Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2010 Comp. Trib. 15
File No.: CT-2008-004
Registry Document No.: 0703

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*;

AND IN THE MATTER of a Motion by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for a Show Cause Order;

AND IN THE MATTER of a Motion by the Respondent Groupe Westco Inc. for an Order or Direction regarding the Tribunal's Interim Supply Order;

B E T W E E N:

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)

Dates of hearing: 20100706 to 20100707
Before Judicial Member: Blanchard J.
Date of Reasons and Order: September 24, 2010
Reasons and Order signed by: Justice Edmond P. Blanchard

SENTENCING ORDER

I. INTRODUCTION

[1] By order dated January 22, 2010, the Respondent Groupe Westco Inc. ("Westco") was found to be in contempt of a Tribunal order. The contempt relates to an interim order issued in the context of an application filed pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). This decision relates to the sentencing hearing held on July 6 and 7, 2010 following the contempt finding.

II. BACKGROUND FACTS

[2] On January 22, 2010, the Tribunal found Westco in contempt of the Tribunal's interim order dated June 28, 2008 ("Interim Order"). Pursuant to that order, Westco had been required to provide Nadeau Poultry Farm Limited (the "Applicant" or "Nadeau") with a specific number of live chickens on a weekly basis. The Tribunal held that Westco had failed to provide the required number of chickens:

> **[92]** The Interim Order was clear. It provided that the Respondents, including Westco continue to supply Nadeau with a specific number of live chickens on a weekly basis. Westco was aware of the existence of the Tribunal's Interim Order and knowingly disobeyed the Order. I have considered the arguments raised by Westco and the circumstances surrounding the non-compliance. For the reasons set out above, I reject Westco's arguments. I therefore find that the Applicant has met its onus and the constituent elements of contempt have been proved beyond a reasonable doubt.
>
> (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2010 Comp. Trib. 2)

[3] A complete description of the facts underlying the contempt proceedings appears in the Tribunal's contempt decision and will not be repeated here.

[4] Following the contempt finding, the Tribunal ordered that a sentencing hearing take place to determine the appropriate penalty. The sentencing hearing took place on July 6 and 7, 2010. The parties tendered evidence and made submissions relating to their respective positions on sentencing.

III. PARTIES' POSITIONS

[5] Nadeau seeks restitution of business losses attributable to Westco's contemptuous conduct, a fine and costs of the contempt proceedings on a solicitor-client basis. Westco disputes each of these claims. I will set out below the respective position of the parties on each.

A. Restitution

i. Nadeau

[6] Nadeau asks the Tribunal to issue a restitution order pursuant to which Westco would pay to Nadeau the inventory value of the number of chickens Westco failed to deliver to Nadeau during the interim period (from September 14, 2008, to June 20, 2009). In Nadeau's written submissions, it submits that Westco should be ordered to make restitution in the amount of $2,884,932.00, the inventory value of 933,398 chickens.

[7] In the alternative, Nadeau seeks a restitution order pursuant to which Westco would pay Nadeau $ **[CONFIDENTIAL]**; the profits Westco allegedly made by selling larger chickens to Olymel S.E.C. ("Olymel"), a Quebec chicken processor. In the further alternative, Nadeau asserts in its written submissions that because of Westco's failure to supply it with chickens sized to suit Kentucky Fried Chicken (which are called nine cuts), Nadeau has suffered a loss in the amount of approximately $**[CONFIDENTIAL]**. At the sentencing hearing, this amount was reduced to "approximately $**[CONFIDENTIAL]**" during oral submissions. Counsel for Nadeau also referred to another way to calculate the amount to be included in the restitution order. According to those calculations, the amount sought is "approximately $**[CONFIDENTIAL]**to $**[CONFIDENTIAL]**".

[8] Nadeau asserts that the Tribunal has the jurisdiction to issue such orders in this case because it has a broad discretion to determine the appropriate penalty in a contempt proceeding. It agrees that the Tribunal does not have the power to order damages, but states that the Tribunal's ability to order restitution in a contempt proceeding is a separate and different matter.

[9] Nadeau submits that the Tribunal's discretion is very broad. In that regard, it relies on the Supreme Court of Canada decision in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, in which it held that the Tribunal has the powers of a superior court of record with respect to enforcement of its orders, which includes the power of contempt for breaches of its orders. Nadeau further refers to paragraph 472(*d*) of the *Federal Courts Rules*, SOR/98-106, which provides that the Court, after making a finding of contempt, may order that a contemnor "do or refrain from doing any act." In Nadeau's view, there are no limits on the Tribunal's exercise of its sentencing power in contempt matters.

