawn Neylan

get them done within their contemplated time frame."

Neylan also advised that the Commissioner has the right to appeal the decision (there has not yet been an announcement regarding an appeal) and that, if she decides to do so, she can bring a formal merger challenge. He said

The events leading up to the Tribunal's decision are fairly simple:

On Feb. 1, Labatt Brewing Company Limited (the second-largest brewing company in Ontario) made an offer to buy all the outstanding units of the Lakeport Brewing Income Fund. The Lakeport Fund owns a 78 per cent interest in Lakeport Brewing Limited Partnership. (Lakeport presently holds a 12 per cent share of the off-premises sale of discount beer.)

Teresa Cascioli and Roseto

see LABATT p. 22

Inc., who hold the remaining 22 per cent, signed an agreement with Labatt whereby they would convert their interest in Lakeport into Lakeport Fund Units. The Board of Trustees of the Lakeport Fund unanimously recommended that unitholders of the Lakeport Fund accept Labatt's offer of \$28 per unit. Labatt's offer was scheduled to close on March 29.

Labatt provided the prescribed long form information to the Competition Bureau on Feb. 12. From the outset, Labatt and Lakeport offered to be bound by a time-limited hold separate agreement with the Commissioner, in order to preserve the boundaries between Lakeport and Labatt for a month after the closing of the transaction.

The hold separate would have kept the assets of Lakeport distinct from those of Labatt, but did allow some presence of representatives of Labatt in the operations of Lakeport.

The Commissioner did not accept this offer. On the basis of the information received, as well as

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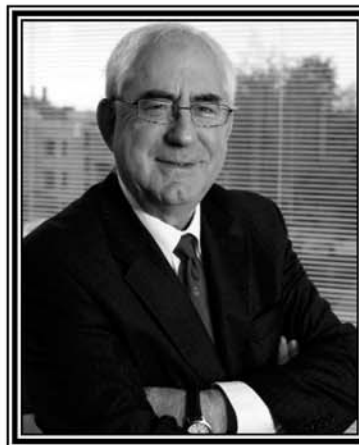
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**Commissioner
applied for an
interim order**

LABATT

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information gathered in the course of recently examining other mergers in the beer industry, the Commissioner concluded she had reason to believe that grounds existed for an order under s. 92 of the Act.

Consequently, on Feb. 15 she commenced an inquiry into the proposed acquisition of Lakeport by Labatt.

In order to gain more time to complete the inquiry, the Commissioner applied for an interim order from the Tribunal forbidding the closing of the merger, pending completion of her inquiry.

Justice Phelan turned down the Commissioner's application on March 28 and released his written reasons on March 30.

The Commissioner of Competition was represented by Bryan Finlay, William Miller, Nikiforos Iatrou, Robert Levine, and Marie-Andrée Vermette.