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Docket: T-325-07

Citation: 2008 FC 59

Ottawa, Ontario, January 28, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE COMMISSIONER OF COMPETITION

**Applicant
(Responding Party)**

and

LABATT BREWING COMPANY LIMITED

and

LAKEPORT BREWING INCOME FUND

and

LAKEPORT BREWING LIMITED PARTNERSHIP

**Respondents
(Moving Parties)**

PUBLIC REASONS FOR ORDER AND ORDER
(Confidential Reasons for Order and Order issued January 18, 2008)

[1] Labatt Brewing Company Limited and Lakeport Brewing Income Fund seek an order under Rule 399 of the Federal Courts Rules, setting aside or varying an order that I issued on November 8, 2007. My order was made pursuant to section 11 of the *Competition Act*, in relation to an *ex parte* application brought by the Commissioner of Competition. The order required Labatt and Lakeport

to produce documentary records, as well as a written return of information, both relating to a variety of topics.

[2] According to Labatt and Lakeport, the information provided by the Commissioner in support of its application was misleading, inaccurate or incomplete, such that the order should never have been made. Moreover, Labatt and Lakeport say, much of the information sought by the Commissioner has either already been produced, or is not relevant to her ongoing inquiry into the competitive implications of the acquisition of Lakeport by Labatt.

[3] For the reasons that follow, I find that the disclosure made by the Commissioner's office on the *ex parte* application was indeed misleading, inaccurate and incomplete. I am further satisfied that had I been provided with complete disclosure, I would not have granted the order that I did, in the form that I did. As a consequence, my November 8, 2007 order relating to Labatt and Lakeport will be set aside, without prejudice to the right of the Commissioner to bring a fresh application for a further section 11 order, on notice to both Labatt and Lakeport.

Background

[4] There have been significant dealings between the office of Commissioner and both Labatt and Lakeport over the past several years. While I have carefully reviewed the history of this matter, which is both lengthy and complex, the following brief chronology will serve to put my reasons into context.

[5] In 2006, Labatt attempted to acquire Sleeman Breweries Ltd. This attempt was unsuccessful, and Sleeman was ultimately acquired by Sapporo Breweries Ltd. later that same year.

[6] In connection with its abortive attempt to acquire Sleeman, Labatt sought an advance ruling certificate from the Commissioner pursuant to section 102 of the *Competition Act*. To this end, Labatt provided the Commissioner with a great deal of information with respect to the competitive implications of the proposed transaction for the beer industry in Ontario.

[7] On January 31, 2007, Labatt agreed to acquire Lakeport. Once again, Labatt provided the Commissioner with considerable information with respect to the competitive implications of the proposed transaction, this time through filings made in accordance with section 114 of the *Competition Act*. Similar information was also provided to the Commissioner by Lakeport.

[8] On February 15, 2007, in the exercise of her powers under paragraph 10(1)(b) of the *Competition Act*, the Commissioner commenced an inquiry into the Lakeport acquisition, and its likely competitive implications for the production, distribution, sale and marketing of beer in Ontario. This inquiry will be referred to as the “Lakeport inquiry” in these reasons.

[9] The Lakeport inquiry was not the first examination of the state of competition in the Ontario beer market that had been carried out by the Commissioner in recent years. In 2003, the Commissioner conducted an inquiry in relation to the Standard Mould Bottle Agreement (“SMBA”), which had been entered into by a number of breweries in the province.

[10] The Commissioner also carried out two separate reviews in 2006 into the sale of Sleeman, one of which related to Labatt’s ultimately abortive attempt to acquire the company, and the other of which related to the acquisition of Sleeman by Sapporo.

[11] In furtherance of the Lakeport inquiry, in February of 2007, the Commissioner brought 11 *ex parte* applications for section 11 orders against different breweries. Orders requiring Labatt and Lakeport, amongst others, to produce records and written returns of information were issued by Justice Noël on February 22, 2007. The information sought and records required to be produced by these orders were extensive.

[12] Indeed, in fulfilling its obligations under Justice Noël's order, Labatt alone provided the Commissioner with some 7,432 documents, consisting of over 138,620 pages. Compliance with this order imposed a significant burden on the company, with the production of these documents costing Labatt in the vicinity of \$750,000 in external costs alone.

[13] On March 26, the Commissioner applied to the Competition Tribunal for an order under section 100 of the *Competition Act*, enjoining the closing of the Lakeport acquisition for 30 days. Justice Phelan refused to grant the injunction, and the Lakeport acquisition closed on March 29, 2007.

[14] Even though the transaction has closed, the Commissioner's inquiry into whether the acquisition of Lakeport by Labatt substantially prevents or lessens, or is likely to prevent or lessen competition in the Ontario beer market is ongoing.

[15] On November 6, 2007, the Commissioner brought a second set of *ex parte* applications for section 11 orders against 15 respondents, including Labatt and Lakeport. Eight of these respondents, again including Labatt and Lakeport, had been subject to section 11 orders issued by Justice Noël in February of 2007.

[16] Based upon the information provided to me by the Commissioner, on November 8, 2007, I granted the Commissioner's applications. The orders that I issued required that the respondents, including Labatt and Lakeport, each produce a copious amount of records. My orders further required the companies to provide extensive information in relation to a number of topics. A copy of my order relating to Labatt and Lakeport is attached as an appendix to these reasons.

[17] On November 23, 2007, Labatt and Lakeport brought their motion to have my November 8, 2007 order set aside or varied. Labatt and Lakeport assert two bases for the motion: firstly, that the order was based upon misleading, inaccurate or incomplete disclosure provided to the Court by the Commissioner, and secondly, that much of the information sought by the Commissioner is not relevant to her inquiry.

The Legislative Regime

[18] Before turning to address the issues raised by this motion, it is helpful to have an understanding of the investigative provisions contained in section 11 of the *Competition Act*, which is the legislative provision underlying the Commissioner's application for *ex parte* relief.

[19] The portions of section 11 which are relevant to this motion provide that:

11. (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have information that is relevant to the inquiry, the judge may order the person to

[...]

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

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(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

[20] Failure to comply with an order made under section 11 of the *Competition Act* is an offence.

In this regard, subsection 65(1) of the Act provides that:

65. (1) Every person who, without good and sufficient cause, the proof of which lies on that person, fails to comply with an order made under section 11 and every person who contravenes subsection 15(5) or 16(2) is guilty of an offence and liable on summary conviction or on conviction

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on indictment to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding two years, or to both.

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[21] Where an order is made *ex parte*, Rule 399 of the Federal Courts Rules allows the Court to set aside or vary the order if the party against whom the order is made discloses a *prima facie* case why the order should not have been made.

The Duty to Disclose

[22] There is no disagreement between the parties with respect to the heavy burden on the Commissioner to make full and frank disclosure when seeking *ex parte* relief under section 11 of the *Competition Act*.

[23] A party seeking *ex parte* relief has the duty of ensuring that the Court is apprised of all of the relevant facts. The reason why this is so is self-evident. As Justice Sharpe noted in *United States of America v. Friedland*, [1996] O.J. No. 4399, both the judge hearing an *ex parte* motion and the party against whom the order is sought are literally “at the mercy” of the party seeking the relief in issue.

[24] Justice Sharpe went on to observe at paragraph 26 of *Friedland* that:

The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia judge noted recently:

There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an *ex parte* injunction. (*Watson v. Slavik*) [citation omitted]

[25] It is for this reason that the law requires that a party seeking *ex parte* relief must do more than simply present its own case in the best possible light, as would be the case if the other side were present. Rather, the person seeking *ex parte* relief must:

[S]tate its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side: *Friedland*, at ¶27.

