

CITATION: Labatt Brewing Co. Ltd. v. NHL Enterprises Canada L.P. 2011 ONSC 3219
COURT FILE NO.: CV-11-9122-00CL
DATE: 20110603

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

B E T W E E N:

**LABATT BREWING COMPANY LIMITED
and LABATT BREWERIES OF CANADA LP**

Applicants

- and -

**NHL ENTERPRISES CANADA, L.P.,
NHL INTERACTIVE CYBERENTERPRISES, LLC,
NHL ENTERPRISES, L.P., NHL ENTERPRISES B.V.,
MOLSON COORS CANADA INC. and MILLERCOORS LLC**

Respondents

BEFORE: Justice Newbould

COUNSEL: Linda Rothstein, Richard P. Stephenson and Andrew C. Lewis, for the
Applicants

Terrance J. O'Sullivan and James Renihan for NHL Enterprises Canada, L.P.,
NHL Interactive Cyberenterprises, LLC, NHL Enterprises, L.P. and NHL
Enterprises B.V., Respondents

R. Paul Steep, Darryl R. Ferguson and Adam Ship for Molson Coors Canada
Inc. and MillerCoors LLC, Respondents

DATE HEARD: May 24, 25 and 26, 2011

Newbould J.

[1] This application concerns beer rights, and in particular whether Canadian television viewers will be subjected to or entertained by, depending on one's taste, advertising for Budweiser or Coors as the official beer of the NHL in Canada for the next three seasons.

[2] Labatt has had these rights, referred to as sponsorship rights, since 2002. The current contract runs from July 1, 2008 to June 30, 2011. Negotiations to renew these rights for three years to June 30, 2014 took place between business people from Labatt and the NHL beginning in August, 2010. A renewal clause provided Labatt with an exclusive period to negotiate. Labatt says they made a deal within the exclusive period. The NHL says they did not. The negotiators were extremely close to a final signed agreement by February, 2011 when Molson¹ came to the NHL and expressed an interest in negotiating U.S. and Canadian sponsorship rights. At that point the lawyers for the NHL went into high gear and the NHL said to Molson that it was free to negotiate with them. A deal was signed soon after between the NHL and Molson for 7 years under which Molson paid substantially more for the Canadian sponsorship rights than Labatt and the NHL had agreed to.

Renewal option

[3] At the heart of the debate is clause 7 in the 2002 Labatt/NHL agreement that was carried forward in the 2008 agreement that at first blush looks straightforward but after three days of precision surgery looks less so. It is entitled Renewal Option and provides:

7. RENEWAL OPTION

Before entering into negotiations with a third party for sponsorship rights with respect to the Canadian Territory within the Category for the period beginning immediately after expiration of the License Term, The NHLECOs shall deliver to LABATT a written proposal for the renewal of this Agreement on or before October 1, 2006. Thereafter, LABATT will have the exclusive first right to negotiate the terms of a renewal of this Agreement for a period of sixty (60) days...[non-pertinent text redacted]...If, during such sixty-day period, LABATT and the NHLECOs are unable to agree on the terms of such renewal, LABATT will, within fifteen (15) days after the end of such sixty (60) day period, offer to the NHLECOs a proposal to which LABATT would be willing to agree. The NHLECOs will then have ten (10) days to accept or reject LABATT's counteroffer, after which time, if the NHLECOs reject LABATT's counteroffer, the NHLECOs will be free to negotiate the rights and benefits relating to the

¹ Molson Coors Canada Inc. is the Molson corporate entity operating in Canada. MillerCoors is the U.S. Molson corporate entity operating in Canada. For simplicity, I refer generally to Molson unless it is necessary to distinguish the entities.

renewal with any third party; provided that the NHLECos will not offer any third party terms more favorable to such third party than those in LABATT's counteroffer without providing LABATT the opportunity to accept such an offer within a ten-day period.

[4] Thus, before the NHL may enter into negotiations with a third party, certain things must occur:

- a) The NHL shall deliver to Labatt a written proposal for the renewal of the agreement on or before October 1, 2006. Because the clause was in the 2002 agreement, the parties treated the obligation on the NHL in the 2008 renewal agreement to deliver its proposal on or before October 1, 2010.
- b) Thereafter Labatt will have the exclusive first right to negotiate the terms of a renewal of the agreement for a period of 60 days.
- c) If during such 60 day period, Labatt and the NHL are unable to agree on the terms of such renewal, Labatt will within 15 days thereafter offer to the NHL a proposal to which Labatt would be willing to agree.
- d) The NHL will then have 10 days to accept or reject Labatt's counteroffer.
- e) If the NHL rejects Labatt's counteroffer, the NHL will be free to negotiate the rights relating to the renewal with any third party, providing it will not offer to any third party terms more favourable than those in Labatt's counteroffer without providing Labatt the opportunity to accept such offer within a 10 day period. (underlining added)

[5] I have underlined words because the parties contend different meanings for the words "proposal", "offer" and "terms of a renewal".

[6] To understand the position of the parties, it is necessary to understand what took place regarding these renewal rights.

Renewal negotiations

[7] On August 6, 2010, the NHL presented Labatt with its written proposal for renewal, pursuant to the renewal option. It contained 10 pages of various sponsorship rights that would be

provided to Labatt for a five year term with a right of first negotiation for renewal for 60 days at the end of the five year term. It was in the form of a typical term sheet. It was agreed that this proposal triggered the 60-day exclusive negotiation period, which would expire at midnight on October 5, 2010.

[8] On September 21, 2010 Labatt gave a counter-offer to the NHL. It proposed a three year term. It too was not in the form of an agreement. Under a heading Proposed Next Steps, it stated “Terms Sheet pending written agreement w/o 4 October”.

[9] The NHL was not able to respond within the 60 day exclusive period ending midnight October 5, 2010. On October 8, 2010 the NHL met with Labatt. It was not yet ready to present a counter-offer but its representatives stated to Labatt that it was not negotiating with any other parties, it intended to complete a deal with Labatt and that it would extend the exclusive negotiating period. On October 10, 2010 the extension was confirmed by e-mail from Mr. Wachtel of the NHL to Mr. Ramella of Labatt which stated:

Thank you for your time on Friday. Per our conversation, the NHL will provide a counter proposal to Labatt’s offer early this week. We are committed to getting a deal done with you and as such, will extend the exclusive negotiating window another week until 10/15. Should we need more than this week we can re-address this date again. Labatt has been a good NHL partner and its always been our intent to start and finish this process with you. Hope you enjoyed the holiday weekend.

[10] The NHL sent a counter-offer to Labatt on October 13, 2010, two days before the end of the extended exclusive negotiating period. A meeting was scheduled for October 14, 2010 to discuss it. On October 14, 2010 Mr. Ramella of Labatt e-mailed Messrs. Wachtel and McCann of the NHL and said “wanted to set expectations that an extension until 10/22 will be needed”. On the same day Mr. McMann replied “Extension to Oct 22 will not be an issue”.

[11] On October 15, 2010 at a meeting, Labatt made a counter-offer to the NHL. The NHL intended on making a counter-offer on October 21, 2010, one day before the exclusive period, as extended, expired. On October 20, 2010 Mr. McMann e-mailed Labatt as follows:

Sorry the day got away from me.

Can we set time to present our final tomorrow (Thurs) at 4pm - your office is fine, or you're welcome to come to mine.

In advance of the meeting I want to let you know that we WILL NOT ask for more \$'s.

We appreciate that you're at your upward limit here. Based on where you've come in, and the respective asks, there are some elements on your last counter that I need to modify.

I think we're essentially there and don't expect any of these to be deal-breakers.

My day is jammed so I'm thinking if the 4 pm slot is still open I come over at and present the offer. I can leave after that to give you time to discuss on your own and we can either continue the discussion and finalize things over dinner and the game or set aside time on Friday or early next week.

