

INFORMATION NOTE¹

The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al.

On March 30, 2007, the Tribunal rendered its reasons in *The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al.*; the first section 100 application for an interim order heard by the Tribunal since amendments were made to the provision in 1999.

The Commissioner, who had authorized an inquiry into the proposed acquisition of Lakeport by Labatt, filed an application for an Interim Order pursuant to section 100 of the *Competition Act*, prohibiting the Respondents from closing or taking steps toward closing the proposed acquisition by Labatt of all outstanding units of the Lakeport Brewing Income Fund, which owned a 78% interest in Lakeport. The Commissioner was of the opinion that she needed more time to complete the inquiry.

The Tribunal found that in order to issue an interim order under section 100 of the Act, it needed to consider the following two criteria:

- a. Whether an inquiry is on-going and the Commissioner needs more time to complete it; and
- b. Whether in the absence of an interim order, the Tribunal's ability to remedy the effect of the merger on competition would be substantially impaired because an action by a party to the merger would be difficult to reverse.

The Commissioner's principal expert on issues of the implications of mergers raised a number of competitive issues, but his evidence suffered from the infirmity of addressing all issues from the perspective of U.S. law, which aims at restoring competition to pre-merger conditions.

The Tribunal found that the proper construction of the last part of paragraph 100(1)(a) was that "the Tribunal's ability to remedy is impaired because it can no longer impose a certain remedy because the action that was allowed will certainly be difficult to reverse, and this action was important enough to substantially affect the remedy."

The Tribunal dismissed the application because it was not satisfied that the closing of the sale would substantially impair its ability to remedy the effect on competition, should a section 92 application (challenging the merger) be filed later.²

¹ This is an unofficial summary prepared by the Registry of the Tribunal

² The Tribunal's decision was appealed. On January 22, 2008, the Federal Court of Appeal upheld the Tribunal's decision, and dismissed the Commissioner's appeal with costs (see: *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22)