[26] This duty of the utmost good faith imposes “a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances”: see *Canadian Paralegic Assn (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, [1997] N.J. No. 122 (Nfld.Lab. Ct of App.), at ¶18, as cited in *TMR Energy Ltd. v. State Property Fund of Ukraine*, [2005] F.C.J. No. 116, 2005 FCA 28, at ¶65

[27] The Court went on to observe in *Friedland* that the duty to make full and frank disclosure is not to be imposed in a formal or mechanical manner. A party should not be deprived of a remedy because of “mere imperfections in the affidavit or because inconsequential facts have not been disclosed”. Rather, the defects complained of must be relevant and material to the discretion to be exercised by the Court. [at ¶31]

[28] It should, however, be noted that one of the reasons cited in *Friedland* for allowing for a certain degree of latitude to a party making such an application is that *ex parte* applications are almost always brought on an emergency basis, with little time for preparation of material.

[29] That is not the situation here. In this case, the Commissioner's inquiry has been ongoing for months, and there has never been any suggestion that there was any urgency to the *ex parte* application.

[30] That being said, court orders – even those made without notice to the opposing party - are not lightly to be set aside. As Justice Reed noted in *Canada (Commissioner of Competition) v. Air Canada*, [2001] 1 F.C. 219, “The non-disclosure or errors, in the evidence placed before the issuing judge, must be such as to have caused the issuing judge, had he or she known of them, to have refused to grant the order.” [at ¶13]

[31] As to what type of non-disclosure will be viewed as “material”, the jurisprudence teaches that the test is an objective one:

... The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a complaint of non-disclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts were relevant or important. **All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.** [see *Gee, Mareva Injunctions and Anton Piller Relief* (3d Edition 1995 at p. 98, as quoted in *Friedland*, at ¶36, emphasis added.]

[32] While these comments were made in the context of a motion to set aside a *Mareva* injunction, they are, in my view, equally apposite in a case such as this.

[33] With this understanding of the duty of disclosure on the Commissioner in seeking *ex parte* orders under section 11 of the *Competition Act*, I turn now to assess whether this duty has been fulfilled in this case.

Was Adequate Disclosure Made in This Case?

[34] I agree with the Commissioner that the burden is on Labatt and Lakeport to demonstrate that the disclosure provided in the *ex parte* application brought before me was misleading, inaccurate or incomplete.

[35] I also agree with the Commissioner that in order to justify setting aside my November 8, 2007 order, any non-disclosure that may have occurred in this case would have to be sufficiently material as to have caused me to have refused to grant the order in the first place.

[36] For the reasons that follow, I find that the disclosure made by the Commissioner was misleading, inaccurate or incomplete in several material respects.

The Failure to Mention the Representations Made to Justice Noël

[37] The first area in which I find that the disclosure provided by the Commissioner was incomplete or inadequate relates to the representations that were previously made by the Commissioner to the Court in connection with the section 11 orders granted by Justice Noël.

[38] In this regard, I note that the information sought by the Commissioner from Labatt and Lakeport (amongst others) in February of 2007 was very extensive, and dealt with a wide range of topics. As was previously noted, in responding to Justice Noël's order made against Labatt, the company produced some 138,620 pages of material.

[39] Indeed, in subsequent representation made by the Commissioner to Justice Phelan in the context of the section 100 proceedings, the delay in completing the Commissioner's inquiry into Labatt's acquisition of Lakeport was justified, in part, because the information provided by the breweries (including Labatt and Lakeport) in response to the February section 11 orders was "voluminous and profound", requiring additional time for further analysis.

[40] The amount of information and documentation required to be produced by Labatt and Lakeport in accordance with my November 8, 2007 order is also enormous – both in scope and in complexity.

[41] I will return to the voluminous nature of the information requested further on in this decision, but it was - or should have been - obvious to the Commissioner that the effect of the section 11 orders sought, both in February and again in November, would be to impose a significant burden on those against whom the orders were made.

[42] In what may have been an effort to allay potential concerns on the part of the Court as to the extremely broad scope of the information sought, the supporting affidavit relied on by the Commissioner before Justice Noël stated that “The Commissioner believes that the responses to these questions from the Brewers [including Labatt and Lakeport] will be sufficient for the purposes of her inquiry.” (See the affidavit of Paula Lajeunesse dated February 20, 2007, at ¶17).

[43] This sentiment was echoed in representations that were made the following month to Justice Phelan to the effect that once the experts retained by the Commissioner had analyzed the information received in accordance with the section 11 orders, the Commissioner would be in a position to determine whether to initiate proceedings before the Competition Tribunal. (See the affidavit of Stephen Peters, sworn March 21, 2007, at ¶35).

[44] Moreover, it is clear that by March, 2007, the information already in the hands of the Commissioner was sufficient as to enable her to provide Justice Phelan with an affidavit from an economist by the name of Philip Nelson which discussed the “irremediable effects” that the Lakeport acquisition would have on competition in the Ontario beer market.

[45] While the Commissioner made me aware of the orders issued by Justice Noël, and provided me with copies of those orders, I was not made aware of the Commissioner’s previous representation to the Court that the information sought in the orders made by Justice Noël in February of this year would likely be sufficient for the purposes of the Commissioner’s inquiry.

[46] Had I known that the Commissioner had previously represented to the Court that the extensive information sought in the February, 2007 production orders “would likely be sufficient” for the purposes of the Lakeport inquiry, I would not have granted the order that I did without some explanation from the Commissioner as to why so much additional information and documentation was now required.

[47] The Commissioner submits that she had no obligation to tell me about the previous submissions made to Justice Noël in this regard. As I understand the Commissioner’s position, the only thing that she says that she has to establish in order to be entitled to an order under section 11 of the *Competition Act* is that there is a section 10 inquiry under way, and that the respondent has information that is relevant to the inquiry.

[48] In this regard, the Commissioner relies upon decisions such as that in *Commissioner of Competition v. Xerox Canada Ltd.*, Superior Court of Quebec, unreported, No. 5500-05-010175-001, November 24, 2000, *Canadian Pacific Ltd. v. Canada (Director of Investigation and Research)*, [1995] O.J. NO. 709, and the *Air Canada* case previously cited.

[49] As a consequence, the Commissioner says that any representations may have been made on her behalf to the Court as to whether the information previously sought would suffice for the purposes of her inquiry were irrelevant to my deliberations as to whether a further order should now issue.

[50] I do not agree. Section 11 of the *Competition Act* provides for independent judicial oversight with respect to the extensive investigative powers granted to the Commissioner under the *Competition Act*. To this end, section 11 does not mandate that the Court act as a mere “rubber stamp”, automatically issuing production orders once the two conditions identified in section 11 of the Act have been satisfied. Rather, the section confers a discretion on the Court in this regard: see *Air Canada*, at ¶31.

[51] I agree that the Court must indeed be satisfied that the two statutory conditions precedent to the granting of a production order have been met – namely that there is a section 10 inquiry under way, and that the respondent has information that is relevant to the inquiry – prior to granting a production order under the Act. However, in order to properly exercise the discretion conferred on the Court by section 11 of the *Competition Act*, and for the Court to be able to control its own processes, and to guard against the abuse of those processes, the Court must also be fully apprised of the relevant circumstances surrounding the request.

[52] Depending upon these circumstances, the Court may decline to grant the order sought, may seek further information or clarification from the Commissioner, or may require that notice be given to the party affected by the proposed order, in order that the affected party may have a right to be heard before an order issues.

[53] In this case, the representation made by the Commissioner to Justice Noël was tantamount to a statement that, absent an unforeseen matter arising, his order would be sufficient for the purposes of the Commissioner’s inquiry. The failure to disclose either that this representation had been

made, or to indicate what had changed since February of 2007 were material omissions which justify the setting aside of my November 8 order.

[54] Quite apart from the issue of the prior representations to Justice Noël, there were, however, other areas in which the Court was not fully apprised of the circumstances surrounding the request, further justifying the setting aside of my November 8, 2007 orders against Labatt and Lakeport. These will be addressed in the next sections of this decision.

The Degree of Overlap Between the Section 11 Orders

[55] As was previously noted, an enormous amount of information and documentation was ordered to be produced by Justice Noël in February of 2007. Indeed, I have already mentioned that a representative of the Commissioner's office has described the material produced in response to Justice Noël's section 11 orders as "voluminous and profound".