[10] Further, while it acknowledges that the courts have occasionally commented that the primary purpose of sentencing for contempt is to ensure respect for court orders, Nadeau submits that this does not remove from the Tribunal the power, in an appropriate case, to grant a remedy of a civil nature. It further argues that in civil contempt proceedings, the Tribunal should not only look at punishment and deterrence but also at the civil impact of the contempt. Nadeau states that its rights are at issue.

[11] Nadeau also submits that civil contempt bears the imprint of criminal law and thus states that any sanction available in criminal law, including restitution, is applicable in civil contempt proceedings. Accordingly, the Applicant submits that subsection 738(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, which is a restitution provision, is applicable in the present case.

ii. Westco

[12] Westco submits that the only issue for this sentencing hearing is the penalty to be imposed in view of its failure to respect the Tribunal's order. Westco thus argues that restitutionary or compensatory awards are inappropriate in cases of contempt.

[13] Westco also submits that the Tribunal does not have the jurisdiction to award damages in the form of compensation or restitution. Westco states that the Competition Tribunal is a statutory tribunal and only has the powers granted by statute. It states that neither the Act nor the *Competition Tribunal Act*, R.S.C., 1985, c.19 (2nd Supp.), confer on the Tribunal the power to award damages. Westco states that parties who have suffered a loss as a result of a breach of a Tribunal order have a private right of action in damages under section 36 of the Act and that the Tribunal has no jurisdiction to hear a section 36 private action. Regarding restitution, Westco argues that the Tribunal may only order restitution under paragraph 74.1(1)(*c)* of the Act in the context of deceptive marketing practices and that the provision is not applicable in the case.

[14] Westco submits that the *Chrysler* case does not support the contention that the Tribunal has jurisdiction to make a restitutionary order in sentencing for contempt. It states that the Supreme Court never addressed that specific question. Westco also submits that there is no authority in the *Federal Courts Act*, R.S.C., 1985, c. F.7 or the *Federal Courts Rules* that would give jurisdiction to the Tribunal to render a damages award in the context of sentencing for contempt.

[15] Westco further states that contempt proceedings may not be used as a backdoor to recover damages or as a means to obtain damages in an expedited manner. It indicates that damages should only be awarded following appropriate pre-trial disclosure and discovery and a full trial of the issues on the merits.

[16] Additionally, Westco argues that even if the Tribunal had jurisdiction to make a restitutionary order, the restitution provision of the *Criminal Code* invoked by Nadeau would not be applicable in the circumstances of this case. Westco argues that the *Criminal Code* allows for restitution as a possible sentencing measure in very limited circumstances where there has been damage to, loss or destruction of property belonging to the victim and where the amount at issue is readily ascertainable. It submits that in the present case, there has been no damage to, loss, or destruction of any property belonging to Nadeau and that the amount at issue is not "readily ascertainable".

B. Fine

i. Nadeau

[17] Nadeau submits that a fine of $250,000 should be imposed on Westco. It submits that Westco's conduct was deliberate and contumacious, and that Westco sought to make a profit from its contempt. In this regard, Nadeau argues that Westco made a profit when it undersold to Nadeau and sold to Olymel pursuant to a profit-sharing agreement. Referring to evidence

adduced at the hearing of the application for interim relief, Nadeau asserts that Westco realized a profit from its breaches of the Interim Order, totaling $**[CONFIDENTIAL]**. Nadeau says that this is an aggravating factor which should increase the fine paid by Westco.

[18] Nadeau also asserts that Westco has failed to establish the existence of any mitigating factors. It disputes Westco's claim that it acted in good faith; Nadeau says that Westco's actions clearly demonstrate that it acted in bad faith. In Nadeau's view, Westco was determined to deliver fewer and heavier chickens to Nadeau and made no effort to comply with the Interim Order. With respect to the apology made at the hearing by Westco's Chief Executive Officer, Nadeau submits that the apology was neither timely nor sincere.

ii. Westco

[19] Westco submits that if a fine is to be imposed, $10,000 would be an appropriate and fair penalty in the circumstances. It argues that there are no aggravating factors, but many mitigating factors including the following:

(1) Westco's significant level of compliance with the Interim Order;
(2) the honest interpretative issue which led to the Tribunal's decision that there had been a violation of the Interim Order;
(3) the impact of quota reduction upon Westco's ability to comply with the Interim Order;
(4) Westco's good faith attempts to comply with the Interim Order and to resolve the interim supply dispute with Nadeau;
(5) Westco's desire to assume responsibility for its actions and its apology;
(6) the fact that Westco has never before been accused of contempt or a criminal offence; and
(7) the fact that no profits were made as a result of the breach.