Looking forward to working through these last couple of points with you.

See you tomorrow.

[12] There was no express extension of the exclusive negotiation period beyond October 22, 2010.

[13] The “elements” that Mr. McMann said in his e-mail he needed to modify related to “premiums”, which are branded merchandise that is either given away or sold at a discount in order to increase beer sales (such as a tee-shirt in a case of beer). The NHL did not want too much of this as it could negatively impact the NHL’s own retail business of selling NHL branded merchandise.

[14] The parties met on October 22, 2010. The NHL was not able to present its “final” offer, as stated in Mr. McMann’s e-mail the previous day, as Mr. McMann said that he would have to speak to the NHL’s Consumer Products division before he could make a full counter-offer on the premiums issue. The form of counter-offer presented by the NHL at the meeting contained the following language regarding the premiums issue:

THIS MUST BE FURTHER DISCUSSED AS AT PROPOSED VOLUMES
THE NHL HAS SERIOUS CONCERNS ON IMPACT TO OUR RETAIL
BUSINESS-WE WILL NEED TO FOLLOW-UP ON THIS.

[15] On cross-examination, Mr. McMann acknowledged that the NHL's October 21, 2010 counter-offer was not what he described as a full counter-offer, and that as of October 22, 2010, Labatt was waiting for the NHL to make a full counter-offer on the premiums issue.

[16] A meeting of both sides to discuss the premiums issue was scheduled for October 27, 2010. On that day, Erin Thomson of Desperado Marketing, who was assisting Labatt in this initiative, sent an e-mail to Mr. McMann. The subject line said "Document for Discussion" and the text said "Please find attached the document for today's discussion". The attached document was similar to the earlier documents sent back and forth by the parties, being an excel spreadsheet with the title "Business Terms Summary" with business terms expressed in short form. It contained a changed provision regarding the premiums issue.

[17] The NHL takes the position that the exclusive negotiating period ended on October 22, 2010 and that this e-mail of October 27, 2010 and the attached sheet was Labatt's final proposal or counteroffer within the meaning of the renewal option. Labatt takes the position that while there was no express extension of the exclusive negotiating period past October 22, 2010, the NHL's conduct and statements reflected an unequivocal intention to waive strict reliance on the exclusive time period and that it was extended indefinitely until an agreement was later reached on business terms on November 12, 2010. Labatt denies that the e-mail from Desperado Marketing of October 27, 2010 was a final proposal or counter-offer within the meaning of the renewal option.

[18] On November 2, 2010 there was a telephone call between representatives of the parties, including the group vice-president of consumer products for the NHL to discuss the premiums issue. What exactly was said is not clear.

[19] On November 8, 2010 the NHL presented a counter-offer to Labatt, containing terms regarding the premiums issues that were acceptable to it. The NHL also raised an issue regarding premium suppliers proposing that only NHL approved suppliers would be acceptable.

[20] A meeting took place between the parties on November 12, 2010 to discuss the premiums issue, which was the one outstanding issue. After discussion, the attendees came to an agreement on terms covering the premiums issue. They shook hands. There is a difference as to exactly what was said before they shook hands. Mr. McMann says that he told the Labatt people that he still had to present the terms of the proposed sponsorship deal to Mr. John Collins, the COO of the NHL and to the NHL's lawyers. The Labatt people in attendance deny that Mr. McMann said that he had to go to Mr. Collins, but acknowledge there may have been discussion that each side would have to get their lawyers involved.

Draft Letters of Intent

[21] On November 19, 2010, Ms. Lee at the NHL emailed Mr. Malcolm at Desperado, stating:

Subject: Final deal points spreadsheet

Hi Ian,

Would you mind sending over the final deal points as discussed last week?

Thanks

[22] On November 26, 2010, Mr. Thompson sent to the NHL an e-mail attaching a draft letter of intent and what he described as a final term sheet, which was the excel spreadsheet with the Business Terms Summary containing all of the various offers back and forth and the final terms as agreed at the meeting on November 12, 2010. The e-mail stated:

Subject: NHL Final Term Sheet

Hi Kyle and Nicole – Here is the final term sheet. Looking forward to the next 3 years. I know that it takes time to get a final agreement in place so I was hoping to get a Letter of Intent signed so that both feel comfortable as the agreement gets

drafted up. Can you please sign and send back to me by Tuesday of next week. Have a great weekend. Scott.

[23] The draft letter of intent contained, amongst other things, the following:

On behalf of Labatt... please accept this non-binding letter intent regarding Labatt's interest in entering into a sponsorship agreement with NHL...The purpose of this letter of intent is to set out the financial basis upon which Labatt would be prepared to enter into a sponsorship agreement with the NHL...

Upon execution of this letter of intent, the NHL....will prepare a definitive Sponsorship Agreement which will incorporate agreed upon terms finalized during recent negotiations as well as standard terms and conditions to be mutually agreed to by the parties, such as renewal and termination rights, representations, warranties, obligations, covenants, indemnification and other provisions that are customarily found in sponsorship agreements of the kind contemplated by this letter of intent.

Other than the confidentiality obligation outlined above, the parties agree that this letter of intent shall be **non-binding** until such time as the Sponsorship Agreement has been entered into. If the Sponsorship Agreement is not entered into by the parties, again subject to the confidentiality obligation, the parties agree that they shall be under no further obligation to each other.

[24] There were discussions between the parties about a confidentiality provision in the draft letter of intent. The NHL revised the draft, including the confidentiality provision and the paragraph about the non-binding nature of the letter of intent, and e-mailed it to Labatt on December 12, 2010. The draft by the NHL contained:

If the Sponsorship Agreement is not completed by June 30, 2014, each Receiving Party agrees that any Confidential Information of a disclosing party will be immediately delivered to the Disclosing Party or destroyed by such Receiving Party.

Other than the confidentiality obligation outlined above, the parties agree that this letter of intent shall be **non-binding**. If the Sponsorship Agreement is not entered into by the parties, again subject to the confidentiality obligation, the parties agree that they shall be under no further obligation to each other.

[25] The NHL did not want to attach the Term Sheet to the letter of intent. Labatt would not sign the letter of intent without attaching the Term Sheet. Ultimately, on December 13, 2010, Mr.

McMann proposed simply moving on to the long form agreement and Mr. Thompson agreed. At that point, Mr. McMann was already close to having a draft long form ready to be sent to Labatt for review.

[26] On December 29, 2010, Mr. McMann sent a draft long form agreement to Mr. Thompson. In his covering e-mail, he stated:

I think with our negotiations through the fall we've aligned on all of the key business points so our hope is that we're able to get this done quickly once you've had a chance to review.

[27] During a call between Mr. McMann and Mr. Thompson on January 13, 2011, Mr. Thompson e-mailed to Mr. McMann a marked up copy of the draft long form agreement. The parties differ as to whether the markings were questions only or requirements for changes. Mr. Thompson said they were only notes to himself on points he wanted to inquire about. The evidence would seem to support him, and I view Mr. McMann's affidavit evidence on the point, like much of his affidavit, as simply argument. In any event on February 2, 2010, after four further discussions between Mr. McMann and Mr. Thompson, Mr. Thompson sent the draft as proposed by the NHL to Labatt in-house lawyers for review.

[28] On February 8, 2011, Mr. Wachtel of the NHL telephoned Mr. Thompson and said that the NHL was terminating its negotiations with Labatt. On the same day Mr. Wachtel e-mailed Mr. Thompson and stated:

As I just advised you, this will confirm that the NHL has withdrawn any offer we might have made to Labatt and we have terminated our negotiations with Labatt.

[29] The reason for this was that on that day the NHL signed an agreement with Molson Coors for Canadian sponsorship rights for 7 years.

