



**PUBLIC VERSION**

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 6  
File No.: CT-2008-004  
Registry Document No.: 0532

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*.

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: 20081117 to 20081121, 20081124 to 20081128, 20081202 to 20081203

Before: Blanchard J. (presiding), H. Lanctôt and P. A. Gervais

Date of Reasons and Order: June 8, 2009

Reasons and Order signed by: Mr. Justice E. Blanchard, Mr. H. Lanctôt and Mr. P. A. Gervais

**REASONS FOR ORDER AND ORDER**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

[1] Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the “Applicant” or “Nadeau”) brings an application for an order directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms. The application is made pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”).

[2] In the reasons that follow, we<sup>1</sup> find that:

- (a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- (b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
- (d) The Applicant has not established that the product is in ample supply; and
- (e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[3] Since the Act requires that all of the requirements of subsection 75(1) be met for an order to issue, it follows that the application will be dismissed.

## **II. BACKGROUND FACTS**

### **A. The parties**

[4] The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, is a corporation incorporated under the laws of the Province of New Brunswick and is a wholly-owned subsidiary of Maple Lodge Holding Corporation (“Maple Lodge”), which is one of Canada’s largest chicken processors.

[5] Maple Lodge employs about 2,300 people and owns 100% of the shares of two chicken processing facilities in Canada, one in Norval, Ontario, which is operated by Maple Lodge Farms Ltd. (“Maple Lodge Farms”), and one in St-François de Madawaska, New Brunswick (the “St-François Plant”). The St-François Plant is operated by the Applicant.

[6] The Respondent Groupe Westco Inc. (“Westco”) is a corporation incorporated under the laws of the Province of New Brunswick. Westco is highly integrated in the chicken industry. It owns or controls egg hatching production quota, farms, chicken production quota and chicken production farms. Through its subsidiaries, Westco owns or controls around 50.9% of New Brunswick’s chicken production.

[7] The Respondent Groupe Dynaco, Coopérative Agroalimentaire (“Dynaco”), is a co-operative registered in the Province of Quebec. Dynaco has interests in certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. Dynaco is the [TRANSLATION] “fifth most significant co-operative in the Province of Quebec”.

[8] The Respondent Volailles Acadia S.E.C., created under the laws of the Province of Quebec, is registered as an extra-provincial limited partnership in the Province of New Brunswick, and the Respondent Volailles Acadia Inc./Acadia Poultry Inc., incorporated under the laws of Canada, is registered as an extra-provincial corporation in the Province of New Brunswick (collectively, “Acadia”). Acadia’s main activity is the production of chicken and turkey.

## **B. The poultry supply management system**

[9] The events underlying this proceeding occurred in the context of Canada’s poultry supply management system. It is therefore useful to understand the workings of that system.

[10] Under Canada’s supply management system, the typical set of market-determined economic arrangements is replaced with a detailed and complex set of regulations, akin to a centrally planned economic system. It has been described as being, in effect, a state-mandated cartel arrangement.

[11] Supply management in the poultry sector evolved as a policy response to the interprovincial competition in chicken and egg marketing; also known as the “chicken and egg wars”. The policy regime originated in the early to mid-1970s and replaced open, and at times aggressive, competition with mandated market shares enforced by provincial and producer marketing quotas. As a result, the poultry sector is likely the most highly regulated industry in the Canadian economy.

[12] Supply management is commonly said to rest on three pillars, namely production control, price control and import control. We will briefly deal with each of these in turn.

[13] Chicken farmers or producers are limited to producing their quota amounts, which are measured in kilograms of live weight. A producer receives a single quota applicable to all of his or her production regardless of the intended destination. Non-compliance can give rise to penalties. National quotas are set by a federal marketing agency, the Chicken Farmers of Canada (the “CFC”). Its prime responsibility is to ensure that Canadian chicken producers supply a sufficient quantity of product to ensure that the domestic market meets consumer demand. The CFC then allocates provincial quotas of chicken to the provinces. In turn, the provincial marketing boards set individual quotas for producers. Unlike some other provinces, New Brunswick currently does not have regulations requiring producers to direct their live chicken supply to any particular processor. Since 1995, the national quota or the quantities of chicken required have been determined at the provincial level through a process known as the “bottom-up” approach. Under this approach, provincial processors negotiate with provincial marketing boards to determine provincial quota requirements. The provincial requirements are then

aggregated and adjusted, if necessary, by the CFC. The national quota is thus the aggregate of provincial requirements and is set periodically, “every 6 or 7 weeks depending on the year of production” according to the expert evidence adduced.

[14] While there is no legislation preventing the interprovincial trade of chickens, the evidence indicates that relatively few chickens move across provincial borders. In 2005, interprovincial trade in chickens involved only 4% of total Canadian production. A producer wishing to export chickens to another province must obtain a license from the CFC. The license is issued by the CFC as long as the producer is in compliance with statutory regulations.

[15] Farmers may buy and sell their quotas, but certain restrictions apply. One such restriction is that owners themselves must be engaged in the production of chickens. New entrants have little option but to purchase quota from existing farmers, which can prove costly. The cost of quota for an average-size chicken farm in 2007 climbed to \$2.25 million. In certain provinces new quotas are reserved for new entrants at no cost, but these quotas are limited. In most jurisdictions, free entry involves a very long wait and is not a realistic option for new entrants. The more realistic approach has been for new entrants to purchase existing quotas from producers. Most new quota allocations are issued to existing producers.

[16] The minimum price at which chickens may be sold in respective provinces is set by provincial marketing boards. Under law, the provincial boards are charged with the task of restricting production so that farmers can earn a reasonable margin, but at the same time they must prevent prices from rising so high that demand is choked off. The evidence would suggest that the boards have been successful, since chicken production in Canada has risen by 77% in the last 15 years. Certain provinces have used the price negotiated in Ontario as the benchmark price for their own negotiations. Since May 2003, the price in Ontario is established by a formula which includes taking into account market conditions, input costs based on a cost-of-production formula, and prices set in neighbouring provinces.

[17] Protection from imports from other countries is also an important feature of the supply management scheme. To import chickens into Canada, a special permit is required. Import quotas, also known as “tariff rate quotas” (“TRQs”), specify the quantity of imports that are allowed, and are allotted annually and not permanently. These quotas are managed by the federal Department of Foreign Affairs and International Trade, whose role it is to allocate the TRQs to individual firms and set and maintain the rules by which they are administered. The TRQs are automatically set at 7.5% of the previous year’s production. Allocation procedures vary by commodity and are affected by increases or decreases in demand of the commodity in question and other factors. For the most part, quota holders are likely to have their import quota allotment renewed or re-allocated in subsequent years.

[18] Given the significance of the supply management system and its impact on this case, we shall conduct a comprehensive review of the legislative and regulatory framework of the system later on in these reasons and particularly in those parts relating to paragraphs 75(1)(b) and (d) of the Act.

### **C. Nature of the Applicant's business**

[19] The Applicant is a primary processor that slaughters live chickens and sells them (in whole or in parts) to further processors and other customers. The Applicant's only business is the St-François Plant, which was acquired in 1989. At the time of the acquisition, the former owner was insolvent. The Applicant has invested millions of dollars over the years to improve and maintain the St-François Plant. It has been the only chicken processing plant in New Brunswick since 1992 and has been slaughtering all of the chickens produced in New Brunswick since 1998.

[20] In February 2002, the St-François Plant was damaged by a fire that resulted in the closure of operations. It was rebuilt as a "broiler plant" and was up and running again in November 2002. During the rebuilding period, the Applicant continued to purchase all of New Brunswick's live chicken production and arranged to have the chickens slaughtered at other processing plants. According to the Applicant, the newly rebuilt St-François Plant is the most modern and efficient chicken processing facility in Canada.

[21] The Applicant currently has about 375 employees. It is the largest employer in the St-François community. At present, it runs one production line with two shifts, averaging sixty hours a week, five days a week.

[22] The Applicant states that it requires a full range of birds within certain weight tolerances in order to meet its customers' specifications. The Applicant offers both air-chilled and water-chilled chicken. Air-chilled chickens, which are considered to be "premium" chickens, are cooled after being eviscerated by using cold air, rather than water. This method prevents the absorption of water thus reducing the amount of moisture in the chicken. Having both systems at the St-François Plant gives the Applicant increased flexibility to satisfy its customers' needs.

[23] The majority of the Applicant's arrangements with its customers are verbal agreements that are entered into by way of a "handshake deal". The only written contract between the Applicant and any of its customers is a [CONFIDENTIAL] contract between the Applicant and [CONFIDENTIAL] relating to the sale of chicken by [CONFIDENTIAL] to [CONFIDENTIAL]. The Applicant also has written agreements with [CONFIDENTIAL] and [CONFIDENTIAL] with regard to their respective specifications and pricing requirements.

### **D. Nature of the Respondents' businesses**

#### **(1) Westco**

[24] Westco is a group of chicken and turkey producers. Westco's head office is located in St-François de Madawaska. Through its subsidiaries, it currently owns or controls 50.9% of New Brunswick's quota, which represents an annual volume of 19,367,920 kg of live chickens. Westco presently has approximately 200 employees.

[25] Westco (formerly called Fermes Waska) was created in 1984 by the consolidation of a dozen New Brunswick chicken producers who wanted to increase their buying and negotiating power vis-à-vis egg and meal producers, chick breeders, carriers and processors. A further



consolidation of production quotas occurred during the 1990s, mainly between 1994 and 1998, resulting in an increase in Westco's quota. The consolidation was encouraged by Maple Lodge in order to bring production quota closer to the St-François Plant.

[26] In the early 1990s, Westco started to pursue a project of vertical integration. Westco's vertical integration started gradually, beginning with the purchase of trucks making it possible to transport chips and meal and continuing with the consolidation of meal purchasing to facilitate negotiations for its fabrication and price. Westco then constructed hatcheries, reproduction farms and transport facilities. During Westco's vertical integration, the size of farms also dramatically increased.

[27] Westco is now involved in almost all phases of the production of live chickens including the organic production of manure, the purchase of wholesale grains, egg production, the manufacture of meal, fecundation, chick production, poultry production and transportation. According to Westco, the only phases in which it is not involved are the processing of live chickens and distribution of processed chicken to the retail market.

## **(2) Dynaco**

[28] Dynaco is an agricultural co-operative with over 1,500 members, 655 of which are agricultural producers. It is involved in other fields such as home renovation centers, the sale of petroleum products and transportation.

[29] Dynaco's poultry production represents 1.6% of its total sales figure and Dynaco owns 6.22 % of New Brunswick's chicken production quota.

[30] Dynaco holds 100% of the shares of Les Fermes J.J.C. Bolduc inc. and Les Fermes avicoles Bolduc ("Fermes Bolduc") and also owns 25% of the shares of Cormico Inc. ("Cormico"). Cormico's other shares are owned by La Coop Fédérée ("Coop Fédérée") (25%) and the Cormier family (50%). Its chicken production quota represents 4.98% of New Brunswick's supply. Coop Fédérée is Canada's largest firm in the chicken sector: with revenues of \$2.9 billion, this poultry co-operative ranks second amongst all co-operatives. The quota held by Fermes Bolduc is, however, the only New Brunswick production quota over which Dynaco has control with respect to the slaughtering destination.

## **(3) Acadia**

[31] Acadia was created in 2006 to acquire poultry and pig production facilities. Acadia's main activity is chicken and turkey production. It operates four chicken production sites in New Brunswick. Its pig production has been abandoned.

[32] Acadia currently owns or controls 16% of New Brunswick's chicken production quota. Since 2006, Acadia has also been producing the quota for Slipp Farms, a New Brunswick chicken producer, under a leasing agreement. Its quota represents 1.01% of New Brunswick's supply or about 3,679 chickens per week. Acadia does not exert any control over where Slipp Farms' production is processed.

## **E. Relationship between the Respondents**

[33] Westco owns one of Dynaco's 734 shares. Dynaco is a member of Coop Fédérée. Dynaco is also indirectly related to Olymel S.E.C. ("Olymel"), given that Coop Fédérée owns 60% of Olymel. Olymel is a limited partnership formed under the laws of Quebec. It is a primary and secondary chicken processor and is the Applicant's primary competitor in Quebec and the eastern provinces. Olymel currently owns two chicken processing plants, one in Berthierville and another in St-Damase, Quebec. On average, the aforementioned plants process approximately 1.3 million chickens per week. Olymel also owns 50% of Volaille Giannone inc., which operates a chicken processing plant in St-Cuthbert, Quebec.

[34] The shareholders of Volailles Acadia Inc./Acadia Poultry Inc. are the same as the limited partners of Volailles Acadia S.E.C. Acadia is jointly owned by Coop Fédérée (30%), Dynaco (30%), Purdel Coopérative Agro-Alimentaire ("Purdel") (15%) and Westco (25%). Purdel is also a member of Coop Fédérée. Acadia is thus also indirectly affiliated with Olymel, as three of its four co-owners are related to Coop Fédérée.

[35] Rémi Faucher, who testified on behalf of both Acadia and Dynaco in these proceedings, has worked for each of these Respondents. Mr. Faucher was president and administrator of Acadia from May 2006 to July 2008 and was also president and general manager of Dynaco from September 1998 to February 2008.

## **F. The Applicant's supply of live chickens**

[36] When the St-François Plant was acquired in 1989, the birds in the province were split between northern and southern New Brunswick (50/50). At that time, there was another processing plant in Sussex, New Brunswick, which was processing birds from southern New-Brunswick, while the St-François Plant was processing birds from the province's northern part. In 1989, the St-François Plant was in financial difficulty as a result of problems between the previous owners and producers. Consequently, many producers from northern New Brunswick were shipping their birds to Quebec and Ontario for processing.

[37] In or about June 1990, the Applicant entered into negotiations with New Brunswick producers that were shipping their production out-of-province. The Applicant wanted to bring the New Brunswick birds back to New Brunswick to be processed at the St-François Plant. The Applicant agreed to pay the producers \$0.065 over the Ontario price instead of the price set by the New Brunswick chicken marketing board, which was about \$0.04 over the Ontario board price. The negotiations thus raised the New Brunswick board price (the "NB Board Price") by \$0.025.

[38] The Sussex plant closed in 1992, making the St-François Plant the only chicken processing plant in New Brunswick. In late 1995, as a result of poor markets and the suggestion of the then Deputy Minister of Agriculture, the Applicant introduced a "relocation bonus" whereby it split its transportation costs for transporting birds from southern New Brunswick to northern New Brunswick with producers from the north who bought quota from the south. The agreement was that the Applicant would pay \$0.03/kg for three years from the date the producer

purchased the quota. Payments under the program started in about 1996 and the last of the quota was purchased in 1998. Accordingly, the program was completed by 2001. As of 1998, the Applicant was processing the totality of the New Brunswick production.

[39] The Applicant began receiving supply from the Respondents in 1990 and was processing the totality of their production at the time the Applicant filed its Notice of Application with the Tribunal on March 17, 2008. The Respondents' production facilities are currently all located within 30 km of the St-François Plant. The Applicant does not have any written contracts with New Brunswick producers, including the Respondents, specifying the number and size of chickens that are to be supplied by those producers to Nadeau. There are also no contractual arrangements between the parties specifying a term for supply.

[40] From 1990 to January 2007, the Applicant always paid its producers the NB Board Price for their chickens, which is \$0.065 above the regulated Ontario minimum price. In January 2007, the Applicant developed a market-based incentive plan for producers in New Brunswick (the "Incentive Plan"). The Incentive Plan cost the Applicant \$[CONFIDENTIAL] in 2007, of which \$[CONFIDENTIAL] went to the Respondents collectively. Westco gained \$[CONFIDENTIAL] from the Incentive Plan that year.

[41] Prior to May 2007, the Applicant obtained all of its live chickens from New Brunswick producers, with almost 75% being supplied by the Respondents or their quota-holding predecessors. Due to a plant closure in Nova Scotia in May 2007, the Applicant began to obtain supply from Nova Scotia and Prince Edward Island. When the Notice of Application in this case was filed, the St-François Plant was processing on average about 565,800 chickens per week from the following sources:

Westco	186,230
Acadia	58,670
Dynaco	26,450
New Brunswick, other	94,450
Prince Edward Island	40,000
Nova Scotia	160,000

[42] The Applicant began receiving an additional 25,000 birds per week from Nova Scotia in June 2008 and another 6,250 birds per week in September 2008.

[43] In order to accommodate the surplus of birds coming from Nova Scotia and Prince Edward Island, the Applicant started a second shift, which required it to hire approximately 130 new employees. In order to offset the additional costs incurred by running a second shift, the Applicant needed some assurance that it would receive the Nova Scotia birds for a reasonable time period. The Applicant therefore made a "handshake deal" with certain Nova Scotia producers under which they would send Nadeau their chickens for a period of three years. This "handshake deal" was entered into in May 2007.

## **G. The termination of the supply relationship**

### **(1) Westco**

[44] In January 2007, Westco advised the Applicant of its interest in buying or investing in the St-François Plant. Westco submits that the only way to ensure its future in the poultry industry is to proceed with a complete vertical integration of its operations, which requires Westco to acquire an existing slaughterhouse or to build a new one. During a meeting which was held in Atlanta on January 25, 2007, Anthony Tavares, the president and CEO of Maple Lodge at the time, informed Westco that Maple Lodge's shareholders would likely not be interested in selling the St-François Plant. Mr. Tavares further stated that a structure that would result in Westco owning a percentage of the St-François Plant and retaining 100% of its live production assets would result in non-aligned shareholder interests and would likely eventually lead to conflicts.

[45] Shortly after the meeting in Atlanta, Mr. Tavares met with the Board of Directors of Maple Lodge, which decided that it was not interested in selling to Westco. The Board, however, indicated that it would be prepared to look at an ownership structure in which Nadeau and Westco assets would be pooled and Westco and Maple Lodge would each own a part of the combined operations. This proposal was communicated to Westco, but there was no agreement.

[46] Westco approached Olymel in March 2007 in order to develop a partnership so as to complete its strategy of vertical integration. As mentioned above, Olymel is a chicken processor in Quebec and competes with the Applicant in Quebec and the eastern provinces. The purpose of the partnership was to acquire the assets or shares of the Applicant or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with the Applicant, the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel") which was created pursuant to the New Brunswick *Limited Partnership Act*, S.N.B. 1984, c. L-9.1.

[47] Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if the Applicant was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.

[48] Mr. Tavares met with Westco representatives again on September 6, 2007. During the meeting, Mr. Tavares told Westco's representatives that he was shocked by their decision to partner with Olymel and also stated that he was of the opinion that it was a poor business decision. Westco's representatives did not reconsider.

[49] Following the September 6, 2007, meeting, Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.

[50] On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by the Applicant. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to the Applicant, effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

[51] During the negotiations, the Applicant filed complaints with the New Brunswick Minister of Agriculture and Aquaculture and with Chicken Farmers of New Brunswick (sometimes "CFNB").

### **(2) Dynaco**

[52] The Applicant submits that during the negotiations for the acquisition of the St-François Plant, Mr. Soucy affirmed that he had the authority to speak on behalf of Dynaco and that that is why Dynaco was referenced in the Applicant's correspondence with the Minister of Agriculture and Aquaculture. Dynaco states that Mr. Soucy never had the authority to speak on its behalf. Notwithstanding an apology by the Applicant for the mistaken reference to Dynaco in the letter to the Minister, Dynaco confirmed by two letters dated March 6, 2008, that its chickens would cease arriving at Nadeau, effective September 15, 2008.

### **(3) Acadia**

[53] By letter dated February 28, 2008, Acadia gave the Applicant formal notice that it would cease supplying it with live chickens, effective September 15, 2008. Acadia submits that this was a business decision and states that its decision to cease supplying the Applicant was not influenced by the negotiations that took place between the Applicant and Westco regarding the acquisition of the St-François Plant.

## **H. History of the proceeding and relief sought**

[54] This proceeding is brought pursuant to the Tribunal's order of May 12, 2008, which granted the Applicant leave to apply for an order under section 75 of the Act. The Applicant seeks an order requiring the Respondents to continue supplying the Applicant with live chickens on the usual trade terms and in the numbers previously provided by the Respondents.

[55] On June 26, 2008, the Tribunal granted the Applicant's request for interim relief pursuant to section 104.1 of the Act (the "Interim Supply Order"). The Respondents were ordered to continue to supply the Applicant with live chickens on usual trade terms at the level of weekly supply that was in place at that time, namely 271,350 live chickens, pending the hearing of the main application.

[56] On November 4, 2008, the Applicant filed a motion for an order requiring the Respondents to show cause why they should not be held in contempt of the Interim Supply Order ("Show Cause Motion"). The Applicant alleged that the Respondents breached and are continuing to breach the Interim Supply Order, as the Applicant has been and will continue to be significantly short on deliveries of chicken.

[57] On November 6, 2008, Westco filed a motion for an order or direction regarding the interpretation of the Interim Supply Order. Westco seeks an order to confirm its view that the weekly number of chickens ordered to be delivered to the Applicant is a notional figure based on a hypothetical average weight of 2 kg and that the volume of live chickens to be supplied to the Applicant by the Respondents will :

- i. be decreased by the volume of replacement chickens obtained by the Applicant;
- ii. vary proportionally and in accordance with the periodic fluctuation of the Respondents' production quotas; and
- iii. reflect the Respondents' production schedules.

[58] On February 26, 2009, the Tribunal dismissed the Show Cause Motion with respect to Acadia and Dynaco. It granted the motion with respect to Westco and ordered a show cause hearing. The show cause hearing has not yet taken place and the matter is still outstanding before the Tribunal. Westco's motion for an order or direction regarding the interpretation of the Interim Supply Order will be argued at the show cause hearing.

### III. LEGISLATIVE FRAMEWORK

[59] The refusal to deal provision is contained in section 75 of the Act. It reads as follows:

**75.** (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

*(a)* a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

*(b)* the person referred to in paragraph *(a)* is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

*(c)* the person referred to in paragraph *(a)* is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

*a)* qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

*b)* que la personne mentionnée à l'alinéa *a)* est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

*c)* que la personne mentionnée à l'alinéa *a)* accepte et est en mesure de respecter les conditions de commerce normales imposées par le

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

(3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

#### **IV. THE PARTIES' WITNESSES**

[60] Before turning to the analysis of the merits of the application before us, it is important to identify all the witnesses who appeared before the Tribunal. A detailed description of their testimony appears in Schedule A to these reasons.

##### **A. The Applicant**

###### **(1) Experts**

[61] Dr. Richard Barichello, Dr. Roger Ware and Mr. Grant Robinson filed expert reports and testified as experts on behalf of the Applicant.

[62] Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. The Tribunal found that he was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. The Respondents did not take issue with Dr. Barichello's qualifications to give an expert opinion on these matters.

[63] Dr. Roger Ware is a professor of economics at Queen's University. With the parties' agreement, the Tribunal recognized Dr. Roger Ware as an expert in the areas of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms.

[64] Grant C. Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. The Tribunal found that he was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry.

###### **(2) Lay witnesses**

[65] Seventeen other individuals appeared on behalf of the Applicant.

[66] Two members of the Applicant's management team testified. The Applicant called Yves Landry, the Applicant's general manager, and Denise Boucher, its office manager.



[67] Anthony Tavares, the former president of the Applicant and Chief Executive Officer of Maple Lodge, and John Feenstra, the former general manager of the Applicant, also gave evidence.

[68] The Applicant called three members of its procurement team to testify about the Applicant's efforts to procure chickens from Quebec. Those members were Tina Ouellette, Léonard Viel and Réjean Plourde.

[69] Further processors of chickens and other customers of the Applicant also appeared before the Tribunal. They are:

- (i) Guy Chevalier, President, Service Alimentaire Desco Inc. ("Desco"). Desco is a further processor and distributor of chicken;
- (ii) Terry Ellis, President, Sunchef Farms Inc. ("Sunchef"). Sunchef is a further processor of chicken;
- (iii) Lyndsay Gazzard, Senior Purchasing Manager responsible for poultry purchases for the Unified Purchasing Group of Canada ("UPGC"). UPGC operates as the purchasing agent for YUM! Restaurants International Canada Ltd.;
- (iv) Corey Goodman, General Manager, UPGC, and Chief Purchasing Officer, Prizm;
- (v) Debbie Goodz, President and CEO, Poulets Riverview Inc. ("Riverview"). Riverview is a further processor and distributor of chicken; and
- (vi) Jeffrey Lloyd McHaffie, the *de facto* vice-president of Puddy Bros. Limited ("Puddy"), in charge of sales and the purchase of poultry products. Puddy is a further processor of chicken.

[70] Kevin Thompson, Executive Director, Association of Ontario Chicken Processors, and Bruce McCullagh, Senior Vice President and General Manager, Poultry Operations, Maple Leaf Consumer Foods ("Maple Leaf"), also testified on behalf of the Applicant. Maple Leaf is a large poultry processing company located in Ontario.

[71] Finally, Andre Merks, a Nova Scotia chicken farmer, and Michael Donahue, Vice-President, Agri Stats, Inc. ("Agri Stats"), were called by the Applicant. Agri Stats is a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America.

## **B. The Respondents**

### **(1) Expert**

[72] Margaret Sanderson was called as an expert by the Respondent Westco. Ms. Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. The Tribunal accepted Ms. Sanderson as an expert in the area of economics,

competition policy and industrial organization, including market definition and the competitive behaviour of firms. The Applicant consented to Ms. Sanderson's expertise.

[73] Ms. Sanderson was the only expert to testify on behalf of the Respondent Westco. Dynaco and Acadia did not call any experts.

**(2) Lay witnesses**

**(a) Westco**

[74] Five lay witnesses appeared on behalf of Westco. Westco called two individuals who testified about its operations. They were Thomas Soucy, Westco's Chief Executive Officer and President, and Bertin Cyr, a member of Westco's Board of Directors.

[75] Westco also called two Olymel employees. The vice-president of Olymel's chicken procurement division, Yvan Brodeur, and another Olymel employee, Julie Desroches, gave evidence.

[76] Richard Wittenberg was the last lay witness to testify for Westco. He is a Nova Scotia chicken farmer.

**(b) Dynaco**

[77] Gilles Lapointe and Rémi Faucher testified on behalf of Dynaco. Gilles Lapointe is Dynaco's chief financial officer and Rémi Faucher is Dynaco's former chief executive officer.

**(c) Acadia**

[78] As stated above, Rémi Faucher also testified for Acadia as he acted as Acadia's president from 2006 until 2008. He was the only witness called by Acadia.

[79] Before turning to the elements of section 75 and the issues to be determined, we dispose of an outstanding matter: the ruling with respect to objections made by Westco to certain paragraphs found in certain witness statements.

**V. THE RULING WITH RESPECT TO WESTCO'S OBJECTIONS TO WITNESS STATEMENTS**

[80] Prior to the hearing of the Application, the parties filed witness statements setting out the lay witnesses' evidence in chief in full pursuant to the *Competition Tribunal Rules*, SOR/2008-141 (Rules 68-70). The parties were provided with an opportunity to raise objections with respect to the admissibility of the witnesses' statements or parts thereof. Both the Applicant and Westco raised such objections. In its order dated October 31, 2008, the Tribunal dealt with some of the objections raised by the parties but it reserved its ruling on three of Westco's objections until the final reasons. What follows is the ruling on those objections.

[81] Westco argued that certain statements made in the witness statements of Yves Landry (paras. 74-79), Réjean Plourde (paras. 7-9) and Lyndsay Gazzard (paras. 9-12) (the “Contested Statements”) consisted of hearsay evidence and were consequently inadmissible. Westco further stated that the individuals mentioned in the Contested Statements were not identified as witnesses scheduled to appear during the hearing.

[82] The Applicant indicated that the Contested Statements did not consist of hearsay as they were not put into evidence for the purpose of proving the truth of their contents. The Applicant argued that the Contested Statements were rather offered as proof that the assertions were made to these witnesses. The Applicant submitted that the assertions were fact evidence that could be given orally by the witnesses during the hearing and stated that there was no requirement that persons named in a witness statement appear on a party’s witness list. The Applicant further argued that the Contested Statements were relevant to the issues in the litigation and had probative value.

[83] With respect to paragraph 77 of the statement of Mr. Landry, the Applicant argued that it did not constitute hearsay evidence as Mr. Landry was providing his own testimony as to the identity of Mr. Morin.

[84] Hearsay is testimony or written evidence of a statement made to a witness by a person who is not called as a witness, the statement being offered to show the truth of the matter stated therein. The main concern underlying the admissibility of hearsay lies in the inability to test the truth of the statement or assertion through cross-examination. Therefore, written or oral statements “are inadmissible, if such statements [...] are tendered either as proof of their truth or as proof of assertions implicit therein.” (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham: Butterworths, 1999) at 173).

[85] Upon reviewing the Contested Statements and considering the arguments of the parties, we admit the statements for the purpose of establishing the fact that they were indeed made and not to prove the truth of their contents. To that end, the Contested Statements are not hearsay. We now turn to the elements of section 75.

## **VI. THE ELEMENTS OF SECTION 75 AND THE ISSUES TO BE DETERMINED**

### **A. Onus and standard of proof**

[86] The burden of proof rests on the Applicant who must establish each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act on the balance of probabilities.

**B. Has the Applicant established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms pursuant to paragraph 75(1)(a) of the Act?**

[87] Market definition is the first issue. This question will be assessed from two perspectives: the product market and the geographic market where the Applicant might reasonably be expected to look for supplies of live chickens. We will deal with each in turn.

**(1) The relevant product market**

[88] In its Notice of Application, the Applicant seeks an order “directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms, in the numbers previously provided to Nadeau by the Respondents.” In its Notice of Application and Reply (the “Pleadings”), the Applicant deals only with numbers of live chickens and does not mention that the chickens must be within a given weight range. However, in its submissions, the Applicant takes the position that the “product” for the purposes of paragraph 75(1)(a) is live broiler chickens, in a full range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg.

