File No.: CT-2008-004

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 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 Show Cause Order issued against the Respondent Groupe Westco Inc.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
April 14, 2010
Jos LaRose for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT # 652

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

SUBMISSIONS OF GROUPE WESTCO INC. ON SENTENCING AND COSTS

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I. OVERVIEW

1. On January 22, 2010, in its Reason for Order and Contempt Order (the "**Decision**"), the Competition Tribunal (the "**Tribunal**") found the Respondent Groupe Westco Inc. ("**Westco**") to be in contempt of the Tribunal's Interim Order of June 26, 2010 (the "**Interim Order**") and ordered Westco to serve and file written submissions on sentence, including the question of costs. Westco has appealed the underlying Decision to the Federal Court of Appeal, and thus makes the present submissions under reserve of all legal rights, and without prejudice to its position on appeal.

2. In short, Westco submits that no fine should be imposed upon it given the circumstances giving rise to the contempt. If, however, a fine is to be ordered, a maximum amount of $10,000 would be an appropriate and fair penalty. In particular, having regard to Westco's significant level of compliance with the Interim Order, the honest interpretive issue which led to the Tribunal's decision that there had been a violation of the Interim Order, the impact of quota reduction upon Westco's ability to comply, Westco's good faith attempts to comply with the Interim Order as well as resolve the interim supply dispute with Nadeau, Westco's desire to assume responsibility for its actions, and the fact that this is Westco's first offence, such a fine would be sufficient to strike the proper balance between deterrence and the temperance of justice.

3. This is especially so when considered in conjunction with Westco's liability for costs, which itself represents a significant penalty. Westco recognizes that, as the successful litigant, the Applicant Nadeau Poultry Farm Limited ("**Nadeau**") should be entitled to recover reasonable costs associated with the prosecution of the contempt proceedings against it. That said, an award of costs remains within the full discretion of the Tribunal. While it is customary practice to award costs on a solicitor-client basis in contempt proceedings, in this case, several factors militate in favour of an award of costs representing less than full indemnity. Moreover, notwithstanding the nature of the costs to which Nadeau may be entitled, only those costs that were reasonably incurred in the prosecution of the contempt proceedings against Westco should form part of the costs award.

II. THE LAW

(a) Sentencing Principles in Contempt Proceedings

4. The array of penalties that may be imposed by the Tribunal following a finding of contempt are provided for at Rule 472 of the Federal Courts Rules, which reads in relevant part as follows:

> **472. Penalty** – Where a person is found to be in contempt, a judge may order that:
>
> (...)
>
> (*c*) the person pay a fine;
>
> (...)
>
> (*f*) the person pay costs.

- *Federal Courts Rules*, SOR/98-106 [***F.C.R..***], Rule 472;
- *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 8(2) and 8(3);
- *Competition Tribunal Rules*, SOR/2008-141 [***C.T.R.***], Rule 34.(1).

5. By analogy to criminal proceedings, the Tribunal has a wide discretion in imposing a sentence that fits the offence rather than the offender. Relevant criteria to be considered in assessing what penalty should be imposed following a finding of contempt have been variously set out in Federal Court jurisprudence. As a matter of first principle, the responsibility of the Tribunal in sentencing is to assess "the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice."

- *R. v. Gardiner*, [1982] 2 S.C.R. 368 [***Gardiner***] at p. 414-415;
- *Baxter Travenol Laboratories of Canada, Ltd. v. Cutter (Canada) Ltd.*, [1987] 2 F.C. 557 (F.C.A.), Urie, Stone and MacGuigan JJ. [***Baxter***], at p. 562;
- *Lyons Partnership, L.P. v. MacGregor* (2000), 5 C.P.R. (4th) 157 (T.D.), Lemieux J. [***Lyons***], at para. 21;
- *Canada (Minister of National Revenue – M.N.R.) v. Marshall* 2006, 294 F.T.R. 297 (T.D.), Kelen J. [***Marshall***], at para. 15.

6. As a corollary to the foregoing, the primary purpose of imposing sanctions is generally to ensure compliance with orders of a court/tribunal. Deterrence is important to ensure continued public confidence in the administration of justice. However, although the amount of the fine should reflect the severity of the law, it should be sufficiently moderate to show the temperance

of justice. In that respect, good faith attempts to comply, apologize or accept responsibility, a lack of contumacity, and whether the offence is a first offence are all mitigating factors to be taken into account.

- *Lyons*, at paras. 21, 23;
- *Marshall*, at paras. 15-16;
- *Merck & Co. v. Apotex Inc.* (2003), 227 D.L.R. (4th) 106 (F.C.A.), Stone, Noël and Sexton JJ.A. [***Merck (Appeal Decision)***], at para. 56;
- *Baxter*, at p. 564-567.

7. In *Canada (Minister of National Revenue – M.N.R.) v. Marshall,* Kelen J. provided a helpful summary of these relevant factors as follows:

> [16] 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.

