

SCHEDULE "D"

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research, for orders pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985 c. C-34 as amended.

AND IN THE MATTER OF the acquisition by ADM Agri-Industries, Ltd. of the milling assets of Maple Leaf Mills Inc.

B E T W E E N :

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

and

ADM AGRI-INDUSTRIES, LTD.,

Respondent

CONSENT ORDER IMPACT STATEMENT

1. This statement is filed by the Director of Investigation and Research (the "Director") pursuant to section 77 of the *Competition Tribunal Rules*. It describes the circumstances surrounding, and expected effect on competition of, the draft consent order attached to the notice of application as Schedule "C" and submitted by agreement of the parties to this proceeding. Unless otherwise expressly defined herein, terms used in this statement incorporate the meaning ascribed to them in the draft consent order.

2. The respondent ADM Agri-Industries, Ltd. ("ADM") does not contest the facts herein for the purposes of this application, but nothing in this application shall be taken as an admission now or in the future by ADM of any facts or submissions which would support the allegation that the acquisition prevents or lessens, or is likely to prevent or lessen, competition substantially in any market.

I. NATURE AND PURPOSE OF THE PROCEEDING

3. The Director files with this statement a statement of grounds and material facts, attached as Schedule "A" to the notice of application under section 92 and 105 of the *Competition Act* (the "Act").

4. As indicated in the statement of grounds, the Director has concluded that the acquisition by ADM of the assets of MLM in the Province of Quebec prevents or lessens, or is likely to prevent or lessen, competition substantially in the provision of bulk hard wheat flour in the Quebec/Atlantic Canada market.

5. The Director has also filed as the covering documents to this statement and to accompanying Schedules "A", "B" and "C", a notice of application and a consent form (Schedule "E") which indicate that the Director and the respondent have reached an agreement on the terms of a draft consent order ("DCO"). This DCO, if implemented, will avoid the substantial prevention or lessening of competition resulting from the merger. The Director requests the Competition Tribunal's approval of the DCO pursuant to section 105 of the Act to give effect to this agreement.

II. GENERAL DESCRIPTION OF THE DRAFT CONSENT ORDER

6. The DCO provides for a combination of divestiture and supply obligations by the respondent ADM.

7. The DCO, designed to avoid the substantial lessening of competition which would otherwise arise from the merger, provides for the divestiture of the Oak Street mill, accompanied by a supply agreement pursuant to which ADM will make available to the purchaser of the mill a supply of bulk hard wheat bakery flour for up to four and a half years, a period of time sufficient to enable the purchaser to become familiar with the market, generate a sufficient and stable customer base, and subsequently be in a position to expand quickly.

III. PROPOSED REMEDY

8. The proposed remedy which the Director seeks involves the divestiture of a mill to reduce ADM's market share and to enable the establishment of an effective competitor in the Quebec/Atlantic Canada market, accompanied by a supply agreement between ADM and the purchaser of the mill.

(a) Divestiture of the Oak Street Mill

9. The Director has determined that the primary remedy to preserve competition in the relevant market is to require the divestiture of the Oak Street mill in Montreal, Quebec, together with the supply agreement.

10. With a rated daily milling capacity of 3,000 hundredweights, the Oak Street mill first became operational in 1965. It is a dedicated hard wheat flour mill producing bulk hard wheat flour and bulk durum flour. The Oak Street mill has its own wheat elevator and bulk flour storage facility. It is equipped with rail sidings to receive wheat shipments by rail; in addition, it has access to the same grain elevator in the Montreal harbour as all other competitors operating flour mills in Montreal. The mill is equipped with the facilities required to load trucks used for the shipment of bulk flour to customers. The mill has adequate site space for expansion or remodeling. The mill is capable of operating independently (on a stand-alone basis) in its current lines of business and at its current levels of output. The Oak Street mill is a relatively efficient mill in that its cost structure is comparable to that of other larger mills in Canada, which provides a basis for it to become an effective competitor in the market.

(b) Supply Agreement

11. The supply agreement, attached to the DCO as schedule II, would provide the purchaser of the Oak Street mill with the right to purchase from ADM up to 3,500 hundredweights of bulk hard wheat bakery flour per day, for a period of three years from the closing date of the purchase. This agreement also provides the purchaser with an option to extend the supply agreement for an additional period of up to 18 months. This option is conditional upon the prospective purchaser's undertaking to expand the capacity of the Oak Street mill. The supply agreement is available to the purchaser even if expansion of the mill occurs prior to the expiry of the initial three-year period of the agreement. The DCO requires that any disputes between ADM and the purchaser with respect to the supply agreement be resolved through a specified and binding arbitration process.

