

File No.: CT-2008-004
Registry Document No.:

PUBLIC VERSION

COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the *Competition Act*;

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
CT-2008-004	
November 21, 2011	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 738

**NADEAU FERME AVICOLE LIMITÉE/
NADEAU POULTRY FARM LIMITED**

Applicant

AND

**GROUPE WESTCO INC. AND GROUPE DYNACO, COOPÉRATIVE
AGROALIMENTAIRE AND VOLAILLES ACADIA S.E.C. AND
VOLAILLES ACADIA INC./ACADIA POULTRY INC.**

Respondents

**MEMORANDUM OF FACT AND LAW OF THE
APPLICANT NADEAU FERME AVICOLE LIMITÉE/
NADEAU POULTRY FARM LIMITED**

PART I – STATEMENT OF FACTS

A/ Overview

1. Groupe Westco Inc. ("**Westco**") seeks the exercise of equitable discretion in its favour, in order that it be permitted to commence proceedings seeking damages against the Applicant ("**Nadeau**"). Nadeau submits that this motion is premature, and that the deliberate and contumacious misconduct of Westco disentitles it from the relief it seeks. Moreover, this Tribunal lacks jurisdiction to grant the relief sought.

B/ Procedural Background

2. By an Application dated March 17, 2008, Nadeau sought an interim order pursuant to section 104 of the *Competition Act* (the "**Act**").
3. In support of its Application, Nadeau filed the Affidavit of Anthony Tavares, which contained the following paragraph (the "**Undertaking**"):

"Nadeau undertakes to abide by any order that may be made against it as a result of the granting by the Tribunal of the interim relief being requested by Nadeau."

4. On June 26, 2008, the Competition Tribunal (the "**Tribunal**") granted an interim order in favour of Nadeau (the "**Interim Order**"). The Interim Order provided that, subject to certain reductions as specified in the Interim Order, the Respondents were required to continue to supply Nadeau with "live chickens on the usual trade terms at the current level of weekly supply, namely 271,350 live chickens", pending the determination of Nadeau's application for an order under section 75 of the Act (the "**Main Application**").

5. Nadeau commenced contempt proceedings against all the Respondents on November 4, 2008, and sought an expedited hearing. The Tribunal did not grant the request for an expedited hearing, and required the exchange of materials leading to a show cause hearing in February, 2009. Following this hearing, on February 26, 2009, the Tribunal found that Westco was in *prima facie* breach of the Interim Order, and required it to show cause as to why it should not be held in contempt (the "**Show Cause Order**").
6. The Interim Order terminated on June 8, 2009, in consequence of the dismissal by the Tribunal of the Main Application.
7. The contempt hearing was held over four days in November, 2009. On January 22, 2010, the Tribunal made a contempt order against Westco (the "**Contempt Order**"). It found that Westco was in contempt of the Interim Order, from and after September 14, 2008, until the termination of the Interim Order upon the determination of the Main Application. The Tribunal found that Westco acted deliberately and with contumacious intent, and that it breached the Interim Order for the prospect of financial gain. Westco was subsequently sentenced to pay a fine of \$75,000, and costs of \$250,000 to Nadeau.
8. Westco appealed the Contempt Order, and also appealed the sentence imposed against it. The appeal from the Contempt Order was dismissed by the Federal Court of Appeal in March, 2011. The appeal from sentence was subsequently discontinued.
9. The Federal Court of Appeal dismissed Nadeau's appeal from the dismissal of the Main Application on June 2, 2011.

10. On June 3, 2011, the very next day, Westco wrote directly to the Tribunal requesting direction as to the practice and procedure to be followed in order to enforce the Undertaking.
11. On August 5, 2011, the Tribunal directed that Westco file a formal motion (the "**Motion**"), and that it address the following two questions:
 - a) Does the Tribunal have jurisdiction to enforce an undertaking as to damages? ("**Question 1**")
 - b) Assuming the Tribunal does have jurisdiction, should leave be granted to Westco so that it can proceed with an application for a hearing relating to the enforcement of the undertaking as to damages? ("**Question 2**")
12. On August 25, 2011, Nadeau filed an application for leave to appeal to the Supreme Court of Canada from the Federal Court of Appeal decision dismissing Nadeau's appeal from the dismissal of the Main Application. As of the date hereof, Westco has delivered its response to the application for leave to appeal and Nadeau has delivered its reply. No decision has as yet been rendered by the Supreme Court.

