**Date: 20070705**

**Docket: T-592-06**

**Citation: 2007 FC 704**

**Ottawa, Ontario, the 5th day of July 2007**

**PRESENT: THE HONOURABLE MR. JUSTICE MARTINEAU**

**BETWEEN:**

**FÉDÉRATION DES PRODUCTEURS ACÉRICOLES DU QUÉBEC**
**and**
**CINTECH AGROALIMENTAIRE, DIVISION INSPECTION INC.**

**Applicants**

**AND**

**CANADIAN FOOD INSPECTION AGENCY**
**and**
**ATTORNEY GENERAL OF CANADA**

**Respondents**

## REASONS FOR ORDER AND ORDER

[1] Under section 44 of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the AIA), the applicants, the Fédération des producteurs acéricoles du Québec (the Fédération) and Cintech Agroalimentaire, Division Inspection Inc. (Cintech), are applying for a review in this Court of a decision by the Canadian Food Inspection Agency (the Agency) dated March 14, 2006 authorizing

the disclosure of certain documents relating to the applicants. The Attorney General of Canada (AGC), a co-respondent with the Agency in this matter, argues that the application at bar should be dismissed.

## I. BACKGROUND

[2] The Fédération is a federation of eleven professional maple producers' unions and is officially responsible for marketing maple syrup products in the province of Quebec for the purposes of section 65 of the *Act respecting the marketing of agricultural, food and fish products*, R.S.Q., c. M-35.1. It applies and administers the Plan conjoint des producteurs acéricoles du Québec (decision 5057 of the Régie des marchés agricoles et alimentaires du Québec (the RMAAQ), 1990 G.O. 2, 743) (the Joint Plan). To administer the Joint Plan, the RMAAQ approved *inter alia* the *Réglement sur l'agence de vente des producteurs acéricoles* (decisions 7449 and 7484 of the RMAAQ, 2002 G.O. 2, 1707, amended by subsequent RMAAQ decisions) (the Sales Agency Regulation).

[3] Essentially the Fédération, which is the sales agency for maple products in Quebec, is a single outlet through which all maple syrup produced in Quebec and marketed in large containers is sold by maple producers to interested buyers. The Fédération uses two maple syrup warehouses in Quebec for which the Fédération holds a registration under the *Maple Products Regulations* (C.R.C. c. 289). These warehouses belong to 9020-2292 Québec Inc., which also does business under the name "Decacer". Accordingly, as required by the *Règlement des producteurs acéricoles sur les*

*normes de qualité et le classement* (decision 7360 of the RMAAQ, 2001 G.O. 2, 7217) (the Quality Standards Regulation), all syrup produced in Quebec in large containers must be inspected and graded before being sold by the Fédération on behalf of producers.

[4] The Quality Standards Regulation also allows the Fédération to conclude agreements delegating the performance of the tasks of grading and inspection to a third party. Under this power, the Fédération concluded various agreements with the Centre d'innovation technologique agro-alimentaire (Cintech Agroalimentaire) that together covered the period from January 18, 2002 to February 28, 2006. Additionally, Cintech Agroalimentaire may itself assign the functions of grading and inspection to one of its wholly-owned subsidiaries, which it did by assigning these duties to Cintech. In practice, it is the employees of Cintech who act as inspectors.

[5] The Agency is a body corporate created pursuant to the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6 (the CFIA Act), which exercises its powers only as an agent of Her Majesty the Queen in right of Canada. The Agency is responsible for implementing and overseeing the application of certain legislation, including the *Canada Agricultural Products Act*, R.S.C. 1985 (4th Supp.), c. 20. Additionally, the Maple Products Regulations pursuant to which the Fédération obtained a registration were adopted in accordance with this enabling legislation on agricultural products.

## II. FACTS GIVING RISE TO THE APPLICATION AT BAR

[6] On or about December 5, 2005, a complaint was filed with the Agency against the Fédération. Various documents belonging to the applicants were attached to the complaint and were filed without their consent. Although the name of the person responsible for the complaint was not disclosed by the Agency (under the law, the person's identity must remain confidential), the applicants argue that the documents attached to the complaint came from a former Cintech employee who was dismissed.