[89] The Respondents are of the view that the “product” is clearly live chickens since this is the product described in the Applicant’s Pleadings. Further, the Respondents contend that this is the product that meets the test for determining the product market articulated in *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.

[90] In *B-Filer*, the Tribunal adopted the approach to the definition of product market in the context of paragraph 75(1)(a) set out in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff’d (1991), 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (F.C.A.), where it is stated that the ultimate test concerns the effect on the business of the person refused supplies. In *B-Filer*, the Tribunal restated the test in the following terms at paragraphs 79 and 80 of its reasons:

[79] For purposes of clarity, we articulate the “*Chrysler test*” as follows: For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[80] In regard to the meaning of “substantially” as used in paragraph 75(1)(a), as noted by the Tribunal in *Chrysler* at page 23, “[t]he Tribunal agrees that ‘substantial’ should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as ‘important’ are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.” In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person’s business moving out of the market in which it currently participates.

[91] It is noteworthy that the Tribunal in *B-Filer* took into consideration whether the addition of paragraph 75(1)(e) had changed the context and purpose of section 75. The Tribunal ruled that the market of concern in 75(1)(e) need not be the market of concern in paragraphs 75(1)(a) and 75(1)(b), and therefore the addition of 75(1)(e) did not change the ultimate concern of 75(1)(a). We are also of that view.

[92] The Tribunal finds that the proper test for determining the product market is the above-stated test articulated in *B-Filer*, which is based on the substitutability of products. The application of that test to the evidence leads us to the conclusion that the relevant product market here is live chickens without regard for weight. Our reasons for this conclusion now follow.

[93] The evidence indicates that a number of the Applicant's customers require chickens that meet certain specifications particularly in respect to size. [CONFIDENTIAL].

[94] Since its reconstruction after the 2002 fire, the St-François Plant has been producing only "broiler chickens". Mr. Feenstra's evidence, on cross-examination at the hearing, is that broiler chickens range in size between 1.7 and 2.4 kg live weight. We note that a "broiler" is defined under Order II of the New Brunswick Chicken Marketing Board as a chicken which is not more than 2.65 kg live weight.

[95] The above evidence is of little assistance in determining whether chickens in the Applicant's stated size range, namely a minimum of 1.71 kg and a maximum of 2.4 kg, can be substituted by smaller or larger chickens without substantially affecting the Applicant's business. The Applicant has not established the impact of losing supply of live chickens within the stated size range on its business. For instance, we do not know if the Applicant had the option of processing and marketing larger or smaller birds in the event that it lost its supply of all chickens in the stated size range. The Applicant's evidence focuses essentially on the loss of live chickens, not live chickens of a given size.

[96] While there is some evidence relating to the Applicant's size requirements, the Applicant's expert, Dr. Ware, made no case for a narrower market. Dr. Ware does not explicitly refer to the size of chickens. In discussing the product market under paragraph 75(1)(a), he refers only to the "market for selling live chicken". At paragraph 35 of his report, he acknowledges the difficulty in obtaining birds that meet the size and quality requirements of the Applicant's customers, but no further discussion on the issue is found in his report. Ms. Sanderson, in her expert report, expresses the view that "the relevant product market is not in dispute here, it is live chicken". We find there is insufficient evidence to establish that chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg cannot be substituted by other chickens.

[97] Further, the Applicant's Pleadings do not specify that the live chickens at issue are chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg. As stated above, the Notice of Application deals with a broader product market, live chickens. It would have been open to the Applicant to move to amend its Pleadings, but it did not. In the absence of such an amendment, it is our view that it would be unfair for the Respondents to be required to address the issue of a narrower product market without notice.

[98] The Applicant has therefore failed to establish that the product market is defined more narrowly to include only those birds in the stated size range. In this respect, the Applicant has failed to meet its onus. We therefore find the product market for the purposes of paragraph 75(1)(a) of the Act to be “live chickens”.

## **(2) The relevant geographic market**

### **(a) Positions of the parties**

[99] There is no agreement between the parties as to the definition of the relevant geographic market.

[100] It is the Applicant’s position that the relevant market is limited to the Province of New Brunswick. The Applicant argues, in the alternative, that even assuming replacement supply can be obtained from Quebec producers, this supply cannot be obtained on usual trade terms. The Applicant’s expert, Dr. Ware, expresses the opinion that, because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it is “neither economic nor efficient” for the Applicant to replace the Respondents’ supply with supply from locations farther away in Quebec. In reaching this conclusion, Dr. Ware points to the level of interprovincial trade. He notes that, at present, between 4% and 5% of Quebec-grown chickens are shipped outside the province and that this level will reach 14% if the Respondents’ supply is replaced with supply from Quebec. In Dr. Ware’s view, it is unlikely that such a level of export would be permitted by the Quebec governmental agencies in the long run.

[101] The Respondents contend that the relevant geographic market includes New Brunswick, Quebec, Nova Scotia and Prince Edward Island, and submit that the Applicant can source live chickens from producers in Quebec without being substantially affected. Ms. Sanderson is of the opinion that Quebec producers can provide a ready alternative to replace the Respondents’ supply and, in support of her conclusion, points to the following factors:

- (i) The Applicant’s current live chicken shipments include shipments from more distant locations, such as Nova Scotia and Prince Edward Island;
- (ii) A substantial volume of chickens is produced in regions that are located within a reasonable distance from the St-François Plant such as the Quebec City, Beauce and Central Quebec regions;
- (iii) There are no regulatory restraints preventing the Applicant from sourcing chickens in Quebec;
- (iv) The Applicant’s survey indicates that Quebec producers are willing to supply Nadeau live chickens at a reasonable cost; and
- (v) The costs associated with Quebec supply such as shrinkage, transportation and birds that are dead on arrival at the processing plant (“DOAs”) are not so high as to make it uneconomic for the Applicant to source chickens from Quebec.

(b) Analysis

[102] There is no dispute that New Brunswick forms part of the geographic market. However, at the outset, we reject the contention that the geographic market in the instant case is confined to New Brunswick. At a minimum, the market would include Prince Edward Island since Nadeau has obtained and expects to continue to obtain supply from that province. Both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens. The undisputed evidence is that Prince Edward Island is a long term supplier.

[103] It is useful to discuss the approach we adopt in order to define the geographic market. The Tribunal acknowledged in *Chrysler* that, because of the language used in paragraph 75(1)(a), the market definition analysis under that paragraph would be different from the analysis usually performed under other sections of the Act. The Tribunal held at page 10 as follows:

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies.

[104] As stated above, the Tribunal relied, in *B-Filer*, on the above paragraph in *Chrysler* and developed the “*Chrysler* test” to determine the relevant product market under paragraph 75(1)(a). While the Tribunal was not required to consider the geographic market definition, it nevertheless noted that the “correct test for defining markets” (our emphasis) for the purposes of paragraph 75(1)(a) is the *Chrysler* test which it articulated as follows:

For the purposes of 75(1)(a), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[105] In *Chrysler*, the Tribunal did not explicitly allude to the proper test for defining the relevant geographic market. It based its conclusion on the geographic market on functional indicators, in particular, the existence of different price lists from Chrysler, the only supplier for Canada and the United States. The existence of price differences is one of the functional indicators referred to in the Competition Bureau’s *Merger Enforcement Guidelines*. Therefore, the test in *Chrysler* for defining the geographic market essentially consisted of the simple application of these functional indicators.

[106] In the instant case, there is evidence of functional indicators which support the contention that parts of Quebec should be included in the geographic market. These indicators are those summarized from the evidence of Ms. Sanderson at paragraph 101 above and which essentially consist of the location of current suppliers; the relative proximity of potential Quebec suppliers

to the St-François Plant based on the Applicant's survey; significant volumes of chickens in Quebec being located at a reasonable distance, around 500 km, from the St-François Plant; and the absence of regulatory restraints preventing the Applicant from sourcing chickens in Quebec.

[107] We are of the view that consideration of these functional indicators is the preferred approach to defining the geographic market in the instant case. These indicators will be comprehensively dealt with below. As will be seen, they clearly support including that part of Quebec within 500 km from the St-François Plant as part of the geographic market. We find support for our position in the results obtained in the procurement survey conducted by the Applicant, which indicate that numerous Quebec suppliers within 500 km of the St-François Plant are willing to supply chickens to the Applicant. Indeed this radius was acknowledged in Ms. Sanderson's report; she states that "... chicken from Quebec (at the very least from within 500 km of St. Francois) should comprise part of the relevant geographic market for Nadeau's live chicken volumes."

[108] In the circumstances of this case, the proper approach is to consider the above-mentioned functional indicators discussed in Ms. Sanderson's evidence. We find support for our approach to defining the geographic market in the expert evidence adduced before us.

[109] Neither Ms. Sanderson nor Dr. Ware expressed a formal opinion as to the limits of the relevant geographic market for the purposes of paragraph 75(1)(a). Nor did they explicitly set out the test that should be applied to determine the market. While they were silent on the exact parameters of the relevant geographic market, both experts did address the question of whether the Applicant can obtain supplies in Quebec.

[110] Dr. Ware testified that the determination of the relevant geographic market in this case poses some difficulties:

But the important point here is, especially with respect to the geographic market, is that it really is a construct; that we--it's not actually the case that necessarily a supplier who is just outside that boundary plays no role in this market at all. Neither is it the case that every supplier that's inside that boundary plays an equal role in competition.

[111] To the extent that geographic market definition is a pre-condition for analysis under paragraph 75(1)(a), it is to suggest a definition that includes a geographic area within which an applicant might reasonably be expected to look for supplies following a refusal to deal. This geographic market may include areas from which supplies of live chickens are currently obtained by the Applicant and could, in this case, therefore include New Brunswick, Prince Edward Island and Nova Scotia. Further, the geographic market could also include areas where an applicant might reasonably be expected to seek supplies and may therefore include, pursuant to the evidence adduced, geographic areas that are similarly placed in relation to an applicant's existing sources of supply. This method reflects the approach adopted by the experts who gave their opinions before the Tribunal.



[112] We are of the view that, in this case, the geographic market also includes parts of Quebec. Both Dr. Ware and Ms. Sanderson turned to that province to determine whether obtaining supplies from that province is a reasonable possibility for the Applicant. Mr. Robinson, an expert who testified on behalf of the Applicant, based one of his four scenarios on the assumption that the Applicant can replace the Respondents' supply with Quebec-grown chickens and examined the effect of such replacement supply on the Applicant's business.

[113] We agree that the geographic market includes parts of Quebec where the Applicant might reasonably be expected to look for supplies of live chickens. The evidence adduced shows that many producers in Quebec located within 500 km of the St-François Plant are no farther than the distance between the Applicant's current suppliers and its St-François Plant. For example, the Applicant processes chickens from Prince Edward Island producers, and the distance between these producers and the St-François Plant is approximately 650 km. As explained above, both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens.

[114] Further, as stated above, there are no regulatory impediments to interprovincial shipments. A producer must obtain a license from the CFC pursuant to the *Canadian Chicken Licensing Regulations*, SOR/2002-22. After having obtained such a license, the producer can export chickens in accordance with the conditions set out in the *Canadian Chicken Licensing Regulations*.

[115] Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebec-based processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

[116] To support his view, Dr. Ware refers to the Applicant's submissions in an application brought before the Chicken Farmers of New Brunswick in which it stated that "... the industries in Ontario and Quebec undertook negotiations because interprovincial trade reaching 5 to 7% of total production was considered a crisis situation." In his examination in chief, he admitted that he was not an expert in this particular field.

[117] After a careful review of the evidence, we conclude that it is insufficient to support Dr. Ware's hypothesis. The evidence establishes that provincial processing associations have expressed concerns about interprovincial trade. Mr. McCullagh testified that the Quebec and Ontario processing associations have approached their respective governments to advise them "that interprovincial trade has the jeopardy of creating an unsustainable premium war". According to Mr. Brodeur, over the last few years, attempts have been made to address these concerns, but, up until now, no solution has been found. Mr. Robinson, the Applicant's expert who was recognized by this Tribunal as having expertise in the chicken processing industry, stated that the increase in interprovincial trade would have a significant impact on the

competitive price to acquire live supply, but he did not confirm the evidence adduced by Dr. Ware according to which Quebec stakeholders would intervene to limit such trade.

[118] We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

[119] In summary, given the absence of regulatory restrictions and the proximity of many Quebec producers to the Applicant's St-François Plant, we agree that parts of Quebec should be included in the geographic market for the purposes of the analysis performed under paragraph 75(1)(a).

[120] Regarding Nova Scotia chickens currently processed by the Applicant at its St-François Plant, apart from the three-year arrangement involving the delivery of 160,000 chickens per week, there is evidence of limited supply being sourced from Nova Scotia. In June and September 2008, the Applicant sourced an additional 31,250 chickens per week from Nova Scotia. While there is a paucity of evidence regarding Nova Scotia supply, we nevertheless conclude that Nova Scotia is part of the geographic market because chickens are currently being sourced from there and because the evidence also indicates that the Applicant is not processing these chickens at a loss.

[121] The geographic market will therefore comprise New Brunswick, Prince Edward Island, parts of Quebec which extend to a radius of 500 km of the St-François Plant and Nova Scotia. The parties did not suggest that any other geographic areas be considered.

[122] We now turn to the analysis under paragraph 75(1)(a) and consider the following question.

**(3) Is the Applicant substantially affected in its business because of its inability to obtain adequate supplies of live chickens anywhere in a market on usual trade terms?**

[123] The analysis under paragraph 75(1)(a) sets out a number of components that require definition, in particular the phrases "substantially affected" and "usual trade terms".

(a) The meaning of "substantially affected"

[124] We turn first to the meaning of "substantially affected". The Tribunal dealt with the expression in the *Chrysler* case, and concluded that the ordinary dictionary meaning should be given to the word "substantially", and that it required showing "more than something just beyond *de minimis*". The Tribunal, in that case, went on to state that, "[w]hile terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations" (*Chrysler*, at p. 23). In *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6, the Tribunal also held that the term

“substantial” in respect to the expression “substantially affected” carries meanings such as “important” and “significant” (*Sears*, at para. 31).

[125] The parties disagree on the meaning to be given to this phrase. The Applicant submits that terms such as “large, significant, important and substantial” capture the concept of a substantial effect on a business. In support of its argument, the Applicant points to the *Chrysler* case.

[126] The Respondent Westco adopts a different approach. In its submissions, it argues that the Tribunal has never really dealt with or specifically defined “substantially affected” or any of the various components of paragraph 75(1)(a) and invites the Tribunal to do so in this case.

[127] The Respondent Westco argues that paragraph 75(1)(a) contemplates two circumstances: first, that the refusal substantially affects the Applicant in “his business” (“son entreprise”), and second, that it precludes “a person” from “carrying on business” (“ne peut exploiter une entreprise”). In the latter case, the Respondent contends that this could only mean that the refusal would effectively preclude a new entrant from entering the market because no reference is made to the Applicant’s existing business (“his business”). In the Respondent’s view, the rules of statutory interpretation require that the terms “substantially affected” and “precluded from carrying on business” be read together. The Respondent contends that this approach is consistent with the case law, since the term “substantially affected” would be given its usual and ordinary meaning in accordance with the case law (*Chrysler* and *Sears*), but would be qualified by the expression “precluded from carrying on business”. Consequently, the required magnitude of the “substantial effect” would be such that it would approach an applicant being unable to continue in business. The Respondent therefore submits that an enterprise that is not affected to the point of it being unable to carry on business does not meet the test of “substantially affected” for the purposes of paragraph 75(1)(a).

[128] With respect, and for the reasons that follow, we reject the Respondent’s above interpretation of “substantially affected” in paragraph 75(1)(a).

[129] The applicable principle of statutory interpretation, also known as “the modern approach to interpretation”, was endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. At paragraph 21 of that decision, Mr. Justice Iacobucci wrote:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Coté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)); Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[130] In accordance with this approach to statutory interpretation, we will first consider the words of paragraph 75(1)(a), and in particular the following words which are at issue: “a person is substantially affected in his business or is precluded from carrying on business”. The sole issue here is whether the two circumstances contemplated in the provision should be read together as suggested by the Respondent. In our view, the above-cited words, read in their grammatical and ordinary sense, contemplate two separate circumstances. The phrase “substantially affected in his business” is not qualified by the phrase “or is precluded from carrying on business” (emphasis added). Had Parliament intended this to be so, it would have used the word “and” and not “or” in linking the two phrases. Support for the proposition that Parliament intended two separate scenarios by the provision is found in the 1975 House of Commons committee debates. The Minister responsible for the legislation, in response to questions from committee members, indicated that the purpose of the clause was to protect someone who was in business from being put out of business and to allow the entry of others in the market. We reproduce below the relevant passages from the transcripts of the committee debates.

**Mr. Clarke** (Vancouver Quadra): What was the intent of the clause then?

**Mr. Ouellet**: Well, under certain conditions to make sure that the refusal to deal could become a reprehensible action.

**Mr. Clarke** (Vancouver Quadra): But was it the purpose of that clause to protect someone who was in business from being put out of business?

**Mr. Ouellet**: Yes. But we would like to allow the entry of others, because if we add too many conditions the refusal to deal will never become a reprehensible activity.

**Mr. Clarke** (Vancouver Quadra) Did the Minister say, Mr. Chairman, that they did want to prevent the entry of others or they did not want to prevent the entry of others?

**Mr. Ouellet**: To facilitate the entry of others.

**Mr. Clarke** (Vancouver Quadra): That is what I thought. But the way I read the recommendations from the Senate Committee they are suggesting the present wording would discriminate against someone who wanted to enter that field and their recommendation was designed, in their description, to facilitate the entry of someone into the field. Their criticism is - and I will see how it is worded here. It says:

The Committee does not consider that the reviewable practice jurisdiction should be available to someone who has never been in business.

And it recommends the deletion of the words “or is precluded from carrying on business”.

**Mr. Ouellet:** The way the proposal made by the Senate has to be understood is that they want to deal with people that are already in the business. We feel it would be too restrictive.

**Mr. Clarke** (Vancouver Quadra): Do you mean that the Senate recommendation is the opposite of what I have been saying?

**Mr. Ouellet:** As suggested by the Senate, it will narrow the protection that we are giving, and we do not want to go that far.

**Mr. Clarke** (Vancouver Quadra): Perhaps the definition hangs on the word “precluded” – precluded from carrying on business, and the way you are reading that is, “or is prevented from entering business,”? Is that the idea?

**Mr. Ouellet:** Yes.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl. 1st Sess., No. 46 (May 12 1975) at 46:14 - 46:15).

[131] In this case, the Applicant is already in the business of processing chickens and is not seeking to enter the market. In order to meet the test of “substantially affected” for the purposes of paragraph 75(1)(a), the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way. This interpretation is in accordance with the above-cited principle of statutory interpretation and with the case law of the Tribunal.

[132] Having defined “substantially affected”, we now turn to the meaning of “usual trade terms”.

(b) The meaning of “usual trade terms”

[133] “Usual trade terms” is relevant to section 75 in three ways. First, under paragraph 75(1)(a), it must be established that an applicant is unable to obtain adequate supplies on the usual trade terms; second, an applicant must be willing under paragraph 75(1)(c) to meet those trade terms as a condition of supply; and third, any order issued under section 75 must be based on the usual trade terms. We turn now to the paragraph 75(1)(a) requirement.

[134] Subsection 75(3) of the Act defines trade terms as follows:

**75(3)** For the purposes of this section, the expression “trade terms” means terms in

**75(3)** Pour l’application du présent article, « conditions de commerce »

respect of payment, units of purchase and reasonable technical and servicing requirements.

s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

[135] Paragraph 75(1)(a) speaks of supply of a product on “usual” trade terms. Reference to the dictionary definition of “usual” is helpful. The *Canadian Oxford Dictionary* (2004) defines “usual” as follows: “such as commonly occurs or is observed or done, customary, habitual ...”. *Webster's Ninth New Collegiate Dictionary* (1986) provides the following definition: “Normal; commonly or ordinarily used; found in ordinary practice or in the ordinary course of events”.

[136] The term “usual” qualifies the statutorily defined expression “trade terms” in paragraph 75(1)(a). Applying the ordinary meaning to the term, we are left with trade terms that are ordinarily used or found in ordinary practice in a market. The specific terms which are ordinarily used will, of course, vary and depend on the circumstances in each case. Further, there may be a need to interpret the words and phrases used in the definition of “trade terms” found in subsection 75(3), in particular, for our purposes: “terms in respect of payment”.

[137] The parties disagree on the elements to be included in defining “usual trade terms”. In reference to the statutory definition in subsection 75(3), the Applicant argues the term “usual trade terms” must have a correlative meaning and therefore refers to the practice that had been in place between the contending parties in terms of price, units, etc. before the refusal to supply. It is the Applicant's contention that the “usual trade terms” in place between each of the Respondents and the Applicant entailed the following elements:

- (a) delivery of chickens in a full range of broiler sizes, namely, from 1.71 kg to 2.4 kg;
- (b) the CFNB regulated price, which equates to the Ontario base price plus \$0.065/kg, plus applicable CFNB size premiums, where applicable;
- (c) delivery of chickens grown within 30 km of the St-François Plant, thus resulting in minimal transportation costs, minimal DOAs, and minimal shrink;
- (d) payment pursuant to the Marketing Orders of the CFNB, namely net 7 days; and
- (e) delivery each and every week of chickens in numbers averaging about:
  - (i) from Westco, 186,230 chickens per week;
  - (ii) from Acadia, 58,670 chickens per week; and
  - (iii) from Dynaco, 26,450 chickens per week,

for a total supply from the Respondents of about 271,350 chickens per week.

[138] The Respondents argue that subsection 75(3) provides a complete definition of “trade terms” and as such can only refer to “terms in respect of payment, units of purchase and reasonable technical and servicing requirements”. The Respondents contend that the definition

does not include price or volume and that, had Parliament wanted price to be included in “trade terms”, it would have said so expressly and not used the phrase “terms in respect of payment” in its definition. Further, the Respondents argue that since paragraph 75(1)(d) requires that the product be in ample supply, it was not contemplated that volume be a concern. It is consequently argued that the Tribunal would not have the jurisdiction to grant the Applicant’s request and order the Respondents to continue to supply “in the numbers previously provided to Nadeau by the Respondents”. It is also argued that since the product market is live chicken, and not chickens of a specified weight, there is no basis here to support size or weight of the chickens as a usual trade term.

[139] We are of the view that “usual trade terms” must be determined in relation to a defined market at a particular time. The applicable time frame in this case is generally at about the time the Respondents gave notice of their refusal to continue to supply. For the purposes of this application, we have also determined above that the product is live chickens and that the geographic market includes parts of the Province of Quebec as well as New Brunswick, Nova Scotia and Prince Edward Island.

[140] What then are the applicable “usual trade terms” that are ordinarily used or found in ordinary practice in the geographic areas? We do not accept the Applicant’s submission that the applicable terms are those which reflect the very agreements, in terms of price, units supplied etc., that prevailed between the Respondents and the Applicant prior to the refusal. Parliament did not provide that the Applicant need only establish its inability to obtain supply on the “same” trade terms, for the purposes of paragraph 75(1)(a). Had it intended this, it would have expressly provided so, as it did elsewhere in the Act. See section 80 of the Act where reference is made to “same” trade terms.

[141] In our view, the plain reading of the provision leaves no doubt that the trade terms are not those specific to the parties, but rather those that are viewed from the perspective of all processors competing for live chickens in the defined market generally. In such a market, the usual trade terms are identified and customarily come to be expected by suppliers of live chickens.

[142] Price is clearly the most important element influencing trade in chickens. It is a commodity product and is sold largely on the basis of price. In the context of supply management, if price were not important, the marketing board would have felt no need to set a minimum price. It is difficult therefore to divorce trade terms from price. The issue here is whether the expression “terms in respect of payment” is to be interpreted to include price and, in particular, premiums. We respectfully reject the Respondents’ position on the question and, for the reasons that follow, find that “terms in respect of payment” must be interpreted to include price in the circumstances.

[143] We acknowledge that the issue has never been dealt with before by the Tribunal. In *Chrysler*, the Tribunal ordered Chrysler Canada to accept the complainant as a customer for the supply of Chrysler parts “on trade terms usual and customary to its relationship with [the complainant] as the said terms existed prior to [the date that the complainant was first refused supply]” (at p. 28). In that case, there was but one supplier and one customer. The Tribunal has not yet identified the “usual” trade terms involving a business with multiple suppliers and

customers. If “terms in respect of payment” includes price, it could be argued that the Tribunal’s order in *Chrysler* prevented Chrysler Canada from ever raising its price to the complainant. Since the Tribunal recognized the regular fluctuation in Chrysler Canada’s prices, this would appear not to have been the Tribunal’s intention. If price, however, is not to be included as a usual trade term, there would be nothing to prevent a supplier, even one subject to a section 75 order, from raising its prices to a point to the point that this person can no longer afford to purchase from the supplier. This would render the provision ineffective, particularly in cases where a complainant was the sole purchaser in a market.

[144] While there is no dispute that “terms in respect of payment” includes credit terms and acceptable methods of payments, in the context of paragraph 75(1)(a), we are of the view that price is also included. Otherwise, a complainant who is unable to obtain adequate supplies in a market because prices are higher than the usual price would have no possibility of relief under the provision, simply because other usual terms of payment are in place. For example, in the instant case, it would matter little if the credit terms and the methods of payment available in the market for processors were the usual terms prevailing in that market, if the amount to be paid in order to obtain live chickens was increased by suppliers to an amount higher than the usual price paid for live chickens in that same market. In essence, the only term of payment that really matters in the circumstances here is price.

[145] Under supply management, price is essentially the principal trade term. As discussed above, the minimum price is set by the respective provincial marketing boards. Whether this minimum price set by the marketing board translates into a usual trade term will depend on the circumstances. In this case, the ultimate price paid by chicken processors in the market may be higher than the minimum price. This will depend on a number of factors, not the least of which is the premium paid to producers. A premium is an amount over the board price paid by processors to producers. Therefore, the notion of price as a “usual trade term” is best expressed, for our purposes, in terms of a range of prices. This approach recognizes the dynamic reality of a competitive market and would be particularly helpful in the event that the Tribunal were to issue an order to continue supply on “usual trade terms”, since it would allow for flexibility by not binding the parties to a fixed price. The range of prices for our purposes would include minimum board prices set by the provincial marketing boards from time to time, plus the applicable premium, which would likely also vary by reason of competitive market forces.

(c) Applicant’s inability to obtain adequate supplies on usual trade terms

[146] Having determined the meaning of “substantially affected” and “usual trade terms”, we will now turn to the question of whether the Applicant has established that it is substantially affected in its business because of its inability to obtain adequate supplies anywhere in a market on usual trade terms.

[147] The parties disagree markedly on whether the suppliers are likely to provide adequate replacement supplies on usual trade terms. Quebec is important in the instant case because it is the most likely source of replacement chickens for the Applicant.

[148] The Applicant, at the time it filed its application, processed around 94,450 chickens from southern New Brunswick, 40,000 chickens from Prince Edward Island, and 160,000 chickens



from Nova Scotia. On the evidence, there is no dispute that it is unlikely the Applicant can obtain the required additional volumes of chickens to replace the Respondents' chickens from southern New Brunswick or Prince Edward Island. In respect to New Brunswick and Prince Edward Island, the evidence shows that the Applicant currently processes all of the New Brunswick and Prince Edward Island supply.

[149] The 160,000 chickens from Nova Scotia were to be made available for a period of three years, and there is little evidence to indicate whether this volume of chicken would be available in the long term. Since the Interim Supply Order, the Applicant has secured an additional supply of around 31,250 chickens per week from Nova Scotia. However, we do not know the terms, if any, on which the Nova Scotia producers that are continuing to supply ACA Co-Operative Ltd. ("ACA"), the only Nova Scotia processor, would be willing to switch to the Applicant. No survey of Nova Scotia producers was conducted by the Applicant in order to ascertain the availability and terms of supply from Nova Scotia, as was done in Quebec. Nor did the experts address this issue. As a consequence, we are unable to make a finding regarding the terms on which additional supply could be acquired from Nova Scotia.

[150] This leaves Quebec as the only source of additional supply about which we actually know the possible terms of supply. Therefore, producers located in parts of Quebec are the most likely source of replacement supply for the Applicant. In order to determine whether the Applicant can obtain supplies from these producers on the usual trade terms, it is useful to define the relevant usual trade terms that are applicable to live chickens in Quebec.

(i) The relevant usual trade terms

[151] In order to determine whether the Applicant has met its burden in establishing that it is unable to obtain adequate supplies of live chickens anywhere in the market on "usual trade terms", it is necessary to clearly define the usual trade terms in this case. By definition, "trade terms" includes "terms in respect of payment", which we have interpreted to include price. It also includes "units of purchase" and "reasonable technical and servicing requirements". No issues regarding technical and servicing requirements are raised in this case. The only issue in respect to trade terms is the price of the replacement chicken.

[152] In order to assess whether the Applicant is able to obtain adequate supplies "on usual trade terms", the usual price for live chickens in the market must be determined. As stated above, in the circumstances, that price will consist of a range of prices. In order to determine the usual range of prices, we turn to the evidence adduced and in particular the evidence regarding premiums.

[153] Determining the range of prices for live chickens in those relevant parts of Quebec will indicate the "usual trade terms" for those chickens. The price usually paid by the Applicant is not necessarily the applicable "usual trade term". It is rather the usual price for live chickens paid by processors in the market. For our purposes, these processors are mostly Quebec-based processors and, as indicated in our earlier analysis on the geographic market, these processors would be competing in the area where the Applicant is likely to find its replacement chickens. They are paying the Quebec board price set by the Quebec marketing board, Les Éleveurs de volailles du Québec, which is \$0.065 below the NB Board Price, plus a premium. Significant evidence was

adduced regarding premiums. Premiums currently being paid by Quebec processors will afford the best evidence of the usual prices being paid by processors in the market and are the best indicator of usual trade terms.

