

OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

Direct Dial: (514) 847-4891
Direct Fax: (514) 286-5474
elefebvre@ogilvyrenault.com

SENT BY EMAIL

| | |
|--|--------|
| Competition Tribunal Tribunal de la concurrence | |
| FILED / PRODUIT June 29, 2009 CT- 2008-004 | |
| Chantal Fortin for / pour REGISTRAR / REGISTRAIRE | |
| OTTAWA, ONT. | # 0482 |

Montréal, June 29, 2009

Honourable Justice Blanchard
Competition Tribunal
Thomas D'Arcy McGee Building
#600-90 Sparks Street
Ottawa, ON K1P 5B4

Dear Mr. Justice Blanchard:

**Re : Nadeau Poultry Farm Limited ("Nadeau") v. Groupe Westco Inc. ("Westco") et al.
Tribunal File No. CT-2008-004 – Contempt Proceedings**

We write to you in response to Nadeau's letter to the Competition Tribunal (the "Tribunal") dated June 19, 2009 that purported to enclose the documents to be filed with the Tribunal pursuant to its disclosure order dated June 4, 2009. In its letter, Nadeau also requested that "Westco be required to produce witness statements for experts it intends to call in its defence, if any, prior to the conference call of July 13, 2009." Although the matter was not raised by way of motion, Nadeau is presumably seeking an order of the Tribunal requiring mandatory production by Westco.

Summary of Westco's Position on Nadeau's Request

Having regard not only to the substantive nature of Nadeau's request, but also to the manner in which this issue has been raised with the Tribunal, Westco objects to any such requirement being imposed on it. Such a requirement would, in our view, be contrary to the very nature of a contempt proceeding as well as basic principles of fairness. Nadeau seeks, in short, to compel Westco to provide Nadeau with advance notice of its evidence notwithstanding that Westco has no obligation to produce evidence, to give advance notice of the substance of its defence or to assist Nadeau in supplementing or bolstering its case or in meeting its burden of proof.

Nature of Nadeau's Request is Contrary to Established Procedure

Nadeau's substantive "request", which raises very serious issues of fundamental justice, including the right of an accused to remain silent, was not raised by way of motion with notice to Westco. Nor was it based on an analysis of existing jurisprudence (much of which was canvassed during the proceeding that led to the Tribunal's disclosure order of June 4, 2009). Instead, the request was raised at the end of a letter that purported primarily to set out a list of documents to be filed with the Tribunal, which letter was neither addressed directly to Westco, nor served upon it in the usual electronic fashion (although Westco was copied on the email by which it was sent to the Tribunal). Given the immediacy of the remedy sought, and the impact it could have on the contempt proceedings, Westco is of the view that such a request, if permitted to be made at all, should necessarily have only been done by motion, duly served upon Westco or, at a very minimum, have been based on submissions that explained the basis upon which Nadeau was seeking an order and been framed according to existing jurisprudence.

Failure of Nadeau to Raise Request During the Disclosure Proceeding

In any event, regardless of the form in which Nadeau's request was made, it is entirely inappropriate for Nadeau to raise anew issues of disclosure at this late stage. Indeed, the topic of disclosure applicable to the contempt proceedings was first broached during a conference call between the parties and the Tribunal held on May 11, 2009. Further to that conference call, the Tribunal issued a direction of same date pursuant to which the parties were to "serve and file submissions with the Tribunal regarding the nature of the disclosure required for the contempt proceedings" by May 21, 2009.

The parties had every opportunity to comply with that directive. Indeed, Westco's submissions to the Tribunal of May 21, 2009 dealt not only with the disclosure obligations incumbent on Nadeau in the contempt proceedings, but also with the absence of such correlative obligations on Westco (see specifically pages 1, 2, 4 & 6 of Westco's submissions). Nadeau, however, elected in its submissions not to raise or to address the existence of any possible disclosure obligations upon Westco. It would have been open to Nadeau to do so at that time, but it chose not to. That being the case, it is inappropriate for Nadeau to attempt to re-open the debate at this juncture, several weeks after the Tribunal's decision on disclosure issued.

Nadeau's Request is Inconsistent with Federal Court, Competition Tribunal and Criminal Procedure

From a substantive standpoint, Nadeau's request to require Westco to produce any expert witness statements to the Tribunal in advance of the hearing, let alone the case management conference of July 13, 2009, would be highly prejudicial to Westco and is without merit.