- *Marshall*, para. 16.

8. Finally, civil damages are <u>not</u> relevant to determining what the fine should be in contempt proceedings. As MacKay J. has stated, "[a]ny concern of the Plaintiffs about the injury to them caused by [contemptuous] activities ought to be recoverable in damages or profits claimed. The concern of the Court, in a case of civil contempt such as this, must be the failure to respect the Court's process."

- *Merck & Co. et al v. Apotex Inc.* (2001), 206 F.T.R. 51 (T.D.), MacKay J. [***Merck (Penalty Decision)***], at para. 11; varied, but not on this point, by *Merck (Appeal Decision)*;
- *CHUM Ltd. et al. v. Stempowicz et al.* (2004), 251 F.T.R. 292 (T.D.), Blais J., at para. 34.

(b) Procedural Issues

9. The procedural guidelines that govern evidentiary issues at sentencing hearings in criminal, or quasi-criminal, proceedings are well-established. The restrictive evidentiary rules that apply at trial are relaxed at the sentencing stage. However, any disputed facts which the prosecuting party seeks to rely on in aggravation of sentence must be proved beyond a reasonable doubt:

> It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail.
>
> [...]
>
> Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.
>
> To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof.
>
> (Emphasis added)

- *Gardiner*, at p. 414-415;
- *Criminal Code*, R.S., 1985, c. C-46 [***Criminal Code***], s. 724(3)(e).

III. FINE

10. Having regard to all the circumstances and in light of the relevant factors to be taken into account in the determination of sentence in contempt proceedings, Westco submits that a maximum fine of $10,000 would be a fair and just penalty in the present instance.

(a) Deterrence

11. In the circumstances of this case, a fine in the amount of $10,000 – when also coupled with Westco's liability for costs – would be more than sufficient to ensure that future orders of the

Tribunal are complied with, thereby achieving the desired deterrent effect. Anything greater than such an amount would, in contrast, result in undue punishment for Westco.

12. Westco has never before been found to have breached an order of the courts, and there is no reason to expect that Westco will ever be so found again. Westco is a respectful corporate citizen that is in good standing with the regulatory authorities in New Brunswick. It has never been found guilty, nor even accused, of a criminal offence, and the present proceedings mark the first time that it has faced accusations of contempt. Furthermore, and notwithstanding Westco's prior good record, Mr. Thomas Soucy has indicated in his witness statement that Westco will henceforth act even more prudently to guarantee its compliance with judicial orders.

- Déclaration de témoin de Thomas Soucy, at paras. 3.3-3.4.

13. In addition, it is important to highlight that the violation of the Interim Order by Westco found to have occurred by the Tribunal was not motivated by expediency or a desire to achieve greater profits, but rather resulted from an honest interpretive mistake as to the meaning of the order made. Contrary to many other cases in which a corporate party has been found in contempt, Westco derived little financial benefit from the breach of the order.

- See e.g. letters from Westco to Nadeau dated July 18, 2008 (Exhibits R-37 and CR-63); letter from Westco to Nadeau dated October 8, 2008 (Exhibit CR-64); letter from Westco to Tribunal dated October 29, 2008 (Exhibit A-15).
- Déclaration de témoin de Thomas Soucy, at paras. 2.1-2.3;
- See in contrast *Lyons*, and *Merck (Penalty Decision)* and *Merck (Appeal Decision)*.

14. While it is true that in the context of the application for the Interim Order, Westco made evidence to the effect that its inability to supply its partner Olymel S.E.C., through the partnership Sunnymel, would cause it significant financial harm, the corresponding benefits that it had anticipated failed to materialize given the relatively small number of chickens that were supplied to the partnership. Westco's liability for costs, not to mention the fees and expenses it itself incurred in defence of the contempt proceedings, will thus dwarf any minimal benefit it may have derived from its contemptuous behaviour. From a deterrence standpoint, there is accordingly no risk that a fine imposed, however small its amount may be, might be perceived as a license fee for which a corporation could simply budget; the reasoning relied upon in *Merck*

(Appeal Decision), which in any event was primarily focussed on considerations particular to the intellectual property context, is thus inapplicable to the present situation.

- Déclaration de témoin de Thomas Soucy, at paras. 2.1-2.3, and Exhibit TS-1 thereto;
- Affidavit of Thomas Soucy dated May 29, 2008 (Exhibit CA-66);
- *Merck (Appeal Decision)*, at para. 89.

(b) Aggravating Factors – Gravity of the Contempt

15. Westco recognizes that all instances of contempt are serious in that they tend to depreciate the authority of the judicial system. That being said, careful consideration of the circumstances surrounding the violation of the Interim Order found to have occurred by the Tribunal demonstrates that the contempt in this case is of relatively minor gravity, both objectively and subjectively.

