

Date: 20080128

Docket: T-325-07

Citation: 2008 FC 105

Ottawa, Ontario, January 28, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE COMMISSIONER OF COMPETITION

**Applicant
(Respondent on the Motion)**

and

MOOSEHEAD BREWERIES LIMITED

**Respondent
(Moving Party)**

REASONS FOR ORDER AND ORDER

[1] Moosehead Breweries Limited seeks 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 Moosehead to produce documentary records, as well as a written return of information, both relating to a variety of topics.

[2] According to Moosehead, 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, Moosehead says, much of the information sought by the Commissioner has either already been produced, or is not relevant to her ongoing inquiry into the implications that the acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Limited has for competition within the Ontario beer industry. Finally, Moosehead says that compliance with the onerous obligations imposed on it by my order will result in extreme hardship and irreparable harm to the company.

[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 Moosehead 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 Moosehead.

Background

[4] The order in issue on this motion was made in the context of an inquiry by the Commissioner of Competition under paragraph 10(1)(b) of the *Competition Act* into the acquisition of Lakeport by Labatt, 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.

[5]. Moosehead is a relatively small player in the Ontario beer market, currently having approximately a 3% share of that market.

[6] 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 Moosehead, Labatt and Lakeport, amongst others, to produce records and written returns of information were issued by Justice Noel on February 22, 2007. The information sought and records required to be produced by these orders were extensive.

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

[8] 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 Moosehead, each produce a copious amount of records, and further ordered the companies to provide extensive information in relation to a number of topics. A copy of my order relating to Moosehead is attached as an appendix to these reasons.

[9] On November 28, 2007, Moosehead brought its motion to have my November 8, 2007 order set aside or varied. As was noted above, Moosehead asserts that the order was based upon

misleading, inaccurate or incomplete disclosure provided to the Court by the Commissioner.

Moosehead further asserts that much of the information sought by the Commissioner is not relevant to her inquiry, and that compliance with the order will result in extreme hardship and irreparable harm to the company.

[10] Moosehead's motion was heard at the same time as a similar motion brought by Labatt and Lakeport. My decision in relation to that motion is being publicly released at the same time as this decision, and my reasons for granting Moosehead's motion are substantially the same as my reasons for granting the motion brought by Labatt and Lakeport. As a consequence, these reasons will be brief, and should be read in conjunction with the reasons given in relation to Labatt and Lakeport's motion.

Analysis

[11] The duty on a party seeking *ex parte* relief is discussed in some detail in the Labatt and Lakeport decision, and will not be repeated here. Suffice it to say that there is a heavy burden on a party moving *ex parte* to ensure that the Court is apprised of all of the relevant facts.

[12] In this case, Moosehead has satisfied me 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 Noel

[13] 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 Noel.

[14] The information sought by the Commissioner from Moosehead (amongst others) in February of 2007 was very extensive, and dealt with a wide range of topics. In this regard, 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.

[15] 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 Noel stated that "The Commissioner believes that the responses to these questions from the Brewers [including Moosehead] will be sufficient for the purposes of her inquiry." (See the affidavit of Paula Lajeunesse dated February 20, 2007, at ¶17).

[16] After being served with Justice Noel's order, Moosehead worked closely and co-operatively with the office of the Commissioner to produce the documentation and information required to be produced in accordance with that order.

[17] No mention of her earlier representation that the order sought in February would likely suffice for the purposes of her inquiry was made by the Commissioner in the application materials brought before me in November of 2007. For the reasons given in relation to Labatt and Lakeport's motion, I am of the view that this was a material omission that justifies the setting aside of my November 8, 2007 order.

The Degree of Overlap Between the Section 11 Orders

[18] 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".

[19] This was 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 Moosehead through the production order granted by Justice Noel in February of 2007.

[20] I have discussed areas of overlap between the February and November, 2007 orders issue against Labatt and Lakeport in my decision involving those companies. Suffice it to say here that the orders made against Moosehead in February and November of 2007 contain identical provisions to those giving identified as being of concern in my decision relating to Labatt and Lakeport.