To begin with, the contempt proceedings arise not under the *Competition Act* but rather under the *Competition Tribunal Act*. As such the proceedings are governed not by normally applicable *Competition Tribunal Rules*¹ (the “**Tribunal Rules**”) but rather by Rules 467 to 470 of the *Federal Courts Rules*.² Those Rules establish a code that governs contempt of Court before the Tribunal, which code is complemented by the common law. Had the parties, in fact, been proceeding under the Tribunal Rules, Nadeau would have notably been required to produce the expert report provided for under those rules. Instead, Nadeau has purported to elect to proceed by way of witness statement and not expert report for the expert Westco understands Nadeau intends to call during the contempt proceeding. As discussed below, Westco will only be in a position to properly address this issue once it has had the opportunity to review the “expert” witness statement of the person Nadeau intends to call as an expert.

Further, as Westco stated previously in its submissions to the Tribunal dated May 21, 2009, and as the Tribunal concluded in its decision of June 4, 2009, contempt proceedings are quasi-criminal in nature. It is well established that an accused person or company, in this case Westco, has the right to remain silent until such time as the moving party has discharged the onus of proof.³ The Federal Court held as follows: “an alleged contemner is under no obligation to respond; he may remain absolutely silent until such time as the onus of proving beyond a reasonable doubt has been met.”⁴

The procedure suggested by Nadeau would utterly vacate Westco’s fundamental right to remain silent by obligating Westco to disclose its defence, by way of will-say statement or expert report, before the onus which Nadeau carries has been discharged. It was precisely this way of proceeding that was proscribed by the Federal Court of Appeal in *Apple Computer*. Indeed, one must not forget that in contempt proceedings, it is the person alleging contempt, in this case Nadeau, which bears the burden of proving the offence beyond a reasonable doubt. Before *viva voce* evidence is led against it at the hearing, Westco is simply not in a position to assess whether or not expert evidence will be necessary. If Westco is of the opinion that Nadeau has not discharged its onus, it could, as is its unassailable right, elect not to lead any evidence whatsoever in its defence.

¹ SOR/2008-141.

² SOR/98-106.

³ *Apple Computer, Inc. v. Mackintosh Computer Ltd.*, [1988] F.C.J. No. 237 (FCA) [*Apple Computer*].

⁴ *Selection Testing Consultations International Ltd. v. Humanex International Inc.*, [1987] F.C.J. No. 146 at page 3 (Rouleau, J.) [*Selection Testing*].

Nadeau rightly points out that in criminal trials, pursuant to s. 657.3 of the *Criminal Code of Canada*, any party that wishes to call an expert as a witness must: (i) prior to the hearing, give notice of its intention to call an expert witness, and provide the name of the proposed expert, as well as the expert's area of expertise and qualifications; and (ii) prior to calling its witness, provide to the other party a copy of the expert's report or witness statement. However, Nadeau fails to point out that, in the case of (ii) (the actual communication of the expert report to the other party), an accused is only obligated to provide that information at the close of the prosecution's case.⁵ In this way, there is no breach of the fundamental right of an accused to remain silent until the prosecution has discharged its onus.

June 19 Nadeau Disclosure

Finally, we wish to point out that, due to an apparent transmission problem which Nadeau is currently attempting to rectify, Westco has not yet in fact received the "expert" witness statement of the individual that Nadeau intends to call as an expert witness. Apparently for the same reason, numerous other relevant documents that were intended to be disclosed by Nadeau have not yet been received by Westco. Consequently, we have not yet been able to review the entirety of Nadeau's disclosure. On July 13 we should be in a position to provide the Tribunal with our position on not only the adequacy of the Nadeau disclosure but also on the appropriateness of Nadeau not filing an expert report.

Conclusion

In conclusion, Nadeau has made no attempt to conceal that the expert evidence it is seeking from Westco in advance of trial is for the purpose of allowing it to "adequately prepare its case" and "add additional witnesses to its List of Witnesses." With respect, the burden of preparing its case is squarely Nadeau's, not Westco's, and Westco objects to this belated and irregular request, which constitutes a flagrant breach of its right to a fair trial.

Yours very truly,



Éric C. Lefebvre

⁵ Criminal Code, R.S.C. 1985, c. C-46, section 657.3(3)(c).

c.c. Leah Price, *Fogler Rubinoff LLP*
Olivier Tousignant, *Joli-Coeur, Lacasse, Geoffrion, Jetté, St-Pierre*
Valérie Belle-Isle, *Lavery De Billy*