**Date: 20080122**

**Docket: A-192-07**

**Citation: 2008 FCA 22**

**CORAM:** **RICHARD C.J.**
**NOËL J.A.**
**SHARLOW J.A.**

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Appellant**

**and**

**LABATT BREWING COMPANY LIMITED**
**LAKEPORT BREWING COMPANY LIMITED**
**LAKEPORT BREWING LIMITED PARTNERSHIP**
**ROSETO INC.**
**TERESA CASCIOLI**

**Respondents**

Heard at Ottawa, Ontario, on January 22, 2008.

Judgment delivered from the Bench at Ottawa, Ontario, on January 22, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Ottawa, Ontario, on January 22, 2008)**

**SHARLOW J.A.**

[1] The Commissioner of Competition is appealing the March 28, 2007 order of Justice Phelan, sitting as Presiding Judicial Member of the Competition Tribunal. His reasons were issued on March 30, 2007 (2007 Comp. Trib 9). In the order under appeal, Justice Phelan dismissed the Commissioner's application for an interim order under paragraph 100(1)(*a*) of the *Competition Act*,

R.S.C. 1985, c. C-34, in relation to what was then the proposed acquisition by Labatt Brewing Company Limited of all of the units of Lakeport Brewing Income Fund.

Mootness

[2] The acquisition was completed on March 29, 2007, rendering this appeal moot. The Commissioner has argued that the appeal should be heard despite its mootness. The respondents have objected to the appeal being heard.

[3] As indicated at the opening of the hearing, we concluded that this appeal should be heard despite its mootness because it raises a point of law that is likely to recur, and because the time constraints associated with a decision to grant or deny an application under paragraph 100(1)(*a*) of the *Competition Act* renders such decisions evasive of appellate review (*Air Canada v. Canada (Commissioner of Competition)(C.A.)*, [2002] 4 F.C. 598, at paragraph 21; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at page 364).

Standard of Review

[4] A decision to grant or deny an interim order under paragraph 100(1)(*a*) of the *Competition Act* is a discretionary decision. This Court will not intervene in a discretionary decision unless it is based on an error of law or a wrongful exercise of discretion in that no weight, or no sufficient weight, was given to relevant considerations, or consideration was given to irrelevant factors: *Elders Grain Co. v. Ralph Misener (The) (C.A.)*, [2005] 3 F.C.R. 367, at paragraph 13.

[5] The Commissioner argues that the order under appeal is based on a misinterpretation of paragraph 100(1)(*a*) of the *Competition Act*. This is a question of law for which the standard of review is correctness: *Air Canada v. Canada (Commissioner of Competition) (C.A.)*, [2002] 4 F.C. 598 at paragraph 43; *Canada (Commissioner of Competition) v. Superior Propane Inc. (C.A.)*, [2001] 3 F.C. 185 at paragraph 88; *Canada (Commissioner of Competition) v. Canada Pipe Co. (C.A.)*, [2007] 2 F.C.R. 3 at paragraph 34.

Facts

[6] The basic facts are not in dispute. Labatt and Lakeport are both in the business of brewing and selling beer. Prior to the events that gave rise to this case, they were competitors. On February 1, 2007, Labatt announced its intention to acquire all of the units of Lakeport. Shortly thereafter, the Commissioner started to consider the consequences of the proposed acquisition on competition.

[7] On February 12, 2007, Labatt and Lakeport provided the Commissioner with a large volume of information pursuant to section 114 of the *Competition Act* and section 17 of the *Notifiable Transactions Regulations* SOR/87-348. By virtue of paragraph 123(1)(*b*) of the *Competition Act*, and applicable securities regulations, the proposed acquisition could not be completed before March 29, 2007.

[8] Upon reviewing the information submitted by the parties, the Commissioner concluded that there was a basis for commencing an inquiry of the proposed acquisition under paragraph 10(1)(*b*) of the *Competition Act*. The purpose of the inquiry was to determine whether an application to the

Competition Tribunal under section 92 of the *Competition Act* was warranted. The Commissioner's inquiry commenced on February 15, 2007.

[9] By March 21, 2007, the Commissioner had concluded that further time was required to complete the inquiry. On that date, the Commissioner made an application for an interim order under paragraph 100(1)(*a*) of the *Competition Act* to prohibit the respondents from closing or taking steps toward closing the proposed acquisition.

Discussion

[10] There are three conditions that must be met before an interim order is granted under paragraph 100(1)(*a*) of the *Competition Act*:

1. The Commissioner must certify that an inquiry is being made into a proposed transaction under paragraph 10(1)(*b*) of the *Competition Act*.

2. The Commissioner must be of the opinion that more time is required to complete the inquiry.

3. The Tribunal must be satisfied that if the interim order is not granted, a person is likely to take action that would substantially impair the ability of the Tribunal to make an order under section 92 to remedy the effect of the proposed transaction on competition because that action would be difficult to reverse.

[11] It is undisputed that the first two conditions were met. Only the third condition is in issue.