C. Costs

i. Nadeau

[20] Nadeau is seeking solicitor-client costs, including GST and disbursements, in the amount of $587,850.48. Nadeau submits that, as a general rule, on a finding of contempt, the court will award solicitor-client costs in favour of the aggrieved party. It argues that no reason has been shown to depart from the rule in this case.

[21] Nadeau submits that the costs claimed are reasonable and that they are directly attributable to the contempt. Though Nadeau admits that the costs claimed "look high", it submits that the amount is justified as the contempt proceedings have been unusually lengthy and complicated. Nadeau indicates that the contempt proceedings have taken more time and have generated more Tribunal orders than did the main application.

ii. Westco

[22] Westco recognizes that Nadeau should be entitled to recover reasonable costs associated with the prosecution of the contempt. However, it submits that several factors militate in favour of an award of substantially less than full indemnity. It submits that considering the relatively minor gravity of the contempt, the presence of numerous mitigating factors such as Westco's good faith, its willingness to assume responsibility for its actions and the fact that its contempt was a first offence, an award of solicitor-client costs consistent with the bills of costs prepared by Nadeau would be a penalty grossly out of proportion to the severity of the offence.

[23] Westco further argues that Nadeau's two bills of costs are unreasonable and include improper claims which should be deducted. Westco does not quantify the deductions it deems necessary based on its assertion that Nadeau's bills of costs do not provide sufficient detail. However, Westco submits that the Tribunal should not award any costs for the following claims: (1) claims in respect of work accomplished for the prosecution against Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. (collectively, "Acadia") and Groupe Dynaco, Coopérative Agroalimentaire ("Dynaco"); (2) claims in respect of motions that were silent on costs and where success was divided; (3) claims in respect of the interpretation motion, a distinct proceeding which was dismissed without costs; and (4) claims for disbursements which are unsubstantiated or unrelated to the contempt proceedings.

IV. EVIDENCE

A. Westco

i. Thomas Soucy

[24] Mr. Thomas Soucy, Westco's Chief Executive Officer, testified on Westco's behalf. Mr. Soucy indicated that he was actively involved in the contempt proceedings. He testified that Westco had never been accused of contempt or any other criminal offence and further indicated that Westco had never violated any of the regulations applicable to the chicken industry. Mr. Soucy stated that Westco has great respect for the law and that it did not intend to breach the Interim Order. He indicated that the breach resulted from an interpretive error and that Westco believed itself to be in compliance with the Interim Order throughout the interim period.

[25] Mr. Soucy testified that no additional profits were realized by Westco as a result of growing larger chickens or sending larger chickens to Olymel. He stated that Westco had a monetary incentive for shipping heavier birds but indicated that the cost-savings he had anticipated did not materialize. He also indicated that Westco did not receive any additional profits from the profit-sharing agreement between Olymel and Westco as the agreement had not come into force. Mr. Soucy testified that it only came into force once Westco delivered 100% of its production to Olymel. Mr. Soucy indicated that he wanted to continue to sell chickens to Olymel because Olymel was its partner and he wanted to pursue his business plan.

[26] Mr. Soucy apologized to the Tribunal for having breached the Interim Order and stated that the breach had been unintentional. He also accepted responsibility for the breach. He testified that he has learned from this experience and that, in the future, Westco would take more care to ensure compliance with court orders. Mr. Soucy also apologized to the Applicant for having breached the order.

ii. Yves Landry

[27] Mr. Yves Landry, general manager of Nadeau, was also called on behalf of Westco to address certain aspects of the evidence about restitution given by the Applicant's expert. Mr. Landry testified with respect to the costs associated with processing chickens at the Nadeau plant, the premiums paid to producers on nine-cut sized chickens and the number of nine-cut sized chickens delivered to Nadeau. Mr. Landry also indicated that Nadeau realized profits on the heavier birds delivered by Westco. He further stated that Westco continued to supply Nadeau with chickens following the issuance of the Tribunal order dismissing the main application.

B. Nadeau

i. Mr. Grant Robinson

[28] Grant C. Robinson is a chartered accountant. He previously served as the chief financial officer for Maple Lodge Holding Corporation, the parent company of the Applicant. With the parties' agreement, Mr. Robinson was qualified to give evidence as an accountant, including his expert opinion about the chicken processing industry.