C/ The Conduct of Westco

13. Westco opposed Nadeau's application for the Interim Order. It relied in support of its opposition, among other things, upon an affidavit of Thomas Soucy, the CEO of Westco, sworn May 29, 2008. In this affidavit, Mr. Soucy swore:

- (a) that Westco and Olymel s.e.c. ("**Olymel**") had concluded a partnership ("la conclusion du partenariat avec Olymel") for the purpose of either acquiring Nadeau's processing plant, or building a new plant in New Brunswick;
- (b) that Westco was *contractually* committed to this partnership with Olymel ("son engagement contractuel envers Olymel");
- (c) that Olymel and Westco had put in place a formula to divide the profits realized upon the resale of Westco chickens processed by Olymel in Quebec ("une formule de partage des profits réalisés par Olymel et Westco lors de la revente des poulets transformés a été mis en place");
- (d) that the decision to cease supplying Nadeau was required as part of Westco's contract with Olymel ("la décision de Westco de cesser d'approvisionner Nadeau... répond aux impératifs contractuels de l'entente partenariat liant Westco et Olymel");
- (e) that the totality of Westco's production was promised to another buyer, namely Olymel ("Même si Westco désirait approvisionner Nadeau, à partir du 20 juillet 2008, Westco n'aura tout simplement aucune production excédentaire à offrir à Nadeau puisque la totalité sa production actuelle a été promise et vendue à un autre acheteur, soit Olymel, en vertu de leur entente de partenariat"); and
- (f) that Westco had a contractual obligation to supply Olymel ("son obligation contractuelle d'approvisionner Olymel en poulets vivants à partir du 20 juillet 2008").

Ref: Affidavit of Thomas Soucy dated May 29, 2008 (the "Soucy Affidavit"), paras. 38(c), 41(c), 50(c), 52(d) and 82(a), Exhibit B to the Affidavit of Jessica Petrie dated September 29, 2011 (the "Petrie Affidavit"); Responding Record of the Applicant, Tab B, p. 41; Exhibit A to the Affidavit of Mary Anderson, Supplementary Record of the Applicant, pp. 4-9

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. When confronted with the "fasting" issue at the contempt sentencing hearing, Mr. Soucy changed his evidence, and said instead that:

- (a) because shipment to Olymel entailed a higher rate of condemnations; and
- (b) because Westco incurred additional labour costs for a "scale guy", plus the costs of certification of the scale, higher insurance premiums, etc.;

there was no additional profit resulting from the shipment of non-fasted birds to Olymel, despite his earlier testimony.

Ref: Evidence of Thomas Soucy, pp. 21-25, Exhibit W to Petrie Affidavit, Responding Record of the Applicant, Tab W, pp. 360-364

20. With regard to the additional profit arising out of growing larger birds, Westco, despite the Interim Order, proceeded to grow larger birds anyway, and shipped exclusively larger

birds to Nadeau from and after August, 2008 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The average weight of the chickens shipped to Nadeau by Westco (weight at shipment) during the pendency of the Interim Order increased, as follows:

A-87	(September 14 to November 8, 2008)	2.233 kg.
A-88	(November 9, 2008 to January 3, 2009)	2.288 kg.
A-89	(January 4, to February 28, 2009)	2.217 kg.
A-90	(March 1 to April 25, 2009)	2.295 kg.
A-91	(April 26 to June 20, 2009 – 6 weeks only)	2.326 kg.

[REDACTED]

Ref: Schedule B to Contempt Order, Exhibit U to Petrie Affidavit, Responding Record of the Applicant, Tab U, p. 340

21. As can be seen from the foregoing, the chickens supplied to Nadeau were, at weighing, essentially as big as (or bigger than) the expected weight of the chickens Westco planned to send to Olymel. As such, Westco actually realized 100% of the higher profits from growing bigger birds, despite the Interim Order. Moreover, if one adds to this Mr. Soucy's later claims (referred to in paragraph 19 above), the profits were even *higher*, since the percentage of condemnations on shipments to Nadeau were low, and Westco

did not have to incur the additional "scale guy" etc. expenses complained of by Mr. Soucy in connection with his sales to Olymel.

