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OTTAWA, ONT

413

COMPETITION TRIBUNAL

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

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

AND IN THE MATTER of an application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited pursuant to section 104 of the *Competition Act*

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

BETWEEN:

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

Applicant

- and -

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

Respondents

MEMORANDUM OF FACT AND LAW OF GROUPE WESTCO INC.
(Motion for Interpretation)

INTRODUCTION

1. Groupe Westco Inc. (“Westco”) seeks an order or direction from the Tribunal interpreting the terms of, and the nature and scope of Westco’s obligations under, the Order issued by the Tribunal on June 26, 2008 (the “Interim Supply Order”).
2. Since the Interim Supply Order was issued, Westco has supplied, and continues to supply, all of the live chicken it has available for sale to the Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (“Nadeau”) with the exception only of the live chicken it is permitted to deduct pursuant to the terms of the Interim Supply Order and which Westco has supplied to Olymel S.E.C. (“Olymel”).
3. Westco submits that it has supplied live chicken to Nadeau in compliance with the terms and spirit of the Interim Supply Order and in accordance with the regulated industry in which Westco’s production authority (its quota allocation) fluctuates. Westco further submits that it has supplied to Olymel a lesser volume of live chicken than provided for under the terms of the Interim Supply Order.
4. Westco now produces and has for sale chickens which are larger than Westco previously offered for sale. Accordingly, within its quota allocation, Westco now produces fewer, but larger, chicken than Westco has produced in the past. Consistent with the Interim Supply Order, Westco has continued to supply Nadeau with all of its production of chicken within its quota allocation, save for a reduction, as provided for in the Interim Supply Order, representing the volume of replacement chicken obtained by Nadeau from other sources.
5. In Westco’s submission, the purpose and intent of the Interim Supply Order is to maintain the “current level of weekly supply” of live chicken to Nadeau, not to dictate to Westco, and the other Respondents, the type and weight of chickens the Respondents should be producing.
6. In the present circumstances, therefore, Westco seeks an order confirming that:
 - a. The number of 271,350 chickens per week provided in the Interim Supply Order to reflect the “current level of weekly supply” at the time of the Interim Supply

Order was a notional figure calculated on the basis of a hypothetical average weight of 2 kilograms per chicken, assumed no variation in production from week to week, and corresponded to the totality of the Respondents' production of chicken (which is expressed in kilograms);

- b. The volume of live chicken to be supplied by Westco and the other Respondents in a given quota period pursuant to the Interim Supply Order is an amount of kilograms calculated by multiplying the notional figure of 271,350 chickens by the hypothetical average weight of 2 kilograms per chicken, by the 8 weeks contained in any given quota period;
- c. This volume of live chicken to be supplied to Nadeau by the Respondents in a given period will:
 - i. be decreased by the volume of replacement chicken obtained by the Applicant;
 - ii. vary proportionally and in accordance with the periodic fluctuation of the Respondents' production quotas; and
 - iii. reflect the production schedules of Westco, Groupe Dynaco, Cooperative Agroalimentaire ("Dynaco") and Volailles Acadia S.E.C., Volailles Acadia Inc./ Acadia Poultry Inc. ("Acadia") (collectively, the "Respondents").

PART I STATEMENT OF FACTS

A The Terms of the Interim Supply Order

7. By Notice of Application dated March 17, 2008, Nadeau commenced an application alleging a refusal to deal by Westco and the other Respondents, pursuant to section 75 of the *Competition Act*.
8. Nadeau also sought to obtain, pursuant to section 104 of the *Competition Act*, an interim order requiring Westco and the other Respondents to supply Nadeau with live chicken pending the Tribunal's decision on the section 75 application.

9. The Interim Supply Order requires Westco, and the other Respondents, to continue to supply Nadeau with live chicken until a decision is rendered by the Tribunal on Nadeau's application under section 75 of the Act.

10. Paragraphs 57 and 58 of the Interim Supply Order provide as follows:

[57] The Respondents are to continue to supply the Applicant with live chickens on the usual trade terms at the current level of weekly supply, namely 271,350 live chickens.

[58] This requirement to supply will last until a final decision is made on the merits of the application under section 75 of the Act. This volume of supply is to be reduced by 25,000 live chickens per week upon the first delivery of the live chickens to the Applicant expected from Nova Scotia in September, 2008, and further reduced by any other supply of live chickens the Applicant may secure during this interim period.