[29] Mr. Robinson was asked to "look at the impact of fewer birds being delivered by the respondent [Westco] to Nadeau …under the June 26, 2008 Interim Order." The calculations found in his affidavit are based on two different ways of measuring the impact of Westco's failure to fully comply with the Interim Order. In the first scenario, the amount sought by Nadeau in its claim for restitution is based on the value of the number of chickens Westco failed to deliver to Nadeau during the interim period, i.e. from September 14, 2008, to June 20, 2009. In that regard, Mr. Robinson indicated that he "was directed to consider the replacement cost of the inventory". In this instance, he concluded that Nadeau was unable to "acquire inventory valued at $2,844,932 as a result of the shortfall in birds delivered."

[30] In the second scenario, Mr. Robinson examined the premium contributions Nadeau could have realized had it been able to continue supplying KFC-sized chickens to its clients. In this calculation, he appears to have assumed that only Westco supplied Nadeau with KFC-sized chickens and that Nadeau had lost the "KFC contract". He found the "financial impact of not having the KFC sized product available for sale was a lost contribution of $**[CONFIDENTIAL]**" to Nadeau. Mr. Robinson testified that a contribution refers to the "selling price minus all the variable costs".

[31] Mr. Robinson stated in his examination in chief that only some of the chickens supplied by Westco to Nadeau fell into the KFC-sized category. Relying on testimony given earlier that

day by Mr. Soucy, Mr. Robinson indicated that if only 30% of the chickens supplied by Westco to Nadeau were KFC-sized, the lost contribution would be around 15 % less than $**[CONFIDENTIAL]**. According to Mr. Robinson, the amount would be "in the low **[CONFIDENTIAL]** thousand range".

[32] Counsel for Westco initially objected to this evidence on the basis that it could not be introduced at the hearing as it had been set out in an amended affidavit and the Tribunal had refused to grant Nadeau leave to file the amended affidavit. The Tribunal allowed the evidence on the basis that the matter had been raised in Mr. Soucy's evidence.

[33] Mr. Robinson testified that after finalizing his affidavit, he learned that Nadeau had not lost the KFC contract. In cross-examination, he also acknowledged that he had learned that Acadia and Dynaco had continued to supply KFC-sized chickens to Nadeau during the interim period.

[34] In cross-examination, Mr. Robinson further acknowledged that his calculation was not precise.

[35] It is not disputed that Mr. Robinson's affidavit does not examine Nadeau's actual loss of profits during the interim period. He testified that he had not been asked to calculate those losses.

IV. THE LAW

[36] The general purpose of the court's contempt power is to ensure the smooth functioning of the judicial process and the primary purpose of imposing sanctions in contempt proceedings is to ensure compliance with orders of the court (*Merck & Co. v. Apotex Inc*., 2003 FCA 234, 241 F.T.R 160). The Tribunal has, to date, applied the *Federal Courts Rules* to these contempt proceedings by applying Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141. Section 472 of the *Federal Courts Rules* sets out the penalties which may be imposed for contempt:

472. Where a person is found to be in contempt, a judge may order that	**472.** Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :
(*a*) the person be imprisoned for a period of less than five years or until the person complies with the order;	*a*) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;
(*b*) the person be imprisoned for a period of less than five years if the person fails to comply with the order;	*b*) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;
(*c*) the person pay a fine;	*c*) qu'elle paie une amende;
(*d*) the person do or refrain from	*d*) qu'elle accomplisse un acte ou

doing any act;	s'abstienne de l'accomplir;
(*e*) in respect of a person referred to in rule 429, the person's property be sequestered; and	*e*) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;
(*f*) the person pay costs.	*f*) qu'elle soit condamnée aux dépens.

[37] Justice Kelen of the Federal Court summarized the factors to be considered in sentencing hearings as follows in *Canada (Minister of National Revenue) v. Marshall*, 2006 FC 788:

> To summarize, the factors relevant to determining a sentence in contempt proceedings are:
>
> i. The primary purpose of imposing sanctions is to ensure compliance with orders of the court. Specific and general deterrence are important to ensure continued public confidence in the administration of justice;
>
> ii. Proportionality of sentencing requires striking a balance between enforcing the law and what the Court has called "temperance of justice";
>
> iii. Aggravating factors include the objective gravity of the contemptuous conduct, the subjective gravity of the conduct (i.e. whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness), and whether the offender has repeatedly breached orders of the Court; and
>
> iv. Mitigating factors might include good faith attempts to comply (even after the breach), apologize or accept responsibility, or whether the breach is a first offence.