NHL/Molson negotiations

[30] Mr. John Collins, the NHL's COO, contacted MillerCoors on January 3, 2011 to enquire as to whether MillerCoors would be interested in meeting with the NHL to discuss U.S.

sponsorship rights. That meeting eventually took place on January 26, 2011, in Chicago, with representatives of both MillerCoors and Molson Coors present.

[31] In the period between January 3 and January 26, 2011, Molson received information from a number of sources, including the NHL's New York City office, the President of the Edmonton Oilers, and a representative of the Ottawa Senators, that the NHL had a "deal" with Labatt for the NHL's Canadian rights. As a consequence, when Molson and the NHL met on January 26, 2011, Molson and the NHL thought it was going to be with respect to the U.S. NHL rights only.

[32] The meeting between the NHL, MillerCoors and Molson Coors took place on January 26, 2011. John Collins and Wachtel attended for the NHL. At the meeting:

- a. Mr. Collins raised the opportunity for MillerCoors to obtain the NHL's exclusive league sponsorship rights in the U.S.
- b. After some discussion, Andy England (MillerCoors) indicated that MillerCoors and Molson Coors were not interested in a U.S. only deal, but that they would be open to speaking with the NHL when both exclusive U.S. and Canadian sponsorship rights were jointly available.
- c. Mr. Collins indicated that although the NHL was currently in negotiations with Labatt about the Canadian rights, no contract or agreement had been signed. Mr. Collins indicated that the NHL would get back to Molson within the next 24 hours on whether the NHL could immediately enter into negotiations for a North America-wide exclusive sponsorship deal.

[33] After the meeting, Mr. Wachtel contacted Mr. McMann and asked him which NHL lawyer was working on the Labatt deal. Mr. Collins checked with Gary Bettman. On January 27, 2011 Mr. Collins called Mr. England and told him that the NHL was in a position to immediately enter into discussions for a North America-wide exclusive sponsorship deal that would include Canada. Mr. England told Mr. Collins that Molson would entertain such discussions but would

require an indemnity from the NHL concerning any litigation Labatt might commence against Molson.

[34] The NHL insisted that a deal with Molson be negotiated quickly. Immediately legal counsel for both sides became involved. Terms were discussed and Molson and the NHL began drafting a letter agreement on Saturday, February 5, 2011. It was executed on February 8, 2011, and provided for a further definitive agreement to be negotiated containing the principle terms set forth in the letter agreement “as well as other customary terms and conditions for sponsorships of this type”. It provided for substantially more money to be paid by Molson than what had been agreed between the NHL and Labatt. It contained an indemnity in favour of Molson against the expenses and costs of litigation by Labatt against Molson.

Position of Labatt

[35] Labatt says that once the proposal was received from the NHL on September 6, 2010, the 60 day exclusive negotiating period for the parties to negotiate the terms of a renewal of the agreement commenced. That exclusive negotiating period was twice expressly extended to October 22, 2010. Labatt’s position is that by that point, the NHL had waived the time limit for exclusivity and extended it indefinitely in order to complete an agreement on the terms of the renewal of the agreement. In the alternative, Labatt says that the NHL, by its conduct, represented an intention that it would not rely upon the strict time limits

[36] Labatt says that by November 12, 2010 the parties came to an agreement on the terms of renewal. That agreement was evidenced by the term sheet that passed between the parties that contained the business terms as agreed. Labatt says that the “terms of renewal” of the agreement contained in the renewal clause in section 7 mean something less than a fully negotiated, long form agreement and that what was required was only an agreement as to the business terms for the renewal of the agreement.

[37] Labatt says that because an agreement on the terms of renewal was reached within the exclusivity period extended indefinitely by the NHL, the NHL was precluded by the renewal clause from entering into negotiations with Molson for the Canadian NHL sponsorship rights.

[38] Alternatively, if the exclusivity period was not extended beyond October 22, 2010, Labatt says that as terms of an agreement were not reached by then, under the renewal clause it had 15 days to deliver its final offer. Labatt delivered a proposal to the NHL on October 27, 2010 and if it is to be considered Labatt's final offer, the NHL had 10 days to "accept or reject" it under the renewal clause. Labatt says that the NHL did neither within 10 days and thus was not free to negotiate with Molson. Labatt says that to reject, the NHL was required to take some positive step within the 10 days to communicate its rejection. The delivery of a proposal by the NHL on November 8, 2010 could not be considered a rejection within the meaning of the renewal clause as it was after the 10 day period in which the Labatt offer had to be accepted or rejected.

[39] Labatt says that as a result of the inability of the NHL to negotiate with Molson resulting from the renewal clause, an order should be made (i) prohibiting the NHL and Molson from implementing their agreement; (ii) prohibiting the NHL from implementing an agreement with any third party to the extent it includes terms agreed between Labatt and the NHL; (iii) prohibiting the NHL from terminating negotiations towards execution of a definitive agreement with Labatt to implement the business terms set out in the term sheet until the earlier of (a) an impasse is reached after good faith negotiations (b) a definitive agreement is executed, or (c) June 30, 2014; (iv) in the alternative to (iii), a reference to a judge with respect to damages.

NHL/Molson position

[40] The NHL, supported by Molson, says that the renewal clause is unenforceable, being only an agreement to agree. Alternatively, if it is enforceable, it had no application by November 12, 2010 when Labatt says an agreement on terms of renewal was reached because the exclusive negotiating period had expired on October 22, 2010 and there was no extension of it.

[41] The NHL was not precluded from negotiating with Molson because the final Labatt proposal of October 27, 2010 was rejected by the NHL within the 10 day period required in the renewal clause.

[42] Further, the renewal clause required not an agreement on only some business terms during the exclusive negotiating position, but rather a new binding agreement containing all terms, and in any event, there was no agreement between the parties on the material and essential business terms.

[43] Furthermore, if the renewal clause was breached by the NHL, Labatt is not entitled to specific performance and has not suffered any compensable damages for which a reference is warranted.

[44] Molson takes the further position that it is an innocent third party who was advised by the NHL that it was free to negotiate with Molson.

Analysis

(a) Enforceability of the renewal clause

[45] The NHL says that the renewal clause is no more than an agreement to agree and therefore unenforceable. In my view this is overly simplistic. The clause does contain an exclusive first right to Labatt for a period of time to negotiate the terms of a renewal of the agreement. But it also contains a negative covenant restricting the NHL from negotiating with third parties until a number of steps have been taken.

[46] Negative covenants preventing one party from contracting with another have been enforced at least since the days of *Lumley v. Wagner* (1852), 21 L.J. Ch. 898 in which an injunction was granted preventing the opera singer Wagner from performing at another theater after she had contracted with the plaintiff not to do so without the plaintiff's consent. Justice Sharpe in his work *Injunctions & Specific Performance*, looseleaf (Aurora: Canada Law Book, 2010) § 9.230 stated:

[T]he plaintiff had an interest to protect in having the exclusivity clause enforced specifically, which was quite distinct from his interest in having the defendant perform at his own theatre. If she were to sing at a rival theatre in competition with the plaintiff, as a star performer she would attract customers away from the plaintiff and the loss the plaintiff would thereby suffer would be difficult to measure.

[47] Labatt refers to the following statement of Lord Ackner or in *Walford v. Miles* [1992] 2 A.C. 128 (H.L.) in a case involving an agreement by a vendor to deal exclusively with a plaintiff:

I believe it helpful to making these observations about a so-called "lock-out" agreement. There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B, agrees for a specified period of time, not to negotiate with anyone except A in relation to the sale of his property.

[48] In this case the renewal clause provides timelines during which the NHL is precluded from negotiating with any third party. If the principle of English contract law as enunciated by Lord Ackner that requires a specified period of time for the negative covenant is applicable, the renewal clause as drafted complies with that. There is an issue, however, whether such a specified period of time is required under Canadian law. In *Irving Industries Ltd. v. Canadian Long Island Petroleums Limited* [1975] 2 S.C.R. 715 it was held that a right of first refusal unlimited as to time was enforceable and not caught by the rule against perpetuities. This case was followed in *Harris v. McNeely* (2000) 47 O.R. (3d) 161 (C. A.) which held that a right of first refusal was a negative covenant and not void even though it could last indefinitely.

