

The *Labatt/Lakeport* case: Implications for Canadian Merger Review

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In Canada, *the* story in the world of competition law in the past year has been the *Labatt/Lakeport* merger. The unsuccessful attempt by the Commissioner of Competition (Commissioner)¹ to persuade the Competition Tribunal (Tribunal) to prohibit the Labatt Brewing Company Limited (Labatt) from completing its acquisition of the Lakeport Brewing Income Fund (Lakeport) in order to give the Competition Bureau (Bureau) more time to complete its review of the transaction generated tremendous attention. Labatt's subsequent successful challenge of the Commissioner's use of her formal information-gathering powers added to the case's notoriety.²

Beyond the headlines, what does the *Labatt/Lakeport* case mean? Does it, as some have suggested, signal a "new paradigm" for merger review in Canada? Will it prompt a "re-think" of the Bureau's use of the Commissioner's formal information-gathering powers or encourage broader changes to Canada's merger review regime, including greater harmonization with its U.S. counterpart? Or will *Labatt/Lakeport* be distinguished by the unique circumstances underlying the case, such that its impact on future merger reviews will be more limited?

The *Labatt/Lakeport* Transaction

Labatt announced its offer to acquire Lakeport on February 1, 2007. It had previously sought to acquire Sleeman Breweries Ltd. (Sleeman), Canada's third largest brewer, but Japan's Sapporo Breweries Ltd. (Sapporo) purchased Sleeman before Labatt could satisfy the Bureau that its acquisition would not be anticompetitive. With this experience still fresh, Labatt devised a strategy to prevent the Bureau's review of its Lakeport acquisition from providing a repeat of its experience with Sleeman.

Owing to the size of the parties' businesses in Canada, Labatt could not acquire Lakeport without both parties complying with the pre-merger notification provisions of the Competition Act. Labatt and Lakeport filed long-form pre-merger notifications on February 12, 2007, thereby triggering a forty-two day statutory waiting period (SWP).³ Three days later, on February 15, 2007, the Commissioner initiated a formal inquiry pursuant to section 10 of the Competition Act, thereby

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¹ The Commissioner, who heads the federal Competition Bureau, is Canada's chief competition enforcement official.

² See, e.g., Janet McFarland et al., *Judge Rebukes Watchdog in Labatt Takeover*, GLOBE & MAIL, Jan. 28, 2008; Jim Middlemiss, *Suds All in a Lather: Brewers Frustrated by Competition Bureau Tactics*, NAT'L POST, Feb. 2, 2008; Jim Middlemiss, *Competition Bureau Under Fire Over Beer*, NAT'L POST, Feb. 6, 2008; Jacquie McNish, *Competition Bureau Under Siege*, GLOBE & MAIL, Feb. 6, 2008; see also Susan M. Hutton, *Brian Gover Appointed to Advise Bureau on Section 11*, COMPETITOR, Apr. 24, 2008, available at <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/11083.htm>.

³ The parties could have filed short-form pre-merger notifications, which trigger a shorter, fourteen day SWP. Short-form pre-merger notifications, however, carry the risk of being "bumped" to a long-form filing prior to the expiration of the fourteen day SWP, with a new forty-two day SWP commencing after both parties have filed their long-form notifications.

enabling use of the Commissioner's formal powers, contained in section 11 of the Competition Act, to compel the production of records and written returns.

Anticipating that the Bureau's review could exceed the applicable forty-two day SWP, Labatt advised the Commissioner that it intended to complete the transaction upon expiration of the SWP. The Bureau's review remained incomplete as the end of the SWP approached, thereby presenting it with two options: (1) let Labatt complete the transaction, while putting it on notice that its review was incomplete and that Labatt would be closing at its own risk;⁴ or (2) file an application with the Tribunal requesting an order under section 100 of the Competition Act prohibiting Labatt from completing the acquisition for a further thirty days,⁵ thereby allowing the Bureau additional time to complete its review. Opting for the latter, the Commissioner filed a section 100 application on March 22, 2007.