[REDACTED] In his May 29, 2008 affidavit, Mr. Soucy also said that under Westco's partnership contract with Olymel, Westco would receive 50% of the profits on the subsequent sale of all Westco chickens processed by Olymel. He later changed his testimony, and claimed that Westco received no profits on the sale of any of the Westco chickens processed by Olymel. Mr. Soucy claimed that the reason for this was because Westco did not supply *all* of its chickens to Olymel, and that the precondition to the profit participation contract was the supply to Olymel of 100% of Westco's chickens. [REDACTED]

[REDACTED]

[REDACTED]

Ref: Soucy Affidavit, para. 80, Exhibit B to Petrie Affidavit, Responding Record of the Applicant, Tab B, pp. 40-41

[REDACTED]

Ref: Evidence of Thomas Soucy, pp. 16-18, Exhibit W to Petrie Affidavit, Responding Record of the Applicant, Tab W, pp. 355-357

[REDACTED]

23. Westco knew that Nadeau required smaller chickens to service its "nine-cut" customers. The purpose of the Interim Order was to preserve the *status quo*, and thus to allow Nadeau to maintain its existing customers. Nadeau was supposed to continue to be

supplied with live chickens, as it had been supplied before. Less than six weeks after the issuance of the Interim Order, however, Westco changed its supply practices, and ceased all supply to Nadeau of "nine-cut" sized chickens. It did so in the hope that this would result in the loss of all of Nadeau's "nine-cut" customers. Westco was motivated not just by the "prospect of financial gain" for itself, but also by bad faith. Westco sought to undermine Nadeau's ability to carry on its business, pending the determination of the Main Application, despite the issuance of the Interim Order. Westco was, as found by the Federal Court of Appeal, well aware of the importance to Nadeau of maintaining the previous supply "pattern in terms of size of the chickens supplied." As found by this Tribunal, Westco "made virtually no effort to adjust its production or make alternate arrangements in order to comply with the Interim Order."

Ref: Sentencing Order, paras. 59, 66, Exhibit Z to Petrie Affidavit, Responding Record of the Applicant, Tab Z, pp. 418-419

Ref: Federal Court of Appeal Judgment, para. 8, Exhibit BB to Petrie Affidavit, Responding Record of the Applicant, Tab BB, p. 432

24. Given its contumacious intent, as set out above, it is not surprising that Westco took every possible procedural step available to delay the hearing of Nadeau's contempt motion. It opposed expedited proceedings, and insisted on full and complicated productions, even though the key allegations underlying the contempt proceedings (fewer and bigger chickens) were essentially admitted. These delay tactics were effective – the finding of contempt was not made until long after the expiration of the Interim Order.

Thus Westco was not called to account at any time during the pendency of the Interim Order.

25. Westco expressed no concern about the effect of its improper conduct on Nadeau's business, or on the administration of justice, and made no effort to atone to Nadeau or to this Tribunal. No apology was proffered until the "last possible moment", and even then, the apology was only to the Tribunal.

"Westco est profondément désolée d'avoir offensé le Tribunal et tient à lui présenter ses excuses".

Ref: Sentencing Order, para. 61, Exhibit Z to Petrie Affidavit, Responding Record of the Applicant, Tab Z, p. 418

Ref: Déclaration de Thomas Soucy, delivered March 26, 2010, para. 3.2, Exhibit V to Petrie Affidavit, Responding Record of the Applicant, Tab V, p. 344

26. Indeed, as late as the sentencing hearing, far from expressing remorse or apologizing to Nadeau for the damage caused to it by Westco's breaches of the Interim Order, Mr. Soucy was still accusing Nadeau of waging commercial warfare against Westco:

"...c'était quand même dur pour moi de continuer à faire affaires avec Nadeau quand eux utilisent ce gain, le gain d'apât, pour me faire une guerre commerciale.