[49] In my view the negative covenant contained in the renewal clause precluding the NHL from negotiating with a third party until certain steps have been taken is enforceable.

(b) Did the NHL waive the 60 day exclusive period before October 22, 2010?

[50] In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 Major J. stated the following regarding the elements of waiver:

19. ...The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20. Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[51] Labatt says that the waiver of the time limit for exclusivity beyond October 22, 2010 should be inferred from the conduct and statements of the parties.

[52] In my view of the evidence, the employees of the NHL dealing with Labatt did waive the date of October 22, 2010 as being the end of the exclusive negotiating period for Labatt to negotiate the terms of a renewal.

[53] The initial 60 day exclusive period expired at midnight on October 5, 2010. On October 5, 2010 Mr. McMann told Mr. Ramella of Labatt that he was working on a counterproposal to the proposal earlier made by Labatt and it was likely that the NHL would be able to do so within the next few days. When the parties met on October 8, 2010, the NHL stated that it was not negotiating with any other party and that it intended to complete a deal with Labatt. Mr. Wachtel of the NHL apologized for the delay in the NHL responding to Labatt and, as an act of good faith, agreed to extend the exclusive negotiating period by one week. On October 10, 2010 Mr. Wachtel confirmed the extension in an e-mail which included the statement:

We are committed to getting a deal done with you and as such, will extend the exclusive negotiating window another week until 10/15. Should we need more than this week we can re-address this date again. Labatt has been a good NHL partner and its always been our intent to start and finish this process with you.

[54] This statement indicated an intention on the part of the NHL that it wanted to "get a deal done" with Labatt within the exclusive negotiating window provided in the renewal clause and that if required, a further extension of that exclusive negotiating window could be addressed. Mr. Wachtel was responding to his understanding that Labatt was focused on the exclusive negotiating period. There was a shared understanding by the negotiators on both sides that they wished to make their agreement within the exclusive negotiating window, and that is effectively what Mr. Wachtel was representing to Labatt.

[55] After the NHL delivered its counter-offer to Labatt on October 13, 2010, and in advance of the meeting set for October 15, 2010, Mr. Ramella of Labatt e-mailed Mr. Wachtel and Mr. McMann at the NHL on October 14, 2010 and said that in advance of the meeting the next day, "wanted to set expectations that an extension until 10/22 will be needed". Mr. McMann's reply e-mail of the same day stated "Extension to Oct 22 will not be an issue". This reply was consistent with the tenor of the earlier e-mail from Mr. Wachtel on October 10, 2010 extending the exclusive negotiating window to October 15, 2010. There was no suggestion in this e-mail that there would not be any further extensions if necessary.

[56] Labatt relies heavily, with reason, on Mr. McMann's e-mail of Wednesday, October 20, 2010 in advance of a scheduled meeting for the following day to discuss the anticipated NHL response to the previous Labatt counter-offer of October 13, 2010. The e-mail in its entirety is as follows:

Sorry the day got away from me.

Can we set time to present our final tomorrow (Thurs) at 4pm - your office is fine, or you're welcome to come to mine.

In advance of the meeting I want to let you know that we WILL NOT ask for more \$'s.

We appreciate that you're at your upward limit here. Based on where you've come in, and the respective asks, there are some elements on your last counter that I need to modify.

I think we're essentially there and don't expect any of these to be deal-breakers.

My day is jammed so I'm thinking if the 4pm slot is still open I come over at and present the offer. I can leave after that to give you time to discuss on your own and we can either continue the discussion and finalize things over dinner and the game or set aside time on Friday or early next week.

Looking forward to working through these last couple of points with you.

See you tomorrow. (underlining added)

[57] The NHL contends that the reference to the NHL presenting its final is an indication of its intention to make its next or last offer within the exclusive negotiating window. I think that is a fair inference, but telling against the NHL in light of the inability of the NHL to make its final offer before October 22, 2010, as will be discussed.

[58] The e-mail also indicates the NHL's view that the parties are very close to a deal ("we're essentially there") that perhaps could be finalized on the following day over dinner and the hockey game to which they were both going or on Friday, October 22, 2010 "or early next week". Early next week, of course, was beyond the October 22, 2010 date, the previously extended date of the exclusive negotiating window.

[59] At the meeting on October 21, 2010, the NHL presented an incomplete counter-offer to Labatt. At that meeting it raised for the first time an issue regarding premiums. Labatt had proposed to spend a minimum amount of money on premiums, being branded merchandise given away to promote beer sales. The NHL had a concern that the amount that Labatt proposed to spend indicated that it might flood the market with NHL-branded merchandise that would impact the NHL's own retail business. The 2008 agreement had provided for a minimum amount to be spent on premiums without any maximum and issue the raised for the first time at the October 21, 2010 meeting was what the maximum should be. Mr. McMann said that the NHL was not in a position to make a "full counter-offer" on the premiums issue because he had to first speak to the NHL's consumer products division, and the NHL proposal on October 21, 2010 contained a caveat regarding that.

[60] Mr. McMann acknowledged on cross-examination that by October 22, 2010 he had not obtained the information he needed from the NHL's consumer products division to make a full

counter-offer to Labatt. Mr. McMann also acknowledged on cross-examination that as of October 22, Labatt was waiting for the NHL to make a full counter-offer on the premiums issue.

[61] The NHL had indicated its desire to negotiate a deal during the exclusive negotiating window. When viewed in the context of Mr. McMann's e-mail of October 20, 2010, the inference I draw from what was said at the October 21, 2010 meeting regarding the inability of the NHL to make its "final" (the language of the e-mail) or "full counter-offer" (Mr. McMann's language) by October 22, 2010 and the NHL's acknowledgment that Labatt was waiting for the NHL to make a counter-offer that would deal with the NHL's position on the premiums issue, is that the NHL unequivocally waived reliance on October 22, 2010 as the end of the exclusive negotiating window.

[62] Mr. McMann made the assertion in his affidavit that "the parties had agreed between themselves that [the exclusive negotiating window] would end on October 22, 2010" and that "It was obvious to all that it was over". These were bald statements without any particulars of evidence to support them. Like much of Mr. McMann's affidavit, I view these statements as essentially argument. In oral argument, Mr. O'Sullivan said that the statement of Mr. McMann was based on the fact that Mr. McMann's e-mail of October 14, 2010 said that an extension to October 22, 2010 would not be an issue, and thus there was no agreement to extend it further. This is hardly an agreement by the parties that the exclusive negotiating window would end on that date.

[63] The first time that the NHL took the position that the exclusive negotiating window terminated on October 22, 2010 was in this litigation. Mr. McMann acknowledged on cross-examination that at the time he wrote his e-mail of October 20, 2010, and on the following two days, he did not know that the NHL would later take the position that the exclusive negotiating period had ended on October 22, 2010. He also acknowledged that it would have been disingenuous of him to write his October 20, 2010 e-mail had he known the NHL intended to take that position. The fact that it would have been disingenuous is an acknowledgment that the purport of the October 20, 2010 e-mail and what took place the following two days was contrary to the position now being taken by the NHL.

[64] The NHL acknowledges that from the commencement of negotiations through to January 26, 2011, it was not interested in negotiating the renewal rights with anyone other than Labatt, and that it did not give any consideration to so doing. Thus it is by no means a stretch to conclude that it intentionally waived reliance on the October 22, 2010 date as being the final date of the exclusive negotiating window. It is also noteworthy that there is no documentation, including any internal e-mails or memoranda, indicating that the NHL or Labatt considered the exclusive negotiating window to have expired on October 22, 2010.

