

PUBLIC

File No.: CT-2008-004

**COMPETITION TRIBUNAL**

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

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

**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

**MOTION RECORD OF THE APPLICANT**

Date: November 4, 2008

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<b>COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE</b>	
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OTTAWA, ONT. 1315	

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**COMPETITION TRIBUNAL**

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Respondents

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**Tab 1**

**COMPETITION TRIBUNAL**

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**BETWEEN:**

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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 Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited ("**Nadeau**"), will make an urgent motion to the Competition Tribunal (the "**Tribunal**"). Nadeau respectfully requests that the within motion be disposed of based on the written record, pursuant to Rule 84(1) of the *Competition Tribunal Rules*.

**THE MOTION IS FOR:**

1. An Order pursuant to section 8 of the *Competition Tribunal Act* requiring the Respondents, Groupe Westco Inc. ("**Westco**"), Groupe Dynaco, Coopérative Agroalimentaire ("**Dynaco**"), Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. (collectively, "**Acadia**"), to forthwith show cause why they should not be held in contempt of the Tribunal's Order dated June 26, 2008;

2. In the alternative, an Order pursuant to section 8 of the *Competition Tribunal Act* requiring Westco to forthwith show cause why it should not be held in contempt of the Tribunal's Order dated June 26, 2008, based on the admissions contained in a letter from counsel for Westco dated October 29, 2008;
3. An Order pursuant to Rules 2 and 5 of the *Competition Tribunal Rules* setting an expedited schedule for the hearing of this motion, and in particular:
  - (a) an Order requiring the Respondents to deliver their responding materials, if any, within two (2) days of receipt of the Applicant's Motion Record;
  - (b) an Order requiring the parties to deliver supplementary evidence, if any, two (2) days thereafter;
  - (c) an Order dispensing with Memoranda of Fact and Law;
4. The costs of this motion, payable forthwith; and
5. Such further or other Order as this Honourable Tribunal may deem just.

**THE GROUNDS FOR THE MOTION ARE:**

1. By Order dated June 26, 2008 (the "**Interim Order**"), the Competition Tribunal (the "**Tribunal**") ordered that:

[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

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in September, 2008, and further reduced by any other supply of live chickens the Applicant may secure during this interim period.

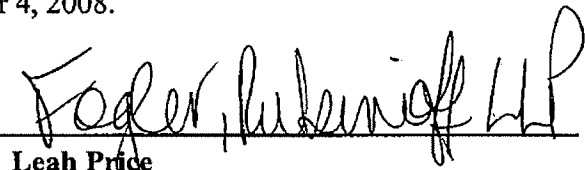
2. By letter dated July 17, 2008, counsel for Nadeau advised counsel for the Respondents that Nadeau had begun receiving an extra 25,000 chickens (sometimes referred to as "heads") per week from Nova Scotia;
3. By letter dated August 22, 2008, counsel for Nadeau advised counsel for the Respondents that Nadeau would begin receiving another 6,250 heads per week, commencing on September 15, 2008 (quota period A-87);
4. Under the terms of the Interim Order, taking into account the permitted reductions set out above, the Respondents are required to supply Nadeau with a collective total of 240,100 heads per week, from and after September 15, 2008;
5. The Respondents have breached, and are continuing to breach, the Interim Order. There have been, and will continue to be, significant short deliveries of chickens from the Respondents, as follows:
  - (a) *Actual* deliveries for the first 7 weeks of quota period A-87 have been short by 172,088 heads; and
  - (b) *Scheduled* deliveries for the last week of quota period A-87 (week 8) are projected to be short by another 74,600 heads;
6. In total, Nadeau will be short 246,688 chickens for period A-87;
7. Counsel for Nadeau has requested that the Respondents reinstate compliance with the terms of the Interim Order;

8. The Respondents have refused to reinstate compliance with the terms of the Interim Order;
9. Counsel for Westco, in a letter dated October 29, 2008, has:
  - (a) Confirmed that Westco has taken 100% of the benefit of the reduction from 271,350 to 240,100 heads per week;
  - (b) Admitted that Westco is sending far fewer heads than are required under the terms of the Interim Order; and
  - (c) Admitted that Westco is supplying, *as its first priority*, 31,250 heads to Olymel;
10. The Respondents have delivered schedules for projected deliveries for the period A-88, which continue to show significant projected shortfalls;
11. The Respondents' conduct is deliberate, contumelious and intentional; and
12. Section 8(3) of the *Competition Tribunal Act*, and Rules 2, 5, 84(1), 85 and 87 of the *Competition Tribunal Rules*.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. Affidavit of Yves Landry, sworn November 4, 2008.

Dated at Toronto this 4<sup>th</sup> day of November, 2008



Leah Price

Andrea McCrae

Joshua Freeman

**FOGLER, RUBINOFF LLP**

Barristers and Solicitors



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

**Tab 2**

**PUBLIC**

File No.: CT-2008-004  
Registry Document No.:.....

**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 for an Order pursuant to section 75 of the *Competition Act*.

**BETWEEN:**

**NADEAU FERME AVICOLE LIMITÉE/  
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Applicant

**AND**

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

Respondents

**AFFIDAVIT OF YVES LANDRY**

I, **YVES LANDRY**, of the Town of Clair, in the Province of New Brunswick, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the General Manager of the chicken processing plant (the "St-François Plant") operated by the Applicant, Nadeau Poultry Farm Limited ("Nadeau"). I have worked at the St-François Plant for 31 years.
2. As the General Manager of the St-François Plant, I am responsible for all of the day-to-day operations of the St-François Plant.
3. Attached hereto as Exhibit "A" is a copy of the Tribunal's Order dated June 26, 2008 (the "Interim Order").

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## 4. The Interim Order states:

[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.

## 5. The breakdown of supply by Respondent, according to the data utilized by all of the parties before the Tribunal, is as follows:

<b>RESPONDENT</b>	<b>LEVEL OF WEEKLY SUPPLY</b>
Westco	186,230 heads per week
Acadia	58,670 heads per week
Dynaco	26,450 heads per week
<b>TOTAL</b>	<b>271,350</b>

6. By letter dated July 17, 2008, counsel for Nadeau advised counsel for the Respondents that Nadeau had begun receiving 25,000 additional heads per week from Nova Scotia.
7. By letter dated August 22, 2008, counsel for Nadeau advised counsel for the Respondents that Nadeau would begin receiving an additional 6,250 heads per week from Nova Scotia, starting on September 15, 2008. Accordingly, from and after September 15, 2008, the Respondents are required to supply Nadeau with 240,100 ( $271,350 - 31,250 = 240,100$ ) heads per week.

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8. Attached as **Exhibit "B"** are the schedules we received from the Respondents regarding projected deliveries for the period A-87, along with revisions to Westco's schedule (for the 3<sup>rd</sup> and 6<sup>th</sup> weeks only). Period A-87 runs from September 14, 2008 to November 8, 2008. The schedules from Westco clearly show the number of heads destined for [REDACTED] (about [REDACTED] or more, each and every week).
9. The Respondents have not been supplying Nadeau with the correct number of chickens in period A-87. In fact, they have been significantly short.
10. From and after September 15, 2008, the Respondents' actual deliveries have been less than 240,100 per week. Attached as **Exhibit "C"** is a chart showing actual and projected deliveries. As can be seen from the chart, the Respondents have delivered (and are projected to deliver) 1,674,112 heads during period A-87, which translates into 209,264 heads per week (short by 246,688 heads for the period or 30,836 heads per week).
11. Attached as **Exhibit "D"** is a copy of a letter from Leah Price to counsel for the Respondents, dated October 28, 2008, along with a copy of a chart showing the number of heads ordered, received, and projected to be received for period A-87.
12. In their letter dated October 29, 2008 (attached as **Exhibit "E"**), Westco's lawyers:
  - (a) Confirm that Westco will take 100% of the benefit of the reduction from 271,350 to 240,100 heads per week;
  - (b) Admit that Westco is sending far fewer heads than are required under the terms of the Interim Order;

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- (c) Admit that Westco is supplying, *as its first priority*, 31,250 heads to a third party (according to the schedules previously provided to Nadeau, that third party is Olymel); and
- (d) Despite the Tribunal's direction issued on October 16, 2008, Westco has taken no steps to supply the required number of heads to Nadeau.

