

Competition Tribunal



Tribunal de la Concurrence

CT - 1991 / 001 – Doc # 31

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

AND IN THE MATTER OF the acquisition by Hillsdown Holdings (Canada) Limited of 56% of the common shares of Canada Packers Inc.

B E T W E E N:

The Director of Investigation and Research

Applicant

- and -

Hillsdown Holdings (Canada) Limited,
Maple Leaf Mills Limited,
Canada Packers Inc. and
Ontario Rendering Company Limited

Respondents



ORDER REGARDING CONFIDENTIALITY

Date of Hearing:

May 21, 1991

Presiding Member:

The Honourable Mr. Justice B.L. Strayer

Counsel for the Applicant:

Director of Investigation and Research

Peter J. Cavanagh
Debbie Campbell

Counsel for the Respondents:

Hillsdown Holdings (Canada) Ltd.
Maple Leaf Mills Ltd.
Canada Packers Inc.
Ontario Rendering Co. Ltd.

Glenn R. Leslie
George C. Vegh

COMPETITION TRIBUNAL
ORDER REGARDING CONFIDENTIALITY

The Director of Investigation and Research

v.

Hillsdown Holdings (Canada) Ltd. et al

A pre-hearing conference was held on May 21, 1991 to settle certain issues arising out of the affidavits of documents of the parties.

The Director of Investigation and Research ("Director") also sought an amendment to the Notice of Application to add Nine Five Investments Ltd. as a respondent. Counsel advised me at the pre-hearing conference that the respondents consented to such an amendment and it was left to counsel to agree on the actual wording of the necessary changes in the Notice of Application.

With respect to the affidavit of documents of the Director, the respondents reserved the right to apply at a later date for an order requiring the Director to deliver a further and better affidavit. The Director reserves the right to contest the confidentiality of any particular document for which the respondents claim confidentiality, after the present issues are settled.

With respect to the affidavit of documents of the respondents, and the request by the respondents for a confidentiality order similar to that issued in the case of *Director of Investigation and Research v. Southam Inc. et al* (CT - 90/1), three issues emerged:

- 1) Whether the respondents should be required to produce the documents listed in schedule 5 of their affidavit of documents;
- 2) With respect to use of the confidential documents of the respondents, whether the Director and his staff should be required to sign a confidentiality agreement as proposed by the respondents; and
- 3) With respect to those documents, on what terms should the documents be disclosed to consultants or experts retained on behalf of the Director?

With respect to issue (1), the respondents have listed in schedule 5 documents which paragraph 10 of their affidavit says are

...not in their power or control because the documents have either been obtained from third parties on the condition that the confidentiality of such documents would be protected or were prepared from information provided by such confidential documents.

By sub-rule 14(3) of the *Competition Tribunal Rules*, a party is only obliged to allow inspection and copying of documents included in its affidavit of documents where such documents are within that party's "possession or control".

Counsel for the respondents argued that a party must have "legal possession" to be obliged to produce. Several authorities were cited for this proposition.¹

While I accept the authority of those cases, each case must turn on its own facts as to whether a party has "legal possession". In my view the respondents have not in their affidavit of documents provided the Tribunal with enough facts to make a determination on this point. In effect, the affidavit states a conclusion of law, namely that the documents were obtained on certain terms (such terms being described only in the most general way) with the result that the respondents do not have the documents in their power or control. Given the importance of this question in Tribunal proceedings, I will give the respondents a further opportunity to prove that they do not have possession or control. While I cannot and ought not to prescribe the evidence which they must produce for this purpose, at a minimum they should provide the Tribunal with the written agreements with the third parties which according to counsel support this conclusion. I will give them until June 14, 1991 to produce such evidence and, failing that, the documents must be treated on the same basis as those in schedule 2 where the confidentiality can be contested with respect to the intrinsic nature of each document. If necessary an additional pre-hearing conference will be held on June 21, 1991, to determine whether the respondents have proven that the documents in question are not within their possession or control.

¹ *Ivey v. Canada Trust Co.* [1962] 0.W.N. 62 (Ont. H.C.); *Continental Can Co. of Canada Ltd. v. Bank of Montreal* (1974) 3 O.R. (2d) 167 (Ont. H.C.); *Bowlen v. R.* (No. 2) (1977) 5 C.P.C. 215 (F.C.T.D.).

With respect to issue (2) the Director complains as to the form of the proposed confidentiality agreement which the respondents have requested to have in the form identical to that prescribed by Reed J. in the *Southam* case. In particular, the Director objects to being obliged, or to his officers being obliged, in order to have access to confidential documents made available to his counsel, to sign such an agreement which in the form requested by the respondents would cover all "information...over which claims for confidentiality have been advanced..." and would give him access to such "information" only on condition that it neither be copied nor disclosed to other persons nor that it:

...be used by me for any purpose other than in connection with this proceeding. (emphasis added)²

The Director says that this would preclude him from fulfilling his statutory duties such as under section 10 of the *Competition Act* which mandatorily requires him to cause an inquiry to be made:

(b) whenever he believes on reasonable grounds that:

...

(ii) grounds exist for the making of an order under Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed....