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The Section 100 Application

Until 1999, section 100 had required that the Tribunal be satisfied that a proposed merger was "reasonably likely to prevent or lessen competition substantially" before it could issue a section 100 order. In 1999, this language was replaced with a requirement that the Tribunal be satisfied that, in the absence of an order, the parties were likely to take some action that would "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition . . . because that action would be difficult to reverse." At the time of its enactment, it was widely believed that this amendment would lower the threshold to be met by the Commissioner to obtain a section 100 order.⁶

The Tribunal dismissed the Commissioner's section 100 application on March 28, 2007.⁷ In its reasons, the Tribunal clearly rejected the notion that it should "rubber stamp" the Commissioner's decision that the Bureau needs more time to review a transaction. While acknowledging that the 1999 amendment to section 100 was intended to make the process of obtaining section 100 orders "less onerous," the Tribunal noted that the amendment also coincided with a doubling of the SWPs associated with pre-merger notifications, thereby "creat[ing] a heightened expectation that 42 days should be sufficient to complete a merger review."⁸ Accordingly, the Tribunal concluded that Parliament had maintained the "significant" requirement that "the Commissioner establish that the Tribunal's ability to remedy the effect of a proposed merger would be substantially affected if the proposed merger (or another action) were difficult to reverse."⁹

⁴ Absent the issuance of an advance ruling certificate pursuant to section 102 of the Competition Act, the Commissioner has three years after closing to file an application with the Tribunal in respect of a merger.

⁵ The Tribunal may extend the initial term of a section 100 order by up to 30 additional days (to a maximum of 60 days in total) on further application by the Commissioner (on 48 hours' notice to the parties) if it is satisfied that the Commissioner is unable to complete the inquiry within the initial period "because of circumstances beyond [her] control."

⁶ In fact, until Labatt filed its application, there were many who believed that the threshold for the Commissioner to obtain a section 100 order was low, or even minimal. The principal basis for this view was that closing of a transaction, other than in circumstances where parties had agreed to an appropriate "hold separate arrangement," would in and of itself "substantially impair" the Tribunal's ability to remedy the effect of a proposed merger by "scrambling the eggs." The Federal Court of Appeal, however, cast doubt on this view in a 2000 decision involving section 104 of the Competition Act (which is closely related, but not identical, to section 100), stating that "a merger is not like scrambled eggs" since "[it] can be broken up, competition can be restored, though it may be difficult to do and inconvenient." *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 175 (C.A.).

⁷ *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007).

⁸ *Id.* ¶ 28.

⁹ *Id.* ¶ 29.

The Tribunal's rejection of the Commissioner's section 100 application allowed Labatt to complete its acquisition of Lakeport, which it did on March 29, 2007. The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal, which rejected the Commissioner's appeal on January 22, 2008.¹⁰

Given that *Labatt/Lakeport* was the first case to consider the revised language in section 100, it is unfortunate that certain positions taken by the Commissioner enabled the Tribunal to deny the Commissioner's application without engaging in a detailed analysis of the test to be met in a section 100 application. Of particular note are deficiencies in the evidence filed by the Commissioner respecting her ability to remedy the effects of the merger. As noted by the Tribunal, evidence from the Commissioner's "principal expert on issues of the implications of mergers" suffered from "the infirmity of addressing all issues from the perspective of U.S. law, which aims at restoring competition to pre-merger conditions" (in contrast to the Canadian legal standard, set out in *Canada (Director of Investigation and Research) v. Southam*,¹¹ of restoring the market to the point at which competition ceases to be lessened or prevented substantially).

The Tribunal did, however, summarize what must be established by the Commissioner in a section 100 application:

The Commissioner must establish that the impairment to the Tribunal's ability to remedy is substantial. The nature and the 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 [substantial lessening of competition].¹²

In affirming the Tribunal's decision on appeal, the Federal Court of Appeal similarly identified several relevant considerations for a section 100 application:

an understanding of the nature of the potential lessening of competition that prompted the [Commissioner's] 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.¹³

For the most part, therefore, the Tribunal and the Federal Court of Appeal left it to future cases to flesh out the requirements of a section 100 application.