[56] The same could easily be said for the information and documentation ordered to be produced by my November 8, 2007 section 11 order.

[57] The written submissions of the Commissioner which were filed in support of the *ex parte* applications brought before me stated that "None of the records or information sought has previously been requested from the respondents".

[58] This is neither a fair nor an accurate representation of the situation, as there are several areas where there is considerable overlap between the information sought by the Commissioner in

November of 2007, and that which had previously been requested from Labatt and Lakeport, both through the section 11 orders issued by Justice Noël, and through the orders made in the context of the SMBA inquiry.

a) Overlap with the February, 2007 Production Orders

[59] I will deal first with the areas of overlap between the information and documentation that had previously been ordered to be produced by Labatt and Lakeport through the section 11 orders issued by Justice Noël, and the information and documentation sought by the Commissioner through the section 11 order issued by me against Labatt and Lakeport in November of 2007.

[60] By way of example, my November, 2007 order required Labatt and Lakeport to “Describe in detail any plans or consideration, since January 1, 2000 or having effect after January 1, 2000 relating to ...[t]he allocation of brewing and packaging capacity by your company in or for Ontario.”

[61] In this regard, Justice Noël’s orders required Labatt and Lakeport to produce “A spreadsheet, in Electronic Form, showing annual production capacity and packaging capacity separately for brewing operations in Ontario and nationally.”

[62] It is true that there are differences between the information and documentation sought by the orders. My order is limited to the Ontario area, whereas Justice Noël’s orders required the production of information that is national in scope. Similarly, my order covers the period from January 1, 2000 to the present, whereas Justice Noël’s orders cover the period from January 1, 2004

to the present (unless otherwise specified). That said, there is nevertheless obvious overlap between the subject matter of the orders.

[63] Similarly, my November, 2007 order required Labatt and Lakeport to:

Describe in detail any plans or consideration, since January 1, 2000 or having effect after January 1, 2000 relating to:

- a) The expansion by your company of existing brewing capacity situated in Ontario;
- b) The expansion by your company of existing packaging capacity situation in Ontario.

[64] In this regard, Justice Noël's orders required Labatt and Lakeport to produce all records relating to the proposed acquisition of Lakeport by Labatt, as well as "All records relating to any proposed or contemplated merger which is not the Proposed Transaction, directly or indirectly involving Lakeport or any other producer of Discount beer."

[65] Because mergers can be a means of expanding capacity, as a result of Justice Noël's February 2007 order made against Labatt, the company would have already been required to disclose all of its records relating to mergers that it was contemplating, including the Lakeport acquisition.

[66] While the scope of my November 2007 order is broader than that of Justice Noël, in that my order is not limited to the acquisition of Lakeport by Labatt, information related to this merger would nevertheless have been included in the ambit of my order, thereby resulting in a clear area of overlap between the two orders, insofar as Labatt is concerned.

[67] The Commissioner submits that having included a copy of Justice Noël's February, 2007 section 11 orders in the application materials submitted to the Court in November of 2007, it cannot now be said that there was any lack of disclosure with respect to the scope of the previous section 11 orders made against Labatt and Lakeport in the context of the Lakeport inquiry.

[68] Nor, she says, can it be said that there was any lack of disclosure with respect to the potential for overlap between the information and documentation ordered to be produced through the February, 2007 production orders, and the information and documentation sought to be produced through the application before me.

[69] The answer to this submission is found in the *Friedland* case, where Justice Sharpe observed that:

[T]he fact that a document is before the Court, given the volume of exhibits and the time which an *ex parte* judge has to deal with such matters, does not relieve the moving party of its duty to make full and fair disclosure. It is apparent that a judge ... will necessarily focus on the lead affidavit, the factum and the representations of counsel, and that it is up to the parties and counsel to bring relevant matters to the attention of the Court. [at &166]

[70] Thus the fact that the Commissioner produced copies of Justice Noël's February, 2007 section 11 orders in its November 2007 application materials does not excuse the disingenuous and misleading representations made in the Commissioner's written submissions, which stated that "None of the records or information sought has previously been requested from the respondents".

[71] Further, as is discussed below, the affidavit relied upon by the Commissioner in support of her *ex parte* application before me is drafted in a way that suggests that what the Commissioner described as potential “inadvertent duplication” between Justice Noël’s orders and the order sought from me was limited to one specific area, namely the Ontario Minimum Social Reference Price for beer.

[72] The affidavit relied upon by the Commissioner in the *ex parte* application before me comes from Terence Stechisyn, a case officer in the Commissioner’s office who is involved in the Lakeport inquiry. Mr. Stechisyn’s affidavit provides that:

18. The previous section 11 Order required that the Respondents produce all correspondence with the Government of Ontario related to the Minimum Social Reference Price for beer (or “Ontario’s Social Reference Price for beer”). The current section 11 Order requires that the Respondents provide all records relating to an increase in Ontario’s Social Reference Price for beer, and all records and information relating to the Respondents’ experience with any attempt to increase that price. The current section 11 Order requires a broader range of documents for a more specific subject. These records are important to the Commissioner’s inquiry, as they would indicate the Respondents’ positions on or reactions to the change in Ontario’s Social Reference Price for beer, and would show how this change affected the different segments of the off-premise market for beer.

19. To the extent that there may be any inadvertent duplication with a previous order, the Commissioner does not require the Respondents to produce a further copy of such records or information in response to the Order, provided that the Respondents (i) identify to the Commissioner’s satisfaction any records or information in the possession of the Commissioner which are responsive to the Order; (ii) agree that such records or information shall be deemed to have been provided to the Commissioner pursuant to the Order; and, (iii) receive confirmation from the Commissioner that the records or information are in the Commissioner’s possession.

[73] The juxtaposition of the reference to “inadvertent duplication” in paragraph 19 of the Stechisyn affidavit in relation to the area of admitted potential overlap in paragraph 18 creates the impression that the only area of potential “inadvertent duplication” is in relation to the information sought with respect to the Ontario Social Reference Price for beer. As was explained earlier, this is clearly not the case.

[74] Moreover, the degree of duplication between Justice Noël’s section 11 orders made against Labatt and Lakeport and my November 8, 2007 order against Labatt is confirmed by the affidavit of Michelle Schotel, a law clerk with the law firm representing both Labatt and Lakeport in this matter. According to the evidence of Ms. Schotel, of the 7,432 records produced by Labatt in response to Justice Noël’s February, 2007 section 11 order, at least 1,786 of these documents are also responsive to my November 8, 2007 order.

b) Overlap with the SMBA Production Orders

[75] It should be noted that the Stechisyn affidavit refers to “inadvertent duplication with a previous order”, and thus does not purport to restrict the representations made in relation to the question of potential duplication to orders made only in the context of the Lakeport Inquiry.

[76] Insofar as the areas of overlap between the information sought to be produced through the section 11 order that I issued on November 8, 2007, and the section 11 orders issued against Labatt and Lakeport in the context of the SMBA inquiry in 2004 are concerned, I note first that in his oral submissions, counsel for the Commissioner conceded that there was some overlap between the information sought to be produced through my November 8, 2007 order, and that sought through the section 11 orders issued against Labatt and Lakeport in the course of the SMBA inquiry.

[77] I would further note that the material before me on the *ex parte* applications does not even mention the SMBA inquiry, or make any reference to the information requested from Labatt and Lakeport through section 11 orders made in that context.

[78] Indeed, little mention is made of the extensive involvement of the Commissioner's office in examining the state of competition in the beer market in Ontario over the last four years. Nor is there any mention of the voluminous information that her office has accumulated from various sources within the industry, including Labatt and Lakeport over this period. These are, in my view, material omissions.

[79] Moreover, my review of the matter suggests that there is considerable overlap between the information sought to be produced through the section 11 orders that were made against Labatt and Lakeport in the context of the SMBA inquiry, and that sought through the section 11 order that I issued on November 8, 2007.

