**CITATION:** Miller & Smith Foods Incorporated v. Citadelle, Coopérative de Producteurs de Sirop Dérable, 2024 ONSC 6133
**COURT FILE NO.:** CV-23-00703522-0000
**DATE:** 20241104

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Miller & Smith Foods Incorporated

**AND:**

Citadelle, Coopérative de Producteurs de Sirop Dérable/Maple Syrup Producers' Cooperative

**BEFORE:** J.T. Akbarali J.

**COUNSEL:** *Sam Zucchi*, for the plaintiff

*Michael R. Bookman and Aaron Gold*, for the defendant

**HEARD:** November 4, 2024

## ENDORSEMENT

### Overview

[1] The defendant, Citadelle, Coopérative de Producteurs de Sirop Dérable/Maple Syrup Producers' Cooperative (« Citadelle ») brings this motion for an order that certain agreements it must rely on in this litigation be sealed and not form part of the public record. The plaintiff consents to the motion.

### Brief Background

[2] The plaintiff is a food ingredient supplier and broker providing industrial food ingredients and account management services across Canada and the United States.

[3] Citadelle is an agricultural cooperative that processes and distributes certain products around the world, including micro-filtered not-from-concentrate cranberry juice ("NFC"). Among Citadelle's buyers is The Coca-Cola Trading Company, LLC ("Coca-Cola"). Citadelle's relationship with Coca-Cola is governed by Master Supply Agreements ("MSAs") which set out the overall terms governing the supplier relationship, and Individual Supply Agreements ("ISAs"), which set out the specifics of the supply. ISAs are entered into pursuant to the MSAs. The terms of the MSAs are deemed incorporated into their corresponding ISAs.

[4] In its action, the plaintiff alleges that it has entered into an agreement with Citadelle to provide account management services in exchange for 3% commission on all sales of NFC to

Coca-Cola in the United States. Citadelle has not defended the action, but disputes the plaintiff's claims.

[5] Citadelle delivered a Request to Inspect Documents without prejudice to its rights to challenge the jurisdiction of the Ontario courts to adjudicate the plaintiff's claim.

[6] In its response to the Request to Inspect Documents, the plaintiff delivered copies of MSAs and ISAs between Citadelle and Coca-Cola.

[7] The MSAs and ISAs include detailed confidentiality clauses that impose obligations of confidentiality on Citadelle and Coca-Cola. A representative of Coca-Cola has sworn an affidavit on this motion indicating that the information in the MSAs and ISAs is commercially sensitive, and the release of such information could cause competitive harm to Coca-Cola or other Coca-Cola entities. Specifically, Coca-Cola's competitors could acquire information that could be used to impair Coca-Cola's supplier relationships and bargaining power. Coca-Cola has not authorized the disclosure of any information related to its supplier agreements; to the contrary, it wishes to keep the terms of its relationship with Citadelle confidential.

[8] Similarly, Citadelle argues that the MSAs and ISAs include information commercially sensitive to its interests, including about its proprietary information, exclusive technology, financial information and performance criteria, all of which could be used by its competitors to under Citadelle in future negotiations with Coca-Cola.

[9] It is these MSAs and ISAs over which Citadelle seeks a sealing order.

**Analysis**

[10] Under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 48, a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed, and not form part of the public record.

[11] The most recent case on protective orders from the Supreme Court of Canada, *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, reiterates that court proceedings are presumptively open to the public. "[T]he open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy": *Sherman Estate,* at para. 1.

[12] Confidentiality and sealing orders and related publication bans are governed by a discretionary test that balances the public interest in open courts with other public interests that the open court principle may compromise. As the Court described in *Sherman Estate,* at para. 38:

> In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> > (1) court openness poses a serious risk to an important public interest;

> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[13] All three prerequisites must be met before a protective order can be made: *Sherman Estate*, para. 38.

[14] I consider each of these prerequisites in turn.

Does court openness pose a serious risk to an important public interest?

[15] It is the commercial interests of Citadelle and Coca-Cola that are engaged in this motion. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 55, the Court concluded that, to justify a sealing order, an important commercial interest cannot be specific to the party requesting the order, but must be one which can be expressed in terms of a public interest in confidentiality.

[16] In this case, disclosure of the information at issue would cause a breach of a confidentiality agreement. The Supreme Court recognized in *Sierra Club*, at para. 55, that the breach of a confidentiality agreement "can be characterized more broadly as the general commercial interest of preserving confidential information."

[17] In *Sierra Club*, at para. 60, the court held that a protective order requires the applicant to demonstrate that: (i) the information in question has been treated at all relevant times as confidential; (ii) on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; (iii) the information in question must be of a confidential nature in that hit has been accumulated with a reasonable expectation of it being kept confidential.

[18] The information in this case satisfies all of these criteria. It has always been treated as confidential, as evidenced by the confidentiality clauses and the clear labelling of the agreements as confidential. The plaintiff has copies of the MSAs and ISAs because of the relationship it alleges it has between Citadelle and Coca-Cola; its possession of those agreements does not take away from the confidential character of the information.

[19] The information in question includes confidential and commercially sensitive information about Citadelle's business. It includes information about Citadelle's exclusive technology, proprietary information, financial information, and performance criteria. It is reasonable to conclude that disclosure could harm Citadelle's commercial interests, not least because of its need to remain a trusted party in its commercial relationship with Coca-Cola. In addition, competitors could use the information to undercut Citadelle in future negotiations with Coca-Cola.

[20] The information also includes confidential and commercially sensitive information about Coca-Cola's business. For example,it includes standard terms and provisions that Coca-Cola uses in its supplier agreements. It is reasonable to conclude that disclosure of the information could harm the commercial interests of the non-party, Coca-Cola, in that it could be used to undermine Coca-Cola's supplier relationships.

[21] The information in question has been accumulated with a reasonable expectation of being kept confidential, as is apparent from the confidentiality clauses that apply to the MSAs and ISAs.

[22] I conclude that the principle of court openness in this case poses a serious risk to an important public interest, that is, the general commercial interest of preserving confidential information.

**Will reasonably available alternative measures prevent the risk?**

[23] The first question is whether the documents in question are relevant to the proceeding. The plaintiff, having produced the MSAs and ISAs in response to the Request to Inspect Documents, has demonstrated that it intends to use them in prosecuting its action. Citadelle will also use the documents to defend against the action, assuming its jurisdiction motion, scheduled for February 2025, does not succeed. Moreover, the MSAs and ISAs will be used in the jurisdiction motion as evidence of, for example, the location in which the alleged agreement between the parties was executed and/or performed.

[24] Citadelle proposes a narrow protective order, which would seal only the MSAs and ISAs. The confidential information is peppered throughout the MSAs and ISAs, such that redacting the documents is not a practical solution.

[25] I conclude that there are no reasonably available alternative measures to prevent the risks of disclosure.

**Do the benefits of the order outweigh its negative effects?**

[26] In this case, the benefits of the order outweigh its negative effects. The confidentiality order sought is narrowly tailored. The order would protect information confidential to not only the defendant, but a non-party, Coca-Cola. At the same time, the public does not have a strong interest in accessing the MSAs and ISAs, apart from the general public interest in being fully informed of what transpires during the judicial process, which is only mildly impaired by the narrow order proposed.

**Conclusion**

[27] In the result, the motion is granted. The order shall go in accordance with the draft I have signed, sealing the identified MSAs and ISAs, including the documents at Tab B of the affidavit of Sébastien Roy, affirmed October 1, 2024, and filed in the moving party's motion record.

J.T. Akbarali J.

**Date:** November 4, 2024