11. On October 16, 2008, Justice Blanchard issued a direction to counsel stating that the Respondents' weekly supply of live chicken to be provided to Nadeau pursuant to paragraphs 57 and 58 of the Interim Supply Order will continue to be expressed in number of live chickens.

B. Basis of the "Current Level of Weekly Supply"

12. The "current level of weekly supply" represented, at the time the Interim Supply Order was issued, all of Westco's and the other Respondents' production as allowed under their respective production quotas, which are allocated in kilograms of live chicken per period.

13. The number of 271,350 live chickens referenced in the Interim Supply Order to reflect this current level of supply was a notional figure put forward by Nadeau based on the following assumptions:

- Westco was deemed to be supplying Nadeau with roughly 186,230 live chickens at the time the application for interim relief under section 104 of the *Competition Act* was filed by Nadeau, using an hypothetical average weight of 2kgs/chicken;
- At the same time, Dynaco was deemed to be supplying Nadeau with approximately 26,450 live chickens, using the hypothetical average weight of 2kgs/chicken; and
- At the same time, Acadia was deemed to be supplying Nadeau with approximately 58,670 live chickens, using the hypothetical average weight of 2kgs/chicken.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 2

14. The notional status of the 2kg reference was confirmed by Nadeau's representative, Mr. Anthony Tavares, who clearly stated that the numbers used to reference the weight of the chicken were approximate while the quotas, expressed in kilograms, were exact numbers (the 2kgs/chicken measure, therefore, was not an exact number):

Attached hereto and marked as Exhibit "D" to this my affidavit is a chart prepared by Yves Landry, General Manager of Nadeau ("Mr. Landry"), the contents of which I verily believe are true. It shows all of New Brunswick's chicken quotas, by kilograms, for the quota period A83, which covers the 8-week period from February 3, 2008 to March 29, 2008. As each chicken weighs about 2 kilograms, the chart represents a total for New Brunswick of about 365,800 chickens per week. The chart shows the nominal quota-holder (for example, "Montagnaise"), as well as the controlling producer groups.

(emphasis added)

Affidavit of Anthony Tavares, sworn March 14, 2008, par. 28

15. The 2kgs/chicken assumption was also explained by Westco's representative, Mr. Thomas Soucy, during the proceedings that led to the issuance of the Interim Supply Order:

Poids moyen d'un poulet : 2 kilogrammes.

Ce poids moyen est utilisé afin de simplifier les données et les rendre comparables à celles utilisées dans l'Affidavit Tavares. Cependant, le commerce du poulet et le calcul des quotas se fait généralement par kilogrammes et non par nombre de poulets en raison du fait que certains types de poulets comme les poulets à rôtir peuvent avoir un poids moyen supérieur à deux kilos. Il ne s'agit donc pas de données exactes lorsque nous mentionnons le nombre de poulets par année ou par semaine. Toutefois, le nombre de kilogrammes, lui, est exact.

(emphasis added)

Affidavit of Thomas Soucy dated May 29, 2008, Exhibit C, ("Formule de Conversion et Détails des Calculs Effectués par Monsieur Thomas Soucy")

16. Exhibit C referred to above contains the basis and the explanations for all statistics and comparisons used by Mr. Soucy in his affidavit that was before the Tribunal.
17. The production quotas allocated to Westco and to other producers are established in terms of kilograms over eight week periods and not in number of chickens per week. The notional figure of 186,230 live chickens per week used to reflect Westco's "current level

of weekly supply” was thus only arrived at on the basis of the 2kgs/chicken assumption made by Mr. Tavares.

Affidavit of Anthony Tavares, sworn March 14, 2008

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 6, Exhibit A

18. As the representative of Nadeau has acknowledged, in order to supply 186,230 live chickens per week to Nadeau during period A-87, Westco would have had to have reduced its chicken size and to have produced chicken weighing less than 2kg.
19. Following the Tribunal’s Order dated January 15, 2009 requiring Nadeau to respond to questions to which it had objected during cross-examinations, Mr. Landry admitted as follows:

Westco’s quota allocation for period A-87 was 2,796,356. When averaged equally over the period, Westco had a weekly allocation of approximately 349,545 kg. Therefore, Westco could have produced 186,230 chickens per week at an average weight of approximately 1.88 kg, which is less than 2.0 kg.

