

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 under section 75 of the *Competition Act*.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2008-004 December 10, 2008 <small>Jos LaRose for / pour REGISTRAR / REGISTRAIRE</small>	
OTTAWA, ONT	# 355

**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

**SUBMISSIONS OF THE APPLICANT
NADEAU FERME AVICOLE LIMITÉE/
NADEAU POULTRY FARM LIMITED**

PART I: OVERVIEW

1. This is an application for an order under section 75 of the Competition Act requiring the Respondents to continue supplying the Applicant with live broiler chickens, in a full range of sizes, in the numbers previously supplied by them to the Applicant.
2. The Respondents all notified the Applicant of their intention to cease supplying the Applicant. Pursuant to an Interim Order issued by this Tribunal on June 26, 2008, supply has continued past the Respondents' proposed termination dates.

3. As of the first of the proposed termination dates (July 20, 2008), the Respondents supplied the Applicant with, on average, 271,350 chickens per week, in a full range of sizes. In addition, the Applicant received about 94,450 chickens per week from other New Brunswick chicken producers, 40,000 chickens per week from producers in PEI, and 160,000 chickens per week from Nova Scotia.

4. Since the issuance of the Interim Order, the Applicant has received an additional chickens per week from Nova Scotia. Pursuant to the Interim Order, the Respondents were obliged to provide 271,350 chickens per week to the Applicant, but could reduce this number by any new supply obtained by the Applicant from Nova Scotia or elsewhere. Accordingly, the Respondents are currently obligated by the terms of the Interim Order to supply Nadeau with an average of: chickens per week, until the final disposition of this Application.

5. The Applicant's supplies of live chicken from Nova Scotia will cease in about of (about years from now), in accordance with the verbal agreement reached between the Applicant and its Nova Scotia suppliers, or earlier, when a local Nova Scotia solution is found to the current processing problems in that province.

PART II: BACKGROUND FACTS AND REGULATORY OVERVIEW

A/ The Parties

(i) The Applicant

6. The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Limited ("**Nadeau**"), is a corporation incorporated under the laws of the Province of New Brunswick. Nadeau is a wholly-owned subsidiary of Maple Lodge Holding Corporation ("**MLH**").

7. Nadeau's sole business is chicken processing. It operates the sole chicken-processing plant in New Brunswick (the "**Nadeau Plant**"). The Nadeau Plant was acquired by MLH in 1989.

8. When MLH took over the Nadeau Plant, it was in serious financial difficulty as a result of problems between the previous owners and New Brunswick chicken producers. At the time, many of the producers in northern New Brunswick were shipping their chickens to Québec and Ontario for processing. Producers in the south sent their chickens to a processing plant in Sussex, New Brunswick. (The Sussex plant closed in 1992.) As a result, supply was very tight, and the situation was very difficult.

Ref: Affidavit John Feenstra ("Feenstra Affidavit"), Tribunal Exhibit CA-1, par. 4-7, Applicant's Compendium, Tab 1

Ref: Evidence of John Feenstra, Public Transcript, November 17, 2008, p. 94, lines 7-14, Applicant's Compendium, Tab 2

9. In June, 1990, Nadeau reached a deal with the predecessors of the Respondent, Groupe Westco Inc. ("**Westco**"), who were then called "Waska". They agreed to bring their chickens back to New Brunswick for processing, and Nadeau agreed to pay them 6.5¢ per kilogram, over the Ontario base price. This was a 2.5¢ per kilogram increase over the price then in effect in New Brunswick. The price paid by Nadeau for chicken produced in New Brunswick has (with minor exceptions) remained at least 6.5¢ per kilogram over the Ontario price ever since. This has resulted in New Brunswick's chicken producers receiving the highest prices in mainland Canada, year-over-year.

Ref: Feenstra Affidavit, par. 8-9 and par. 27, Applicant's Compendium, Tabs 1 and 3

Ref: Reply Affidavit of John Feenstra, Tribunal Exhibit CA-4, ("Reply Affidavit of John Feenstra") , par. 8(n) and 10, Feenstra Affidavit, Exhibit "E", Applicant's Compendium, Tab 4

10. Nadeau has been very supportive of New Brunswick's chicken producers over the past 18 years. Nadeau had developed stable long-term supply relationships with New Brunswick's producers. Nadeau had:

- (a) paid premium prices to the producers for their live chicken to encourage the improvement of production facilities, to make them more efficient;
- (b) guaranteed to the producers that it would purchase all of their live chicken; and
- (c) provided additional incentives ("relocation bonuses") to encourage the relocation of production facilities further north (closer to the St-François Plant).

Ref: Affidavit of Anthony Tavares, Tribunal Exhibit A-23, ("Tavares Affidavit") par. 18, Applicant's Compendium, Tab 5

11. These long-term supply relationships resulted in a stable continuing supply of live chicken, which enabled the Nadeau Plant to develop stable and profitable markets for its products. Historically, Nadeau obtained 100% of its live chicken from New Brunswick's producers, of which almost 75% came from the Respondents or their predecessor quota holders.

Ref: Tavares Affidavit, par. 19, Applicant's Compendium, Tab 5

12. Following a disastrous fire in February 2002, Nadeau immediately announced its pledge to rebuild the Nadeau Plant. During the reconstruction period, Nadeau continued to honour its moral commitment to buy 100% of the chicken produced in New Brunswick. This chicken was sent to a plant in Québec owned by Olymel s.e.c. ("Olymel"), to be "custom-killed", despite the fact that this resulted in very large losses to Nadeau. As a result, there was absolutely no

economic loss suffered by the chicken producers of New Brunswick. Although it could have done so, Nadeau trusted its long-time business associates, and did not demand a long-term supply contract at that time.

Ref: Tavares Affidavit, par. 23-29, Applicant's Compendium, Tab 6

Ref: Feenstra Affidavit, par. 51, Applicant's Compendium, Tab 7

13. Nadeau opened a new state-of-the art facility only nine months later, in November 2002. The Nadeau Plant is now the most efficient in Canada. This is admitted by Westco.

**Ref: Thomas Soucy Examination, Tribunal Exhibit CA-107, at pp. 249-251
Applicant's Compendium, Tab 8**

Ref: Affidavit of Grant C. Robinson, Tribunal Exhibit CA-89 ("Robinson Report"), at p. 4, par. 6 and 7, Applicant's Compendium, Tab 9

14. Nadeau is a mainstay of the local community. It directly employs approximately 340 employees at the Nadeau Plant, and as such is the main employer in town, and the largest employer in the local community. The benefits of Nadeau's operations in this area of the province are crucial to the economy of the region. Any negative impact on the viability of the Nadeau Plant would have a reverberating effect on the local economy.

Ref: Tavares Affidavit, par. 21, Applicant's Compendium, Tab 10

15. Nadeau is totally dependent on the continuance of stable long-term supply relationships. The Nadeau Plant's operations require that the daily level of supply be maintained, or the operations will cease. The Respondents understand this very well.

Ref: Tony Tavares Affidavit 1, par. 20, Applicant's Compendium, Tab 10

(ii) *The Respondents*

16. The Respondent, Groupe Westco Inc. ("Westco"), is a corporation incorporated under the laws of the Province of New Brunswick. Westco owns 50.9% of the total New Brunswick quota of live chicken. As of May 29, 2008, Westco produced about 186,230 live chickens per week, up from' live chickens in 2006.

Ref: Tavares Affidavit, par. 4, Applicant's Compendium, Tab 11

Ref: Affidavit of Thomas Soucy sworn May 29, Tribunal Exhibit CA-115, par. 8(a), 8(e), Applicant's Compendium, Tab 142

17. The Respondent, Groupe Dynaco, Coopérative Agroalimentaire ("Dynaco"), is an agricultural co-operative registered in the Province of Québec. Dynaco is a member of La Coop fédérée.

Ref: Rémi Faucher Declaration (Dynaco), Tribunal Exhibit CRV-147 ("Faucher Dynaco Declaration"), par. 2.1 and 2.3, Applicant's Compendium, Tab 12

Ref: Applicant's Request to Admit at par. 3, and Dynaco's Response to the Request to Admit, Applicant's Compendium, Tab 13

18. Through "Les Fermes J.J.C. Bolduc inc." and "Les Fermes avicoles Bolduc", Dynaco holds 6.22% of New Brunswick's chicken quota. As of early 2008, this amounted to 26,450 chickens per week.

Ref: Tavares Affidavit, par. 74, Applicant's Compendium, Tab 14

Ref: Faucher Dynaco Declaration, par. 3.1-3.3, Applicant's Compendium, Tab 12

19. In addition, the quota held by Slipp Farm is leased to Dynaco. This quota is 1.01% of New Brunswick's supply, or about 3,679 chickens per week.

Ref: Exhibit D to Tavares Affidavit, Applicant's Compendium, Tab 15

20. As well, Dynaco owns:

Ref: Faucher Dynaco Declaration, par. 3.5, Applicant's Compendium, Tab 12

Ref: Exhibit D to Tavares Affidavit, Applicant's Compendium, Tab 15

Ref: Dynaco's Response to Request to Admit, Applicant's Compendium, Tab 16

21. The Respondent, Volailles Acadia s.e.c., is a limited partnership. The Respondent, Volailles Acadia inc., is the general partner of Volailles Acadia s.e.c. (collectively, "Acadia").

Acadia is owned by:

Ref: Rémi Faucher Declaration (Acadia), Tribunal Exhibit CRV-145, par. 3-7, Applicant's Compendium, Tab 17

22. Acadia holds 16.04% of the total New Brunswick chicken quota, and produces about 58,670 chickens per week. In addition,

Ref: Exhibit D to Tavares Affidavit, Applicant's Compendium, Tab 15

Ref: Tavares Affidavit, par. 74, Applicant's Compendium, Tab 14

Ref: Rémi Faucher Dynaco Declaration, par. 3.4, Applicant's Compendium, Tab 12

23. The Respondents together directly own 73.16% of New Brunswick's chicken quota, lease another 1.01%, and have (together with _____ a 50% interest in another 4.96% , for a total of 79.13% of New Brunswick's quota. Put another way, only 20.87% of New Brunswick's chicken quota, or about 94,500 chickens, is independent of the Respondents.

Ref: Exhibit D to Tavares Affidavit, Applicant's Compendium, Tab 15

24. All of the Respondents' production facilities are located less than 30 kilometres from the Nadeau Plant.

Ref: Reply Affidavit of Yves Landry, Tribunal Exhibit CA-41, par. 32, Applicant's Compendium, Tab 18

B/ Supply Management in Canada

25. Professor Richard Barichello ("**Barichello**") testified as an expert in the area of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy, and the analysis of government policy. His report, together with his oral evidence, sets out a detailed explanation of the origins, purpose, operations and effects of the supply management system in chicken. His evidence was undisputed, and indeed was buttressed and supported by the testimony of many of the other witnesses.

Ref: Affidavit of Richard Barichello, Tribunal Exhibit A-54 ("Barichello Report**")**

Ref: Evidence of Professor Barichello, Public Transcript November 20, 2008, pp. 18-19, Applicant's Compendium, Tab 19

(i) Overview

26. By way of overview, Barichello stated in paragraph 6 of his report:

"Canada's supply management system is relatively unique among the world's agricultural marketing institutions, and unique among regulated markets within Canada. It is, in effect, a state-mandated cartel arrangement that substitutes a detailed and complex set of regulations, akin to a centrally planned economic system, for a more typical set of market-determined economic arrangements. To understand the workings of Canada's supply management system requires that you suspend your normal appreciation of how markets work and instead think of a collection of controls, specifically quota (quantity) and price controls which work in concert to determine the functioning of this industry sector."

Ref: Barichello Report, par. 6, Applicant's Compendium, Tab 20

27. In his oral evidence, Barichello explained it this way:

"Well, in the supply management system in Canada, in its essence, is a cartel, really, arrangement that is backed by legislation, in other words state sanctioned, and it substitutes some detailed regulations that basically supplant what would normally be a market-determined set of economic arrangements. And so it specifies key economic parameters for the industry and the industry participants must follow those rules and take those parameters as given"

Ref: Evidence of Professor Barichello Public Transcript, November 20, 2008, p. 21, lines 14-22, Applicant's Compendium, Tab 21

(ii) **Origins and Purpose**

28. The supply management system originated in the early to mid-1970s. In the poultry industry it arose as a result of:

"the inter-provincial competition in chicken and egg marketing that here termed the chicken-and-egg wars. And that period of substantial instability was considered sufficiently undesirable that the poultry sector followed the dairy sector and imposed the system of national quotas and the associated restrictions."