[12] The current version of paragraph 100(1)(*a*) of the *Competition Act* was enacted in 1999. Under the predecessor provision, the Commissioner was required to satisfy the Competition Tribunal that the proposed transaction was reasonably likely to prevent or lessen competition substantially. That requirement ceased to exist upon the enactment of the current version of paragraph 100(1)(*a*). The Commissioner argues that in this case, Justice Phelan interpreted and applied paragraph 100(1)(*a*) as though that requirement were still there.

[13] Having carefully reviewed the reasons for the order under appeal and the Commissioner's submissions, we are all of the view that there is no merit to the Commissioner's argument.

[14] It is apparent that Justice Phelan was aware of the 1999 amendment to paragraph 100(1)(*a*), and the purpose and implications of the amendment. That is evident from paragraphs 9 through 13 of his reasons. The Commissioner, however, is concerned about paragraphs 48, 49 and 63 of Justice Phelan's reasons, which read as follows (our emphasis):

> **48.** The Commissioner must establish that the impairment to the Tribunal's ability to remedy is substantial. The nature and level of proof will be dictated by the circumstances of the case, but it is not sufficient to say that pre-merger conditions cannot be restored or compensated. The Commissioner must establish that absent an order, the Tribunal's remedies post-merger would not be effective to eliminate the SLC.
>
> **49.** On the record before me, I am not satisfied that the Commissioner has met this threshold. Much of the evidence before the Tribunal was addressed to whether the Hold Separate Agreement ("HSA") proposed by the Respondents was appropriate or adequate. For reasons later discussed, the merger must be assessed against paragraph 100(1)(a) without regard to

> the Hold Separate Agreement in which the Commissioner refuses to participate and in which the Commissioner's involvement is essential.
>
> […]
>
> **¶63.** The Commissioner argued that by allowing the acquisition to go forward, the Tribunal was depriving itself of the possibility of eventually, in a section 92 application, ordering the parties not to merge. However, the Commissioner did not show how the lack of that remedy would substantially impair the Tribunal from remedying the effect on competition, if an SLC or an SPC were established. In other words, the Commissioner did not show that the acquisition prevented the Tribunal from imposing remedies which could be sufficient to remedy the SLC, and that by losing the possibility of forbidding the merger, the Tribunal was substantially impaired.

[15] The Commissioner argues that Justice Phelan has essentially reformulated paragraph 100(1)(*a*) in a way that has the effect of restoring, as a condition to the obtaining of an interim order, the requirement that that the Commissioner establish the particulars of the substantial lessening of competition perceived by the Commissioner, as well as the remedies that would be needed to eliminate the substantial lessening of competition.

[16] In contrast, the Commissioner proposes an interpretation of paragraph 100(1)(*a*) that would make the obtaining of an interim order virtually automatic in the case of a proposed transaction, if the Commissioner commences an inquiry and expresses the opinion that more time is required to determine whether an application should be sought under section 92 to stop proposed transaction. The Commissioner suggests that the only limitation on obtaining of an interim order in such a case would be the Competition Tribunal's residual discretion to refuse an order if the Commissioner has acted in a patently unreasonable manner or is not acting in good faith, or if the application for an interim order is an abuse of process. We do not agree that Parliament intended the role of the Competition Tribunal to be so limited.

[17] Nor do we agree with the Commissioner's interpretation of the comments of Justice Phelan quoted above. In our view, Justice Phelan was explaining, correctly, that in assessing whether the third condition for the issuance of an interim order is met, the Competition Tribunal must consider the effectiveness of the available section 92 remedies in the absence of an interim order, assuming there is a determination that the proposed transaction would, or would be likely to, prevent or lessen competition. In the factual context of this case, that necessarily required an understanding of the nature of the potential lessening of competition that prompted the inquiry, the kinds of remedies that might be sought by the Commissioner in the event the inquiry resulted in a section 92 application, the action sought to be forbidden, what would be required to reverse that action, and the potential effectiveness of the available section 92 remedies with and without an interim order.

[18] As we read Justice Phelan's reasons, he did not refuse to grant the interim order because of any failure on the part of the Commissioner to establish that the proposed acquisition was reasonably likely to prevent or lessen competition substantially. Rather, he found the Commissioner's application for an interim order to be deficient in that it failed to establish that, without an interim order, the Tribunal's remedial powers under section 92 would be substantially impaired. That conclusion was not wrong in law, and was reasonably open to him on the record.

[19] This appeal will be dismissed with costs.

"K. Sharlow"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-192-07 |
| **STYLE OF CAUSE:** | THE COMMISSIONER OF COMPETITION<br>and<br>LABATT BREWING COMPANY LIMITED<br>LAKEPORT BREWING COMPANY LIMITED<br>LAKEPORT BREWING LIMITED PARTNERSHIP<br>ROSETO INC.<br>TERESA CASCIOLI |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | January 22, 2008 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | Richard C.J., Noël & Sharlow J.A. |
| **DELIVERED FROM THE BENCH BY:** | Sharlow J.A. |

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