(emphasis added)

Nadeau – Answers to Questions 1, 6, 7, 8, 9, & 19 As Set Out in Column 7 of Schedule B to the Order of the Competition Tribunal Dated January 15, 2009, page 3, Response to Question 8

20. For period A-88, Mr. Landry acknowledged that to produce 186,230 chickens within its quota, Westco would have had to have produced a chicken at an average weight of 1.785 kgs:

Q. Comment venez-vous à la conclusion, Monsieur Landry, que Westco aurait pu produire 186,230 poulets pendant la période A-88?

LE TÉMOIN: Entre produisant un poulet qui est un peu plus petit en kilos.

...

Q. I apologize. The translation was a good effort, but if I may, the question is what is that lighter weight lower than the two kg per chicken that needs to be used in order for Westco to produce 186,230 birds during period A-88, as you have suggested it is possible to do?

...

INTERPRÈTE: Quel serait le poids du poulet requis pour arriver à ce chiffre de 186,230 têtes par semaine en moyenne? Quel serait le poids possible pour -- qui pourrait être possible pour atteindre ce niveau?

Q. Pour la période A-88.

...

LE TÉMOIN: Ça arriverait à un poids moyen de 1.785.

Examination of Yves Landry, December 22, 2008, Confidential Level B, pages 12 to 15

21. A similar issues arises for the most recent period A-89. Mr. Landry noted, again following the Tribunal's Order of January 15, 2009:

For period A-89, Westco's quota allocation was 2,910,233 kg. When averaged equally over the period, Westco had a weekly allocation of approximately 363,779 kg. Therefore, Westco could have produced 186,230 chickens per week at an average weight slightly less than 2.0 kg (approximately 1.95 kg).

Nadeau – Answers to Questions 1, 6, 7, 8, 9, & 19 As Set Out in Column 7 of Schedule B to the Order of the Competition Tribunal Dated January 15, 2009, page 3, Response to Question 7

22. The evidence from Mr. Landry is a clear acknowledgement that the only way it would be possible to keep the number of chickens at the notional figure of 186,230 per week (referred to in the Interim Supply Order) would be to continually adjust the average weight of the chicken produced – an adjustment that, for very practical purposes, is unrealistic. Maintaining the same number of chickens at the 2kgs weight (or, presumably, greater) would result in Westco exceeding its quota allocation.
23. Westco does not raise its chicken in this manner – i.e. varying the chicken size from period to period.

C. Change of Composition of Westco Flock

24. The Interim Supply Order would have been premised on the typical commercial arrangements between the parties. As part of those arrangements, Nadeau would have known that Westco was in the process of shifting the size and type of flock that it had to sell. Nadeau would not have been able to dictate the nature or sex of chicken that Westco had for sale. There was no written contract between the parties setting chicken size. Nadeau could not dictate how Westco grew its chickens, when it would have applied

necessary vaccines and when the chickens would have been taken out of the barn and sold. These are business/production issues that are, and always have been, within Westco's exclusive control.

25. The levels of Westco's actual weekly supply to Nadeau vary considerably depending on its quota for that period and on the utilisation of the production barns and have never reached, in any given week, the exact figure of 186,230 chickens.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 7

26. In terms of the change of its flock, as noted in correspondence included in Ms. Anderson's affidavit:

- a. Westco's initiative to change its production to fast-feathered chickens began in 2005. This initiative involved a genetic alteration of the type of chickens that Westco would be raising and selling. Fast-feathered chicken results in greater uniformity and higher daily gain in chicken carcasses as well as better feed conversion but does not permit feather sexing.
- b. Nadeau was aware of the fast-feathering initiative and participated in the barn/plant testing of the new chickens. The new flocks were tested by Westco, in barn, during the weeks of January 5 to February 9, 2005 and January 11 to February 16, 2005. These same flocks were tested by Nadeau, in plant, during the weeks of February 10, 2005 and February 17, 2005. Nadeau was also aware that following the testing, Westco was moving forward with the fast-feathered initiative.
- c. Flock orders are placed roughly 18 months in advance of receipt. A breeder flock (for fast-feathered chicks) was confirmed around March 2007, placed in incubation on November 4, 2007, hatched on November 25, 2007 and placed in Westco's barn on November 26, 2007.
- d. In early February 2008, a fire in Pondeuse Atlantique's laying barn in Saint-Léonard, New Brunswick completely destroyed the barn which had been scheduled to hatch chicks destined for Westco. Accordingly, and consistent with

its fast-feathered initiative, Westco entered into a contract with a Nova Scotia producer group (Synergy) for the supply of laying hen eggs (for fast-feathered chicks).