Ref: Evidence of Professor Barichello, Public Transcript, November 20, 2008, p. 22, line 20 to p. 23, line 1, Applicant's Compendium, Tab 22

29. In his report, Barichello stated that the supply management system:

"replaced open, if periodically aggressive, competition with mandated market shares enforced with provincial (and producer) marketing quotas"

Ref: Barichello Report, par. 8, Applicant's Compendium, Tab 20

30. The "open and periodically aggressive competition referred to above was:

"between processors selling into each of the provinces and competition at [the] producer level whereby producers could undercut each other and the end result was quite a high variability

in prices. Prices would go up and down and it was considered to be sufficiently unstable that it was undesirable".

Ref: Evidence of Professor Barichello November 20, 2008, Public Transcript, p. 23, lines 2-12, Applicant's Compendium, Tab 22

31. "The purpose of the supply management system has been to try and cater to small family farms, and the system has been designed in many instances to avoid vertical integration and to keep regional economies buoyant in the agricultural sector. ...And so the supply management system was erected in an effort to try and put greater attention to the preservation of smaller family farm entities and not move to these large corporate interests, to the same extent. ...[There] are often maximum quota levels that an individual entity can hold... and that's another measure to try and restrict farm size in the sector".

Ref: Evidence of Professor Barichello, Public Transcript, November 20, 2008, p. 42, line 25 to p. 43, line 21, Applicant's Compendium, Tab 23

32. John Feenstra, who has been in the chicken industry, in one capacity or another, for more than half a century, put it this way:

"Supply management was put into place to protect the family farm, and to ensure decent returns for producers".

Ref: Feenstra Affidavit, par. 11, Applicant's Compendium, Tab 24

(iii) Operation of the System

33. "The market is organized almost entirely by administrative means. In fact, few normal market mechanisms are at work in this system. Farmers are given their marketing quota, so production decisions are not really theirs to make, at least in the short run. Prices are also dictated, and most rules as to how these prices are paid are also set, as are rules surrounding how the farm quotas are to be used".

Ref: Barichello Report, par. 11, Applicant's Compendium, Tab 25

34. "Negotiations take place between provincial processors and the provincial commodity board representing the producers. The result of the negotiations is a minimum price in dollars per kg. that the processors will pay the producers. It has been customary for other provinces to use the price negotiated in Ontario as a benchmark for their own negotiations."

Ref: Barichello Report, par. 42, Applicant's Compendium, Tab 26

35. "The key point is that it is not a normal market price but is a constructed price".

Ref: Barichello Report, par. 12, Applicant's Compendium, Tab 25

36. Since 1995, national production levels have been determined by the 'bottom-up' approach, whereby processors in each province calculate their expected requirements, and these estimates are taken by the provincial commodity boards to the national board (the Chicken Farmers of Canada – CFC). The CFC aggregates the provincial requirements, makes any adjustments it considers appropriate, and sets the total national production. The national production thus calculated is then allocated amongst the various provinces. The provincial commodity boards in turn allocate the permitted provincial production among the existing quota holders in their respective provinces.

Ref: Barichello Report, par. 30-31, Applicant's Compendium, Tab 27

Ref: Evidence of Professor Barichello Public Transcript, November 20, 2008, p. 29, lines 17-25, Applicant's Compendium, Tab 28

37. The system ensures "that the supply of a product matches the demand for it and that the prices paid to agricultural producers are steady over time and provide the producers with fair returns".

Ref: Barichello Report, par. 22, Applicant's Compendium, Tab 29

38. As stated by the Supreme Court of Canada:

"The quota system is an attempt to maintain an equilibrium between supply and demand and attenuate the inherent instability of the markets".

Ref: *Fédérations des producteurs de volailles du Québec v Pelland*, [2005] 1 S.C.R. 292 (hereinafter called "Pelland"), at par. 38, Applicant's Compendium, Tab 30

39. "The intention is for there to be an *ample supply* of product available for each commodity..." (Emphasis added)

Ref: *Evidence of Professor Barichello, Public Transcript, November 20, 2008*, p. 30, lines 16-17, Applicant's Compendium, Tab 31

(iv) Effects

40. "The underlying motivation in supply management is protection of the producer. The system revolves around regulations that ensure that the producer receives a predictable, steady, and sufficient profit. ... The producer is guaranteed a minimum price for his or her production by the marketing board for that product within his or her province. The minimum price of the product is set by the provincial marketing board, and so the producer has both a guaranteed market and a guaranteed minimum price. The production goes to a processor who prepares the chicken for onward sale via a wholesaler. The major part of the risk is therefore taken at the processor level."

Ref: *Barichello Report, par. 24, Applicant's Compendium, Tab 29*

41. There are major barriers to new entries at the producer level, essentially because there is no realistic way for a new entrant to obtain new quota. "[T]he possession of quota is a sine qua non for those who want to start production, but finding quota at a reasonable price is not a trivial

task As chicken sales increase, so the value of the farms producing the chicken also increase. Therefore the owner of the farm will not wish to see any dilution of quota".

Ref: Barichello Report, par. 39, Applicant's Compendium, Tab 32

42. In a case from Saskatchewan, a Mr. Armstrong went onto a quota waiting list in 1982. By 2000, he still had not received any quota. "During Mr. Armstrong's long wait, chicken production in the province had expanded significantly, but the expansion was dealt with by increasing the quota of those who already held quota, instead of allowing those on the [quota waiting list] a costless entree to the market".

Ref: Barichello Report, par. 40, Applicant's Compendium, Tab 32

43. Producer margins have increased over time, as have the sale prices for quota. These rise "because of this monopoly that the system implicitly involves..."

Ref: Evidence of Professor Barichello Public Transcript, November 20, 2008, pp. 35, lines 14 to p. 36, line 3, Applicant's Compendium, Tab 33

44. "Another feature of this organization of producers and the profitability of this policy regime is that producers have lobbied strongly and effectively to maintain and strengthen the system for the continued benefit of producers. This means maintaining their price levels, continuing the tight restrictions on imported product, and continuing the powers that have existed within the national agencies and provincial marketing boards. What this has done is to reduce considerably the risks faced by producers in this system. There is now no risk about price, no risk from unexpected imports, no risk that imports could affect the domestic price, and virtually no risk about the size of the domestic market".

Ref: Barichello Report, par. 53, Applicant's Compendium, Tab 34

45. In the result, chicken producers are completely insulated from normal competitive pressures:

... "the producers don't have the opportunity to undercut by lowering their price or they have no economic interest in doing this because the marketing board requires that the processor pay a certain minimum price. So all of that potential competition from producers undercutting each other, competing against each other by lower price, that's an avenue that's foreclosed in our supply management system".

Ref: Evidence of Professor Barichello Public Transcript, November 20, 2008, p. 54, lines 18-25, Applicant's Compendium, Tab 35

46. The picture is very different for processors. "[I]n supply management it is the processor who bears the risk, because the processor lacks the protection afforded by supply management. ... 'Open contracting' is the term used for unrestricted competition between processors for limited supply. The premia paid by processors to producers can grow large as processors fight for a share of a legally restrained sum of production, and the premia paid add to their risk and may reduce the long-term ability of processors to continue in business."

Ref: Barichello Report, par. 57, Applicant's Compendium, Tab 36

47. This comment in Professor Barichello's September report has proved to be prophetic. On October 23, 2008,

Ref: Letter dated October 23, 2008, Exhibit E to Reply Affidavit of Yves Landry, Tribunal Exhibit number CA-41, Applicant's Compendium, Tab 37

C/ The Conspiracy to Acquire or Destroy Nadeau

48. In late Westco approached for the purpose of discussing the acquisition of the Nadeau Plant. A meeting was held between representatives of Westco and representatives of. As a result, by August 8, 2006,

Ref: Evidence of Thomas Soucy, November 25, 2008, Transcript p. 62, line 23 to p. 63, line 9, p. 65, lines 2-20, Applicant's Compendium, Tab 38

Ref: Tribunal Exhibit CA-149, Applicant's Compendium, Tab 39

49. The e-mail referring to the meeting between _____ and Westco was copied to Rémi Faucher ("**Faucher**") even though Faucher was not an officer or director of any of _____, or Westco. Faucher was, however, "directeur général" of the Respondent Dynaco, and the President and "administrateur" of the Respondent Volailles Acadia inc., and a member of the Board of Directors of the Respondent Volailles Acadia s.e.c.

Ref: Tribunal Exhibit CA-149, Applicant's Compendium, Tab 39

Ref: Faucher Dynaco Declaration, par. 1.2, Tribunal Exhibit CRV-147 Applicant's Compendium, Tab 40

Ref: Rémi Faucher Declaration (Acadia), par. 2, Tribunal Exhibit CRV-145 Applicant's Compendium, Tab 41

Ref: Evidence of Thomas Soucy November 25, 2008, Confidential Transcript, p. 69, lines 9-12, Applicant's Compendium, Tab 42

50. As a result of Westco's approach, _____ decided to send a letter proposing that _____ and Westco join together for the purpose of acquiring the Nadeau Plant. The letter states in part:

Ref: Tribunal Exhibit CA-105, Applicant's Compendium, Tab 43

51. Although it appears this letter was never actually signed by Westco, the "Plan" certainly proceeded apace.

52. According to Minutes of a meeting of Dynaco's directors held

Ref: Tribunal Exhibit CA-150, Applicant's Compendium, Tab 44

53. About a month later, on September 21, 2006, Faucher was able to report to Dynaco's board that:

Ref: Tribunal Exhibit CA-151, Applicant's Compendium, Tab 45

54. On January 12, 2007, Soucy reported to _____ with a copy to Faucher and others (including _____ and Bertin Cyr and other executives at Westco), on a meeting he had held with Yves Landry and John Feenstra of Nadeau:

Soucy then refers to a meeting scheduled to take place in Atlanta with Tony Tavares ("Tavares"). He ends the report:

Ref: Tribunal Exhibit CA-106, Applicant's Compendium, Tab 46

55. Soucy did meet with Tavares in Atlanta,

Ref: Evidence of Thomas Soucy, November 25, 2008, Confidential Transcript, p. 74, line 17-24, Applicant's Compendium, Tab 47

56. At the meeting in Atlanta, Westco told Tavares that it was interested in buying or investing in the Nadeau Plant, and also that it wanted a price increase or additional incentives.

Ref: Tavares Affidavit, par. 35, Applicant's Compendium, Tab 48

57. Tavares responded that:

- a) Nadeau's shareholders would likely not be interested in selling;
- b) that in any event a structure that would result in Westco owning a percentage of the Nadeau Plant while retaining 100% of their live production assets would result in non-aligned shareholders' interests and likely lead to conflicts over time; and
- c) even though the New Brunswick price was 6.5¢ higher than the negotiated market price in Québec, Nadeau would consider a market-based incentive plan for the New Brunswick producers.

Ref: Tavares Affidavit, par. 36, Applicant's Compendium, Tab 48

58. Shortly after the Atlanta meeting, Tavares met with the Board of Directors of MLH. The Board said:

- a) They were not interested in selling a part of the Nadeau Plant to Westco.
- b) Although their strong desire was to maintain the status quo, they would be prepared to look at an ownership structure where the Nadeau and Westco assets would be pooled and Westco and MLH would each own a part of the combined operations.
- c) Even though the price in New Brunswick was 6.5¢ per kilogram higher than the price in Québec, Nadeau would consider paying additional market-based incentives.

Ref: Tavares Affidavit, par. 36, Applicant's Compendium, Tab 48

59. A market-based incentive plan was subsequently developed, and communicated to Soucy. The plan was implemented in or about March, 2007 with payments retroactive to January, 2007. The incentive plan resulted in additional payments in 2007 to the Respondents totaling over and above the New Brunswick price.