[80] By way of example, the SMBA orders require Labatt and Lakeport to advise the Commissioner as to:

How many facilities commenced or ceased operations during the relevant period?
Provide the names and locations of those facilities and the reasons why operations were halted.

[81] The "relevant period" for this request was 2000-2004.

[82] In contrast, my November 8, 2007 order requires Labatt and Lakeport to advise the Commissioner as to:

Whether you constructed a new facility or purchased an existing facility as a means of entering the industry (including source and type of brewing and packaging equipment).

[83] This request relates to the period from January 1, 2000 onwards.

[84] The Commissioner suggests that the SMBA orders merely seek a list of facilities that commenced or ceased operations, and the reasons therefore, while the November 2007 order seeks information regarding the means Labatt and Lakeport used to enter a market.

[85] In my view, this difference is inconsequential. My November, 2007 order requires Labatt and Lakeport to provide lists of new or purchased facilities obtained in order to enter the market. These facilities would also fall into the scope of the SMBA orders because they would constitute facilities that commenced operations.

[86] Moreover, the SMBA orders required that reasons for the commencement of a facility be provided. Therefore, if a facility was commenced in order to enter into a particular market, the Commissioner would already have that information.

[87] Without going into detail, I would simply note that there are a number of other areas of overlap between the information sought to be produced through the section 11 order that I issued on November 8, 2007, and the section 11 orders issued against Labatt and Lakeport in the context of the SMBA inquiry.

c) Other information in the Hands of the Commissioner

[88] I would also note that in describing the areas of duplication between the information sought by the Commissioner through my November 8, 2007 order, and that already provided to her, I have not even touched on the areas of substantial overlap between the information and documentation sought through my order, and that which had already been provided to the Commissioner's office by Labatt and Lakeport in compliance with their statutory obligations.

[89] These obligations include the filings made in accordance with section 114 of the *Competition Act* and section 17 of the *Notifiable Transactions Regulations*.

[90] While the Lajeunesse affidavit provided to Justice Noël made specific reference to the potential for duplication between the information identified in the production orders being sought in February of 2007, and the documents previously provided in compliance with the companies' statutory notification requirements, there is no reference in the Stechisyn affidavit relied on by the Commissioner to support her November, 2007 application to the copious amount of information previously provided to the Commissioner by Labatt and Lakeport in compliance with their statutory obligations, beyond the statement that "Labatt and Lakeport supplied the Commissioner with the prescribed long-form information pursuant to section 114 of the *Competition Act* and section 17 of the *Notifiable Transactions Regulations*".

[91] In this regard, I would note that in fulfillment of its statutory obligations, Labatt alone had already produced some 10,000 pages of records and information relating to the impact of the Lakeport acquisition by Labatt, and why the companies believed that the acquisition would not result in a substantial lessening of competition in the Ontario beer market.

d) Conclusion Regarding Overlap and Duplication

[92] A section 11 order will not be refused merely because it imposes a significant burden on the party against whom the order is directed. Indeed, the jurisprudence recognizes that citizens, including corporate citizens, have both a moral and a legal duty to assist in the enforcement of Canadian laws: see, for example, *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, [1990] 1 S.C.R. 425 at ¶244, and *R. v. TeleMobile*, (2006), 81 O.R. (3d) 745 at ¶43.

[93] In addition, I am by no means suggesting that in seeking a section 11 order, the Commissioner must disclose every contact that she may have ever had with the players in a particular industry, however fleeting those contacts may have been.

[94] That said, the Commissioner cannot come before this Court, on an *ex parte* basis, seeking onerous production orders that are enforceable through criminal sanctions, and represent that extraordinarily extensive information and documentation sought has not previously been requested, when that is clearly not the case.

[95] Moreover, the Commissioner herself recognizes that both the burdensome nature of section 11 orders and the potential for duplicative requests are relevant factors to be considered in deciding whether to seek orders under section 11 of the *Competition Act*.

[96] In this regard, I note that the “Information Bulletin on Section 11 of the *Competition Act*” published by the Competition Bureau notes that the Commissioner does not seek an order under section 11 without first balancing her responsibility to enforce the Act with the interests of those parties who will be required to respond to the order. In so doing, the factors considered by the Commissioner include the burden that the order will impose on the responding parties, and the completeness of the information which has already been obtained through other means.

[97] Just as these considerations are relevant to the Commissioner’s decision to seek an order under section 11 of the *Competition Act*, so too are they relevant to the Court’s exercise of the discretion conferred on it by the section, and to the Court’s ability to control its processes, and prevent abusive requests.

[98] In this case, the misleading, inaccurate and incomplete information provided to the Court by the Commissioner with respect to the areas of overlap and duplication between the information already provided to the Commissioner, and that sought through my November 8, 2007 order, is a material non-disclosure - one that would have affected the exercise of my discretion.

[99] Indeed, had I been aware of the significant degree of overlap between the information and records being sought through the applications before me, and that which had previously been provided to the Commissioner, I would either have required the Commissioner to narrow the

requests, or would have required that notice be given to Labatt and Lakeport, to give them the opportunity to be heard prior to an order being issued.

The Commissioner's Failure to Draw Labatt's Prior Concerns to the Court's Attention

[100] I am also satisfied that the Commissioner breached her duty to provide full disclosure in failing to bring the concerns previously articulated by Labatt about the burdensome nature of the Commissioner's prior demands for information to the Court's attention.

[101] In this regard, I note that after being served with Justice Noël's February, 2007 section 11 order, counsel for Labatt wrote several letters to the Commissioner's office, expressing their dismay over the Commissioner's failure to advise Justice Noël of the large volume of material already in the possession of the Commissioner with respect to the state of the beer industry in Ontario. In particular, counsel referred to the over 10,000 pages of information which had already been produced in relation to Labatt's acquisition of Lakeport, the "huge volume" of information previously provided by Labatt in connection with its attempt to acquire Sleeman, and the material which had already been provided to the Commissioner in the course of the SMBA inquiry.

[102] Concern was also expressed by counsel for Labatt that the breadth of the order made by Justice Noël meant that a great deal of irrelevant information had to be produced. Moreover, counsel advised that its efforts to comply with the February, 2007 order had caused Labatt's file server to crash, and that the cost of attempting to restore lost data would have exceeded a half a million dollars.

[103] Finally, in March of 2007, counsel for Labatt had expressed their concern to the Commissioner that terms of the February, 2007 order had “purported to require Labatt to waive privilege by providing a high level of detail in respect of documents over which privilege was claimed”.

[104] It will be recalled that the duty of full and frank disclosure requires a party seeking *ex parte* relief to inform the Court of any points of fact or law known to it which favour the other side, in order that a balanced consideration of the issues can occur.

[105] The Commissioner was clearly aware of the fact that prior concerns expressed by the target of a section 11 order could be material to the Court’s deliberations as to whether a second section 11 order should be issued against the same party.

[106] We know this because the Commissioner’s November, 2007 application for a section 11 order made with respect to Moosehead Breweries Limited, which was brought at the same time as the application against Labatt and Lakeport, specifically drew the Court’s attention to the concerns previously expressed by that company as to the burdensome nature of the previous section 11 order.

[107] For whatever reason, in this case the Commissioner chose not to advise the Court of the very similar concerns raised by Labatt. In my view, this was an additional area in which the disclosure provided by the Commissioner was inadequate.

Conclusion on the Issue of Non-Disclosure

[108] I have thus found that the disclosure provided by the Commissioner in support of her November, 2007 applications for a production order under section 11 of the *Competition Act* was misleading, inaccurate and incomplete.

[109] While I accept that I have the discretion to continue the order, notwithstanding that there has been material non-disclosure, I decline to do so here. In my view, in the circumstances of this case, to allow my previous order to stand would render the Commissioner's duty of disclosure "empty", to paraphrase the *Friedland* decision (at ¶28).