Ils font une guerre commerciale avec Westco depuis quand même trois ans..."

Ref: Evidence of Thomas Soucy, p. 27, Exhibit W to Petrie Affidavit, Responding Record of the Applicant, Tab W, p. 366

27. At both the substantive and sentencing phases of the contempt proceedings, Westco pointed to its delivery of chickens to Nadeau after the expiration of the Interim Order. Westco cynically sought to rely on these deliveries as evidence of good faith. However, upon cross-examination, Mr. Soucy admitted that these deliveries occurred only because Olymel could not process Westco's chickens:

"Mr. Folkes: And that was because your partner Olymel was not able to process them yet. Correct?"

M. Soucy: C'est parce qu'on ne peut pas se virer sur un 10 cents dans cette industrie-là, oui".

Ref: Evidence of Thomas Soucy, pp. 45-46, Exhibit W to Petrie Affidavit, Responding Record of the Applicant, Tab W, p. 373-374

28. Westco at all times acted in bad faith in pursuance of its private commercial agenda and its desire to destroy Nadeau, without regard to its duties and obligations arising out of the Interim Order. It does not come to this Tribunal with clean hands.

PART II- POINTS IN ISSUE

29. The following are the issues to be determined on the Motion:
- (a) Does the Tribunal have jurisdiction to enforce an undertaking as to damages? ("Question 1")
 - (b) Assuming the Tribunal does have jurisdiction, should leave be granted to Westco so that it can proceed with an application for a hearing relating to the enforcement of the undertaking as to damages? ("Question 2")

PART III – SUBMISSIONS

Question 1: Does the Tribunal have Jurisdiction?

30. The jurisdiction of the Tribunal arises in the first place under the *Competition Tribunal Act* (the "**Tribunal Act**"). The Tribunal Act provides as follows:

8.(1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.

8.(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

...

9.(1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

...

13.(1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.

Ref: *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp.), as amended, ss. 8, 9, 13

31. While the Tribunal has been granted the power to make a wide variety of coercive orders under Parts VII.I and VIII of the Act, it has not been given any power to award damages. The Tribunal is not a court of competent jurisdiction for the purposes of section 36 of the Act, and the Act makes it clear ("for greater certainty") that the Tribunal cannot award damages under Section 77 of the Act. In fact, apart from costs, and administrative

monetary penalties under Part VII.1, the Tribunal has no power to make any monetary awards at all.

Ref: See, for example, Act, ss. 36, 74.09-74.16, 75-78, 86, 90.1, 92

32. As a statutory tribunal, the Tribunal has "only such jurisdiction and powers as are provided for in [its] enabling statute or such jurisdiction and powers as may be inferred by "necessary implication"".

Ref: *Commissioner of Competition v. P.V.I. International Inc.*, 2001 Comp. Trib. 017, 2001 CACT 17 (CanLII), at para. 5, Applicant's Brief of Authorities Tab 5

33. As is apparent from a review of the legislation, there is no *express* grant of any power to the Tribunal to enforce an undertaking as to damages. Indeed, there is no mention at all in the Act of such an undertaking. Accordingly, jurisdiction must be found, if at all, by "necessary implication".

34. Jurisdiction by "necessary implication" will, however, only be found:

*** [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;*

** [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;*

** [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;*

** [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and*

* *[when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board".*

Ref: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 73, Applicant's Brief of Authorities Tab 2

35. A power can only be inferred where "that power is actually necessary for the administration of the terms of the legislation; coherence, logicity, or desirability are not sufficient".

Ref: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 1998 CanLII 818 (S.C.C.), at para. 16, Applicant's Brief of Authorities Tab 3

36. Moreover, broadly drawn powers are "limited to only what is rationally related to the purpose of the regulatory framework".

Ref: *ATCO, supra*, at para. 74, Applicant's Brief of Authorities Tab 2

37. There is no doubt that the purpose of the regulatory framework under the Act and the *Tribunal Act* is to protect competition in the marketplace. The power to grant an interim order under section 104 of the Act is rationally related to that purpose – the power to award damages is not. The power to award damages generally relates to the determination of a private commercial dispute, and is within the purview of the courts. It is not logically part of the role of the Tribunal, whose concern is to maintain "the proper long-term functioning of the free market", rather than to enhance the profitability of a single private party.