[154] The evidence on premiums stems principally from efforts made by the Applicant's procurement team following the Tribunal's Interim Supply Order dated June 26, 2008. The Applicant's management team instructed the procurement team to begin making efforts to inquire about the availability of chickens from Quebec producers. Initially, calls were made to a list prepared by the Fédération des producteurs de volailles du Québec in the year 2000 containing the names of 700 Quebec producers. In total, attempts were made to contact 454 producers. Many could not be contacted by reason of incorrect phone numbers, phone line disconnection and number changes. This comes as no surprise, given that the list of names and contact information was over eight years old. Many producers did not respond to the initial telephone message, and of those that did, only 67 requested a meeting with a procurement agent of the Applicant. Call logs were kept and turned over to the Applicant's procurement agents for follow-up. These call logs were eventually filed in evidence.

[155] The Respondents contend that the Applicant's procurement effort or survey of Quebec producers was essentially undertaken as a result of the Tribunal's Interim Supply Order and was not a serious effort to obtain replacement chickens in Quebec. In its Interim Supply Order, the Tribunal found that there was a duty to mitigate damages. At paragraph 37 of its reasons it wrote:

I reject the Applicant's contention that it had no duty to mitigate. It could not sit idly by and make no attempt to secure additional live chickens when faced with the loss of about half of its supply. However, what is adequate mitigation will turn on the circumstances of each case.

[156] The Respondents point to a number of deficiencies in the Applicant's procurement effort. They argue that the Applicant's procurement team did not have a mandate to close a deal or sign contracts for supply with any of the Quebec producers called. They point to Mr. Feenstra's testimony, where he attests that the procurement team was "[t]o gauge what the opportunities are to procure chickens in Quebec". He also asserted on examination for discovery that he was not hopeful of the outcome of the procurement survey and that he would not initiate negotiations with Quebec producers who were not willing to sell their supply of live chickens at a price that is equal to or lower than the NB Board Price. They point to the testimony of Ms. Ouellette, where she attests that Mr. Landry had ordered her to end her calls to Quebec producers even though 196 producers had yet to be contacted by the Applicant's procurement team.

[157] There is evidence, essentially uncontested, to support a finding that the Applicant's procurement effort was not designed with the objective of securing sufficient live chickens from Quebec to replace all the chickens lost as a result of the Respondents' refusal to supply. However, whether or not the Applicant's efforts were genuinely motivated by a desire to obtain replacement chickens from Quebec is essentially not material to the question of whether replacement chickens are actually available on usual trade terms from Quebec. While the procurement effort is not a perfect gauge of the opportunities available in Quebec, it does provide evidence to assist in answering the question. The call logs reflect information obtained as a result of the procurement efforts. While this information has been interpreted differently by

the experts, it is essentially unchallenged. Further, the members of the procurement team consisting of Ms. Ouellette, Mr. Plourde and Mr. Viel gave testimony regarding the procurement efforts. In our view, they did so in a forthright manner, and we find their testimony to be credible.

[158] Ms. Ouellette was tasked with placing the initial call to producers in Quebec for the purpose of inquiring as to whether they were interested in meeting with the Applicant to discuss the possibility of supplying chickens. In determining which producer to call, Ms. Ouellette attests that she considered the geographic location of each producer *vis-à-vis* the location of the St-François Plant. She stated that the majority of the calls were placed to producers that were located east of Montreal. Ms. Ouellette kept call logs for each call placed. Of the producers with whom she spoke, 67 requested a meeting with a “Nadeau procurement agent”. She then gave the call logs containing the contact information of each interested producer to either Mr. Plourde or Mr. Viel, who were responsible for the follow-up.

[159] Mr. Plourde eventually met with 39 producers between July 14 and September 19, 2008. During these meetings, he made detailed notes which were annexed to the call logs. Mr. Plourde attests that the Quebec producers he met demanded the following pricing arrangements before they would agree to moving their production to the Applicant, namely [CONFIDENTIAL]; and payment of premiums in addition to the Quebec board price, ranging from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]/kg.

[160] Mr. Viel, who is the Applicant’s manager of sales and transportation, assisted the procurement team when Mr. Plourde was on vacation. He met with 11 Quebec producers in the week of July 21, 2008, and also made detailed notes during these meetings, which notes he attached to the call logs provided by Ms. Ouellette. Mr. Viel attests that the producers he met with indicated they would consider moving their production to the Applicant on pricing arrangements which would include [CONFIDENTIAL] and premiums ranging from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]/kg. Mr. Viel further stated that each producer would be able to supply between [CONFIDENTIAL] and [CONFIDENTIAL] heads per eight-week quota period.

[161] As indicated above, in order to determine the usual trade terms for live chicken in Quebec, it is helpful to examine evidence of the “usual” premium paid by processors in that geographic area. The survey of the Applicant’s procurement team tabulated data of premiums actually paid by Quebec processors to producers in that province. This evidence was considered by the experts. Ms. Sanderson attested that among all of the producers who offered the Applicant supply at a requested premium of \$[CONFIDENTIAL]/kg, the highest premium that the producer receives from its current Quebec customer is \$[CONFIDENTIAL] above the Quebec board price. Based on the procurement surveys conducted by the Applicant, Ms. Sanderson aggregated the premiums that are currently received from Quebec processors and divided these by the total number of kilograms offered. She found that the weighted average premium that is currently received by the surveyed producers from processors is \$[CONFIDENTIAL]/kg above the Quebec board price. The evidence indicates that the survey conducted by the Applicant’s procurement team covered less than [CONFIDENTIAL]% of the Quebec quota owned by producers located within 500 km of the Applicant’s plant in St-François. The producers surveyed

that did not specify a premium and those that indicated that they would not supply the Applicant represented [CONFIDENTIAL]% of the total quota within 500 km of the St-François Plant.

[162] While it is difficult to determine from the above evidence what premium would be sought by those producers that were not surveyed, the evidence provides a good indication of the premiums currently being paid by Quebec processors to producers in the relevant area of Quebec. Further, the evidence adduced in respect to the “Projet Westco” (the “Projet Westco Report”), a 2007 report prepared by Olymel regarding a possible partnership with Westco, indicates that the premiums paid by Olymel for its Quebec live supply in 2006 is \$[CONFIDENTIAL]/kg above the Quebec board price. Mr. Brodeur’s witness statement confirms that Olymel’s current premium is in the order of \$[CONFIDENTIAL]/kg above the Quebec board price.

[163] The above evidence in respect to premiums paid by Quebec processors is not speculative, nor is it contested. It represents direct evidence of premiums that are actually being paid by processors in the relevant areas of Quebec. While the survey does not tabulate the premiums paid by all processors in Quebec, the data is sufficiently complete to allow us to determine a range of premiums that are usually paid by processors in that part of the Quebec market covered by the Applicant’s procurement survey, which includes that area within 500 km of the St-François Plant. We find that premiums range from \$[CONFIDENTIAL] and \$[CONFIDENTIAL] over the Quebec board price. It follows that usual trade terms for Quebec chickens, in this instance, would include prices within that stated range of premiums above the Quebec board price.

[164] We note that Quebec prices including the premiums are very close to the NB Board Price. As mentioned above, both the Quebec board price and Ontario board price are \$0.065 below the NB Board Price. The Serecon Report, a consultant’s report on the assessment of the broiler chicken industry in Nova Scotia published in July 2008, indicates that “there is no real historical pattern of a consistent spread in price between Nova Scotia and Ontario” and that “[f]or the past few periods (about the past year), the spread has been somewhat consistently 6.5 cents”. We also know that the Applicant pays Nova Scotia producers the NB Board Price. Mr. Wittenberg testified that the Nova Scotia board price was “somewhat higher” than the NB Board Price, but he did not know the exact board price. Mr. Merks testified that “historically”, the Nova Scotia board price was \$0.02 below the NB Board Price. We are satisfied on the evidence that the Nova Scotia and New Brunswick board prices are very close.

(ii) Are supplies available on usual trade terms?

[165] We now turn to considering whether the Applicant is able to obtain supplies of chickens in Quebec on usual trade terms or within the stated price range. Both Mr. Robinson and Ms. Sanderson considered the data obtained from the Applicant’s procurement survey.

[166] In his expert report on behalf of the Applicant, Mr. Robinson made certain assumptions in respect to the replacement of the Respondents’ birds with birds from Quebec. He assumed this chicken could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation cost and shrink; and that the appropriate chickens can be found for the sizes necessary for the customers. Mr. Robinson assumed, based on conversations the Applicant’s

management team had with Quebec producers, that a minimum premium of \$[CONFIDENTIAL]/kg over the Quebec board price would have to be paid.

[167] Ms. Sanderson stated that because of the assumptions adopted in both the Ware and Robinson reports, these reports overstate the potential impact that the loss of the Respondents' supply of live chickens would have on the Applicant. She stated that the assumed premium is far above the premiums currently and historically paid in Quebec. She first estimated the premium needed to obtain chickens from Quebec producers to be in the area of \$[CONFIDENTIAL]/kg. After corrections were made in the affidavits of Ms. Boucher, Mr. Viel and Mr. Plourde, and based on additional testimony, Ms. Sanderson revisited her opinion on the premiums that the Applicant would have to pay above the Quebec board price in order to obtain chickens from Quebec. Her revised opinion was that that premium would be in the area of \$[CONFIDENTIAL]/kg. She explained that in coming to this opinion, she assumed that the producers in Quebec that the procurement team did not meet or contact would respond in the manner as those that were contacted. In other words, the premiums requested by the producers that did respond were extrapolated and applied for the purpose of her analysis to all producers from Quebec in the market.

[168] The parties therefore take different approaches in reviewing the data obtained from the Applicant's procurement survey. On premiums, each of the two experts disputes the appropriateness of the different assumptions made by the other. In the end, we note that neither expert takes issue with the accuracy of the data collected. It is not disputed that, at a minimum, a premium of at least \$[CONFIDENTIAL]/kg would have to be paid, which is higher than the premiums we have determined to be within the usual trade terms (i.e. \$[CONFIDENTIAL]/kg - \$[CONFIDENTIAL]/kg).

[169] The Applicant contends that two other factors bear on the question of whether the Applicant can obtain chickens in Quebec on usual trade terms. First, the concerns expressed by a number of witnesses regarding interprovincial trade and premium wars; second the specific characteristics of co-op producers and their significance in the market place. It is useful to review the evidence adduced in respect to these factors.

(iii) Premium wars

[170] There is significant evidence adduced, essentially on behalf of the Applicant, regarding concerns in respect to growing interprovincial trade in live chickens. Mr. McCullagh, the vice-president of Maple Leaf, expresses the view that increased interprovincial trade is "a jeopardy to processing companies". He says that the supply management system affords protection to Canadian chicken producers and allows for sustainable farm earnings. He attests that the system further insulates chicken farmers from competition by reason of the national quotas which are allocated to provinces based upon a market share system and governed by an interprovincial agreement.

[171] Mr. McCullagh expresses the view that any attempts by the Applicant to source chickens from Quebec would be very expensive and that such a strategy is highly unlikely to succeed. If, however, the strategy were successful, he attests that Quebec processors who lose supply to the Applicant would seek to regain chickens by offering premiums to producers in other provinces,

such as Ontario. According to Mr. McCullagh, the outcome would be that downstream processors, retailers, food service operators and consumers would incur greater costs, and chicken producers would receive an unfair financial benefit by leveraging power allotted to them through the quasi-monopoly afforded to them through supply management regulations.

[172] At the hearing, Mr. McCullagh testified that Maple Leaf was extremely concerned with the developments in interprovincial trade because of the tremendous risk that premiums will be driven to unsustainable levels for the industry. [CONFIDENTIAL]. He also expressed the view that this premium war had the potential, by reason of the limited supply of chickens owing to quotas, to escalate to encompass the entire industry.

[173] The executive director of the Association of Ontario Chicken Processors, Mr. Thompson, expressed similar views in regard to premium wars. He explained that under supply management, no province is able to increase its share of national chicken production beyond its historical market share. Processors that lose supply to an interprovincial competitor have little choice but to retaliate by providing increased premium incentives to induce local producers to return to processors within their own province, if they wish to stay in business.

[174] Mr. Thompson expresses the view that the interprovincial movement of chicken is a weakness in the regulated supply system. He attests that the provincial percentage share of national production is effectively fixed. He argues that because of this, the only avenue outside of consolidation where processors may seek additional supply is by “raiding” the producers selling to their competitor in neighbouring provinces.

[175] This aspect of interprovincial trade in chicken is also acknowledged by Mr. Brodeur, who testified on behalf of the Respondent Westco. In his testimony, he attests that the pressure from Ontario processors attempting to source chickens from Quebec is now very strong and growing. He recognized that this could have an upward effect on premiums. He also testified that it was essentially smaller processors that were involved in Quebec-Ontario interprovincial trade of chickens and that the “big players” were essentially not involved. He considered Olymel, Exceldor, Maple Leaf and Maple Lodge to be the big players. He testified that Maple Lodge and Exceldor did trade but only for smaller volumes.

[176] Both Mr. Tavares and Mr. Feenstra testified to the effect that increased interprovincial trade in chickens would spark a price war that would increase costs for any processor and would further erode profits. They expressed the general reluctance of major processors to become involved in interprovincial trade of chickens for this reason. Mr. Feenstra stated that he had been involved in premium wars in the past and that the net effect of a premium war is a huge hit on the processing sector because if they want supply, processors have no choice but to pay the premiums demanded by the producers.

[177] Professor Barichello stated in his report that relatively little interprovincial trade in chickens takes place in Canada. The bulk of this movement is between Ontario and Quebec. He reported that in 2005, interprovincial trade in chickens involved only 4% of total Canadian production. He is of the opinion that because the quantity of output is fixed under supply management, producers can only increase their margin by demanding a higher price from the processor, or by making their operations more efficient, or both.

[178] Dr. Ware, in examination in chief, explained that even if the Applicant were able to source all of the Respondents' chickens from Quebec, this would represent an increase in demand for supply of chicken from Quebec by about 10%. He says that in a supply management system where the total amount of chicken produced in Quebec is regulated and cannot be expanded, this could only occur by bidding supply away from other chicken processors. This would cause price increases in the form of escalating premiums.

[179] While there are no regulatory restrictions on interprovincial trade in chickens, [CONFIDENTIAL]. We know that under supply management, supply is limited. In these circumstances, it is understandable that to attract supply away from other processors, a higher price would have to be offered.

[180] We are prepared to accept that the evidence supports the contention that circumstances surrounding interprovincial trade in live chickens and premiums could lead to upward pressure on the price of live chickens in the market. In our view, however, this is no more than the result of competition between processors in a market where the aggregate supply of live chickens remains unchanged. The underlying theme of the evidence of processors and their representatives cited above is that processors should not have to compete for live chickens because such competition would result in higher prices and a "premium war" amongst processors. This evidence is self-serving. It should come as no surprise that in a market where supply is limited, competition for that supply usually results in higher prices. In the instant case, the issue is not about "premium wars", but rather the supply of live chickens. The issue of the supply of live chickens will be comprehensively dealt with below when we consider the "ample supply" requirement under paragraph 75(1)(d) of the Act.

(iv) Co-op producers and their significance in the market place

[181] The evidence indicates that the Exceldor co-op is an important processor with approximately 47% of the Quebec slaughter. This is similar to Olymel's share. The Exceldor co-op is made up of and owned by 260 member suppliers or producers. The Exceldor producers receive a dividend based on the Co-op's performance at the year's end. In his report, Mr. Robinson expresses the view that Exceldor's status as a co-op represents yet another barrier to the Applicant in its effort to source chickens from Quebec. He refers to the philosophy of co-op members that would favour having their product processed in a plant they own so that they may benefit from year-end dividends. Apart from making up these dividends, the Applicant would have to overcome this different philosophy of co-op members who favour the co-op business model over the Applicant's for-profit model. Mr. Robinson expresses the view that it may not be possible to entice any significant number of producers or chickens from Exceldor members no matter what price is paid by the Applicant. Given the significance of Exceldor's share of Quebec slaughter, this represents another significant hurdle for the Applicant.

(v) Conclusion regarding the Applicant's ability to obtain chickens in Quebec on usual trade terms

[182] The evidence reviewed above indicates that even if the Applicant were able to access the necessary volume of chickens to replace the Respondents' from Quebec producers, it would only be able to do so at premiums that exceed those considered within the range of usual trade terms.

Ms. Sanderson conceded that the Applicant would have to pay a premium of \$[CONFIDENTIAL] above the Quebec board price to obtain replacement supplies, whereas we have found the usual trade terms in that market regarding premiums to be between \$[CONFIDENTIAL] and \$[CONFIDENTIAL] above the Quebec board price. In all of the circumstances, we find that the Applicant is unable to obtain adequate supplies of live chickens anywhere in the market on usual trade terms.

(d) Is the Applicant substantially affected in its business?

[183] We now turn to the question of whether the Applicant is substantially affected in its business due to its inability to find adequate supplies of live chickens anywhere in the market on usual trade terms. We will first review the evidence adduced by the parties, in particular the expert reports.

(i) The Applicant's evidence

[184] The reports of Mr. Robinson and Dr. Ware deal directly with the elements of paragraph 75(1)(a). We turn first to the evidence of Dr. Ware.

[185] Dr. Ware notes that the Respondents supply almost one half of the chickens processed by the Applicant and that if this supply were redirected to rival processing facilities, the Applicant would lose over half its revenue. Dr. Ware indicates that "[t]here is no economically feasible source of supply whereby Nadeau can make up this shortfall in supplies of live chicken". He further states that replacing such a volume would take at least months if not years and that the only economically comparable replacement would have to come from New Brunswick. With respect to the market for selling live chickens, Dr. Ware is of the opinion that the Applicant would not be able to bid supply away from producers outside New Brunswick because those producers are already contractually committed to other processors; that not all producers raise chickens that meet the Applicant's size and quality requirements; and that very high premiums would have to be paid to producers in Quebec to attract them away from current processors. Dr. Ware relies on the affidavit evidence of Mr. Tavares in support of these claims. He also indicates that because of high transportation costs "it is neither economic nor efficient for [the Applicant] to replace the large amount of supply from the respondents with supply from greater distances."

[186] With respect to the market for purchasing live chickens, Dr. Ware's observations are not based on any independent analysis. He does not seek to quantify the costs the Applicant would incur to replace the Respondents' live chicken supply.

[187] Mr. Robinson gave evidence with respect to projected earnings of the Applicant. He was asked to review the Applicant's operations to assess the impact of the withdrawal of the Respondents' birds, namely 271,350 birds per week. Mr. Robinson approached his task by developing the following four different scenarios involving:

1. the loss of the Respondents' chickens;
2. replacement of the Respondents' birds with birds from Quebec;
3. the loss of the Respondents' birds and Nova Scotia birds; and



4. replacement of the Respondents' birds with birds from Quebec and loss of Nova Scotia birds.

[188] In developing the four models, Mr. Robinson used the 12-month period ending June 30, 2008, as the base period for his analysis (the "Base Period"). This period included supply from the Respondents as well as Nova Scotia and Prince Edward Island. Mr. Robinson reasoned that this period represented an appropriate base since it not only represented the current operations of the Applicant but was also representative of the performance the Applicant could achieve "on a long term basis" through good and poor periods. In his testimony, Mr. Robinson refers to very strong prices in the poultry market for the first six months of the Base Period ending December 31, 2007, and a very weak market for the remainder of the period.

[189] Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed that these chickens could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; and that the appropriate chicken could be contracted for the sizes necessary for the customers. As stated above, Mr. Robinson assumed, based on conversations the Applicant's management team had with Quebec producers, that a minimum premium of \$[CONFIDENTIAL]/kg would have to be paid on the Quebec board price. He also assumed that, as a result of having to haul the birds up to six hours, the Applicant would have to compensate producers for higher DOAs, higher transportation costs and higher shrink. This would amount to an additional \$[CONFIDENTIAL]/kg on top of the live price premium.

[190] Mr. Robinson concluded that in all four scenarios, the Applicant's operations are negatively impacted to a significant degree.

(ii) The Respondents' evidence

[191] Ms. Sanderson acknowledges that certain costs are higher when sourcing live chicken from Quebec rather than from New Brunswick, such as transportation costs, shrink and mortality. She notes that the regulated minimum board price paid to Quebec producers is \$0.065/kg lower than that paid to New Brunswick producers. Ms. Sanderson factors in the additional costs to the Applicant to purchase replacement chickens for volumes lost because of increased mortality and shrink for more distant shipments. She is of the opinion that the Applicant would be able to replace all of the Respondents' chickens with chickens from Quebec at an additional cost of approximately \$[CONFIDENTIAL]. This would cover additional costs associated with premiums, shrink, DOAs and transportation. In Ms. Sanderson's view, this would still leave the Applicant with operational earnings of approximately \$[CONFIDENTIAL], which is more than [CONFIDENTIAL]% over the Applicant's average earnings from operations between 1998 and 2007.

[192] Ms. Sanderson expresses the opinion that, because of the assumptions essentially about the size of the premiums in the Robinson and Ware reports, their estimate of the potential impact on the Applicant from the Respondents' shifting their supply of live chickens from the Applicant to Sunnymel is overstated.

(iii) Positions of the parties

[193] It is the Applicant's position that it is substantially affected by the refusal and relies on the evidence of Mr. Robinson. Mr. Robinson testified that without the Respondents' supply, the Applicant's earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] using the Base Period as a comparator. He testified that, assuming that the Applicant incurred additional costs for transportation and for DOAs and shrink, and assuming that the Applicant would be required to pay a premium of \$[CONFIDENTIAL] over the Quebec board price to access replacement chickens in Quebec, the Applicant's earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL].

[194] The Respondents argue that the Applicant is not substantially affected by the refusal. They contend that the evidence supports their submission that the Applicant would be able to replace the Respondents' chickens with chickens from Quebec and in doing so would be able to maintain historic levels of processing which would result in earnings that would allow it not only to survive but also to be viable.

[195] The Respondents point to the Applicant's own procurement initiative, which concluded that within a 600 km radius of the Applicant's plant in St-François, a significant volume of live chickens is available from Quebec producers upon payment of certain premiums over the Quebec board price.

[196] The Respondents also rely on the opinion of the Applicant's expert, Mr. Robinson, who testified using the same approach as that used by Ms. Sanderson, that the Applicant would incur additional costs of \$[CONFIDENTIAL] in order to procure replacement chickens from Quebec and would be left with earnings of over \$[CONFIDENTIAL]. The Respondents argue that even earnings of this magnitude approach the Applicant's average yearly earnings prior to the arrival of the Nova Scotia and Prince Edward Island chickens, and that the Applicant therefore cannot be "substantially affected" by their refusal even if the Applicant had to replace all the Respondents' chickens with chickens from Quebec producers.

[197] The Respondents essentially argue that chickens are available in the market to replace the chickens currently supplied by the Respondents in sufficient quantities and on trade terms that would allow the Applicant not only to survive but to be viable based on the survival and viability thresholds set by Mr. Tavares in his testimony. Mr. Tavares attested that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable", but later stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by, that "getting by" referred to "viability in the long term" and that "[d]epending on the markets, it could mean losing a lot of money".

[198] Further, the Respondents contend that even if the Applicant failed to replace any of the Respondents' chickens, its current supply from Nova Scotia and Prince Edward Island and other producers in New Brunswick would allow the Applicant to maintain processing such that it would achieve 108.5% and 93.05% of its self-declared survival ("getting by") and viability thresholds respectively. In the Respondents' view, given the above considerations, the Applicant cannot be substantially affected in its business by reason of the refusal.

[199] The Respondents Dynaco and Acadia argue that their respective refusals cannot substantially affect the Applicant's business because of their small numbers.

(iv) Analysis

[200] Earnings are a meaningful indicator of the performance of an enterprise. In order to assess the impact of the refusal at issue on the Applicant's business, it is therefore useful to consider the Applicant's earnings over time. The projected impact on future earnings by the refusal will be a helpful guide in determining whether the Applicant's business is substantially affected by the refusal.

[201] The evidence of both Mr. Robinson and Ms. Sanderson addresses the question of projected earnings of the Applicant. As discussed above, various models were developed by Mr. Robinson and reviewed by Ms. Sanderson. We review below certain relevant aspects of this evidence.

[202] Mr. Robinson's first scenario involved the loss of the Respondents' chickens. He concluded that without those chickens, the Applicant's earnings would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] using the Base Period as a comparator. Ms. Sanderson assumed that the Applicant would be able to replace the Respondents' chickens with Quebec-sourced chickens, and she did not provide an estimate of the Applicant's earnings if it could not obtain supply on usual trade terms. She is of the opinion that the Applicant would incur an additional cost of almost \$[CONFIDENTIAL] if it were to replace the Respondents' chickens with Quebec-sourced chickens.

[203] Of the four scenarios considered by Mr. Robinson, the one that least affects the Applicant's business is the second scenario, which assumes that the Respondents' birds are replaced with Quebec birds and that the Nova Scotia and Prince Edward Island birds continue to be processed by the Applicant. If the Applicant can demonstrate that under this scenario its business is substantially affected by the refusal, there will be no need to consider the other scenarios developed by Mr. Robinson, including his first scenario in which the Applicant's earnings will drop to \$[CONFIDENTIAL].

[204] In the second scenario, Mr. Robinson makes the following assumptions: that chicken could be obtained in Quebec but that premiums would have to be paid to Quebec producers to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; that the appropriate chickens could be contracted for the sizes necessary for the Applicant's customers. As mentioned above, Mr. Robinson assumed a premium of \$[CONFIDENTIAL]/kg of live chicken based on conversations between the Applicant's management and Quebec producers.

[205] As a result of this analysis, Mr. Robinson identified that the earnings from operations would drop by \$[CONFIDENTIAL] from \$[CONFIDENTIAL] to \$[CONFIDENTIAL] and that the St-François Plant would continue to operate [CONFIDENTIAL]. In Mr. Robinson's opinion, under this scenario, as with the other three he developed, the removal of the Respondents' chickens would have a significant impact on the profitability of the operations and, by extension, on the viability of one of the "most efficient processing plants in Canada".

[206] Ms. Sanderson disagreed with the size of the premium that Mr. Robinson assumed would have to be paid by the Applicant to Quebec producers. Initially, she was of the view that a more realistic premium would be \$[CONFIDENTIAL] over the Quebec board price. Ms. Sanderson was of the opinion that after taking into account the differences in board prices, premiums and transportation costs, and the cost of purchasing additional chickens to replace the lost volumes from increased mortality and shrink, the total incremental cost to the Applicant to source live chickens from Quebec instead of the Respondents is \$[CONFIDENTIAL]/kg of live weight, which represents [CONFIDENTIAL]% of the Applicant's total cost of sales for the 12-month period ending June 2008. In Ms. Sanderson's opinion, this would leave the Applicant with earnings of \$[CONFIDENTIAL] for the period, as opposed to over \$[CONFIDENTIAL] estimated by Mr. Robinson.

[207] As discussed earlier, these figures were revised by Ms. Sanderson as a result of corrected data adduced during the trial. As explained above, her estimate of earnings for the period was revised to \$[CONFIDENTIAL] after corrections were made to affidavits and additional evidence was provided. This now represents a drop of approximately \$[CONFIDENTIAL] from estimated earnings of \$[CONFIDENTIAL]. Her revised opinion was that the premium would be in the area of \$[CONFIDENTIAL].

[208] On cross-examination, Ms. Sanderson agreed that a reduction in earnings of "[CONFIDENTIAL]" is in an order of magnitude of [CONFIDENTIAL] %. She acknowledged that [CONFIDENTIAL] % is "a large number" (the actual reduction is in the order of [CONFIDENTIAL] %). She nevertheless went on to express the opinion that the Applicant would not be substantially affected or precluded from carrying on business by reason of the refusal, because its earnings from operations would be comparable with historical levels.

[209] Ms. Sanderson stated her opinion as follows on examination in chief at the hearing:

Yes. So – given I find that they're going to be able to earn profits – earnings from operations that are in the range of [CONFIDENTIAL], which is [CONFIDENTIAL]percent higher than the average over '98 through to 2007 and about, if you exclude the year of the fire. So given that their earnings are within the range of historical levels, they're certainly not precluded from carrying on business if they get replacement supply.

And I would also conclude that they're not substantially affected given their earnings are comparable to historical levels.

[210] It is noteworthy that Mr. Robinson's assessment regarding the Applicant's reduction in earnings relative to the Base Period is in the order of a [CONFIDENTIAL] % reduction.

[211] In terms of transportation costs, Ms. Sanderson compared the live-haul cost of chickens from Quebec with the Applicant's average live-haul cost for all of New Brunswick. Mr. Robinson accepts Ms. Sanderson's live-haul cost of \$[CONFIDENTIAL]/kg for Quebec chickens, but argues that she should have compared that cost with the live-haul cost for the Respondents' chickens. Had this been done by Ms. Sanderson, Mr. Robinson maintains that the result of her analysis would have essentially been the same as his. If the analysis undertaken by both experts assessed the incremental costs of replacing the Respondents' chickens with Quebec

chickens, then the approach advocated by Mr. Robinson would necessarily produce a more accurate result in terms of incremental costs, as it relates to the replacing of the Respondents' birds.