[110] Moreover, on the return of the motion brought by Labatt and Lakeport to set aside my November, 2007 order, the Commissioner provided no explanation as to why such extensive information and records are now required, notwithstanding the Commissioner's previous representations to the Court that the information and records sought through the orders obtained through Justice Noël would likely suffice for the purposes of the Lakeport inquiry.

[111] In my view, the preferable approach is to set aside my November 8, 2007 order against Labatt and Lakeport, without prejudice to the right of the Commissioner to bring a fresh application for a further section 11 order, on notice to both Labatt and Lakeport.

Relevance

[112] Given my findings in relation to the disclosure issue, it is not necessary to address Labatt and Lakeport's arguments as to the alleged lack of relevance of much of the information and documentation ordered to be produced by my November, 2007 order.

Costs

[113] Having regard to all of the circumstances, as well as the factors referred to in Rule 400(3), and in the exercise of my discretion, I am of the view that Labatt and Lakeport should have their costs associated with this motion at the upper end of Column 5.

[114] Labatt and Lakeport were represented by the same counsel, and are thus only entitled to one set of costs. However, the matter was complex, as is evidenced by the fact that all of the parties were represented by multiple counsel. In the circumstances, the companies should be entitled to the costs of second counsel.

ORDER

THIS COURT THEREFORE ORDERS AND ADJUDGES that:

1. The November 8, 2007 order against Labatt and Lakeport is set aside, without prejudice to the right of the Commissioner to bring a fresh application for a section 11 order, on notice to both Labatt and Lakeport.

2. Labatt and Lakeport are entitled to one set of costs associated with this motion, including the costs of second counsel, at the upper end of Column 5.

“Anne Mactavish”

Judge

Federal Court



Cour fédérale

Date: 20071108

Docket: T-325-07

OTTAWA, Ontario, this 8th day of November 2007

PRESENT: THE HONOURABLE MADAM JUSTICE MACTAVISH

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, (as amended);

AND IN THE MATTER OF an inquiry under subparagraph 10(1)(b)(ii) of the *Competition Act* to review the acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Ltd., pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* Application by the Commissioner of Competition for the issuance of Orders requiring that certain persons produce certain records pursuant to paragraph 11(1)(b) of the *Competition Act*, and provide written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

- and -

Applicant

LABATT BREWING COMPANY LIMITED

- and -

LAKEPORT BREWING INCOME FUND

- and -

LAI~EPORT BREWING LIMITED PARTNERSHIP

Respondents

ORDER FOR THE PRODUCTION OF RECORDS AND A WRITTEN
RETURN OF INFORMATION

UPON APPLICATION made the 6th day of November 2007, by the Commissioner of Competition (the "Commissioner") appointed under the *Competition Act*, for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, and heard this day at the Federal Court, Ottawa, Ontario;

AND **UPON READING** the affidavit of Terence Stechysin, swbrn on the 6th day of November 2007 and filed with Schedules "A" and "B", and Exhibits "A" and "B" referred to therein, and upon reading the draft Order filed;

AND **UPON** being satisfied that an Inquiry is being made pursuant to section 10 of the *Competition Act* into the acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Ltd., pursuant to section 92 of the *Competition Act*;

AND **UPON** being satisfied that the requested records and information sought through the written returns are relevant to the Inquiry;

AND **UPON** being satisfied that the Respondents have or are likely to have information that is relevant to the Inquiry:

1. **THIS COURT ORDERS** that pursuant to paragraph 11(1)(b) of the *Competition Act*, the Respondents, by a duly authorized representative of the corporation, produce to the Commissioner or her authorized representative all records and other things identified in Schedule A, attached, which are in the possession of or under the control of the company.
2. **THIS COURT FURTHER ORDERS** that in order to facilitate the handling and orderly maintenance of the records and to ensure the accurate and expeditious return of records produced pursuant to this Order, the following procedures shall be observed:
 - a) all records are to be produced in their entirety. If any portion of any record is responsive to any paragraph or subparagraph of Schedule A, then the entire record must be produced. If a record contains privileged material, the entire record shall be produced, with the privileged material redacted and recorded in the manner set forth in subparagraph 2 I), below;
 - b) where records exist only in paper format then records that are stapled or attached together in any manner are to remain attached;
 - c) the records produced are to be either original records or certified by affidavit to be true copies;
 - d) the records produced are to be organized in folders that correspond respectively with each paragraph or subparagraph of Schedule A of this Order and provided therein chronologically, numbered consecutively at or near the bottom right corner in a location that does not obscure any information on the record. Each folder should be identified by the names of the Respondents, the date of this Order and

the paragraph or subparagraph to which the enclosed records are responsive;

- e) where a record is responsive to more than one paragraph or subparagraph, the Respondents must produce it only once. Such a record should be placed in the folder for the first paragraph or subparagraph to which it is responsive. The Respondents shall note, in a separate log or otherwise, all paragraphs and subparagraphs to which the record responds;
- 1) for each record or portion thereof withheld under a claim of privilege, the Respondents shall submit a sworn or certified statement from the Respondents' counsel, or a corporate officer, containing a statement of the basis upon which the privilege is claimed and identifying to the fullest extent possible without compromising the privilege being claimed: 1) the paragraphs, and subparagraphs in this Order to which the record is responsive; 2) the withheld record by author, addressee, date, number of pages, and subject matter; 3) each person to whom the withheld material was sent; and 4) each person to whom the withheld material or its contents, or any part thereof, was disclosed. Identify all persons by name, title, and address. The Respondents must preserve any record or part of a record withheld under a claim of privilege;

all electronic records (readable in a computer system) are to be produced as described below:

all electronic records shall be provided on DVD, CD-ROM, diskette or other removable storage media or external drive (USB or Firewire);

database records shall be provided as a flat file, in a non-relational format;

spreadsheets shall be in either Lotus 123 or MS Excel format;

word processing files shall be in either MS Word or WordPerfect format;

email records and attachments shall be provided in a mailbox format (.DBX or .PST), in a generic email format (.MSG or .EML), in a text format, or paper form;

images (scanned paper records) shall be provided in .TIF or .PDF single page format;

all electronic records shall be provided with a corresponding

electronic index (i.e. Microsoft Access database or text document), indexed to the questions to which they respond;

- h) in the event the electronic records cannot be delivered in the formats described above, they shall be provided in their existing format along with instructions and such other materials (including software and passwords) as are necessary for the retrieval and use of the electronic records; and
- i) all electronic media (DVD, CD-ROM, diskettes, or removable storage media) shall be identified with a label describing the contents.

3. **THIS COURT FURTHER ORDERS** that pursuant to paragraph 11(1)(c) of the *Competition Act*, the Respondents, by a duly authorized representative of the company, shall make and deliver to the Commissioner or her authorized representative a written return of information under oath or solemn affirmation in response to the questions set out in Schedule B, attached.

4. **THIS COURT FURTHER ORDERS**

- a) that all records and written returns described in Schedules A and B are to be produced to the Commissioner at the following address:

Competition Bureau
Mergers Branch
50 Victoria Street, 19th floor
Gatineau, Quebec
K1A 0C9

Attention: Tammy Polomeno

- b) the person producing the records and written return of information is to provide them under oath or solemn affirmation explaining that all records in its possession or control were produced, and that the records produced are either original records or certified true copies;
- c) the production of records responsive to Schedule A and the return of information responsive to Schedule B shall be made within 90 days of the date of service of this order.

5. **THIS COURT FURTHER ORDERS** that this Order may be served by means of facsimile machine or registered letter on the Respondents or on any other duly authorized representative of the Respondents, including the registered office.

Anne L. Mactavish

Judge

SCHEDULE "A"

RECORDS SPECIFIED TO BE PRODUCED
PURSUANT TO s. 11(1)(b)

Notice Concerning Failure to Respond and Obstruction

Failure to respond to the Order is an offence under s. 65 of the Competition Act Any person who in any manner impedes or prevents or attempts to impede or prevent any inquiry or examination under the Competition Act, or who destroys or alters or causes to be destroyed or altered, any Record or thing that is required to be produced under section 11 of the Competition Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be prosecuted Conviction of any of these offences is punishable by fine or imprisonment or both.