IV. ANTICIPATED IMPACT OF THE PROPOSED REMEDIES

12. For a minimum of three years and assuming no further capacity expansion during this period, the combination of divestiture and supply obligations would make 6,500 hundredweights of bulk hard wheat bakery flour per day immediately available in the Quebec/Atlantic Canada market to the purchaser of the Oak Street mill. This represents a market share of up to 15.5% of the hard wheat flour milling capacity in the Quebec/Atlantic Canada market. ADM's post-merger share during the period of the supply agreement in the Quebec/Atlantic Canada market would range between 45.5% and 53.5% depending on the extent that the purchaser of the Oak Street mill draws upon the supply agreement. During this period and the following 18 months if the purchaser of the Oak Street mill chooses to extend the agreement, while not re-establishing the same market share structure that existed pre-merger, MLM will be replaced by another competitor, capable of providing long-term, vigorous and effective competition to ADM within the entire Quebec/Atlantic Canada market. The divestiture therefore maintains the same basic market structure as that which existed prior to the merger, in that there will continue to be two relatively large, viable and effective competitors in a position to constrain a significant and non-transitory price increase by ADM.

13. Following the termination of the supply agreement, there will be considerable incentive for the purchaser of the Oak Street mill to continue to provide effective competition by expanding the capacity of the Oak Street mill. First, as noted above, the supply arrangement can be extended for a further 18-month period if the purchaser undertakes to significantly expand the capacity of the Oak Street mill before the end of the three-year period. Second, with the subsequent reliance upon the supply agreement, the purchaser of the Oak Street mill could expand capacity to maintain its customer base following the termination of the supply agreement. Third, capacity expansion to the mill, should it occur, can be completed in less than one year once construction begins; the Oak Street mill will therefore be in a position to expand quickly.

14. For all the above reasons, the combined divestiture and supply agreement package ensures that any substantial prevention or lessening of competition which would have otherwise arisen in the supply of bulk hard wheat flour in the Quebec/Atlantic Canada market as a consequence of the merger will be avoided.

15. If the divestiture of the Oak Street mill, with the accompanying supply agreement, is not accomplished by ADM within 15 months, nor by the trustee during the following 3 month period, ADM will comply with the alternative "backstop" remedy set out in the confidential schedule I to the DCO. This "backstop" remedy provides an incentive to ADM to accomplish the primary divestiture successfully and in a timely manner, and provides the Director and the Tribunal with the assurance that, if the Oak Street mill divestiture to a qualified purchaser does not occur, an alternative remedy which would also avoid any substantial prevention or lessening of competition arising from the merger will be put into effect.

16. Pending the completion of the proposed divestiture, the operation of the Oak Street mill is subject to a hold-separate arrangement executed by ADM on February 25, 1997 and which will be the object of a consent interim order of this Tribunal. The hold-separate arrangement is intended to ensure that the Oak Street assets are preserved and maintained in a viable state, and that the Oak Street mill will be an ongoing and competitively independent supplier of bulk hard wheat flour in the Quebec/Atlantic Canada market until divestiture is achieved.

V. MARKET INTEREST

17. The Director has made contacts with market participants and found that there is preliminary interest in the purchase of the Oak Street mill accompanied by the supply agreement. At the date of filing, ADM has received four inquiries in writing from persons currently involved in the milling business to obtain information on the proposed divestiture of the Oak Street mill accompanied by the supply agreement.

VI. ALTERNATIVE TO THE SETTLEMENT

18. The alternative to the settlement proposed would be to proceed with a fully contested hearing of the Director's challenge to the merger as it relates to the supply of bulk hard wheat flour in the Quebec/Atlantic Canada market. The Director has accepted the DCO for two reasons. First, the proposed Oak Street mill divestiture and supply arrangement will, in the Director's view avoid the substantial prevention or lessening of competition arising from the merger. Second, the DCO provides a more timely and certain outcome for customers of bulk hard wheat flour in Quebec/Atlantic Canada than litigated proceedings.

VI. CONCLUSION

19. For the reasons presented herein, the Director recommends the settlement and asks the Competition Tribunal to approve the draft consent order.