[212] While we agree with Mr. Robinson's approach, we disagree with his estimate (\$[CONFIDENTIAL]) of the live-haul cost for the Respondents' chickens. We agree with Ms. Sanderson that this estimate must be incorrect because Mr. Landry testified that the cost of transporting live chickens from southern New Brunswick to the St-François Plant varies between \$[CONFIDENTIAL] and \$[CONFIDENTIAL], and that 15% of the Applicant's New Brunswick supply comes from southern New Brunswick. He added that the Applicant's average transportation cost for New Brunswick chickens is around \$[CONFIDENTIAL]/kg. The freight costs associated with the Respondents' live chickens must therefore be approximately \$[CONFIDENTIAL]/kg, since the Respondents' supply represents 85% of the Applicant's New Brunswick supply. The incremental transportation costs of supplying the replacement birds, approximately \$[CONFIDENTIAL]/kg, are therefore part of the additional costs of replacing the Respondents' birds, and these costs, together with premiums, constitute the main factors affecting the cost of live chickens to be obtained from Quebec. Premiums also represent the main area of disagreement between the two experts.

[213] It is not disputed that Nadeau will incur additional costs when sourcing chicken in Quebec because of DOAs and shrinkage. With respect to DOAs, Mr. Landry testified that if a load arrives at the St-François Plant with a DOA rate of 1% or more, the Canadian Food Inspection Agency will conduct an investigation. If this rate is 3% or higher, the Agency will impose a fine.

[214] There is general agreement between Mr. Robinson and Ms. Sanderson in respect of DOA/shrink costs. Mr. Robinson finds that Nadeau's shrink and DOA percentages would be [CONFIDENTIAL]%. There is, however, a different approach in respect to losses associated with replacing DOAs and shrink. Ms. Sanderson does not factor in lost profits, since these chickens are replaced with new purchases.

[215] Both experts agree that, as a result of the Applicant having to replace all of the Respondents' chickens with chickens from Quebec, earning from operations will drop, relative to the Base Period, to a range from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]. Ms. Sanderson's opinion acknowledges this reduction in earnings but reasons that the Applicant is not substantially affected or precluded from carrying on business as a result, because this range of earnings is comparable with historic levels. Historic levels are defined by Ms. Sanderson as the average earnings between 1998 and 2007, excluding the year of the fire.

[216] The Tribunal accepts that the approach taken by both parties regarding the Applicant's earnings is the correct one for assessing the projected earnings of the Applicant as a result of the refusal. With respect, however, we reject Ms. Sanderson's conclusion on "substantial effect" for the reasons that follow.

[217] On cross-examination, Ms. Sanderson agreed that a [CONFIDENTIAL]% reduction in earnings is "a large number" but was of the opinion that the Applicant was not substantially affected. Her opinion is based on the choice of a different comparator period. In her analysis, Ms.

Sanderson adopts the period 1998-2007 in support of her conclusion. In her view, excluding the year of the fire, this period reflects the historic performance of the Applicant in terms of earnings. Her analysis consequently fails to take into account the subsequent period, when earnings from operations were significantly higher as a result of the arrival of additional chickens from Nova Scotia and Prince Edward Island. In our view, this approach does not fairly reflect the Applicant's circumstances. It is an approach that would purport to measure the impact of the refusal on the basis of the Applicant's historic performance and not its current circumstances. Such an approach would not allow for consideration of growth and dynamic expansion of an enterprise in assessing the effect of a refusal to deal under paragraph 75(1)(a). We agree, however, that current earnings should not be considered if they reflect unusual or non-recurring circumstances.

[218] Here, for reasons that are particular to this case, the Applicant saw its processing capacity increase significantly for a three-year period as a result of certain agreements with Nova Scotia and Prince Edward Island producers. A second shift had to be set up at the Applicant's plant and additional employees had to be hired. In many ways, this was a planned expansion of production, although potentially not for an indefinite period. This is not comparable with an exceptional event such as a fire or other act of God, which arguably would not be reflective of normal operations.

[219] While the Applicant's earnings from operations since 2007 indicate a significant increase in earnings over prior years, they are nevertheless earnings that resulted from business decisions which were made in the context of an expansion of operations owing to particular circumstances. The substantial effect on the Applicant's business by reason of the Respondents' refusal must, in our view, be considered in the context of this increased capacity and, by extension, the Applicant's increased earnings, because this is the Applicant's current business situation. To conclude otherwise would be inconsistent with the provision which requires that the Applicant be substantially affected in "his business". The fact that the Applicant's earnings are above its historic average is of no consequence. What matters, for the purpose of paragraph 75(1)(a), is the effect of the refusal on the Applicant's current business. In our view, it is therefore appropriate to consider the Applicant's recent increase in earnings in assessing the effect of the refusal on the Applicant's business.

(v) Conclusion on paragraph 75(1)(a)

[220] In summary, we agree with Mr. Robinson that the Base Period is the appropriate comparator period in the circumstances. The increase in earnings over the historic average, reflected in the selected Base Period, is representative of the Applicant's current business earnings and is therefore a proper basis upon which to consider the effect on the Applicant's business that may be caused by reason of the Respondents' refusal to supply.

[221] In the result, we find that a reduction in earnings of [CONFIDENTIAL]% relative to the Base Period is significant and important in the circumstances of this case. We therefore find that, on the basis of the evidence and arguments adduced, replacing the Respondents' chickens with Quebec chickens will have a substantial impact on the Applicant's business. Given our above determinations, we find that the Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade

terms. Because of the effect of the refusal on earnings explained above, we are of the view that our conclusion would have been the same under any of the Robinson scenarios. Therefore, by reason of the projected impact on the Applicant's earnings, the Applicant would be substantially affected in its business.

[222] Certain other options in terms of supply, which are potentially plausible, were simply not argued before the Tribunal: for instance, the possibility of replacing one half of the Respondents' supply from Quebec producers, as opposed to all of it. The impact on the Applicant's business was not considered by the experts, nor did the parties advance arguments on such a scenario and, in these circumstances, we decline to speculate on its effect on the Applicant's profits.

[223] On the evidence, and upon consideration of the arguments advanced by the parties, for the above reasons, we are satisfied that the Applicant has met its burden under paragraph 75(1)(a) of the Act.

[224] We now turn to consideration of the requirement under paragraph 75(1)(b).

**C. Has the Applicant established that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market pursuant to paragraph 75(1)(b) of the Act?**

**(1) Parties' Submissions**

[225] The Applicant contends that it is unable to obtain adequate supplies of live chickens because of insufficient competition among suppliers in the market. It submits that as a result of the supply management scheme, chicken producers are completely insulated from competition. The Applicant states that it is in fact the processors who fight among themselves to offer ever-increasing prices to producers.

[226] The Respondent Westco contends that the insufficient competition referred to in paragraph 75(1)(b) must be assessed in light of the overall context of the Act and can only refer to situations in which a competitor or competitors have a dominant position or a monopoly, or in which there is a lack of competition as a result of any kind of collusion. It submits that there are a considerable number of suppliers in the relevant market and that there is no evidence of collusion among them, which indicates that there is no issue of insufficient competition. Westco further states that not only are there several competitors, but the evidence also shows that chicken producers are indeed willing to compete and supply the Applicant with their production upon payment of premiums over and above the board price set by regulatory authorities. The Respondents Dynaco and Acadia also submit that there are enough producers in the relevant market to conclude that there is sufficient competition.

[227] In the alternative, the Respondents contend that the evidence in the Tribunal's record shows that the cause of any inability on the Applicant's part to obtain replacement birds has nothing to do with a lack of competition among suppliers of live chickens. It is rather because of the following three factors that came to light during the hearing, namely, the Respondents' objectively justifiable business reasons for the refusal, the workings of the supply management system and the level of competition among processors.

## (2) Analysis

[228] Pursuant to paragraph 75(1)(b) of the Act, the refused party must demonstrate that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market. As was set out in *B-Filer*, paragraph 75(1)(b) of the Act contains two requirements. First, there must be insufficient competition among suppliers in the relevant market. Second, the inability of the refused party to obtain adequate supplies of the product must be by reason of that insufficient competition. The Tribunal, in *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, considered the causal requirement of the provision and concluded as follows, at page 116:

In addition, the refusal to supply must occur “*because of insufficient competition among suppliers of the product*”. That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.

(emphasis added)

[229] The Tribunal must therefore determine whether the Applicant has established that insufficient competition among suppliers in the market is the overriding reason why it is unable to obtain adequate supplies of the product in the market. The product and geographic markets, for the purposes of paragraph 75(1)(b), are the same as those which have been defined pursuant to paragraph 75(1)(a). The relevant geographic market therefore consists of New Brunswick, Prince Edward Island, parts of Quebec within a 500 km radius of the St-François Plant, and Nova Scotia.

[230] The Tribunal has not yet had an opportunity to determine the meaning of “insufficient competition”. In *Xerox* and *Chrysler*, the Tribunal defined the relevant product market in a very narrow manner, and it was therefore not difficult for the Tribunal to conclude that there was insufficient competition among suppliers in the market. The Tribunal noted that the level of competition among suppliers will depend on the facts of the particular case. The Tribunal also stated the following in *Xerox*, at page 116:

Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be “substantially affected”. One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

[231] We now turn to an assessment of the competitive conditions in the market. The evidence on the record shows that there are many suppliers in the relevant market. Data provided by the Chicken Farmers of New Brunswick indicate that in 2007 there were 38 chicken producers in New Brunswick, 82 producers in Nova Scotia, 7 producers in Prince Edward Island and 760 producers in Quebec. Statistics from Les Éleveurs de volailles du Québec indicate that in 2006 there were 85 producers in the Beauce region, 62 producers in the Québec region and 22 producers in the Côte-du-Sud region, all of which are located in Quebec within 400 km of the



St-François Plant. From this data, the Tribunal can conclude that there are, in fact, numerous producers located in the relevant geographic market.

[232] The evidence adduced at the hearing shows that over the last few years a number of chicken producers have consolidated their quotas and that some producers have formed alliances to reap financial benefits. Further, the evidence demonstrates that some producers are related, as they are members of the same co-operatives. The evidence does suggest some lack of independence among producers in the New Brunswick market. In fact, Mr. Feenstra has indicated that only eight nominal quota holders in New Brunswick are independent from the Respondents. The Respondents together produce almost 75% of New Brunswick's live chickens. Mr. Feenstra, however, also acknowledged that he is not aware of that degree of concentration in any other Canadian province. In fact, no evidence was adduced regarding such concentrations in Nova Scotia, Prince Edward Island or parts of Quebec. Furthermore, evidence adduced by the Applicant concerning its efforts to seek replacement supply of live chickens in Quebec clearly demonstrates that producers are acting independently. Results from the Applicant's survey show that producers were in fact offering live chickens to the Applicant at different prices above the board price. Under these circumstances, there is insufficient evidence to conclude that there is either collusion or a lack of independence amongst producers in the market as a whole.

[233] Normally, the presence of numerous suppliers acting independently is a strong indicator of sufficient competition. However, the parties in this matter are operating within the supply management system, which is governed by a detailed and complex set of regulations. We must therefore consider the impact, if any, of the supply management system on competition among suppliers in the market.

[234] As discussed above, under supply management, the minimum price for which chicken may be sold in respective provinces is set by the provincial marketing boards. Production is also restricted to quota holders and limited by a producer's quota allocation.

[235] The Applicant asserts that as a result of the supply management system, chicken producers do not compete amongst themselves. Mr. McCullagh indicated that the supply management system has been a "quasi-monopoly for chicken producers" and Dr. Ware indicated that "[w]hatever the merits of such a system, there is no doubt that competition is restricted by it, as entry is precluded completely and the competitive battles for market share which create benefits for consumers and foster incentives for innovation are also completely absent".

[236] The purpose or objects of the acts and regulations governing the supply management system are not intended to limit competition. The CFC was created in 1978 by order in council pursuant to section 16 of the *Farm Products Agencies Act* ("FPAA"), R.S.C. 1985, c. F-4. Section 21 of the FPAA identifies the objects of a farm product agency:

**21.** The objects of an agency are

(a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and

**21.** Un office a pour mission :

a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité;

(b) to have due regard to the interests of producers and consumers of the regulated product or products.

b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés.

(emphasis added)

(nos soulignements)

[237] As an agency created under Part II of the FPAA, the CFC has the power to implement a marketing plan for chicken pursuant to the terms of the proclamation establishing it (see s. 22(1) FPAA). Some of the terms of that plan are found in the 2001 Federal Provincial Agreement for Chicken. The purpose and objectives of that agreement are as follows :

**1.01** This Agreement provides for an orderly marketing system for chicken coordinated in a flexible and market responsive manner having appropriate safeguards so as to provide consistency, predictability and stability in accordance with the following objectives:

**1.01** Le présent Accord établit un système de commercialisation ordonnée du poulet coordonné de façon flexible et axée sur le marché, comportant les mesures de protection nécessaires pour assurer l'uniformité, la prévisibilité et la stabilité en conformité avec les objectifs suivants :

(a) to optimize sustainable economic activity in the chicken industry;

(a) optimiser l'activité économique durable dans l'industrie du poulet;

(b) to pursue opportunities in both domestic and international markets;

(b) rechercher des débouchés tant sur le marché national que sur le marché international;

(c) to enhance competitiveness and efficiency in the chicken industry; and

(c) améliorer la compétitivité et l'efficacité dans l'industrie du poulet;

(d) to work in the balanced interest of producers, industry stakeholders and consumers.

(d) travailler dans l'intérêt mutuel des producteurs, des intervenants de l'industrie et des consommateurs.

(emphasis added)

(nos soulignements)

[238] The Applicant's expert, Dr. Barichello, has indicated that competition, within the context of the supply management system, can exist among producers in the provinces in which premiums are paid, albeit not below the minimum price established by the board:

**Ms. Healey:** So to the extent - - so there's that range, minimum price and up; that's an area in which producers could engage in competition?

**Dr. Barichello:** That's correct.

**Ms. Healey:** You want 6 cents for your birds; I'll agree to 4.5?

**Dr. Barichello:** Right.

[239] However, Dr. Barichello also stated that there was a relatively modest scope for competition within the market, as the margin within which producers could compete was limited. He also added that “[n]ormal competitive pressure would be when you would be able to also lower your required price such as below the minimum price”.

[240] The Tribunal accepts that the margin in excess of the regulated minimum price that Quebec producers receive is relatively small. In our view, however, it is competition among individual producers that keeps this margin relatively small. What matters is that the price received by producers (including the margin in excess of the regulated minimum price) is determined by competition among producers. As for Dr. Barichello’s contention that the minimum price set by the provincial board restricts competition, we are of the view that the regulated minimum price does not itself limit a producer’s ability to compete effectively unless the aggregate market supply set by the marketing board exceeds demand at the regulated minimum price. In that case, the regulated minimum price would prevent the competitive price adjustment required to clear the market. There is no evidence that competition in the relevant market is currently inhibited in this way.

[241] Significant evidence was adduced to the effect that prices received by producers in Quebec exceed the minimum price set by the marketing board. Such evidence was outlined under the paragraph 75(1)(a) analysis and will not be repeated here. Suffice it to say that the Tribunal is satisfied that prices received by producers in Quebec generally include a premium above the regulated base. As Dr. Barichello has conceded, this premium and thus the price received by each producer can be determined by competition among individual producers.

[242] Furthermore, some Quebec producers canvassed during the Applicant’s procurement survey indicated that they were seeking the same price as other producers were getting. This is consistent with price-taking behaviour and supports the finding that an individual producer cannot set the price and that the price ultimately paid is set by the competitive forces in the market.

[243] The restrictions on entry and expansion established by the supply management system have an impact on competition, but inelastic market supply does not itself imply that there is insufficient competition among suppliers in the market.

[244] In our view, while supply management restricts the available aggregate supply and makes it less price-responsive, it does not give any one producer any price-setting power. The inability of the Applicant to obtain adequate supplies on the usual trade terms is not the result of insufficient competition among individual producers. The existence of inelastic market supply is not incompatible with the market price being set by competition among individual producers in the market.

[245] Apart from producers in Quebec, there is very little evidence regarding the prices producers in Nova Scotia and Prince Edward Island are receiving relative to their respective regulated minimum prices. We know that in New Brunswick, there is an Incentive Plan in place. We are unable, therefore, to make a conclusive finding as to whether and how the regulated minimum prices in those provinces might have affected competition among producers.

[246] To conclude, we are of the opinion that the Applicant has failed to establish that there is insufficient competition among suppliers in the relevant market for the following reasons: the number of producers in the market; the absence of any evidence that producers, except for the Respondents, are not acting independently; and our conclusion that supply management in and of itself does not establish that there is insufficient competition among individual producers.

[247] Even if there were a finding of insufficient competition among suppliers, we would nevertheless still be of the view that the Applicant has not met its burden under paragraph 75(1)(b) of the Act. There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens. As will become evident from our discussion of ample supply for the purposes of paragraph 75(1)(d) later in these reasons, the limit on aggregate supply has a very significant impact on the question of whether the Applicant is able to obtain adequate supplies of chickens in the market.

[248] Therefore, for the purposes of paragraph 75(1)(b), we conclude that the Applicant has not established that it is unable to obtain adequate supplies of chickens because of insufficient competition among suppliers in the market.

**D. Has the Applicant established that it is willing and able to meet the usual trade terms pursuant to paragraph 75(1)(c) of the Act?**

[249] The Applicant contends that it has always met the usual and customary terms of trade. The testimony of the Applicant's representatives, Mr. Feenstra, Mr. Landry, and Mr. Plourde, indicates that the Applicant is willing to meet the usual trade terms with respect to Quebec supply. There appears to be no dispute that the Applicant is willing and able to meet the usual trade terms.

[250] On the evidence, we are satisfied that the Applicant is willing and able to meet the usual trade terms of the suppliers of live chickens.

**E. Has the Applicant established that the product is in ample supply pursuant to paragraph 75(1)(d) of the Act?**

[251] The Tribunal has dealt with this element of the provision only once. *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, is the only case in which the Tribunal has made a determination in respect to ample supply. It decided that the product, Harley-Davidson motorcycles, was not in ample supply and consequently declined to grant an interim order. The Tribunal held, at paragraph 19, that "section 75, and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser."

[252] In *Quinlan's*, the Tribunal acknowledged that the product was in ample supply some months of the year, but found that it was not appropriate to order interim supply, in the

circumstances, because the product was not in ample supply at the time the order to supply was sought.

[253] In the circumstances of this case, the supply of the product, live chickens, is regulated under the supply management system. The system strictly controls the supply of live chickens in Canada through a quota system. Under supply management, each producer may only produce live chickens in accordance with its quota in a given period. A producer faces a significant penalty if it exceeds its quota. The system does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment formula designed to strike a balance between chicken production and consumer demand. The issue here is whether, under these circumstances, live chickens can be said to be in ample supply for the purposes of paragraph 75(1)(d).

### (1) The supply management system

[254] Before proceeding further, it is useful to fully understand the complex supply management system in place for the production of live chickens in Canada and to appreciate how that system functions. To that end, we will review below the various statutory and regulatory provisions which underlie the system, applicable federal-provincial agreements and certain orders issued by provincial marketing boards which are material to the issues in this case.

#### (a) Chicken Farmers of Canada and the 2001 Federal- Provincial Agreement

[255] As mentioned above, the Chicken Farmers of Canada was created in 1978 by order in council and implements a marketing plan pursuant to the terms of the 2001 Federal-Provincial Agreement for Chicken (the "FPA"). Schedule A to the FPA is known as the *Chicken Farmers of Canada Proclamation*, SOR/79-158. This document establishes the CFC and the quota system. Under section 6 of the Proclamation, the CFC shall establish a quota system for the signatory provinces by which quotas are allotted to chicken producers in each province to which quotas are allotted by the appropriate board. The CFC Board of Directors is comprised of the following persons:

- (i) ten members representing the producers of each provincial marketing board;
- (ii) two persons appointed by the Canadian Poultry and Egg Processors Council;
- (iii) one person appointed by the Canadian Restaurant and Food Service Association;
- (iv) one person appointed by the Further Poultry Processors Association of Canada; and
- (v) one national chairperson elected from among the chairs of the provincial marketing boards.

[256] Under section 3.01 of the FPA, each Provincial Commodity Board agrees to limit chicken production pursuant to the quotas:

<p><b>3.01</b> In the fulfillment of their obligations under section 2.05, the Provincial Commodity Boards each agree:</p>	<p><b>3.01</b> Dans le cadre de la réalisation de leurs obligations en vertu de l'article 2.05, chaque office de commercialisation</p>
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provincial convient :

(a) to limit the total quantity of chicken produced in their respective provinces, and marketed, to the quota allocation as determined from time to time by reference to this Agreement;

(a) de limiter la quantité totale de poulet produite et commercialisée dans leur province respective à l'allocation de contingents déterminée, de temps à autre, conformément au présent Accord;

(b) to establish the minimum prices at which live chicken may be sold in their respective provinces; and

(b) d'établir des prix minimums de vente du poulet vivant dans leur province respective;

(c) in conjunction with CFC, to implement and maintain a coordinated system of quota allotment that is auditable by CFC, where the basic effects as between provinces are similar.

(c) de mettre en œuvre et de maintenir, en collaboration avec les PPC, un système coordonné d'allocation de contingents qui peut être vérifié par les PPC lorsque les effets de base entre les provinces sont similaires.

(emphasis added)

(nos soulignements)

[257] Schedule B to the FPA is known as the Operating Agreement and its purpose is to set out the fundamentals of the operation of the marketing system for chickens.

[258] Schedule B distinguishes “federal quota” from “provincial quota”. It defines “federal quota” as “the quantity of chicken expressed in live weight that a producer is entitled to market in interprovincial and export trade in a period, and is allotted to the producer by the Provincial Commodity Board on behalf of CFC”. This is different from the “provincial quota” defined as “the quantity of chicken expressed in live weight that a producer is entitled to market in intraprovincial trade in a period, and is allotted to the producer by the Provincial Commodity Board.”

[259] It appears, however, that the provinces adopt as the provincial quota the exact share assigned by the CFC. Justice Abella, in *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20; [2005] 1 S.C.R. 292, acknowledged that this is the accepted practice in the industry. She states at paragraph 8 that “[e]ach provincial body ... adopts as its intraprovincial production quota the exact share federally assigned to it.”

[260] It is also accepted that the system provides for a granting of authority in respect of allotting federal quotas and administering them in accordance with the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 (see subsection 2(1) of the *Chicken Farmers of Canada Delegation of Authority Order*, SOR/2003-274). This was recognized by Justice Abella in *Pelland*, where she wrote at paragraph 9 of the Court’s decision that “[i]n order to facilitate the integration of production and marketing quotas, the federal body delegates its authority to regulate the marketing of chickens in interprovincial and export trade to the provincial body”.

[261] This regulatory scheme provides strict limitations on quotas. Section 9 of the *Canadian Chicken Marketing Quota Regulations* provides the following limits:

9. The Provincial Commodity Board of a province must allot federal quotas to producers in the province in such manner that the aggregate of the following numbers of kilograms of chicken that is produced in the province, and authorized to be marketed, during the period referred to in the schedule will not exceed the applicable number of kilograms of chicken set out in column 2 of the schedule in respect of the province for that period:

(a) the number of kilograms of chicken authorized to be marketed by producers in interprovincial or export trade under federal quotas allotted on behalf of CFC by the Provincial Commodity Board;

(b) the number of kilograms of chicken authorized to be marketed by producers in intraprovincial trade under provincial quotas allotted by the Provincial Commodity Board; and

(c) the number of kilograms of chicken anticipated to be marketed by producers under quota exemptions authorized by the Provincial Commodity Board.

(emphasis added)

9. L'Office de commercialisation d'une province doit allouer des contingents fédéraux aux producteurs de cette province de manière que la somme des nombres de kilogrammes de poulet ci-après, exprimés en poids vif, qui sont produits dans une province et dont la commercialisation est autorisée au cours de la période visée à l'annexe, n'excède pas le nombre de kilogrammes de poulet, exprimé en poids vif, visé à l'annexe pour cette province, pour la période en cause :

a) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché interprovincial ou d'exportation, au titre des contingents fédéraux alloués au nom des PPC par l'Office de commercialisation de la province;

b) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché intraprovincial, au titre des contingents alloués par l'Office de commercialisation de la province;

c) le nombre de kilogrammes de poulet que les producteurs prévoient de commercialiser en vertu des exemptions de contingents autorisées par l'Office de commercialisation de la province.

(nos soulignements)

[262] The schedule referred to in the above provision sets the quota allocation for an eight-week production period. The system provides for periodic adjustments to the schedule. We reproduce in Schedule B to these reasons a recent schedule issued covering the quota period of January 4, 2009, to February 28, 2009.

[263] The FPA also provides for a specific quota allocation procedure (see sections 3.01 to 3.10 of the FPA) (the "quota allocation procedure") and for subsequent adjustments to the quotas set

in the initial procedure (see sections 4.01 to 4.11 of the FPA) (the “quota adjustment procedure”). We will briefly review these two regulatory procedures.

(b) The quota allocation procedure

[264] Section 3.02 of the FPA provides that, for six periods at a time, the CFC will establish the initial base for each province pursuant to a formula which takes into account the previous year’s level. Each provincial commodity board may make a request to adjust the initial base allocation for one or more of the six periods provided that the adjustments for any period do not exceed 5% and the total of the bases for the six periods does not change (s. 3.03).

[265] Further, prior to each period, each provincial commodity board also makes a written quota allocation request to the CFC in the following manner:

**3.05 ...**

(a) in accordance with the procedures, if any, established pursuant to section 5.01 below, the Provincial Commodity Board will consult with its processors using a “bottom up approach and, having regard to the market requirements proposed by those processors will arrive at the estimated provincial market requirements prior to the submission of the quota allocation request for the period to CFC;

(b) in accordance with the procedures, if any, established pursuant to section 5.02 below, Provincial Commodity Boards in each region shall consider discussing market conditions and estimated market requirements in the region prior to the submission of the quota allocation request by each Provincial Commodity Board to CFC; and

(c) in submitting its quota allocation request to CFC for a period, each Provincial Commodity Board will provide to CFC the rationale for the request which will enable CFC to fulfill its obligations under the *Farm Products Agencies Act*, including those in section 23(2).

**3.05 [...]**

(a) l’office de commercialisation provincial consulte ses transformateurs, conformément à la procédure, s’il y en a une, qui est établie en vertu de l’article 5.01, en utilisant une approche «ascendante» et, après avoir examiné les besoins de marché proposés par ces transformateurs, estime les besoins du marché provincial avant de soumettre aux PPC la demande d’allocation de contingents pour la période;

(b) les offices de commercialisation provinciaux de chaque région envisagent de discuter, conformément à la procédure, s’il y en a une, qui est établie en vertu de l’article 5.02 ci-dessous, des conditions de marché et des estimations des besoins du marché dans la région avant de présenter la demande d’allocation de contingents aux PPC;

(c) lorsqu’il présente sa demande d’allocation de contingents aux PPC pour une période, chaque office de commercialisation provincial fournit aux PPC la justification de la demande, ce qui permet aux PPC de s’acquitter de leurs obligations en vertu de la Loi sur les offices des produits agricoles, y compris



celles qui sont prévues au paragraphe 23(2).

(emphasis added)

(nos soulignements)

(c) The quota adjustment procedure

[266] The Operating Agreement also sets out certain rules regarding adjustments to the quota allocation. Temporary changes to the regional range are possible in certain circumstances (see s. 4.02). For provinces in a region (“region” is defined in section 2.01 of the Operating Agreement), the regional range shall allow for quota allocation changes of up to 5%. An adjustment to the regional range, which is not temporary and which establishes a new regional range requires a special vote of the CFC (s. 4.01).

[267] Further, section 4.07 provides that a provincial board may request a quota allocation that exceeds the provincial range for one or more periods to accommodate exceptional circumstances (“provincial range” means the percentage change from the base for a province for a period). Section 4.06 provides that “[f]or a province, the provincial range shall allow for quota allocation changes of up to eight (8) percent” and “[a]n adjustment to the provincial range, other than pursuant to section 4.07, requires a special vote” of the CFC.

[268] What emerges from the above provisions of the FPA is that any adjustments to quotas are made provincially and/or regionally. The system provides for adjustments to be made on a “macro” level, that is, for all producers within a province or a region.

[269] The evidence adduced before the Tribunal does not contradict the above summary of the supply management system. We note, in particular, the evidence of Mr. Feenstra in his reply affidavit, wherein he confirms that the “bottom-up” approach was implemented across Canada in or about January 1995. He further attests that during the period leading up to the new approach, processors had experienced shortages of chickens for so long and thought they could sell a lot more chicken. According to Mr. Feenstra, this shortage led to a recommendation to increase volumes and prices substantially. Mr. Feenstra further testified that the market could not handle the increase and that a significant oversupply of chickens resulted across Canada.

**(2) Positions of the parties**

[270] The Applicant argues that the product here is in ample supply. It takes the position that the Respondents can and do raise enough chickens and just want to deprive the Applicant of them. It is argued that the purpose of paragraph 75(1)(d) is to ascertain whether the supplier, through no fault of its own, is unable to supply the Applicant with the product. Alternatively, the Applicant argues that the purpose of the supply management system as a whole is to ensure a match between supply and demand or, in other words, to ensure ample supply to meet consumer needs. The Applicant also relies on a statement made by Mr. Brodeur, who stated at the hearing that there is too much supply (“Il y a trop d’approvisionnement”).

[271] The Respondents argue that the product is not in ample supply. It is argued that ample supply must be assessed not in relation to the Applicant's need, but rather in relation to what is available in the relevant market or from the supplier from whom an obligation to supply is sought. The focus must be on the suppliers' capacity to offer product in the relevant market. The Respondents contend that live chickens are not generally a product in ample supply because the supply management system regulating the chicken industry expressly limits the quantities that may be supplied by producers in a given period. In the Respondents' view, this is the primary reason chickens are not available in ample supply.

[272] Further, the Respondents argue that section 75 is not intended to apply to situations where a supplier's particular production capacity is limited, nor is it intended to oblige the Tribunal to arbitrate an agreement between customers who are seeking access to a limited supply of products. It is argued that the section provides for only one remedy, namely acceptance of the customer on usual trade terms. If the product were in ample supply, there would be no need for an order stipulating a volume or to allocate supply, since the suppliers in the market would have available capacity to meet the needs of the person who has been refused supply. Conversely, the Respondents maintain that if, in order to accomplish its purpose, an order should need to specify a volume to ensure supply to a customer at the expense of another, the product then would not be in ample supply, and the conditions of section 75 would not have been met.