Ref: Tavares Affidavit, par. 38-40, Applicant's Compendium, Tab 49

Ref: Feenstra Affidavit, par. 35-43, Applicant's Compendium, Tab 50

Ref: Landry Affidavit, par. 91, Applicant's Compendium, Tab 51

60. Tavares advised Soucy shortly after the Atlanta meeting about the MLH Board's willingness to consider a pooled asset structure. Soucy never replied to this suggestion (no doubt, because such was not consistent with the "Plan")

Ref: Tavares Affidavit, par. 37, 41, Applicant's Compendium, Tab 52

61. On March 27, 2007, Faucher told the Board of Dynaco the following:

Ref: Tribunal Exhibit CA-153, Applicant's Compendium, Tab 53

62. By May,

Ref: Tribunal Exhibit CA-112, Applicant's Compendium, Tab 54

63. The following are some pertinent extracts from

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Ref: Tribunal Exhibit CA-112, p. 15, Applicant's Compendium, Tab 54

64. By June 28, 2007, Westco and

Soucy reported to the Board of Directors of Westco on that date in part as follows:

Ref: Tribunal Exhibit CA-113, Applicant's Compendium, Tab 55

Ref: Evidence of Soucy, Confidential Transcript November 25, 2008, p. 93 line 11 – p. 95, line 13, Applicant's Compendium, Tab 56

65. The meeting referred to above did not actually occur until August 19th. Tavares sets out in his Affidavit what occurred at this meeting:

"At the meeting, Mr. Soucy and Réjean Nadeau advised me, on behalf of Westco and Olymel, that Westco and Olymel (the "Consortium") wanted Nadeau to sell the St-François Plant to the Consortium. They told me that if Nadeau was not willing to sell it, at a price acceptable to them, then all of the chicken produced by Westco and Dynaco would be diverted to Québec, and the Consortium would then build its own plant in New Brunswick. In other words, if Nadeau would not give the Consortium what it wanted, Nadeau's supply would be cut off.

Ref: Tavares Affidavit, par. 42, Applicant's Compendium, Tab 57

66. This narration of events is confirmed by Soucy himself. In his affidavit sworn on May 29, 2008, Soucy states, in part:

"J'ai avisé Monsieur Tavares...si l'achat de l'abattoir Saint-François s'avérait impossible, Westco acheminerait dorénavant la totalité de sa production de poulet vivant aux abattoirs d'Olymel en attendant la fin de la construction de son nouvel abattoir issu de leur partenariat."

Ref: Affidavit of Thomas Soucy sworn May 29, 2008, Tribunal Exhibit CA-115, par. 38 (c), Applicant's Compendium, Tab 58

67. As well, in a report e-mailed to his Board on August 19, 2007, Soucy states in part:

Ref: Tribunal Exhibit CA-117, par. 2, 3 and 5, Applicant's Compendium, Tab 59

Ref: Evidence of Soucy, Confidential Transcript November 25, 2008, p. 121, line 7, to p. 122, line 12, Applicant's Compendium, Tab 60

68. In that same month (August 2007), and Westco signed a

Ref: Tribunal Exhibit CA-114, Applicant's Compendium, Tab 61

69. This reference to

Ref: Evidence of Soucy, Confidential Transcript November 25, 2008, p. 106, lines 21-24, Applicant's Compendium, Tab 62

70. In order to put additional pressure on Nadeau, around this time and without notice,
Westco

Ref: Extract from Discovery of Soucy, July 24, 2008, Tribunal Exhibit CA-108, pp. 183-184, Applicant's Compendium, Tab 63

71. On August 21, 2008, Faucher reported to the Dynaco Board that

Ref: Tribunal Exhibit CA-154, Applicant's Compendium, Tab 64

72. Nadeau met with representatives of Westco on September 6, 2007. Nadeau attempted to persuade them to change their minds, but they refused, saying they had given a commitment to

On that occasion, Soucy stated that after their acquisition of the Nadeau Plant, Westco planned to demand that all growers shipping to the processing plant also buy chicks from Westco's hatchery.

Ref: Tavares Affidavit, par. 46, Applicant's Compendium, Tab 65

Ref: Feenstra Affidavit, par. 69, Applicant's Compendium, Tab 66

Ref: Landry Affidavit, par. 69(c), Applicant's Compendium, Tab 67

73. Soucy denies that he made the latter statement, however his bare denial is not corroborated by other evidence within Westco's control. Of the four other representatives of Westco present at the meeting, only Bertin Cyr testified. He said in connection with this issue: "le Témoin n'a pas eu connaissance que monsieur Soucy ait pu manifester" this intention. It is submitted that the failure of Westco to put forward evidence from witnesses within its control

(the other Westco representatives) on this topic permits the drawing of an adverse or at least an unfavourable inference against it on this point.

**Ref: Bertin Cyr Declaration, Tribunal Exhibit CRW-124, par. 4.7,
Applicant's Compendium, Tab 68**

**Ref: John Sopinka, Sidney N. Lederman & Alan W. Bryant, The Law of
Evidence in Canada, 2nd edition (Toronto: Butterworths, 1999), par. 6.321:
Applicant's Compendium, Tab 69**

74. As noted above,

As such, the Respondents, if they succeed in their plan to eliminate Nadeau as an independent actor, would have the means to carry out the intention manifested by Soucy. Certainly the behaviour of Westco and the other Respondents shows that they are quite willing to make and act upon threats of this nature.

Ref: Tribunal Exhibit CA-153, Applicant's Compendium, Tab 53

75. By e-mail dated September 20, 2007, Tavares wrote to Soucy advising that he had been instructed to put together a negotiating team "in accordance with the demands of Westco and Olymel". In that e-mail, Tavares also noted that in the event of the sale of the Nadeau Plant, "Olymel will realize substantial benefits to their existing operations as a result of their strengthened competitive position in the Eastern Canadian marketplace".

Ref: Tavares Affidavit, Exhibit E, Applicant's Compendium, Tab 70

76. Réjean Nadeau called Tavares in early October, 2007, to ask whether Nadeau's valuations would take into account "the fact that 80% of [Nadeau's] volume was not under [Nadeau's] control".

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Ref: Tavares Affidavit, par. 49, Applicant's Compendium, Tab 71

77. Faucher reported to the Dynaco Board, on October 9, 2007, that

Ref: Tribunal Exhibit CA-156, Applicant's Compendium, Tab 72

78. In the meantime, fighting for its life, Nadeau sought assistance from the Government of New Brunswick. Among other things, Nadeau made a complaint that the New Brunswick Chicken Board (Chicken Farmers of New Brunswick, or "CFNB") could not deal with the matter because it was controlled by the Respondents. As a result, officials of the New Brunswick Farm Products Commission (the "**Commission**") visited the CFNB on or about November 2, 2007.

Ref: Tribunal Exhibit CA-120, Applicant's Compendium, Tab 73

79. This attempt by Nadeau to enlist the help of the Government to avoid the fate sought for it by the Respondents seemed to enrage Soucy. In handwritten notes

, Soucy wrote:

"I understand they do not want to sell. However [sic] they had an opportunity to do it with us and they refused. The fact that I want to buy and not build beside at least [sic] gives them value I fail to understand why they are doing this. Resistance. This plant could be worthless if I built one."

Ref: Tribunal Exhibit A-119, Applicant's Compendium, Tab 74

Ref: Evidence of Thomas Soucy, Confidential Transcript November 25, 2008, p. 145, line 2, p. 146 line 9, Applicant's Compendium, Tab 75

80. In these notes, Soucy also states that he had "given Olymel all of my product for them to controll [sic] where they will process it," that he had spoken to the COO of La Coop fédérée

and that he (Soucy) would put a motion on the table at the next shareholders meeting of Acadia,

Ref: Tribunal Exhibit A-119, Applicant's Compendium, Tab 74

Ref: Evidence of Thomas Soucy, Confidential Transcript November 25, 2008, p. 147, lines 7-16, Applicant's Compendium, Tab 76

81. To his cohorts, Soucy was reassuring. By an e-mail dated November 6, 2007.

Ref: Tribunal Exhibit CA-120, Applicant's Compendium, Tab 73

82. In response, _____ wrote to the group as follows:

Ref: Tribunal Exhibit CA-120, Applicant's Compendium, Tab 73

83. At the meeting with Nadeau that took place on November 6, 2008, Soucy advised Nadeau that all of its live chicken supply had been assigned to Olymel effective November 6, 2008, and that Dynaco's chicken would be similarly assigned to Olymel effective November 16, 2007. In effect, 75% of New Brunswick's supply of live chicken was to be placed under the control of Nadeau's competitor.

Ref: Tavares Affidavit, par. 51-52, Applicant's Compendium, Tab 77

Ref: Feenstra Affidavit, par. 70, Applicant's Compendium, Tab 78

84. The Olymel/Westco Consortium held a further meeting with Nadeau on December 18, 2007. Tavares sets out what occurred at that meeting:

"At the meeting, the Consortium handed out a summary document whose "bottom line" showed a value of approximately 25% of the amount arrived at by our valuers. Réjean Nadeau stated that other transactions (which we considered to be similar) included a payment for guaranteed supply, which he said that Nadeau does not have in New Brunswick. Réjean Nadeau mentioned this three

separate times, and further stated that the valuation for the St-François Plant has to be less as a result. Réjean Nadeau said we could not expect to be paid anything for amounts earned from processing the Producers' birds.

The Consortium concluded by suggesting a valuation approach based on a "bricks and mortar" or asset-based approach. In effect the Consortium assigned no value to any of the work and goodwill that we had created in the business for the past eighteen years. They also provided comparative replacement values for two of Olymel's plants in Québec at values which I believe are well below the replacement cost of the Nadeau plant. The resulting amount is not even remotely close to a reasonable value for the St.-François Plant."

Ref: Tavares Affidavit, par. 54-55, Applicant's Compendium, Tab 79

85. Nadeau refused to sell. As a result, one after the other, the Respondents by letter notified Nadeau of their intention to cease supplying Nadeau, effective July 20, 2008 (Westco) and September 15, 2008 (Dynaco and Acadia). The supply was to be diverted to Olymel. The price to be paid for this supply was to be

Ref: Tribunal Exhibit CA-108, at pp. 267-268, Applicant's Compendium, Tab 80

86. Nadeau refused to roll over and die. Among other efforts to prevent the destruction sought by the Respondents, Nadeau commenced these proceedings. Upon learning of this, the Respondent

Ref: Tribunal Exhibit CA-160, Applicant's Compendium, Tab 81

87. It is apparent from the foregoing narration that the Respondents have acted in concert throughout the relevant period. Their common purpose was to abuse their state-protected monopoly in chicken production in order to attempt to force an improvident sale (or the disappearance) of the Nadeau Plant for the purpose of obtaining total control of the New Brunswick agricultural production chain:

"Westco was never negotiating in good faith with Nadeau. Its sole intention was and is to weaken or destroy Nadeau, to eliminate a competitor to Olymel/Westco. As Westco's "partner", Olymel is acting in concert with Westco in seeking to drive Westco out of business, to its advantage..."

Ref: Supplementary Affidavit of Anthony Tavares, Tribunal Exhibit A-22, par. 24 ("Tavares Supplementary Affidavit"), Applicant's Compendium, Tab 82

D/ Continued Bad Faith – Westco Refuses to Supply in Accordance with the Usual and Agreed Practice

88. Westco has always known that Nadeau requires a stable and continuing supply of chickens over the entire broiler size range (from 1.71 to 2.4 kilograms). As stated by John Feenstra:

"At the end of the day, Nadeau needs a stable supply. Stable supply means that our customers can rely on us on a daily basis, weekly basis or monthly basis, as the case may be, to look after them. If we do not have a stable supply, we simply cannot do that, and if we cannot do that, we will lose our customers. Customers want and need a stable supply from wherever they can get it. Our customers today are with us because we can supply with them their

birds on a daily basis, weekly basis, exactly as they want, and in the exact sizes they want. this is why our business has grown over all these years. We simply cannot function without our supply."

Ref: Feenstra Affidavit, par. 76, Applicant's Compendium, Tab 83

89. Yves Landry ("Landry"), Nadeau's plant manager, testified that

Ref: Evidence of Yves Landry, Confidential Transcript, November 18, 2008, p. 176, line 22 to p. 178 line 2, Applicant's Compendium, Tab 84

90. Landry further testified that

Ref: Evidence of Yves Landry, Confidential Transcript, November 18, 2008, p. 180 line 15 to p. 181 line 2, p. 182 line 12-23, Applicant's Compendium, Tab 85

91. In fact, as admitted by Westco, :

Westco continued to supply a substantial number of _____ size birds through 2008, until the end of July. The overall average weight of the chickens supplied by Westco in 2007, was _____ kilograms. The overall average weight of the chickens supplied by Westco to the end of July, 2008, was _____ kilograms.

