

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* regarding an alleged refusal to deal by the Respondents

BETWEEN:

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

Applicant

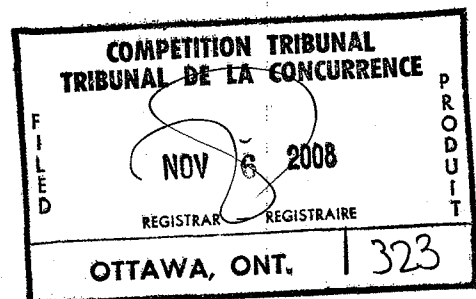
- and -

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

Respondents

NOTICE OF MOTION

TAKE NOTICE THAT the Respondent, Groupe Westco Inc. ("Westco"), will make a Motion to this Honourable Tribunal on a date fixed by the Tribunal for the Motion to be heard, in Ottawa, Ontario.



THE MOTION IS FOR:

1. The issuance, by this Tribunal, of an order or direction regarding the interpretation of the Order of June 26, 2008 allowing an application for interim relief under section 104 of the *Competition Act* (the “**Interim Supply Order**”) and confirming that:
 - a. The number of 271,350 chickens per week expressed to reflect the current level of weekly supply at the time of the Interim Supply Order was a notional figure calculated by the Applicant on the basis of an hypothetical average weight of 2 kilograms per bird, and assuming no variation in production from week to week;
 - b. The volume of live chicken to be supplied by the Respondents in a given quota period pursuant to the Interim Supply Order is calculated by multiplying the notional figure of 271,350 chickens by the hypothetical average weight of 2 kilograms per bird, by the 8 weeks contained in a given quota period;
 - c. The 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 Respondents’ production schedules.
2. An order that responding materials and memoranda of fact and law be filed at date to be set by the Tribunal;
3. Westco’s costs of this motion; and
4. Such further and other relief as to the Tribunal may seem just.

THE GROUNDS FOR THE MOTION ARE:

1. By Notice of Application dated March 17, 2008, Nadeau Poultry Farm Limited (“Nadeau”) commenced an application alleging a refusal to deal by Westco and the other Respondents, pursuant to section 75 of the *Competition Act*.
2. By Notice of Application dated March 17, 2008, 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.
3. The Interim Supply Order orders the Respondents to continue to supply Nadeau with live chicken until a decision is rendered by the Tribunal on the section 75 application.
4. 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.

(emphasis added)

5. On October 16, 2008, Justice Blanchard issued a direction to counsel (the “**Direction**”) stating that the Respondents’ weekly supply of live chicken to be provided to the Applicant pursuant to paragraphs 57 and 58 of the Interim Supply Order will continue to be expressed in number of live chickens.
6. 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.

7. The number of 271,350 birds 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 birds 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/bird;
- At the same time, Dynaco was deemed to be supplying Nadeau with approximately 26,450 birds, using the hypothetical average weight of 2kgs/bird; and
- At the same time, Acadia was deemed to be supplying Nadeau with approximately 58,670 birds, using the hypothetical average weight of 2kgs/bird.

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

8. Nadeau's representative for the hearing of Nadeau's application for interim relief, Mr. Anthony Tavares, clearly stated that the numbers used to reference the weight of chicken were approximate while the quotas, expressed in kilograms, were exact numbers (the 2kgs/bird 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

9. The 2kgs/bird assumption was also explained by Westco's representative, Mr. Thomas Soucy during the Interim Supply Order proceedings:

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")

10. 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.
11. 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, and the notional figure of 186,230 birds used to reflect Westco's "current level of weekly supply" was thus only arrived at on the basis of a 2kgs/bird assumption made by Mr. Tavares.

Affidavit of Anthony Tavares, sworn March 14, 2008

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

12. 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

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

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

14. 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

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

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

16. 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

17. The Interim Supply Order was issued on June 26, 2008 during period A-85 (period ending July 19, 2008). The Respondents' quotas were reduced for periods A-86 and A-87.

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

18. 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 periods basis (16 weeks).

Affidavit of Thomas Soucy, sworn November 5, 2008, par. 18

19. 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

20. 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

21. 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 own quota allocation.

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

22. On October 31, 2008, the Tribunal issued a direction stating that pursuant to subrule 81(2) of the *Competition Tribunal Rules*, any further requests regarding the interpretation

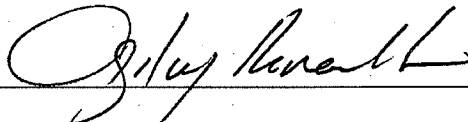
of the terms of the Interim Supply Order or compliance therewith were to be raised by way of motion by the parties.

23. Section 8 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, section 5 and Part 3 of the *Competition Tribunal Rules* SOR/2008-141, and Rule 53 of the *Federal Courts Rules*.
24. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied on at the hearing of the motion:

1. Affidavit of Thomas Soucy sworn November 5, 2008;
2. Affidavit of Thomas Soucy sworn May 29, 2008, filed;
3. Affidavit of Anthony Tavares, sworn, March 14, 2008, filed;
4. The Reply submissions of Nadeau filed on June 19, 2008, filed;
5. The Tribunal's Direction of October 16, 2008;
6. The Tribunal's Direction of October 31, 2008; and
7. Such further and other material as counsel may advise and this Honourable Tribunal may permit.

DATED AT MONTREAL, this 5th day of November, 2008.



Eric C. Lefebvre
Denis Gascon
Martha 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

Solicitors for Groupe Westco Inc.