16. In the period during which the Interim Order was in effect, between July 20, 2008 and June 8, 2009, Westco supplied 6,196,330 live chickens to Nadeau, or 13,938,499 kilograms of live chicken. The deliveries of chicken made by Westco to Nadeau represent very significant compliance with the Interim Order over a 46-week period.

- Schedule B to the Witness Statement of Denise Boucher (Exhibit CR-22);

17. The Interim Order was issued on the assumption (acknowledged by all parties) that the average weight of chickens produced by Westco was 2 kilograms. Although the supply obligation provided for in the Interim Order was not expressed in kilograms but rather in number of heads of chicken, simple arithmetic suggests that, had the assumptions that underlay the Interim Order been borne out, compliance with the Interim Order would have resulted in 14,358,160 kilograms of chickens being supplied to Nadeau during the interim period ((161,230 × 8 weeks + 154,980 chicken × 38 weeks) × 2 kg). Westco in fact supplied Nadeau with 97% of that amount over the 46-week period during which the Interim Order was in effect. If reductions in quota allocations are taken into account, Westco in fact exceeded the level of supply of kilograms of chicken contemplated by the Interim Order.

- Schedule B to the Witness Statement of Denise Boucher (Exhibit CR-22)

- Quota Variation and Supply Obligation Table (Exhibit R-60)
- KGs Delivered by Westco (Exhibit R-62)

18. Objectively speaking, the magnitude of the breach was small, in comparison both to the level of compliance exhibited by Westco and other cases in which contempt has been found. For instance, in the 24 hours following release of reasons for judgment finding that a generic product manufactured by Apotex infringed a patent held by Merck – but before a formal judgment issued – Apotex sold $9,000,000 of the product, flagrantly ignoring the clear prohibitions contained in the reasons. This equated to a month of normal sales. The trial judge qualified the contempt as "extraordinary and without parallel". However, in *Merck (Appeal Decision)*, the Federal Court of Appeal judged that a fine in the amount of $125,000 would be appropriate. The circumstances that led to the extraordinary sentence in that case are not present here.

- *Merck (Penalty Decision)*, at para. 11;
- *Merck (Appeal Decision)*, at para. 92.

19. Moreover, the shortfall in the number of chickens supplied to Nadeau was due in large part to the reduction in production quota allocations in the chicken industry – a situation entirely beyond Westco's control which was acknowledged as a relevant and indeed determining factor during the show cause proceedings against the co-respondents Groupe Dynaco, Coopérative Agro-alimentaire ("**Dynaco**"), and Volailles Acadia S.E.C. and Volailles Acadia Inc. ("**Acadia**"). As a matter of fairness, this factor must also be taken into account in sentencing.

- *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 3 [***Show Cause Decision***].

20. In hindsight, it is true that had Nadeau accepted the offer made by Westco, Westco would have met the number of chickens provided in the Interim Order in spite of the reduction of its quota allocations. However, that reduction exacerbated the effect of Westco's mistaken interpretation of the Interim Order.

- Decision, at para. 96 (Schedule B);
- Déclaration de témoin de Thomas Soucy, at para. 2.4.

21. Westco sought to give effect to both paragraphs 57 and 58 of the Interim Order in the face of constantly varying quota allocations. To do so, it mistakenly attributed a fixed percentage of its total volume of production (in kgs) to Nadeau, taking into account the number of replacement chicken obtained by Nadeau from other sources. The percentage of Westco's total production that was supplied to Nadeau remained constant over the interim period. However, when quotas decreased, the number of chickens Westco produced and, *a fortiori*, the number supplied to Nadeau decreased accordingly and created the shortfall found to have occurred by the Tribunal.

- Decision, at para. 96 (Schedule B);
- Sommaire des livraisons du Groupe Westco Inc. (Exhibit R-57);
- Transcript of Contempt Hearing (Thomas Soucy), November 4, 2009, at p. 543-553.

22. In dismissing the motion for a show cause order against the co-respondents, the Tribunal stated as follows in relation to quota reductions:

> [7] In the circumstances and given the Respondents' admissions that they have not supplied the required numbers of chicken, there is *prima facie*, a breach of the Interim Order by all Respondents.
>
> [8] However, it does not necessarily follow that a show cause order will issue against all the Respondents. I have concluded that Acadia and Dynaco should not be the subject of such an order because their failure to comply is largely explained by the reduction in quota. The Tribunal is of the opinion that both parties would have been in compliance with its Interim Order but for the reduction. The Tribunal has thus concluded that the violation took place in circumstances in which it is "absolutely certain that it did not deserve to be punished."
>
> (Emphasis added)

- *Show Cause Decision*, at paras. 7-8.

23. In assessing the gravity of the contempt at the sentencing stage, and by extension the sentence to be imposed, it follows that due consideration must similarly be had for the impact of quota reductions on Westco's ability to fully comply with the Interim Order.