[65] Molson contends that its review of the evidence indicates that Labatt told the NHL that it was content to allow the exclusive negotiating window to lapse. I do not accept that. In an e-mail of September 24, 2010, Mr. Ramella said to Mr. McMann that he was getting pressure to come to terms “within the existing window, or at max 1 week later”. However, Labatt was aware of the window and after that e-mail there were two express extensions of the exclusive negotiating period by the NHL. The NHL could not have been led to believe by that e-mail that Labatt was content to negotiate after the expiry of the exclusive negotiating period.

[66] The counter-offer sent to the NHL on October 27, 2010 was not on my view of the evidence a final offer by Labatt following the end of the exclusive negotiating period. There is no evidence that it was intended by Labatt to be such an offer. It was sent by Ms. Thomson of Desperado Marketing, who was assisting Labatt on this matter, with a subject line “Document for Discussion”. The text of the e-mail said “Please find attached the document for today’s discussion”. The discussion was to be with the NHL’s marketing personnel knowledgeable about the premiums issue, and the attached spreadsheet contained a change that reduced the premium royalty, which had been the topic of discussion between the parties on October 21, 2010. As it turned out, the discussion could not take place until days later as the NHL marketing people were not available.

[67] Regarding the e-mail of October 27, 2010 and attachment from Ms. Thomson, Mr. McMann stated in his affidavit that “Pursuant to the terms of the renewal provision in the 2008 Letter Agreement, this was properly considered to be Labatt’s “final offer”.” If this statement was intended to suggest that Mr. McMann at the time of receipt thought that, I do not accept it.

It does not say who if anyone “properly considered” that or when. Mr. McMann acknowledged on cross-examination that he was surprised to receive the October 27 offer from Labatt because at that stage the NHL had not been able to provide the full nature and extent of its concerns regarding the premiums issue and thus Labatt was not in a position to be responsive to the NHL’s concerns. If Mr. McMann had thought that the exclusive negotiating period had expired, he would have been expecting an offer from Labatt rather than be surprised by it.

[68] Moreover on November 5, 2010, 10 days after receiving the Labatt offer of October 27, 2010, Mr. McMann sent an e-mail to Mr. Ramella of Labatt asking if Mr. Ramella was free on the following Monday, November 8, 2010 “to walk through our position on premiums”. While there had been a call scheduled for this purpose on November 2, 2010, it appears from Mr. McMann’s e-mail that this was changed to November 8. If Mr. McMann had thought that the NHL had to “accept or reject” the Labatt offer of October, 27 within 10 days, his e-mail of November 5, 2010 was nothing of the sort.

[69] It was not until November 2, 2010 that Mr. McMann was able to speak with someone in the NHL's consumer product division about the premium issue. It was not until November 8, 2010 that the NHL presented a full counter-offer to Labatt that encompassed a resolution of the premiums issue that was satisfactory to the NHL. However, part of the resolution proposed by the NHL on November 8, 2010 introduced another issue that had not been raised by the NHL since its initial August 6, 2010 proposal. This second new issue related to premiums suppliers. The NHL proposed that Labatt use only NHL pre-approved suppliers. Under the 2008 Agreement, Labatt could use NHL pre-approved suppliers, or its own suppliers, the difference being Labatt would pay the NHL a higher royalty rate for the latter.

[70] It was at the meeting of November 12, 2010 to discuss the premiums issue that the parties came to an agreement on terms covering the premiums issue, and thus on all of the business terms contained in the excel spread sheet referred to as the Term Sheet.

[71] I conclude that the NHL intentionally and unequivocally waived indefinitely the October 22, 2010 time limit for the exclusive negotiating period and that the waiver continued to November 12, 2010.

[72] I do not infer this waiver from the negotiations that took place after October 22, 2010, although these negotiations are consistent with the waiver.

(c) Is the NHL estopped from relying on October 22, 2010 as the end of the exclusive negotiating period?

[73] Promissory estoppel, closely related to the doctrine of waiver, requires the party relying on the doctrine to establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, it acted on it or in some way changed its position. A party should not be allowed to go back on a choice when it would be unfair to the other party to do so. See *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13 and *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, *supra*, at para. 18.

[74] In my view, for the same reasons that I have found waiver on the part of the NHL, I find that the NHL should be estopped from relying on the date of October 22, 2010 as the date on which the exclusive negotiating period ended. The NHL gave Labatt reason to believe that the exclusive negotiating period had not ended.

[75] Labatt relied on what the NHL represented. Had the actions and statements of the NHL leading to October 22, 2010 not been made, the inference I draw is that Labatt would have requested, and no doubt obtained, a further extension of the exclusive period. The NHL wanted to do a deal with Labatt and had no reason not to extend it. On cross-examination, Mr. McMann acknowledged that to refuse a request for an extension of the exclusive negotiating period might have ticked off Labatt and run an unnecessary risk of scuppering the negotiations. The NHL did not want to do that as Labatt had been a good NHL partner.

[76] I do not read Mr. Thompson's affidavit as being contrary to this conclusion. Mr. Thompson stated that after October 21, 2010 Labatt did not contemplate asking for a further extension of the exclusive negotiating window. He gave a number of reasons, including what had been said in Mr. McMann's e-mail of October 20, 2010. It is understandable that Labatt did not further consider the issue in light of the events and statements made to Labatt up to and including October 21, 2010.

(d) Was an agreement on terms of renewal reached?

[77] To some extent, this issue requires the renewal clause to be interpreted. The parties differ as to the meaning of some of the terms.

[78] The principles in interpreting a contract are well known. In *The Plan Group v. Bell Canada* (2009), 96 O.R. (3d) 81 (C.A.), Blair J.A. stated the following regarding the principles to be applied in interpreting a commercial contract:

37. ...Broadly speaking, however - as this Court noted in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, at para. 24 - a commercial contract is to be interpreted,

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),

(d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity. [Footnotes omitted.]

38. In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999), 119 O.A.C. 78 (C.A.), at para. 17, each word in an

agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement." Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that - while apparently logical at one level - does not make sense given the overall wording of the document and the relationship of the parties.

[79] If there is ambiguity in a contract, a court may look to the conduct of the parties and method of performance of the contract as evidence of what the parties intended. See *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989) 70 O.R. (2d) 737 (C.A.) per Finlayson J.A. and the authorities cited by him. See also *Canada Square Corp. et al. v. VS Services Ltd. et al.* (1981) 34 O.R. (2d) 250 per Morden J.A. at para. 26 in which caution in looking at subsequent conduct is urged.

[80] In his affidavit, Mr. McMann asserted that "Nothing but a binding long-form agreement would suffice for the NHL to enter into a new sponsorship agreement with Labatt." That is the position taken by the NHL in this application.

[81] What passed back and forth between the parties started as a 10 page proposal from the NHL. Eventually the terms were put on an excel spread sheet that was sent back and forth. It contained a heading "Business Terms Summary". Labatt refers to it as a Term Sheet. No form of an agreement to be signed was drafted by either side prior to November 12, 2010.

[82] Labatt says that the Term Sheet was an agreement on the terms of renewal of the 2008 Agreement for the purposes of the renewal option. It says that the words "terms of a renewal" and "terms of such a renewal" in the renewal clause mean something less than a fully negotiated, long-form legal agreement and the language in the renewal clause connotes that what was required was an agreement to the business terms for the renewal of the agreement, or, in business parlance, a term sheet.

[83] There is little doubt that the persons involved in the negotiations for the renewal in 2010, including Mr. McMann who was the lead negotiator for the NHL, thought they had arrived at an agreement by November 12, 2010. In his e-mail of October 10, 2010 to Mr. Ramella, Mr.