Definitions

For the purpose of this Schedule, the term:

"Agent" means a person who is authorized to represent a manufacturer of beer in Ontario and who holds a valid Manufacturer's Representatives License issued by the Alcohol and Gaming Commission of Ontario;

"and" and "or" have both conjunctive and disjunctive meanings;

"Brewer" means a person who holds a valid Manufacturer's Liquor License issued by the Alcohol and Gaming Commission of Ontario;

"Decommissioning" means closure of a Production Facility by means of closure of operations, removal or sale of process equipment, or removal or sale of buildings;

"Electronic Form" means, without restricting the generality of the term, computer text files such as Microsoft Word, WordPerfect; computer presentation files such as Microsoft PowerPoint; computer e-mail files; and computer spreadsheet and database files such as Microsoft Excel, Access, and Lotus 123;

"Financially Justable" means that an undertaking would result in a positive contribution margin for a firm after consideration of expected production costs, expected transportation costs, and the expected market price that the firm would receive for the products produced;

"*Lakeport*" means Lakeport Brewing Income Fund, Lakeport Brewing Limited Partnership, and the operations of the business(es) therein;

"*LCBO*" means The Liquor Control Board of Ontario;

"*Production Facility*" means any premise at which beer is produced, packaged, stored, or distributed;

"*Record*" has the meaning of that term as defined in subsection 2(1) of the *Competition Act*;

"*Response*" includes but is not limited to the introduction of price promotions, financial analyses, sales performance analyses, marketing plans, business intelligence reports and strategic plans;

"*Relating to*" includes describing, containing, analysing, studying, reporting on, considering, setting forth, concerning, regarding or pertaining to, in whole or in part;

"*Senior Officer*" means the Chairperson, President, Chief Executive Officer, Vice-President, Secretary, Treasurer, Chief Financial Officer, Chief Operating Officer and includes any individual who performs their functions;

"*TBS*" means The Beer Store and includes Brewers Retail Inc.

Instructions

1. Use of the singular or the plural in this Order should not be deemed a limitation, and the use of the singular should be construed to include, where appropriate, the plural; and vice versa.
2. Use of a verb in the present or past tense in this Order should not be deemed a limitation, and the use of either the present or past tense should be construed to include both the present and past tense.
3. If available, Records should be provided in Electronic Form unless there are features of the hard-copy format that are not available in the Electronic Form.
4. The required Records must be provided in addition to the information requested in Schedule B to this Order.

Notice Concerning Records Already Provided

Certain of the Records hereinafter required may have been previously provided to the Commissioner. The Respondent is not required to produce a second copy of such Records in response to this Order, provided that the Respondent:

- (i) Identifies to the Commissioner's satisfaction any Records in the possession of the Commissioner which are responsive to the Order;
- (ii) Agrees that such Records shall be deemed to have been provided to the Commissioner pursuant to this Order; and,
- (iii) Receives confirmation from the Commissioner that the Records are in the Commissioner's possession.

Records Required

1. For the period January 1, 2000 to the present, provide all Records prepared or received by a Senior Officer Relating to:
 - a) The expansion by your company of existing brewing capacity situated in Ontario;
 - b) The expansion by your company of existing packaging capacity situated in Ontario;
 - c) Building by your company of greenfield brewing capacity in Ontario;
 - d) Building by your company of greenfield packaging capacity in Ontario;
 - e) The expansion by your company of existing brewing capacity situated outside of Ontario that is currently used to supply beer in or into Ontario;
 - f) The expansion by your company of existing brewing capacity situated outside of Ontario that could be used to supply beer in or into Ontario in a Financially Justifiable manner;

The expansion by your company of existing packaging capacity situated outside of Ontario that is

- g) currently used to supply beer in or into Ontario;
- h) The expansion by your company of existing packaging capacity situated outside of Ontario that could be used to supply beer in or into Ontario in a Financially Justifiable manner;
- i) Building by your company of greenfield brewing capacity outside of Ontario that will or could be used to supply beer in or into Ontario in a Financially Justifiable manner;

- j) Building by your company of greenfield packaging capacity outside of Ontario that will or could be used to supply beer in or into Ontario in a Financially Justifiable manner;
- k) Contract production of beverage alcohol by others located in Ontario for your company for sale in Ontario;
- l) Contract production of beverage alcohol by others located outside of Ontario for your company for sale into Ontario;
- m) Contract production of any beverage by your company for others from a Production Facility situated inside of Ontario;
- n) Contract production of any beverage by your company for others from a Production Facility situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner;
- o) The allocation of brewing and packaging capacity by your company in or for Ontario;
- p) The allocation of brewing and packaging capacity by your company for contract production of any beverage at any Production Facility that serves Ontario;
- q) Decommissioning or leaving idle any of your company's existing brewing capacity in Ontario;
- r) Decommissioning or leaving idle any of your company's existing packaging capacity in Ontario;
- s) Decommissioning or leaving idle any of your company's existing brewing capacity situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner; and,
Decommissioning or leaving idle any of your company's existing packaging capacity situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner.
- t) Decommissioning or leaving idle any of your company's existing packaging capacity situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner.

2. For the period February 22, 2007 to present, provide all Records Relating to:

- a) Plans to change your prices, introduce price promotions, and introduce non-price promotions in any price-segment of the Ontario beer market;
- b) Your rationale for price changes, price promotions, and non-price promotions in any price-segment of the Ontario beer market;

- c) Your Response and the anticipated and/or actual Response of other Brewers or Agents to price changes, price promotions, and non-price promotions in any price-segment of the Ontario beer market;
 - d) Voluntarily discontinued SKUs by your company in any price-segment of the Ontario beer market;
 - e) The introduction of new SKUs by your company into any price-segment of the Ontario beer market;
 - f) SKUs of your company that have been de-listed by TBS; and,
 - g) SKUs of your company that have been de-listed by the LCBO.
3. For the period January 1, 2000 to present, provide all Records Relating to the quality of service, retail function and the mandate of TBS.
 4. For the period January 1, 2000 to present, provide all Records Relating to the quality of service, retail function and the mandate of the LCBO.
 5. For the period January 1, 2000 to present, provide all Records Relating to an increase in Ontario's Social Reference Price for beer, or Relating to any attempt to increase Ontario's Social Reference Price for beer.
 6. Provide all Records Relating to the likely effect of your acquisition of Lakeport on prices or promotions in the Ontario beer market.
 7. For the period January 1, 2000 to present, provide all formalized brand licensing or contract brewing agreements that commit you to produce any beverage from Production Facilities that currently supply beer or could supply beer in or into Ontario in a Financially Justifiable manner.
 8. For the period January 1, 2000 to present, provide all formalized brand licensing or contract brewing agreements under which you obtain beer that is currently supplied or could be supplied in or into Ontario in a Financially Justifiable manner.
 9. Provide all Records Relating to Ontario's Beverage Alcohol Review Panel.
 10. For the period February 22, 2007 to present, provide all Records Relating to your competitors, namely:
 - a) Competitors' sales;
 - b) Competitors' pricing;
 - c) Product introduction by competitors;

- d) Capacity expansion by competitors;
- e) Decommissioning or leaving idle any of your competitors' facilities; and, 0
Competitors' market shares.

11. Provide all Records Relating to Lakeport's management, marketing, manufacturing, pricing and other strategic plans that are now in Labatt's possession post-closing.
12. For the period February 1, 2007 to present, provide all Records Relating to the future of the Lakeport brands of beer in the Ontario beer market including management, marketing, manufacturing, pricing and other strategic plans for the Lakeport brands.
13. For the period February 1, 2007 to present, provide all Records Relating to the future of the Labatt brands of beer in the Ontario beer market including management, marketing, manufacturing, pricing and other strategic plans for the Labatt brands.
14. Provide all Records Relating to the nature and extent of the efficiencies that your company has realized, will realize or plans to realize as a result of your acquisition of Lakeport.