[273] Finally, the Respondents maintain that it does not matter whether the product is no longer available because it is reserved for an innocent third party, as in *Quinlan's*; or whether it is no longer available by reason of a business decision by the Respondent Westco to vertically integrate its operations. The supplier simply does not have "ample supply" of the product because there is no excess capacity available to meet the demand.

### (3) Analysis

#### (a) Meaning of "ample supply"

[274] Defining "ample supply/quantité amplement suffisante" in the context of paragraph 75(1)(d) is essentially a question of legal interpretation. It is now accepted law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

[275] The word "ample" is defined by both the *Canadian Oxford Dictionary* (2004) and *Webster's Encyclopedic Dictionary of the English Language* as plentiful, abundant, extensive and more than enough. *Le Petit Robert de la langue française* (2006) defines "amplement" as "abondamment" and "en allant au-delà du nécessaire". This is to be contrasted with the word "adequate" found in paragraph 75(1)(a), which is defined by the *Canadian Oxford Dictionary* as sufficient, satisfactory, and barely sufficient. The *Webster's Encyclopedic Dictionary of the English Language* defines "adequate" as equal to or sufficient for a special requirement.

[276] A different meaning of “supply” was therefore intended in each paragraph. In its grammatical and ordinary sense, ample therefore means more than a sufficient or adequate supply. It means supply available in abundance or to the point that it is considered to be excessive. Ample or abundant supply must then be considered in the context of the object and scheme of the Act, the object of the particular provision, and the intention of Parliament.

[277] The purpose of the Act is set out in section 1.1. It essentially provides that the purpose of the Act is to maintain and encourage competition in Canada. It includes, among other objectives, doing so in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and product choices.

[278] In *Xerox*, the Tribunal had occasion to consider the constitutionality of section 75 of the Act. In finding the provision to be within Parliament’s legislative authority and constitutionally valid, it commented on the purpose of the provision. At page 78 of its decision, the Tribunal wrote:

Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section’s objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI.

[279] We agree with the above characterization of the objective of the provision. The goal of promoting and maintaining competition is also reflected in the scheme of the Act. The scheme under section 75 of the Act provides for certain conditions which, when met, render a refusal to deal, an otherwise legal act, a reviewable practice. Two of these conditions make express reference to competition being affected. In paragraph 75(1)(b), it must be established that there is insufficient competition among suppliers in the market, and paragraph 75(1)(e) requires that it be shown that the refusal to deal is having or is likely to have an adverse effect on competition in the market. Therefore, a refusal’s impact on competition is a central focus of the provision. Once it is established that competitive forces are hindered by the refusal or the lack of access to supplies, the Tribunal may, pursuant to section 75 of the Act, order that one or more suppliers of a product in a market accept the Applicant as a customer on usual trade terms. As stated by the Tribunal in *Xerox*, the effect of the remedy under section 75 is to open up channels of distribution and free competitive forces hindered by lack of access to supplies.

[280] The term “ample supply” must be interpreted harmoniously with the above discussed purpose of the Act and scheme. Supply is not ample when suppliers generally would be inhibited from growing or even changing the nature of their business, or be forced to ration supplies between current and potential future customers because supply is limited. A product is in ample supply when its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels, such as involvement in the downstream processing market.

[281] A remedy under section 75 would not be available in circumstances where a refusal to supply was caused by reason of a shortage of supply in general as a result of a strike, scarcity of raw materials, or by reason of an upstream supplier going out of business. In such circumstances, supply is constrained by reason of factors beyond anyone's control. As a consequence, a supplier is unable to meet demand in the market, by reason of supply being limited. It follows that the product is therefore not in ample supply. This view finds support in the 1974 transcripts of committee proceedings before the House of Commons when Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl.) was being debated. The issue being debated was a refusal where the product was in short supply. The following question was put to the minister responsible, followed by his response:

**Mr. Frank:** Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.

To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.

At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure that they were not shorting them. Consequently, they refused to sell to these dealers that had unfortunately found themselves ex-customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they had not supplied before?

**Mr. Gray:** No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 29th Parl. 2nd Sess., No. 9 (April 30, 1974) at 9:34)

[282] Bill C-7 died on the order paper, but the provision at issue was eventually brought back under a different bill. The above exchange is therefore relevant and would appear to support an intention by the minister to have the provision apply only where there is evidence of ample supply of the product in the market. What is also suggested is that in cases where product is in short supply, a supplier would not be required to ration limited supplies of a product in a manner that prevents existing customers from obtaining the quantities they wish to purchase.

[283] The above factors support a definition of “ample supply” consistent with that articulated by the Tribunal in *Quinlan’s*. The words “ample supply”, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, are meant to deal with situations in which the product is in ample supply, in the sense that suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers.

(b) Are “live chickens” a product in ample supply in the circumstances of this case?

[284] As can be observed from the above review of the supply management system for live chickens in Canada, the system as structured does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment mechanism designed to strike a balance between chicken production and consumer demand. Essentially quotas are adjusted by the CFC when consumer demand for chicken increases or decreases. This is measured by what industry participants refer to as a “bottom-up” process which starts when processors gauge changes in consumer demand for chicken. According to Mr. Brodeur, any increase in demand translates into a corresponding increase in what is known as the “meat margin”. The “meat margin” measures the difference between the minimum board prices for live chickens set by the provincial marketing board and the aggregate of the prices paid for processed chickens at both the primary and secondary stages of transformation. These prices are not regulated and are set by market forces. Therefore, when the prices for processed chickens either rise or fall, the “meat margin” increases or decreases. This reflects an increase or decrease in consumer demand. It is when the “meat margin” exceeds historic levels that the CFC is led to conclude that supply and demand for chickens in Canada is not in equilibrium, and as a result there is a need to increase production quotas in order to satisfy increased consumer demand. The evidence indicates that, historically, such an adjustment has served to reduce prices at both the wholesale and retail levels. The converse is also true. When the “meat margin” is below historic levels, quotas may be reduced. As seen above, such adjustments in quotas, if any, can only occur at the end of an eight-week production period.

[285] We are satisfied that the above review of the supply management system in Canada as it relates to chickens properly reflects the system under which the parties to this application are operating and were operating at the time of the filing of the application. It is a system that does not allow for an immediate or timely response to changes in market conditions as would be the case in an unregulated market.

[286] The system in place provides for supply to be adjusted at the “macro” level. Quotas may be increased nationally and even on a provincial level as a result of increased consumer demand. However, under the system, there is no assurance that a particular supplier who wishes to increase production can obtain the increased quota that it needs to meet its business plan. Indeed the evidence of Mr. Feenstra indicates that adjustments in the system are made across the system and that an increased quota over a previous period is divided up on a pro-rata basis between each existing producer. That is of little assistance to individual producers who wish to accommodate additional customers.

[287] Under the system, aggregate supply is maintained at adequate levels to meet consumer demand. The level of supply is essentially fixed for any given period. Increases in quotas are made only after the market data is computed and assessed at various levels of administration in the system for a given period. When quotas are adjusted, they are adjusted on an aggregate basis and distributed on a pro-rata basis among existing producers. This takes time, and in the meantime, a producer is unable to increase production to meet increased demand. A producer can only supply more if it acquires production quotas from another producer, and processors can only increase capacity and grow in the market by obtaining additional supply by accessing supply that is destined for another processor, since total supply is limited by the system.

[288] As can be seen from the above review of the supply management system, the main focus has been to ensure stability and a reasonable rate of return for producers and an adequate supply for consumers. Indeed, on the latter point, the Marketing Plan issued under Order I of the Chicken Farmers of New Brunswick (see Schedule C) uses such language. The plan provides that one of its objects is to ensure that there is “adequate supply of New Brunswick grown chicken available to the consumer”. Under the supply system as discussed above, the product cannot be said to be in ample supply, in the sense that it is available on a timely basis to individuals wishing to expand or develop their businesses. This is a consequence, in particular, of the time lag required for an adjustment in aggregate supply and of the apportioning of any adjustment among all suppliers.

[289] In accordance with the definition of “ample supply” set out earlier in these reasons, and in the circumstances of this case, it follows that the product, live chickens, cannot be said to be in ample supply as that term is understood for the purposes of paragraph 75(1)(d) of the Act.

[290] The Applicant further argues that “(s)ubsection 75(1)(d) cannot be interpreted so as to permit the malefactors to profit from their own misconduct”. The Applicant maintains that the Respondents “embarked on a deliberate and conspiratorial course of conduct, as far back as August 2006, whose sole purpose and object was to attempt to force an improvident sale of the Nadeau Plant”. In support of its argument, the Applicant relies on evidence adduced by different witnesses which indicates that the Respondents were strategizing to acquire the St-François Plant at below market value by threatening to cut off supply to the Applicant if it was not prepared to sell. A number of e-mails and other correspondence were adduced in evidence, including exchanges between the Respondents and their respective officials that support elements of the Applicant’s allegation.

[291] As stated earlier, the Respondents argue that the prime reason that motivated their decision to refuse supply to the Applicant is their decision to have their birds processed by Sunnymel. This would allow for continued vertical integration of Westco’s enterprise. In essence, the Respondents say that it was no more than a business decision.

[292] We are of the view that we need not decide whether the Respondents’ conduct, which led to its decision to terminate supply to the Applicant, is misconduct, as alleged by the Applicant, or tough negotiations motivated by a business decision, as argued by the Respondents. In our view a determination is not necessary in the circumstances because of our above finding that there is

not “ample supply” of chickens in the market. In the context of a section 75 application, for a remedy to be available, all the requirements in subsection 75(1) must be met.

[293] We now turn to the final requirement under subsection 75(1) and consider whether the refusal is having or is likely to have an adverse effect on competition in a market.

**F. Has the Applicant established that the refusal to deal is having or is likely to have an adverse effect on competition in a market pursuant to paragraph 75(1)(e) of the Act?**

[294] Under paragraph 75(1)(e), the market of concern is different from the market defined for the purposes of paragraph 75(1)(a). Our analysis will involve the “downstream market”. We will begin by defining this market, which includes defining the relevant product market and the relevant geographic market.

**(1) Relevant product market**

[295] Neither party disputes that the product market includes processed chicken. The only question is whether “further processed chicken” and “air-chilled chicken” constitute separate and distinct product markets. The parties adopt different approaches to this question.

[296] In its Pleadings, the Applicant states that the refusal to deal is likely to have an adverse effect on competition “at various levels of the market for chicken”. The Applicant’s final submissions also refer to “sub-markets”. Dr. Ware refers to both the market for “processed chicken” and the “market for further processed chicken” in his reports. In his examination in chief, Dr. Ware stated that there can be subcategories within the broad category of processed chicken such as air-chilled chicken, but said that he “didn’t have even close to adequate data” that would allow him to make that identification. He also stated, however, that the market for further processing of chicken constituted another product market in this case.

[297] The Respondents assert that the relevant product market is processed chicken. Ms. Sanderson’s report also refers to “processed chicken”. In cross-examination, when asked whether air-chilled products are different from water-chilled products, Ms. Sanderson stated the following:

They may be different products, but they may be part of the same relevant product market. So for example, because this happens with differentiated products, it may be the case that you’re unable to increase the price of an air-chill product by a substantial amount, because if you were to do that, customers will substitute to water-chill products. If there’s sufficient substitution possibilities between those products at a market level, then they might be part of the same relevant product market even though they’re distinguished from each other.

[298] With regards to air-chilled chicken and water-chilled chicken, we acknowledge, as did Dr. Ware, that they may well be “subcategories for processed chicken”. However, there is

insufficient evidence on the record to support a conclusion that they are separate product markets.

[299] We come to the same conclusion with respect to further processed chickens. There is a paucity of evidence on this issue. Counsel for the Applicant acknowledged that stakeholders do not always agree on the definition of “further processing”. This disagreement may lie in the fact that there are different types of further processing operations such as boning, cutting, and cooking. Mr. Donahue referred to different “grades of further processing” and responded as follows in cross-examination when asked about the Applicant’s processing operations:

**[CONFIDENTIAL]**

[300] Dr. Ware described the product market for further processed chicken as “basically anything that happens to the chicken after it’s been killed and possibly cut up”. However, without further evidence, we are unable to conclude on the record before us that further processed chicken constitutes a separate product market.

[301] We therefore find that the product market for the purpose of paragraph 75(1)(e) is processed chicken. We agree that further processed chicken forms part of the same relevant product market in the circumstances.

## **(2) Relevant geographic market**

[302] The parties disagree on the definition of the relevant geographic market. The dispute turns on whether Ontario or parts of Ontario should be included in the geographic market.

### **(a) Positions of the parties**

[303] In its Pleadings, the Applicant submits that the relevant geographic market for the purposes of paragraph 75(1)(e) is Quebec and the Maritimes. In its submissions, however, the Applicant takes the position that provincial boundaries are artificial boundaries and distances itself from a formal definition of the geographic market. When asked about the Applicant’s submissions concerning the relevant geographic market, counsel for the Applicant stated:

All right. In my argument I don’t look at geographic. I think if you remember Dr. Ware said, he said provincial boundaries are somewhat artificial lines that are drawn and they may not be relevant for the purpose of the market analysis. Because the real question is, is what is the market that’s affected?

...

My point though is that in trying to draw --I submit that it’s somewhat artificial to use geography as the defining characteristics of the behaviour of a market where the element that is concern is the impact, wherever it may fall, of the particular behaviour. We have to look at the impact of the behaviour wherever it may fall, and if it falls within three miles of Toronto, fine, but if it falls 1,000 miles away it’s still relevant for the purpose of the 75(1)(e) analysis.



[304] Dr. Ware did express the view that relevant markets need not necessarily coincide with provincial borders. Using provincial boundaries, however, he found that the “best definition” of the geographic market is one that consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island.

[305] The Respondents are of the view that the relevant geographic market is the region comprising Ontario, Quebec and the Maritimes.

(b) Analysis

[306] Dr. Ware is of the opinion that the hypothetical monopolist test should be used to define the relevant geographic market, but expresses the view that the data are insufficient to determine the precise boundaries of the market pursuant to such a test:

My conclusion was, and is, that the geographic market for processed chicken is likely -- well, let me put it this way, well described by the boundary of Quebec, New Brunswick and the maritime provinces, not including Newfoundland, but it's certainly smaller than the boundary of those same provinces and the Province of Ontario. That's my conclusion. The reason -- so my reasoning that I have used in reaching this conclusion is indirect. It's indirect because, as I said, I don't have the ability -- I mean, what I need to do to make a formal precise conclusion of that kind is I need to -- I need to actually estimate the ability of a hypothetical monopolist who controlled the supply within Quebec, New Brunswick and the other maritime provinces too if they were to act as one to increase the price. That would give me the answer. That would give me a precise answer, but I don't have the ability to do that. I need a lot of data on demand elasticities and supply, behaviour of all the relevant producers. I don't have that information, but I do have indirect information and there are various indirect indicators that one can use to assess whether or not the geographic market is, in a sense, broad or relatively narrow. And, again, I do stress that because this is both a spatially and a product differentiated market, that geographic market definition is going to be a rather fuzzy sort of concept because if you have -- you know, clearly these producers are separated by space. We're talking about a lot of territory here.

[307] Instead, Dr. Ware therefore relies on indirect indicators, namely (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of Nadeau's products; (2) concerns expressed by Nadeau's customers regarding its possible exit from the market; (3) the apparent clustering of processors; (4) transportation costs; (5) price relationships between different geographic areas as described in the *Merger Enforcement Guidelines*; and (6) the regulatory limitation of the aggregate supply of chickens available to the market.

[308] Ms. Sanderson is not explicit about the test she uses to define the geographic market. The evidence on which she relies includes (1) Nadeau's and Olymel's historic shipping patterns; (2) shipping distances; (3) transportation costs; and (4) price comparisons.

[309] While the usual approach to market definition under paragraph 75(1)(a) is based on the ability of the applicant to substitute in favour of alternative service or material inputs without being substantially affected, the Tribunal clarified in *B-Filer*, as mentioned earlier in these reasons, that the approach need not be the same under paragraph 75(1)(e):

[78] In our view, while the addition of paragraph 75(1)(e) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(a). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(e) need not be the market of concern in paragraphs 75(1)(a) and 75(1)(b), the market that best suits the particular context and purpose of 75(1)(e) can be separately considered when considering that paragraph of the Act.

[310] Therefore, the conventional hypothetical monopolist approach to market definition which, in essence, relies on the practical indicia suggested in the *Merger Enforcement Guidelines*, can be used under paragraph 75(1)(e).

[311] Both the Applicant and the Respondents ultimately make use of the practical indicia suggested in the *Merger Enforcement Guidelines* and commonly used in connection with geographic market definition in merger cases to support their proposed market definitions. Practical indicia include transportation costs, price relationships, shipping patterns and trade views.

[312] Our approach to determining the relevant geographic market will involve considering the above-mentioned practical indicia as well as the following indicators suggested by Dr. Ware: (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of the Applicant's products; (2) concerns expressed by the Applicant's customers regarding the Applicant's possible exit from the market; (3) the apparent clustering of processors; and (4) the regulatory limitation of the aggregate supply of chickens available to the market. We will consider each of these indicators in turn.

(i) The predicted effect of a hypothetical Nadeau/Olymel merger

[313] Dr. Ware is of the opinion that an Olymel/Nadeau merger would result in an increase of approximately [CONFIDENTIAL]% in the price of processed chicken. [CONFIDENTIAL]. On the assumption that the geographic market would consist of Ontario, Quebec and the Maritimes, Nadeau would hold a 7% market share in such a market. Dr. Ware reasons that a "7% market share" is not sufficient to produce a price increase of nearly 2% and concludes that these data point to a narrower geographic market.

[314] Ms. Sanderson notes that the [CONFIDENTIAL]. She adds that Dr. Ware did not question the Nadeau management team's belief or provide any analysis to support the [CONFIDENTIAL]% price increase upon which he founded his opinion. She also notes that Olymel's managers, "who are in a more informed position to assess Olymel's ability to raise

prices to Olymel customers should the Partnership acquire the St. François facility”, did “not identify price increases as part of their internal valuation of the acquisition”.

[315] We note that the Projet Westco Report indicates that [CONFIDENTIAL]. While this may represent Olymel’s view, this does not necessarily imply either higher prices in general or a [CONFIDENTIAL]% price increase in particular.

[316] We are also of the view that Dr. Ware’s opinion regarding the effect of a hypothetical merger on the price of processed chicken is of little assistance in determining the geographic market. Dr. Ware’s market share analysis is incomplete in its own terms in that it does not appear to take into account the combined market share of the merging parties. Further, apart from the belief of the Applicant’s management team reflected in the Robinson Report, there is simply no explanation to support the conclusion that the merger would result in a [CONFIDENTIAL]% price increase.

(ii) Concerns expressed by the Applicant’s customers

[317] As a second indicator, Dr. Ware cites the concerns of some of the Applicant’s customers that prices would increase and service would deteriorate if the Applicant were to cease to be a competitor. He points, for example, to a letter written by Ms. Goodz, the president of Riverview, who wrote that “[i]f the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur”. Dr. Ware is of the opinion that these customers would not be concerned if the geographic market were broader, that is, if it included Ontario processors; the fact that these customers expect prices to rise and supplies to be restricted indicates that the geographic market is significantly smaller.

[318] In her report, Ms. Sanderson closely examines each of the letters cited by Dr. Ware and notes that in many cases, alternative sources of supply exist.

[319] Complaints by customers will be dealt with more comprehensively later in these reasons when we consider the adverse effect on competition. In the absence of further corroborating evidence to support complaining customers’ concerns about price increases and supply shortages, very little can be concluded in terms of their impact on geographic market definition.

[320] First, as pointed out by Ms. Sanderson, many of the complaining customers did not investigate alternative sources of supply in the event the Applicant is unable to continue supplying chickens. This was the case of the general manager of UPGC, also Prizm’s chief purchasing officer, who admitted in cross-examination that he had not sought out other sources of supply.

[321] Second, there is no evidence to establish the relative importance of these complaints in respect to the geographic definition of the market. For instance, Puddy, one of the largest complaining customers, is located in the Greater Toronto Area and is closer to Ontario processors and Quebec processors than it is to the Applicant. Consequently, Puddy’s complaint does not point to a narrower geographic market.

[322] On the evidence, it is difficult to assess the relative importance of customers' complaints and concerns. Many of the complaints are not based on the geographic proximity of competing suppliers. For these reasons we find this indicator to be of little utility in determining the geographic market and consequently conclude that no inference can be drawn for defining the geographic market.

(iii) The apparent clustering of processors

[323] Also regarded as being instructive by Dr. Ware is a map of Eastern Canada (Figure 1 in his Expert Report) that appears to show that there is a cluster of processors around the Toronto area. Dr. Ware testified that :

...there are two distinct clusters of poultry processing plants in Eastern Canada. Given the significance of transportation costs, the cluster of processing plants west of Toronto are unlikely to be part of the same market as those in Quebec, New Brunswick and Nova Scotia (the plant in Newfoundland is supplied by, and supplies to, only Newfoundland).

[324] While admitting that this was not a "super scientific approach", he stated that these clusters illustrate "a kind of density of economic activity that they are more likely - the ones close together - are more likely to be in the same geographic area than the ones that are further away".

[325] While Dr. Ware's definition of clustering is somewhat vague, we accept the general proposition that plants that are close together are more likely to be in the same geographic market than plants that are further away from each other. There are, however, many factors (such as the availability of the requisite inputs) that bear on the location of plants. Whether plants in different locations are in the same geographic market depends on the characteristics of the product concerned, in particular, the distance over which it can be shipped economically. Looking at plant locations is simply the starting point of the analysis required to determine the boundaries of the geographic market. In the circumstances, this indicator is of little assistance in defining the geographic market.

(iv) Regulatory limitations

[326] At paragraph 23 of his first report, Dr. Ware also suggests that another reason why geographic markets for processed chicken are smaller than might be expected from their basic manufacturing characteristics is because the supply elasticities for live chickens are kept low by supply management policies. If the price of processed chicken rises in one area, potential importers will have to bid chicken away from consumers in other areas.

[327] Ms. Sanderson responds that the inelasticity of the supply of live chickens is common throughout Canada and that there is no reason to believe that it is possible to distinguish Quebec and the Maritimes from Ontario or the rest of Canada on this basis.

[328] It is true that under the marketing board regime, additional chickens can be shipped to one geographic area only by diverting them from another, but this is also true within individual provinces. We therefore agree with Ms. Sanderson that there is no reason to distinguish Quebec and the Maritimes from Ontario on this basis.

(v) Transportation costs

[329] In his first report, Dr. Ware relies on the Projet Westco Report to conclude that the Applicant's transportation cost for processed chicken is \$[CONFIDENTIAL]/kg. In her expert report, Ms. Sanderson states that if the transportation cost is \$[CONFIDENTIAL]/kg, it is less than [CONFIDENTIAL]% of the average price of processed chicken; she therefore notes that large shipments of processed chicken can be made over substantial distances because of low transportation costs. In this regard, she testified that the analysis should focus on the cost to ship processed chicken relative to the price, rather than the cost of processed chicken.

[330] At paragraph 20 of his reply report, Dr. Ware points to data on sales for quota period A-76 to conclude that the average transportation cost as a proportion of the sale price is not [CONFIDENTIAL]%, but rather [CONFIDENTIAL]%. Prior to the hearing, Westco objected to paragraph 20 and other paragraphs of Dr. Ware's reply report on the basis that it failed to constitute a proper reply to Ms. Sanderson's report. In an order dated November 7, 2008, the Tribunal held that the evidence would be admitted; Westco was granted the latitude to address this issue at the hearing (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 31).

[331] Dr. Ware testified that transportation costs matter because customers say they matter and because the figure of [CONFIDENTIAL]% is significant. He failed, however, to explain the significance of [CONFIDENTIAL]% or to point to any customer who stated that transportation costs matter *per se*.

[332] In her examination in chief, Ms. Sanderson testified that the figure of [CONFIDENTIAL]% is incorrect, as it is the result of an error in the sales data on which Dr. Ware relied. She found that transportation costs for Nadeau averaged [CONFIDENTIAL]% of its sales revenue of 2007. Ms. Sanderson testified that it is significant that transportation costs are less than 5% of the price of the product because this would allow competitors to undercut a 5% price increase by a hypothetical monopolist.

[333] We agree with Ms. Sanderson that Nadeau's average transportation cost was [CONFIDENTIAL]% of the average price of its products in 2007. As an average, however, it does not tell us what the fixed component (loading and unloading) of transportation costs is and how the variable component of transportation costs increases with distance. As a consequence, it does not speak conclusively to the boundaries of the geographic market. Nevertheless, Nadeau's average transportation cost does reflect the cost of relatively large shipments in excess of 1,000 km because we know that one of the Applicant's largest customers, [CONFIDENTIAL], is located in Mississauga, Ontario. The evidence that the Applicant's transportation costs for processed chicken averaged [CONFIDENTIAL]% of the price of its products certainly implies that transportation costs are not prohibitive even over significant distances. It could also imply

that transportation costs would not prevent an Ontario processor from undercutting a 5% price increase by a New Brunswick or Quebec producer and vice versa. The stated 5% price increase refers to the hypothetical monopolist test as articulated in the *Merger Enforcement Guidelines*<sup>2</sup>.

(vi) Price comparisons

[334] The expert economists make a variety of price comparisons, none of which are entirely satisfactory.

[335] At paragraph 21 of his initial report, Dr. Ware refers to paragraph 3.25 of the *Merger Enforcement Guidelines*, which states that “[e]vidence that prices in a distant area have historically either exceeded or have been lower than prices in the candidate geographic market by more than transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs”. He then compares retail prices for various cuts of processed chicken in Ontario, Quebec and New Brunswick because wholesale price data are sparse. Dr. Ware finds that retail prices of processed chicken are higher in New Brunswick than in Ontario and assumes that this implies that wholesale prices are also higher.

[336] In her report, Ms. Sanderson notes that a review of the retail price data for the products set out in Dr. Ware’s report shows that the average retail price for those products is \$[CONFIDENTIAL] in Ontario, \$[CONFIDENTIAL] in Quebec, and \$[CONFIDENTIAL] in New Brunswick, making average prices 17% lower in Ontario and 20% lower in Quebec than in New Brunswick. At first glance, this would mean that Quebec is not in the same market as New Brunswick and that therefore Quebec-based Olymel does not compete with the Applicant. Ms. Sanderson finds that such a conclusion is nonsensical and that conclusions of this type cannot be drawn from retail price comparisons. [CONFIDENTIAL].

[337] In his reply report, Dr. Ware uses another source of data to construct average wholesale prices for the Applicant’s sales by province. Dr. Ware conducts an analysis of Nadeau’s 2007 sales and finds that when the analysis is confined to products sold in all three provinces, the weighted average wholesale price was \$[CONFIDENTIAL] in Ontario, \$[CONFIDENTIAL] in Quebec and \$[CONFIDENTIAL] in New Brunswick. [CONFIDENTIAL].

[338] At the hearing, Ms. Sanderson produced a price comparison of the average Ontario, Quebec and New Brunswick prices of the Applicant’s five biggest-selling products in Ontario. Ms. Sanderson testified that these top five products represent [CONFIDENTIAL]% of the Applicant’s sales in Ontario. Her bar graph is reproduced as Table 1 below.

Table 1

[CONFIDENTIAL]

[339] Ms. Sanderson stated that this comparison shows that the prices are basically the same. [CONFIDENTIAL].

[340] During her cross-examination, Ms. Sanderson agreed that [CONFIDENTIAL] of the [CONFIDENTIAL] products sold in all three provinces were priced higher in New Brunswick than in Ontario. Further, [CONFIDENTIAL] of the [CONFIDENTIAL] products were priced higher in New Brunswick than in both Quebec and Ontario. Ms. Sanderson stated that this was consistent with the weighted average price being [CONFIDENTIAL] in New Brunswick than in Ontario.

[341] Both experts agreed that a comparison of the Applicant's weighted average wholesale prices of products sold in all three provinces, Ontario, Quebec and New Brunswick, in 2007 was the most informative. As mentioned above, the comparison was confined to [CONFIDENTIAL] products sold in all three provinces. The results were as follows: Ontario, \$[CONFIDENTIAL]/kg; Quebec, \$[CONFIDENTIAL]/kg; and New Brunswick, \$[CONFIDENTIAL]/kg. The Applicant's weighted average price in Ontario was [CONFIDENTIAL] and its price in Quebec [CONFIDENTIAL] than in New Brunswick during 2007.

[342] The extent to which the observed differences in the weighted average prices are due to differences in the mix of products sold in each province and to the average size of the customers in each province is unclear. The same is true of the extent to which these averages might vary from year to year. The above data support the contention that differences amongst the three provinces are relatively small. There is no expert evidence on price differentials that would allow for any inference to be drawn with respect to the relationship between prices in Prince Edward Island and Nova Scotia and the remainder of the market.

[343] With respect to the differences between New Brunswick and Quebec prices, the Applicant has already defined New Brunswick and Quebec as being in the same geographic market. The observation of price differences between New Brunswick and Quebec merely serves to emphasize that there is a certain amount of underlying price variability within a geographic market.