[38] Engaging in contemptuous conduct for financial gain has also been considered an aggravating factor (*Louis Vuitton Malletier, S.A. v. Bags O'Fun Inc*., 2003 FC 1335). Further, profits made from contemptuous conduct and the financial situation of the contemnor are factors that have been considered when assessing the appropriate fine (*Dursol-Fabrik Otto Durst GmbH Co. KG v. Dursol North America Inc*., 2006 FC 1115).

V. ANALYSIS

A. Restitution

[39] Subsection 8(2) of the *Competition Tribunal Act* provides that the Tribunal has, with respect to the enforcement of its orders, all such powers, rights and privileges as are vested in a superior court of record. The Supreme Court of Canada held in *Chrysler Canada Ltd. v.Canada*

(Competition Tribunal), [1992] 2 S.C.R. 394, that the Tribunal has the power over contempt for breaches of its orders given the wording of section 8 of the *Competition Tribunal Act*. No question arose in that case with respect to criminal contempt.

[40] Courts have stressed that ensuring compliance with Court orders is the objective of civil contempt proceedings. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, it was held at p. 943 that:

> The criminal law of contempt must be distinguished from civil contempt. The purpose of criminal contempt was and is punishment for conduct calculated to bring the administration of justice by the courts into disrepute. On the other hand, the purpose of civil contempt is to secure compliance with the process of a tribunal including, but not limited to, the process of a court. See *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, *R. v. Hill* (1976), 73 D.L.R. (3d) 621 (B.C.C.A.), at p. 629, *Poje v. Attorney General for British Columbia*, [1953] S.C.R. 516.
> …
> In order to secure compliance in a proceeding for civil contempt, a court may impose a fine or other penalty which will be exacted in the absence of compliance. However, the object is always compliance and not punishment.
>
> (Sopinka J. dissenting, but not on this point. See also: *Canada (Min. of National Revenue) v. Marshall*, 294 F.T.R. 297 (F.C.)).

[41] Courts, referring to the purpose of contempt proceedings, have generally refused any request for indemnification made in the context of a contempt proceeding.

[42] In *Pro Swing Inc. v. Elta Golf Inc*., [2006] 2 S.C.R. 612, Justice Deschamps, writing for the majority, held as follows at p. 635:

> In Canadian law, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification.
>
> [my emphasis]

[43] In *Wanderingspirit v. Salt River First Nation 195*, 2006 FC 1420, the Federal Court found that the sentencing process following a finding of contempt is not a way for a party to recover funds. In that case, two individuals were found guilty of contempt for the issuance, authorization and acceptance of cheques drawn on accounts of the Salt River First Nation ("SRFN"), contrary to the terms of a number of orders of the court. The applicants argued that should the Court impose a fine, the fine should equate to that amount of money allegedly

siphoned from the SRFN account by the cheques issued in contravention of the orders. Justice Snider refused to apply such a principle and stated as follows:

> The purpose of the penalty in contempt cases has been described as to "repair the depreciation of the authority of the court" (*International Forest Products v. Kern*, [2001] B.C.J. No. 135 at para. 20 (B.C.C.A.)). The issue in this contempt proceeding is whether the Contemnors violated an order of the court and not whether they stole funds from SRFN. For this reason, the penalty should be designed to restore the reputation of the Court and to deter the Contemnors from any further breaches of orders. The penalty is not a way for the Applicants to recover funds that they believe were effectively stolen from the SRFN. In any event, any fine proceeds are paid to the Court and not the Applicants.
>
> [my emphasis]

[44] Finally, in *Sussex Group Ltd. v. 3933938 Canada Inc. (c.o.b. Global Export Consulting)* (2003), 124 A.C.W.S. (3d) 482, Justice Cumming of the Ontario Superior Court of Justice, indicated that a contempt proceeding should not appear to have the function of a civil action in tort:

> The moving party Sussex Group Limited ("Sussex") seeks a fine in addition to a prison term, and submits that the fine should be made payable to Sussex rather than to the Crown. The Interim Manager and Sussex undoubtedly have been put to additional outlays in an attempt to obtain compliance with the September 30, 2002 Order and arguably have suffered significant consequential losses because of the harm done to Sussex's business relationships in Cuba. The Court has a broad discretion under Rule 60.11(5): *Lougheed v. Thomson and McDonald*, [1928] O.J. No. 165 (O.S.C.-H.C.D.); *R. v. CHEK TV Ltd.* (1987), 33 C.C.C. (3d) 24 (B.C. C.A.). A fine payable for the benefit of a moving party may be an appropriate approach in certain circumstances. However, this is a contempt proceeding in respect of breaches of a Court Order, pure and simple. It does not have, and must not appear to have, the function of a civil action in tort or for breach of contract. The Interim Manager can, of course, pursue remedies for civil wrongs by the respondents through a civil action.
>
> [my emphasis]

[45] At the hearing, counsel for the Applicant candidly acknowledged that they had been unable to find a precedent to support its position. The above cited case law indicates that superior courts have been unwilling to allow claims for indemnification made in the context of contempt proceedings.