- e. By the time Nadeau launched its application before the Tribunal in March 2008, Westco had already been pursuing its flock initiative for some years.
- f. Each chick comes from a laying hen. Prior to being placed in the barn, the egg would have “cooled” for 3 – 4 days, would have spent 21 days in the hatchery and would, thereafter have been “grown” for 37 – 39 days. In accordance with Canadian Food Inspection Agency requirements, a vaccine is applied to the growing chicks (in barn) at 14 days. Westco must wait a further 21 days before the chicks are pulled from the barn. The earliest date, therefore, the chickens could be pulled is at 36 days. They are ready to be pulled at 37 days in accordance with Westco’s quota. (There is, on the record, some evidence of chickens being pulled from the barns earlier than 37 days. Pulling chickens early during testing conditions, however, cannot be generalized to be applicable or acceptable in usual commercial operations.)
- g. In total, the “growing process” for a broiler chicken spans a period of roughly 9 weeks. Chicks, for example, that would have been released during the first week of period A-86 would have been hatched during period A-84.

Affidavit of Mary Anderson, sworn December 10, 2008, Exhibit “B”, pages 161 and 204

- 27. Over the last year, Westco has actually supplied a weekly average of 2kgs/chickens only twice (both times in January, 2008).

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 8 and 10

- 28. The fact that quotas tend to vary from period to period was clearly established by Nadeau and the representative of Westco.

Affidavit of Thomas Soucy, sworn May 29, 2008, par. 10(e);

Nadeau Reply Submissions filed June 19, 2008, par. 34

29. When the quotas vary, the maximum quantity of live chicken that a farmer may produce varies accordingly.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 15

30. Westco's quotas will likely continue to fluctuate (increasing or decreasing) every period, thus limiting the maximum production of Westco if its quotas are reduced.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 16

D. Westco's Quota at Time of Interim Supply Order and Subsequent Reduction

31. The Interim Supply Order was issued on June 26, 2008 during period A-85 (period ending July 19, 2008). Since then, the Respondents' quotas were reduced by a total of 3.26% for A-86, 7.8% for A-87 and 12.68% for A-88 (when compared to Westco's quota at the time the Interim Supply Order was issued).

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 17

Affidavit of Thomas Soucy, sworn December 15, 2008, par. 9

32. The Chicken Farmers of New Brunswick, the regulatory body responsible for enforcing the quota limitations in New Brunswick, verifies compliance of producers on a two period basis (16 weeks).

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 18 and Exhibit "A"

33. A chicken producer may over-produce chicken in a given period, as long as that producer then proportionately under-produces in the following period.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 19

34. Westco usually overproduces during even periods (A-84, A-86, A-88) and under-produces during odd periods (A-85, A-87, A-89). It has been doing so for many years.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 20

35. Setting the exact number of chicken that must be delivered by Westco every week without factoring in industry practice and regulation would lead to an interpretation of the Interim Supply Order that would be inconsistent with Nadeau's obligation to obtain

replacement supply and the reality of the production of chicken in New Brunswick. Production levels are not static. Quota allocations vary. Westco cannot produce chicken in violation of its quota allocation.

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 9, 13 and 21

PART II POINTS IN ISSUE

36. Westco seeks clarification of the terms of the Interim Supply Order and confirmation that it has complied with its supply obligations under that Order.

PART III SUBMISSIONS

37. It is critical that orders requiring action or conduct be clear and executable. Westco has outlined below the manner in which it has actioned the Interim Supply Order based on its production of live chicken, production schedules and the commercial plans that had been put in place starting in 2005.
38. Viewed from the perspective of Westco's quota allocation, for the periods A-86, A-87 and A-88 (the periods at issue in the present motion), Westco has, on average, over-supplied Nadeau with a volume of live chicken greater than contemplated in the Interim Supply Order.
39. As Westco noted in its letter to the Tribunal of October 29, 2008:

Westco's understanding of the Interim Supply Order is that the level of supply to Nadeau was to be maintained at prior levels (100% of Westco's allowed production pursuant to the applicable period's quota) with allowance for a reduction in the supply of chicken as Nadeau obtained replacement chicken.