13. Nadeau has suffered harm as a result of these substantial shortfalls, including but not limited to the following:

- (a) our employees have lost work hours;
- (b) we have not been able to fill some of our customers' orders;
- (c) we have lost profits; and
- (d) we have lost some sales.

14. Westco has provided Nadeau with schedules for projected deliveries for quota periods A-88 and A-89. Attached as Exhibit "F" are the schedules we received from Westco regarding the projected deliveries, which continue to show substantial projected deliveries to [REDACTED] and significant projected shortfalls to Nadeau.

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- 15. Dynaco and Acadia have also provided Nadeau with schedules for projected deliveries for quota period A-88 (but not for A-89). Attached as Exhibit "G" is a chart showing the projected deliveries from the Respondents for period A-88. As can be seen from the chart, there continue to be substantial projected shortfalls for period A-88 (short 245,658 heads per period or 30,707 heads per week).

SWORN before me at the Town of Clair,  
 in the Province of New Brunswick, this 4<sup>th</sup>  
 day of November, 2008.

*Chantale B. Boutôt*  
 A Commissioner for taking affidavits.

*Yves Landry*  
 Yves Landry

**CHANTALE B. BOUTÔT**  
 Commissaire aux serments  
 Ma nomination expire  
 le 31 décembre 20 08



" 11  
This is Exhibit A referred to in the  
affidavit of YVES Landry  
sworn before me, this 4<sup>th</sup>  
day of November 2008  
Chantale B. Boutôt  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTÔT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 2008.....

PUBLIC

Competition Tribunal



Tribunal de la Concurrence

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 16  
File No.: CT-2008-004  
Registry Document No.: 0070

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)

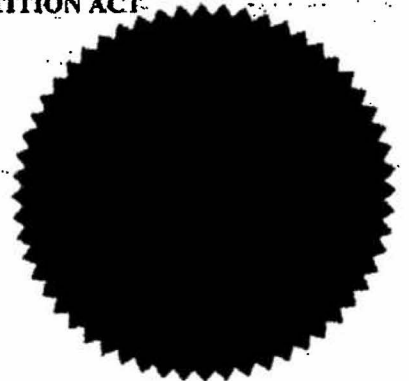
Date of hearing: 20080623

Presiding Judicial Member: Blanchard J.

Date of Reasons and Order: June 26, 2008

Reasons and Order signed by: Justice Edmond P. Blanchard

**REASONS FOR ORDER AND ORDER ALLOWING AN APPLICATION FOR  
INTERIM RELIEF UNDER SECTION 104 OF THE COMPETITION ACT**



## I. INTRODUCTION

[1] Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the "Applicant") applies to the Competition Tribunal pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended (the "Act"), for an order directing the Respondents to continue to deal with the Applicant and to supply it with live chickens on the usual trade terms, in the volumes previously supplied, pending the Tribunal's decision on the Applicant's main application under section 75 of the Act.

[2] The Applicant operates a chicken processing facility in Saint-François-de-Madawaska, New Brunswick (the "St-François Plant") and the Respondents currently supply approximately 46% of its live chickens.

[3] The Respondent Groupe Westco Inc. ("Westco") possesses approximately 51% of New Brunswick's chicken production and supplies 31.5% of the Applicant's live chickens. As of July 20, 2008, Westco will cease supplying live chickens to the Applicant by reason of its decision to have its live chickens processed by Olymel, a Quebec based processor, pursuant to a partnership agreement.

[4] The Respondents Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. ("Acadia") supply approximately 10% of the Applicant's live chickens and the Respondent Groupe Dynaco, Coopérative Agroalimentaire ("Dynaco"), supplies 4.5%. As of September 15, 2008, Acadia and Dynaco will cease supplying live chickens to the Applicant.

[5] On March 17, 2008, the Applicant applied to the Tribunal for leave to seek an order under section 75 of the Act and for an interim supply order under section 104. Leave was granted on May 12, 2008, as the Tribunal concluded that it had reason to believe that the Applicant is directly and substantially affected in its business by a practice referred to in section 75 that could be subject to an order under that section. A complete description of the parties' businesses, their business plans and all the relevant facts appear in that decision (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 7) and will not be repeated here.

[6] After the filing of further written submissions with regard to the application for interim relief and cross-examinations by the Applicant and Westco on their opponent's affidavits, the submissions of counsel for all parties on this application for an interim supply order were heard in Ottawa on June 23, 2008.

**II. THE TEST FOR INTERIM RELIEF**

[7] Section 104 of the Act sets out the test to be applied on an application for an interim order. It reads:

<p>104. (1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.</p> <p>(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.</p> <p>[...]</p>	<p>104. (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75 ou 77, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.</p> <p>(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.</p> <p>[...]</p>
--	---

[8] The Tribunal has consistently applied the principles found in the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, when considering an application for an interim supply order. The Supreme Court of Canada held in that decision that to issue an order for injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the injunction were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

**III. ANALYSIS**

**A. Serious Issue to be tried**

[9] I will turn to the first part of the test: whether the evidence before the Tribunal is sufficient to satisfy it that there is a serious issue to be tried.

[10] The Applicant submits that, leave having been granted, it has demonstrated that there is a serious issue to be tried. In the alternative, it asserts that the evidence adduced demonstrates that there is a serious issue to be tried and that the requirements of section 75 of the Act have been met.

[11] The Respondents contend that the Applicant has failed to establish, even on a *prima facie* basis, that it meets all of the criteria set out in section 75. They assert in their written submissions that there is insufficient evidence showing that the Applicant 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" (para. 75(1)(a) of the Act). The Respondents submit that the expression "substantially affected in his business" ("*sensiblement gênée dans son entreprise*") is synonymous with being unable to continue to carry on business ("*être incapable de continuer à exploiter son entreprise*"). See Hearing Transcript, p. 107). To conclude otherwise, argue the Respondents, would mean that each time the Applicant loses supply and revenue, it is substantially affected. As the Applicant's own evidence shows that it can carry on business with a weekly supply of 300,000 live chickens, the Applicant has failed to establish that it is substantially affected in its business.

[12] The Respondents further contend that the Applicant has failed to provide sufficient evidence that it is unable to obtain ("*se procurer*") adequate supplies of live chickens anywhere in a market on usual trade terms. They say that the Applicant has not made any attempt to replace the Respondents' supply whereas the evidence indicates that other sources of supply are available in the market on usual trade terms. They stress that the definition of "trade terms" set out in subsection 75(3) of the Act explicitly excludes price. So even if the Applicant's assertion that it would have to pay higher premiums to replace the Respondents' live chickens proves to be true, the Applicant still failed to establish, even on a *prima facie* basis, that it is unable to obtain adequate supplies on usual trade terms.

