

Landmark merger review decision from the Competition Tribunal

The Competition Tribunal has dismissed an application by the Commissioner of Competition to delay closing of a transaction between Labatt Brewing Company and Lakeport Brewing Income Fund. Both parties sell beer in Ontario. Stikeman Elliott represented Lakeport on the transaction and before the Competition Tribunal.

On February 1, 2007, Labatt and Lakeport jointly announced a supported offer by Labatt for all of Lakeport's trust units. The parties mailed their offer materials on February 22 and the offer period expired on March 29. The parties also filed long form merger notification materials under the *Competition Act* — the statutory waiting period relating to those expired on March 26. Lakeport units trade on the Toronto Stock Exchange.

The support agreement included an obligation for Labatt to attempt to negotiate a "hold separate" arrangement with the Commissioner of Competition, if needed, and to take any and all possible steps within the requirements of the support agreement to be able to pay for the units at the earliest possible date, including vigorously resisting any application by the Commissioner to delay closing.

At the outset, the parties had told the Commissioner that it was important that the offer close at the earliest possible date. Further, Labatt offered to put all of the acquired business into a hold separate for a period of time to allow the Commissioner to complete her review. A draft hold separate in a form previously used by the Tribunal was also provided to the Commissioner. However, the Commissioner took the position that a hold separate arrangement was not appropriate and refused even to consider whether any form of hold separate might be acceptable. Instead, the Competition Bureau said that closing had to be delayed.

The Commissioner brought an application for an order under s. 100 of the *Competition Act* to prevent closing for a 30 day period. The Commissioner's application was heard on March 26 and 27. The Tribunal issued an order dismissing the Commissioner's application on March 28. Importantly, the Tribunal also declined to order a hold separate arrangement, even though that had been offered by Labatt. In its order the Tribunal said:

"For reasons to follow, the Tribunal is dismissing the application because the Commissioner has failed to establish that the Tribunal's ability to remedy the effect of the proposed merger on competition, that is to remedy the substantial prevention or lessening of

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competition, is substantially impaired by the closing of the Transaction.

Given the Commissioner's position in regard to hold separate agreements at this stage of the inquiry, the Tribunal does not require that the closing be subject to the Hold Separate Agreement/Undertaking proposed by Labatt that would have required the Commissioner's participation."

The reasons, to be issued shortly by the Tribunal, will likely provide guidance for the review of future transactions.

The Bureau routinely applies a maximum five-month review period to the most complex transactions, far beyond the 42 day statutory waiting period under the *Competition Act* that applies to long form merger filings. This decision makes it clear that the Tribunal will carefully scrutinize merger reviews to determine whether more time is needed. While it is common for merger reviews to be resolved through negotiations with the Bureau, there are times when negotiations are unsuccessful, such as here. If the Bureau refuses to negotiate or to accept a hold separate prior to closing of the transaction and seeks an injunction, it is clear from this case that the Tribunal will take a hard look at the Bureau's approach and will determine if it is reasonable to delay the closing pending completion of the Bureau's review. This decision shows that the Tribunal will not act as a rubber stamp on such applications.

It will continue to be incumbent on the parties in future cases to work hard to provide filings, submissions, responses to document production orders and further information on a timely basis to facilitate the timely completion of the Bureau's review. Where that has been done, the merging parties, armed with this decision, should be in a stronger position in pushing for a timely closing. This lessens the chances of transactions being abandoned, or never pursued in the first place, due to concerns about regulatory delay.

For further information, please contact your Stikeman Elliott representative or any of the team members listed below.

Stikeman Elliott's competition team was led by Shawn Neylan (sneylan@stikeman.com), while Katherine Kay (kkay@stikeman.com) argued the case in the Competition Tribunal. The corporate team was led by Rod Barrett (rbarrett@stikeman.com) and David Weinberger (dweinberger@stikeman.com).