24. Subjectively speaking, Westco never intended to breach the Interim order, or acted with the intention to interfere with the process of the Tribunal. Rather than flagrantly disregarding the imperatives of the Interim Order, Westco sought instead to give it logical effect, having regard to

the prevailing practices in the chicken industry. Moreover, Westco was completely transparent in so doing, going to great lengths to apprise both Nadeau and the Tribunal of the way in which it understood the Interim Order. Under the circumstances, one cannot contend that Westco intended to violate the Interim Order, as Westco then understood it.

- Déclaration de témoin de Thomas Soucy, at para. 3.1;
- See e.g. letters from Westco to Nadeau dated July 18, 2008 (Exhibits R-37 and CR-63); letter from Westco to Nadeau dated August 1, 2008 (Tab 6 to Exhibit CR-64); letter from Westco to Nadeau dated September 2, 2008 (Exhibit R-40); letter from Westco to Nadeau dated October 8, 2008 (Exhibit CR-64); letter from Westco to Tribunal dated October 29, 2008 (Exhibit A-15).

25. Finally, Nadeau has indicated its intention to tender considerable evidence at the sentencing hearing concerning the damages it allegedly suffered as a result of the contempt. As Westco has not had the benefit of reviewing Nadeau's submissions as to sentence, it can only assume that Nadeau intends to rely on the alleged damages as an aggravating factor demonstrating the gravity of the contempt. As stated above, however, the issue of civil damages is irrelevant to the present proceedings; the sole concern of this Tribunal as regards the determination of the penalty must the failure to respect the Tribunal's process. Their relevance notwithstanding, the damages alleged to have been suffered by Nadeau are in any event unsubstantiated by the evidence, based on an inherently flawed analysis and are, in short, wholly unproven. It is the Tribunal's legal duty to disregard them.

(c) Mitigating Factors

26. In addition to the foregoing, the presence of several mitigating factors in this case militates in favour of only a small fine being imposed. First and foremost, as stated above, Westco has indicated its intention to tender a formal apology to the Tribunal at the sentencing hearing, in the terms outlined in Thomas Soucy's witness statement. The apology to be offered to the Tribunal expresses Westco's profound regret for having contravened the will of the Tribunal, recognizes how seriously Westco has taken its conviction for contempt, and underscores Westco's deep respect for the judicial process and the principles upon which it is based, including the rule of law. In short, Westco is prepared to accept responsibility for its actions.

- Déclaration de témoin de Thomas Soucy, at paras. 3.1-3.3.

27. Second, Westco is a corporate citizen that is in good standing with regulatory authorities in New Brunswick and it had never before been accused, let alone convicted, of contempt. Nor has it ever been accused of a criminal offence. Westco's record of respect for the laws and orders to which it is subject confirm the exceptional nature of the violation which was found to have occurred. As is recognized systematically in the jurisprudence, the fact that the Tribunal is dealing here with a first offence is a very important consideration to be taken into account in assessing the severity of the penalty.

- Déclaration de témoin de Thomas Soucy, at paras. 3.3-3.4;
- *Wanderingspirit v. Salt River First Nation 195*, 2006 F.C. 1420 (F.C.), Snider J. [***Wanderingspirit***], at para. 4;
- *Marshall*, at para. 16.

28. Westco's good faith attempts to resolve the dispute that led to the finding of contempt also suggest that only a small fine should be imposed. It was Westco that first raised the logistical difficulties related to compliance with the Interim Order in two letters dated July 18, 2009 addressed to Nadeau. It was again Westco that first raised the interim supply issue with the Tribunal, albeit indirectly, in its letter of October 9, 2009. Following the issuance of the direction of the Tribunal on October 16, 2008, which stated that the Respondents' weekly supply of live chicken would "continue to be expressed" in number of live chickens, it was Westco that proactively sought further clarification of that direction prior to the initiation of the contempt proceedings, by way of letter dated October 29, 2009. Westco wrote to the Tribunal as follows:

> We are writing further to Justice Blanchard's direction of October 16, 2008 ("Direction") and to the Order of June 26, 2008, allowing the Applicant's application for interim relief under section 104 of the *Competition Act* (the "Interim Supply Order").
>
> We also received yesterday further communication from counsel to the Applicant, attached hereto as Attachment A. In view of the content of that letter, Westco seeks to confirm that its interpretation and application of the Interim Supply Order is consistent with that Order. If Westco's interpretation is not maintained by the Tribunal, Westco seeks further direction as to the precise nature of its supply obligations in this interim period.

(Emphasis added)

- Letters from Westco to Nadeau dated July 18, 2008 (Exhibits R-37 and CR-63);
- Letter from Westco to Tribunal dated October 9, 2008 (Exhibit CA-11);
- Direction to counsel dated October 16, 2008 (Exhibit A-13);
- Letter from Westco to Tribunal dated October 29, 2008 (Exhibit A-15).

