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THE FIRST SECTION

PUTTING THE COMMISSIONER ON NOTICE: THE *LABATT* SECTION 11 CASE

By: Omar Wakil and Sue-Anne Fox
Torys LLP*

In a much-reported decision,¹ the Federal Court of Canada recently set aside a section 11 order issued in connection with the acquisition of Lakeport Brewing Income Fund by Labatt Brewing Company Limited.² The decision was highly critical of the Commissioner of Competition's handling of the *ex parte* application process that resulted in the initial order. It triggered an unprecedented political response and later the appointment of a third party to review and advise on the standard of disclosure required in *ex parte* applications under the *Competition Act*.³

Background

The section 11 order was the second issued to Labatt in connection with the Labatt/Lakeport merger. As noted by the Federal Court, it was issued against the backdrop of significant recent dealings between the Commissioner and both Labatt and Lakeport, notably:⁴

- Between 2003 and 2006, the Commissioner conducted an abuse of dominance inquiry in relation to the Standard Mould Bottle Agreement ("SMBA"), which had been entered into by a number of breweries in Ontario.⁵ Labatt, Lakeport and numerous other parties received section 11 orders as part of that inquiry.
- In 2006, Labatt attempted to acquire Sleeman Breweries Ltd. The attempt was unsuccessful, and Sleeman was later acquired by Sapporo Breweries Ltd.⁶ The Commissioner carried out two separate reviews, one in respect of Labatt's attempted acquisition and the other in respect of the Sapporo acquisition.⁷
- In January 2007, Labatt agreed to acquire Lakeport.⁸ The Commissioner commenced an inquiry in February and brought 11 *ex parte* applications for section 11 orders. Federal Court Justice Noël issued the orders later that month.⁹ "The information sought and records required to be produced by these orders were extensive."¹⁰ Labatt alone produced over 100,000 pages of documents and incurred external costs of some \$750,000.¹¹
- In March 2007, the Commissioner applied to the Competition Tribunal for an order under section 100 of the *Competition Act* to enjoin the closing of the Lakeport acquisition for 30 days. The Commissioner represented that the injunction was needed in part because the response to the February section 11 orders was "voluminous and profound" and that more time was needed for further analysis.¹² The Tribunal refused

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to grant the injunction, and the transaction closed on March 29, 2007.¹³ The Commissioner continued her inquiry into whether the transaction would prevent or lessen competition substantially.

- In November 2007, the Commissioner brought a second set of *ex parte* applications for further section 11 orders against 15 respondents, including Labatt and other respondents subject to the February 2007 section 11 orders issued by Justice Noël.¹⁴ The orders were issued that month by Federal Court Justice Mactavish.

In November 2007, Labatt brought a motion to have its November order set aside or varied.

The Court's Decision

There were two bases for Labatt's motion. The first was that the orders were based upon misleading, inaccurate or incomplete disclosure provided to the Court by the Commissioner. The second was that much of the information sought by the Commissioner was not relevant to her inquiry.¹⁵

The Court agreed with Labatt that the Commissioner's disclosure was "misleading, inaccurate and incomplete" and that, had the Court "been provided with complete disclosure," it would not have granted the order in the form that it was granted.¹⁶ Having decided to set aside the order on that basis, the Court determined that it was unnecessary to decide whether the information requested by the Commissioner was irrelevant to her inquiry.¹⁷

In reaching her decision, Justice Mactavish relied on *Canada (Commissioner of Competition) v. Air Canada*,¹⁸ a 2000 section 11 case, and other cases dealing with *ex parte* applications generally. It was not disputed that on an *ex parte* application, the Commissioner has an obligation to disclose to the court all relevant facts, including principles of law known to favour the other side.¹⁹ This requirement is intended to reduce the inherent risk of injustice present in *ex parte* situations, where the court is asked to grant an order in the absence of the other party.²⁰ The Court agreed with the parties that there is a "heavy burden on the Commissioner to make full and frank disclosure."²¹ The Court noted, however, that court orders will not be set aside lightly. The non-disclosure must be sufficiently material to have caused the court, had it been fully aware of the circumstances, to have refused to grant the order in the first place.²²

As noted, the Court found that the Commissioner failed to meet the requisite standard of disclosure. In particular:

- Prior representations by Bureau staff that responses to the February 2007 section 11 orders would likely provide information sufficient for the agency's inquiry were not disclosed.²³ The Commissioner should have informed the Court of the representations and disclosed how the circumstances had changed to explain why a second round of section 11 orders was necessary.²⁴ This non-disclosure alone was considered sufficient to justify setting aside the order.²⁵ The Court emphasised that it must be "fully apprised of the relevant circumstances" surrounding a section 11 request.²⁶
- Areas of considerable overlap between information requested in the first and second section 11 orders and information gathered in previous investigations were not disclosed.²⁷ The Commissioner's assertions that