Wachtel said he was “committed to getting a deal done” and extended the exclusive negotiating window for that purpose. In his e-mail of October 20, 2010 to Mr. Ramella and Mr. Thompson, in which he referred to presenting “our final” the next day, Mr. McMann said “I think we are essentially there” and “Looking forward to working through these last couple of points with you”. Mr. McMann acknowledged on cross-examination that at the time of those e-mails, he was not contemplating that a long-form agreement would be agreed during the exclusive negotiating period.

[84] On Friday November 12, 2010 after the meeting with Labatt at which there was a shake of hands, Mr. McMann sent an e-mail to Mr. Wachtel, to whom he reported. The subject line stated “Labatt is done!” and the e-mail stated “You can veto but we’re there on all our terms”. Mr. Wachtel did not veto it. It is quite evident that Mr. McMann though an agreement had been reached with Labatt on “all our terms”.

[85] On Monday, November 15, 2010, Mr. McMann emailed Mr. Norrington at Labatt, saying “Hey Kyle, If you're ok, was going to have Nicole reach out to the Bud Team to get them to a game next week. Think it'd be good to get the core team around a table to discuss the deal and how to best activate it.” Activation is a word used in the marketing world that means taking steps to proceed with marketing, and the e-mail was another indication that Mr. McMann understood that a deal had been reached with Molson.

[86] On November 12, 2010, Mr. Thompson sent an e-mail to several persons in Labatt and said :

Good news all! We have come to business terms with the NHL and have a hand shake on our new agreement. Next steps will be to move to long form agreement for signatures. Term is 3 yrs ending June 30th, 2014.

[87] Thus it is clear that the negotiators for both sides thought they had an agreement.

[88] At issue is whether the parties reached a binding agreement sufficient to preclude the NHL from later negotiating with Molson.

[89] The renewal clause relates to the renewal of “this Agreement”. The clause was section 7 of the 2002 agreement, which was a detailed 25 page signed agreement with schedules. The 2008 agreement was a 14 page signed letter agreement, and provided for a definitive marketing agreement to be entered into, which did not occur. It provided that until a definitive agreement was signed, the terms of the 2002 agreement would be in force to the extent not inconsistent with the letter agreement. Thus the “Agreement” in the renewal clause to be renewed in 2010 is the 2008 letter agreement as supplemented by the terms of the 2002 agreement that had been incorporated into the 2008 letter agreement.

[90] It is also fair to say that the heading of the clause in the Agreement, being “Renewal Option” is a misnomer. The Agreement is not simply being renewed, nor is it just an option. The NHL is obliged to deliver a proposal for renewal of the Agreement and the parties have to negotiate and agree on the terms of the renewal before there is a renewal. Whether the parties include or discard clauses contained in the Agreement is a matter of negotiation.

[91] My interpretation of the renewal clause, taking into account the applicable principles, including the language of Doherty J.A. that each word in an agreement is not to be placed under an interpretative microscope in isolation and given a meaning without regard to the entire document, is as follows:

1. At the first stage, the NHL is to deliver a written proposal to renew the Agreement. It is intended that the proposal is to include those terms that the NHL wishes to include in a new agreement. I view the word “proposal” as amounting to an offer. If the NHL does not wish to include in the new agreement provisions in the 2008 letter agreement as supplemented by the 2002 agreement, it is not obliged to do so.
2. In the second stage, during which Labatt has the exclusive first right to negotiate the terms of a renewal of the Agreement, Labatt can offer to include in a new agreement whatever terms it wishes. If Labatt does not wish to include in the new agreement provisions in the 2008 letter agreement as supplemented by the 2002 agreement, it is not obliged to do so, nor is it precluded from proposing terms not in those agreements.

3. The “terms of a renewal of this Agreement” to be negotiated are all, not some, of the terms to be included in the new agreement. Because the Agreement is being renewed does not mean that any term of the Agreement survives without it being contained in a term that is agreed. In this regard, had the initial proposal of the NHL of September 10, 2010 been accepted by Labatt, either orally or in writing, there would have been an enforceable agreement, notwithstanding that the NHL proposed no terms regarding intellectual property and its protection, various representations and warranties, indemnification, confidentiality, termination, rights of the parties upon default, and common contractual provisions such as an “entire agreement” clause and a severability clause. Because the 2008 letter agreement supplemented by the 2002 agreement contained clauses of that nature does not mean that the terms of a renewal of the Agreement necessarily has to include such terms. It depends on what terms are agreed.
4. The phrase “the terms of a renewal of this Agreement” that are to be negotiated does not mean just some of the terms of an agreement, such as so-called business terms, and that other terms are to be later negotiated. The purpose of an exclusive negotiating provision is to give a party the exclusive right to negotiate an agreement, not part of an agreement, for an agreed period of time. It makes no commercial sense to assert that its intention requires only a partial agreement be agreed during the exclusive period in order to prevent the other party from negotiating with third parties.
5. The new agreement does not have to be in writing or any particular form, unless one of the agreed terms provides otherwise. If one of the agreed terms is that the new agreement will have no force until an agreement in writing is signed, the new agreement will require a written signed agreement in order to be enforceable. The initial NHL proposal did not provide any term regarding the need for a written agreement. The initial Labatt offer contained the cryptic words “Terms Sheet pending written agreement”, but this appears to have been dropped in the subsequent offers back and forth. Thus the terms agreed on November 12, 2010 did not require a written signed agreement.

6. It would be open to the parties to agree to a term that further terms are to be negotiated. Whether such a term would be enforceable would depend on the language used in the term. In this case, there was no such term agreed by the parties in the terms agreed on November 12, 2010.
7. In the third stage, if there is no agreement on the terms of a renewal of the Agreement within the exclusive negotiating period, Labatt will within 15 days offer a proposal to which it would be willing to agree. This offer would have to contain all, not some, of the terms of a new agreement that would be agreeable to Labatt.
8. In the fourth stage, the NHL has 10 days to accept or reject Labatt's offer, after which time, if the NHL rejects it, it will be free to negotiate with any third party, subject to the proviso contained at the end of the renewal clause. I see no language which requires any positive step required to reject Labatt's offer. A failure to accept within 10 days would in my view amount to a rejection.

[92] In my view, the parties reached an agreement on the terms of a renewal of the Agreement by the end of their meeting on November 12, 2010. That is, they agreed on all terms that were to constitute a renewal of the Agreement. There was no term agreed that there had to be a written signed agreement in order for the new agreement to have effect.

[93] While the Labatt negotiators may have been told on November 12, 2010 at the time of the handshake that the terms had to be presented to Mr. Collins, the COO, and that NHL lawyers needed to deal with it, the evidence of which is contested, and had previously been told that the COO of the NHL needed to approve the response of the NHL to the first Labatt offer, and while Mr. McMann said to Mr. Wachtel on November 12, 2010 that "You can veto but we're there on all our terms", there was no vetoing by the NHL of the terms agreed on November 12, 2010. After November 12, 2010 neither the NHL nor Labatt resiled from the terms agreed on that day.

[94] I do not accept the position of the NHL that a long-form signed agreement was required in order for there to be a binding agreement with Labatt. That was not a term that was negotiated

and settled on November 12, 2010. Had the NHL wished such a term, it could have negotiated it. It did not. There is no doubt that from the past experience, both parties contemplated that some form of agreement would be negotiated and settled, but no term to that effect was contained in the agreement arrived on November 12, 2010. Mr. McMann's assertion in his affidavit that nothing but a long-form agreement would suffice is inconsistent with his e-mail of November 12, 2010 to Mr. Wachtel that stated "Labatt is done and "we're there on all our terms".

[95] For the same reason, I do not accept the position of Labatt that once there was agreement on "business terms" on November 12, 2010, the NHL was required in good faith to negotiate a long-form agreement. While it is evident that Mr. Thompson thought that the next step was to "move to" a long-form agreement to be signed, there was no agreement reached with the NHL that such a step should occur. It would make sense for the parties to try to achieve that, but no agreement requiring that was made. The NHL does not suggest there was such an agreement, and says that if there were it would be unenforceable.