The Section 11 Challenge

The Bureau continued its review of the *Labatt/Lakeport* transaction following its implementation on March 29, 2007. As part of its continued review, the Commissioner sought and obtained, on November 8, 2007, ex parte orders from the Federal Court pursuant to section 11 of the Competition Act requiring Labatt and Lakeport, as well as several other parties, to provide documents and other information relevant to its review.¹⁴

¹⁰ *Commissioner of Competition v. Labatt Brewing Co.*, 2008 FCA 22 (Jan. 22, 2008).

¹¹ *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, at ¶ 85.

¹² *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007) at ¶ 48.

¹³ *Commissioner of Competition v. Labatt Brewing Co.*, 2008 FCA 22 at ¶ 17 (Jan. 22, 2008).

¹⁴ Including Labatt and Lakeport, the Court issued a total of fifteen section 11 orders.

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Many (eight) of the parties, including Labatt and Lakeport, targeted by these orders had already been the subject of such orders in February 2007.¹⁵ Labatt and Lakeport filed an application seeking to have the second order against them set aside or varied. Madam Justice Mactavish granted the application on January 28, 2008, setting the order aside on the basis that the “disclosure made by the Commissioner’s office on the ex parte application was . . . misleading, inaccurate and incomplete.”¹⁶ Weighed against the high burden to be met by an applicant seeking an ex parte order, Justice Mactavish said that she would not have issued the order in the form that she did had proper disclosure been given.

The Bureau’s need for information to complete merger reviews is legitimate and its efforts to inform itself about the competitive effects of mergers inescapably impose a burden on those from whom the Bureau requires information. However, by relying on section 11 of the Competition Act, the Bureau imposes a formality on the information-gathering process that, according to critics, is unnecessary in most cases. Justice Mactavish’s decision reflected concerns raised about the Bureau’s increasing propensity toward the use of section 11 orders (as opposed to voluntary information requests) in merger cases, and about the overly broad scope of such orders, due in part to the ex parte nature of section 11 applications and the Bureau’s refusal to engage in prior consultations with parties about the contents of such orders.¹⁷

While the Bureau’s use of section 11 orders has been the subject of debate for some time,¹⁸ Justice Mactavish’s decision had the effect of elevating the issue to the political level. The federal Minister of Industry, the Honorable Jim Prentice, described the Court’s comments about the

¹⁵ In the case of Labatt, it had already provided (in addition to the 10,000 pages of records information provided with its long-form pre-merger notification) 7,432 documents consisting of over 138,620 pages in response to the first of these orders, and incurred external costs of approximately \$750,000 to do so.

¹⁶ *Commissioner of Competition v. Labatt Brewing Co. Ltd.*, 2008 FC 59 at ¶ 3 (Jan. 28, 2008). Among the deficiencies cited by the Court were:

- a failure to disclose prior representations to the Court that the extensive information sought in the earlier (February 2007) orders “would be sufficient for the purposes of the Commissioner’s inquiry”;
- written submissions of the Commissioner’s counsel stating that “none of the records or information sought has previously been requested,” when in fact the Court, with Labatt’s assistance, identified several areas of overlap between the orders (with Labatt providing evidence that 7,432 records that it produced in response to the February order were also responsive to the November order); and
- a failure by the Commissioner to inform the Court of the concerns previously communicated by Labatt about the nature and scope of the February 2007 demands and their implications for the November 2007 order.

Id.

¹⁷ See COMPETITION BUREAU, INFORMATION BULLETIN ON SECTION 11 OF THE COMPETITION ACT 7 (Nov. 2005), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01995e.html>.