[13] The Respondent Westco further submits that the Applicant's inability to obtain adequate supplies of live chickens is in no way linked to "insufficient competition among suppliers in the market" as is required by paragraph 75(1)(b). Rather, it is the result of Westco's legitimate business decision to add chicken processing to its business plan. The Respondents also contend in their written submissions that there is no evidence indicating that there is insufficient competition among chicken producers in the market.

[14] Finally, the Respondent Westco refers to the Tribunal's decision in *Quinlan's*, above, to assert that live chickens are not in ample supply under paragraph 75(1)(d). Westco asserts that as of July 20, 2008, Westco's live chickens are to be processed in Quebec pursuant to its partnership agreement with Olymel. As Westco has no excess supply given the national supply management scheme in place, it should be free to select the customers to whom it will sell the product. Since Westco has chosen that customer, the Tribunal cannot conclude that the product in question is in ample supply.

[15] In *RJR-MacDonald*, above, the Court described the consideration of a serious issue to be tried as follows (at pp. 337-338):

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. [...] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the

opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[16] The Tribunal has applied this test in respect of a private application pursuant to section 104 of the Act. An interim supply order was granted by the Tribunal in *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28. In describing the standard for granting such an order, Madam Justice Simpson stated at paragraph 24 of her reasons:

One of the principles applied by Superior Courts in dealing with interim orders requires the Judge to have regard for all the circumstances of the case, including its practical and statutory context. In that regard, it seems wrong to conclude that a private applicant, who has just been granted leave on the basis of the fact that the Tribunal "could" find the facts necessary to prove a section 75 case, must show a strong *prima facie* case in a subsequent motion for an interim order. In my view, the demonstration of a serious issue (in the sense that it is not frivolous or vexatious) is most consistent with the statutory scheme which sets a relatively low threshold for leave. It is also the case that, in the context of an application under section 75, a mandatory order is not an extraordinary remedy. Rather, it is what the section is all about and it seems to me that, in this context, orders which preserve or resume supply should not be viewed as exceptional.

[17] I have carefully reviewed the Respondents' submissions relating to the factors to be met in order to obtain relief under section 75 of the Act. Those arguments raise complex questions of fact and law which may require assessing the credibility of evidence and considering expert evidence. Such questions are ill suited for determination in an application for interim relief where a prolonged examination of the merits is generally neither necessary nor desirable. Having reviewed the evidence and arguments of the parties, I am of the opinion that the application is neither vexatious nor frivolous. I therefore conclude, in view of the principles set out in *RJR-MacDonald* and based on the record before me, that the Applicant has raised serious issues to be tried on the merits of its case under section 75 of the Act. This is not to suggest that I am in any way satisfied that the case has been met under section 75. I remind the reader of the low threshold that must be met at this stage.

#### **B. Irreparable Harm**

[18] I will now turn to the second part of the test, the question of irreparable harm.

[19] The Applicant asserts that the St-François Plant is the Applicant's only business and that it would suffer irreparable harm if an interim order were refused. The Applicant's affiant, Mr. Anthony Tavares, formerly the Chief Executive Officer of Maple Lodge Holding Corporation, the Applicant's parent company, attests that the Applicant will suffer the following irreparable harm should 46% of its supply of live chickens be lost:

1. a massive loss of revenue estimated at \$20,000,000 and profits estimated at \$3,336,000 over the six month period from July, 2008, to the end of January, 2009,

would result from the loss of supply by Westco only. The Applicant contends that this loss of profits represents over 50% of its annual profits which will not be recoverable.

2. an immediate inability to fulfill the needs of its customers which would cause immediate damage to the relationships the Applicant has built with its customers over the last 18 years. More specifically, this would result in: a loss of confidence, a loss of goodwill, a potential loss of market share, and a potential loss of customers.

3. an immediate impact on the viability of the St-François Plant. The Applicant asserts that it has developed long term supply relationships with New Brunswick producers which allowed it to develop stable and profitable markets for its products. It contends that it depends on live chickens supplied by the Respondents without which the St-Francois Plant will only be able to operate at 40% capacity or just over ¼ of one shift per day. The Applicant claims that the majority of the 340 jobs at the plant will be lost if supply from the Respondents is cut off, and the viability of the whole plant would be severely compromised.

[20] Mr. Tavares' affidavit further attests that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable." However, on cross-examination, he stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by and 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." He also stated that after the Respondents cut off supply, the Applicant will have a supply of 294 450 live chickens.

[21] During the hearing, counsel for the Applicant confirmed that the Applicant had secured, since the filing of its initial affidavit, an additional 25,000 live chickens to be supplied from Nova Scotia. This volume would apparently be available to the Applicant sometime early this fall. The only dispute between the parties relating to the volume concerns the number of live chickens to be supplied by the Respondent Dynaco after September 15, 2008. The Respondent Westco contends that an additional 3 679 chickens would continue to be supplied to the Applicant by Dynaco via Slipp Farm whereas counsel for the Applicant denied that allegation.

[22] The Respondents contend that the Applicant adduced no clear and tangible evidence that the Respondents' refusals will result in irreparable harm to the Applicant before a hearing on the merits. The Respondents assert that irreparable harm, if any, which would result from a loss of supply, can only be that harm attributable to a loss of supply which would cause the Applicant to fall below its viability threshold. In the Respondents' submissions, the Applicant's own evidence suggests that threshold to be at 300,000 live chickens per week, a threshold which is not in jeopardy in the circumstances of this case. The Respondents consequently argue there can be no irreparable harm. The Respondents further maintain that the Tribunal would not have jurisdiction to make an order beyond the Applicant's viability threshold since it could not then be said that the Applicant is "substantially affected in his business", a prerequisite of paragraph 75(1)(a) of the Act.

[23] The Respondents stress that the Applicant has operated the St-François Plant for 15 years with less than 350,000 live chickens per week and that it is only recently that the Applicant's

weekly supply has increased. The Respondents also contend there are other sources of supply of live chickens in the market on usual trade terms and that the Applicant has failed to make any efforts to access this supply.

[24] The Applicant's affiant, Mr. Tavares, in his supplementary affidavit, affirms that since chicken supply is controlled in Canada by the supply management system, alternative sources of supply could only be obtained with great difficulty and only if the Applicant paid "extortionate" prices and diverted existing supplies from other processors. He further attests that it is difficult to transport live chickens from Quebec or Ontario and that the Applicant has already had problems in the winter with respect to the transportation of live chickens from Nova Scotia including attrition rates in transit and concerns raised under laws governing livestock handling.

[25] The Supreme Court of Canada held in *RJR-MacDonald*, above, at p. 341, that "irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which either cannot be quantified in monetary terms or which cannot be cured. It would include instances where one party will be put out of business by the court's decision.

[26] Normally, proof of irreparable harm cannot be inferred and evidence establishing irreparable harm must be clear and not speculative. However, here, there can be no direct evidence of harm because the Respondents are still supplying the Applicant with live chickens. The evidence relating to loss resulting in irreparable harm must, of necessity, be inferred. The relief sought in this application is akin to a *quia timet* injunction. The jurisprudence teaches that an applicant seeking a *quia timet* injunction may establish that it will suffer irreparable harm through inferences that can reasonably be drawn from the evidence. See: *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.* (1994), 83 F.T.R. 161 at paras. 117-120. While the drawing of inferences that logically follow from the evidence is permitted in such circumstances, there must nevertheless be clear evidence showing how such harm will occur and why it will be irreparable. In the absence of such evidence, there is nothing on which inferences of irreparable harm can reasonably and logically be based. See: *Bayer HealthCare AG and Bayer Inc. v. Sandoz Canada Inc.*, 2007 FC 352 at para. 35.