#### (vii) Shipping Patterns

[344] In Ms. Sanderson's view, processed chicken can be shipped economically for considerable distances. She notes that the Applicant's revenues from sales in Ontario account for [CONFIDENTIAL]% of the Applicant's sales revenues whereas the Applicant's revenues from sales in New Brunswick and Nova Scotia account for [CONFIDENTIAL]% and [CONFIDENTIAL]% respectively of the Applicant's sales revenue. She states that the Applicant's furthest Ontario customer is located [CONFIDENTIAL]km from the St-François Plant. Relying on the Applicant's customer data for quota period [CONFIDENTIAL], she concluded that the Applicant makes frequent and large shipments of processed chicken every day to very distant customers, including customers based in Ontario. In her opinion, the fact that the Applicant can profitably ship processed chicken to Ontario is clear evidence that Quebec and Ontario processors can profitably ship to customers located in New Brunswick and Nova Scotia.

[345] Ms. Sanderson also finds that the Applicant's customers based in Quebec and Ontario have access to alternative nearby processors and that in many instances, the closest processing facility is not the Applicant's plant.

[346] She adds that Olymel makes [CONFIDENTIAL]% of its sales in Ontario and that over [CONFIDENTIAL]% of those sales are made to customers located in the Greater Toronto Area. Ms. Sanderson concludes that, given that Olymel can profitably ship processed chicken 475 km to Toronto, Ontario processors could profitably ship their products the same distance in the other direction:

... it is self-evident that Ontario-based processors in the GTA can also profitably ship product to Montreal and throughout Quebec, which they do. Consequently, the prices that Olymel charges to its Quebec customers are influenced by competition from Ontario processors and as a result, Nadeau's prices to its Quebec customers are also influenced by Ontario processors given the competition that exists between Nadeau and Olymel for sales in Quebec.

[347] In cross-examination, Ms. Sanderson conceded that she had no direct evidence of Ontario processors' shipping their products to customers in New Brunswick. She also agreed that Olymel does not have significant sales in New Brunswick. In her report, Ms. Sanderson stated that Olymel makes more sales to customers in the western provinces than it does to customers in the Maritimes.

[348] We find the fact that Olymel sells only a small amount of processed chicken in New Brunswick does not support the position that Ontario is not part of the relevant market. Dr. Ware has defined the relevant market to include both New Brunswick and Quebec so that the lack of sales by Olymel (a Quebec-based processor) in New Brunswick merely emphasizes that a producer in a relevant geographic market need not have sales in every part of it at all times.

[349] It is not disputed that the Applicant ships processed chicken to Quebec and Ontario and that Olymel also does so. There is some evidence that processed chicken is shipped from Ontario to Quebec and the Maritimes. Mr. McHaffie testified that Ontario-based Puddy delivers to [CONFIDENTIAL].

[350] The Brodeur affidavit states that Olymel buys 210,000 birds per week from other primary processors but that the great majority of these purchases are from Exceldor. Mr. Brodeur states that Olymel has purchased chicken for further processing from Ontario processors such as Maple Leaf and from the United States. Ms. Goodz testified that [CONFIDENTIAL].

[351] Mr. Brodeur testified that McDonald's chicken nuggets are all made in Ontario and that Costco in Ontario is supplied by Exceldor.

[352] Based on the above evidence, we find that processed chicken can be and is shipped profitably for fairly long distances, over 1,000 km in one major instance. A considerable fraction of Nadeau's and Olymel's sales are in Ontario's Toronto area. Olymel ships some processed chicken products further still. While there is no reason to believe that processed chicken could



not be shipped equivalent distances to customers east of Ontario, there is less evidence of such shipments.

(viii) Trade views

[353] In her expert report, Ms. Sanderson relies on the Serecon Report to the effect that Nova Scotia must compete in a national chicken market despite being located in a high-cost region. The Serecon Report refers to the fact that current production in Nova Scotia exceeds consumption within the province and that this is why “NS chicken has to compete with production from outside the region not only in NS but also in Quebec and Ontario”.

[354] In cross-examination, Mr. Feenstra agreed that the Applicant competes with Ontario and Quebec processors for its business in the Greater Toronto Area and that it competes with Ontario processors that want to sell into Quebec for the Quebec business. During his examination for discovery, he stated that “[p]rocessed product travels across the country back and forth all the time”.

[355] A number of witnesses testified that they consider Ontario and Quebec to be in the same market. Mr. McHaffie stated that “Ontario processors can sell into Quebec at their whim and Quebec processors can sell here at their whim”. Mr. Brodeur expressed the view that Quebec and Ontario constitute a single market. Mr. Ellis stated that Sunchef competes with processors in Ontario and Quebec.

(ix) Analysis and conclusion

[356] It is not disputed that Quebec and Ontario are in the same geographic market. Counsel for the Applicant conceded this:

We have not suggested that Ontario and Quebec are not in the same market with each other. There’s no question that there’s competition between Ontario and Quebec. And you heard Mr. Lefebvre talk about a central Canada market. That’s right through the evidence, not just of our witnesses but of all of them. Ontario and Quebec compete with each other.

The issue, in my respectful submission, for this Tribunal is not that at all, not this issue, but rather the issue as to whether there is competition between Ontario and New Brunswick, because the question was whether the scope of the geographic market -- we, as I told you at the outset, accept that it’s New Brunswick and Quebec. The question is does it extend as far as Ontario?

[357] As mentioned above, Dr. Ware finds that the relevant geographic market consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Ms. Sanderson is of the opinion that the relevant market consists of Ontario, Quebec and the Maritimes. The experts thus agree that New Brunswick and Quebec are in the same market. Further, the Applicant concedes that Quebec and Ontario are in the same market. If Ontario and the Maritimes are both in the

same market as Quebec, it is difficult to escape the conclusion that they are in the same market as each other. The implication is that Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island are part of the same geographic market.

[358] Put another way, Quebec processors compete with Ontario-based processors as well as with New Brunswick and Nova Scotia-based processors. Quebec processors discipline and are disciplined by both Ontario and Maritime-based processors.

[359] Put yet another way, according to the Applicant's argument, even if Nadeau were to disappear, Olymel would continue to be disciplined by competition from Ontario processors as well as from Exceldor and ACA on the [CONFIDENTIAL]% of its sales that are in Quebec and Ontario. There is nothing on the record to indicate that this competitive discipline would not apply to any sales that Olymel or any other competitor might make to customers located in New Brunswick in the event that Nadeau disappears.

[360] In our view, the evidence relating to both the practical indicia suggested in the *Merger Enforcement Guidelines*, including transportation costs, price relationships, shipping patterns and trade views, and the indicators relied on by Dr. Ware support the argument that the Ontario processors should be included in the relevant geographic market. The relevant geographic market is therefore defined to include processors in New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

[361] Having defined the relevant product and geographic market for the purposes of paragraph 75(1)(e), we now turn to the requirement that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

### **(3) Adverse effect on competition in a market**

#### **(a) Meaning of adverse effect on competition**

[362] We first consider what is meant by "an adverse effect on competition in a market". We begin with the position advanced by the parties.

[363] The Applicant submits that by deliberately omitting the word "substantial" and using the word "adverse", "Parliament must be taken to have accepted that a remedy should be granted at the suit of a private litigant on a showing of *any* non-trivial adverse effect on *any* market" (emphasis in original).

[364] The Respondent Westco submits that adverse effect, while a lower threshold than substantial effect, must still incorporate a notion of market power or dominant market position; it cannot just be a trivial reduction in competition. Westco contends that the test established in *B-Filer* does not admit a finding of adverse effect on competition if only one competitor is affected and notes that protecting competition cannot be reduced to protecting competitors or a select handful of them.

[365] In *B-Filer*, beginning at paragraph 195, the Tribunal had occasion to consider the final element of subsection 75(1) of the Act. It conducted a comprehensive review of the case law in interpreting the phrase “competition in a market”. It was guided by prior decisions that dealt with how paragraph 79(1)(c) of the abuse of dominance provision of the Act had been interpreted. The Tribunal in *B-Filer* agreed that paragraph 75(1)(e) demands a relative and comparative assessment of the market in two time frames, namely with the refusal to deal and without the refusal to deal. It concluded as follows at paragraph 200 of its decision:

Thus, we conclude that paragraph 75(1)(e) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal.

[366] The Tribunal went on to consider what is meant by “competitiveness”. It considered the case law on the issue under the abuse and merger provisions of the Act. The Tribunal noted that adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market or a decrease in the variety of products made available to buyers. The Tribunal noted that these and other competitive factors can only be adversely affected by the exercise of market power. The Tribunal applied this reasoning to the refusal to deal provision and concluded:

Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

[367] The Tribunal then distinguished between the term “substantial” found in other provisions of the Act and the term “adverse” used in section 75. It found that the difference lies in the degree of the effect and that “adverse”, according to its plain meaning, is a lower threshold than “substantial”.

[368] Regarding the requirement that the refusal to deal “is likely to have” such adverse effect, based on earlier case law, the Tribunal found the requirement to establish the likelihood of an adverse effect requires proof that such an event is “probable” and not merely possible.

[369] We agree with and adopt the approach articulated in *B-Filer*, above, regarding the meaning of adverse effect on a market. Consequently, our analysis under paragraph 75(1)(e) will require consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1, the Tribunal noted that “[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period”. In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers. As indicated above in *B-Filer*, the impact on indicators such as price, quality and variety of the product must also be considered in assessing adverse effect. It is also understood that without

market power there can be no adverse effect in a market. Our analysis under paragraph 75(1)(e) will therefore lead us to consider the following indicators in the circumstances of this case:

1. Market share and market concentration;
2. Barriers to entry;
3. Impact on prices;
4. The effect of the refusal on rivals' costs;
5. Impact on quality and variety of the product;
6. Possible foreclosure of supply to other processors in the market; and
7. Impact of possible elimination of an efficient processor.

[370] Before proceeding to our analysis of the above indicators, it is useful to first set out the respective positions of the parties on adverse effect under paragraph 75(1)(e) of the Act.

(b) Positions of the parties on “adverse effect on competition”

[371] The Applicant submits that the evidence adduced establishes the likelihood of many scenarios involving adverse effects on competition in various markets and sub-markets. In its written submissions, the Applicant states that these adverse effects include the following:

- (a) the adverse effect on competition entailed by the increase in “live price” caused by a “premium war”;
- (b) the adverse effect on competition resulting from the “raising of a rival’s costs”, in that it is admitted that Nadeau is a rival of Olymel’s (the Partnership) and the refusal to deal will admittedly (at a minimum) raise its costs;
- (c) the adverse effect on non-price dimensions of competition, namely product quality, product choice and service;
- (d) the adverse effects on the price (money) dimension of competition, given the likelihood that the live cost increases caused by a premium war, if these cannot be passed on by Nadeau and other processors to their customers;
- (e) the likelihood that the elimination of Nadeau would create market power for Olymel in the Maritimes, where it previously had none (“un percée sur le marché des Maritimes”);
- (f) the “raising of rival’s costs” among Nadeau’s customers who are competitors of Olymel’s at the further processing levels of the market;
- (g) Olymel’s enhanced market power *vis-à-vis* the other players in the market, even assuming that the geographic dimensions of the market encompass Ontario; and
- (h) the possible elimination of the most efficient chicken processing plant in Canada.

[372] In the Applicant’s argument, any of the adverse effects listed above would flow from the Respondents’ refusal to supply. We summarize below the Applicant’s explanation of the alleged adverse effects.

[373] The Applicant contends that the resulting premium war amongst processors will lead to an increase in the cost of price of live chickens which will generate “severe repercussions on the price of chicken at the retail level”. The Applicant submits that raising its costs has an anti-

competitive effect because it would weaken the Applicant to the benefit of Olymel. It is further argued that the Respondents' refusal to supply will threaten the Applicant's very viability and that its elimination will have an immediate effect on product quality and availability throughout the Maritimes. The Applicant states that many of its customers are also further processors that compete directly with Olymel. It is argued that the weakening or elimination of the Applicant would prohibitively increase its costs, even if it is able to obtain supply, and thus imperil its businesses. Finally, the Applicant contends that it "operates the most modern and efficient processing plant in Canada" and that for this reason alone, its elimination would have an adverse effect on competition in the market.

[374] In oral argument, counsel for the Applicant argued that except for (g) listed above, which provides for a market power analysis, none of the alleged adverse effects require an exercise of market power by Olymel. It is argued, for instance, that the disappearance of a processor that is unable to remain viable has nothing to do with Olymel's market power but is nonetheless an adverse effect on competition.

[375] In his report, Dr. Ware relies largely on the possible shift in market share from Nadeau to Olymel to support his inference that the alleged refusal to deal would have an adverse effect on competition. He argues that if Olymel were to experience the same increase in market share as a result of a merger or acquisition, the Competition Bureau would deem the merger or acquisition concerned as likely to lessen competition substantially and would challenge it.

[376] The Respondent Westco submits that the guidelines on mergers and abuse of dominant position state that there is no market power where market share is below a threshold of 35%. It argues that Westco's refusal will not create, maintain, or enhance the market power of Westco or any other entity in the relevant market because no entity will have a sufficient market share as a result of the refusal to supply, even if Nadeau ceased its operations. Westco further submits that the evidence shows that the other indicia of market power, be they direct or indirect, have not been met in this case.

[377] Ms. Sanderson focuses on the question of whether Olymel would gain market power or enhance it as a result of the refusal. To answer this question, Ms. Sanderson suggests the following analytical steps: (1) define the relevant market; (2) examine the position of the firm concerned with that of other firms in the market (using market share and concentration); (3) examine the ability of customers to switch suppliers; and (4) examine the ability of rivals to expand their supply. In her view, the inference of an adverse effect cannot be drawn on the basis of market share and concentration evidence alone.

[378] In his reply report, Dr. Ware states that the increase in Olymel's market share coupled with what he calls the degradation in product quality and disruption in supply to certain customers resulting from Nadeau's possible inability to continue to supply them constitutes an adverse effect on competition. Dr. Ware relies on affidavits filed by certain customers of the Applicant to support his conclusion that the refusal will decrease quality and disrupt supply. In support of his conclusion, Dr. Ware points to the Projet Westco Report wherein it is stated that [CONFIDENTIAL].

(c) Analysis

[379] As stated earlier, we adopt the approach set out in *B-Filer*, which provides that for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. As a consequence we necessarily reject the Applicant's submission that the exercise of market power need not be established for there to be an adverse effect on competition in a market.

[380] We acknowledge that neither Westco, nor any of the Respondents for that matter, are involved in the slaughter of chickens or the sale of processed chicken. Strictly speaking, the Respondents have no market share in this downstream market. However, the arrangement under which Olymel will process the Respondents' chickens is a [CONFIDENTIAL] partnership. While the interests of this Sunnymel partnership are not fully aligned with those of Olymel, it is reasonable to treat the Sunnymel partnership and Olymel as a single entity for purposes of the analysis of the competitiveness of the Ontario-Quebec-Maritimes market for processed chicken. We therefore accept that adverse effect under paragraph 75(1)(e) may be analysed by measuring the impact on the market power of the said partnership.

[381] We now turn to the above-mentioned indicators which we will consider in our evaluation of market power.

(i) Market share and market concentration

- *Evidence of the parties*

[382] Having defined the geographic market for processed chicken as Quebec, New Brunswick, Nova Scotia and Prince Edward Island, Dr. Ware calculates the market shares of the processors in Table 4 of his expert report as follows:

Nadeau	[CONFIDENTIAL]%
Olymel	[CONFIDENTIAL]%
Exceldor	[CONFIDENTIAL]%
ACA Co-op	[CONFIDENTIAL]%
Other (Quebec)	[CONFIDENTIAL]%

[383] The Herfindahl-Hirschman Index ("HHI") is a common measure of industry concentration that takes into account all participants in a relevant market and gives proportionately greater weight to the market shares of larger firms. The HHI is defined as the sum of the squares of the respective market shares of each competitor in the market.

[384] Dr. Ware calculates the HHI for this market to be 3062. He also describes Olymel as "the dominant processor" in that market. Ms. Sanderson correctly points out that the market shares Dr. Ware reports do not support the characterization of Olymel as dominant given Exceldor's market share of [CONFIDENTIAL]%.

[385] We have concluded that the geographic market is broader than the one defined by Dr. Ware and that it should include Ontario-based processors. This has the effect of reducing both the market shares of the processors listed in Dr. Ware's Table 4 and the market concentration.

[386] We note, however, that even according to his own definition of the geographic market, Dr. Ware's estimates of market share and market concentration are imperfect. The market shares Dr. Ware reports are based on *slaughter* (number of chickens slaughtered) rather than sales of processed chicken to customers in the relevant market. However, slaughter data were the only data available to the experts and the Tribunal.

[387] It is known that [CONFIDENTIAL]% of Olymel's total sales are to customers in Ontario. According to Dr. Ware's definition of the relevant geographic market, these would be "exports". Similarly, the Applicant "exports" [CONFIDENTIAL]% of its sales to Ontario. There is little evidence regarding Exceldor's sales outside the market as defined by Dr. Ware. It is also the case that Olymel, Exceldor, the Applicant and ACA are not the only processors competing in the geographic market as Dr. Ware defines it. There is some evidence that Ontario processors compete in this market. For example, Mr. Feenstra testified that it is safe to assume that the Applicant competes with the Ontario processors that want to sell into Quebec. In addition to excluding the "export" sales of Olymel, Exceldor, the Applicant and ACA, a proper market share calculation would include the share of "imports" from Ontario and elsewhere.

[388] Dr. Ware conceded in cross-examination that including only the sales that were made within the relevant market "might be a better way to do it". He stated, however, that he did not have the necessary data to make those calculations:

**Ms. Healey:** Right. Okay. So back to the issue of assessing shares of sales in Quebec and the Maritimes: You would only include the sales that were made within those provinces; correct?

**Dr. Ware:** I would -- I think I would like to have done that. Of course, I didn't have those data.

**Ms. Healey:** Fair enough, Dr. Ware. I'm not-- I'm not suggesting that you did.

**Dr. Ware:** But I -- I think I would have preferred that, yes.

[389] We have found that the relevant geographic market for the purposes of paragraph 75(1)(e) includes Ontario processors. Ms. Sanderson examines the market shares in this broader geographic market, but these shares are also based on slaughter and therefore include sales that are made outside the relevant market and ignore sales of chickens that are slaughtered outside the relevant market (imports). However, we find that the misstatement of market shares is likely to be less serious than was the case with the more narrowly defined market advocated by Dr. Ware because exports from and imports to the broader market are absolutely and proportionately smaller. In particular, Olymel makes [CONFIDENTIAL]% of its sales outside of Quebec and the Maritime provinces but only [CONFIDENTIAL]% of its sales outside of Ontario, Quebec and the Maritime provinces. Similarly, Nadeau makes [CONFIDENTIAL]% of its sales outside Quebec and the Maritime provinces but only [CONFIDENTIAL]% of its sales outside of Ontario, Quebec, New Brunswick and Nova Scotia.

[390] Maple Lodge Farms is among the Ontario processors in the relevant geographic market. The Applicant and Maple Lodge Farms are wholly-owned subsidiaries of Maple Lodge. It is clear that as a wholly-owned subsidiary, the Applicant's interests are fully aligned with those of Maple Lodge. It is therefore sensible to assume that Maple Lodge Farms and the Applicant conduct themselves with an eye to their joint profitability and to treat them as a single entity (Maple Lodge) for the purpose of analyzing the state of competition in this market.

[391] The processors' market shares (based on weekly slaughter) in the relevant geographic market in 2007 are found in Exhibit A to Mr. Soucy's affidavit of May 29, 2008. While they have their defects, we accept these data to be an adequate reflection of the market shares of processors in the market for that period. Based on these data, the shares are as follows<sup>3</sup>:

Maple Lodge Farms/Nadeau	22.6%
Maple Leaf	17.9%
Olymel	17.9%
Exceldor	18.5%
ACA	5.1%
Cargill	5.1%
Port Colborne	3.8%
Grand River	2.6%
Other Ontario	3.8%
Other Quebec	2.6%
(Total	99.9%)

[392] The HHI in the relevant geographic market in 2007 was 1579.<sup>4</sup> Maple Lodge Farms/Nadeau had the largest market share (over 22%) with Maple Leaf, Exceldor and Olymel all grouped at around 18%. For purposes of comparison, taken by itself, the Applicant's share of this market would have been 7.2%.

[393] As stated above, the Applicant advances a number of scenarios where there would be an adverse effect on competition. Some of these assume that the Applicant will remain a market participant, although with higher costs as a result of the refusal; in other scenarios it is no longer a participant. Dr. Ware acknowledged these scenarios:

And as I say, there are sort of a number of possible scenarios here. One, ranging -- and we already went through this. I don't want to -- perhaps you don't want to spend a lot of time on this, but ranging from Nadeau, ceasing to process -- ceasing to replace, not being able to replace the chicken that it's currently getting from New Brunswick. Two, it being able to -- possibly being able to replace after a delay perhaps but at a significantly higher price. So both those cases, it seems to me, would amount to an adverse effect on competition.

[394] In its analysis, the Tribunal decided that it would be helpful to develop the scenarios described by the Applicant and Dr. Ware to determine the likely impact on market shares and, where possible, on market concentration if the scenarios played out.



- *Possible scenarios and the resulting impact on market share*

[395] We agree that a number of scenarios are possible. The Respondents' refusal to supply takes place against an uncertain backdrop. The Sunnymel partnership has stated its intention to build a processing plant in New Brunswick, but it has not commenced construction, and the Applicant argues that it will not do so. According to the evidence adduced, the Sunnymel partnership is proceeding with certain tests, such as testing the groundwater, to determine the best location for a new processing plant. Witnesses have also testified that ACA may expand its Nova Scotia plant and that Maple Lodge may participate in that expansion. There is also considerable disagreement regarding the success that the Applicant is likely to have in replacing the Respondents' birds, both in terms of the price premium to be paid and the number of birds it will succeed in obtaining. Also in dispute is the point (in terms of weekly slaughter) at which the Applicant's St-François Plant would cease to be a viable operation.

[396] The suggested implication of the foregoing is that the refusal could impact market shares and market concentration in a variety of ways. We agree that a number of scenarios are possible and some are more likely than others. It is therefore useful to consider a number of these scenarios and the resulting impact on market share for each. In considering these alternatives, an analysis of market share and market concentration (as measured by the HHI) is helpful in assessing the market power implications of each scenario.

#### *Scenario 1*

[397] One possible scenario is that the Applicant is able to replace all of the Respondents' birds from sources in Quebec. Given the operation of the Quebec supply guarantee (VAG), the net effect of this would be to leave Maple Lodge Farms/Nadeau's market share unchanged while increasing Olymel's market share at the expense of Exceldor and other Quebec processors. In this scenario, given the increase in exports from Quebec to New Brunswick, the VAG allocated to each Quebec processor, including Olymel's allocated share, would be reduced. In this regard, it is difficult to understand the basis for Dr. Ware's assertion at paragraph 14 of his reply report, that "[t]here is every reason to believe that Olymel's production of processed chicken would increase by the volume of redirected chicken". On cross-examination, Dr. Ware acknowledged that he had not taken the VAG into consideration. He also stated that Olymel's market share would, however, increase in this scenario and added that he was not qualified to predict the effect of the VAG on concentration and market shares. We are unable to compute the HHI for this circumstance because of insufficient data.

#### *Scenario 2*

[398] Another possibility is that the Applicant is able to replace approximately half of the Respondents' birds from sources in Quebec. [CONFIDENTIAL]. Dr. Ware is of the opinion that 136,000 birds per week is the "absolute maximum" Nadeau would be able to obtain in Quebec. The net effect of this would be to reduce Exceldor's and Maple Lodge Farms/Nadeau's respective market shares and increase Olymel's. Here, too, the data available do not make it possible to compute the HHI.

### Scenario 3

[399] Yet another possibility is that the Applicant is unable to replace any of the Respondents' birds but is able to retain the balance of the New Brunswick birds as well as the Prince Edward Island and Nova Scotia birds it is presently processing. According to Mr. Robinson, the Applicant would remain profitable under these circumstances; in his view, the Applicant's earnings would drop from \$[CONFIDENTIAL] to \$[CONFIDENTIAL]. In this case, Olymel would slaughter the Respondents' 271,350 chickens and, as a result, its market share would go up by 3.5 percentage points to 21.4% and Maple Lodge Farms/Nadeau's share would go down to 19.1%. The HHI would decline from 1579 to 1570. That is, by the well-known market concentration measure used by Dr. Ware, the market would become *less* concentrated. The reason for this is that a processor with a smaller market share (Olymel) is increasing its share at the expense of a processor with a larger market share (Maple Lodge Farms/Nadeau). This reduces the share inequality in the market and, in turn, reduces the HHI.

[400] In his discussion of this scenario at paragraph 16 of his reply report, Dr. Ware states that an increase of Olymel's market share by 3.5 percentage points, coupled with evidence on quality degradation and supply disruption, would satisfy the threshold requirement for an adverse effect on competition. Keeping aside the issues of supply disruption and quality degradation for the moment, it does not appear analytically sound to infer an adverse effect on competition on the basis of an increase in the market share of *one firm*, when the *overall* measure of market concentration (the HHI) is decreasing, if only by a small amount.

### Scenario 4

[401] Another possibility is that the Applicant is unable to source any birds from Quebec and that it ultimately loses the Prince Edward Island and Nova Scotia birds to ACA. In this event, the St-François Plant would likely be closed and the remaining New Brunswick birds might go to either ACA or Olymel. In this scenario, we assume that the remaining New Brunswick birds go to ACA. In this event, as explained above, Olymel's market share would go up to 21.4%, Maple Lodge Farms/ Nadeau's share would go down to 15.4% and ACA's share would go up to 8.8%. The HHI would fall to 1494. If ACA gets the Prince Edward Island and Nova Scotia birds, but the remaining New Brunswick birds go to Olymel, ACA's market share would be 7.7% and Olymel's 22.5%, and the HHI would be 1524.

### Scenario 5

[402] Another possibility is that the Applicant is unable to source any birds from Quebec and ultimately loses its Prince Edward Island and Nova Scotia birds and remaining New Brunswick birds to Olymel. We are of the view that, on a balance of probabilities, this scenario is not likely. The Applicant is more likely to be able to obtain supply to replace at least some of the Respondents' chickens. In this scenario, Olymel's market share would go up to 25.1%, Maple Lodge Farms/Nadeau's share would be 15.4%, and ACA's would remain unchanged. The HHI would be 1615. This could be regarded as the worst-case scenario from a competition perspective. In this scenario, the refusal would result in an increase in the HHI, implying a more concentrated market. The HHI would increase from 1579 to 1615 or 36 points. In their expert

reports, both Dr. Ware and Ms. Sanderson referred to thresholds at which mergers can be challenged or blocked. In this case, to provide a frame of reference, a merger of two firms each of which had a market share of 4.25% would increase the HHI by 36 points. A merger of this nature would be within the safe harbours stated in the *Merger Enforcement Guidelines*<sup>5</sup>. We fully appreciate, however, that the experts' reference to safe harbours is in the context of mergers and that a different threshold applies; namely a "substantial" lessening or prevention of competition and not an "adverse effect" pursuant to paragraph 75(1)(e).

### *Conclusion*

[403] Based on the above, we find that the refusal to supply will likely not have a significant impact on market shares of processors or market concentration. Even the worst case scenario, scenario 5, results in only a very small increase in the HHI.

#### (ii) Barriers to entry

[404] The assessment of barriers to entry is usually part of the assessment of market power. None of the experts discussed barriers to entry directly. Neither Dr. Ware nor Ms. Sanderson incorporated considerations on barriers to entry into their market power analyses.

[405] There is very little evidence of the kind usually used in the assessment of barriers to entry on the record. We have no systematic information on the historic entry-and-exit pattern, although there are statements to the effect that the chicken processing industry has become more consolidated over time. For instance, in a document prepared by Agriculture and Agri-Food Canada on the Canadian chicken industry, one can read that "the poultry industry has become concentrated over the years" and that "[w]hile the concentration ratio has stabilized in the recent years, concentration in the industry might continue to occur in the future".

[406] Concerns about cost-related barriers to entry normally center on diseconomies of small scale and sunk costs (specialized investments required for entry). We have very little information on these factors, although Dr. Barichello does state that "[c]learly, a processing plant represents a considerable capital investment and therefore business risk". With respect to regulatory barriers to entry, we have some information: given that the supply of live chickens is fixed by the marketing boards, a new entrant abattoir would have to bid against incumbents for live birds. Although some chicken producers may have relationships with co-ops, having to bid against incumbents for birds does not necessarily place an entrant at a disadvantage. The problem for new abattoirs comes with the provincial allocation systems in place in Ontario and Quebec, which allocate incumbents their historic share of provincial slaughter. These allocation schemes provide for some exceptions. Dr. Barichello stated that there is an "open sign-up pool"<sup>6</sup> in Ontario. Also, new entrants can bid inter-provincially. The impression remains, however, that the provincial allocation schemes make new entry into processing at the abattoir level difficult. Entry into further processing would not be subject to the same regulatory barrier. While there is evidence that there are barriers to entry in primary processing, there is little to indicate that the refusal would increase them or prevent them from eroding.

[407] While it is clear that barriers to entry do exist, they are one of many factors to be considered in assessing market power. In our view, the existence of barriers to entry is not in itself determinative.

(iii) The effect of the refusal on the price of processed chicken

[408] With respect to the link between the Respondents' refusal to supply and the price of processed chicken paid by consumers, four issues are raised in argument, namely (1) the price increase that is implied by the change in Olymel's market share and in the HHI; (2) contractual provisions bearing on the ability of processors to pass premiums along to customers; (3) statements by processors regarding their ability to pass price increases along; and (4) the implications of supply management for processors' ability to raise the price of processed chicken. We will deal with each of these in turn.