Ref: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, at p. 407, Applicant's Brief of Authorities Tab 6

38. It is true that the Tribunal has, under subsection 8(1) of the *Tribunal Act*, jurisdiction over "matters related to" applications under Part VIII of the Act, including therefore matters "related to" applications under section 104. However, this does not mean that the Tribunal has suddenly acquired what amounts to the jurisdiction of the ordinary courts to award monetary damages. To the contrary, the silence of Parliament on the issue (that is, the failure to grant power to award damages) is telling. Parliament did "address its mind" to the issue of interim relief and "decide[d] against conferring the power" to award damages. Accordingly, to imply a power do so would be "to introduce indirectly into the Act a power which Parliament did not intend it to have".

Ref: *Canada (Attorney General) v. Mowat*, 2009 FCA 309 (CanLII), at paras. 93-95, affirmed *sub nomine Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 CanLII, Applicant's Brief of Authorities Tab 4

39. It is submitted therefore, that this Tribunal does not have jurisdiction to grant the relief sought by Westco .

Question 2: Should Westco be granted leave to commence proceedings seeking damages?

A/ The Motion is Premature

40. It is well established that a matter cannot be considered to have been finally determined so long as a right of appeal remains open to a party:

"This is because an action or suit does not come to a conclusion when a trial judge renders his decision; as long as a right of appeal exists the matter has not been finally determined, and an

action is still alive until all avenues of appeal have been exhausted. During the appeal period and until the final judgment of the last appeal Court is entered, the rights and liabilities as between the parties have still not been finally determined. "

Ref: *Re Walker*, 2010 BCSC 489 (CanLII) at para. 54, Applicant's Brief of Authorities Tab 16

See also:

***Apotex Inc. v. Merck & Co.* 2010 CarswellNat 561, 2010 FC 287, at paras. 19-20, 24, Applicant's Brief of Authorities Tab 1**

41. If the Supreme Court of Canada grants Nadeau's application for leave to appeal and if the appeal is allowed, the underlying basis of Westco's claim for damages will disappear. In these circumstances, the Motion is premature, and it should be adjourned.

B/ Westco's Conduct Disentitles it from Relief

(i) A Contemnor Should be Denied Audience

42. There is a "general rule" that a contemnor who has failed to purge its contempt should be denied audience before the Court. This principle applies not only to the proceedings out of which the contempt arises, but also to related proceedings.

Ref: *Innovation and Development Partners Inc./IDP Inc. v. Canada* (1994), 81 F.T.R. 90, 1994 CarswellNat 1871 (F.C.A.), Applicant's Brief of Authorities Tab 10

Ref: *Dickie v. Dickie*, 2006 CanLII 576 (ON C.A.) per Laskin, J.A. (dissenting) at paras. 85-99. Laskin, J.A.'s dissenting reasons were approved and adopted [2007] 1 S.C.R. 346, 2007 SCC 8 (CanLII), at para. 6, Applicant's Brief of Authorities Tab 7

Ref: *Venkatesh v. Venkatesh*, 2010 ONSC 1177 (CanLII), Applicant's Brief of Authorities Tab 14

43. Westco was in continuing breach of the Interim Order for at least nine months. It made no effort to assist Nadeau to make up the lost chickens, either during the pendency of the Interim Order, or after its termination. The fact that Westco was sentenced to pay a fine, and paid that fine, does not purge its contempt, in the same way that the carrying out of a sentence does not "purge" a criminal of his or her crime.
44. On the authorities set out above, Westco should be denied audience, and the Motion should be dismissed.

(ii) *Westco Does Not Come with "Clean Hands"*

45. Westco seeks the exercise of the Tribunal's discretion in its favour on the Motion. As such, it is obliged to show that its conduct was above reproach, and that it comes to this Tribunal with "clean hands". The court will refuse to enforce an undertaking as to damages where the defendant's conduct has been inequitable:

"...the defendants throughout this whole transaction have behaved in a manner which does them discredit...they have not come to court with clean hands, and cannot ask the court to rule in their favour".