Affidavit of Denise Boucher, sworn December 11, 2008, Exhibit Q, page 55

40. Nadeau has, in fact, received all of Westco's chicken production with the exception, as provided for in the Interim Supply Order, of chicken representing the volume of replacement chicken obtained by Nadeau from other sources and which Westco has shipped to Olymel. The chicken that Westco supplied to Nadeau is summarized in the chart below:

Period	Weekly Supply Obligation (assumed avg 2kg/chicken and showing quota reduction and replacement chickens)	Total Weight Delivered to Nadeau per period (kgs)	Total Weight Delivered to Nadeau per week (kgs)	Number of live chickens supplied per week (assumed avg. 2kg/chicken) per week	Over (Under) Supply (chickens per week)
A-86	155,159 (186,230 – 3.26%) - 25,000	██████████	██████████	██████████	██████████
A-87	140,454 (186,230 – 7.8%) - 31,250	██████████	██████████	██████████	██████████
A-88	131,366 (186,230 – 12,68%) - 31,250	██████████	██████████	██████████	██████████

41. Viewed as a whole and when expressed in terms of kilograms, therefore, Westco’s supply to Nadeau significantly exceeded Westco’s obligation under the Interim Supply Order for periods A-86 and A-88 and in the aggregate for all three periods combined and only nominally fell short of its supply for period A-87. This shortfall is largely compensated by the oversupply obtained by Nadeau during period A-86 alone. For all periods, Westco’s reduction for replacement volumes and corresponding supply to Olymel was, on average, less than that permitted under the Interim Supply Order.
42. The Interim Supply Order requires Westco to ship to Nadeau its “current level of weekly supply” (which corresponds to all the live chicken it produces within its quota allocation), with the exception of an allocated amount equivalent to the volume of replacement chickens obtained by Nadeau. This replacement volume has been established by Nadeau at 31,250 chickens and, apart from the 31,250 chickens already identified by Nadeau, no new/additional volume of replacement chicken has been confirmed by Nadeau since September, 2008.
43. The Interim Supply Order requires Westco to ship to Nadeau its “current level of weekly supply”, not to supply live chicken of a given size. Westco remains free to determine the size of chicken it will produce, subject to its obligation to supply all of its production save for an amount equivalent to the volume of replacement chicken obtained by Nadeau.

44. As no average weight of the 31,250 replacement chickens was confirmed by Nadeau at the time of the hearing that led to the Interim Supply Order (or since that time), Westco assumed that the average chicken from Nova Scotia weighed approximately 2.23 kgs. Westco advised Nadeau that it would assume the average chicken would be at such weight. Westco received no substantive response to this correspondence and, accordingly, ensured, at a minimum, that it did not exceed this volume and the *number* of replacement chickens that had been obtained by Nadeau.

Affidavit of Mary Anderson, sworn December 10, 2008, Letter from Ogilvy Renault to Fogler, Rubinoff dated July 18, 2008, page 146

45. The numbers of chicken that Westco has sent to Olymel for the quota periods A-87 and A-88 are summarized, by period, in the chart below. They are lower than the replacement chickens contemplated under the terms of the Interim Supply Order.

Period	Replacement Chicken Obtained by Nadeau	Chicken shipped to Olymel (total for period)	Chicken shipped to Olymel (avg/week)
A-87	31,250	████████	████████
A-88	31,250	████████	████████

Westco – Answers to Questions Arising from the Examination on Affidavit of Thomas Soucy: Question 2, Order of the Competition Tribunal Dated January 15, 2009

46. If, however, there is another manner in which the Tribunal had intended the Interim Supply Order to be interpreted, Westco seeks clarification of such further or other requirements as the Tribunal may have.

PART IV ORDER SOUGHT

47. Westco has supplied all the live chicken it produces and has available for sale to Nadeau with the exception only of the chicken it is authorized to deduct under the Interim Supply Order representing the replacement volumes obtained by Nadeau. Westco cannot alter the size and composition of the live chickens it produces on a period by period basis. Westco has, therefore, applied the Interim Supply Order so as to send to Nadeau a volume of live chicken corresponding to the totality of its production less the reduction

contemplated under the Interim Supply Order and seeks an order or direction clarifying the nature of its obligations under the Interim Supply Order, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, this 19th day of January, 2009.

(S) Ogilvy Renault LLP

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

Ogilvy Renault LLP
Barristers & Solicitors
Suite 1100 – 1981, McGill College Avenue
Montreal, Quebec H3A 3C1
Telephone: (514) 847-4747
Facsimile: (514) 286-5474
Counsel to Groupe Westco Inc.