Ref: Tribunal Exhibit CA-109 (Letter from Ogilvy Renault and Charts: Sommaire têtes et kilos abattus à chaque semaine, Année 2007 and Année 2008), Applicant's Compendium, Tab 86

Ref: Yves Landry Affidavit, Exhibit H, Applicant's Compendium, Tab 87

92. In his affidavit sworn May 29, 2008, in opposition to the Interim Order sought by Nadeau, Soucy testified that

Ref: Thomas Soucy Affidavit May 29, 2008, Tribunal Exhibit CA-115, par. 77-78, and Exhibit "X", p.1, Applicant's Compendium, Tab 88

93. It transpires that despite the pending application, and the subsequent granting of the Interim Order, Westco

Ref: Tribunal Exhibit CA-109 , pp. 74-75, Applicant's Compendium, Tab 89

94. On July 8, 2008, Nadeau received Westco's delivery schedule for period A-86 (which began on July 20th). That schedule showed that, starting August 7, 2008, Westco intended to ship exclusively _____ and bigger _____ chickens. No prior notice was provided by Westco to Nadeau, to Nadeau's counsel, or to this Tribunal, of Westco's intention to suddenly change the usual and ordinary terms of supply in this fashion.

Ref: Yves Landry Affidavit 1, par. 47-50, Applicant's Compendium, Tab 90

95. Nadeau offered Westco an additional _____ per kilogram premium to get these birds, but Soucy refused. In the result, Nadeau has been unable to meet the needs of its _____ size customers.

96. Landry stated:

"As a result of Westco changing its production from _____ day sexed flocks to _____ day mixed flocks in quota period A-86, Nadeau was unable to service _____ because Nadeau simply did not have the right size of birds in order to meet _____ requirements.

Thus, commencing on August 7, 2008, Nadeau implemented an emergency accommodation for _____. More specifically, Nadeau arranged to buy 9-cut processed chicken from _____.

However, Nadeau lost _____ restaurants in Nova Scotia to A.C.A. Co-Op. Nadeau will not be getting those accounts back.

These accommodations were afforded to _____ at no additional cost to _____. For obvious reasons, there is no profit margin for Nadeau on these sales. This is therefore not a long-term solution. If Westco is allowed to continue to supply us with only the larger birds, and we are unable to replace this supply with another producer, Nadeau will like lose its remaining _____ accounts."

Ref: Yves Landry Affidavit, par. 55-57 Applicant's Compendium, Tab 91

97. Westco's bad faith change in its terms of supply to Nadeau have also caused harm to _____ the details of which are set out below. It is apparent from Olymel's response to _____

complaints in this regard, that this conduct is part of the overall "strategy" of the conspirators to put improper pressure on Nadeau, in this instance through Nadeau's customers:

.....

Ref: Affidavit of Lyndsay Gazzard, Tribunal Exhibit CA-56, at p. 4, par. 12, and Exhibit "C", Applicant's Compendium, Tab 92

98. Soucy confirmed in cross-examination that

Ref: Evidence of Thomas Soucy, Confidential Transcript, Nov 25, 2008, p. 90, line 15 to 91, line 9, Applicant's Compendium, Tab 93

PART III: THE ELEMENTS OF SECTION 75 OF THE COMPETITION ACT

E/ Nadeau is Unable to Obtain Adequate Replacement Supplies on the Usual Trade Terms (s. 75(1)(a) of the *Competition Act*)

99. This element of the test requires the Applicant to show that it cannot obtain adequate replacement supplies of the product(s) which the Respondents are refusing to supply "anywhere in a market on usual trade terms".

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

100. The "product" for the purposes of subsection 75(1)(a) is live broiler chickens, in a full range of sizes from a minimum of 1.71 kilograms, to a maximum of 2.4 kilograms.

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

101. "Trade terms" are defined in subsection 75(3) as "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". "Usual" trade terms must have a correlative meaning, and therefore refers to the practice that had been established in terms of price, units, etc., that had been in place between the contending parties before the refusal to supply.

Ref: Competition Act, s. 75(3), Applicant's Compendium, Tab 94

102. The evidence establishes that the "usual trade terms" in place between each of the Respondents and the Applicant entailed:

- (a) delivery of chickens in a full range of broiler sizes, namely, from 1.71 kilograms to 2.4 kilograms;
- (b) the CFNB regulated price, which equates to the Ontario base price plus 6.5¢ per kilogram, plus applicable CFNB size premiums, where applicable;
- (c) delivery of chickens grown within 30 kilometers of the Nadeau Plant, thus resulting in minimal transportation costs, minimal DOAs (dead on arrival), and minimal "shrink";
- (d) payment pursuant to the Marketing Orders of the CFNB, namely net 7 days; and
- (e) delivery each and every week of chickens in numbers averaging about:
 - (i) from Westco, 186,230 chickens per week;
 - (ii) from Acadia, 58,670 chickens per week; and

(iii) from Dynaco, 26,450 chickens per week

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

Ref: Tavares Affidavit, par. 74, Applicant's Compendium, Tab 14

103. To the extent that the relevant market for the purposes of subsection 75(1)(a) is New Brunswick, there is no issue that the Applicant is unable to obtain replacement supplies, since there are *no* available additional supplies of chicken in New Brunswick. (As is undisputed, Nadeau already processes the remaining about 94,450 chickens per week produced in New Brunswick.)

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

104. If this Tribunal were to determine that Québec be included in the relevant market for the purposes of subsection 75(1)(a), there is no question, even assuming that replacement supplies could be obtained, that supplies could only be obtained on different, and substantially less advantageous trade terms than the usual trade terms in effect between the Applicant and the Respondents.

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

105. This point is made by one of the Applicant's experts, Professor Roger Ware ("Ware"):

Ref: Affidavit of Roger Ware, Tribunal Exhibit CA-81, p. 18, par. 40 ("Ware Report"), Applicant's Compendium, Tab 95

106. Margaret Sanderson ("Sanderson"), the Respondent's expert, does not dispute this:

Ref: Margaret Sanderson Report, Tribunal Exhibit CRW-139 ("Sanderson Report"), p. 9, par. 19, Applicant's Compendium, Tab 96

107. It is submitted, therefore, that Nadeau is clearly unable to obtain adequate replacement supplies "on the usual trade terms".

F/ Nadeau Will be Substantially Affected in its Business (s. 75(1)(a))

108. The first part of subsection 75(1)(a) requires the Applicant to show that it will be substantially affected in its business due to its inability to obtain adequate supplies of the product anywhere in a market on usual trade terms.

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

109. The onus of proof is on the Applicant. The standard of proof is the civil standard, namely, proof on a balance of probabilities (51%).

Ref: *B. Filer Inc. et al v The Bank of Nova Scotia* (2006), 2006 Comp. Trib. 42, at par. 45-46, Joint Brief of Authorities, Tab 4B, p. 129 (hereinafter called "B-Filer") Applicant's Compendium, Tab 97

110. In the *Chrysler* case, this Tribunal held that the ordinary dictionary meaning should be given to the word "substantially", and that it required a showing of "more than something just beyond *de minimus*". Terms such as "important" are acceptable synonyms.

Ref: *Canada (Director of Investigation and Research, Competition Act) v Chrysler Canada Ltd.*, [1989] C.C.T.D. No. 49, Joint Book of Authorities, Tab 8B, at p. 382 Applicant's Compendium, Tab 98

111. In her initial Report, Sanderson accepted that the additional cost to Nadeau to replace the Respondents' chicken in Quebec was million per annum. In her oral testimony, however, she corrected this figure, and conceded an incremental cost to Nadeau of "just under million". This then must be taken to be the *minimum* additional cost.

Ref: Sanderson Report, p. 25, par. 50, Applicant's Compendium, Tab 99

Ref: Sanderson Supplemental Analysis, Tribunal Exhibit CRW-142, sections C, D, E, Applicant's Compendium, Tab 100

112. In cross-examination, Sanderson agreed that :

Ref: Evidence of Margaret Sanderson, Confidential Transcript, November 27, 2008, p. 143, line 20, p. 144, line 11, p. 145, lines 5-23, Applicant's Compendium, Tab 101

113. Grant Robinson, a Chartered Accountant with over 34 years experience, including expertise in the chicken industry, concluded that the *minimum* incremental cost to replace the Respondents' chickens would be over million, or a drop in earnings from operations in the model year. He based this on an assumed per kilogram premium over the Québec Board price. Subsequent information shows that this figure was probably low. (It should be noted that Robinson also analysed the impact of an *inability* to replace the Respondents' chicken. The

result would be about an drop in earnings from operations. For obvious reasons, Sanderson did not contest that this would be disastrous.)

Ref: See, for example, the Evidence of Tony Tavares, Confidential Transcript, November 18, 2008, p. 131, line 15 to p. 132, lines 1-6 or more, and the Evidence of Bruce McCullagh, Confidential Transcript, November 21, 2008, at p. 9, lines 14 :

, Applicant's Compendium, Tab 102

Ref: Robinson Report, Scenario 2, Applicant's Compendium, Tab 103

114. In his oral evidence, Robinson emphasized that :

Ref: Evidence of Grant Robinson, Confidential Transcript, November 24, 2008, P. 199, lines 1-16, Applicant's Compendium, Tab 104

See, also for example, the evidence of Dr. Richard Barichello, John Feenstra Affidavit, par. 77, and Supplementary Affidavit of Tony Tavares, par 15 and 16, and Affidavit of Kevin Thompson, par 4, 8, 9, 11 and Affidavit of Bruce McCullagh, par. 12-15, Applicant's Compendium, Tabs 105, 106, 107 and 108, respectively,

115. The example of is instructive in this regard. When he was first visited by Réjean Plourde, the proprietor indicated he might be willing to sell some chicken to Nadeau for

**Ref: Evidence of Réjean Plourde, Confidential Transcript, November 20, 2008,
p. 170, line 1 to p. 174, line 25, Applicant's Compendium, Tab 109**

116. The evidence in this case amply demonstrates that if Nadeau could replace the Respondents' chicken in Québec at all (itself a doubtful proposition), it could not do so without suffering very significant harm. It is submitted that, on the record before this Tribunal, Nadeau has demonstrated that it would be "substantially affected" in its business were the Respondents to remove their supplies of chicken from Nadeau.

117. The Respondents have in effect admitted this. Destruction of Nadeau by removal of its vital chicken supplies is, after all, their aim. Their many comments to the effect that the removal of chicken would destroy Nadeau, and their expectation that even the threat of such would bring Nadeau to its knees, is evidence of the very substantial harm they expect their conduct, if permitted, will inflict on Nadeau.

118. As such, it is submitted there is no doubt that Nadeau has met the s. 75(1)(a) test in this case.

Ref: Competition Act, s. 75(1)(a), Applicant's Compendium, Tab 94

**G/ The Inability to Obtain Supplies is due to Insufficient
Competition Among Suppliers (s. 75(1)(b))**

119. There is no doubt that Nadeau's inability to obtain adequate supplies is because of insufficient competition among chicken producers.

Ref: Competition Act, s. 75(1)(b), Applicant's Compendium, Tab 94

120. The evidence of Professor Barichello is quoted extensively above. In essence, he concludes that, as a result of the supply management system, chicken producers are completely insulated from competition. They need not compete among themselves to supply processors at all. In fact, in premium wars, processors fight among themselves to offer ever-increasing prices to producers, in return for no additional consumer welfare whatsoever.

121. Ware points out that:

Ref: Roger Ware Affidavit, par. 32, Applicant's Compendium, Tab 110

122. As Barichello notes, chicken producers are in fact a state-sanctioned cartel. As such, they do not compete amongst themselves at all.

Ref: Evidence of Richard Barichello, Public Transcript, November 20, 2008, p. 21. line 14-17, Applicant's Compendium, Tab 111

H/ Nadeau is Willing to Meet the Usual Trade Terms (s. 75(1)(c))

123. Nadeau has always met the usual and customary terms of trade, as fixed by the CFNB.

There is no evidence to the contrary.

I/ The Product is in Ample Supply (s. 75(1)(d))

124. The Respondents argue that, once having *di verted* their production from Nadeau to Olymel, they will not have any extra chickens to give to Nadeau, because of quota restrictions.

They then say that the product is therefore not in "ample supply".

Ref: Competition Act, s. 75(1)(d), Applicant's Compendium, Tab 94

125. This is a circular, self-serving and illogical argument. After all, the Respondents' purpose, goal and objective is to deprive Nadeau of chicken. So no matter how many chickens they have available, they will still give none of them to Nadeau.

126. Subsection 75(1)(d) cannot be interpreted so as to permit the malefactors to profit from their own misconduct. Surely the true intent is to ascertain whether the supplier, *through no fault of its own*, cannot supply the Applicant with the product. Examples of such a defence would be if there were a fire that destroyed the barns, or a disease that killed the birds. In such a case, the Respondents could not be faulted for failing to supply chickens they do not have. In our case, however, the Respondents can and do grow enough chicken, they just want to deprive Nadeau of it, for the reasons referred to above.