[27] The Respondents Dynaco and Acadia contend that because of the small number of live chickens they respectively supply to the Applicant, there can be no irreparable harm as a result of their supplies being cut off. I continue to be of the view that there is sufficient evidence of ties between the Respondents which allows me to consider, for the purposes of this application for interim relief, the Respondents' supply collectively.

[28] I reject the Respondents' argument that irreparable harm, if any, can only be sustained for losses which result from a reduction of supply below the Applicant's self declared viability level. The Applicant's evidence is that it can be viable at 350,000 live chickens per week and in September 2008, it will have almost this number of live chickens. However, viability is not the starting point for an analysis of irreparable harm. In my view, companies can suffer irreparable harm long before they hit the point where they are no longer viable.

[29] The most compelling evidence adduced by the Applicant about irreparable harm is the evidence regarding the loss of profits that would be suffered by the Applicant should supply



from the Respondents be terminated. Mr. Tavares, the Applicant's affiant, attests that "each 100,000 chickens represent approximately 150,000 kg of saleable product with a selling value of approximately \$3/kg or \$450,000." The profit on this volume would be approximately 50¢/kg or \$75,000. Accordingly, the removal of "Westco's 186,230 birds alone would cause revenue loss of over \$830,000 per week, and loss of profits of more than \$139,000 per week." Mr. Tavares states that "[b]ecause of the high level of fixed costs, loss of the Westco birds alone would reduce profits by about 50% on an annualized basis." This evidence is not contested by the Respondents. It is clear evidence showing how the harm alleged will occur. It is irreparable because the Tribunal has no authority to award damages should the Applicant meet with success on the underlying application. Further, the Respondents have not provided an undertaking to compensate for the stated losses, should they not be successful on the application.

[30] The Applicant also asserts irreparable harm concerning the damage to its customer base over the past 18 years, including loss of confidence and goodwill and potential loss of market share and customers. Given the significant volume of live chickens involved, 46% of the Applicant's total current supply, the impact on the Applicant of such a disruption of supply is, in my view, overwhelming. I am prepared to infer that irreparable harm can reasonably and logically result to the Applicant's customer base in such circumstances. This inference can be drawn because a reduction in supply of this magnitude necessarily implies that the Applicant will be unable to continue to provide its customers with the level of service it currently provides, since it will simply not have sufficient supply of live chickens to do so. The Applicant may be able to replace some of its live chickens from other suppliers, essentially from outside New Brunswick, as recent experience indicates. However, I am prepared to infer, based on the record, that such efforts are unlikely to sufficiently address the very significant deficiency in supply in the short term.

[31] The Applicant has failed to adduce any direct evidence that it would default in its contractual commitments to its customers. There is only the affidavit evidence of Mr. Tavares who asserts that "[i]nterruption of supply would create an immediate inability to fulfill the needs of Nadeau's customers." There is, nevertheless, sufficient evidence on the record upon which the inference of irreparable harm to the Applicant's customer base can reasonably and logically be based, and I so find.

[32] It can also be inferred, based on the record before me, that a reduction of supply of this magnitude will have a significant impact on the operational efficiencies of the St-Francois Plant. Reducing operations to ¾ of one shift per day cannot be as efficient or as profitable as operating at one or two shifts per day, since the fixed overhead costs remain the same.

[33] Finally, the record shows that the Applicant has not, historically, relied on producers from outside New Brunswick. The current supply from Nova Scotia and Prince Edward Island is recent and results from a shortage of processing capacity in Nova Scotia, which apparently, is a short term situation. Also, there is evidence of a recent contract for 25,000 live chickens to be supplied from Nova Scotia. Further, the evidence does clearly establish that there is a benefit to the Applicant in accessing its supply of live chickens from its nearest suppliers. This is not an insignificant component of the cost of doing business, particularly given the recent increases in fuel costs. There is also evidence to establish other difficulties associated with transporting live

chickens long distances, such as the Canadian climate, the condition of the birds upon arrival and transportation requirements. On the evidence, I can infer that live chickens supplied from Nova Scotia or from more distant suppliers will generally cost more to the Applicant than those obtained through its traditional New Brunswick supply.

[34] The Respondents argue that the Applicant has a duty to mitigate by purchasing live chickens from other producers. This would necessarily entail accessing supply outside New Brunswick since the Respondents collectively produce almost 75 % of New Brunswick's total quota. There would simply be insufficient supply left in New Brunswick to replace the Applicant's lost volume. Additionally, this would involve extra costs for the Applicant.

[35] The Applicant relies on *Quinlan's*, above, in support of its contention it has no duty to mitigate. In *Quinlan's*, the Tribunal had this to say at paragraph 25:

In my view, when bringing a case under section 75 of the Act, there is no duty to mitigate damages by entering into supply arrangements to replace the items at issue in the case. *Quinlan's* was a H-D [Harley-Davidson] dealer and, if it can prove its case, it may continue to be a H-D dealer. It is unrealistic to suggest that, pending a final ruling on its access to H-D products, it is required to make supply agreements with other motorcycle manufacturers. It may choose to do so, but to require it to do so is contrary to the scheme of section 75.

[36] In my view *Quinlan's* does not stand for the general proposition that there is no duty to mitigate in refusal to deal cases. The case can be distinguished on the facts and finds no application here. In *Quinlan's*, the Tribunal was saying that on an interim basis no duty to mitigate is present when mitigation involves a fundamental change to the nature of an applicant's business. In *Quinlan's*, the Applicant was an exclusive Harley-Davidson dealer. It could not be expected to mitigate the loss of supply of Harley-Davidson motorcycles by attempting to secure supply from another manufacturer.

[37] Here the Applicant is dealing in a commodity, live chickens. On the evidence, there is nothing exclusive about the live chickens the Applicant requires in order to operate. Save for the complications and additional costs associated with the transportation of live chickens from longer distances, which may be significant, a chicken is a chicken. 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.

[38] In this case, the Applicant's failure to mitigate is of little or no consequence. This is so because of the magnitude of the lost supply. On the record before me, it can be inferred that even if the Applicant had been diligent in its efforts to mitigate, such efforts could not have resulted in the replacement of the lost supply of live chickens in the short or medium term.

[39] In this case, the volume of live chickens at issue is very significant. It represents 46% of the Applicant's current supply, most of which is from New Brunswick. The impact of the loss of

such a volume would be overwhelming to any processor. I am therefore satisfied on the record before me and for the above reasons, that interruption of the stated supply from the Respondents constitutes irreparable harm to the Applicant for the purposes of this application.

### C. Balance of Inconvenience

[40] Finally, I turn to the last part of the test: balance of inconvenience.

[41] The Applicant asserts that the inconvenience it will suffer, should interim relief be withheld, is more substantial than the inconvenience the Respondents will suffer if interim relief is granted. It contends that it will suffer a massive loss of revenue and profits, that it will have to lay off employees, and that it will lose customers, confidence, and goodwill.

[42] The Respondent Westco asserts that the balance of inconvenience favours Westco. Westco's affiant attests that Westco's profits from the sale of its live chickens to Olymel, pursuant to the partnership agreement, would be superior to those resulting from its dealings with the Applicant. According to Westco's evidence, Olymel will also share with Westco a percentage of the profits generated by the processing of the live chickens. Westco further submits that an interim supply order will delay the implementation of its decision to integrate chicken processing in its business plan which will also lead to delay in the construction of the new processing facility.