² Memorandum of the Applicant, Pre-Hearing Conference, May 21, 1991, para. 13.

Counsel for the Director argues that if the Director gains access to documents in this proceeding he would be precluded from using either the document *or the information in that document* for the carrying out of his statutory duty under section 10 to cause an inquiry to be held.

This argument was made before my colleague Reed J. in the *Southam* case (Supra). She rejected it and her decision is now under appeal. While I believe the wording of the confidentiality agreement approved in that case and proposed by the respondents in this case could be improved, I see no sufficient reason for departing from the form of words approved in *Southam* in the decision which is now under appeal. I have made only one small change in the first paragraph to emphasize that a party is not precluded from making other uses of such information if it acquires the same information by means other than these proceedings.

With respect to issue (3), the Director complains of a provision in paragraph 2 of the order issued in the *Southam* case and which the respondents seek to have included in my order in this case. This provision requires that where confidential documents are provided by counsel to the respective clients or experts retained by them, each such person shall execute a copy of the confidentiality agreement and deliver that agreement to the party whose document is thus disclosed. The Director complains that in this way the respondents will

become aware of any experts the Director consults even if such experts are never called as witnesses. I am not convinced that any serious prejudice will result to the Director in this respect and I believe that such procedure will potentially facilitate enforcement of the confidentiality agreement by the respondents. This obligation will, of course, be mutual and those to whom counsel for the respondents provide any confidential documents of the Director will similarly be required to provide counsel for the Director with a copy of a signed confidentiality agreement.

The parties retain their rights to challenge the confidentiality of any particular documents in the respective affidavits, once the present order and annexed confidentiality agreement are issued.

FOR THESE REASONS, THIS TRIBUNAL ORDERS THAT:

1. All documents in respect of which confidentiality has been claimed by the parties in their respective affidavits of documents shall, subject to agreement of the parties or further order, be maintained in confidence, and such documents shall not be made available to any person other than counsel to the parties.
2. Subject to paragraph 4, counsel to the parties may disclose such confidential documents to their respective clients, or experts retained by them, for

the purpose of preparing for the hearing of this matter provided that all such persons execute and deliver to the party whose documents are in issue, a Confidentiality Agreement in the form attached as an annex hereto.

3. The confidentiality of the documents referred to herein shall be maintained throughout the hearing of these proceedings, subject to an order by the Tribunal ordering that any such documents may be publicly disclosed.

4 The documents listed in Schedule 5 of the affidavit of documents of the respondents dated May 4, 1991 need not be produced for inspection or copying by the respondents at present, provided that if the respondents have not filed adequate proof with the Tribunal by June 14, 1991 that they do not have possession or control of these documents, the Director may apply for such documents to be treated the same as other documents referred to in this order for which a claim of confidentiality is made. Such application shall if necessary be made at a pre-hearing conference to be held on June 21, 1991 for such purposes.

5. The parties having agreed that the Director may amend the notice of application to add Nine Five Investments Ltd. as a respondent, counsel will settle the wording of that amendment.

6. This order is subject to further direction of the Tribunal.

DATED at Ottawa, this 23rd day of May, 1991.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) B.L. Strayer
B.L. Strayer

**ANNEX TO ORDER REGARDING CONFIDENTIALITY
DATED MAY 23, 1991**

CT - 1991 / 001

IN THE MATTER of an application by the Director of Investigation
and Research for an order pursuant to section 92 of the
Competition Act, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by
Hillsdown Holdings (Canada) Limited of 56%
of the common share of Canada Packers Inc.

B E T W E E N:

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Applicant

- and -

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Respondents

CONFIDENTIALITY AGREEMENT

COMPETITION TRIBUNAL
CONFIDENTIALITY AGREEMENT

The Director of Investigation and Research

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Hillsdown Holdings (Canada) Ltd. et al

IN CONSIDERATION of being provided with information in connection with this proceeding over which claims for confidentiality have been advanced, I, _____, of the City of _____, in the _____ of _____, hereby agree to maintain the confidentiality of such information. It shall not be copied or disclosed to any other person nor shall the information so obtained be used by me for any purpose other than in connection with this proceeding.

Upon completion of this proceeding, I agree that such information, and any copies of same, shall be dealt with in accordance with instructions from my counsel or as prescribed by order of the Competition Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on May 23, 1991 in this regard, a copy of which is attached as Schedule "A", and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that neither the Director, the respondents herein nor other owner of the document may have an adequate remedy at

law and would be irreparably harmed in the event that any of the provisions of this agreement are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Director, the respondents herein or other owner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.

Insert for Experts

I will promptly, upon the request of the party providing the document, advise where such material is kept by me and at the conclusion of my involvement in proceedings deliver to the said party the material without retaining any copies thereof. All documents relating to the material will be destroyed, except that I may retain in my confidential files, subject to the requirements of confidentiality imposed by this agreement, materials prepared by me, such as study results and materials of a general nature which do not replicate the information contained in the confidential document.

I hereby attorn to the jurisdiction of the courts of any province in Canada to resolve any disputes arising under this Agreement.

Signed, sealed and delivered before a witness this _____ day of _____, 1991.

(Print Name)

(Witness)

(Signature)