**Ref: Competition Bureau Information Bulletin – Refusal to Supply, at p.720
Applicant's Compendium, Tab 112**

127. In the alternative, if the supply management system as a whole is examined, as stated above by Barichello, its purpose is in fact to ensure a match between supply and demand, or in other words, an ample supply.

128. Finally, the evidence of Olymel itself demonstrates that there is an ample supply, indeed perhaps an oversupply, of chicken at the present time in Québec. Mr. Brodeur, Olymel's Vice-President of Procurement, expressly stated that:

"Il y a trop d'approvisionnement. C'est d'ailleurs ce qu'on mentionne au PPC à chaque période, que les inventaires sont trop élevés."

**Ref: Evidence of Yvan Brodeur, Public Transcript, November 26, 2008, p. 57
Applicant's Compendium, Tab 113**

129. Accordingly, the Applicant has shown that there is an ample supply of the product in issue in this litigation is in ample supply.

J/ There will be an Adverse Effect on Competition (s. 75(1)(e))

(i) The Proper Test

130. It is to be noted that the Respondent's expert, Margaret Sanderson, utilizes the test set out in the Merger Enforcement Guidelines as her analytic method. That test, however, was developed for, and is applied to, the *merger* sections of the *Competition Act*, which require that a merger be shown to be likely to "prevent or lessen" competition "substantially".

Ref: Competition Act, s. 92, Applicant's Compendium, Tab 114

131. By contrast, subsection 75(1)(e) only requires a showing that the refusal to supply "is having or is likely to have *an adverse effect* on competition in *a market*" (emphasis added). This is a much lower test.

Ref: Competition Act, s. 75(1)(e), Applicant's Compendium, Tab 94

Ref: *B-Filer, supra*, at par. 210-211, Applicant's Compendium, Tab 115

132. Parliament, in choosing to add a private right to relief (subject to leave) to section 75 in 2002, gave specific thought to what, if any, effect on competition needed to be shown. By deliberately omitting the word "substantial" (already in subsection 75(1)(a), and in sections 31, 33, 50, 77, 79 and 92 of the *Act*), Parliament must be taken to have accepted that a remedy should be granted at the suit of a private litigant on a showing of *any* non-trivial adverse effect on *any* market. In *Barcode*, for example, it was sufficient (albeit at the leave stage) for the applicant to show that it had "somewhat" of a presence in the Western Canadian market, and that the refusal to deal "could be likely to impede its ability to be an effective competitor in that market".

Ref: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2005] 2 F.C.R. 254, Joint Brief of Authorities, Tab 28, p. 1309

133. The evidence in these proceedings demonstrates the likelihood of not one, but many adverse effects on competition in various markets and sub-markets. These include:

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

These are dealt with in greater detail below.

(a) **Increase in "Live Price"**

134. It is submitted that it cannot be seriously doubted that, at a minimum, the Respondents' refusal to supply will result in a premium war, and a concomitant increase in live price for all processors. Indeed, on the evidence, the premium war has already started (C. . . . demanded and got a . . . per kilogram premium on his VAG, for a total of more than . . . per kilogram increase in landed costs to . . . ; and the premiums reported by Yvan Brodeur have increased from the . . . to . . . level reported in the . . . for the years 2000-2006, to over . . . per kilogram recently).

Ref: Evidence of Bruce McCullagh, Confidential Transcript November 21, 2008, p. 10, lines 2-24, Applicant's Compendium, Tab 116

Ref: Evidence of Yvan Brodeur, Confidential Transcript November 26, 2008, p. 118, 123, Applicant's Compendium, Tab 117

135. According to the Ware Report, this increase in the price for live chickens "

Ref: Ware Report, par. 35, Applicant's Compendium, Tab 118

136. In cross-examination, Ware elaborated:

Ref: Roger Ware Evidence, Confidential Transcript November 24, 2008, p. 24, lines 10-18, Applicant's Compendium, Tab 119

137. This is echoed by Bruce McCullagh:

"Faced with rising premiums, processors will look to and need to pass on these costs to their retail and foodservice customers who, in turn, will seek to increase prices to consumers".

Ref: Affidavit of Bruce McCullagh, Tribunal Exhibit A-77, par. 14, Applicant's Compendium, Tab 120

138. As stated by Kevin Thompson:

"Premiums are an undesired feature of supply management that is unintended by the legislation" (para. 6)

"...these senseless supply share battles among processors...really amount to a zero sum gain for the chicken processors and only serve to increase costs to processors and consumers." (para. 9)

Ref: Affidavit of Kevin Thompson, Tribunal Exhibit A-60, par. 6, 9, Applicant's Compendium, Tab 121

(b) Raising Nadeau's Costs

139. It is conceded that, at a minimum, the refusal to deal will substantially raise Nadeau's costs. It is conceded that Nadeau is a rival of Olymel's. As such, the raising of Nadeau's costs has an anti-competitive effect because this would weaken Nadeau, to the benefit of Olymel (and the Partnership).

Ref: *Canada v. Tele-Direct (Publications)*, 1997 CarswellNat 3120, at par. 590-592, Applicant's Supplementary Brief of Authorities, Applicant's Compendium, Tab 122

Ref: *Commissioner of Competition v Canada Pipe Co.*, [2007] 2 F.C.R. 3, at para. 74-78, Joint Brief of Authorities, Tab 6, pp. 283-285, Applicant's Compendium, Tab 123

(c) Effect on Viability of Processors

140. To the extent that processors *cannot* pass on the increased live costs caused by a premium war, their viability will be threatened. The vulnerability of processors to attacks on cost and supply is amply demonstrated on the record. Since April 2007 alone, two processors in Eastern Canada have closed (Maple Leaf in Nova Scotia and Lilydale in Québec). This attests to the vulnerability to attack of processors in Québec and the Maritimes.

141. As stated by Barichello, the real risks in the supply management system are borne by processors. As stated by Kevin Thompson:

"...increased live chicken costs create hardship for those processors who are in weaker financial condition and for those who cannot pass these additional costs on to their customers."

"...Of course processors cannot sustain these higher costs in the long term if they are unable to pass these costs on to their customers and some may be forced out of business."

Ref: Affidavit of Kevin Thompson, par. 9, 11, Applicant's Compendium, Tab 124

(d) Effects on Customers (non-monetary)

142. In *B-Filer*, this Tribunal stated that "adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, *a decrease in the quality of products* sold in the market (including such product features as warranties, quality of service and product innovation) *or a decrease in the variety of products made available* to buyers."

Ref: *B-Filer, supra*, at par. 206, Joint Book of Authorities, Tab 4B, at p. 166, Applicant's Compendium, Tab 125

143. Ms. Sanderson conceded that

Ref: Evidence of Margaret Sanderson, Confidential Transcript, November 27, 2008, p. 83, lines 3-12, p. 106, lines 10-19, p. 153, lines 16-17, Applicant's Compendium, Tab 126

See also, *Merger Guidelines*, cl. 2.2 and 2.13 and in particular footnote 17, Joint Brief of Authorities, Tab 8B, pp. 1655-1656, 1658, Applicant's Compendium, Tab 127

144. The record in this case amply demonstrates the vulnerability of Nadeau and its customers to the Respondents' refusal to supply. Westco's refusal to supply Nadeau with live birds commencing in August, 2008, caused an immediate adverse effect on product quality and product availability throughout the Maritimes.

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145. Following Westco's refusal to supply, [redacted] approached both Olymel (who refused to quote restaurant-landed prices) and Exceldor (who indicated that the [redacted] product could not be supplied at a commercial viable price). [redacted] entered into emergency arrangements with Nadeau and ACA, which cannot be sustained over the long-term. As explained by Corey Goodman:

"Well, obviously the current situation's untenable. There is – our requirements and our specifications call for kill plus six fresh bird and as it stands right now the contingency that's in place, as of today, is that we're getting an awful lot of frozen product. So we're at a bit of a loss as to what we might do in the event the situation is not resolved. So frozen product is not really satisfactory to us"

Ref: Evidence of Corey Goodman, Public Transcript, November 20, 2008, p. 114 line 21 to 115 line 3, Applicant's Compendium, Tab 128.

146. Customer after customer testified as to the inevitability of reduced product quality and product availability in the event Nadeau were to be denied supplies and would in turn have to cease supplying them. They all testified that there were no reasonably available alternatives. This evidence is clear and uncontradicted proof that adverse effects on competition in the market would be immediately caused by the Respondents' refusal to supply.

See, in this regard, the affidavits and testimony of (in addition to KFC): Lyndsay Gazzard, Terry Ellis, Guy Chevalier, Jeffrey McHaffie and Debbie Goodz, as well as the letters filed by other customers with the Affidavit of Anthony Tavares, at Tabs 129, 130, 131, 132, 133 and 134, respectively.

147. As stated by Ware:

Ref: Roger Ware Reply Affidavit, Tribunal Exhibit CA-83 par. 26 ("Ware Reply Report"), Applicant's Compendium, Tab 135

(e) **Raising Rival's Costs – Effects on Customers Who Compete with Olymel**

148. A number of Nadeau's customers are further processors, who compete directly with Olymel (and Exceldor). They all emphasized that the elimination or weakening of Nadeau would prohibitively increase their costs (if supply could be obtained at all), and thus imperil their businesses.

Ref: See evidence and affidavits of Terry Ellis, Guy Chevalier, and Debbie Goodz, Applicant's Compendium, Tabs 129-134

149. Ware summarizes this effect as follows:

Ref: Ware Reply Report, par. 30, Applicant's Compendium, Tab 136

150. Ware elaborated on this point in his oral evidence:

Ref: Evidence of Roger Ware, Confidential Transcript, November 21, 2008, p. 122, line 2 to 123, line 7, Applicant's Compendium, Tab 137

(f) **Market Power**

151. There is a major disagreement between Sanderson and Ware as to the extent of the relevant geographic market in this case. This is so because it is virtually conceded by Sanderson that if

152. It is submitted that, on careful analysis, Ware's view of this matter is the better one, and the geographic scope of the market should be Quebec and the Maritimes (excluding Newfoundland). Ware's opinion is supported by the evidence adduced in this case as to actual variation in prices, among other things. Sanderson's view is based mostly on unsupported assumptions as to what might occur in a normal (not a supply-managed) market. It is submitted that Ware's opinion should be preferred to that of Sanderson, and that the geographic scope of the market should *exclude* Ontario.

153. In the alternative, even if Ontario is *included* in the geographic market, it is submitted that an adverse effect sufficient to meet the lower threshold of subsection 75(1)(e), is nonetheless shown in this case. This issue is addressed in the Ware Reply Report.

Ref: Ware Reply Report, par. 16, Applicant's Compendium, Tab 138

154. Further, as stated by Ware, "air chill" capacity is not common among processors. The elimination of Nadeau would greatly increase Olymel's market share, and hence its market power, in this specialized market in Eastern Canada.

Ref: Ware / Report, par. 42, Applicant's Compendium, Tab 139

155. There would in any event be an adverse affect on competition, even if Nadeau is able to obtain replacement supplies from Québec, given that Olymel would receive 100% of the Respondents supplies, while the other Québec processors would see their VAG reduced.

Ref: Ware Reply Report, par. 15, Applicant's Compendium, Tab 140

(g) Nadeau is the most efficient plant in Canada

156. As demonstrated by the statistics compiled by Michael Donohue, and as reinforced in the Affidavit of Grant Robinson, Nadeau operates the most modern and efficient processing plant in Canada. Its elimination would for this reason alone have an adverse effect on competition in the market.

Ref: Ware Affidavit, par. 46, Applicant's Compendium, Tab 141

(h) Conclusion on s. 75(1)(e)

157. For the reasons set out above, it is submitted that Nadeau has more than satisfied the test under subsection 75(1)(e) of the *Competition Act*.

K/ Discretion

158. It is submitted that there is no valid reason to refuse an order in this case.

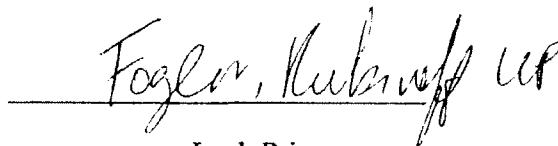
159. The Respondents make self-serving arguments in an effort to mask their true intention which is to abuse their state-protected monopoly to attack competition at the unprotected processor level of the market. Further, as the evidence makes clear, the Respondents do not have "clean hands". They embarked on a deliberate and conspiratorial course of conduct, as far back as August 2007, whose sole purpose and object was to attempt to force an improvident sale of the Nadeau Plant. In these circumstances, their improper conduct should not be rewarded, and the Order requested should be made.

