

**CITATION:** *Fairview Donut Inc. v. The TDL Group Corp.*, 2011 ONSC 1862  
**COURT FILE NO.:** CV-08-00356806-CP00  
**DATE:** 20110324

**ONTARIO SUPERIOR COURT OF JUSTICE**

**RE:** **Fairview Donut Inc. and Brulé Foods Ltd.**, Plaintiffs/Moving Parties  
**The TDL Group Corp. and Tim Hortons Inc.**, Defendants

**BEFORE:** **G.R. Strathy J.**

**COUNSEL:** *Lori Stoltz*, for the Plaintiffs/Moving Parties  
*Peter Howard & Bevan Brooksbank*, for the Defendants  
*Ryan Morris*, for Arytza A.G.

**DATE HEARD:** March 23, 2011

**ENDORSEMENT**

(Plaintiffs' Motion for Production)

[1] This motion brought by the plaintiffs for production of certain documents arises in the context of two important motions scheduled for hearing in August, 2011 – the plaintiffs' motion for certification of this action as a class proceeding and the defendants' motion for summary judgment. This endorsement will briefly summarize the terms of the order I propose to make.

[2] I will deal with the various items at issue in accordance with the lettered headings I used at the hearing, cross-referenced to the records identified in the letter of plaintiffs' counsel dated March 22, 2011.

(a) Items II.1 and II.2

[3] The plaintiffs request contemporaneous documentation of the overhead per case and direct labour per case as used for year-end valuation of inventory for 2002-'09. The plaintiffs want this information to assist in establishing the components of the cost of donuts as they move down the supply chain to franchisees.

[4] The defendants say that they have produced everything they have in their possession and that if the plaintiffs want this information, they should take it up with Arytza, which has acquired

Page: 2

the defendants' share in the joint venture. This position applies to several other items, discussed below.

[5] Counsel for Arytza was present at the motion. It was his submission that Arytza will entertain any request for documentation but (i) it does not know what documentation exists; (ii) there is an issue as to how soon the documents can be produced; (iii) there is an issue as to who will bear the cost of production; (iv) there is an issue as to confidentiality; and (v) there is an issue as to relevance.

[6] The plaintiffs have put forth some evidence that the documents are relevant and necessary for the defence of the summary judgment motion. There is also some evidence that documentation of this kind should exist. It is unfortunate that after some weeks (if not months) of the plaintiffs requesting this information, the defendants' answer is "ask Arytza" and Arytza's answer is "we'll think about it". I don't understand why diligent inquiries have not been made to determine whether the documents exist, what it will take to locate and produce them and how expensive it will be to do so.

[7] I make this observation with full recognition that there has been massive production by the defendants and good faith efforts have been made, with success, to resolve many issues. That said, the plaintiffs are facing a motion for summary judgment and they are entitled to production of relevant documents. The defendants have an obligation to make reasonable efforts to obtain such documents from a third party: *Fedorczenko v. Jamieson* (1986), 56 O.R. (2d) 252 (H.C.J.). This obligation extends, in my view, to cases where they have no legal right to compel production from the third party. In this case, however, it strikes me that as a former partner in the joint venture with TDL, Arytza may have a legal obligation to produce documents requested by TDL that are required for the defence of this litigation or the prosecution of the summary judgment motion. The defendants may wish to consider whether they should take steps to ensure that Arytza fulfills that obligation.

[8] Arytza should assume that it has now been asked by the plaintiffs and by the defendants to produce this information and it should inform them within five days of its position with respect to the production of the information. I encourage all parties, including Arytza, to discuss how production can be accomplished in a way that is expeditious, inexpensive and with as little inconvenience to Arytza as possible, bearing in mind that the plaintiffs say that the information is important to their defence. If the issues cannot be resolved, a motion can be brought before me in the week of April 4, 2011 or can be made in writing if the parties agree.

(b) Item II.5

[9] There are several items under this heading.

[10] The request for the per unit prices billed by 3052887 to CillRyan's Bakery Limited should be addressed by Arytza, as suggested above.

[11] The request in item 9 (copies of annual operating plan and strategic plan for 2001 to 2009) is being deferred by the plaintiffs.

Page: 3

[12] As discussed at the motion, the defendants shall make their best efforts to comply with the request in item 11 (as clarified in the Adair Morse letter of March 4, 2011) by April 1, 2011 and in any event shall comply no later than April 8, 2011. If the request is not complied with by April 1, 2011, the parties will agree to a reasonable extension to the date by which the plaintiffs are required to file its responding materials to the motion for summary judgment on the *Competition Act* claims.

(c) Item II.6

[13] This issue has been resolved.

(d) Item II.10

[14] This concerns representative contemporaneous invoices showing the per unit price billed by CillRyan's to TDL for certain donuts and "Timbits" in the years 2002 to 2009. The defendants say that these documents are in the possession of Arytza. The request should be addressed by Arytza as suggested above.

(e) Item II.11

[15] The defendants acknowledge an obligation to attempt to locate and to produce the documents in question. The defendants have undertaken to produce all such documents in their possession by April 1, 2011.

(f) Item I.36: Records of Customer Complaints

[16] The plaintiffs assert that product quality declined a result of the "Always Fresh" conversion. They want access to the defendants' customer complaints database. The defendants initially took the position that the information was not relevant and that, in any event, the plaintiffs would have to pay the costs of developing a sampling plan and producing the documents.

[17] The parties are prepared to meet and confer, together with their consultants, to develop an acceptable, expeditious and cost-effective plan for the sampling of the database. I order that they do so. It seems to me that, pending further order of the court, the costs of preparing and executing the plan should be shared equally. If a dispute arises, an appointment can be scheduled, or submissions can be made in writing.



---

G.R. Strathy J.

DATE: March 24, 2011



**SUPERIOR COURT OF JUSTICE**  
**COUR SUPÉRIEURE DE JUSTICE**

*361 University Avenue  
Toronto, ON M5G 1T3*

*Telephone: (416) 327-5284 Fax: (416) 327-5417*

**FAX COVER SHEET**

**Date: March 24, 2011**

**TO:**

**Lori Stoltz**

**Peter Howard/Bevan Brooksbank**

**Ryan Morris**

**FAX NO.:**

**416-863 1241**

**416-861 0445**

**416-863 2653**

**FROM:** Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

**TOTAL PAGES (INCLUDING COVER PAGE): 4**

**MESSAGE:**

**Re: Fairview Donut Inc. v. The TDL Group et al**  
**Court file no. CV-08-00356806-CP00**

**See attached Endorsement released today.**

*The Information contained in this facsimile message is confidential information. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address*

**Original will NOT follow. If you do not receive all pages, please telephone us immediately at the above number.**