- *The effect of the change in market shares and the HHI on the price of processed chicken*

[409] Dr. Ware testified that he did not model the effect of the change in market concentration on the price of processed chicken. He explained that he had not been asked to undertake such an analysis and that he did not have enough data to do so. He explained that "because... we have a standard of the adverse effect on competition rather than a substantial lessening on competition ... any lessening or any change in market structure in the direction of increasing concentration would constitute an adverse effect on competition" and that "if you add that to the increasing costs arising from an increase in premiums and an increase in live transport costs plus the effect on the further processing market, then that would amount to an adverse effect on competition". The first statement would appear to require some qualification. An increase in concentration could be the result of pro-competitive forces at work. For example, an increase in concentration may occur if a more efficient firm attracts customers from a less efficient rival. In any event, as stated above, the refusal in this case could well decrease concentration. In the worst-case scenario, it would increase concentration by a very small amount.

- *Contractual limitations on the ability of processors to pass on increases in premiums to their customers*

[410] Dr. Ware contends that if the Applicant attempted to replace the Respondents' birds by acquiring birds in Quebec, the result would be an increase in premiums paid by the Applicant and other processors, and these premiums would be passed on to consumers. Dr. Ware believes that some of the Applicant's contracts with its customers "are of a cost plus form in which their cost -- Nadeau's cost increase would automatically be represented in their prices to the customers". During her cross-examination of Dr. Ware, counsel for the Respondent Westco made reference to several cost-plus contracts. According to Westco, these contracts do not allow the Applicant to pass on its premiums to its customers. Below, we review the provisions in a number of these contracts.

[411] Clauses [CONFIDENTIAL] of the Applicant's contract with [CONFIDENTIAL] stipulate the following: [CONFIDENTIAL].

[412] [CONFIDENTIAL].

[413] On this evidence, while [CONFIDENTIAL] may be able to pass an increase in the NB Board Price on to [CONFIDENTIAL], it is unclear if any other increase can be passed on.

[414] The Applicant's contract with [CONFIDENTIAL] sets out the following pricing formula: [CONFIDENTIAL].

[415] We have limited evidence to explain how the contracts described above work in practice. On the whole, they appear to provide for prices to be fixed at least for a set time period. It is unclear as to how and when cost increases can be passed on, if at all. There is simply insufficient evidence to determine, based on these contracts, how increases in cost to the Applicant, caused by "premium wars", could be passed on to customers.

- *Processors' statements regarding their ability to pass on cost increases to their customers*

[416] At paragraph 101 of her report, Ms. Sanderson stated that "[t]he record is filled with statements from processors indicating that they have no ability to raise prices to customers". In that regard, she referred to the statements made by Mr. Feenstra and two of the Applicant's customers. Cara, a full-service restaurant operator, indicated in a letter that its business is very price-sensitive and that there is "virtually no room to increase prices to our customers". In a letter addressed to the Applicant, the following concerns are expressed on behalf of La Préférence, another customer:

Eliminating Nadeau from the supply chain, by way of shut down or purchase from a competitor of there's [sic] will only tighten the supply of fresh raw products, and ultimately I foresee an increase in the price of poultry.

An increase in the price of poultry will hurt La Preference's bottom line. Our clients will not pay for the increase in price for simply having fostered a controlled supply.

[417] In her testimony, Ms. Sanderson stated that the fact that costs were going up did not necessarily mean that prices of processed chicken would go up. She expressed the opinion that processors were worried about a premium war because they could not pass the higher premiums on to their customers.

[418] Mr. Brodeur stated that it would be very difficult for a processor to pass these costs on to customers and consumers. In his evidence, he gave three reasons to explain his view. He said:

7.16. À la connaissance du Témoin, advenant une augmentation des coûts d'approvisionnement en poulets vivants causés par une hausse des primes versées aux éleveurs, il serait très difficile pour un transformateur ou un surtransformateur

d'exiger un prix plus élevé de la part de ses clients et ultimement, des consommateurs. Cela s'explique par les trois raisons suivantes :

1ère raison: produits substitués

7.16.1. Il existe une « concurrence croisée » entre le poulet et les autres viandes telles que le bœuf et le porc. Le Témoin a pu constater, au fil de ses années d'expérience dans l'industrie, que lorsque les prix des Produits transformés et surtransformés augmentent, les consommateurs se tournent vers le porc ou le bœuf, ce qui a résulté en une baisse de la demande des clients d'Olymel pour ses Produits transformés et surtransformés. Cette réalité a aussi été constatée dans le rapport des PPC, joint à la présente déclaration à la pièce YB-16, à la page 41. En effet, chez les Canadiens, la consommation d'un type de viande se fait naturellement au détriment d'un autre type.

2e raison: coûts des inventaires

7.16.2. Les coûts associés à la conservation en inventaire des Produits transformés et des Produits surtransformés sont élevés et motivent les abatteurs, transformateurs et surtransformateurs à vendre leurs produits rapidement. De plus, une fois congelé, le produit perd de sa valeur en raison des frais qui devront être encourus pour le décongeler et des limitations concernant l'utilisation de cette viande.

3e raison: augmentation prévisible des contingents

7.16.3. Advenant une hausse des prix de vente, les contingents de production des poulets vivants sont rapidement ajustés à la hausse afin de ramener les « marges viande » des transformateurs à leur niveau historique.

7.16.4. Il faut savoir que les données produites par la firme Express Markets Inc. (EMI), dont les résultats sont utilisés par les organismes de réglementation dans leur évaluation des besoins en poulets de la population canadienne, ne tiennent pas compte des primes payées aux éleveurs dans le calcul de la «marge viande» des transformateurs. Dans les calculs effectués par ces organismes de réglementation, la «marge viande» des transformateurs correspond à l'écart entre les prix de gros moyens (données EMI) et prix de référence du poulet vivant en Ontario.

7.16.5. Or, lorsque cette marge augmente au-delà d'une moyenne historique, ceci peut laisser présager un manque de viande sur le marché domestique et les contingents de production de poulets vivants seront normalement ajustés à la hausse, ce qui aura pour effet d'augmenter la quantité de produit disponible pour les abatteurs et, par le fait même, de réduire les primes versées aux éleveurs.

7.17. Selon l'expérience du Témoin, il n'y a pas de relation directe entre les primes payées aux éleveurs pour les poulets vivants et les prix de vente en gros et au détail des Produits transformés et surtransformés. En effet, la variation des prix de ces produits est principalement causée par les fluctuations de l'offre et de la demande et par les variations de prix des autres viandes transformées. Quant aux primes payées aux éleveurs, celles-ci dépendent notamment de la concurrence entre les abatteurs et de la rentabilité relative de l'industrie.

[419] Some processors stated, however, that they would attempt to pass on the increased costs to their customers. In a letter addressed to the New Brunswick Farm Products Commission, Kevin Thompson, on behalf of the Association of Ontario Chicken Processors, stated that processors would “attempt to [pass] the additional costs on to their customers causing increases in the price of chicken at the retail meat counter and an adverse impact on consumption which will in turn lead to lower production for all chicken farmers”. In his view, “...consumers who already pay higher prices in Canada to support supply management will unjustly pay even more”.

[420] Mr. McCullagh, at paragraph 14 of his affidavit, states that processors will look to and need to pass on the costs to their retail and foodservice customers, who, in turn, will seek to increase prices to consumers.

[421] However, Mr. Feenstra testified that it is very difficult for processors to pass on the costs of a “premium war” to the end consumer as consumers are willing to pay only so much for their chicken. In cross-examination, Dr. Ware responded to Mr. Feenstra's testimony as follows:

**Ms. Healey:** If Mr. Feenstra were to advise the Tribunal that it is very difficult to pass along the cost of a premium to a consumer or consumers are only willing to pay so much for chicken, would you have any reason to doubt Mr. Feenstra's comments in that regard?

**Dr. Ware:** Yes, I would because it is possible that economists take a bit more of a detached view of how markets work than people who are embroiled in the everyday decision-making and, as I said, these premiums are not just going up to Nadeau. These premiums are going to go up way across Quebec and if that were to happen, that would be, you know, a market-wide increase in costs and it's hard for me to imagine that a market-wide increase in costs would not be reflected in the price of chicken.

[422] Dr. Ware is distinguishing between the ability of the Applicant or that of any other individual competitor to pass on cost increases that they may have incurred and the ability of processors as a group to pass on a market-wide increase in the premiums they pay for live chicken. Competitive pressure normally limits the ability of individual competitors to pass on cost increases that they have incurred. In the absence of supply management, a market-wide increase in costs is more likely to be passed on as Dr. Ware has stated. It is the Tribunal's view, however, that supply management itself limits processors' ability to pass on even a widespread increase in the premiums they pay for live birds. We will now turn to that issue.

- *Limitations posed by supply management on the ability of processors to increase price*

[423] Supply management reduces the ability of processors to raise the price of processed chicken and also attenuates any link between price and concentration that might otherwise exist. The supply of live chickens in Canada is determined by producer-controlled provincial marketing boards coordinated by a national marketing board, the CFC. Dr. Barichello explains the regulatory process by which the supply of live chickens is determined:

1. Processors calculate their requirements for production.
2. Each province's marketing board aggregates processors' requirements within their province.
3. Provincial marketing boards send their aggregates to the CFC.
4. The CFC makes any necessary adjustments and then authorizes a total production for each province.

[424] According to Dr. Barichello, national chicken quota is set by the CFC for a six- to seven-week production period, and farmers cannot deviate materially from their quota. Thus, there is a continuous flow of live chickens coming to market. The quantity is determined by regulation, and the birds must be processed and sold to consumers. It is normally not possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the case at hand, it would appear very difficult to raise the price of processed chicken without simultaneously restricting the amount offered on the market. The weekly flow of chicken into the market is not under the control of any one processor.

[425] The evidence also points to a recent instance in which processors jointly lobbied the CFC for a reduction in the national quota and were successful; the CFC reduced the allocation for period A-87. Mr. Landry testified as follows with respect to the request made by the processors:

**Mr. Lefebvre:** Une des dernières questions que j'ai pour vous. Pourquoi tant vouloir baisser la production de poulets?

**Mr. Landry:** C'est comme je t'ai expliqué, c'est que le prix de vente, c'est un marché contrôlé, c'est là qu'est la demande. Puis quand le prix vivant du poulet vient trop élevé--

**Mr Lefebvre:** Oui.

**Mr. Landry:** --- pour le prix de vente que les abattoirs peuvent faire, les retours sont pas bons. Donc, c'est une des raisons pourquoi que le système est révisé à toutes les huit semaines.

[426] The limited information provided about this one incident is insufficient to support the inference that processors exercise the kind of control over supply management that would be necessary for them to increase the price of processed chicken as and when they wish. This is particularly so given the complex nature of quota adjustments provided for in the supply management system.



[427] As indicated in our earlier review of the supply management system, a “bottom-up approach” is contemplated in order to determine if quota adjustments are required. The mechanism is designed to strike a balance between chicken production and consumer demand. In essence, quotas are adjusted as a result of changes in that demand.

[428] We find that it would normally not be possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the absence of an increase in consumer demand or a reduction in supply, there is no reason to believe that prices will rise.

[429] The Applicant contends, in essence, that the price increases caused by “premium wars” will be passed on to customers and consumers. In the event that the Applicant is able to obtain all of its replacement birds from Quebec, the concern is that this would result in “premium wars” that would squeeze processor margins. It is argued that processors would then attempt to pass on premium increases to customers. It is our view that other factors, such as consumer preferences, being equal, an increase in the price of processed chicken cannot be sustained in the absence of a further restriction in supply by the marketing boards. Here, any “premium war” would be the result of excess processor demand for live chickens. There is little evidence to suggest that the marketing boards would respond to excess processor demand for chickens by reducing quotas and thus further restricting supply. This would only make things worse, because processors would then be competing for an even smaller supply of chickens. It is our view that it would be more logical for marketing boards to attempt to mitigate any premium increase by increasing quotas to ensure that there would be sufficient chickens for all processors. In that case, prices would fall.

[430] For the above reasons, we find that the price increases to processors caused by “premium wars” are not likely to be passed on to customers or consumers without an accommodating reduction in supply by the marketing boards. We also question whether a further restriction of supply would remedy or even be seen as a remedy for a deterioration of processor margins caused by “premium wars”.

(iv) The effect of the refusal on rivals’ costs

[431] The Applicant further argues that to the extent that processors cannot pass on the increased live costs caused by a “premium war”, their viability will be threatened. It also argues that the refusal will substantially raise the Applicant’s costs and that the raising of these costs would have an anti-competitive effect because it would weaken the Applicant to the benefit of Olymel. Dr. Ware states as follows in his examination in chief:

**Ms. Price:** Can I just stop you there for a minute and ask a question arising from what you said? This concept of raising rivals’ costs, I believe that there’s been a fair bit of evidence that Nadeau and Olymel do compete in the primary processing market. Does that concept that you’ve just described apply not only to the further processors whose costs might be raised as you’ve described but also to Nadeau itself in the event it has to go into Quebec?

**Dr. Ware:** It could, yes. Yes, it could. We don’t know -- you’re basically saying does it apply to the processing market, the primary processing market?

**Ms. Price:** As well.

**Dr. Ware:** Yes. Well, it certainly could. We don't know -- and I didn't really directly address this, but we don't know how much premiums will be bid up in Quebec to other processors as a result of them being bid up to Nadeau.

**Ms. Price:** Right.

**Dr. Ware:** But they certainly will be bid up to some extent because as I was saying before the break, if Nadeau is going to bid 10 percent of the supply of Quebec chicken out of Quebec, it's going to do that by raising the price, and you raise the price -- when you raise the price that they pay, that's going to increase the price to everyone else too.

[432] "Raising rivals' costs" is a term described in section 4.2 of the Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* and can be described as a set of anti-competitive strategies that a dominant incumbent firm might use to inhibit the expansion of smaller competitors or the entry of new competitors, thereby entrenching its dominance. The Guidelines note that in order for the raising of rivals' costs to be a profitable strategy for the dominant firm, the burden of the cost increase concerned must fall more heavily on the rivals of the dominant firm than on the dominant firm itself.

[433] The Tribunal has found that, for the purposes of paragraph 75(1)(a), if the Applicant replaced the Respondents' birds with birds from Quebec, its costs would increase and it would be substantially affected as a consequence. The question here is whether the evidence supports that the raising of rivals' costs would be the result of the refusal and, if it does, whether this implies that competition in the Ontario-Quebec-Maritimes market for processed chicken would be adversely affected. The answer is that it does not. The reasons are as follows.

[434] First, the conditions for the successful pursuit of a strategy of raising rivals' costs do not appear to exist in the relevant market. Olymel, the recipient of the Respondents' birds, is not dominant in the relevant market, and the receipt and retention of the Respondents' birds would not come close to making it so. Indeed, there is no dominant firm in the relevant market. There are several other large, if not larger, competitors (Maple Leaf, Maple Lodge, Exceldor) and numerous smaller ones. Second, there is little in the evidence to indicate that a price war for live chickens would be less burdensome to Olymel than to other processors. In his testimony, Dr. Ware refers to a market-wide increase in processors' costs that is the result of their bidding more aggressively for live birds.

[435] To the extent that cost increases resulting from the refusal are confined to the Applicant, it is unlikely that any cost increases experienced by the Applicant could be passed on to consumers in the form of higher prices. Indeed, it is central to the Tribunal's determination under paragraph 75(1)(a) that the Applicant would be substantially affected by the refusal, that it could not simply pass the higher cost of acquiring replacement birds in Quebec on to its customers. The evidence relating to the possibility that costs increases experienced by the Applicant could be passed on to consumers is summarized above. Further, Mr. Robinson assumed that the price at which the Applicant sells processed chicken would remain unchanged in scenario 2, where the Applicant is able to replace the Respondents' chickens with birds from Quebec. The ultimate limitation on the ability of the Applicant or other processors to increase the price of processed

chicken is that they do not control the supply of chickens to the market. Control of supply lies with the marketing boards.

- (v) The effect of the refusal on the quality and variety of processed chicken available to consumers

[436] Dr. Ware states as follows at paragraph 25 of his reply report:

There are compelling reasons also to believe that the refusal to deal will lead to severe declines in quality in some cases, which are sufficient in themselves to constitute an adverse effect on competition.

[437] Dr. Ware cites an example of what he sees as a decline in quality, the evidence of [CONFIDENTIAL], which is that if the Applicant were to close, [CONFIDENTIAL] would lose a source of [CONFIDENTIAL], and replacement sources would be further away and more costly. [CONFIDENTIAL].

[438] Ms. Sanderson responds that if the Applicant were able to replace the Respondents' birds, there is no issue. If the Applicant were unable to replace the Respondents' birds, [CONFIDENTIAL] would still have a variety of realistic alternatives. One possibility is that Sunnymel builds a plant in New Brunswick. Exceldor and ACA could also supply [CONFIDENTIAL] without greatly increasing the shipping distance.

[439] Ms. Gazzard stated in her affidavit that UPGC and Olymel have been in negotiations to replace the Applicant as a source of supply. Olymel has apparently stated that it has the capability of filling UPGC's requirements but has not quoted a price. She stated that they had also approached Exceldor about replacing the lost Nadeau volume. Exceldor believed, however, that their price would not be commercially viable to UPGC.

[440] There is evidence of complaints by certain customers of the Applicant, in particular Puddy, relating to their inability to obtain chickens of the required quality and variety should they no longer be supplied by the Applicant. Mr. McHaffie stated as follows:

By contrast, our purchases from Olymel have declined significantly since 2006. This is because of quality and service problems. The quality problems have included bruising, cuts, neck skin left on, missing parts, (such as wings), and the like. Service problems include late delivery and short delivery. Olymel, for reasons unknown, has been unresponsive to our requests for improvement. As we are unable, in our view, to obtain sufficient supplies to meet our needs from elsewhere in Québec, it has been a major advantage for us to have Nadeau as an alternative source of fresh killed chicken.

[441] Given the distances processed chicken is routinely shipped, a need to find a new (possibly more distant) source of supply does not necessarily qualify as a decline in quality. There are several post-refusal scenarios under which Prizm and Puddy would not experience any need to change suppliers, for instance, if the Applicant were to replace some or all of its lost

supply. In the event that they have to change suppliers, there are several other options open to Prizm and Puddy whereby they need not go much further afield for supply. Nor is it necessarily the case that the need to change suppliers qualifies as an adverse effect on competition. Changing suppliers is part of the normal process of competition. Given the consolidation that has occurred among chicken processors, customers have presumably changed suppliers in the past although there is not much in the way of evidence on this point.

(vi) Possible foreclosure of supply to other processors in the market

[442] Dr. Ware also cites a possible lessening of competition in what he calls the “market for further processed chicken” as another manifestation of the adverse effect on competition flowing from the refusal. He cites the affidavit of Ms. Goodz of Riverview and the affidavit of Mr. Ellis of Sunchef. Both Ms. Goodz and Mr. Ellis express the concern that, as a competitor, Olymel would not supply them or would not supply them on reasonable terms. Also, at paragraph 28 of his report, Dr. Ware cites the affidavit of Mr. McHaffie of Puddy. Mr. McHaffie explains that Puddy has had quality and service problems with Olymel and that Olymel has been unresponsive to its request for improvement. We now turn to the evidence of some of the Applicant’s customers in that respect.

*Riverview*

[443] Ms. Goodz testified that both Olymel and Exceldor have refused to supply Riverview. She stated as follows at paragraph 17 of her affidavit:

My ability to continue to supply my specialized product at an acceptable price depends on my ability to obtain supplies from Nadeau. Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off, and we will no longer be able to continue in this business.

[444] Ms. Sanderson responds to these concerns at paragraph 77 of her report. She states that Ms. Goodz’ concerns would not arise if the Applicant is able to replace the Respondents’ birds. She states that alternate suppliers such as Exceldor, Abattoir Agri and Lilydale are closer to Riverview than Nadeau is and that Maple Lodge Farms and Maple Leaf are not much further away. Lilydale is no longer an alternative for Riverview as it is going out of business, and Exceldor is questionable as Ms. Goodz has testified that it has refused to supply her. Ms. Goodz also stated that some suppliers cannot meet her size requirements. Ms. Goodz conceded under cross-examination that [CONFIDENTIAL]. Ms. Sanderson further stated that even if Riverview were forced out of business, it is small enough that there would be no adverse effect on the market for processed chicken.

*Sunchef*

[445] Sunchef is a further processor of chicken located in Montreal. [CONFIDENTIAL]

[446] Mr. Ellis states at paragraph 16 of his affidavit that if the Applicant's supplies are cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated:

This would have a major adverse effect at our level of the market. It would permit Olymel to increase its dominance and market power, at the expense of other businesses like ours.

[447] At paragraph 15 of his affidavit, Mr. Ellis makes the same claim as Ms. Goodz as to the crucial role that continued supply from Nadeau at the same level plays with respect to the future of his business:

Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off and that we will no longer be able to continue in this business.

*Puddy Brothers*

[448] Puddy is a further processor located in Mississauga, Ontario. According to Mr. McHaffie, it currently purchases whole birds from Exceldor ([CONFIDENTIAL]%), Nadeau ([CONFIDENTIAL]%) and Olymel ([CONFIDENTIAL]%). According to paragraph 9 of Mr. McHaffie's affidavit, Puddy has been in business since 1884 and began purchasing from the Applicant in about 2004 or 2005. Since 2006, it has reduced its purchases from Olymel because it has not been satisfied with its service. Mr. McHaffie states that Puddy cannot buy from Ontario primary processors, which are much closer than Nadeau, because they are also engaged in further processing, and the requirements of Ontario processors exceed the Ontario slaughter.

[449] Mr. McHaffie states that if the Applicant were unable to continue as a viable business, Puddy would be forced to buy more from Olymel, and its service might be worse. He concludes that if the Applicant were to close or be taken over by Olymel, competition in the market would definitely be hurt. He admitted under cross-examination, however, that he had not taken his concerns regarding inadequate supply up with the CFC.

*Desco*

[450] Mr. Chevalier testifies that Desco competes directly with Olymel and Exceldor and that they have refused to supply Desco at reasonable prices. At paragraph 7 of his affidavit, he states that if the Applicant's supplies of live chicken were reduced or cut off, Desco's ability to compete effectively against Olymel would be reduced.

[451] Ms. Sanderson responds to Mr. Chevalier at paragraph 78 of her report. She states that there would be no issue if the Applicant is able to replace the Respondents' birds. Ms. Sanderson also calculates that Desco's purchases from Nadeau account for [CONFIDENTIAL]% of its annual chicken purchases, indicating to her that Desco has many other suppliers available to it. She states that Desco currently obtains fresh-killed chickens within 72 hours from the United States and that the Ontario processors as well as ACA could provide chicken within the same

delivery time. Ms. Sanderson also states that if Desco were to go out of business, this does not mean that prices for processed chicken would rise.

[452] In cross-examination, Mr. Chevalier conceded that the Applicant's supply accounts for a small percentage of Desco's supply.

### *Analysis*

[453] We earlier determined that further processed chicken is not a separate product market. We have little evidence regarding the respective market shares of the stated further processors Riverview, Sunchef, Puddy and Desco. We note that Mr. McHaffie stated in cross-examination that further processors are numerous. When questioned on the matter, he stated that he thought that there are more than 50 further processors in Ontario and 5 to 15 in Quebec.

[454] Both Riverview and Sunchef maintain that any diminution of their supply of chicken from the Applicant would be disastrous. Puddy concludes that it would be forced to return to a longstanding supplier, Olymel, with whom it has recently become disenchanted. This assumes, of course, that the Applicant is put out of business. There are many possible scenarios short of the worst-case scenario in which the St-François Plant closes and all the Applicant's birds go to Olymel. In the event of the worst-case scenario where the St-François Plant closes and Riverview and Sunchef are denied chicken from all other sources and are obliged to close, there is insufficient evidence to infer that this would have an adverse effect on competition in the relevant market which is the Ontario, Quebec and Maritimes market for processed chicken. This is essentially because of the size of that market, the apparent number of further processors in the market, the marketing boards' ultimate control of supply in the market and the paucity of evidence to show that complaining further processors cannot obtain supply elsewhere.

[455] We further note that there are several reasons why customer complaints might not be given significant weight in the determination of whether the probable effect of the refusal competition in the market is or is likely to be adverse. First, some of the complaints appear to have been orchestrated. For example, as explained above, some of the letters sent to the Applicant by some of its customers regarding the Respondents' refusal contain paragraphs that are virtually identical to those found in a draft letter prepared by the Applicant. This letter, which was apparently provided to Riverview and Cara, includes the following two paragraphs:

Our business is a "pennies" business. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices would rise, and supply problems would occur. We are therefore opposed to any reduced competition.

[456] The evidence adduced shows that similar paragraphs are found in letters sent to the Applicant by Riverview and Cara:

[Riverview]

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur. We are therefore strongly opposed to any reduced competition in this market.

[Cara]

Our business is very price sensitive. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.

If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices could rise, and supply problems could occur. We are therefore extremely concerned with any reduced competition.

[457] Second, notwithstanding the evidence adduced on behalf of certain customers, in particular Sunchef and Riverview, that they would be put out of business should the Applicant cease operations, we are not persuaded that this result is likely. Some complaining customers have not attempted to investigate alternate sources of supply and have simply asserted that it would be either unavailable or too costly. While the complaining customers assert that specific suppliers approached were either unwilling or unable to supply chickens to required specifications, there is insufficient evidence to establish that these further processors were unable to obtain the chickens they require from other suppliers in the market. Further, at this time, no one appears to have complained about the situation to the CFC, the regulatory body responsible for determining the supply of chickens available to processors as well as being the most capable of remedying their perceived supply problems.

[458] Third, many customer complaints focus on a limited set of scenarios, to wit, the possibility of the Applicant's closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that the Applicant will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual or business on a reduced scale. This reduced scale could be quite consistent with the Applicant's historic supply of chickens, before it added an extra shift to accommodate the Nova Scotia and Prince Edward Island birds. In the event that the Applicant were to operate at a reduced scale, it might well arrange to continue to supply those customers who rely most on it and allow customers that are less concerned about their alternatives to seek supply elsewhere. This could also be true of some complaining customers who have only recently entered into contracts with the Applicant or increased their purchases from the Applicant.

[459] The quality degradation issue appears to be overblown to the extent that it is related to incremental shipping distances. In many cases, complaining customers have alternate sources of supply that are closer than the Applicant. The most common source of concern appears to be the tension between the abattoirs and the further processors rather than distance. This issue is

market-wide and cannot turn on the actions of the St-François Plant. The Applicant itself engages in some further processing (Kentucky Fried Chicken birds) and its sister, Maple Lodge Farms, is also integrated into further processing. There are apparently 50 further processors in Ontario, even though the major abattoirs in Ontario (Maple Lodge Farms and Maple Leaf) are integrated into further processing. It appears that there are market opportunities for specialists in further processing and that these opportunities will not depend on the conduct of or the scale of operations at the St-François Plant.

[460] A need to change suppliers does not necessarily equate with a supply disruption. The aggregate supply of chickens coming to market remains the same regardless of where the Respondents send their birds. The capacity to process chickens would remain the same unless the St-François Plant actually closes. Even then, the Sunnymel partnership may build a new plant, and/or ACA may expand, perhaps with the participation of Maple Lodge. It appears that some of the customers who have submitted evidence in this proceeding have changed their mix of suppliers in the past, some quite recently. This is a normal part of doing business, and it is not clear that any special significance should be attached to the fact that some of the Applicant's current customers are obliged to make further changes in their mix of suppliers.

[461] In the event that the worst-case scenario prevails and some of the Applicant's current customers are adversely affected, the question remaining is whether this can be regarded as an adverse effect on competition in the market. There is no evidence of concern among purchasers of processed chicken who are not current Nadeau customers. Nor is there much in the way of evidence regarding the portion of the market accounted for by Nadeau's complaining customers. Given the limited likelihood of the worst-case scenario prevailing and the lack of evidence regarding the portion of the market that would be affected if it did prevail, the complaints of the Applicant's customers are not sufficient to support an inference that the Respondents' refusal is likely to have an adverse effect on competition in the market.

(vii) Impact of possible elimination of an efficient processor

[462] The Applicant argues that it operates the most modern and efficient processing plant in Canada and that for this reason alone, its elimination would have an adverse effect on competition in the market. In this regard, the Applicant relies on the statistics compiled by Mr. Donahue and the affidavit of Mr. Robinson.

[463] Mr. Donahue, as explained above, works for Agri Stats, a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America. At the Applicant's request, he prepared a report about the St-François Plant. He testified that the Applicant's wage rates [CONFIDENTIAL] and that the Applicant [CONFIDENTIAL].

[464] According to Dr. Ware, [CONFIDENTIAL] are an example of the greater efficiencies obtained by the Applicant. He is of the opinion that any adverse effect on competition will be quantitatively more severe if processing at the St-François Plant were replaced by the processing of chickens at a less efficient plant.

[465] Mr. Robinson, at paragraph 6 of his affidavit, states that [CONFIDENTIAL].



[466] The evidence adduced does not establish that the Applicant operates the most efficient processing plant in Canada. When asked about the findings of his report, Mr. Donahue simply stated that [CONFIDENTIAL].

[467] Further, given the paucity of evidence regarding the efficiency of other processing plants in the relevant market, we cannot agree with Dr. Ware that any adverse effect would be quantitatively more severe if another processing plant processed the Respondents' chickens. As stated earlier, we find it unlikely that the Applicant would close. However, if it were to close, any new plant built by Sunnymel could benefit from the same sources of efficiency [CONFIDENTIAL].

(d) Conclusions for paragraph 75(1)(e)

[468] As stated above, for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. This analysis requires a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal. The level of competitiveness in the presence of the refusal to deal must be compared with the level that would exist in the absence of the refusal. It must then be determined whether the effect on competition, if any, is "adverse". In *B-Filer*, the Tribunal found that "adverse" is a lower threshold than "substantial".

[469] Paragraph 75(1)(e) refers to two time frames: the present and the future. In the instant case, because of the Interim Supply Order, the refusal to deal is not having an adverse effect on competition at present because the Respondents have not yet ceased supply. Indeed, in their arguments, the parties referred to the likely effects of the refusal to deal.