PART IV: ORDER REQUESTED

160. The Applicant respectfully requests that an order be made pursuant to section 75 of the *Competition Act* directing and requiring the Respondents to accept Nadeau as a customer, and directing and requiring the Respondents to supply live broiler chickens to Nadeau in the full range of sizes (ranging from 1.71 kilograms to 2.4 kilograms each), on the usual trade terms in the numbers previously provided to Nadeau by the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 1, 2008



Leah Price
Andrea McCrae
Joshua Freeman
Fogler Rubinoff LLP

Ron Folkes
Folkes Legal Professional
Corporation

Of Counsel for the Applicants

Pursuant to the Confidentiality Order dated June 26, 2008, Tab 1 only appears in the Confidential Version of the Applicant's Compendium (filed).

Tab 2

1 MR. FEENSTRA: Ninety-two ('92).

2 MR. LEFEBVRE: Ninety-two ('92). And Nadeau
3 has been slaughtering the full production of live chicken in New
4 Brunswick since '92 with the exception of that period when there
5 was the fire; correct?

6 MR. FEENSTRA: No.

7 MR. LEFEBVRE: Okay. When did Nadeau not
8 supply the full production -- slaughter the full production of
9 live chicken in New Brunswick?

10 MR. FEENSTRA: When the Canada Packers plant
11 closed in Sussex, they took the birds with them to the plant in
Nova Scotia.

13 MR. LEFEBVRE: When was that?

14 MR. FEENSTRA: In 1992.

15 MR. LEFEBVRE: When did the birds come back?

16 MR. FEENSTRA: They trickled back from '94
17 or '95 to 1998.

18 MR. LEFEBVRE: And with the exception of
19 that period when there was a fire and reconstruction of the
20 Nadeau plant since 1998, Nadeau has slaughtered the whole live
21 chicken production in New Brunswick?

22 MR. FEENSTRA: Yes.

23 MR. LEFEBVRE: If you go to paragraph 27 of
24 your initial statement, you state that the base price in New

Pursuant to the Confidentiality Order dated June 26, 2008, Tabs 3 to 4 only appear in the Confidential Version of the Applicant's Compendium (filed).

Tab 5

PUBLIC

-5-

17. The St-François Plant is Nadeau's only business and the only chicken processing plant in New Brunswick.
18. Nadeau has been very supportive of New Brunswick's chicken producers over the past 18 years. It has developed stable long-term supply relationships with New Brunswick's producers. Nadeau has:
 - (a) paid premium prices to the producers for their live chicken to encourage the improvement of production facilities, to make them more efficient;
 - (b) guaranteed to the producers that it would purchase all of their live chicken; and
 - (c) provided additional incentives to encourage the relocation of production facilities further north (closer to the St-François Plant).
19. These long-term supply relationships have resulted in a stable continuing supply of live chicken, which has enabled the St-François Plant to develop stable and profitable markets for its products. Historically, Nadeau has obtained 100% of its live chicken from New Brunswick's producers, of which almost 75% has come from quota now owned by Westco, Dynaco or Acadia.
20. Nadeau is totally dependent on the continuance of stable long-term supply relationships. The St-François Plant's operations require that the daily level of supply be maintained, or the operations will cease. The Respondents understand this very well.
21. Nadeau has been a mainstay of the Madawaska community. It directly employs approximately 340 employees in the St-François Plant, and as such is the main employer in town and the largest employer in the local community. The benefits of Nadeau's operations in this area of the province are crucial to the economy of the region. Any negative impact on the viability of the plant would have a reverberating effect on the local economy.

Tab 6

22. Nadeau is a good local corporate citizen. For example, Nadeau went through the expense of installing ~~maintaining~~ a new waste water processing facility to improve water quality in the ~~St. Lawrence~~.
23. As well, following ~~the~~ plant fire in February 2002, Nadeau immediately announced its pledge ~~to~~ the St-François Plant, and opened a new state of the art processing facility by ~~the~~ 2002, only nine months later.
24. During the reconstruction ~~of~~, Nadeau continued to honour its moral commitment to buy 100% of the ~~chickens~~ produced in New Brunswick, although it had no contractual obligation to do so. ~~As a result~~, there was absolutely no economic loss to the chicken producers of New Brunswick but a considerable cost to Nadeau. Nadeau has made no request for financial ~~aid~~ from the Government of New Brunswick.
25. Nadeau was, and ~~continues~~, dedicated to job creation and generation of economic benefits to the Province ~~of~~ Brunswick.

D/ The Producers

26. Over the last few ~~years~~ number of chicken producers in New Brunswick have consolidated their ~~quotas~~ created three main producer groups that now comprise almost 75% of New Brunswick's live chicken production. The groups are the Westco group, the Dynaco ~~and~~ their "coenterprise", Acadia (collectively, the "Producers").
27. This consolidation was ~~achieved~~ by means of sale or lease of chicken quota to Westco, Dynaco, or Acadia, as ~~may~~ be. There was usually not an accompanying change of "title" over the quota ~~words~~, most of the quotas remain in the names of the original producers, ~~even though~~ ownership or control of the production has been transferred to Westco, ~~by~~ Acadia.
28. Attached hereto and ~~marked~~ exhibit "D" to this my affidavit is a chart prepared by Yves Landry, General ~~Manager~~ Nadeau ("Mr. Landry"), the contents of which I verily believe are true. ~~It lists~~ 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.

29. I am advised by Mr. Landry, and verily believe, that Dynaco completely owns or totally controls the quota nominally held by Ferme Avicole Bolduc, Ferme Avicole J.J.C. Bolduc, and also leases the Slipp Farm quota from its owner, for a total of 7.23% of New Brunswick's quota. (Dynaco co-owns another 4.96% with a third party.) Acadia owns or controls 16.04%, as shown on the chart. Westco owns or controls the quotas listed in the chart under the names from "Montagnaise" to "Couvoir Westco", for a total of 50.91%. Accordingly, for quota period A83, Westco, Dynaco and Acadia either own or control a total of 74.18% of New Brunswick's chicken quota.

30. For the last several years, and until May of 2007, Nadeau has obtained almost all its live chicken supplies from New Brunswick. Nadeau typically processed from 350,000 to 375,000 chickens per week, of which nearly 75% came from Westco, Dynaco and Acadia (or their predecessors). Accordingly, nearly 75% of Nadeau's historic supplies of chickens were provided by the Respondents.

E/ New Brunswick Chicken Production

31. Until recently, Nadeau obtained its New Brunswick-raised chickens from about 35-40 producers. However, as demonstrated above, and with the assurance of a stable local buyer (Nadeau), there has been increasing concentration in the producer sector.

32. The CFNB does not impose any individual quota caps. As a result, over time, there were fewer and fewer producers, with larger and larger quotas. Nadeau expressed no concerns over this consolidation because Nadeau never expected that the Producers would attempt to misuse this concentration of supply to hold Nadeau hostage.

33. The concentration within the production sector is aggravated by the fact that the majority of the directors of the CFNB are affiliated with either Westco or Dynaco.

Pursuant to the Confidentiality Order dated June 26, 2008, Tabs 7 to 9 only appear in the Confidential Version of the Applicant's Compendium (filed).

Tab 10

PUBLIC

-5-

17. The St-François Plant is Nadeau's only business and the only chicken processing plant in New Brunswick.
18. Nadeau has been very supportive of New Brunswick's chicken producers over the past 18 years. It has developed stable long-term supply relationships with New Brunswick's producers. Nadeau has:
 - (a) paid premium prices to the producers for their live chicken to encourage the improvement of production facilities, to make them more efficient;
 - (b) guaranteed to the producers that it would purchase all of their live chicken; and
 - (c) provided additional incentives to encourage the relocation of production facilities further north (closer to the St-François Plant).
19. These long-term supply relationships have resulted in a stable continuing supply of live chicken, which has enabled the St-François Plant to develop stable and profitable markets for its products. Historically, Nadeau has obtained 100% of its live chicken from New Brunswick's producers, of which almost 75% has come from quota now owned by Westco, Dynaco or Acadia.
20. Nadeau is totally dependent on the continuance of stable long-term supply relationships. The St-François Plant's operations require that the daily level of supply be maintained, or the operations will cease. The Respondents understand this very well.
21. Nadeau has been a mainstay of the Madawaska community. It directly employs approximately 340 employees in the St-François Plant, and as such is the main employer in town and the largest employer in the local community. The benefits of Nadeau's operations in this area of the province are crucial to the economy of the region. Any negative impact on the viability of the plant would have a reverberating effect on the local economy.

Tab 11

A/ The Parties

2. The Applicant, Nadeau, is a corporation incorporated under the laws of the Province of New Brunswick. Nadeau is a wholly-owned subsidiary of Maple Lodge Holding Corporation ("**Maple Lodge**"), which is one of the largest processors of chicken in Canada. Maple Lodge has been in business since 1956, and is a 100% family-owned business. Maple Lodge currently employs about 2300 people and operates 2 processing facilities in Canada: one in Norval, Ontario and one in St-François de Madawaska, New Brunswick (the "**St-François Plant**"). Nadeau operates the St-François Plant and processes chicken for the Québec and Maritime markets.
3. Attached hereto as **Exhibit "A"** is a copy of a map showing the location of the processing plant in St-François.
4. The Respondent, Groupe Westco Inc. ("**Westco**"), is a corporation incorporated under the laws of the Province of New Brunswick. Westco is highly integrated in the chicken industry. It owns or controls hatching egg production quota, farms, hatcheries, chicken production quota and chicken production farms. Its chicken production facilities are located in New Brunswick and elsewhere. Attached hereto as **Exhibit "B"** is a true copy of a brochure put out by Westco. As can be seen from the brochure, Westco currently has, besides its chicken production facilities, hatcheries and transportation facilities. The brochure also refers to "Volailles Acadia" as a "coentreprise" that was acquired in 2006. The brochure states that Westco has 51% of New Brunswick's chicken production, and Acadia has 17%, for a total of 68%.
5. The Respondent, Groupe Dynaco, Coopérative Agroalimentaire ("**Dynaco**"), is a co-operative registered in the Province of Québec. Dynaco owns certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. It offers a wide range of products and services to meet the needs of agricultural producers and consumers.
6. The Respondent, Volailles Acadia S.E.C., created under the laws of the Province of Québec, is registered as an extra-provincial limited partnership in the Province of New

Tab 12

PUBLIC

- 2 -

- 2.1. Dynaco est une coopérative agro-alimentaire comptant plus de 1 500 membres dont environ 650 producteurs agricoles et elle est la 5^e plus importante coopérative agricole au Québec.
 - 2.2. La production avicole de Dynaco au Nouveau-Brunswick représente 1,8 % du chiffre d'affaires total de l'entreprise pour l'année 2007.
 - 2.3. Dynaco est membre de La Coop fédérée.
 - 2.4. Il existe un lien entre Dynaco et Olymel S.E.C. (ci-après « **Olymel** ») puisque cette dernière est détenue en partie par La Coop fédérée.
3. Relativement aux contingents (aussi appelés « quotas ») de production de poulets détenus par Dynaco, le Témoin viendra témoigner des faits suivants :
- 3.1. En date de son départ le 18 février 2008, Dynaco détenait 6,22 % du contingent de production de poulets du Nouveau-Brunswick, tel qu'il appert des permis de producteurs joints en liasse à la présente déclaration comme pièce RF-1.
 - 3.2. Dynaco détient 100 % des actions des deux entités corporatives que sont Les Fermes J.J.C. Bolduc inc. et Les Fermes avicoles Bolduc (ci-après « **Fermes Bolduc** »).
 - 3.3. Les contingents détenus par Fermes Bolduc sont les seuls contingents de production de poulets pour lesquels Dynaco contrôle le choix du lieu d'abattage au Nouveau-Brunswick.
 - 3.4. Le contingent de Slipp Farm est produit par Volailles Acadia S.E.C. et Volailles Acadia inc. (ci-après « **Acadia** »), Dynaco n'a aucun contrôle sur celui-ci.
 - 3.5. Quant à Cormico inc., Dynaco détient 25 % des actions de cette dernière, les autres actions étant détenues à 25 % par La Coop fédérée et à 50 % par la famille

Cormier. Dynaco n'exerce aucun contrôle sur le lieu d'abattage des poulets produits par Cormico inc. Cette dernière n'a jamais manifesté son intention de faire abattre son contingent de production de poulets ailleurs que chez Nadeau Ferme avicole limitée (ci-après « Nadeau »).