[21] Moreover, in addition to being the subject of a section 11 order issued by Justice Noel, which order was made in the context of the Lakeport inquiry, a further section 11 order had also been made against Moosehead in the course of the Commissioner's inquiry in relation to the Standard Mould Bottle Agreement ("SMBA"), which had been entered into by a number of breweries in the province.

[22] Once again, the orders made with respect to Moosehead contain identical provisions to those identified as being of concern in my decision with respect to Labatt and Lakeport.

[23] Not only did the Commissioner's application materials make no mention of this order, as is explained in my decision relating to Labatt and Lakeport's motion, I am satisfied that there was in fact a substantial degree of overlap between the material ordered to be produced under my November 8, 2007 order, and that which Moosehead had previously been compelled to produce under earlier orders made in accordance with section 11 of the *Competition Act* in the context of the SMBA inquiry

[24] 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 by Moosehead, and that sought through my November 8, 2007 order, is a material non-disclosure - one that would have affected the exercise of my discretion.

[25] 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 Moosehead, to give it the opportunity to be heard prior to an order being issued.

[26] Given my findings in relation to the disclosure issue, it is not necessary to address Moosehead's remaining arguments, including its arguments as to the alleged lack of relevance of much of the information and documentation ordered to be produced by my November, 2007 order. Nor is it necessary to address the submission that compliance with the order will result in extreme hardship and irreparable harm to the company.

Conclusion

[27] 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.

[28] 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.

[29] Moreover, on the return of the motion brought by Moosehead 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 Noel would likely suffice for the purposes of the Lakeport inquiry.

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

Costs

[31] 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 Moosehead should have its costs associated with this motion at the upper end of Column 5.

[32] This matter was complex, as is evidenced by the fact that all of the parties were represented by multiple counsel. In the circumstances, Moosehead should be entitled to the costs of second counsel.

ORDER

THIS COURT THEREFORE ORDERS AND ADJUDGES that:

1. The November 8, 2007 orders against Moosehead are set aside, without prejudice to the right of the Commissioner to bring fresh applications for section 11 orders, on notice to Moosehead.
2. Moosehead is 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

APPENDIX

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

Applicant

- and -

MOOSEHEAD BREWERIES LIMITED

Respondent

**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, sworn on the 6th day of November 2007 and filed with Schedules "A" and "B", and Exhibits "A", "B" and "C", 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 Respondent has or is likely to have information that is relevant to the Inquiry:

THIS COURT ORDERS that pursuant to paragraph 11(1)(b) of the *Competition Act*, the Respondent, 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 f), below;

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;

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 name of the Respondent, the date of this Order and the paragraph or subparagraph to which the enclosed records are

responsive;

where a record is responsive to more than one paragraph or subparagraph, the Respondent 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 Respondent shall note, in a separate log or otherwise, all paragraphs and subparagraphs to which the record responds;

for each record or portion thereof withheld under a claim of privilege, the Respondent shall submit a sworn or certified statement from the Respondent's 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 Respondent must preserve any record or part of a record withheld under a claim of privilege;

- g) 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 format(s) 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 I I (1)(c) of the *Competition Act*, the Respondent, 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
K A 0C9
Attention: Tammy Polomeno

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 Respondent or on any other duly authorized representative of the Respondent, 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 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;

"*Labatt*" means Labatt Brewing Company Limited and the operations of the business(es) therein;

"*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 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.

Information 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;
 - 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;
 - 1) 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; and,
- 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.

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 Labatt's 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,
- f) Competitors' market shares.

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;

"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 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 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 existing brewing capacity in Ontario;
- r) Decommissioning or leaving idle any of your company's existing packaging capacity in Ontario; and,
- 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 Applicable)

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 by 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,
 - i. 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; and,
 - 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.
 - 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. 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.
MOOSEHEAD BREWERIES LIMITED

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: December 6, 2007

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

DATED: January 28, 2008

APPEARANCES:

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