[43] All three Respondents contend in their submissions that an interim order by the Tribunal would limit their freedom to choose to whom to sell their live chickens.

[44] In the balance of inconvenience test, the Tribunal must determine which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. See: *RJR-MacDonald*, above, at p. 342.

[45] I am of the view that the balance of inconvenience in this case weighs in favour of the Applicant and is not offset by the harm that the Respondents will suffer if relief is granted. The evidence adduced by the Applicant establishes that without the Respondents' live chickens, there will be a significant loss of profits, a significant impact on the operational efficiencies of the Applicant's St-François Plant, and a significant harm to the Applicant's customer base. I have accepted, for the purposes of this application, that irreparable harm on this basis has been established.

[46] The Respondent Westco has tendered evidence of the quantum of financial losses it will allegedly incur should the order for interim relief be granted. In the circumstances of this case, the inconvenience associated with harm to the Applicant's existing enterprise outweighs the inconvenience that would flow from delaying the implementation of the Respondent Westco's business plan or partnership agreement. In the Applicant's case, what is at stake is more than a loss of profits, but also a significant impact on its customer base and on the operational efficiencies of its existing plant, while the Respondent Westco's losses are limited to reduced profits in the interim.

[47] Further, the evidence in respect of the major project contemplated by the partnership, namely the new processing plant in New Brunswick, is uncertain as the project has not yet advanced to the point where evidence regarding, for example, the location of the new processing facility and the commencement of construction, is readily available. The Respondent Westco has not adduced its partnership agreement with Olymel or any other agreement regarding the partnership or the construction of the new processing plant.

[48] In the circumstances of this case, I am satisfied that the inconvenience to the Applicant, should interim relief be withheld, outweighs the inconvenience the Respondents will suffer if interim relief is granted.

**D. Tribunal's Discretion to Issue Interim Relief**

[49] The Respondent Westco contends that the Tribunal should refuse to exercise its discretion to grant an order. An interim order would, according to the Respondents, be contrary to the spirit of the *Competition Act* because it would guarantee the Applicant's dominant position in the New Brunswick chicken processing market. The Respondents should be able to select the customers to whom they wish to sell their live chickens.

[50] The Respondents also refer to a bill recently passed by the New Brunswick legislature; Bill 81, *An Act to Amend the Natural Products Act* (2d Sess., 56th Leg., New Brunswick, 2008) which gives the New Brunswick Minister of Agriculture the power to designate the plants where chickens may be processed. The Respondents indicate that the New Brunswick legislature has therefore exercised its constitutional power to address the situation at issue and that the Tribunal, in such circumstances, should refuse to exercise its discretion to grant interim relief. The Respondents do not explicitly assert that the Tribunal does not have jurisdiction to issue the relief sought, they merely contend that out of "caution", the Tribunal should "read down" the powers it has pursuant to section 104 ("il est prudent et constitutionnellement préférable de donner, aux importants pouvoirs que la loi [...] accorde [au Tribunal] en vertu de l'article 104, une interprétation atténuée de manière à éviter un éventuel conflit constitutionnel". See : Hearing Transcript, p. 185).

[51] Subsection 104(1) of the Act provides that the Tribunal "may" issue such interim order as it considers appropriate. Such an order shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

[52] I am not convinced that the Tribunal should refuse to exercise its discretion to grant an interim order by reason of the passage of Bill 81. The debates surrounding Bill 81 indicate that the Minister of Agriculture was aware of the proceedings before the Competition Tribunal and that the power set out in Bill 81 is meant to constitute a temporary measure. Further, the Bill has not yet been proclaimed in force and, in my view, the alleged conflicts, constitutional or otherwise, are speculative at this stage.

[53] The Tribunal's power to grant interim relief pursuant to section 104 of the Act in no way conflicts with the spirit of the *Competition Act*. The provision provides for a temporary measure pending a final disposition of the matter on its merits.

#### IV. CONCLUSION

[54] In the circumstances, I am satisfied that the Applicant has satisfied the tripartite conjunctive test for the granting of an interlocutory injunction.

[55] In consequence, an order granting the interim relief sought will be granted.

#### FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[56] The Application for Interim Relief is granted.

[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.

[59] Absent agreement between the Respondents, the reductions in supply contemplated above shall be prorated on the basis of the current level of supply of each Respondent to the Applicant.

[60] The Applicant shall have its costs on the application.

DATED at Ottawa, this 26<sup>th</sup> day of June 2008.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Edmond P. Blanchard

**APPEARANCES:****For the applicant:**

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

Leah Price  
Andrea McCrae

**For the respondents:**

Groupe Westco Inc.

Éric C. Lefebvre  
Denis Gascon  
Martha A. Healey

Groupe Dynaco, Coopérative Agroalimentaire

Paul Routhier  
Olivier Tousignant

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

Pierre Beaudoin  
Valérie Belle-Isle

This is Exhibit B referred to in the

affidavit of Yves Landry

sworn before me, this 4th

day of November 2008

Chantale B. Boutôt  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTÔT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 2008

**Pursuant to the Confidentiality Order dated June 26, 2008, this exhibit will only appear in the Confidential Level B version.**



This is Exhibit " C " referred to in the  
affidavit of Yves Landry  
sworn before me, this 4<sup>th</sup>

day November 20 08  
*Chantale B. Boutôt*  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTÔT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 20 08.....

**A-87** 2008-09-14 2008-11-08

		Heads	Ordered	(Short) or Over
2008-09-14	Week 1	214,728	240,100	-25,372
2008-09-21	Week 2	191,994	240,100	-48,106
2008-09-28	Week 3	248,480	240,100	8,380
2008-10-05	Week 4	215,340	240,100	-24,760
2008-10-12	Week 5	223,512	240,100	-16,588
2008-10-19	Week 6	207,554	240,100	-32,546
2008-10-26	Week 7	207,004	240,100	-33,096
2008-11-02	Week 8	165,500	240,100	-74,600
		1,674,112	1,920,800	-246,688

Actual numbers  
scheduled numbers

Ordered 271,350 birds - 25,000 - 6,250 = 240,100

**HEADS**

Westco	
1	116,838
2	142,740
3	118,260
4	199,830
5	105,870
6	163,934
7	107,160
8	58,700
	<b>1,011,332</b>

"

This is Exhibit "D" referred to in the  
affidavit of Yves Landry  
sworn before me, this 4th  
day of November 2008  
Chantale B. Boutot  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTÔT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 2008.....



Fogler,  
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October 28, 2008

VIA E-MAIL ONLY

Reply To: Leah Price  
Direct Dial: 416.365.3716  
E-mail: lprice@foglers.com  
Our File No. 07/5264

Éric Lefebvre  
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#1100- 1981 McGill College Avenue  
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Olivier Tousignant  
Joli-Coeur, Lacasse, Geoffrion,  
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Pierre Beaudoin  
Lavery, De Billy  
Barristers and Solicitors  
#500-925 Grande Allée Ouest  
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Dear Counsel:

**Re: Nadeau Poultry Farm Ltd.**

We have been advised that the Respondents have again last week delivered far fewer chickens than the number required under the Interim Order. Attached is a chart showing actual deliveries up to and including A-87 Week 6, showing the shortfalls.

As well, despite request, the Respondents have failed to provide an updated schedule showing numbers compliant with the Interim Order. Attached in this regard is Mr. Landry's email to your clients' designated representatives, to which our client has received no response whatsoever.

As matters currently stand, therefore, it appears that the Respondents have no intention of reinstating compliance with the Interim Order.