4. Relativement à la décision prise par Dynaco de cesser de vendre ses poulets à Nadeau, le Témoin viendra témoigner des faits suivants :
 - 4.1. En décembre 2007, le Témoin apprenait que M. Anthony Tavares, alors président directeur général de Nadeau, avait fait de fausses représentations concernant Dynaco au ministre de l'Agriculture et de l'Aquaculture du Nouveau-Brunswick, M. Ronald Ouellet.
 - 4.2. Le 22 janvier 2008, le conseil d'administration de Dynaco a pris la décision de temporairement faire abattre ses poulets du Nouveau-Brunswick au Québec, tel qu'il appert du procès-verbal du 22 janvier 2008 joint à la présente déclaration à la pièce **RF-2**.
 - 4.3. La décision prise par le conseil d'administration de Dynaco avait pour but de permettre aux deux conseils d'administration de Fermes Bolduc de pouvoir cesser d'approvisionner Nadeau en poulets au moment jugé opportun.
 - 4.4. Le 23 janvier 2008, M. Tavares a fait parvenir une lettre au ministre Ouellet réitérant erronément que Dynaco avait assigné sa production de poulets chez Olymel et accusant Dynaco de prendre part à ce qu'il qualifiait de « illegal conspiracy », tel qu'il appert de la lettre jointe à la présente déclaration à la pièce **RF-3**.
 - 4.5. Le 6 mars 2008, Fermes Bolduc ont informé Nadeau de leur intention de cesser de lui livrer le poulet produit par ces dernières à compter du 15 septembre 2008,

Pursuant to the Confidentiality Order dated June 26, 2008, Tab 13 only appears in the Confidential Version of the Applicant's Compendium (filed).

Tab 14

73. Nadeau cannot obtain replacement supplies of live chicken from within or outside New Brunswick if supplies from the Producers are cut off.

I/ Substantial Detrimental Effect of the Refusal to Deal

74. Currently, the St-François Plant processes about 565,800 chickens per week, on average, from the following sources:

Westco	186,230
Acadia	58,670
Dynaco	26,450
New Brunswick, other	94,450
(Total New Brunswick)	365,800
P.E.I.	40,000
Nova Scotia	160,000

75. Historically, Nadeau obtained all of its supply from New Brunswick. However, in April 2007, one of Nova Scotia's two processing plants (Maple Leaf Foods) shut down, which resulted in a diversion of chicken from that plant to the St-François Plant. As a result, Nadeau has been receiving Nova Scotia chicken (160,000) and P.E.I. chicken (40,000) since May, 2007.

76. However, the current level of supply from Nova Scotia is not guaranteed, and as a result, we cannot rely on it for future planning purposes. The live chickens must travel for over 12 hours from Nova Scotia to get to the St-François Plant. These are not ideal conditions. Further, we are processing these chickens from Nova Scotia because the one remaining plant in that province has stated that it is not able to process and market them profitably at this time. I fully expect that this will change, and the supply of chicken Nadeau currently receives from Nova Scotia will eventually be re-directed to the remaining plant in Nova Scotia.

Tab 15

allocations by Ownerships and Groupes

PUBLIC

ferme Avicole Bolduc	208958	Luc P Nadeau	273176	Quebec Owner	
ferme Avicole J.J.C Bolduc	154961	Scott Broilers	251988	Quebec Owner	
Avicole Owner	363919	Michel P (058385NB Inc)	68658		
			593822	10.15%	
Avicelle Acadia 1	Quebec Co-Owned	116768	Cormico Inc.	290443	Co-owned by Dynaco and Cormier 50-50
Avicelle Acadia 2	Quebec Co-Owned	322520		290443	4.96%
Avicelle Acadia 3	Quebec Co-Owned	305957			
Avicelle Acadia 4	Quebec Co-Owned	39432	Ferme Cormier	252317	
Avicelle Acadia 5	Quebec Co-Owned	60546	Avicole DMS	156849	
Avicelle Acadia 6	Quebec Co-Owned	93350		409166	6.99%
		938573			16.04%
Avicelle Antagnaise	282687	Dianna Edgett	93350	1.59%	
Avicelle de la Riviere	150223	Les Peres Trappistes	85262	1.46%	
Avicelle Boulay	301201	S. Nickerson (Hugh Harmon)	39697	0.68%	
Avicelle du Moulin	322763	Slipp Farm (Dynaco)	58876	1.01%	Rented to Quebec
Avicelle du Lac	207119				
Avicelle du Montiere	180024				
Avicelle de l'Amalex	358296				
Avicelle de l'exam	282651				
Avicelle de Louise Bouchard	81271				
Avicelle de l'ordic	192842	Total net allocation	5,853,076		
Avicelle de l'hapi	124531				
Avicelle de l'J Michaud(503430NBInc.)	193174		2,031,754	34.71%	
Avicelle de l'J Michaud(503431NBInc.)	93350				Percent of quotas owned and co-owned by Quebec interests
Avicelle de l'Group Westco	81987				
Avicelle de l'eroco	112768				
Avicelle de l'ouvoir Westco	5081				
	2979968				50.91%

Old ownership

Note:

Acadia 1	Ferme Anima
Acadia 2	Ferme Monique Ouellet
Acadia 3	Avicole J-P Ouellet
Acadia 4	Marc Ouellet(052641 NB Inc)
Acadia 5	Ferme Avicole Marc Ouellet
Acadia 6	Entreprise JPO

Pursuant to the Confidentiality Order dated June 26, 2008, Tabs 16 to 18 only appear in the Confidential Version of the Applicant's Compendium (filed).

Tab 19

1 what page are we on?

2 **MS. PRICE:** Oh, sorry, it was page 15 of 28,
3 under the heading "I". I hope I didn't -- I'm sorry if I didn't
4 speak up.

5 **THE CHAIRPERSON:** That's okay. Thank you.

6 **DR. BARICHELLO:** So that was an anti-dumping
7 hearing looking at Red Delicious apples, and I was involved in
8 testifying on whether or not injury had occurred to the Canadian
9 growers.

10 The second one listed was to the National
11 Farm Products Marketing Council, and that was a review of an
12 application by B.C. apple growers to achieve a supply management
13 status for B.C. apple marketing. And I was a witness on the
14 viability of that proposal.

15 And thirdly, expert witness before the
16 Supreme Court of British Columbia and this was concerning a
17 dispute between a group of milk producers in British Columbia
18 wishing to withdraw from the provincial marketing scheme.

19 **MS. PRICE:** All right, having gone through
20 that *Curriculum Vitae*, I would ask the Tribunal to qualify
21 Professor Barichello as an expert and let me read for the record
22 again the area of expertise that I request that he be qualified
23 upon. It is in the area of agricultural economics with a
24 specialization in regulated markets, especially supply
25 management, quota markets, trade policy and the analysis of

1 government policy.

2 (09:52) THE CHAIRPERSON: Thank you. Having heard
3 and read the materials and heard your argument in submissions
4 this morning, I am prepared to recognize Dr. Richard Barichello
5 as an expert in the areas that have just been read into the
6 record.

7 (09:53) MS. PRICE: Thank you.

8 Now, Professor Barichello, were you asked to
9 undertake a study and prepare a report for the purpose of these
10 proceedings?

11 DR. BARICHELLO: Yes, I was.

12 MS. PRICE: And is that report appended to
13 an affidavit, which you swore on September 22nd, 2008?

14 DR. BARICHELLO: Yes, that's correct.

15 MS. PRICE: May I please provide you with a
16 copy of that?

17 Could you please look at the report and is
18 that your signature on page 2 of the affidavit?

19 DR. BARICHELLO: Yes, it is.

20 MS. PRICE: And as Exhibit A to the
21 affidavit, is that the report which you prepared?

22 DR. BARICHELLO: Yes, it is.

23 MS. PRICE: May I have the document then
24 marked please as the next exhibit?

25 THE CHAIRPERSON: The Expert Report of Dr.

Tab 20

II. AN OVERVIEW OF SUPPLY MANAGEMENT IN THE CHICKEN AND DAIRY SECTORS

4. The purpose of this study is to review supply management in Canada, with particular reference to issues of competition at the producer level in the chicken and dairy sectors in five provinces. The provinces are New Brunswick, Nova Scotia, Quebec, Ontario, and British Columbia.

5. The study proceeds as follows. First, we present an overview of the key elements of the supply management system in Canada. Second, supply management and the regulations that govern it in practice is reviewed with greater detail for each of the two sectors, chicken and dairy, closing with some comparisons between the two.

6. Canada's supply management system is relatively unique among the world's agricultural marketing institutions, and unique among regulated markets within Canada. It is, in effect, a state-mandated cartel arrangement that substitutes a detailed and complex set of regulations, akin to a centrally planned economic system, for a more typical set of market-determined economic arrangements. To understand the workings of Canada's supply management system requires that you suspend your normal appreciation of how markets work and instead think of a collection of controls, specifically quota (quantity) and price controls, which work in concert to determine the functioning of this industry sector.

7. The description above applies to the New Brunswick chicken sector but it also applies to all components of the supply managed sector within Canada. The features about to be discussed apply with minor variations to the other four supply-managed subsectors of Canadian agriculture as well. The other subsectors are dairy, egg, turkey, and hatching eggs. Taken together, these five subsectors account for about 20 percent of the gross sales value of the Canadian agricultural sector, measured at the farm level.

8. Supply management as a policy regime originated in the early to mid-1970s. In the poultry sector it evolved as a policy response to the interprovincial competition in chicken and egg marketing ("the chicken and egg wars"). This replaced open, if periodically aggressive, competition with mandated market shares enforced with provincial (and producer) marketing quotas. In the dairy sector, supply management arose quite differently, in response to a desire to pay higher prices to farmers without incurring surplus production that was costly to dispose of. Initially a subsidy was paid across the board, but this was changed by instituting a quota to limit farmer access to the total subsidy and allowing a ceiling to be placed on the aggregate subsidy payment. This was followed by a quota on all industrial milk production to restrict supplies to the domestic market, thereby raising milk prices independently of any subsidy.

Tab 21

1 out the purpose of the report -- of the study, could you
2 indicate please for the Tribunal what the purpose of the study
3 was?

4 **DR. BARICHELLO:** It was to review supply
5 management in Canada as to its various general features and with
6 specific reference to the question of competition at the
7 producer level in the chicken and dairy sectors in five
8 provinces.

9 **MS. PRICE:** And you set out in this section
10 an overview of supply management in general, starting at
11 paragraph 6. Could you please explain what you said and
12 indicate for the Tribunal an overview of the supply management
13 system?

14 **DR. BARICHELLO:** Well, in the supply
15 management system in Canada, in its essence, is a cartel,
16 really, arrangement that is backed by legislation, in other
17 words state sanctioned, and it substitutes some detailed
18 regulations that basically supplant what would normally be a
19 market-determined set of economic arrangements. And so it
20 specifies key economic parameters for the industry and the
21 industry participants must follow those rules and take those
22 parameters as given.

23 **MS. PRICE:** Is it an unusual system among
24 world agricultural systems?

25 **DR. BARICHELLO:** Yes, it involves a level of

Tab 22

1 complexity and control that is among the most that I have seen
2 of any agricultural commodity marketing system anywhere.

3 MS. PRICE: And are you able to contrast the
4 system to that in the United States?

5 DR. BARICHELLO: Yes, there is no immediate
6 counterpart, although there have been schemes in the U.S. that
7 have had quota controls such as in tobacco and in peanuts, but
8 those systems no longer exist.

9 MS. PRICE: Now, on that same page, if I can
10 bring you down to paragraph 8? You indicate the origins of the
11 supply management system and can you expand on that please?

12 DR. BARICHELLO: Yes. The system began in
13 the early to mid-1970s, first in the dairy industry, where its
14 origins were that it was introduced to replace a subsidy system
15 which was open access, everyone could get the subsidy for
16 whatever amount of production they wanted. That moved to a
17 system of quotas on subsidies and then finally a federal-
18 provincial agreement to impose quotas on actual production
19 levels.

20 And in the poultry industry, it arose for
21 somewhat different reasons. Perhaps the most pressing issue was
22 the inter-provincial competition in chicken and egg marketing
23 that were termed the chicken-and-egg wars. And that period of
24 substantial instability was considered sufficiently undesirable
25 that the poultry sector followed the dairy sector and imposed

1 the system of national quotas and the associated restrictions.

2 **MS. PRICE:** And in that paragraph, in about
3 the third sentence, you referred to "the system having replaced
4 open and periodically aggressive competition."