¹⁸ See, e.g., Bruce C. Caughill & D. Jeffrey Brown, *The Use of Formal Investigatory Powers in Merger Examinations by the Director*, 16 CAN. COMPETITION REC. No. 4, at 27 (1995–1996). More recently, the Bureau issued an *Information Bulletin on Section 11 of the Competition Act* (Nov. 2005), *supra* note 17, which the Bureau described as “a summary designed to give basic information regarding section 11 of the Act.” Notwithstanding the Bureau’s more usual practice in recent years of releasing such bulletins in draft form for public consultation, the Bureau released the section 11 information bulletin as a *fait accompli*. The Competition Law Section of the Canadian Bar Association, by way of a letter dated February 6, 2007 (available at <http://www.cba.org/CBA/submissions/pdf/07-08-eng.pdf>), submitted comments to the Bureau in any event, noting, among other things, the desirability of prior consultation given the controversy surrounding the Bureau’s use of section 11:

The Bureau’s past resort to section 11 orders has not been without controversy. In view of the significant burden placed on recipients of a section 11 order, stakeholders have significant concerns about the circumstances in which these orders are secured, the scope of the information requested in the orders, and, at times, the execution of the orders. Though the Bulletin provides a useful guide to the Bureau’s thinking on some aspects of the section 11 process, broad formal public consultation prior to issuance might have been helpful, and should be considered with respect to any subsequent versions of the Bulletin.

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Bureau’s inadequate disclosure as “quite serious” and sought assurances from the Commissioner that the Bureau is “taking the situation in hand.”¹⁹ Mr. Prentice later announced the additional step of appointing a third-party reviewer to lead an independent probe into the process used by federal Department of Justice lawyers in seeking section 11 orders on an ex parte basis.²⁰

On March 3, 2008, the Commissioner and the Deputy Minister of Justice requested Mr. Brian Gover, a Toronto lawyer, to conduct this review, with a mandate to complete the review and report to them within ninety days.²¹ Mr. Gover provided the Bureau and the Department of Justice with an (unpublished) interim report on June 10, 2008, and submitted his final report, in the form of an opinion letter, on June 19, 2008 (although it was not released publicly until August 12, 2008).²² Mr. Gover’s findings, and the Bureau’s response, are discussed in greater detail below.

***Labatt/Lakeport* Lessons: What Does It Mean for Canadian Merger Review?**

What are the practical implications of the *Labatt/Lakeport* case for the merger review process in Canada? To answer this question, it is necessary to separate the two issues that arose from the case: the timing of merger reviews under the Competition Act; and the Bureau’s use of section 11 of the Competition Act.

Merger Review Timing. Prior to *Labatt/Lakeport*, it was widely believed that the bar was low for the Commissioner’s use of section 100 to prevent parties from closing a transaction while it completed its review. To the extent that the Tribunal’s section 100 decision raises this bar, *Labatt/Lakeport* could effect, as some have suggested, a “paradigm shift” for the merger review process under the Competition Act—especially if it encourages purchasers to take a more aggressive stance with the Bureau in terms of closing (or threatening to close) transactions before the Bureau has completed its review.²³

As a practical matter, however, timing will not change for the overwhelming majority of mergers since very few give rise to significant competition law issues.²⁴ Even for those mergers where such issues do arise, the potential impact of *Labatt/Lakeport* could be limited if purchasers decline to take aggressive positions of the sort taken by Labatt or if *Labatt/Lakeport* is distinguished from other mergers in future section 100 proceedings as the product of a rare combina-

¹⁹ Jim Middlemiss, *Competition Chief Called on Carpet by Prentice*, NAT’L POST, Jan. 30, 2008.

²⁰ Jim Middlemiss, *Ottawa Probes Competition Law Disclosures*, NAT’L POST, Feb. 16, 2008.

²¹ Competition Bureau, Expert Appointed to Advise on Section 11 Process, Mar. 3, 2008, available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02587e.html>.

²² Letter from Brian Gover to John H. Sims, Deputy Minister of Justice, and Sheridan Scott, Commissioner of Competition (June 19, 2008) [hereinafter Gover Report], available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html>.

²³ See, e.g., Julius Melnitzer, *Competition Decision Means Faster Mergers*, NAT’L POST, Jan. 30, 2008.