Ref: *Windsor (City) v. Anderdon Estates Ltd.*, 1989 CarswellOnt 1919 (Ont.H.C.), at para. 38, Applicant's Brief of Authorities Tab 17

See also: *Ontario (Attorney General) v. Harry* (1982), 35 O.R. (2d) 248 (Ont. H.C.), at pp. 249, 251, Applicant's Brief of Authorities Tab 12

46. Westco has not acted with good faith. The evidence it relied upon changed depending upon the exigencies of the moment and was misleading at best, or out-and-out false at worst. The contempt alone should result in the denial of leave because "[a] party in

contempt of Court is not entitled to the benefit of the Court's discretion". In this case, however, the contempt has been compounded by Westco's lack of candour in its various explanations. In the circumstances, Westco deserves condemnation, and not reward. The request for leave should be denied.

Ref: *Frank v. Bottle*, 1993 CarswellNat 531 (Fed. T.D.), at para. 3, Applicant's Brief of Authorities Tab 8

(iii) *"Special Circumstances" Exist such that Leave should be Denied*

47. As long ago as 1964, the Supreme Court established that, where "special circumstances" exist, the Court should refuse a request to enforce an undertaking as to damages. Leave has been denied:

- (a) where the defendant "had been guilty of conduct which did not move the Court to exercise its discretion in his favour";
- (b) where the defendant has ignored or flouted the very injunction that has been dissolved;
- (c) where the defendant's behaviour "was motivated...purely by a desire to make quick money...no matter what";
- (d) where the defendant's explanation for its conduct demonstrates bad faith (was "ill conceived...had the effect of exacerbating matters"); and
- (e) where the violations of the order in question are "deliberate and flagrant".

Ref: *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd.*, [1965] S.C.R. 195, at p. 207, Applicant's Brief of Authorities Tab 15

Ref: *Metropolitan Toronto (Municipality) v. N.B. Theatrical Agencies Inc.* (1991) 2 O.R. (3d) 260 (Gen. Div.) at pp. 264-265, aff'd (1994) 22 O.R. (3d) 736 (note) (C.A.), Applicant's Brief of Authorities Tab 11

Ref: *Gu v. Tai Foong International Ltd.*, 2001 CarswellOnt 91, at para. 40; aff'd 2003 CanLII 20380 (ON C.A.); leave to appeal refused 326 N.R. 198 (note), 2003 CarswellOnt 4493, Applicant's Brief of Authorities Tab 9

Ref: *United States of America v. Yemec*, 2009 CanLII 44418 (ON S.C.) at para. 124-126, aff'd (in part) 2010 ONCA 414 (CanLII), Applicant's Brief of Authorities Tab 13

48. Most, or possibly all, of the above circumstances exist in this case. It is submitted therefore, that "special circumstances" have clearly been shown, and Westco should be denied leave.

(iv) ***In All the Circumstances, It Would be Inequitable to Enforce the Undertaking Against Nadeau***

49. In its notice of motion, Westco gives short shrift to this Tribunal's finding of contempt:

"18. Bien que la condamnation pour outrage constituera vraisemblablement l'un des facteurs à être considérés par le Tribunal lors de l'audition de la demande d'indemnisation de Westco, celle-ci soumet qu'elle ne doit pas être privée de son droit de déposer une telle demande en raison de sa condamnation pour outrage.

19. Le préjudice causé à Nadeau en raison du non respect de l'Ordonnance provisoire, s'il en est un, sera donc apprécié dans le cadre de la procédure que Nadeau a intentée au Nouveau-Brunswick."

Ref: Avis de Requête, paras. 18-19, Dossier de Requête, p. 3

50. Nadeau submits that this casual approach to the Contempt Order is emblematic of Westco's attitude throughout these proceedings – that is, to put its profit above all else.

The comments of the Ontario Court of Appeal are *à propos*:

"[the defendant], in making light of his conduct, appears to be submitting that a violation of an injunction should not count for much and that the enjoined party should still be entitled to pursue his claim for damages – setting off, it would seem, what he gained by his violation against the damages he incurred. This approach trivializes an injunction".