In view of Justice Blanchard's very clear Direction issued on October 16, 2008, we are driven to conclude that the continuing breach is deliberate and contumelious.

Accordingly, if we do not receive confirmation within 24 hours that compliance will be immediately reinstated, we will be forced to seek a show cause order pursuant to section 8 of the *Competition Tribunal Act*.



This letter is directed to counsel for all the Respondents, because the Interim Order was directed at all the Respondents. Any failure to deliver an aggregate total of 240,100 chickens per week is therefore a breach by all the Respondents. As far as we are concerned, it is the Respondents' collective obligation to ensure that Nadeau receives the required number of chickens, and responsibility for any shortfall lies on all the Respondents, both collectively and as individual entities.

Yours truly,

**FOGLER, RUBINOFF LLP**

A handwritten signature in black ink, appearing to read 'Leah Price', written over a circular stamp or mark.

Leah Price

LP/ma

cc *Ron Folkes*  
*Client*  
*Andrea McCrae, Fogler, Rubinoff LLP*  
*Joshua Freeman, Fogler, Rubinoff LLP*

**A-87** 2008-09-14 2008-11-08

		Heads	Ordered	(Short) or Over
2008-09-14	Week 1	214,728	240,100	-25,372
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2008-09-28	Week 3	248,480	240,100	8,380
2008-10-05	Week 4	216,340	240,100	-24,760
2008-10-12	Week 5	223,512	240,100	-16,588
2008-10-19	Week 6	207,554	240,100	-32,546
2008-10-26	Week 7	223,400	240,100	-16,700
2008-11-02	Week 8	185,500	240,100	-74,600
		1,690,508	1,920,800	-230,292

Actual numbers  
scheduled numbers

---

**From:** Yves Landry [mailto:yves.landry@nadeaupoultry.com]  
**Sent:** Friday, October 17, 2008 12:03 PM  
**To:** (patrick.noel@dynaco.coop); (westco\_gus@hotmail.com)  
**Subject:** Cédule révisée A-87

Bonjour Daniel et Patrick,

Pourriez-vous S.V.P. me faire parvenir une cédule révisée nous démontrant que nous recevrons de Dynaco, Westco et Acadia 240,100 poulets par semaine pour la période A-87.

Merci,  
Yves

17/10/2008

This is Exhibit "E" referred to in the  
affidavit of Yves Landry  
sworn before me, this 4th  
day of November, 2008  
Chantale B. Boutôt  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTÔT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 2008.....



PUBLIC

**OGILVY  
RENAULT**

LP/SENCAL, srl

Direct Dial: (514) 847-4891  
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SENT BY EMAIL

Montréal, October 29, 2008

Mr. Patrice Lavoie  
Competition Tribunal  
Thomas D'Arcy McGee Building  
#600-90 Sparks Street  
Ottawa, ON K1P 5B4

Dear Mr. Lavoie:

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

We are writing further to Justice Blanchard's direction of October 16, 2008 ("Direction") and to the Order of June 26, 2008, allowing the Applicant's application for interim relief under section 104 of the *Competition Act* (the "Interim Supply Order").

We also received yesterday further communication from counsel to the Applicant, attached hereto as Attachment A. In view of the content of that letter, Westco seeks to confirm that its interpretation and application of the Interim Supply Order is consistent with that Order. If Westco's interpretation is not maintained by the Tribunal, Westco seeks further direction as to the precise nature of its supply obligations in this interim period. Westco does not seek, at this point, to vary the Interim Supply Order, merely to ensure the application of that Order is consistent with the facts and assumptions that led to its terms.

**I Background and Source of Reference Figure of 271,350 Birds per week**

As discussed in greater detail below, 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.

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

Avocats, agents de brevets  
et agents de marques de commerce

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DOCSMTL: 3037123\6

**OGILVY  
RENAULT**  
BP/SEACEL, s.c.

Page 2

[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]

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). The number of 271,350 birds referenced in the Interim Supply Order to reflect this current level of supply was a fictional 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.

Nadeau's representative for the hearing of Nadeau's application for interim relief, Mr. 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)

(Tavares Affidavit, March 14, 2008, paragraph 28)



The 2kgs/bird assumption was also explained by Mr. Soucy during the interim 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)

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

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.

The production quotas allocated to Westco and to other producers are established in terms of kilograms and not in number of chickens, and the approximate figure of 186,230 birds used to reflect the "current level of weekly supply" was thus only arrived at on the basis of a 2kgs/bird assumption made by Mr. Tavares. Indeed, the levels of Westco's actual supply to Nadeau vary considerably and have never reached, in any given week, the exact figure of 186,230 chickens. Over the last year, Westco has actually supplied a weekly average of 2kgs/birds only twice (both times in January, 2008).

**II Current Supply of Birds to Nadeau from Westco**

As the attached charts confirm, if the numbers of birds that have been supplied by Westco are expressed in the same manner and using the same assumptions made for the purposes of the Interim Supply Order, Westco has met or exceeded its supply obligation, taking into account the replacement birds obtained by Nadeau which have, to date, been applied against Westco's supply obligation.

**Period A-86**

PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-86	1	Jul. 20 2008	186 488	395 046 kg	2,12 kg	387 514 kg
	2	Jul. 27 2008	151 106	298 615 kg	1,98 kg	295 240 kg
	3	Aug. 3 2008	109 840	241 746 kg	2,20 kg	238 630 kg
	4	Aug. 10 2008	120 648	261 071 kg	2,16 kg	254 688 kg
	5	Aug. 17 2008	248 200	536 863 kg	2,16 kg	529 416 kg
	6	Aug. 24 2008	117 362	253 201 kg	2,16 kg	250 670 kg
	7	Aug. 31 2008	207 230	472 800 kg	2,28 kg	465 912 kg
	8	Sept. 7 2008	122 100	271 021 kg	2,22 kg	266 284 kg
<b>Total (period)</b>			<b>1 262 972</b>	<b>2 730 362 kg</b>	<b>2,16 kg</b>	<b>2 688 354 kg</b>
<b>Weekly average</b>			<b>157 872</b>	<b>341 295 kg</b>		
<b>Total production allowed by the provincial board (live weight)</b>						<b>2 929 168 kg</b>

For the period A-86, Westco's supply obligation was 161,230 birds at an assumed average weight of 2kgs/bird (that is, 186,230 less the replacement supply of 25,000 obtained by Nadeau). This translates into 2,579,680 kgs over the period. Hence, the totality of Westco's weekly production, except for said 25,000 birds has been supplied to Nadeau during period A-86. The "paid weight" column refers to the weight declared by Nadeau to the provincial authorities and used by Nadeau to pay Westco on a per kg basis.

As indicated above, Westco supplied a total of 2,730,362 kgs in live weight to Nadeau which, if expressed using the 2kgs/bird assumption, means that Westco effectively supplied 1,365,181 chickens (an average of 170,648 chickens per week for the period). Said otherwise, over the period A-86, Nadeau received a larger volume of chicken than it was entitled to under the Interim Supply Order.