²⁴ The Bureau, for administrative purposes, classifies mergers on the basis of their complexity. “Non-complex” mergers involve little or no competitive overlap between the parties, whereas “complex” and “very complex” mergers raise serious (or potentially serious) competition concerns that may require remedial action and/or legal proceedings. Based on these classifications, the Bureau endeavors to complete its review of the merger within a designated “service standard period” running from the day after the Bureau is satisfied that it has all of the information it requires to complete its review. For non-complex mergers, the service standard period is up to fourteen days, with the corresponding periods for complex and very complex mergers being ten weeks and five months. With this in mind, the overwhelming majority of mergers reviewed by the Bureau are non-complex (on average, 87 percent of mergers reviewed by the Bureau during the years 2000–2001 to 2006–2007), in contrast to an average of only 11 percent for complex mergers and only 2 percent for very complex mergers. See COMPETITION BUREAU, MERGER REVIEW PERFORMANCE REPORT (June 14, 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02362e.html>.

tion of facts. *Labatt/Lakeport's* potential to effect a paradigm shift, therefore, must be assessed in the context of the specific facts of the case, including the following:

- Labatt was a highly motivated purchaser willing to assume the risk that the Bureau might challenge the acquisition post-closing. Such purchasers have been rare, with most purchasers seeking some form of affirmative clearance from the Bureau before closing a notifiable merger transaction.²⁵
- *Labatt/Lakeport* was a purely domestic merger. Multi-jurisdictional mergers are subject to the same rules and procedures as domestic mergers, but the timing of merger reviews in other jurisdictions can provide a significant discipline on the Bureau's timing as regards its review of a transaction insofar as the Bureau may prefer to avoid being the cause of delay in implementation of a multi-jurisdictional merger.
- Unlike many parties, Labatt was willing to enter into a hold separate arrangement (HSA). When combined with the Tribunal's view that it could not "assume . . . that the [HSA] would be breached," it became difficult for the Tribunal to conclude that closing of the transaction would "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition."
- While not expressly stated in the Tribunal's decision, the Sleeman transaction and other background to the case may have influenced (or in any event may be perceived as having influenced) the Tribunal's decision to deny the Commissioner's section 100 application order. In addition to identifying "deficiencies" in the Commissioner's evidence, the Tribunal suggested that the Bureau was less diligent than it ought to have been in conducting its review of the *Labatt/Lakeport* transaction.²⁶

Notwithstanding these unique facts, it is clear that the Bureau cannot rely on the Tribunal to "rubber stamp" the Commissioner's decisions to seek a section 100 order. At the same time, with the Tribunal and the Federal Court of Appeal having provided only general guidance on section 100's applications, it remains to be seen just how high the threshold for such a section 100 order has become, and how the application of the provision will vary according to the circumstances of a particular case.²⁷

²⁵ The tendency of merging parties, and purchasers in particular, to seek affirmative clearance is reinforced by the Bureau's practices with respect to merger remedies, as set out in its *Information Bulletin on Merger Remedies in Canada*. COMPETITION BUREAU, INFORMATION BULLETIN ON MERGER REMEDIES IN CANADA (Sept. 22, 2006), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02170e.html>. For example, in the event of a merger with respect to which the Bureau determines that a remedy is required to eliminate an alleged substantial prevention or lessening of competition (and in respect of which the parties/purchaser opt to enter into a consent agreement with the Commissioner rather than contest the matter by way of litigation), the Bureau will typically allow a purchaser only 3–6 months in which to complete a divestiture, after which point a trustee is appointed to effect the divestiture, at "firesale" prices if necessary.

²⁶ See *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007) at ¶ 52:

The Tribunal is mindful that the Commissioner has been involved with this industry recently and over an extended period [an apparent reference to an earlier statement, in ¶ 34 of the decision, that "the Commissioner has been involved in reviewing this industry until at least late 2006" and that she "has evidence on the structure of the market, its operation and facilities and its participants."]. The Commissioner has now had more than 40 days to review this specific transaction, yet there is insufficient evidence presented as to market structure and conditions to establish the impairment of the Tribunal's ability to remedy in accordance with Canadian law.