Ref: *Gu v. Tai Foong International Ltd. (Ont. C.A.)*, supra, at paras. 68, 71, Applicant's Brief of Authorities Tab 9

51. This Tribunal held that, in light of Mr. Soucy's affidavit evidence (given in his May 29, 2008 affidavit), it did not accept Mr. Soucy's later testimony wherein he claimed that Westco realized no additional profit from its breaches of the Interim Order. This Tribunal noted further that Westco "breached the Interim Order for the prospect of financial gain". Westco should be confined to whatever profits it has already made from its breaches of the Interim Order. It should not be entitled to seek further profit, in all the circumstances.

Ref: Sentencing Order, para. 66; Exhibit Z to Petrie Affidavit, Responding Record of the Applicant, Tab Z, p. 419


52. It is submitted that the equities favour Nadeau, and Westco's request for leave to proceed should be denied.

PART IV: ORDER SOUGHT

53. It is respectfully submitted that Westco's Motion should be dismissed, with costs. In the alternative, the Motion should be adjourned pending the outcome of the proceedings before the Supreme Court of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 14, 2011



Leah Price
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PART V - LIST OF AUTHORITIES

1. (a) *Apotex Inc. v. Merck & Co.*, 2010 FC 287 (CanLII) (relevant portions only)
(b) *Apotex Inc. c. Merck & Co.*, 2010 CF 287 (CanLII) (relevant portions only)
2. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (relevant portions only)
3. *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 1998 CanLII 818 (S.C.C.) (relevant portions only)
4. (a)(i) *Canada (Attorney General) v. Mowat*, 2009 FCA 309 (CanLII),
(ii) *Procureur général du Canada c. Mowat*, 2009 CAF 309 (CanLII)
(b)(i) *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII)
(ii) *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53 (CanLII)
5. *Commissioner of Competition v. P.V.I. International Inc.*, 2001 Comp. Trib. 017, 2001 CACT 17 (CanLII)
6. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (majority reasons only)
7. (a) *Dickie v. Dickie*, 2006 CanLII 576 (ON C.A.) per Laskin, J.A. (dissenting)
(b) *Dickie v. Dickie*, [2007] 1 S.C.R. 346, 2007 SCC 8 (CanLII)
8. *Frank v. Bottle*, 1993 CarswellNat 531 (Fed. T.D.)
9. (a) *Gu v. Tai Foong International Ltd.*, 2001 CarswellOnt 91
(b) *Gu v. Tai Foong International Ltd.*, 2003 CanLII 20380 (ON C.A.)
(c) *Gu v. Tai Foong International Ltd.*, 326 N.R. 198 (note), 2003 CarswellOnt 4493

10. *Innovation and Development Partners Inc./IDP Inc. v. Canada* (1994), 81 F.T.R. 90, 1994 CarswellNat 1871 (F.C.A.)
11. (a) *Metropolitan Toronto (Municipality) v. N.B. Theatrical Agencies Inc.* (1991) 2 O.R. (3d) 260 (Gen. Div.)

(b) *Metropolitan Toronto (Municipality) v. N.B. Theatrical Agencies Inc.* (1994), 22 O.R. (3d) 736 (note) (C.A.)
12. *Ontario (Attorney General) v. Harry* (1982), 35 O.R. (2d) 248 (Ont. H.C.)
13. (a) *United States of America v. Yemec*, 2009 CanLII 44418 (ON S.C.) (relevant portions only)

(b) *United States of America v. Yemec*, 2010 ONCA 414 (CanLII) (relevant portions only)
14. *Venkatesh v. Venkatesh*, 2010 ONSC 1177 (CanLII)
15. *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd.*, [1965] S.C.R. 195
16. *Re Walker*, 2010 BCSC 489 (CanLII)
17. *Windsor (City) v. Anderdon Estates Ltd.*, 1989 CarswellOnt 1919 (Ont.H.C.)

APPENDIX A – STATUTES RELIED UPON

1. *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp.), as amended, ss. 8, 9, 13
2. *Competition Act*, R.S.C. 1985, c. C-34, ss. 36, 74.09-74.16, 75-78, 86, 90.1, 92