[7] On or about January 16, 2006, the Agency received an access to information request in respect of the complaint. Representatives of the Quebec operational centre of the Agency identified and forwarded to the access to information division 45 pages of relevant documents, numbered 1 to 45. After deleting certain pages which he considered subject to section 3 of the AIA, Denis Châtelain, senior analyst in the Agency's Access to Information and Privacy Division, notified the applicants by letters dated February 13, 2006 of the existence of the access to information request and invited them to submit written representations in this regard.

[8] By letter dated March 1, 2006, the applicants objected to complete disclosure of all documents with page numbers 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 43, 44 and 45, on the ground that their disclosure was prohibited under section 20 of the AIA. They further objected, relying in so doing on the same section of the AIA, to complete disclosure of the document numbered page 4, which set out the

complaint itself and contained information which the applicants regarded as ill-founded and defamatory.

[9] By a letter dated March 14, 2006, Mr. Châtelain notified the applicants that the Agency would disclose only part of the 45 pages. In particular, pages 4, 10 to 14, 16 and 17, 26, 36 and 37, and 41 to 45 would be disclosed, that is, 16 pages. That decision is the subject of the application for review at bar.

## III. DOCUMENTS EXAMINED BY THE COURT

[10] At the start of the hearing held on May 31, 2007, counsel for the applicants confirmed to the Court that the applicants were no longer objecting to complete disclosure of the documents with page numbers 4 and 43. At the same time, the Agency noted that, in connection with the access to information request, the documents with page numbers 15, 18 to 25, 27 to 32, 34, 35 and 44 would not be released. Additionally, pursuant to the submissions made in paragraph 96 of their memorandum of fact and law, the applicants no longer objected to release of the documents with page numbers 41 and 42. Consequently, the issue here exclusively concerns the applicants' objections to release of the documents with page numbers 10 to 14, 16, 17, 26, 33, 36, 37 and 45 (the documents examined) in order to prevent disclosure of their content. The applicants allege in paragraph 96 of their memorandum of fact and law, filed with the Court on October 2, 2006, in the section [TRANSLATION] "ORDER", that the document numbered page 33 was disputed and its release should be prohibited, whereas the Agency's decision dated March 14, 2006 had already

found that the document should not be communicated, and so should not be disclosed. Consequently, it appears in the case at bar that the document numbered page 33 is not at issue.

## IV. STANDARD OF JUDICIAL REVIEW

[11] In *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General),* 2003 FCA 257, at paragraph 15, the Federal Court of Appeal held, in accordance with the pragmatic and functional approach, that the appropriate standard of review for decisions on whether an exemption under subsection 20(1) of the AIA applies to documents to be disclosed is correctness (see also *H.J. Heinz Company of Canada Ltd. v. Canada (Attorney General),* 2006 FCA 378, at para. 15).

[12] Further, as part of an application for review pursuant to section 44 of the AIA, the Court should examine the matter *de novo* and, if necessary, proceed with a detailed review of each of the documents at issue filed (*Air Atonabee Ltd. (c. o. b. City Express) v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453, at para. 30 (F.C.T.D.) (QL)). That is what was done in the case at bar, in accordance with these provisions, although these reasons are stated in general terms.

## V. AGENCY'S CONTROL

[13] The Court must first deal with a preliminary argument submitted by the applicants. The latter maintain that article 2088 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, prevents documents illegally obtained by an employee, who was furthermore dismissed by her employer, being

communicated to the Agency. It follows that, under section 4 of the AIA, the Agency does not have legal “control” over the documents filed with the complaint without its consent. In short, they maintain it is therefore not necessary to consider the application of section 20 of the AIA.

[14] I cannot adopt the applicants’ argument for the following reasons.