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“[n]one of the records or information sought has previously been requested from the respondent” neither fairly nor accurately represented the situation.²⁸ In reaching this conclusion, the Court:

- rejected the Commissioner’s assertion that it was sufficient to produce a copy of a prior section 11 order in her application materials for the subsequent order. The fact that a copy was produced did not excuse “the disingenuous and misleading representations made in [her] written submissions” that there was no overlap in the information requested;²⁹
 - observed that the material before it on the *ex parte* application failed to mention the Commissioner’s SMBA abuse of dominance investigation or, more generally, adequately disclose the “voluminous information that her office has accumulated from various sources within the industry” over the past four years;³⁰ and
 - emphasised that, in exercising its discretion to issue an order, the Court, like the Commissioner, will consider the burden that an order would impose on the responding parties and the completeness of the information that has already been obtained through other means.³¹
- Concerns previously articulated by Labatt about the burdensome nature of the Commissioner’s information requests were also not disclosed.³² These prior concerns should have been disclosed as part of the Commissioner’s duty to fully and frankly disclose any points of fact or law known to her which favour the other side.

Justice Mactavish did not say that the Commissioner had misled the court intentionally, but she clearly considered the extent of non-disclosure to be egregious.

The decision clarifies that courts will not “rubber stamp” section 11 applications.³³ Section 11 of the *Competition Act* confers upon courts the discretion to decline to grant the order, to seek further information or clarification from the Commissioner or to require that notice be given to the party affected by the proposed order to give that party a right to be heard before an order is issued.³⁴

Moving Forward

One must be cautious in drawing conclusions about the long-term implications of *Labatt*, particularly in advance of the recommendations of the independent third-party appointed to review and advise on the section 11 order process. That said, the decision suggests that process reform is needed and also that there may be cases in which notice of a pending section 11 application may be appropriate. (It is disappointing that the third party review will likely be limited to considering the issue of disclosure on *ex parte* applications and not the appropriateness of *ex parte* applications themselves.³⁵)

The decision clearly raises questions about the effectiveness of the Bureau’s internal processes for preparing section 11 applications.³⁶ Those processes failed in *Labatt*. Although most other cases will lack the rich factual history of *Labatt*, the Commissioner will have to exercise greater diligence when applying for section 11 orders

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in the future. For example, in industries where there have been prior inquiries or where the merger parties or others have already provided the Bureau with extensive information, the Bureau will have to be especially vigilant in crafting section 11 orders. To avoid challenges in other cases, effective processes will need to exist to ensure that questions are relevant, do not materially duplicate prior orders or otherwise request information already provided, and that the requested information does not overly burden respondents. The applications will also, of course, have to fully and fairly disclose the nature of the information already in the Commissioner's possession – even if gathered in the context of another or non-merger inquiry – as well as process concerns brought to the Commissioner's attention by parties that may receive an order.

The failure of the Commissioner to meet the requisite standard of disclosure in *Labatt* should also encourage her to provide parties with notice of her intention to seek a section 11 order in some future cases. Until now, the Bureau has been reluctant to do so, even in merger cases.³⁷ However, providing notice and allowing parties – particularly in non-time-sensitive merger cases – to appear on the motion for a section 11 order would reduce the heavy disclosure burden on the Commissioner.

The Commissioner may have another reason to give notice. Justice Mactavish noted in *Labatt* that there was no question of urgency (the circumstance in which *ex parte* applications are often made). She also noted that an option open to a court on an *ex parte* application is to require the applicant to give the respondent notice. Indeed, in dismissing the orders against *Labatt* and *Lakeport*, the Court did just that, requiring that the Commissioner give those parties notice of any future application.

These comments suggest that in future section 11 applications, the Commissioner ought to consider whether it is necessary to proceed on an *ex parte* basis and, if it is, to be prepared to justify its approach in its application.³⁸ In complex or very complex merger cases with lengthy review timelines, or in situations in which parties will not or cannot close mergers pending completion of other regulatory processes (such as CRTC or *Investment Canada Act* review), it may be difficult for the Bureau to explain why it needs to proceed on an *ex parte* basis.³⁹

Notice to affected parties would have other benefits. For example, input in advance from the parties subject to section 11 applications likely would result in narrower, more focused orders, and avoid the inevitable negotiation process that results when an order is unduly vague or burdensome. The targets of section 11 orders are usually best-placed to advise the Bureau or a court what information they have, how it is stored and how best they can provide it. In short, a process involving notice could provide the Bureau with more relevant information while reducing the production burden on the respondents – a stated aim of the Commissioner in most cases. (An additional benefit of streamlined orders would likely be reduced costs, for all parties.)