**Period A-87**

PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-87	1	Sept. 14 2008	116 838	281 429 kg	2,24 kg	257 985 kg
	2	Sept. 21 2008	142 740	317 742 kg	2,23 kg	314 673 kg
	3	Sept. 28 2008	116 260	250 640 kg	2,16 kg	246 908 kg
	4	Oct. 5 2008	199 830	444 936 kg	2,23 kg	440 214 kg
	5	Oct. 12 2008	105 870	239 791 kg	2,26 kg	235 913 kg
	6	Oct. 19 2008	-	- kg	- kg	- kg
	7	Oct. 28 2008	-	- kg	- kg	- kg
	8	Nov. 2 2008	-	- kg	- kg	- kg
<b>Total (period)</b>			<b>681 538</b>	<b>1 514 537 kg</b>	<b>2,22 kg</b>	<b>1 495 673 kg</b>
<b>Weekly average</b>			<b>136 308</b>	<b>302 907 kg</b>		
<b>Total production allowed by the provincial board (live weight)</b>						<b>2 796 359 kg</b>

For the period A-87, with the additional 6,250 birds obtained by Nadeau and again applied against Westco's supply obligation, the required supply obligation of Westco was 154,980 birds at an assumed average weight of 2kgs/bird (that is, 186,230 birds less the replacement supply of 31,250 birds obtained by Nadeau). This translates into 2,479,680 kgs over the period, or 309,960 kgs. per week for the period A-87.

For the period A-87, to date, Westco has supplied 1,514,537 kgs in live weight to Nadeau in the first 5 weeks of the period which, if expressed using the 2kg /bird assumption, means that Westco has supplied 757,269 chickens for the five weeks beginning September 14, 2008 (an average of 151,454 chickens per week). For the reasons explained hereunder, the total delivery for period A-87 (all 8 weeks) will confirm that Westco in fact will, again, meet or exceed the supply level of 154,980 heads of chicken for the period, when expressed using a 2kgs/bird assumption.

Therefore, over the periods A-86 and A-87, Nadeau will have received a volume of chicken at least equal to the supply level set in the Interim Supply Order.

As the charts below will show, the levels of actual supply to Nadeau have varied considerably over time. We have set out below charts showing the level of actual supply from Westco to Nadeau over the last year.

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The level of actual production by Westco and sales to Nadeau vary from a low of 159,401 kgs (period A-82, Week 8) to a high of 554,875 kgs (period A85, Week 6), which translate in an actual number of 86,255 chickens (period A-82, Week 8) to a high of 254,510 chickens (period A85, Week 6). These numbers vary depending on the quota levels (which are allocated by period), on the average weight of the birds delivered and on the levels of production (i.e. whether all barns are in operation for the week, etc). It should be noted that, prior to period A-86 and the consideration of replacement chicken, all of Westco's production was shipped and delivered to Nadeau.

PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-79	1	06-24-2007	207 494	409 965 kg	1.98 kg	404 486 kg
	2	07-01-2007	186 464	395 674 kg	2.12 kg	391 043 kg
	3	07-08-2007	173 814	352 288 kg	2.03 kg	349 508 kg
	4	07-15-2007	154 354	320 601 kg	2.08 kg	317 587 kg
	5	07-22-2007	175 044	339 688 kg	1.94 kg	336 621 kg
	6	07-29-2007	201 076	419 864 kg	2.09 kg	407 443 kg
	7	08-05-2007	138 952	274 624 kg	1.98 kg	271 703 kg
	8	08-12-2007	179 348	349 884 kg	1.95 kg	345 970 kg
Total (period)			1 416 548	2 862 598 kg	2.02 kg	2 824 361 kg
Weekly average			177 069	357 825 kg		
Total production allowed by the provincial board (live weight)						2 972 668 kg

PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-80	1	08-19-2007	202 674	420 973 kg	2.08 kg	415 917 kg
	2	08-26-2007	176 638	359 236 kg	2.03 kg	355 136 kg
	3	09-02-2007	173 956	364 063 kg	2.09 kg	360 589 kg
	4	09-09-2007	166 522	332 019 kg	1.98 kg	329 519 kg
	5	09-16-2007	180 024	371 363 kg	2.06 kg	367 004 kg
	6	09-23-2007	183 964	391 757 kg	2.13 kg	388 607 kg
	7	09-30-2007	180 128	330 987 kg	2.07 kg	327 234 kg
	8	09-07-2007	199 272	426 038 kg	2.14 kg	420 645 kg
Total (period)			1 443 178	2 996 436 kg	2.08 kg	2 962 651 kg
Weekly average			180 397	374 554 kg		
Total production allowed by the provincial board (live weight)						2 914 073 kg

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PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-81	1	10-14-2007	189 748	385 286 kg	2,03 kg	381 152 kg
	2	10-21-2007	167 974	352 694 kg	2,10 kg	348 003 kg
	3	10-28-2007	179 256	370 074 kg	2,08 kg	361 633 kg
	4	11-04-2007	182 214	379 826 kg	2,08 kg	375 237 kg
	5	11-11-2007	220 899	438 460 kg	1,98 kg	432 435 kg
	6	11-18-2007	129 964	244 111 kg	1,88 kg	241 746 kg
	7	11-25-2007	210 672	435 639 kg	2,07 kg	431 143 kg
	8	12-02-2007	152 544	306 135 kg	2,01 kg	301 655 kg
Total (period)			1 433 271	2 912 125 kg	2,03 kg	2 873 002 kg
Weekly average			179 159	364 016 kg		
Total production allowed by the provincial board (live weight)						2 968 760 kg
PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-82	1	12-09-2007	158 190	319 917 kg	2,02 kg	314 566 kg
	2	12-16-2007	216 819	428 454 kg	1,98 kg	423 578 kg
	3	12-23-2007	117 022	218 327 kg	1,87 kg	216 086 kg
	4	12-30-2007	189 242	396 356 kg	2,09 kg	391 783 kg
	5	01-06-2008	222 034	443 448 kg	2,00 kg	439 074 kg
	6	01-13-2008	188 468	392 447 kg	2,08 kg	387 167 kg
	7	01-20-2008	153 215	305 980 kg	2,00 kg	301 625 kg
	8	01-27-2008	86 255	159 461 kg	1,85 kg	158 194 kg
Total (period)			1 331 245	2 664 391 kg	2,00 kg	2 632 073 kg
Weekly average			166 406	333 049 kg		
Total production allowed by the provincial board (live weight)						2 670 611 kg

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PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-83	1	02-03-2008	158 675	335 779 kg	2,12 kg	332 397 kg
	2	02-10-2008	176 290	359 571 kg	2,04 kg	357 401 kg
	3	02-17-2008	177 435	378 342 kg	2,13 kg	373 583 kg
	4	02-24-2008	238 739	488 189 kg	2,04 kg	483 088 kg
	5	03-02-2008	182 590	383 718 kg	2,10 kg	379 378 kg
	6	03-09-2008	203 309	413 330 kg	2,03 kg	409 089 kg
	7	03-16-2008	143 408	303 538 kg	2,12 kg	300 844 kg
	8	03-23-2008	247 924	519 672 kg	2,10 kg	513 120 kg
Total (period)			1 528 370	3 182 140 kg	2,08 kg	3 148 898 kg
Weekly average			191 046	397 767 kg		
Total production allowed by the provincial board (live weight)						2 979 968 kg

PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-84	1	03-30-2008	177 582	388 776 kg	2,08 kg	384 993 kg
	2	04-06-2008	193 507	404 050 kg	2,09 kg	399 258 kg
	3	04-13-2008	154 184	336 449 kg	2,18 kg	331 579 kg
	4	04-20-2008	221 135	456 187 kg	2,06 kg	450 783 kg
	5	04-27-2008	164 909	339 745 kg	2,06 kg	335 358 kg
	6	05-04-2008	203 307	419 589 kg	2,06 kg	413 459 kg
	7	05-11-2008	223 708	468 613 kg	2,09 kg	460 533 kg
	8	05-18-2008	140 387	305 190 kg	2,17 kg	299 957 kg
Total (period)			1 478 699	3 098 581 kg	2,10 kg	3 055 920 kg
Weekly average			184 837	387 323 kg		
Total production allowed by the provincial board (live weight)						3 051 954 kg