[15] Subsection 4(1) of the AIA gives Canadian citizens and permanent residents a general right of access to documents under the control of a government institution, subject to the exemptions set out by Parliament. Even if documents are released to a government institution without the authorization of the third party involved, if they are documents under the control of the government institution, the AIA applies and for good reason. The issue then is whether the documents in question are covered by one of the exemptions set out elsewhere in the AIA. The way in which a government institution obtained the documents examined is not a relevant factor in determining whether a document may be disclosed under the AIA. In such circumstances, the fact that a government institution has documents in its possession within the legal or physical meaning of the word suffices for the AIA to be applicable (*Canada Post Corporation v. Canada (Minister of Public Works)* (C.A.), [1995] 2 F.C. 110, affirming an appeal from a Trial Division judgment, [1993] 3 F.C. 320).

[16] In general, it can certainly be said here that the documents considered are under the “control” of the Agency, since it has the function of implementing and overseeing the application of the *Maple Products Regulations*, which were adopted pursuant to the *Canada Agricultural Products*

*Act*, as discussed earlier in this judgment. The latter prohibits the marketing – whether in import, export or interprovincial trade – of a maple product which has been contaminated. This also includes the marketing of any non-contaminated product which has been mixed with a contaminated product. The complaint, which was based on documents the disclosure of which is at issue here, mentioned certain irregularities which occurred in the pasteurization of maple syrup in Fédération warehouses. According to the information contained in the complaint, the disclosure of which is no longer subject to any objection, maple syrup unfit for consumption was mixed with syrup meeting quality standards. The maple syrup in question had been collected from the ground and put into barrels during pasteurization for the 2003-2004 year.

[17] It is clear that under sections 20 *et seq.* of the *Maple Products Regulations*, Agency inspectors have the power to investigate a complaint, inspect premises where the alleged acts occurred, seize any contaminated maple product and obtain any relevant information from the applicants. Consequently, in the course of an investigation, an inspector from the Agency could have asked to see any relevant document held by the applicants, including the originals of the documents attached to the complaint. That being so, the fact that certain documents attached to the complaint dealt with inspection and quality control procedures voluntarily adopted by the applicants under provincial legislation or regulations is not a factor which allows the Court to exclude these documents from the scope of the AIA. If their relevance as evidence showing the commission of the alleged offences is disputed by the applicants, it is up to them to apply to the Agency for the documents to be withdrawn from the record and returned to them, if necessary. No such application has ever been made by the applicants.

[18] In these circumstances, I consider that all the documents represented by the 45 pages relating to the access to information request and mentioned in the notices sent to the Agency pursuant to section 27 of the AIA are legally under the Agency's control under section 4 of the AIA and should consequently be examined by the Court pursuant to section 47 of the AIA to determine whether any of the exemptions mentioned in subsection 20(1) of the AIA apply here.

## VI. APPLICATION OF SECTION 20 OF THE ACT

[19] For the purposes of these presents, only the application of paragraphs (*a*), (*b*) and (*c*) of subsection 20(1) of the AIA is at issue. Those exemption provisions are as follows:

| | |
|---|---|
| 20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains | 20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant : |
| (a) trade secrets of a third party; | *a*) des secrets industriels de tiers; |
| (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; | *b*) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers; |
| (c) information the disclosure of | *c*) des renseignements dont la |

| | |
|---|---|
| which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or | divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité . . . |

[20] Since the documents examined are the subject of a confidentiality order, the Court will deal with the documents in general terms only. I will first consider the objections based on paragraphs 20(1)(*a*) and (*c*) of the AIA, which must be dismissed based on the evidence in the Court record, and then look at the objection pursuant to paragraph 20(1)(*b*) of the AIA, which this time must be allowed in view of the evidence contained in the Court record.

A. ***Paragraph 20(1)(a) of the AIA***

[21] Page 45 contains the pasteurization codes and information on percentages of light transmission in syrup, for various regulatory classes of syrup. In particular, the applicants submitted that the pasteurization codes found on page 45 are information of a technical nature, which was developed by Bernard Perreault of the Fédération, with the obvious purpose of keeping it confidential. On the other hand, the respondents maintain that the information contained on page 45 is not a trade secret which under paragraph 20(1)(*a*) of the AIA the Agency is bound to refuse to disclose.