If the Bureau continues to seek orders on an *ex parte* basis, future challenges may be required to address fully the other issue that Justice Mactavish ultimately did not need to consider: the assertion that the requested information was not relevant to the Commissioner's inquiry. The very fact that this issue arose in the context of a section 11 challenge may embolden other parties to consider advancing a similar claim in a future case.⁴⁰

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Conclusion

Section 11 orders have increasingly become a source of concern for respondents and their counsel. The *ex parte* manner in which these orders are issued and the overly broad scope of the requested information are common complaints, often with justification. Of particular concern is the enormous volume of often irrelevant electronic information that respondents are sometimes required to review and produce, usually at significant expense. Requiring the Bureau to give notice before seeking a section 11 order would lead to a dialogue that could help narrow the scope of electronic document production to those that are directly relevant to the Bureau's area of inquiry. This approach, it is suggested, would be consistent with the trend in civil litigation towards having adversaries meet and confer regarding the scope of production of electronic documents in order "to avoid the cost, delay, and acrimony" caused by extensive and unnecessary e-discovery.⁴¹

In retrospect, a clash seems almost to have been inevitable and the facts in *Labatt* provided the right circumstance for a challenge. Hopefully the decision and its aftermath will help improve the fairness and streamline the effectiveness of the section 11 process. In this regard, the recommendations of the third party review on disclosure standards should be a useful step forward. Movement away from the Commissioner's rigid "no-notice" stance in merger cases would be another welcome development, and go a long way toward alleviating the growing sense of stakeholder frustration.

Notes

* Omar Wakil is a partner and Sue-Anne Fox is an associate in the Competition and Antitrust Group at Torys LLP. The authors would like to thank Jay Holsten and Linda Plumpton for their comments on an earlier version of this article.

¹ See e.g. Janet McFarland, Jacquie McNish & Richard Blackwell, "Judge rebukes watchdog in Labatt takeover" *The Globe and Mail* (28 January 2008) B1; Julius Melnitzer, "Competition decision means faster mergers: 'Confirms the new paradigm,' Blakes' Facey says" *The National Post* (30 January 2008) FP7; Jim Middlemiss, "Watchdog cast costly net, say brewers: \$2M Price Tag" *The National Post* (31 January 2008) FP3; Jim Middlemiss, "Suds all in a lather: Brewers frustrated by Competition Bureau tactics" *The National Post* (2 February 2008) FP3; Jacquie McNish, "Competition Bureau under siege" *The Globe and Mail* (6 February 2008) B8; and Jim Middlemiss, "Competition Bureau under fire over beer: Watchdog relies on ex parte orders on brew mergers" *The National Post* (6 February 2008) FP6.

² A third-party recipient of a section 11 order, Moosehead Breweries Limited, also had its order set aside. The Court issued separate reasons but the basis for its decision was the same in both cases. This article will focus on the Labatt decision. See *Canada (Commissioner of Competition) v. Labatt Brewing Company Limited et al.*, 2008 FC 59 (F.C.T.D.), online: Federal Court (Canada) <http://decisions.fct-cf.gc.ca/en/2008/2008fc59/2008fc59.html> [Labatt].

³ On March 3, 2008, the Bureau announced that Brian Gover had been appointed to advise the Commissioner and John Sims, Deputy Minister of Justice, on certain matters pertaining to the Bureau's use of section 11 orders. The terms of reference direct Mr. Gover to:

- review and advise on the standard of disclosure required in ex parte applications under section 11 of the *Competition Act*;
- review and advise on the Bureau's section 11 process; and
- make recommendations to ensure that the Bureau makes adequate disclosure to the court having regard to, among other factors: the applicable legal principles pertaining to disclosure; the Commissioner's mandate under the *Competition Act*; the operational exigencies, including time limits, which the Commissioner and the Bureau must address; practices and procedures of counsel in obtaining section 11 orders; and the need to ensure the efficacy of section 11 orders as an effective investigative tool.

See Competition Bureau, News Release, "Expert Appointed to Advise on Section 11 Process" (3 March 2008), online: Competition Bureau <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02587e.html>>.

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⁴ *Labatt*, *supra* note 2 at para. 4.

⁵ *Ibid.* at para. 9.

⁶ *Ibid.* at para. 5.

⁷ *Ibid.* at para. 10.

⁸ *Ibid.* at para. 7.

⁹ *Ibid.* at paras. 8, 11.

¹⁰ *Ibid.* at para. 11.

¹¹ *Ibid.* at para. 12.

¹² *Ibid.* at para. 39.

¹³ *Ibid.* at para. 13.

¹⁴ *Ibid.* at para. 15.

¹⁵ Moosehead additionally asserted that much of the information sought by the Commissioner had already been produced and that compliance with the onerous obligations imposed on the company by the order would result in extreme hardship and irreparable harm. See *Canada (Commissioner of Competition) v. Moosehead Breweries Limited et al.*, 2008 FC 105 (F.C.T.D.), online: Federal Court (Canada) <<http://decisions.fct-cf.gc.ca/en/2008/2008fc105/2008fc105.html>>.