[96] So far as the draft letters of intent are concerned, I agree with the NHL that it is not necessary to look at them because in my view the words "the terms of renewal of this Agreement" in the renewal clause are unambiguous. Looking at what occurred, however, does not indicate any clear picture.

[97] The draft letters of intent no doubt contained cautious language that was the product of lawyers. The cautious language did not reflect the spirit and content of what the businessmen who negotiated the deal agreed to on November 12, 2010.

[98] The draft that first came from Labatt stated that it was a non-binding letter of intent "regarding Labatt's interest in entering into a Sponsorship Agreement with NHL", the Sponsorship Agreement referred to being a long-form agreement to be entered into following the execution of the letter of intent and described in the draft as "a definitive Sponsorship Agreement which will incorporate agreed upon terms finalized during recent negotiations as well as standard terms and conditions to be mutually agreed to by the parties, such as renewal and termination rights, representations, warranties, obligations, covenants, indemnification and other provisions

that are customarily found in sponsorship agreements of the kind contemplated by this letter of intent.” That first draft also stated:

If the Sponsorship Agreement is not entered into by the parties, again subject to the confidentiality obligation, the parties agree that they shall be under no further obligation to each other.

[99] What the implication of referring to “no further obligation” was is not clear, but suggested that there was some existing obligation at the time. As the draft letter of intent said that it was to be non-binding, the existing obligation presumably came from somewhere else, such as the agreement reached on November 12, 2010.

[100] The responding draft of the NHL, to which Labatt was agreeable, contained language indicating an intention that the parties were bound until 2014. It provided:

If the Sponsorship Agreement is not completed by June 30, 2014, each Receiving Party agrees that any Confidential Information of a disclosing party will be immediately delivered to the Disclosing Party or destroyed by such Receiving Party.

Other than the confidentiality obligation outlined above, the parties agree that this letter of intent shall be **non-binding**. If the Sponsorship Agreement is not entered into by the parties, again subject to the confidentiality obligation, the parties agree that they shall be under no further obligation to each other.

[101] This clause contemplates that the Sponsorship Agreement may not be completed by June 30, 2014, the end date of the term agreed on November 12, 2010, and that if it is not entered into by the parties, they agree that they shall be under no further obligation to each other. It contemplates a relationship between the parties until then, and again the reference to “no further obligation” suggests some obligation.

[102] It is clear that lawyers from both sides had a hand in these draft letters of intent. I do not read them as indicating a clear intention on the part of either Labatt or the NHL that no binding agreement was reached by the negotiators on November 12, 2010.

[103] The NHL asserts that the later negotiations over a long-form agreement indicate a lack of agreement on terms said to have been agreed on November 12, 2010. However, the evidence does not support a conclusion of a lack of agreement. Rather it supports a concern of both sides that what was subsequently put on paper in the draft long-form agreement on a few points did not accurately reflect what was agreed. Even on that score it would appear from the evidence of Mr. Thompson that he accepted the draft on all the points in question but one. The evidence does not detract from the fact that an agreement was reached on November 12, 2010.

Summary

[104] In my view the language of the renewal clause and the evidence leads to the conclusion that the exclusive negotiating period was extended indefinitely by the NHL to enable the negotiators to arrive at a negotiated agreement, that an agreement was reached on November 12, 2010 that precluded the NHL from negotiating with Molson and that there is no obligation on Labatt or the NHL to negotiate a long-form agreement.

[105] I realize that this result is not exactly what either side contended. But it is the view I take of the case.

Remedy

[106] Labatt seeks enforcement of two of the NHL's obligations, namely:

1. the NHL's negative covenant to refrain from negotiating with third parties during the exclusive negotiating period and after reaching terms of a renewal; and
2. the NHL's consequent obligation to negotiate in good faith with Labatt toward the execution of a long form agreement, having agreed on terms of a renewal.

[107] Regarding the second obligation, I have found that there is no such obligation to negotiate towards a long-form agreement. Had there been, its enforcement would have been an

issue as the NHL contends that a court will not enforce an agreement to agree. There is language in the draft letters of intent, the form of which was agreeable to the parties but not signed because of issues regarding the attachment that Labatt required in order to sign the letter of intent, which provides objective criteria to be taken into account in negotiating the Sponsorship Agreement. Whether an agreement to negotiate a long-form agreement would be enforceable, taking into account the authorities such as *EdperBrascan Corporation v. 117373 Canada Ltd.* (2000), 50 O.R. (3d) 425 (S.C.J.); aff'd (2002), 22 B.L.R. (3d) 42 (Ont. C.A.) and *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada* [1995] 2 S.C.R. 187 need not be answered.

[108] As to the first obligation, the renewal clause precludes the NHL from negotiating with a third party unless a number of steps have taken place. This is a negative covenant that Labatt seeks to enforce.

[109] Labatt relies on the principle that a plaintiff will rarely be denied specific relief to enforce a negative covenant and that there is no requirement to establish irreparable harm or that the balance of convenience favours the granting of an injunction. See Sharpe, *Injunctions & Specific Performance*, looseleaf (Aurora: Canada Law Book, 2010) at § 7.240; *Certicom Corp. v. Research In Motion Limited*, (2009), 94 O.R. (3d) 511 at para. 84-86; *William Ashley Ltd. V. Manufacturers Life Insurance Co.* (1995), 28 R.P.R. (3d) 105 at para. 19; and *Singh v. 3829537 Canada Inc.*, [2005] O.J. No. 2402 (Ont. S.C.) at para. 4.

[110] The general principle regarding the enforcement of negative covenants is known as the *Doherty v. Allman* principle and is stated in Sharpe, *supra*, in § 9.10

In many cases, injunctive relief will be appropriate as the specific remedy for breach of contract. Where a party has by contract undertaken not to do something, specific performance of that obligation is achieved by enjoining its breach. Where specific performance is sought of a positive obligation, the plaintiff must establish that the ordinary remedy of damages would be inadequate. In the case of negative obligations, however, the courts have more readily granted injunctive relief. Reference is almost invariably made to the dictum of Lord Cairns L.C. in *Doherty v. Allman*:

If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

Stated in such absolute terms, the doctrine that an injunction will always be available may be misleading but, if taken as a statement of general principle, it accurately reflects the attitude of the courts to contractual obligations which are negative in character. Even where the obligation extends over a period of time, the court does not concern itself with problems of enforcement.

[111] The granting of an injunction, however, is a discretionary remedy and relevant circumstances ought to be considered in the exercise of the discretion.

[112] In this case Labatt and Molson point to the admission of Labatt contained in an undertaking on cross-examination:

Labatt does not allege that it will suffer irreparable harm if the primary relief sought herein is not granted.

If the Court determines the damages are the only remedy available to Labatt, Labatt agrees that it does have data available that it anticipates will permit properly qualified experts to render an opinion with respect to the lost revenue and lost brand equity value it would suffer in the event that Labatt is foreclosed from becoming the NHL's exclusive sponsor for the next seven years.

[113] While this admission might preclude an injunction enforcing a positive obligation, is not necessarily the case that it should preclude an injunction to enforce a negative covenant.

[114] Labatt says however that the promotional rights associated with Labatt's relationship with the NHL are a unique and important property, a uniqueness that it is entitled to protect. In specific performance cases involving positive obligations, such as in real estate sale agreements, uniqueness of the property is an important consideration in considering whether

specific performance should be ordered. In *Semelhago v. Paramadeva*, [1996] 2 S.C.R. 415 Sopinka J. stated:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

See also *Erie Sand and Gravel Limited v. Tri-Barclays Acres Inc.* (2009), 97 O.R. (3d) 241 (C.A.) and the authorities cited.