²⁷ In this latter regard, it is interesting to compare an application filed by the Commissioner under section 100 shortly after the Federal Court of Appeal rendered its decision in the *Labatt/Lakeport* case. The application, which involved a proposed merger of two scrap metal processors in eastern Canada, generally adhered to the considerations identified by the Federal Court of Appeal as relevant to a section 100 application and, moreover, included specific reference to facts respecting the Bureau's limited knowledge of the industry, the limited amount of disclosure by the parties to the Bureau and the Bureau's efforts to inform itself about the industry in question, thereby proactively differentiating its position in the case from that which existed in *Labatt/Lakeport*. One day after the Commissioner filed her application, the par-

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Section 11 Orders. In contrast to section 100, the practical impact of *Labatt/Lakeport* on the Bureau's use of section 11 of the Competition Act will likely be more significant. *Labatt/Lakeport* engaged a number of issues that have been the subject of debate for some time. For example, section 11 of the Competition Act provides for section 11 orders to be issued on an ex parte basis, but it does not necessarily follow that these orders should be sought ex parte as a matter of course, as had come to be the case with the Bureau.²⁸ Moreover, as the private competition law bar in Canada has argued,²⁹ there are compelling policy reasons for consulting with the parties targeted by section 11 orders, including contributing to a narrowing of the order to what is truly relevant to the Bureau's review, thereby minimizing the burden of such orders on both the target parties and the Bureau. These questions rose to prominence with the Minister's decision to appoint a third-party reviewer to lead an independent probe into the process used by federal Department of Justice lawyers in seeking section 11 orders on an ex parte basis.³⁰

While some have viewed the Gover Report³¹ as vindication of the Bureau's practices regarding section 11 of the Competition Act, it does not constitute a full endorsement of these practices. In fact, the Gover Report recommended several key changes that had long been advocated by the private bar, including:³²

- Mr. Gover recommended that the Bureau engage in "pre-application" and "post-order" dialogue with respondent parties, something which he recognized had been pushed by the private competition law bar for some time but resisted by some at the Bureau, including in par-

ties filed a consent agreement with the Tribunal that permitted the parties to close on the strength of a 60-day hold-separate period (which appears to have been driven by "serious financial difficulty" on the part of the target), thereby obviating the need for the Tribunal to hear the Commissioner's section 100 application. *Commissioner of Competition v. American Iron & Metal Co.*, CT-2008-001 (Jan. 28, 2008).

²⁸ In principle, ex parte orders are normally reserved for cases of urgency or where there is a genuine concern of document destruction in the event that notice is given—concerns that do not typically arise in the context of mergers, and certainly not in the context of completed mergers. In any event, giving notice to respondent parties need not create significant delay in the issuance of section 11 orders. Motions can be brought and heard on an extremely expeditious basis, i.e. on two day's notice to the affected party (or parties).

²⁹ See, e.g., Caughill & Brown, *supra* note 18.

³⁰ Competition Bureau, *supra* note 21.

³¹ Gover Report, *supra* note 22.

³² While it was prompted by Justice Mactavish's criticism of the Bureau in quashing the second section 11 order against Labatt and Lakeport, the Gover Report concluded that "the Bureau conducts its role responsibly under s. 11 and [that] it properly balances the burden on respondents, particularly third parties, against the need to obtain the information necessary for an inquiry." *Id.* at 3. Indeed, Mr. Gover went one step further, stating that "the conclusions of the Federal Court in *Labatt* were not warranted and the Court erred in exercising its discretion to vacate the November 2007 s. 11 order." *Id.* at 20. Mr. Gover also criticized the Canadian competition law bar, suggesting that "it became apparent [during his review] that the private competition law bar's main criticism was levelled at the existence of a s. 11 power itself." *Id.* at 3.