¹⁶ *Labatt*, *supra* note 2 at para. 3.

¹⁷ *Ibid.* at 112.

¹⁸ [2001] 1 F.C. 219.

¹⁹ *Labatt*, *supra* note 2 at para 23.

²⁰ *Ibid.* at paras. 24-25.

²¹ *Ibid.* at para. 22.

²² *Ibid.* at para. 30.

²³ *Ibid.* at para. 42, citing the “Affidavit of Paula Lajeunesse” (20 February 2007) at para 17.

²⁴ *Ibid.* at para. 53.

²⁵ *Ibid.*

²⁶ *Ibid.* at para. 51.

²⁷ *Ibid.* at para. 58.

²⁸ *Ibid.* at para. 57.

²⁹ *Ibid.* at para. 70.

³⁰ *Ibid.* at para. 78.

³¹ *Ibid.* at paras. 96 and 97.

³² *Labatt* had repeatedly raised concerns about the huge volume of information about the industry already in her possession; about the volume of irrelevant material *Labatt* had to produce in response to the initial section 11; and that the terms of the initial section 11 “purported to require *Labatt* to waive privilege by providing a high level of detail in respect of documents over which privilege was claimed”. See *Labatt*, *ibid.* at paras. 101-103.

³³ *Ibid.* at para. 50.

³⁴ *Ibid.* at para. 52.

³⁵ See *supra*, note 3.

³⁶ The Bureau’s *Information Bulletin on Section 11 of the Competition Act* outlines an internal review mechanism for the vetting of section 11 applications. In determining whether to make an application for a section 11 order, the Commissioner considers, among other factors: the seriousness of the matter; the type of information required and the burden the order will impose on respondents; the completeness of information obtained through other means, including voluntary production; the time frame of the inquiry; the need for a complete and accurate record; whether third parties or other persons would prefer to provide information to the Bureau under a court-ordered process instead of voluntarily; the likelihood that the information sought may be destroyed, refused to be provided or provided on unacceptable terms; and the privacy interests of respondents to an order. See Competition Bureau, *Information Bulletin on Section 11 of the Competition Act* (November 2005), online: Competition Bureau <[http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/infobulletin-section11-cae.pdf/\\$file/infobulletin-section11-cae.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/infobulletin-section11-cae.pdf/$file/infobulletin-section11-cae.pdf)> at 10.

³⁷ See e.g. Competition Bureau, *Stakeholders Consultation on Mergers – Report* (2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02546e.html>> at para. 7: “The Bureau emphasized that it is, indeed, sensitive to the associated demands placed on the merging parties, and third parties in many cases. While there may be circumstances in which a prior dialogue between the Bureau and the parties is possible, the Bureau must protect its ability to collect the relevant information and not compromise the likelihood that material responsive to the Bureau’s investigative needs will be provided; in

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other words, the Bureau's willingness to discuss the scope of a Section 11 order with a target in advance will depend on the nature of the investigation and the proposed recipient of the order."

³⁸ In its 2007 submission regarding the Information Bulletin on Section 11 of the *Competition Act*, the National Competition Section of the Canadian Bar Association noted that: "[t]here are circumstances in which notice to the respondent is appropriate, including situations where the respondent is aware of the Bureau's investigation, as in cases where section 11 is invoked in merger investigations, where investigative measures have been undertaken in other jurisdictions, or in other circumstances where destruction of records is unlikely. In the CBA Section's view the bias should always be in favour of giving notice where doing so would not impair the integrity of the investigation." See Competition Law Section, Canadian Bar Association, Information Bulletin on Section 11 of the Competition Act (6 February 2007), online: Submissions to Government <<http://www.cba.org/CBA/submissions/pdf/07-08-eng.pdf>>. See also John Bodrug & Anita Banicevic, "Section 11 orders unfair" *The Globe and Mail* (5 February 2008), online: <http://www.dwpv.com/en.17623_22508.aspx>.

³⁹ Concerns about document destruction are sometimes cited as a reason for wanting to proceed on an *ex parte* basis. But there is no evidence that this is more than a theoretical concern in the merger context and, to our knowledge, there has never been a prosecution for the destruction of records required to be produced under section 11 or for impeding or preventing an inquiry by destroying records. If document destruction is a real concern in a merger case, that should be explained in the Commissioner's *ex parte* application materials.

⁴⁰ The same could be said for a third argument advanced by Moosehead, that compliance with the production obligations imposed by certain orders can be onerous and result in extreme hardship and irreparable harm.

⁴¹ See *The Sedona Canada Principles Addressing Electronic Discovery*, The Sedona Conference Working Group Series online: <http://www.thesedonaconference.org/content/miscFiles/canada_pincpls_FINAL_108.pdf> at i.