[46] Further, the principle pursuant to which solicitor-client costs are generally awarded in contempt proceedings is based on the policy that the applicant is assisting the tribunal in ensuring respect for its orders:

> It is, of course, customary, in matters of this sort, to require that persons found guilty of contempt pay costs on a solicitor and client basis to the party who has brought the matter to the Court's attention. The policy underlying that jurisprudence is clear: a party who assists the Court in the enforcement of its orders and in the enforcement of respect for its orders, should not, as a rule, be put out of pocket for having been put to that trouble.
>
> (see *Pfizer Canada Inc. v. Apotex Inc.*, 162 F.T.R. 169)

[47] Essentially, the Applicant is seeking to recover the losses it incurred as a result of the Respondent Westco's breach of the Tribunal's Interim Order. This situation is contemplated by section 36 of the Act which provides as follows:

36. (1) Any person who has suffered loss or damage as a result of	**36.** (1) Toute personne qui a subi une perte ou des dommages par suite :
(*a*) conduct that is contrary to any provision of Part VI, or	*a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,	*b*) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.
(my emphasis)	(mes soulignements)

[48] The Competition Tribunal, unlike the Federal Court, is not a court of competent jurisdiction under section 36.

[49] In my view, the presence in the Act of an express provision dealing with losses and damages resulting from a breach of a Tribunal order coupled with the absence of any express language giving the Tribunal the power to award damages indicates that Parliament did not intend the Tribunal to have the power to award damages in such circumstances.

[50] Accordingly, I am of the view that the Tribunal does not have the jurisdiction to award restitution in the present matter and that any prejudice flowing from a breach of a Tribunal order should be addressed by an action pursuant to section 36 of the Act. While the Applicant has acknowledged the distinction between damages and restitution, in my view, in this context a claim of restitution to make the Applicant whole is essentially a claim for damages.

[51] Even if I were satisfied that the Tribunal has jurisdiction, the Applicant's claim for restitution would fail. The Applicant argues that criminal sanctions are applicable in civil contempt proceedings and thus relies on the restitution provision found in the *Criminal Code* to support its claim. Paragraph 738(1)(*a*) of the *Criminal Code* sets out the circumstances under which restitution could be imposed:

738(1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:	**738**(1) Lorsque le délinquant est condamné ou absous sous le régime de l'article 730, le tribunal qui inflige la peine ou prononce l'absolution peut, en plus de toute autre mesure, à la demande du procureur général ou d'office, lui ordonner :
(*a*) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned where the amount is readily ascertainable;	*a)* dans le cas où la perte ou la destruction des biens d'une personne – ou le dommage qui leur a été causé – est imputable à la perpétration de l'infraction ou à l'arrestation ou à la tentative d'arrestation du délinquant, de verser à cette personne des dommages-intérêts non supérieurs à la valeur de remplacement des biens à la date de l'ordonnance moins la valeur – à la date de la restitution – de la partie des biens qui a été restituée à celle-ci, si cette valeur peut être facilement déterminée;
(my emphasis)	(mes soulignements)

[52] The provision refers to "loss or destruction of, the property of any person". I fail to see how 933,398 chickens that were not delivered to Nadeau constitute Nadeau's property. Nadeau did not pay for or own the chickens. Rather, it was deprived of the opportunity to purchase the chickens. I am also of the view, on the evidence, that the amount at issue is not "readily ascertainable".

[53] Similarly, I would also have refused Nadeau's claim for compensation. Nadeau has failed to establish the quantum of its loss as a result of Westco's breach of the Tribunal Interim Order. No conclusive evidence was adduced by Nadeau with regards to its profits during the interim period.

B. Penalty

[54] As stated earlier in these reasons, the general purpose of the court's contempt power is to ensure the smooth functioning of the judicial process and the primary purpose of imposing sanctions in contempt proceedings is to ensure compliance with orders of the court and not to punish the contemnor.

[55] I agree with the summary of factors to be considered in sentencing proceedings articulated by Justice Kelen in *Canada (Minister of National Revenue) v. Marshall*, 2006 FC 788, which are reproduced above. I now turn to consider their application in the circumstances of this case.