The Bureau did not respond to the Gover Report's conclusions (although one official was quoted as saying that "the report speaks for itself"). Janet McFarland, *Review Exonerates Competition Bureau*, *GLOBE & MAIL*, Aug. 13, 2008. Members of the Canadian competition law bar, in contrast, have been highly critical of the report, with criticisms including that: Mr. Gover's consultations were heavily skewed in favor of the Bureau; Mr. Gover erred in his suggestion that members of the bar question "the existence of s. 11 power itself"; and it was inappropriate for Mr. Gover to criticize the Federal Court's decision vacating the second Labatt and Lakeport section 11 order (which decision the Bureau chose not to appeal). See, e.g., *id.*; Jim Middlemiss, *Report Light on Consultations with Private Bar*, *NAT'L POST*, Aug. 13, 2000; Jim Middlemiss, *Competition Bureau Review Draws Flak*, *NAT'L POST*, Aug. 12, 2008. The Canadian Bar Association even took the step of responding publicly to the report. It identified a number of aspects of the Gover Report that "warrant[ed] an immediate response," and expressly questioned the independence of the report and the meaningfulness of the consultations on which it was based. Letter from James Musgrove, Chair, National Competition Law Section of the Canadian Bar Association, to John Sims, Deputy Minister of Justice and Sheridan Scott, Commissioner of Competition (Sept. 4, 2008) [hereinafter CBA Response], available at [http://www.cba.org/CBA/sections_Competition/pdf/08-51-eng\[1\].pdf](http://www.cba.org/CBA/sections_Competition/pdf/08-51-eng[1].pdf).

ticular its Mergers Branch.³³ According to Mr. Gover, such dialogue should be “the norm” and will “reduce the burden of responding to s. 11 orders on respondents and make the s. 11 process more efficient.”³⁴

- While an advocate of pre-application dialogue, Mr. Gover nevertheless believes section 11 orders should continue to be obtained on an ex parte basis. Mr. Gover rejected arguments that section 11 is “permissive” on this point insofar as it contemplates that the Commissioner “will” apply ex parte.³⁵ At the same time, Mr. Gover acknowledged that a respondent might be permitted to attend and make submissions before the issuance of an order in “special circumstances,” although this could occur only where the Court—not the Commissioner—so permits through the issuance of a “special order.”³⁶ Moreover, Mr. Gover recommended that formal notice be given to respondents where a previous section 11 order has been successfully varied or set aside in the same inquiry, and that the Bureau consider giving formal notice where there is a previous section 11 order against the same respondent and a challenge to a further section 11 order is likely.
- Mr. Gover endorsed a “move away from [the Bureau’s prior practice of] making applications in writing without a personal attendance of counsel for the Commissioner.”³⁷ Such personal attendance, Mr. Gover noted, “should go some way towards addressing the concern that the Federal Court is used as a ‘rubber stamp’ on s. 11 applications.”³⁸ While, again, falling short of the private competition law bar’s desire for formal notice to respondents of section 11 applications, personal attendance could expose applications to greater scrutiny by the Court.³⁹

Perhaps most controversially, notwithstanding that Mr. Gover was asked only to examine the process used to seek section 11 orders on an ex parte basis, the Gover Report went further and questioned whether section 11 is an appropriate mechanism for meeting the Bureau’s information gathering needs in a merger review context. According to Mr. Gover (who did not raise the issue when he met with Canadian Bar Association representatives),⁴⁰ the Bureau “would be assisted considerably in carrying out merger review if it had at its disposal an investigation tool similar to a [U.S.] Second Request . . . , which would automatically extend the waiting period for closing the transaction.”⁴¹ A similar recommendation was made by the federally appointed Competition Policy

³³ Indeed, as noted previously, the Bureau’s policy has been not to negotiate the contents of section 11 orders. See COMPETITION BUREAU, *supra* note 17.

³⁴ Gover Report, *supra* note 22, at 4–5.

³⁵ *Id.* at 9–10.

