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Update

Competition Law

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Labatt Decision Creates Some Tactical Flexibility for Merging Parties

On March 29, 2007 the Competition Tribunal denied the Commissioner of Competition's application under section 100 of the *Competition Act* to prevent closing of the proposed acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Limited for a period of 30 days so that the Commissioner could finish her examination. The conventional wisdom until this decision has been that it would be quite easy for the Commissioner to get a section 100 order to prevent closing. The Tribunal in this decision emphasized that the Commissioner has the burden of demonstrating that closing[1] of a proposed merger would substantially impair the ability of the Tribunal to remedy a substantial lessening or prevention of competition caused by a merger. The Commissioner failed to satisfy this burden in this case and Labatt was allowed to close its transaction.

The logic of this decision is similar to an earlier decision of the Federal Court of Appeal in the Superior Propane case[2]. In that case the Commissioner sought a continuation of a "hold separate" order requiring the parties not to integrate their operations pending his appeal of the Tribunal's decision to dismiss the Commissioner's challenge to the merger. The Commissioner argued that once the merging parties had integrated their operations, it would be very difficult to "unscramble the eggs" and order an effective remedy. Mr. Justice Linden found that a merger is not like "scrambled eggs" in that a merger can be subsequently broken up and competition can be restored, though it may be difficult and costly to do. In this case, the parties indicated that they were prepared to take the risk and bear the costs of restoring competition if ultimately ordered to do so. It also appears that the Court took some comfort from the fact that many of the assets were physical assets that could be resold if necessary. The Court was therefore not convinced that the integration of the target firm's operations with those of the buyer would defeat the Tribunal's ability to order an effective remedy in the future.

Under the Act, the Commissioner can challenge a merger before the Tribunal for a period of three years following its substantial completion. As a result, most buyers do not want to bear the risk of potentially fighting a litigated case after closing where the end result may be the dissolution of the merger or an order to sell significant assets in a forced sale. The Labatt decision does not change this risk analysis and most buyers will continue to seek comfort from the Commissioner that there is not a serious competition issue before closing the transaction.

However, where the buyer is confident that the competition risk is small or is worth taking given the potential rewards, and that timing is particularly critical to get the deal done, the Labatt decision may change the calculus in dealing with the Commissioner and her staff. In this scenario, rather than agreeing not to close until the Commissioner has finished her examination,

[1] Section 100 applies to any action that may constitute or be directed towards the completion or implementation of a proposed merger and which would substantially impair the Tribunal's ability to remedy the competitive effects of the merger. In this case the action the Commissioner was targeting was closing of the proposed transaction. Section 100 applies only to those proposed mergers where the Commissioner has not filed an application to challenge the merger. A different interim order power under section 104 applies in cases where a challenge has been brought.

[2] Canada (Commissioner of Competition v. Superior Propane Inc. (C.A.) [2001] 3. F.C. 175

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parties may want to close as soon they are legally able to do so. In the case of a merger subject to the merger notification provisions of the Act, the waiting period is 42 days from filing the long form notification information[3]. In order to reduce the potential costs if ultimately ordered to unwind the merger, the buyer may, as Labatt did in this case, offer to hold separate the target firm's operations for an additional period of time after closing to allow the Commissioner more time to finish her examination. Given the Commissioner's difficulties in establishing that closing a merger substantially impairs the Tribunal's ability to remedy the effect on competition, she and her staff should be more willing to entertain such offers in the future, despite the statement to the contrary in the recently published Merger Remedies Bulletin.[4]

If you would like to know more about this subject or any other aspect of competition law, please contact Richard Annan or Daniel Gormley or any other member of Goodmans' Competition Group.

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[3] It is also possible to file a short form notification which triggers a 14 day waiting period. However, if the strategy is to close after the waiting period expires, the merging parties would be well advised to file a long form notification from the outset as the Commissioner may require a long form notification at any point in the 14 day short form waiting period, extending the waiting period by a further 42 days.

4 In a departure from past practice, the Competition Bureau indicated that it would not normally agree to hold separate provisions pending completion of a merger investigation as section 100 is available for such purposes. (Information Bulletin on Merger Remedies in Canada, footnote 10).