1. Contumacious Intent

[56] The question of contumacious intent remains an important one. The Courts have dealt leniently when a party acted in *bona fide* belief that its conduct did not constitute contempt. Paragraph 92 of the Tribunal's reasons for order and contempt order dated January 22, 2010, provided as follows:

> The Interim Order was clear. It provided that the Respondents, including Westco continue to supply Nadeau with a specific number of live chickens on a weekly basis. Westco was aware of the existence of the Tribunal's Interim Order and knowingly disobeyed the Order.

[57] While I accept that a finding of non-contumacious conduct may be a mitigating factor in the imposition of a penalty, in the circumstances of this case, such a finding is not open to me. Here, Mr. Soucy acknowledged that the numbers of chickens were not delivered pursuant to the Interim Order. He chose instead to interpret the order in a manner consistent with Westco's long term business plan, which involved the production of larger chickens. He contends that the delivery of an equivalent volume of chickens in kilograms was sufficient to comply with the order. This interpretation of the order was rejected by the Tribunal. In reaching this conclusion, it found the order to be clear. Westco now accepts that its interpretation of the Interim Order was in error. It contends nonetheless that it never intended to breach the order.

[58] The Interim Order clearly provided for a specific number of chickens to be delivered on a weekly basis. The terms of the order were clear and simple. In the circumstances, it cannot be said that Westco acted with the *bona fide* belief that its conduct did not constitute a breach of the order. In my view, it was not open to Westco to interpret the Order as it did and substitute the requisite number of chickens for their equivalent weight in kilograms.

2. Attempts to comply

[59] Westco contends that it made good faith attempts to comply with the Interim Order and resolve the interim supply dispute with Nadeau. At paragraph 90 of the contempt decision, the Tribunal found:

> The record establishes that Westco was intent on pursuing its long term business plan, which it argued made it impossible to comply with the Interim Order. It made virtually no effort to adjust its production or make alternate arrangements in order to comply with the Interim Order.

[60] The Tribunal also found that it was not impossible for Westco to comply with the Interim Order, as it had alleged. It follows that this factor will not assist Westco.

3. Apology

[61] At the sentencing hearing, Mr. Soucy offered an apology on Westco's behalf. He also accepted full responsibility for Westco's conduct. I accept, for the Tribunal, the apology and consider it to be unqualified. However, the apology, while sincere, was not timely. It was not presented within a timeframe which would allow it to mitigate the penalty. The apology was made at the last possible moment.

4. Gravity of the contempt

[62] There is no dispute that, for the purpose of this proceeding, the order is valid. The contemnor argues that the Tribunal should consider the fact that Westco was ultimately successful on the main application. In my view, Westco's success in the main application has no bearing on the penalty to be imposed for contempt of the Interim Order.

[63] The contemnor argues that while it failed to deliver the requisite number of chickens pursuant to the Interim Order, it nevertheless delivered a substantial number of the chickens it was required to deliver, namely 84%. Westco further contends that the percentage of chickens delivered is higher when the reduction in quotas is considered.

[64] While it is true that a significant number of chickens was delivered, the number was insufficient to warrant a finding of substantial compliance. The contemnor failed to deliver 933,398 chickens over 38 weeks. This shortfall is significant and far more than a technical breach. The contempt is a serious matter. However, Westco nevertheless delivered a significant number of chickens to Nadeau during the contempt period and their weight in kilograms is essentially equivalent to that of the number of chickens that would have been delivered had there been compliance. These circumstances will militate in favour of a lesser fine for the contempt.

5. Profits

[65] Mr. Soucy testified that Westco did not profit from the contempt. In his affidavit in support of Westco's opposition to Nadeau's request for interim relief, dated May 29, 2008, Mr.

Soucy indicated that Westco would make additional profits in the magnitude of $**[CONFIDENTIAL]**per week selling its chickens to Olymel rather than Nadeau. According to Mr. Soucy, important cost-savings would be realized by sending larger chickens to Olymel. He stated that given Westco's profit-sharing agreement with Olymel, Westco would also earn additional profits on the sale of Westco chickens which had been processed by Olymel. However, during his testimony at the sentencing hearing, Mr. Soucy indicated that the anticipated profits had not materialized. He also submitted evidence indicating that chickens sold to Olymel were sold at the same price as those sold to Nadeau during the interim period.

[66] I am satisfied that, given the reduced number of chickens delivered to Olymel by Westco during the interim period, Westco did not earn the additional profits foreseen by Mr. Soucy in the affidavit described above. However, in light of his affidavit evidence, I do not accept Mr. Soucy's testimony that Westco realized absolutely no additional profit. The difficulty is that the Tribunal does not have sufficient reliable evidence to quantify those profits. Accordingly, they cannot be considered when determining the amount of the fine. Nevertheless, the fact that Westco breached the Interim Order for the prospect of financial gain will be treated as an aggravating factor.