29. The Tribunal declined to either confirm the interpretation of the Order put forward by Westco, or to provide the directions Westco sought as to the precise nature of its supply obligations, instead directing on Friday, October 31 that the parties proceed by way of motion. Westco did precisely that, filing a motion for interpretation of the Interim Order on Wednesday, November 5. Although the Tribunal initially indicated it would hear Westco's motion in priority to Nadeau's motion for a show cause order, stating during a conference call held shortly after the motion were filed that it would "be starting it with the Westco motion", that motion in fact remained pending until March 19, 2010 and was never separately heard.

- Direction from the Tribunal dated October 31, 2008 (Exhibit A-19).
- Transcript of the Conference Call between the Parties and Justice Blanchard Held on November 6, 2008, at p. 19-20.

30. In addition to its proactive and good faith efforts to seize the Tribunal of the dispute in a fair and timely fashion, without necessitating resort to contempt proceedings, Westco offered to supply 100% of its production to Nadeau up until a decision on the merits of its s. 75 application was rendered, again in an effort to ensure that it remained in compliance with the Interim Order. Indeed, in its same letter to the Tribunal of October 29 referenced above, Westco stated the following:

> Westco had understood that the terms and intent of the Interim Supply Order were to permit Westco and the other Respondents to sell to customers other than Nadeau a certain portion of their "current level of weekly supply" when Nadeau was able to secure replacement chicken, namely a proportion of their production quotas which is now equal to 31,250 birds. Westco has indeed been proceeding on this basis and has subtracted from its weekly supply to Nadeau a volume equal to what was represented by those replacement birds. Hence, the totality of Westco's production, except for said 31,250 birds has been supplied to Nadeau during period A-87.
>
> (...)

> [I]f the Tribunal determines that Westco's interpretation of the Interim Supply Order cannot be sustained, the only possibility left for Westco would be for it to supply all of its current production volume to Nadeau on a per week, as produced basis, up to the maximum allowed to be produced under its quota.

- Letter from Westco to Tribunal dated October 29, 2008 (Exhibit A-15).

31. The Tribunal declined to provide any guidance on the suitability of such an alternative. Nadeau for its part refused to accept the offer, which was reiterated in correspondence to Nadeau on Monday, November 3, 2008, preferring instead to initiate show cause proceedings against Westco and the other Respondents the next day.

- Letter from Westco to Nadeau dated November 3, 2008 (Exhibit R-42);
- Letter from Nadeau to the Respondents dated November 4, 2008 (Exhibit R-43).

32. It would be unjust now to unduly punish Westco for a violation of the Interim Order, given the good faith offers Westco made to comply with the Interim Order, and the efforts it made to obtain directions and clarifications from the Tribunal as to the proper interpretation to be given to the Interim Order. In both respects, Westco's conduct demonstrates a very substantial measure of concern for the imperatives of the Interim Order, pursuant to which it sought direction from the Tribunal as to the proper interpretation the Interim Order should be given. This lack of contumacity is directly relevant in considering the penalty to be imposed and suggests that the imposition of a small fine would be appropriate in this case.

- *Baxter*, at p. 564, 566-568.

(d) Proportionality

33. Finally, proportionality of sentencing requires striking a balance between the severity of the law and the "temperance of justice". Courts have repeatedly counseled against imposing fines, or costs awards, that would represent undue punishment upon the contemnor. Those warnings are entirely relevant here given, in particular, the relatively minor gravity of the contempt, the absence of profit derived by Westco from the breach found by the Tribunal, Westco's good faith attempts to come into compliance with the Interim Order or obtain directions as to how best to do so, and finally Westco's willingness to accept responsibility for the breach found by the

Tribunal. In view of those factors, a moderate fine in the amount $10,000, if any, would be more than appropriate in the circumstances. Anything beyond that, when coupled with Westco's liability for costs, would be unduly punitive and cannot be sanctioned by the Tribunal.

- *Lyons*, at para. 21;
- *Marshall*, at para. 16;
- *Pfizer Canada Inc. et al. v. Apotex Inc. et al.* (1998) 162 F.T.R. 169 (F.C.), Hugessen J. [***Pfizer***], at paras. 8-10

IV. COSTS

(a) Costs Principles

34. Courts have often stated that it is "customary" or "normal" practice to award solicitor-client costs against a person found to be in contempt.

- *Louis Vuitton Malletier, S.A. et al. v. Bags O'Fun Inc. et al.* (2004), 242 F.T.R. 75 (T.D.), Dawson J., at para. 41;
- See also *Pfizer*, at para. 8.

35. Rule 472 of the *Federal Courts Rules*, however, maintains the principle that in contempt proceedings, as in all proceedings, costs still reside in the discretion of the trier of fact. Rule 472 provides only that a judge "may" order that a person found to be in contempt pay costs, without more. Further, pursuant to Rule 400 of the Rules, an award of costs remains at the full discretion of the Tribunal. Rule 400 goes on to enumerate various relevant factors to be considered by the Court in exercising that discretion.