³⁶ *Id.*

³⁷ *Id.* at 34. More specifically:

As a rule, counsel should attend before the Court with the person who swore the affidavit . . . to provide clarification based on the affidavit. Where the trial judge elicits information not in the affidavit, the affiant should swear a supplementary affidavit, if the additional information is minor, or withdraw the application in order to amend the affidavit, if the additional information is more significant.

Id.

³⁸ *Id.* at 35.

³⁹ Another potentially significant recommendation of Mr. Gover was that section 11 orders should include language permitting the Commissioner to “read down” the scope of production ordered by accepting less information or fewer documents than directed in the order. Such flexibility, however, should be limited, Mr. Gover said, so as to avoid an impermissible delegation of the judicial oversight function. Mr. Gover recommended against allowing the Commission to “read across” an order, i.e., by allowing substitution of information contained in other documents not requested in the order without seeking an amendment of the order from the Court. *Id.* at 40.

⁴⁰ See CBA Response, *supra* note 32.

⁴¹ Gover Report, *supra* note 22, at 31.

Review Panel in its recently published report to the Minister of Industry (as part of a broader recommendation that Canada harmonize its merger review process with that in the United States),⁴² and is believed to enjoy the political support of the Minister.⁴³

If enacted, a U.S.-style Second Request mechanism would be a major departure from the current choice between voluntary information requests and judicially sanctioned section 11 orders.⁴⁴ As Mr. Gover suggests, such a reform would certainly enhance the Bureau's information-gathering powers. It would do so, however, at the expense of the objectives underlying Mr. Gover's various recommendations to improve the existing section 11 application process in order to render the process more efficient by enhancing rather than reducing private parties' participation and exposing the Bureau's use of section 11 to greater rather than less judicial scrutiny than currently exists. If combined with the U.S. rule of suspending the waiting period until the parties "substantially comply" with the (often onerous) complete information request, it would also obviate the need for the Bureau to apply to the Tribunal for an injunction to prevent closing after expiry of the waiting periods, thereby turning both of the Commissioner's defeats in *Labatt/Lakeport* on their heads.

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Conclusion

The *Labatt/Lakeport* case could, as some have noted, raise the bar for the Bureau to prevent parties from closing transactions while it completes reviews. However, timing will not change for the overwhelming majority of mergers since very few give rise to significant competition law issues. If *Labatt/Lakeport* effects a "paradigm shift" in this regard, therefore, it will be a narrow one.

Conversely, the practical impact for the Bureau's use of section 11 orders could be considerably broader. Viewed in conjunction with the Gover Report, *Labatt/Lakeport* may not affect the Bureau's propensity to resort to section 11 orders or its practice of seeking such orders *ex parte*, but it could lead to more frequent pre-application dialogue and expose section 11 applications to greater judicial scrutiny by ending the practice of seeking such orders without personal attendance. On the other hand, the Gover Report could contribute to a move toward harmonization of Canadian and U.S. merger review procedures, including the replacement of section 11 of the Competition Act with a U.S.-style Second Request information-gathering mechanism, which would remove both the content of information requests and (for practical purposes) the timing of Bureau merger reviews from judicial (or quasi-judicial, in the case of the Tribunal) oversight. Such a result would be ironic (and, indeed, a possible step backward), setting aside process reforms recommended by Mr. Gover (and to a significant extent advocated by the private competition law bar) in favor of a new mechanism that could empower the Bureau to an even greater degree than the "unreformed" section 11 process. ●

⁴² COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN: FINAL REPORT 56, 60, 126 (June 26, 2008).

⁴³ See Jacquire McNish, *Beneath the Noise, Worries over U.S.-Style Rules*, GLOBE & MAIL, Sept. 10, 2008.

⁴⁴ Whether such a reform will be enacted is, at this time, unclear. A federal election on October 14, 2008 resulted in no change of government, but the current Minister of Industry will not necessarily retain his current portfolio. Moreover, it would remain to be seen whether amendments to the Competition Act generally, and this amendment in particular, would be a priority for the new government.