6. Prior convictions

[67] The finding of contempt is a first for Westco. This fact will militate in the contemnor's favour.

7. Deterrence

[68] As stated earlier in these reasons, specific and general deterrence are matters which merit serious consideration when imposing a fine for contempt which, in the case of corporations, is the only available remedy (*Apotex Inc. v. Merck & Co. Inc*., 2003 FCA 234.) In *Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc. et al*., 37 C.P.R. (3d) 8, (F.C.T.D.), Justice Pinard described deterrence and stated that "if those who get caught were to get away unscathed that would encourage such activities and consequently destroy the intended effect of the laws that have been passed".

[69] As well, in *Baxter Travenol Laboratories of Canada, Ltd. v. Cutter (Canada), Ltd.*, [1987] 2 F.C. 557 (F.C.A.), Justice Urie, for the majority, stated that a fine should not be a token fine as this would "be inconsistent with the gravity of the contraventions and might serve to encourage others to flout the law if it is in their financial advantage to do so."

[70] Thus, in assessing the fine, consideration must be given to deterring both Westco and other companies from engaging in contemptuous conduct.

8. Conclusion

[71] Considering all the above, I conclude that a fine of $75,000.00 is fair and reasonable in the circumstances.

C. Costs

[72] The normal practice in contempt cases is to award costs on a solicitor-client basis to the party seeking enforcement of the court order (*M.N.R. v. Bjornstad*, 2006 DTC 6492). Costs cannot however be unreasonable or excessive (*Brilliant Trading Inc. v. Wong*, 2006 FC 254, at para. 5). Further, the imposition of costs should not result in undue punishment of the contemnor (*Coco-Cola Ltd. v. Pardhan (c.o.b. Universal Exporters)* (2000), 5 C.P.R. (4th) 333).

[73] The Applicant has claimed solicitor-client costs in the amount of $587,850.48, inclusive of GST and disbursements. In my view, this amount is unreasonable and would result in undue punishment for Westco.

[74] I am not satisfied that counsel fees in the amount of $496,790.95 have been justified and I am of the view that there are a number of reasons why the Tribunal should reduce the counsel fees claimed by Nadeau.

[75] In its bill of costs of February 23, 2010, the Applicant made an error at page 5 for fees associated with Sarah Hickey. It resulted in an overcharge of $27,197.10, leaving the fees claimed at $469,593.85.

[76] Further, fees and disbursements incurred up to February of 2009 should be reduced in light of the fact that Nadeau's request for a show cause order as against Dynaco and Acadia was denied. Fees claimed in respect of interlocutory motions where the orders were silent on costs should not be awarded and the number of counsel for which fees have been claimed is unreasonable. One counsel for the show cause hearing and sentencing hearing and two counsel for the contempt hearing would have been reasonable. Further, Nadeau's bill of costs does not provide sufficient detail to allow the Tribunal to determine exactly what costs were incurred for what tasks. This deficiency makes it difficult to assess the reasonableness of the fees claimed.

[77] Accordingly, in the exercise of my discretion under Rule 400 of the *Federal Courts Rules*, I will fix counsel fees herein at $200,000.00, inclusive of GST.

[78] Similarly, I am of the view that disbursements in the amount of $63,460.95 are not fully justified. First, it is unclear whether or not some of the disbursements claimed were incurred in the context of the section 75 proceedings or the contempt proceedings. Second, disbursements relating to travel for second and/or third counsel should be disallowed. I would therefore reduce the Applicant's claim for disbursements to $50,000, inclusive of GST.

[79] These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement about any redactions needed to protect confidential evidence.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[80] 1. The Respondent Westco shall pay a fine in the amount of $75,000.00 payable within sixty (60) days of this order.

2. The Respondent Westco shall pay to the Applicant costs fixed in the amount of $250,000.00, all inclusive.

3. On or before Thursday, October 14, 2010, the parties are to jointly correspond with the Tribunal setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

DATED at Ottawa, this 24th day of September, 2010.

SIGNED on behalf of the Tribunal by Justice Blanchard.

(s) Edmond P. Blanchard

COUNSEL:

For the applicant

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

Leah Price
Ron Folkes
Joshua Freeman

For the respondent

Groupe Westco Inc.

Denis Gascon
Martha A. Healey
Éric C. Lefebvre
Alexandre Bourbonnais
Geoffrey Conrad