[115] There is little doubt on the evidence that a sponsorship contract with the NHL for Canada is a unique marketing opportunity. The uncontested evidence of Labatt is set out in the affidavit of Kyle Norrington, Marketing Director, Budweiser and Regional Brands for Labatt in Canada and need not be referred to at length. He was not cross-examined on his affidavit. Amongst the things he stated is the following:

The NHL and the access it provides to Labatt to activate against hockey is the single greatest opportunity to grow Labatt's share in Canada. There is no other substitute for this national access to these consumers. The nexus of sport/heritage/emotion/tradition in hockey has no other Canadian comparable.

NHL sponsorship and its link to Canadian values is extremely important in reinforcing that the Budweiser is "locally made" and relevant for Canadian beer drinkers. There is no better way to connect to Canadian values than through our number one sport and league.

Labatt acknowledges that other sports sponsorships (and indeed sponsorships and other areas altogether) can be valuable. However,... In Canada they are simply not substitutes for the NHL sponsorship.

[116] Mr. Norrington also stated in his affidavit that the NHL agrees with this proposition. He referred to the presentation made by the NHL to Labatt on May 26, 2010. It is evident from that presentation that the NHL holds the same view about the marketing opportunities attached to being the NHL sponsor.

[117] Mr. Norrington also referred to statements made by Molson following the agreement that it reached with the NHL. It is quite evident that Molson views its agreement with the NHL as a singular opportunity. The president and CEO of Molson Coors Canada was quoted

as saying, amongst other things, that "...hockey is so central to Canada and so central to our psyche. And that's why it's powerful for Molson Canadian", and that the agreement with the NHL "will allow us to... take the brand to a whole new level".

[118] Molson contends that Labatt should be restricted to damages on the basis that the order sought by Labatt would adversely affect Molson Coors and MillerCoors which are innocent third parties. I have some difficulty with the concept of Molson being an innocent third party without notice of any possible claim by Labatt.

[119] The first meeting between the NHL and representatives of Molson Coors and MillerCoors took place on January 26, 2011. Prior to that meeting Molson's had received information from a number of sources, including the NHL's New York City office, the President of the Edmonton Oilers, and a representative of the Ottawa Senators, that the NHL had a "deal" with Labatt for the NHL's Canadian rights. On January 26 and 27, 2011, Molson was told by Mr. Collins, the COO of the NHL that while there were negotiations going on with Labatt, no agreement had been signed and that the NHL was free to discuss the Canadian sponsorship rights with Molson. There are no NHL or Molson notes of any such conversation. Mr. Patrick McEleney of Molson Coors who attended the meetings with the NHL acknowledged on cross-examination that the oral assurances to Mr. England was not considered sufficient by Molson Coors to satisfy it that it should proceed with the negotiations and as a result Molson sought and obtained an indemnity from the NHL concerning any litigation Labatt might commence against Molson Coors and MillerCoors concerning the NHL's exclusive sponsorship rights. During negotiations, in which lawyers for both sides were involved, a statement was said to have been made by the NHL's general counsel to Molson Coors chief legal officer that there were no bars to negotiations.

[120] I note that the evidence as to what was said to Mr. England and the evidence as to what was said by the NHL's general counsel to Molson Coor's chief legal officer was not direct evidence, but based on information and belief. In light of the fact that there are apparently no notes by anyone about statements that the NHL was free to talk with Molson, the evidence has

perhaps less probative value than had it been direct, particularly as Labatt obviously is in no position to have direct evidence to contradict it.

[121] A Molson internal e-mail from Ms. Judy Davey, the Vice-President Marketing for Molson Coors in Canada who participated in the negotiations with the NHL captures the concerns of Molson about a deal between Labatt and the NHL. This e-mail was sent late in the day on January 27, 2011 after Molson had been told by Mr. Collins that the NHL was free to talk to Molson. Ms. Davey stated:

I enter into this discussion with great suspicion because we have heard from a number of sources including the NYC office of the NHL that a deal with Labatt was done. Legal should be a part of the conversations.

[122] Molson made a decision to negotiate with the NHL after hearing from different sources that there was a deal between the NHL and Labatt. It was aware that there could be litigation with Labatt and obtained an indemnity from the NHL expressly referring to litigation or threatened litigation by Labatt. The indemnity covered damages, costs etc. arising out of litigation that might be asserted by Labatt based on Molson's agreement with the NHL allegedly breaching an agreement, interfering with contractual relations or prospective advantages between Labatt and the NHL or infringing rights granted by the NHL to Labatt.

[123] Molson did not seek any confirmation of no deal from Labatt before doing so, and while that may be understandable as Molson and Labatt are fierce rivals, it does not hide the fact that Molson was well aware of the issue. Molson is not someone who bought property knowing nothing at all about some third party rights in the property. It was not satisfied with the oral assurances from the NHL and took an indemnity to reduce the risk that it chose to run.

[124] It is argued that Labatt intentionally lied to the NHL during negotiations and that should prevent any equitable relief in favour of Labatt. I do not agree. In his e-mail of September 24, 2010 to Mr. McMann, Mr. Ramella gave as a reason for asking the NHL to respond quickly the fact that he was being pressured by his New York office to come to an agreement. That reason was not true. It was in my view a ruse in negotiations that had little or no effect and

hardly rises to the level of preventing equitable relief. It is also argued that Labatt waited until nearly the end of negotiations to advise the NHL that it wished to change the beer for the sponsorship from Bud Light to Budweiser, and this too should preclude equitable relief. I do not agree. The NHL and Molson were both negotiating to get the best possible deal from their own points of view, and the decision by Labatt was tactical in order to avoid being asked for more money. Mr. McMann said he was surprised by the switch but excited about it, and had he known of it earlier would have negotiated for a higher broadcast spend. In my view, this is hardly activity precluding equitable relief.

[125] In my view the NHL should not be entitled to profit from its breach of its agreement with Labatt. Labatt should be entitled to its bargain and to its unique marketing position resulting from the agreement to be the Canadian sponsor of the NHL for the next three years. In my view, there should be an injunction preventing the NHL and Molson from proceeding with their agreement so far as the Canadian rights are concerned.

[126] The NHL and Molson letter agreement has not yet started to run, and while on its terms it is binding on the parties, there are still steps to be taken under it, including the negotiation of a definitive agreement to supersede the letter agreement.

Conclusion

[127] A judgment is to go as follows:

- (i) It is declared that section 7 of the Agreement prohibited the NHL as of November 12, 2010 from negotiating with Molson or any other third party with respect to Canadian rights inconsistent with the terms of the renewal of the 2008 Agreement agreed upon by the NHL and Labatt on November 12, 2010.
- (ii) The NHL and Molson are enjoined from implementing the terms of their agreement dated February 8, 2008 or any other agreement between them, to the extent that such agreement includes the exclusive sponsorship and related rights agreed upon by the NHL and Labatt on November 12, 2010.

[128] Labatt is entitled to its costs from the NHL and Molson. If costs cannot be agreed, written submissions along with a cost outline in accordance with the rules may be made by Labatt within 10 days and responding submissions may be made within a further 10 days.

Newbould J.

Released: June 03, 2011

CITATION: Labatt Brewing Co. Ltd. v. NHL Enterprises Canada L.P. 2011 ONSC 3219
COURT FILE NO.: CV-11-9122-00CL
DATE: 20110603

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

**LABATT BREWING COMPANY LIMITED
and LABATT BREWERIES OF CANADA LP**

Applicants

- and -

**NHL ENTERPRISES CANADA, L.P.,
NHL INTERACTIVE CYBERENTERPRISES,
LLC,
NHL ENTERPRISES, L.P., NHL
ENTERPRISES B.V.,
MOLSON COORS CANADA INC. and
MILLERCOORS LLC**

Respondents

REASONS FOR JUDGMENT

Newbould J.

Released: June 03, 2011