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PERIOD	WEEK	BEGINNING DATE	HEADS DELIVERED	WEIGHT DELIVERED	AVERAGE WEIGHT	PAID WEIGHT
A-85	1	06-25-2008	220 900	457 792 kg	2,07 kg	451 514 kg
	2	06-01-2008	185 852	385 808 kg	2,08 kg	381 524 kg
	3	06-08-2008	198 818	423 581 kg	2,13 kg	418 734 kg
	4	06-15-2008	181 746	381 589 kg	2,10 kg	378 045 kg
	5	06-22-2008	163 036	335 229 kg	2,06 kg	330 789 kg
	6	06-29-2008	254 510	554 875 kg	2,18 kg	548 716 kg
	7	07-06-2008	149 962	304 208 kg	2,03 kg	298 919 kg
	8	07-13-2008	185 202	406 125 kg	2,19 kg	387 495 kg
<b>Total (period)</b>			<b>1 540 026</b>	<b>3 249 205 kg</b>	<b>2,11 kg</b>	<b>3 205 738 kg</b>
<b>Weekly average</b>			<b>192 503</b>	<b>406 151 kg</b>		
<b>Total production allowed by the provincial board (live weight)</b>						<b>3 027 776 kg</b>

This constant weekly variation further demonstrates that Westco cannot be considered to be in breach of its obligation to deliver a certain weekly quantity of chickens before the end of a specific period which, in the case of period A-87 is November 8, 2008.

When Westco's production numbers of chickens are expressed using the rationale set out above – which is the only interpretation consistent with the terms and objectives of the Interim Supply Order (that is, to maintain the supply at the levels previously provided to Nadeau and subtracting the replacement chicken) –, Westco meets, and for the period A-86 in fact exceeded, the terms and intent of the Interim Supply Order.

We ask that the Tribunal issue an order confirming Westco's approach to the continued supply of chicken.

### III Current Supply to Nadeau from Westco and Impact of Quota Reductions in A-86 and A-87

The Interim Supply Order was issued on June 26, 2008 during period A-85 (period ending July 19, 2008) at which time the quota allocated to Westco was 3,027,776 kgs for the period. Westco's quota was reduced for periods A-86 and A-87 by a total of 7.8% (3.26% for period A-86 and by an additional 4.53% for period A-87). The fact that quotas tend to vary from period to period was clearly established by Nadeau and the representative of Westco (see Soney Affidavit at par. 10(e) and paragraph 34 of the Reply submissions filed by Nadeau on June 19, 2008).



Westco's maximum production, therefore, has equally been reduced by 7.8%, which means that Westco would simply be unable to produce the same quantity of chicken as it produced at the time the order was issued.

Consistent with the Interim Supply Order, however, and notwithstanding this quota reduction, Westco has continued and will be able to continue to meet or exceed its supply obligation when its supply is expressed in number of heads of chicken using the assumptions that were in place at the time the Interim Supply Order was issued.

In fact, when the quota reduction is factored into the supply obligation, using the 2kgs/bird assumption, Westco would be exceeding its obligations by an average of 11,000 chickens per week. A 7.8% reduction of the 186,230 average weekly supply corresponds to a reduction of 14,526 chickens per week, for a total of 171,704 chickens per week. This number has to be reduced by the replacement chickens obtained by Nadeau from other sources (31,250 chickens per week), which leaves a total obligation of 140,454 chickens per week. As explained above, the current supply provided by Westco to date in period A-87 is 151,454 chickens per week (or, an excess supply of 11,000 chicken per week)

#### **IV. Alternative Resolution**

As is clear from the analysis set out above, Westco has never, over the past year, supplied Nadeau with 186,230 birds per week (the closest single week would be in July, 2007, period A-79, week 2, when Westco supplied 186,464 birds). This number is a fictional figure based on an assumed average weight of 2kgs/bird, used to reflect the "current level of weekly supply" at the time of the Interim Supply Order.

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

In the attached letter, Nadeau's counsel expresses the view that each Respondent is accountable for the chicken produced by its co-respondents. This is an untenable position. Westco does not control the numbers of chicken produced by either Dynaco or Acadia and the reverse is equally true. That being said, it is Westco's understanding that Dynaco and Acadia have supplied, and continue to supply, 100% of their production to Nadeau. That is, they continue to ship to Nadeau their "current level of weekly supply", as per the terms of the Interim Supply Order.



In the circumstances, if the Tribunal determines that Westco's interpretation of the Interim Supply Order cannot be sustained, the only possibility left for Westco would be for it to supply all of its current production volume to Nadeau on a per week, as produced basis, up to the maximum allowed to be produced under its quota. As it indeed did prior to July 20, 2008. Even in such a case, production numbers would continue to vary by period and by week in accordance with Westco's quota and its production schedule. While such an approach would in fact erase those provisions of the Interim Supply Order dealing with the impact of replacement chicken (par. 57-58), it would, for the duration of the interim period, have the benefit of avoiding any further debate on the issue of Westco's, and the other Respondents', compliance with the Interim Supply Order.

Fixing the number of chickens that must be delivered by Westco every week based on a fictional average without considering the quota variations would lead to an interpretation of the Interim Supply Order that would not only be inconsistent with either Nadeau's obligation to obtain replacement supply or the reality of a market in which production levels are never static and in which quota allocations are being reduced, but that would have the effect, in certain periods, of forcing Westco to be in violation of its own quota allocation.

We would be pleased to respond to any questions the Tribunal may have.

Yours very truly,

*Éric C. Lefebvre*

Eric Lefebvre

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

"F"  
This is Exhibit.....referred to in the  
affidavit of.....Yves Landry  
sworn before me, this.....  
day of.....November.....20...08  
Chantale B. Boutot  
A COMMISSIONER FOR TAKING AFFIDAVITS

CHANTALE B. BOUTÔT  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 20...08.....

**Pursuant to the Confidentiality Order dated June 26, 2008, this exhibit will only appear in the Confidential Level B version.**

This is Exhibit 6 referred to in the  
affidavit of Ves Landry  
sworn before me, this 4th  
day of November 2008  
Chantale B. Boutot  
A COMMISSIONER FOR TAKING AFFIDAVITS

**CHANTALE B. BOUTOT**  
Commissaire aux serments  
Ma nomination expire  
le 31 décembre 2008

**A-88** 2008-11-09 2009-01-03

		Heads	Ordered	(Short) or Over
2008-11-09	Week 1	224,025	240,100	-16,075
2008-11-16	Week 2	209,517	240,100	-30,583
2008-11-23	Week 3	183,986	240,100	-56,114
2008-11-30	Week 4	218,628	240,100	-21,472
2008-12-07	Week 5	202,266	240,100	-37,834
2008-12-14	Week 6	196,230	240,100	-43,870
2008-12-21	Week 7	227,430	240,100	-12,670
2008-12-28	Week 8	213,060	240,100	-27,040
		1,875,142	1,920,800	-245,658

Actual numbers  
scheduled numbers

Ordered 271,350 birds - 25,000 - 6,250 = 240,100

**HEADS**

## Westco

1	164,726
2	79,517
3	168,586
4	89,328
5	162,766
6	96,030
7	125,130
8	153,280
	<b>1,049,342</b>