SCHEDULE "B"

INFORMATION SPECIFIED TO BE PRODUCED
PURSUANT TO s. 11(1)(c)

Notice Concerning Failure to Respond and Obstruction

Failure to respond to the Order is an offence under s. 65 of the Competition Act Any person who in any manner impedes or prevents or attempts to impede or prevent any inquiry or examination under the Competition Act, or who destroys or alters or causes to be destroyed or altered, any Record or thing that is required to be produced under section 11 of the Competition Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be prosecuted Conviction of any of these offences is punishable by fine or imprisonment or both.

Definitions

For the Purpose of this Schedule, the term:

"Agent" means a person who is authorized to represent a manufacturer of beer in Ontario and who holds a valid Manufacturer's Representatives License issued by the Alcohol and Gaming Commission of Ontario;

"and" and "or" have both conjunctive and disjunctive meanings;

"Beverage Production" means the total output of beer that is ready to be packaged and includes all other output that utilizes capacity that could be allocated to producing beer;

"Brewer" means a person who holds a valid Manufacturer's Liquor License issued by the Alcohol and Gaming Commission of Ontario;

"Decommissioning" means closure of a Production Facility by means of closure of operations, removal or sale of process equipment, or removal or sale of buildings;

"Electronic Form" means, without restricting the generality of the term, computer text files such as Microsoft Word, WordPerfect; computer presentation files such as Microsoft PowerPoint; computer e-mail files; and computer spreadsheet and database files such as Microsoft Excel, Access, and Lotus 123;

"Effective Plant Capacity" means the total amount of brewed and packaged finished product that could be produced;

"*Financially Justifiable*" means that an undertaking would result in a positive contribution margin for a firm after consideration of expected production costs, expected transportation costs, and the expected market price that the firm would receive for the products produced;

"*Lakeport*" means Lakeport Brewing Income Fund, Lakeport Brewing Limited Partnership, and the operations of the business(es) therein;

"*LCBO*" means The Liquor Control Board of Ontario;

"*Off-Premise Distribution Channel*" means the distribution and retail of beer through any means that will eventually be sold directly to end consumers for consumption on private premises;

"*On-Premise Distribution Channel*" means the distribution and retail of beer to persons who hold a valid Liquor Sales License issued by the Alcohol and Gaming Commission of Ontario and who resell beverage alcohol to consumers for immediate consumption;

"*Production Facility*" means any premise at which beer is produced, packaged, stored, or distributed;

"*Record*" has the meaning of that term as defined in subsection 2(1) of the *Competition Act*;

"*Relating to*" includes describing, containing, analysing, studying, reporting on, considering, setting forth, concerning, regarding or pertaining to, in whole or in part;

"*TBS*" means The Beer Store and includes Brewers Retail Inc.

Instructions

1. Use of the singular or the plural in this Order should not be deemed a limitation, and the use of the singular should be construed to include, where appropriate, the plural; and vice versa.
2. Use of a verb in the present or past tense in this Order should not be deemed a limitation, and the use of either the present or past tense should be construed to include both the present and past tense.
3. Information should be provided in Electronic Form.
4. Information responsive to this Schedule must be provided in addition to the Records referred to in Schedule "A" of this Order.

Notice Concerning Information Already Provided

Certain information hereinafter required may have been previously provided to the Commissioner. The Respondent is not required to produce a second copy of such information in response to this Order, provided that the Respondent:

- (i) Identifies to the Commissioner's satisfaction any information in the possession of the Commissioner which is responsive to the Order;
- (ii) Agrees that such *information* shall be deemed to have been provided to the Commissioner pursuant to this Order; and,
- (iii) Receives confirmation from the Commissioner that the information is in the Commissioner's possession.

Information Required

1. Describe in detail any plans or consideration, since January 1, 2000 or having effect after January I, 2000 Relating to:
 - a) The expansion by your company of existing brewing capacity situated in Ontario;
 - b) The expansion by your company of existing packaging capacity situated in Ontario;
 - c) Building by your company of greenfield brewing capacity in Ontario;
 - d) Building by your company of greenfield packaging capacity in Ontario;
 - e) The expansion by your company of existing brewing capacity situated outside of Ontario that is currently used to supply beer in or into Ontario;
 - f) The expansion by your company of existing brewing capacity situated outside of Ontario that could be used to supply beer in or into Ontario in a Financially Justifiable manner;
 - g) The expansion by your company of existing packaging capacity situated outside of Ontario that is currently used to supply beer in or into Ontario;
 - h) The expansion by your company of existing packaging capacity situated outside of Ontario that could be used to supply beer in or into Ontario in a Financially Justifiable manner;
 - i) Building by your company of greenfield brewing capacity outside of Ontario that will or could be used to supply beer in or into Ontario in a Financially Justifiable manner;

- j) Building by your company of greenfield packaging capacity outside of Ontario that will or could be used to supply beer in or into Ontario in a Financially Justifiable manner;
 - k) Contract production of beverage alcohol by others located in Ontario for your company for sale in Ontario;
 - l) Contract production of beverage alcohol by others located outside of Ontario for your company for sale into Ontario;
 - m) Contract production of any beverage by your company for others from a Production Facility situated inside of Ontario;
 - n) Contract production of any beverage by your company for others from a Production Facility situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner;
 - o) The allocation of brewing and packaging capacity by your company in or for Ontario;
 - p) The allocation of brewing and packaging capacity by your company for contract production of any beverage at any Production Facility that serves Ontario;
 - q) Decommissioning or leaving idle any of your company's capacity in Ontario; existing brewing
- Decommissioning or leaving idle any of your company's existing packaging capacity in Ontario;
- s) Decommissioning or leaving idle any of your company's existing brewing capacity situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner; and,
 - t) Decommissioning or leaving idle any of your company's existing packaging capacity situated outside of Ontario that is currently being used or could be used to supply beer in or into Ontario in a Financially Justifiable manner.

Without limiting the requirement to provide a detailed description, include a description of the reasons for such plans or consideration, the time period involved (when the plan or consideration was first contemplated, when a decision was made, and when the plan or consideration was implemented, deferred or abandoned), the brands and products involved, and the cost of doing so.

2. For the period of January 1, 2000 to present, provide a spreadsheet in Electronic Form that identifies each Production Facility located within Ontario and any Production Facility that could be used to supply beer in or into Ontario in a Financially Justifiable manner. Provide data in the following format:

Facility ID	Facility Address	Date Opened	Date Closed (If <u>Applicable</u>)
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In the "Facility ID" column, provide a unique identifier for each Production Facility.

3. For the period of January 1, 2000 to present, provide a spreadsheet in Electronic Form that reports the following capacity information in hectolitres on a monthly basis for each Production Facility identified in Question 2 above. Provide data in the following format:

Facility ID	Date	Beverage Production Capacity	Bottling Capacity	Canning Capacity	Kegging Capacity	Warehousing Capacity	Transportation Capacity	Effective Plant Capacity

In the "Facility ID" column, identify the relevant Production Facility using the unique identifier supplied in Question 2 above.

For each column in the table above, explicitly note the methods used to calculate the supplied data (e.g. the number of shifts worked per week, seasonal variations, downtime attributable to equipment repairs and maintenance, etc.).

4. For the period of January 1, 2000 to present, on a monthly basis, provide a spreadsheet in Electronic Form that reports the following production and sales data in hectolitres for each Production Facility identified in Question 2 above. Place each element below into its own column.
- a. Relevant Facility ID, using the unique identifier supplied in Question 2 above;
 - b. Total beer produced, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.
 - c. Total beer produced for sale by your company in Ontario, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

- d. Total beer produced for sale by your company in all other jurisdictions, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

- e. Total beer produced by your company on a contract basis for a third party, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

- f. Total beer sold by your company through the On-Premise Distribution Channel in Ontario, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

- g. Total beer sold by your company through the Off-Premise Distribution Channel in Ontario, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

- h. Total beer sold by your company through the On-Premise Distribution Channel in Ontario, by outlet type:
 - i. TBS;
 - ii. LCBO;
 - iii. Self-delivery.