[470] We are satisfied that neither Olymel nor any other processor in the market currently exercises market power. For comparative purposes, the market we consider at the outset, without the refusal, is a market consisting of numerous processors; many small processors and a number of larger ones including Maple Lodge, Maple Leaf, Exceldor and Olymel. We will now summarize the results of our above analysis of the effect of the refusal to deal.

[471] We have considered a number of different scenarios of the Applicant's circumstances resulting from the refusal. We have compared the effect of the refusal on market shares under five different scenarios and found that the results of this comparison are normally not associated with any concern about enhanced market power. We recognize, however, that the market shares upon which these calculations or other estimates of market concentration are based are not entirely accurate because they are based on slaughter rather than sales of processed chicken to customers in the relevant market. The parties failed to adduce any other evidence regarding market shares.

[472] In assessing market power, we have also considered a number of other factors. The first factor considered is barriers to entry. We find that while barriers to entry into processing at the abattoir level exist, there is little to indicate that the refusal increases them or keeps them from

decreasing. The next factor considered is the likelihood of an increase in the price of processed chicken. We find that there are good reasons to doubt that any increase in costs incurred by processors as a result of increased competition for birds can be readily passed on to consumers. Given the level of demand, it is impossible to sustain an increase in the price of a product without decreasing the quantity of the product offered in the market. Processors can only indirectly influence the supply of chickens through the regulatory process in which they constitute only one group of stakeholders.

[473] With respect to the effect of the refusal to deal on further processors, we find that this does not constitute an adverse effect on competition. If the Applicant is able to replace the Respondents' birds, these processors will not be affected by the refusal. If the Applicant is obliged to reduce the amount it supplies to some further processors, alternative sources of supply exist. In this regard, it is important to re-emphasize that the refusal does not restrict the supply of chickens coming to market. Only the marketing boards can do that. In the event that some of the complaining further processors were to suffer some form of competitive disadvantage, there remains the question of the significance of this to the market as a whole. The Applicant failed to adduce evidence regarding the competitive significance of the complaining further processors. Given the absence of evidence regarding the significance of these market participants from the perspective of competition in the market, we cannot draw the inference that harm suffered by them constitutes an adverse effect on competition in the market.

[474] The Applicant has failed to establish that it is likely that its customers will experience a disruption in supply and a reduction in quality. There are several plausible scenarios in which there are no adverse effects on complaining customers as a result of the refusal. In the event that some of the Applicant's customers actually do experience a decline in the quality of service or a disruption of service that is beyond the adaptation that is part of the normal competitive process, this effect would be confined to a very small fraction of the market and, because of the paucity of evidence in this regard, would not mean that the effect on competition could be qualified as "adverse" from the perspective of the market as a whole.

[475] Based on the above comparative assessment of the market with the refusal to deal and that same market without the refusal to deal, we find that the Applicant has failed to establish that the refusal to deal is having or is likely to have an adverse effect on competition in the market. None of the factors discussed above, taken individually, support a conclusion that the Respondents' refusal is having or is likely to have an adverse effect on competition in the market. We are also of the view that, taken together, these factors lead to the same result. We find that, as a result of the refusal to deal, Olymel would not be placed in a position of created, enhanced or preserved market power. Instead the post-refusal market situation would be fluid, with the potential for a range of possible shifts in market share and changes in market concentration that are ambiguous in their implied effect on competition and, in any case, so small that they would normally pass without notice.

[476] We note that earlier in these reasons, we developed a number of different scenarios to assist us in our analysis under paragraph 75(1)(e). We have found that, in all cases, there would be no adverse effect on competition. It is therefore unnecessary to determine which of the scenarios is most likely. The evidence on many material factors is not conclusive. For instance,

we do not know if the ACA plant in Nova Scotia will expand and if it does, whether Maple Lodge will be involved. Nor do we know whether or when the Sunnymel partnership will build its proposed New Brunswick plant. We would be speculating on such matters. We are, however, as stated earlier, satisfied on the whole of the evidence that the Applicant will likely succeed in obtaining supply to replace at least some of the Respondents' chickens. Therefore to the extent that a finding of a likely scenario is required, we are of the view that the scenarios which provide for the Applicant's being able to replace some of the Respondents' chickens are, on a balance of probabilities, more likely.

[477] Finally, we agree with the Respondents' contention and with the evidence of Ms. Sanderson who is of the opinion that, while the refusal does not have or is not likely to have an adverse effect on competition in the relevant market, a remedial order might have such an effect. The processor allocation systems maintained by provincial marketing boards limit intra-provincial competition for live birds. The allocation systems have the effect of fixing the share of the provincial slaughter accounted for by each abattoir in the province. This reduces the ability of one abattoir to attract business from another. A way around this is for an abattoir to purchase live birds from another province, but processors have generally been reluctant to do this on a significant scale. The tacit arrangement to avoid interprovincial competition for live birds has been justified, as arrangements of this nature so often are, by the argument that interprovincial competition for live birds would raise their price and this would be ruinous to processors. In our view, an attempt by the Applicant to acquire live birds in Quebec can be viewed as a departure from the tacit arrangement not to compete interprovincially for live birds. From this perspective, a remedial order that ties the Respondents' birds to the Applicant and to New Brunswick would be anti-competitive in all of the circumstances.

## VII. CONCLUSIONS

[478] For the above reasons, we find that:

- (a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
- (b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
- (d) The Applicant has not established that the product is in ample supply; and
- (e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[479] As a consequence, the application will be dismissed.

[480] 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 upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The

parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, July 10, 2009 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

[481] The issue of costs is reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Monday, July 20, 2009, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs. If there is no agreement, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

**FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:**

[482] The application is dismissed.

[483] The issue of costs is reserved. On or before Monday, July 20, 2009, the parties shall communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs.

[484] On or before Friday, July 10, 2009, 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 8<sup>th</sup> day of June 2009

SIGNED on behalf of the Tribunal by the panel members

(s) Edmond P. Blanchard

(s) Henri Lanctôt

(s) P. André Gervais

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<sup>1</sup> We note that, where the words “Tribunal” or “we” are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

<sup>2</sup> Sections 3.5 and 3.6 of the *Merger Enforcement Guidelines* state as follows:

**3.5** The market definition analysis begins by postulating a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would be able to impose a five per cent price increase assuming the terms of sale of all other products remained constant. If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the postulated candidate market is not the relevant market, and the next-best substitute is added to the candidate market. The analysis then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would be able to profitably impose a five per cent price increase. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one

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product of the merging parties in the candidate market. The smallest set of products in which the price increase can be sustained is defined as the relevant product market.

**3.6** The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where the merging parties produce or sell the relevant products. As above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a five per cent price increase by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified.

(emphasis added)

<sup>3</sup> Both Ms. Sanderson and Dr. Ware used market shares based on slaughter; shares of further processors are therefore not included in their calculations.

<sup>4</sup> For purposes of calculating the HHI, the “Other Quebec” processors are treated as one. If there is more than one, this results in a slight overstatement of the HHI. “Other Ontario” processors are treated as three equal sized processors. The reason for this is that the smallest Ontario processor that is identified (Grand River) processes 200,000 birds per week. Unidentified Ontario processors slaughter a total of 300,000 birds per week. It is reasonable to assume that the largest unidentified processor is smaller than Grand River. Given this, the total slaughter by unidentified Ontario processors could be allocated in a variety of ways. The assumption made here is that three unidentified Ontario processors are each slaughtering 100,000 birds per week. Given the very small portion of the market involved, the assumption made regarding the composition of the unidentified segment of the market makes very little difference to the value of the HHI.

<sup>5</sup> See s. 4.12 of the *Merger Enforcement Guidelines*.

<sup>6</sup> He explained that the pool “...provides some flexibility for producers to choose the processor with whom they wish to do business as well as allowing some differential growth among processors” and that there “...is no long-term requirement for a producer to continue to sell to the same processor.”

## [485] SCHEDULE A

### The Applicant's Experts

#### *Dr. Richard Barichello*

Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. He was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. Dr. Barichello testified about the origins and purpose of supply management in the poultry industry and gave his view that the underlying motivation of the supply management system was the protection of the producer. He described the regulations governing the supply management system and described the workings of that system including quota setting and allocation, import control, and price control. He spoke about the barriers to entry in chicken production and he provided his view that competition among producers was limited. He also testified with respect to premiums and the importance of assured continued supply for chicken processors.

#### *Dr. Roger Ware*

Dr. Roger Ware is a professor of economics at Queen's University. He was qualified as an expert in the areas of economics, competition policy and industrial organization, including market definition and competitive behaviour of firms. Dr. Ware opined on the product market and geographic market for both the 75(1)(a) analysis and the 75(1)(e) analysis. In respect of paragraph 75(1)(a) of the Act, he referred to the product as being live chickens. Dr. Ware acknowledged the difficulty in obtaining birds that would meet the size and quality requirements of the Applicant's customers. As for the geographic market under paragraph 75(1)(a), Dr. Ware gave his opinion that because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it was neither economic nor efficient for the Applicant to replace the Respondents' supply with supply from greater distances in Quebec.

In respect of paragraph 75(1)(e), Dr. Ware was of the opinion that the product market was processed chickens and that the geographic market consisted of the Maritimes and Quebec. Dr. Ware also testified with respect to the magnitude and dimensions of adverse effects on competition as a result of the refusal to deal. Dr. Ware opined that the increase in market power of Olymel in the processed chicken market would inevitably lead to higher prices and worsening conditions in other dimensions for customers.

#### *Grant Robinson*

Mr. Grant Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. He was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry. Mr. Robinson developed the

following four scenarios to assist the Tribunal in understanding the impact of the removal of the Respondents' birds on the Applicant's operations:

- i. loss of the Respondents' chickens;
- ii. replacement of the Respondents' birds with birds from Quebec;
- iii. loss of the Respondents' birds and Nova Scotia birds; and
- iv. replacement of the Respondents' birds and loss of Nova Scotia birds.

He provided his view that the Applicant would be substantially affected in its business in all of the abovementioned scenarios. In order to develop his scenarios, Mr. Robinson made assumptions regarding transportation costs, shrink, DOAs and premiums which would have to be paid by the Applicant to source replacement supply in Quebec.

### **The Applicant's Lay Witnesses**

#### *Yves Landry*

Yves Landry is the general manager of the St-François Plant. He testified about the plant's operations, the requirements of Nadeau's customers and Nadeau's arrangements with its customers. He talked about the range of birds supplied by the Respondents to Nadeau and their refusal to deal. He stated that Nadeau began to receive 25,000 additional birds per week from Nova Scotia in early June 2008 and that on September 15, 2008, Nadeau began to receive 6,250 additional chickens per week from Nova Scotia. He testified that one of the reasons why Nadeau had not made extensive efforts to procure supply in Quebec was the concern that those efforts would lead to a premium war. He also testified about Nadeau's efforts to procure chickens from Quebec. He spoke about Nadeau's transportation costs and DOAs.

#### *Denise Boucher*

Denise Boucher is the office manager at the St-François Plant. She is responsible for assembling financial data and is familiar with the records and the operations of the St-François Plant. Ms. Boucher's evidence consisted of adducing a number of financial documents into the record.

#### *Anthony Tavares*

Anthony Tavares is the former chief executive officer of Maple Lodge and former president of Nadeau. Mr. Tavares described the supply management system and Nadeau's operations in New Brunswick. He spoke about New Brunswick producers and chicken production in New Brunswick. Mr. Tavares also testified with respect to the Respondents' threat of the removal of their birds from the Applicant and of the Respondents' termination of supply. Mr. Tavares referred to the substantial detrimental effect the refusal to deal would have on the Applicant and to the difficulty the Applicant would have in replacing the Respondents' chickens. Mr. Tavares spoke about the current situation and indicated that the Applicant was willing to continue to meet all of the usual trade terms and to pay fair market price to the Respondents for the continuation of supply of live chickens.

*John Feenstra*

John Feenstra was the general manager of Nadeau from 1989 to 2006. He talked about Nadeau's initial attempts to obtain supply from New Brunswick producers in the early 1990s, the chicken industry including the legislative scheme in place in New Brunswick and the operations of the St-François Plant. He testified about Nadeau's negotiations with Westco regarding the purchase of the St-François Plant and the effect on Nadeau's business of the Respondents' refusal to supply. Mr. Feenstra explained that an "all-out premium war" would be created if Nadeau were required to purchase chickens from Quebec.

*Tina Ouellette*

Tina Ouellette is part of the procurement team at the St-François Plant. She testified about her role in the procurement effort to source live chickens from Quebec. She indicated that she was charged with making the initial telephone calls to Quebec producers for the purpose of inquiring as to whether or not they would be interested in meeting with a representative from Nadeau to discuss the possibility of supplying the St-François Plant with live chickens. Ms. Ouellette described the procedure she followed when making the calls to producers. She stated that she contacted 454 producers and that 67 producers were interested in meeting with a Nadeau procurement representative. Ms. Ouellette also indicated that a number of producers could not be reached for a variety of reasons and that others could not supply the Applicant because they produced other types of poultry or had sold their quota.

*Léonard Viel*

Léonard Viel is the manager of sales, transportation and the garage at the St-François Plant. He stated that he was asked to assist the procurement team to attempt to source chickens from Quebec when another member of the procurement team was on vacation. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying Nadeau with live chickens. He also outlined the pricing arrangements sought by potential Quebec producers before they would consider moving their production to the St-François Plant and the volume of live chickens they were willing to supply the Applicant.

*Réjean Plourde*

Réjean Plourde is part of the procurement team at Nadeau. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying the Applicant with live chickens. He also testified with respect to the instructions he received from Mr. Landry regarding his task to seek replacement supply in Quebec and stated that he did not have the authority to sign contracts. He indicated that he had met with 39 producers and that he had made detailed notes of these meetings. He testified about the pricing arrangements sought by Quebec producers before they would consider moving their production to the St-François Plant. He also testified with respect to the procedure he followed when meeting with Quebec producers.



*Guy Chevalier*

Guy Chevalier is the president of Desco, a further processor and distributor of chickens. He stated that Desco competes directly with Olymel and Exceldor in the Quebec market and that as a result it cannot purchase fresh-killed chickens from them at reasonable prices. He further stated that Desco has no difficulty obtaining supply at reasonable prices from Nadeau. Mr. Chevalier indicated that he purchased processed chickens from the United States by purchasing importation quotas from processors that did not utilize them. He further testified about the procedure applicable to processors seeking to obtain supplementary importation quotas from the CFC.

*Terry Ellis*

Terry Ellis is the president and a major shareholder of Sunchef, a further processor located in Quebec. He described the nature of Sunchef's business and the contractual relationship between Sunchef and Nadeau. He stated that Sunchef entered into a contractual relationship with Nadeau in 2007 in order to ensure sufficient supply for its biggest customer. He further stated that, since their arrangement came into effect, the birds supplied by Nadeau had been of high quality and of the type and size requested. Mr. Ellis also indicated that Olymel was unwilling to supply fresh-killed chickens to Sunchef at a reasonable price and that although he currently purchased processed chickens from Exceldor, it could not meet all of its needs. Mr. Ellis stated that Nadeau had always been an effective competitor to Exceldor and Olymel and said that if Nadeau's supplies of live chickens were cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated. According to Mr. Ellis, this would have a major adverse effect at Sunchef's level of the market. He further stated that should Nadeau go out of business or be acquired by Olymel, he foresaw that Sunchef's supplies would be reduced or cut off and that he would no longer be able to continue in that business.

*Lyndsay Gazzard*

Lyndsay Gazzard is the senior purchasing manager of UPGC. She testified about UPGC's long and mutually beneficial relationship with Nadeau. She stated that Nadeau had for a long time supplied all of the fresh chickens used in KFC restaurants in New Brunswick, and, in the last two years, supplied 98% of KFC restaurants in Nova Scotia and Prince Edward Island. She further stated that UPGC had no difficulty obtaining all of its requirements for Atlantic Canada from Nadeau at a reasonable price. She testified about UPGC's purchasing requirements and trends, including procurement from Olymel and Exceldor. She also testified about the problems arising from Westco's change in production size. Lastly, she indicated that she remained concerned about UPGC's ability to obtain birds of the required size and specifications in the event that live chicken supply to Nadeau was disrupted.

*Corey Goodman*

Corey Goodman is the chief purchasing officer for Prizm LP and the general manager of UPGC. Prizm operates about 45 KFC restaurants in New Brunswick and Nova Scotia, and UPGC is a non-profit association that operates as the purchasing agent for all KFC restaurants in Canada. Mr. Goodman stated that he was concerned about the impact of any reduction in the supply of

live chickens to Nadeau, as it would result in increased costs, reduced freshness and operational complexities with respect to obtaining replacement supply. He further stated that Olymel and Exceldor were already very powerful players in the market and that with Nadeau weakened or gone, there would be even less competition.

*Debbie Goodz*

Debbie Goodz is the president and CEO of Riverview which is a further processor located in Ste-Sophie, Quebec. Ms. Goodz described Riverview's business and its supply requirements and specifications. She indicated that Riverview purchased the vast majority of its supplies from the Applicant and that it had always been content with the Applicant's service, quality and price. Ms. Goodz stated that her ability to continue to supply her specialized product at an acceptable price depended on her ability to continue to obtain supplies from the Applicant. She indicated that she was unable to obtain chickens from Olymel and that she could not obtain alternative supplies from elsewhere because of transportation issues, price concerns and size requirements. Ms. Goodz also indicated that she had never complained to the CFC regarding the unavailability of supplies. Ms. Goodz expressed her view regarding the current state of competition and stated that if the Applicant's supplies of live chickens were cut off or curtailed, its ability to compete with Olymel would be reduced or eliminated, thus causing a major adverse effect at Riverview's level of the market.

*Jeffrey Lloyd McHaffie*

Jeffrey Lloyd McHaffie is a consultant to Puddy and its *de facto* vice president, in charge of sales and purchases of poultry products. He has over 20 years' experience in the poultry industry. Puddy is a further processor of fresh-killed chickens, specializing in "case-ready" chicken for the retail supermarket. Mr. McHaffie testified about Puddy's strict specifications for its incoming supplies of chickens and stated that Nadeau has consistently been able to meet its exacting quality and freshness requirements. He also testified about Puddy's difficulties in obtaining supply from Ontario and western Canada and he discussed the service and quality problems associated with Olymel's products.

*Kevin Thompson*

Kevin Thompson is the executive director of the Association of Ontario Chicken Processors ("AOCP"). He has been involved with the Ontario chicken industry since 1978. He stated that maintaining a supply of live chicken was essential for a processor as without supply, processors become less competitive and less able to meet the needs of their customers. He described the plant supply allocation systems in place in Ontario and Quebec and the supply management system in place in Canada. He stated that it was disconcerting to the AOCP that Nadeau's only alternative may be to enter into an interprovincial premium war to try to replace 50% of its live supply if the Respondents were able to unilaterally withdraw their live chicken production from Nadeau. He testified on the detrimental effects of interprovincial trade via premium wars and concluded that the consequences of a premium war for the processor community as a whole, its customers and for consumers were all negative. He indicated that the interprovincial movement of live chickens is really a weakness in the regulated supply system and one that must ultimately

be addressed if supply management is to be sustained. He further stated that if Nadeau elected not to source chickens from Quebec or if it decided to close or to sell to one of the other processors in the region, there would be a substantial adverse effect on competition in the marketplace in Quebec and eastern Canada.

*Bruce McCullagh*

Bruce McCullagh is the senior vice president and general manager of poultry operations at Maple Leaf. He has over 12 years' experience in the poultry industry. He described the nature of the supply management system including the manner in which the system shields chicken producers from competition. He also testified about the plant supply allocation systems in place in Ontario and Quebec. Mr. McCullagh discussed the detrimental effects of interprovincial trade including the creation of unsustainable premium wars. He stated that interprovincial trade is a systemic problem in the poultry industry and that the government needs to look at possible amendments to the current regulatory regime to address this issue. Mr. McCullagh also testified about Maple Leaf's involvement in the interprovincial procurement of live chickens.

*Andre Merks*

Andre Merks is a Nova Scotia producer. He has been farming broiler chicken, turkeys and layer eggs for over thirty years. Mr. Merks spoke of the "handshake deal" he entered into with the Applicant following the closure of the Maple Leaf plant in Nova Scotia. He discussed the reasons why he had decided to send his production to the Applicant instead of ACA. Mr. Merks spoke of the concerns expressed by Nova Scotia producers with respect to the chicken industry in Nova Scotia. He also testified with respect to a meeting that took place in October of 2008 between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

*Michael Donahue*

Michael Donahue is the vice-president of Agri Stats, a company that offers benchmarking services for the poultry industry across North America. He described the procedure used by Agri Stats to collect and analyze data. Mr. Donahue explained the report that he had generated for the St-François Plant and indicated that, in the areas he had examined the St-François Plant would be competitive with the Canadian industry.

**Westco's Expert**

*Dr. Margaret Sanderson*

Margaret Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. Ms. Sanderson was qualified as an expert in the area of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms. Ms. Sanderson testified with respect to paragraphs 75(1)(a) and 75(1)(e) of the Act. With respect to paragraph 75(1)(a), Ms. Sanderson expressed the opinion

that the issue was not in dispute and that the product market was live chickens. To determine whether or not the Applicant would be substantially affected in its business, Ms. Sanderson looked at the cost of replacing the Respondents' birds with birds from Quebec. She was of the opinion that the Applicant could source live chickens from producers in Quebec without being substantially affected and thus concluded that Quebec-based chickens were substitutes for the live chickens supplied by the Respondents.

In respect of paragraph 75(1)(e), Ms. Sanderson was of the opinion that the relevant geographic market for determining whether there was an adverse effect on competition was at least as large as Ontario, Quebec and the Maritimes. She examined Nadeau's and Olymel's historic shipping patterns, shipping distances, transportation costs and prices to make this determination. In Ms. Sanderson's view, the refusal would not provide Olymel with market power and would not cause an adverse effect on competition.

### **Westco's Lay Witnesses**

#### *Thomas Soucy*

Thomas Soucy is the president and chief executive officer of Westco. He testified about Westco's activities and operations. He discussed the consolidation of production quota in New Brunswick and Westco's plans for complete vertical integration. He testified about Westco's business relationship with the Applicant and provided his view that the Applicant had abused its monopoly power in New Brunswick. Mr. Soucy described the conception of Sunnymel and discussed Sunnymel's plan to acquire or construct a new processing plant in New Brunswick. He also testified about Westco's negotiations with the Applicant regarding the purchase of the St-François Plant and with respect to the Applicant's ability to obtain replacement supply of live chickens in Quebec.

#### *Bertin Cyr*

Bertin Cyr is a Westco shareholder and has been chairman of Westco's Board of Directors since 2003. He testified about the history of the corporation as well as its plans for complete vertical integration. Mr. Cyr described the steps toward vertical integration that had been taken by Westco in the past and he provided his view that complete vertical integration, by acquiring an existing processing plant or by building a new one, was Westco's only way to ensure its long term survival in the poultry industry. Mr. Cyr testified about Westco's business relationship with the Applicant and indicated that Westco's desire to vertically integrate was also motivated by the fact that the Applicant had abused its position. Mr. Cyr also spoke of Westco's past attempts to enter into a partnership with the Applicant.

#### *Yvan Brodeur*

Yvan Brodeur is vice-president of procurement at Olymel. He described the nature of Olymel's business including its processing and procurement activities. He described the supply allocation system in place in Quebec and he discussed interprovincial trade of live chickens. Mr. Brodeur also spoke about the conditions of purchase of both live and processed chickens. He discussed

transportation costs associated with transporting live chickens as well as transportation costs associated with transporting processed chickens. Mr. Brodeur also testified about Olymel's clients and their location from Olymel's processing plants.

#### *Julie Desroches*

Julie Desroches is an environmental project officer at Olymel. She testified about her involvement in Sunnymel's project to build a new slaughterhouse in New Brunswick and the steps that had been taken to date in the construction project. She also spoke of the circumstances which had led to the project being delayed and she discussed Sunnymel's future construction plans for the new slaughterhouse in New Brunswick.

#### *Richard Wittenberg*

Richard Wittenberg is a chicken producer in Nova Scotia. He testified on the closure of the Maple Leaf plant in Nova Scotia and spoke of the "handshake" agreement he entered into with the Applicant following the closure of that plant. He also testified with respect to a meeting that took place on October 15, 2008, between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

### **Dynaco's Lay Witnesses**

#### *Gilles Lapointe*

Gilles Lapointe is the director of finance for Dynaco. He testified with respect to Dynaco's corporate structure and the nature of its business. He described Dynaco's production quota and indicated that it consisted of 6.22% of New Brunswick's total production quota. Mr. Lapointe testified about Dynaco's decision to cease supplying the Applicant with live chickens. He also described how co-operatives operate and why it was beneficial for Dynaco to send its production to Sunnymel.

#### *Rémi Faucher*

Rémi Faucher is the general manager of Dynaco. He testified about Dynaco's corporate structure and the nature of its business and chicken production. He spoke of the reason why Dynaco decided to cease supplying the Applicant with live chickens and stated that it was essentially based on the deterioration of its business relationship with the Applicant and on the business opportunities offered by Sunnymel.

### **Acadia's Lay Witnesses**

#### *Rémi Faucher*

Rémi Faucher is the former president and director of Acadia. He testified about Acadia's corporate structure and the nature of Acadia's business. Mr. Faucher spoke of Acadia's quota and indicated that it consisted of 16% of New Brunswick's total production quota. He also

testified about Acadia's decision to cease supplying the Applicant with live chickens and indicated that it was a business decision. He also spoke about the financial advantages involved in sending Acadia's production to a processing facility owned by Olymel.

**[486] SCHEDULE B**

Schedule to the *Regulations Amending the Canadian Chicken Marketing Quota Regulations*,  
SOR/2009-4

SCHEDULE (*Sections 1, 5 and 7 to 10*)

LIMITS FOR PRODUCTION AND MARKETING OF CHICKEN FOR THE PERIOD  
BEGINNING ON JANUARY 4, 2009 AND ENDING ON FEBRUARY 28, 2009

Item.	Province	Column 2 Production Subject to Federal and Provincial Quotas (in live weight) (kg)	Column 3 Production Subject to Federal and Provincial Market Development Quotas (in live weight) (kg)
1.	Ont.	65,725,554	2,920,000
2.	Que.	53,105,045	5,400,000
3.	N.S.	7,014,256	0
4.	N.B.	5,716,109	0
5.	Man.	8,390,996	394,950
6.	B.C.	29,212,807	4,089,793
7.	P.E.I.	754,057	0
8.	Sask.	7,015,829	982,216
9.	Alta.	18,430,359	400,00
10.	Nfld. and Lab.	2,825,158	0
Total		198,190,170	14,186,959

ANNEXE (*articles 1, 5 et 7 à 10*)

LIMITES DE PRODUCTION ET DE COMMERCIALISATION DU POULET POUR LA  
PÉRIODE COMMENÇANT LE 4 JANVIER 2009 ET SE TERMINANT LE 28 FÉVRIER 2009

Article	Province	Colonne 2 Production assujettie aux contingents fédéraux et provinciaux (en poids vif)	Colonne 3 Production assujettie aux contingents fédéraux et provinciaux d'expansion du marché (en poids vif)
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	vif) (kg)	(kg)
1. Ont.	65 725 554	2 920 000
2. Qc	53 105 045	5 400 000
3. N.-É.	7 014 256	0
4. N.-B	5 716 109	0
5. Man.	8 390 996	394 950
6. C.-B	29 212 807	4 089 793
7. Î.-P.-É	754 057	0
8. Sask.	7 015 829	982 216
9. Alb.	18 430 359	400 00
10. T.-N.-L.	2 825 158	0
Total	198,190,170	14 186 959
1.		



**[487] SCHEDULE C**

Sections 1 and 2 of Order I - Chicken Farmers of New Brunswick Marketing Plan

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| <p>1. The object of the marketing plan is to control the number of chickens raised for marketing within the province, in such a manner:</p> <ul style="list-style-type: none"><li>(a) As to ensure there is an adequate supply of New Brunswick grown chicken available to the consumer.</li><li>(b) To provide an opportunity for the maximum number of residents in New Brunswick to earn a living in the marketing of chicken.</li><li>(c) To ensure a reasonable rate of return from the sale of chicken and to ensure a continuity of supply.</li><li>(d) To avoid the development of monopolies which could result in excessive cost to the consumers of chicken.</li><li>(e) To avoid a curtailment of the overall supply in the event one or more producers cease to market chicken.</li></ul> <p>2. There shall be established a periodic marketing limit being the number of kilograms of chicken live weight which can be raised for marketing within the Province in conformity with the objectives of the plan.</p> | <p>1. Le but du plan de commercialisation est de réglementer l'élevage du poulet destiné à la commercialisation dans la province, de façon à :</p> <ul style="list-style-type: none"><li>a) assurer au consommateur un approvisionnement adéquat de poulets produits au Nouveau-Brunswick,</li><li>b) offrir à un nombre maximum de résidents du Nouveau-Brunswick l'occasion de gagner leur vie dans la commercialisation du poulet,</li><li>c) assurer un profit raisonnable de la vente de poulets et assurer un approvisionnement continu.</li><li>d) éviter la réalisation de monopoles qui pourraient entraîner un coût excessif au consommateur, et</li><li>e) éviter une réduction de l'approvisionnement global advenant le retrait d'un ou de plusieurs producteurs de la commercialisation du poulet.</li></ul> <p>2. Une limite de commercialisation périodique est établie, correspondant au nombre de kilogrammes (poids vif) de poulets pouvant être élevés à des fins de commercialisation dans la province, conformément aux objectifs du plan.</p> |
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**APPEARANCES :**

For the applicant

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Andrea McCrae  
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For the respondents

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Groupe Dynaco, Coopérative Agroalimentaire

Olivier Tousignant

Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

Valérie Belle-Isle

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