[22] Although page 45 contains technical information, I do not think it contains “trade secrets”. In *Société Gamma Inc. v. Canada (Secretary of State Department)*, [1994] F.C.J. No. 589 (QL), at paragraph 7, the Court defined a trade secret as “something, probably of a technical nature . . .

which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure".

[23] Most of the information to be found on page 45 is already in the public domain. Exhibit A of Sandra McKinnon's public affidavit mentions three documents from three websites which contain information regarding the percentages of light transmission in syrup and their correspondence to classes of syrup. Although those websites do not indicate pasteurization code numbers, I cannot see how this information is of such value that harm to its owner would be presumed by its mere disclosure. Consequently, page 45 is not covered by the exemption provided for in paragraph 20(1)(*a*) of the AIA. However, this finding does not exclude the possible application of paragraph 20(1)(*b*) of the AIA, and accordingly it will be taken into account below.

## B. ***Paragraph 20(1)(c) of the AIA***

[24] The applicants maintain that the exemption contained in paragraph 20(1)(*c*) of the AIA applies here, since disclosure of the documents examined would have a negative impact on the perception of consumers, buyers and producers of maple syrup, as well as on control by the Fédération of inventory of the product, which would be likely to harm its release. The respondents, for their part, argue that, on the contrary, the documents examined are covered by paragraph 20(1)(*c*) of the Act only if the third party in question is able to show that their disclosure

would be likely to result in harm or to show that there are clear reasons for a reasonable expectation of probable harm.

[25] Under paragraph 20(1)(*c*) of the AIA, the head of a government institution shall refuse to disclose information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party. In *Canada Packers Inc. v. Canada (Minister of Agriculture)* (F.C.A.), [1989] 1 F.C. 47, the Court interpreted paragraph 20(1)(*c*) of the AIA as requiring a "reasonable expectation of probable harm". Further, with regard to the requirement of evidence of "material financial loss", Mr. Justice MacKay concluded at paragraph 43 of *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*, [1994] F.C.J. No. 1059 (QL), that evidence of "reasonable expectation of probable harm" must be presented.

[26] In my opinion, paragraph 20(1)(*c*) of the AIA does not apply here. In the case at bar, the applicants submitted no evidence on the basis of which the Court can find that the disclosure of the documents in question could reasonably be expected to result in probable harm. The risk alleged is speculative and remote. In the circumstances, Bernard Perrault's affidavit containing general allegations that the disclosure of information could be expected to result in material loss and damage is not persuasive.

C. ***Paragraph 20(1)(b) of the AIA***

[27] Finally, the applicants maintain that the documents examined contain information covered by paragraph 20(1)(*b*) of the AIA. The respondents do not dispute that the documents examined are not generally available to the public and that they are directly concerned with the inspection, pasteurization and conservation of syrup, which is undertaken by the applicants in order to sell and market maple products. However, since the applicants' activities are carried out in the public interest and the marketing of maple syrup is an activity regulated by both levels of government, in the respondents' view the disclosure of the documents examined should be authorized by the Court.

[28] Considering the evidence of a public nature entered in the Court record, after examining each of the documents objected to by the applicants, and considering the arguments submitted by counsel at the public hearing and at the *in camera* portion of the hearing when the content of each document was discussed, I am of the opinion that paragraph 20(1)(*b*) of the AIA applies to the documents examined here as a whole.

[29] For the exemption set out in paragraph 20(1)(*b*) of the AIA to apply, the information contained in the documents examined must be

1. financial, commercial, scientific or technical information;
2. confidential information;
3. information supplied to a government institution by a third party; and
4. information consistently treated in a confidential matter by the third party.

[30] These four conditions have been met here.