- *F.C.R.*, 400 and 472;
- *C.T.R.*, 8.1 (1).

36. In the contempt context, one matter that is of particular importance is whether an award of costs would constitute undue punishment for the contemnor. Indeed, having regard to the gravity of the contempt and the sentencing factors reviewed above, Courts have in the past mitigated the costs assessed in contempt proceedings, or departed from the practice of awarding solicitor-client costs altogether, so as to prevent the order for costs from being overly punitive or burdensome.

- *Pfizer*, at para. 10;
- *Patterson (N.M.) & Sons Ltd. v. St. Lawrence Seaway Management Corp.* (2002) 225 F.T.R. 308 (T.D.), Hugessen J., aff'd (2004), 322 N.R. 83 (F.C.A.), Décary, Sexton and Malone JJ.A.;
- *Coca-Cola Ltd. et al. v. Pardhan et al.* (2001), 181 F.T.R. 80 (T.D.), Lufty A.C.J., at para. 31;
- *Merck & Co. v. Apotex Inc.*, 2002 FCT 1210 (T.D.), MacKay J. [***Merck (Costs Decision)***], at paras. 33, 35, 37.
- *Wanderingspirit*, at paras. 12-18.

37. Regardless of whether costs are assessed on a party-and-party or solicitor-client basis, the costs claimed must be directly related to litigation forming the object of the award.

- *Fratelli Zanella S.p.A. v. Zanella Clothing Inc.*, [1990] F.C.J. No. 548 (Gregory, Taxing Officer).

38. Further, any costs award remains subject to the overarching criterion that the costs claimed be reasonably incurred, even in the solicitor-client context:

> I wish to note that in ordering costs on a full indemnity basis, I do not wish to be taken as suggesting that there are no "checks and balances" on such costs. At a minimum, such costs are to be reviewed by the court and are limited to those that have been reasonably incurred.

- Mark M. Orkin, *The Law of Costs*, vol. 1 (Aurora, Ont.: Canada Law Book, loose-leaf) [***Orkin on Costs***] at para. 219.05, citing *Mackinnon v. Ontario Municipal Employees Retirement Board* (2007), 288 D.L.R. (4th) 688 (Ont. C.A.) at para. 92.

39. Costs "reasonably incurred" should moreover only include costs that are consistent with those allowed under the rules and jurisprudence of the Court, and they should not include costs for services not generally included within the Court's Tariff B. They should not include costs for which there is inadequate explanation, and should only include reasonable amounts for fees in light of the services rendered within reasonable limits.

- ***Merck (Costs Decision)*** at para. 13.

(b) Nature of Appropriate Costs Award

40. As stated above, Westco recognizes that, as the successful litigant, Nadeau should be entitled to recover reasonable costs associated with the prosecution of the contempt proceedings against it. However, in this case, several factors which have been generally canvassed above

under section III (Penalty) militate in favour of an award of costs of substantially less than full indemnity.

- See paras. 11 to 33 above.

41. In short, considering the relatively minor gravity of the contempt and the presence of numerous mitigating factors outlined above such as Westco's good faith, its willingness to assume responsibility for its actions, and the fact that this contempt is its first offence, an award of solicitor-client costs consistent with the Bill of Costs prepared by Nadeau would quite simply be a penalty grossly out of proportion with the severity of the offence.

- *Pfizer*, at para. 10.

(c) Reasonableness of Costs Included and Claimed

42. Notwithstanding the nature of the costs award which the Tribunal may see fit to grant, only those costs that were reasonably incurred in the prosecution of the contempt proceedings against Westco, and for which there is adequate explanation should form part of the costs award.

43. By way of introduction, it should be pointed out that the fee descriptions contained in Nadeau's Bill of Costs are cursory at best and quite simply lack sufficient detail to constitute adequate explanation to establish the reasonableness of the costs claimed. The descriptions of fees are grouped together indiscriminately in various two, three and four-month blocks which equate to several tens and sometimes even hundreds of thousands of dollars of billed time. The way in which the summaries are presented thus makes it impossible to determine what fees were incurred in relation to which services, by whom they were incurred and, by extension, whether they were reasonably incurred. Nadeau bears the burden of submitting adequate explanation to establish the reasonableness of the costs claimed and they have failed to meet that burden.

- *Merck (Costs Decision)*, para. 13

44. Although it does not allow Westco to assess the amount of fees associated with various items, the Bill of Costs submitted by Nadeau nonetheless allows Westco to conclude that many of the items included are unrelated to the litigation of the contempt proceedings against it.

45. The costs claimed by Nadeau appear to ignore the fact that it made allegations of contempt and sought show cause orders against three separate respondents. Nadeau's motion for a show cause order was however dismissed – without costs to any party – against the co-respondents Dynaco and Acadia. Nonetheless, in spite of their failings pointed out above, it is apparent from the fee descriptions that the costs associated with the litigation of the interim supply issue against Dynaco and Acadia have been wrongfully included in the costs claimed from Westco.