- i. Total beer sold by your company through the Off-Premise Distribution Channel in Ontario, by outlet type:
 - i. TBS;
 - ii. LCBO.

For each category above, explicitly note the methods used to calculate the supplied production data, including the sources of all data used.

- 5. For each Production Facility identified in Question 2 above, provide current-period capacity utilization rates for Beverage Production, bottling, canning; kegging, warehousing, and transportation operations, where capacity is defined as in Question 3 above. For each element of the Production Facility that is not currently operating at 100% capacity utilization, indicate the specific costs and time associated with increasing that element's capacity utilization rate to 100%.

6. For the period of January 1, 2000 to present, on a monthly basis, provide a spreadsheet in Electronic Form that reports the following production data in hectolitres. Place each element below into its own column.
 - a. Total beer produced for your company on a contract basis for sale in Ontario, by package type:
 - i. Bottles;
 - ii. Cans;
 - iii. Kegs.

7. For the time period January 1, 2000 to present, provide a spreadsheet in Electronic Form showing, for each SKU of beer offered for sale by your company in Ontario where there was any marketing support or sales promotion for the SKU:
 - a. The brand name(s) and package size(s) of the SKU or SKUs that were supported;
 - b. The duration of the support program, including its beginning and end dates;
 - c. The total costs, on a monthly basis, of each marketing support program or sales promotion undertaken, as applicable to the following categories:
 - i. Television;
 - ii. Newspaper and print media;
 - iii. Radio;
 - iv. On-Premise Distribution Channel;
 - v. All other media (identify the type of media involved; include, as well, any public relations events and activities undertaken to generate media interest);
 - vi. All other direct expenses related to the program (identify the type of cost involved, including the costs of altering packaging and any value-added item that a consumer would receive from purchasing the SKU);
 - vii. TBS in-store merchandising and promotions; and,
 - viii. LCBO in-store merchandising and promotions.

8. Provide a detailed description of how costs are allocated to individual SKUs offered for sale in Ontario in your accounting system and a list of the specific cost elements that are included in:
- a. Cost of ingredients;
 - b. Cost of production;
 - c. Cost of sales (including On-Premise Distribution Channel and Off-Premise Distribution Channel coverage and support);
 - d. Cost of packaging (primary);
 - e. Cost of packaging (secondary);
 - f. Cost of transportation and distribution;
 - g. Cost of advertising and promotion;
 - h. Cost of sponsorship rights (including and excluding corporate properties); and, Overhead allocation.
9. For a. to i. in Question 8, for the time period January 1, 2000 to present, provide a spreadsheet in Electronic Form showing the per hectolitre cost for each cost group, for each SKU of beer offered by your company for sale in Ontario, on a monthly basis.
10. Provide the following information, for the time period January 1, 2000 to present, unless indicated otherwise:
- a. Whether you constructed a new facility or purchased an existing facility as a means of entering the industry (include source and type of brewing and packaging equipment);
 - b. Date(s) of any exit and re-entry of any SKU of beer by your company from the Ontario market and reasons therefore;
 - c. Brands of beer produced or imported by your company;
 - d. For each brand in c., the brands produced by other Brewers or Agents that you perceive to be the closest competitors to that brand;
 - e. For each brand in c., whether the brand is sold in: (i) TBS, (ii) the LCBO, or (iii) both. Denote the geographic areas that each brand is distributed and sold in within Ontario;
 - f. For each brand in c., whether the brand is sold into the On-Premise Distribution Channel. Denote the geographic areas that each brand is distributed and sold in within Ontario;
 - g. Brands of beer that you have considered or planned or are considering or planning to introduce into the Ontario beer market and, if the brand was not introduced, the reason(s) for not introducing it;

- h. Brands of beer that you have considered or planned or are considering or planning to reposition or move from one price-segment of the Ontario beer market to another and, if the brand was not repositioned or moved, the reason(s) for not repositioning or moving it;
 - i. The method used to distribute your beer to: (i) TBS, (ii) the LCBO, and (iii) licensees;
- J. The type of container used for each SKU of your beer over the course of the time period, specified above. In instances where the Standard Mould Bottle is not used, specify the material and volume of the container;
- k. Your experience Relating to the quality of service, the retail function and the mandate of TBS;
- l. Your experience Relating to the quality of service, the retail function and the mandate of the LCBO;
- m. Your experience Relating to any attempt to change Ontario's Social Reference Price for beer;
 - n. Analyses performed Relating to a potential or actual retail price increase in the Ontario beer industry. Specify the assumptions underlying the analysis, the data employed, the calculations performed, and the results and conclusions of the analyses; and,
 - o. Your contractual relationships with other manufacturers or marketers of beverage alcohol with respect to brand licensing or contract brewing agreements.
11. Indicate whether your company holds any ownership interest in any other parties that currently manufactures or could manufacture beer for sale in or into Ontario in a Financially Justifiable manner. If so, list the parties and indicate the percentage amount of current ownership interest. Explain any rights or obligations associated with these ownership interests.
12. List all of the parties that either directly or indirectly hold any ownership interest your business. Also indicate the percentage amount of current ownership interest and explain any rights or obligations associated with these ownership interests.
13. Describe in detail how you have complied with or deviated from the management, marketing, manufacturing, pricing and other strategic plans of Lakeport identified in Question ID of Schedule "A" to this order, partially or otherwise, including the introduction of new products coming online in the next 24 months and other strategic activities. Specify which plans are still to be implemented.

14. Indicate whether you have changed any management, marketing, manufacturing, pricing and other strategic plans of Lakeport identified in Question 10 of Schedule "A" to this order since acquisition. If so, indicate how, including any integration of pre-existing or new Labatt business into the Lakeport business, and vice versa.
15. For the period February 1, 2007 to present, describe in detail any plans relating to the future of the Lakeport brands of beer in the Ontario beer market including management, marketing, manufacturing, pricing and other strategic plans for the Lakeport brands.
16. For the period February 1, 2007 to present, describe in detail any plans relating to the future of the Labatt brands of beer in the Ontario beer market including management, marketing, manufacturing, pricing and other strategic plans for the Labatt brands.
17. Describe in detail the nature and extent of the efficiencies that your company has realized, will realize or plans to realize as a result of your acquisition of Lakeport.
18. For the period January 1, 2000 to present, describe your experience with contract brewing, with specific reference to:
 - a. Negotiations and tendering processes that you have engaged in to produce beer for others on a contract basis, including but not limited to guaranteed volume, early termination, and liquidated damages clauses;
 - b. The profitability of using contract brewing by third parties to produce beer for your company versus establishing a Production Facility; and,
 - c. The distribution and logistics challenges associated with contract brewing, either for third parties or using a third party to produce beer for your company. In your answer, contrast the viability of using Ontario-based producers with those in all other jurisdictions.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-325-07

STYLE OF CAUSE: THE COMMISSIONER OF COMPETITION v.
LABATT BREWING COMPANY LIMITED ET AL

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 6, 2007

**REASONS FOR ORDER
AND ORDER:** Mactavish J.

DATED: January 28, 2008

APPEARANCES:

Mr. William Miller
Mr. John Syme
Mr. Roger Nessrallah
Mr. Robert Levine

FOR THE APPLICANT
(The Commissioner of Competition -
Responding Party)

Mr. Neil Finkelstein
Mr. Brian Facey
Ms. Catherine Beagan Flood
Mr. Ryder Gilliland

FOR THE RESPONDENTS
(Labatt Brewing Company Limited et al –
Moving Parties)

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada
Department of Justice
Gatineau, Quebec

FOR THE APPLICANT
(Commissioner of Competition -
Responding Party)

**BLAKE, CASSELS & GRAYDON
LLP**
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENTS
(Labatt Brewing Company Limited et al –
Moving Parties)