[31] In the case at bar, the documents examined contain information of a technical or commercial nature. They may contain instructions from management regarding the inspection of syrup, the handling of barrels of syrup or the control of inventory. These technical notifications must be complied with by inspectors and other employees. They may also contain internal memoranda or e-mails exchanged between employees on the grading, disposal, pasteurization, handling or regrading of syrup, including certain observations made by inspectors on the quality of the syrup itself or the general condition of the barrels containing it. The latter information relates directly to the marketing of the syrup.

[32] I am further persuaded that the documents examined are confidential in nature, in that according to the evidence in the Court record they have never been publicly circulated by the applicants and are still not available to the public.

[33] In this regard, I have also considered the comments made by MacKay J. in *Air Atonabee*, *supra*. At paragraph 41, he suggested the following procedure to determine whether a given document contains "confidential information":

> . . . whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:

> (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

[34] In the case at bar there is no evidence in the record that the commercial and technical information contained in the documents examined can be obtained from sources otherwise accessible by the public or can be obtained by observation or independent study. I also do not believe that the regulatory nature of the Fédération's activities confers a general right of public access to the information contained in the documents examined. If, pursuant to federal or provincial regulation, documents that may contain financial, commercial, scientific or technical information are disclosed by the Fédération to the Agency or the RMAAQ, the question would then be whether they were communicated confidentially by the Fédération with the reasonable expectation that they would not be disclosed to the public. The Court is not concerned here with confidential information that was deliberately provided by third parties, namely, the applicants, at the request of the government institution, namely, the Agency, but information that was provided by a fourth party, namely, the person making the complaint, without the authorization of the third party in question.

[35] I note that in *SNC-Lavalin, supra*, the Court observed that "third party" within the meaning of paragraph 20(1)(*b*) of the AIA is not limited to the applicant under section 44 of the AIA. At paragraph 35, MacKay J. wrote the following:

> The respondent submits that paragraph 20(1)(*b*) cannot apply to the evaluation report because it was not supplied to PWC by the applicant, a third party, but rather by a "fourth party", a consultant retained by PWC. That does not preclude the application of this provision, in my view, for "third party" is defined by the Act, s. 2, as including any party other than one that requests information or the government institution.

[36] Finally, based on all the evidence entered in the Court record, I consider that in any case the documents examined were treated confidentially by the applicants.

[37] Consequently, under paragraph 20(1)(*b*) of the AIA, the head of the Agency is required to refuse to disclose the documents examined.

## VII. CONCLUSION

[38] The application at bar must be allowed. In principle, under subsection 53(1) of the AIA, the costs of and incidental to all proceedings in the Court shall be in the discretion of the Court and shall follow the event, unless the Court orders otherwise. In the case at bar, although there are two applicants and two respondents, there will only be one bill of costs against the respondents.

## ORDER

**THE COURT ALLOWS** the application for review and orders the Agency to not disclose to the access to information requestor the documents covered by the access to information request in docket A-2005-0218 / dc and with page numbers 10 to 14, 16, 17, 26, 33, 36, 37 and 45 covered by the decision of March 14, 2006, as well as documents with page numbers 15, 18 to 25, 27 to 32, 34, 35 and 44, which by the parties' admission should also not be released in order to prevent their disclosure. The applicants will be entitled to their costs against the respondents; only one bill of costs to be prepared in the circumstances.

"Luc Martineau"
Judge

Certified true translation
Susan Deichert, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-592-06 |
| **STYLE OF CAUSE:** | FÉDÉRATION DES PRODUCTEURS ACÉRICOLES DU QUÉBEC and CINTECH AGROALIMENTAIRE, DIVISION INSPECTION INC. v. CANADIAN FOOD INSPECTION AGENCY and ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | May 31, 2007 |
| **REASONS FOR ORDER AND ORDER BY:** | The Honourable Mr. Justice Luc Martineau |
| **DATED:** | July 5, 2007 |

**APPEARANCES:**

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| Marie Crowley | FOR THE RESPONDENTS |

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| Justice Canada<br>Civil Litigation | FOR THE RESPONDENTS |