- See description of fees until February 2009 inclusive, referring e.g. to preparation of motion materials, correspondence with "opposing counsel" generally, and review of documents received from "Respondents" and "Acadia".

46. Under the circumstances, the conclusions of the Court in *Wanderingspirit*, in which the Applicant's contempt proceedings against several respondents had been dismissed find application: "[i]t is important that the contemnors are not required to subsidize the failed efforts of the Applicants." Westco should not have to bear the cost of a proceeding that was brought against all three Respondents but was successful only against one. Accordingly, all fees and disbursements incurred up until the Show Cause Decision was issued in February 2009 should be reduced by two thirds.

- *Wanderingspirit*, at paras. 13-14.

47. Nadeau appears also to have indiscriminately included in its Bill of Costs fees that were in fact incurred in the context of its response to Westco's motion for interpretation. Westco's motion for interpretation was a distinct proceeding from Nadeau's motion for a show cause order and it was only recently dismissed – without order as to costs. It is not open to Nadeau to claim any costs associated with its response to that motion, let alone costs on a full-indemnity basis. All such costs should accordingly be excluded. Unfortunately, as stated above, the description of legal fees provided by Nadeau is largely deficient making it impossible to determine which fees were billed for which services.

- See fees until February 2009 inclusive, referring e.g. to responding motion materials, the affidavit and examination of Denise Boucher, and responding factum.)

48. In addition, Nadeau has improperly included in its Bill of Costs fees related to interlocutory motions in which success was divided and in which the orders disposing of the matter were silent

as to costs. These include the decisions relating to the refusals motions brought by all parties in the context of examinations on affidavits (in any event many of the refusals arose during the examinations by Ms. Price of Mr. Patrick Noël, representative of Dynaco and Acadia, or were related to the motion for interpretation), as well as the various decisions of the Tribunal on the issue of disclosure in the contempt proceedings between May and July 2009. As a general rule, where an order is silent as to costs and success is divided, no claim for costs can be made:

> Where an order is silent with respect to costs, it implies that there is no visible exercise of the Court's discretion under Rule 400(1) of the Federal Courts Rules.

- *Coca-Cola Ltd. v. Pardhan (c.o.b. Universal Exporters)*, [2006] F.C.J. No. 72 (Robinson, Assessment Officer), at para. 23; see also, *Orkin on Costs*, at para. 105.7.

49. The application of this rule in the specific context of contempt proceedings was considered in *Merck (Costs Decision)*. The Court determined that the rule should be mitigated where a party that was successful in the contempt proceedings had been successful in obtaining an interlocutory order (even though the order granting the relief sought may have been silent as to costs). However, its analysis confirmed that a party to contempt proceedings that is unsuccessful in seeking or opposing an interlocutory order – for instance where success is divided – is not entitled to costs of the order as costs in the cause. Costs related to the issue of disclosure in the contempt proceedings, as well as related to the issue of refusals arising from the examinations on affidavit, should thus properly be excluded from Nadeau's Bill of Costs.

- *Merck (Costs Decision)*, at paras. 22-23.

50. Regarding the overall reasonableness of the amounts claimed, it is apparent even from the summary information contained in the Bill of Costs that the amount of work devoted to the contempt proceedings was excessive and should not be sanctioned by the Tribunal.

51. Claims for fees are being made by Nadeau with respect to 15 lawyers, students-at-law, and law clerks – notwithstanding that the names of only 5 counsel appear in the fee descriptions themselves – totalling almost 1000 billed hours, and not including the 235 additional hours projected to be billed in March and April 2010. In January and February 2009 alone – it must be presumed mainly for the preparation of and attendance at the 2-day hearing on the show cause

motion – almost 250 hours were billed by counsel to Nadeau, the equivalent of more than 6 full working weeks. Even where a party is found to be in contempt, it should not be subjected to the expense of reimbursing its successful opponent for costs incurred unnecessarily or for frills. By all accounts, the amounts claimed by Nadeau are inflated and wholly unreasonable, particularly given the uncomplicated nature of Nadeau's case.

- *Wanderingspirit*, paras. 13-15;
- *C & B Vacation Properties v. Canada*, [1997] F.C.J. No. 1660 (Wendt, Taxing Officer), at paras. 7-8;
- *Singer v. Singer* (1976), 11 O.R. (2d) 234 (McBride, Taxing Officer), at p. 243.

52. Indeed, while the contempt allegations were forcefully contested by Westco, it must be remembered that the dispute concerning interim supply of chicken was primarily centred upon the interpretation to be given to the Interim Order. As the Tribunal pointed out in the Show Cause Decision, all Respondents had already made admissions by that time that they had not supplied the specific number of heads of chickens mentioned in the Interim Order. Indeed, in its letter of October 29 to the Tribunal before the motion for a show cause order was brought, as well as in Thomas Soucy's affidavit dated December 15, Westco had explicitly set out the numbers of chicken that it had supplied to Nadeau before and during the interim period.

- *Show Cause Decision*, at para. 7;
- Letter from Westco to Tribunal dated October 29, 2008 (Exhibit A-15);
- Affidavit of Thomas Soucy dated December 15, 2008 (Exhibit A-78).

53. Moreover, the work performed by individual students-at-law and law clerks lack any explanation whatsoever (a careful review of the fee descriptions shows that there are only 4 references to meetings and discussions with "students" and none with law clerks), in spite of the fact that more than $44,000 in fees are being claimed for their services. Such a claim cannot be allowed. Furthermore, claims for law clerks and students may in any event only permitted if it is shown that the work performed was of a research nature that might otherwise be done by a lawyer. No such demonstration has been made. Finally, the rates billed for students-at-law and law clerks are simply unreasonable, starting respectively at $205 and $190. Indeed, in *Merck (Costs Decision)*, the Court qualified rates exceeding $75 (for students) and $100 (for law clerks)

as "excessive" and judged that they should be limited accordingly, notwithstanding that the work performed was supported by adequate explanation and found to be assessable. Even after accounting for inflation, the fees charged in the present case far exceed those disallowed by the Court in *Merck (Costs Decision)*.

- *Merck (Costs Decision)*, at paras. 18-19.

54. With respect to disbursements, the claim by Nadeau are also to a large extent unsupported by adequate documentation, unreasonable or unconnected to the contempt proceedings. The amounts claimed for many items should accordingly be reduced or disallowed altogether. Westco wishes to point out the following in particular:

55. Nadeau has claimed photocopying and printing charges in the amount of $9,699.90 (roughly 30,000 pages), at a rate of $0.30 per page, in addition to $2,793.14 for "Surveys/Oversize Prints". As the Tribunal stated (in this point, it was fully supported by Nadeau) during its consideration of costs on the merits of Nadeau's section 75 application, in order to be assessable, the actual cost borne by the law firm making the copy must be proven. Further, Nadeau has failed to demonstrate the reasonableness of the number of copies made, or even explained why "Surveys/Oversize Prints" were required. Accountability for disbursements is no less where costs are assessed on the usual tariff as opposed to an indemnity basis. No relevant evidence has been led in this case and the claim for prints should accordingly be disallowed.

56. Nadeau's claim for out-of-town travel for cross-examinations in December 2008 (which took place all in one day on December 22) in the amount of $12,412.52 is grossly exaggerated and appears to include completely items related to the section 75 hearing. The underlying supporting documentation provided reveals that actual expenses incurred for December cross-examinations were approximately $859.04. Excepting that amount, the balance of the claim for out-of-town travel for December 2008 should be disallowed. Further, the underlying documentation provided by Nadeau fails to fully support the claims made in respect of out-of-town travel for February and November 2009.

- Exhibit C to the Affidavit of Sabrina Santoianni, p. 5-8, 11.

57. Nadeau has also claimed $7,704 for Court Reporting Charges that appear to be related to the section 75 proceedings and should accordingly be disallowed.

- Exhibit C to the Affidavit of Sabrina Santoianni, p. 7, 9.

58. Nadeau has provided no supporting documentation to justify its claim for "Miscellaneous Disbursement" in the amount of $714.45, which should accordingly be disallowed.

59. Moreover, as in the case of the fees claimed, it would appear that those disbursements incurred in relation to the motion for interpretation, the allegations of contempt made against Dynaco and Acadia, and those incurred in relation to interlocutory motions for which no costs award issued, have not been deducted from the Bill of Costs. Indeed, the affidavit of Ms. Sabrina Santoianni makes clear that all disbursements related to the so-called "contempt proceedings" irrespective of the object or context in which those disbursements were made, were included in the Bill of Costs. Two-thirds of all disbursements incurred up until the decision on the Nadeau's motion for a show cause order should thus be disallowed, as should all disbursements incurred relating to the motion for interpretation or interlocutory motions relating to refusals and to disclosure in the contempt proceedings.

CONCLUSION

60. In conclusion, Westco reiterates that in light of all the circumstances, no fine should be imposed upon it by the Tribunal. However, should a fine be deemed appropriate by the Tribunal, a maximum amount of $10,000 would be fair and just. In addition, Westco submits that, given the mitigating circumstances surrounding the contempt, the Tribunal should exercise its discretion to fix costs on a lump-sum basis, at a level significantly lower than full indemnity. In so doing, the Tribunal should moreover consider only those costs directly related to and incurred in the contempt proceedings between Nadeau and Westco and for which adequate explanation and supporting documentation has been advanced, and should exclude all other unrelated fees and disbursements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Montreal, this 14th day of April, 2010.

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