5 What are we talking about there? What was
6 that "open and periodically aggressive competition"?

7 **DR. BARICHELLO:** That was between processors
8 selling into each of the provinces and competition at producer
9 level whereby producers could undercut each other and the end
10 result was quite a high variability in prices. Prices would go
11 up and down and it was considered to be sufficiently unstable
12 that it was undesirable.

13 **MS. PRICE:** And then you talk about, in
14 general terms, and again in the interest of time we won't go
15 through all the details, but in paragraph 9 you refer to the
16 boards and how the quota works. Can you, in a summary way,
17 indicate how that occurs? That's on page 4.

18 **DR. BARICHELLO:** Yes. There, first of all,
19 are provincial boards and there's also a national supervisory
20 board for each of these commodities.

21 The national board's powers vary by
22 commodity somewhat. They're usually responsible for at least
23 accepting the price that is to be set and they're albeit
24 responsible for determining the level of the Canada-wide quota,
25 the aggregate national quota, and then those are passed back to

Tab 23

1 another province?

2 DR. BARICHELLO: Yes, that's correct.

3 MS. PRICE: Paragraph 35, you touched on
4 this subject, but I just want to bring you back to what you say
5 in paragraph 35 about buying and selling quotas. In paragraph
6 35 you refer to buying and selling quotas, but restrictions on
7 transfer exist.

8 Why would there be restrictions on transfer?

9 DR. BARICHELLO: The main reason, in my
10 view, is that there's a desire that the benefits of supply
11 management that are, as I was mentioning earlier, are
12 considerable, that those benefits are targeted to the producers
13 of the products in Canada.

14 And so it is not permitted that outsiders
15 can buy the quotas and then just rent them to farmers.

16 So another view of that would be that
17 there's a strong interest by farmers that they not become just
18 renters, just tenants in this business. So whichever particular
19 angle you wish to put on it, the desire has been consistent with
20 Canadian policy on a number of fronts, that the benefits of
21 these government programs be focused on a particular group, and
22 in this particular case it's the farmers.

23 MS. PRICE: Are we talking about the family
24 farmers or large agro corporations, or does it matter?

25 DR. BARICHELLO: The purpose of the supply

1 management system has been to try and cater to small family
2 farms, and the system has been designed in many instances to
3 avoid vertical integration and to keep regional economies
4 buoyant in the agricultural sector.

5 MS. PRICE: Do you know why that is?

6 DR. BARICHELLO: There were observations of
7 what was going on in the U.S. where the farm production was
8 getting to be the province of only very, very large operations.
9 There was measures into vertical integration where feed
10 companies would own farms and then they would process it, and it
11 was -- there was a strong view within the industry in Canada
12 that that's not the model that we wanted to follow. And so the
13 supply management system was erected in an effort to try and put
14 greater attention to the preservation of smaller family farm
15 entities and not move to these large corporate interests, to the
16 same extent.

17 Now, when it comes to court ownership, they
18 are often maximum quota levels that an individual entity can
19 hold and I believe that's true across almost all of the
20 commodities and that's another measure to try and restrict farm
21 size in the sector.

22 MS. PRICE: Right. And another restriction
23 that you refer to in the second sentence as well in that
24 paragraph is that the owner of the quota must himself engage in
25 the production.

Pursuant to the Confidentiality Order dated June 26, 2008, Tab 24 only appears in the Confidential Version of the Applicant's Compendium (filed).

Tab 25

9. In all five commodity cases, the challenge in the early years of these supply management systems was to make the collection of policies work. To this end, numerous regulations were imposed, and since then the regulations have increased in both number and complexity. More regulations have arisen not only from central agencies at the national level but also from each of the provincial marketing boards. As a generalization, the central agencies for each commodity are responsible for price setting and setting the national or aggregate quota, while the provincial marketing boards look after the allocation of quota among producers and the many associated regulations surrounding its trading and enforcement. The relative importance of national agencies versus provincial boards varies, with provincial boards usually having more power in the poultry sector. Import quotas are also important but policies related to their use, levels, and associated tariffs are specified by World Trade Organization (WTO) trade agreements. Their implementation in Canada is the responsibility of the Department of Foreign Affairs and International Trade. The end result is perhaps the most highly regulated industry within the Canadian economy, and among the most complicated set of agricultural regulations of any agricultural sector in the world.

10. In the next section we will provide an overview of these regulations to show how far-reaching they are and to give an idea of how many decisions and normal market processes they cover. One aspect that should be kept in mind is that there are five commodities and nine individual provinces with marketing boards, plus national agencies for each commodity. In other words there could be as many as 50 different decision makers, so there is much variety across provinces and commodities as far as rules and regulations are concerned. What we attempt to do below is give the reader an overview of what is typically or generally the situation.

III REGULATORY OVERVIEW

11. The market is organized almost entirely by administrative means. In fact, few normal market mechanisms are at work in this system. Farmers are given their marketing quota, so production decisions are not really theirs to make, at least in the short run. Prices are also dictated, and most rules pertaining to how those prices are paid are also set, as are rules surrounding how the farm quotas are to be used. Farmers must still decide how to produce the product to fill their quota, but in some cases, even those decisions are constrained by marketing board rules. Processors also face a given price that they must pay farmers, although this is usually a minimum price that must be paid. Sometimes their selling price is also determined by the board.

12. Even though producers in other industries often face prices over which they have no control, those prices are usually *market* prices, determined by supply and demand forces. Even if there is only a small number of buyers or sellers, the price is usually

determined by market forces, and not fixed by fiat. In the Supply Management system, the farm price is set by the national agency in some cases (e.g., dairy) and by provincial marketing boards in other cases (chicken). When the price is set provincially, it often involves some negotiation between the marketing board and processors. In such a situation the processors have some influence over the price they must pay for their product, but in national price setting schemes they have no such influence. Even when provincial boards set their own price as for chicken, prices across provinces *move* together although the price *levels* vary slightly by province. Regardless of whether the price is set nationally or by province, it does not bear any necessary relation to comparable prices in nearby markets, such as those in the U.S. The price is intended to reflect local costs of production, based on a model of farm costs. Such an argument is open to interpretation, as the price chosen is usually considerably higher than what prevails in nearby (e.g., U.S.) markets and what would occur within Canada without the supply management regime. The key point is that it is not a normal market price but is a constructed price.

13. With this price in place, the supply management authorities, usually at the national level, determine the level of domestic consumption that is expected to occur. This is sometimes done on the basis of research work undertaken by central agency staff, or by consulting with processors regarding their expected sales. In either case, consumption estimates are obtained, and then the aggregate domestic quota is set. First, the amount of imports is subtracted. Because imports are restricted by tariff rate quotas, the minimum level of imports is known with some accuracy. What remains is the share of the domestic market that can be filled with domestic production, and quotas are usually set to be equal to this. To the extent that exports are important, an allowance is made for them when quotas are set. The relationship among these components is the following, all at the national level:

$$\text{Domestic (production) quota} = \text{consumption} - \text{imports} + \text{exports}$$

14. The total supply of product available within the industry is then determined. Domestic production is tightly limited and enforced by domestic farm quotas. Imports are restricted by tariff rate quotas. There is no other source of supply. This degree of control is necessary to set the domestic prices with some certainty. It also means that the domestic supply is fixed, so that the amount of product available to processors is also fixed. If there is an unexpected increase (decrease) in demand, the national agency has the option of increasing (decreasing) domestic quota, by increasing (lowering) "base" quota, or by granting (withdrawing) supplemental quota. It also has the option of requesting an increase in imports, although it has no option to *reduce* the tariff rate quota (TRQ) levels.

Tab 26

41. The Armstrong case illustrates the reluctance of at least one chicken marketing board to welcome new entrants. Not all marketing boards are so reluctant. Quite the opposite approach has been taken by British Columbia. Here the situation is anomalous because British Columbia entered into the federal chicken marketing system only relatively recently, in 2001. As a result, there was a considerable adjustment of relationships between producers and processors because quota was now issued on a federal basis, with regard to the needs of all provinces. Previously British Columbia had been able to issue quota as it wished. To regularize the situation, the province promulgated the Governing Orders of the British Columbia Chicken Marketing Board. Schedule 10 of the Orders covers the offering of new quota and, although the amounts are limited, there is a clear intent to encourage chicken production in certain areas of the province. Instead of paying for a quota, new entrants pay CN\$0.18 on each bird they raise. After 12 years of poultry farming, they are given a free title to the quota¹⁵.

42. The provincial marketing boards involved in supply management have the critical power of setting the domestic price for their commodity. Under the 2001 Federal-Provincial Agreement for Chicken, section 3.01c, provincial commodity boards receive this authority: 'to establish the minimum prices at which live chicken may be sold in their respective provinces'. The same section gives provincial commodity boards the power to limit quota, as discussed above. The task of the provincial commodity boards is thus to restrict production so that farmers earn a reasonable margin¹⁶, but not prevent prices from rising so high that demand is choked off¹⁷. Negotiations take place between provincial processors and the provincial commodity board representing the producers. The result of the negotiations is a minimum price in dollars per kg that the processors will pay the producers. It has been customary for other provinces to use the price negotiated in Ontario as a benchmark for their own negotiations. Quebec has its own price-setting strategy¹⁸. In Ontario, a formula has been used since May 2003 to calculate the price that processors pay to producers in each period. The price is established taking into account market conditions, input costs based on a cost-of-production formula, prices set in neighbouring provinces, and other factors (Poultry Marketplace, 2006).

¹⁵ <http://www.newrules.org/journal/nrfall00farmer.html>

¹⁶ Average total net income for chicken producers has increased from \$82,855 in 2000 to \$104,604 in 2005 (Poultry Marketplace, 2006).

¹⁷ So far they have been successful. Chicken consumption in Canada has risen by 77 per cent in the last fifteen years, although this has been at the expense of other meats (Poultry Marketplace, 2006).

¹⁸ Loi sur la mise en marche des produits agricoles, alimentaires et de la peche(L.R.Q.,c. M-35.1).

Tab 27

30. In 1995, there was a change in the determination of national production levels, or total quota allocations, with the passage of the National Allocation and Pricing Agreement, fully implemented in 1998. The new approach was proposed to be 'bottom-up', and the quantities of chicken required were now to be decided at the provincial level. All industry stake-holders were in favour of the new approach. The Proclamation Amending the Chicken Farmers of Canada Proclamation, SOR/DORS/2002-1 Regulatory Impact, makes that point.

31. Previously, the arrangement had been for CFC to distribute quota to provincial marketing boards based on the CFC's own estimates of demand. Under the new scheme, provincial processors negotiate with provincial marketing boards to determine provincial requirements for quota. The provincial requirements are aggregated by the CFC. The national quota is thus the aggregate of provincial requirements (Poultry Marketplace, 2006:2). The national production quota is divided up among the provinces by the CFC, based on the 'bottom-up' negotiations described above. The quota allocation is 'set periodically every 6 or 7 weeks depending on the year of production', and each province agrees to respect the quota it has been allocated. An illustration of the quota allocation process in British Columbia is provided here⁷:

21. In 2001, BC re-entered the Federal Provincial Agreement for Chicken (the "FPA"). In accordance with the "bottom up" approach under the new FPA, processors advise the Chicken Board of future consumer market requirements on a period-by-period basis. The ultimate consumer market as reflected by retailer requests drives chicken production in the province. The Chicken Board takes the processors requests forward to the national agency Chicken Farmers of Canada ("CFC"). Under the FPA, CFC uses the processors' market requirements to determine the national base allocation of chicken production for each province. The Chicken Board then takes BC's allocation and allots production to individual chicken growers based on their quota holdings and the processors' total requirements. Individual processors are then assigned that production through the huddle process.

32. To summarize the process of quota setting in chicken:

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

⁷ From http://www.bcchicken.ca/publications/download/98/Lilydale_7_Gowers_CMB_04-04_04-10_04-11_-_Gen_Orders_78_Decision_-_Feb_21_2005_.pdf, page 9. We return to this document below.

Tab 28

1 So then you were discussing this, and I'll
2 have the testimony on this table, and then we'll have a larger
3 version when it comes through. You were discussing then the
4 table at -- the equation at paragraph 13 and the figure at page
5 9.

6 I just wanted to take you back for a moment
7 to the text on page 13. You see you say in that text that
8 consumption estimates are obtained. How are consumption
9 estimates obtained? You deal with that in some places in the
10 report, but if you can indicate where in the report that is and
11 then indicate to the Tribunal how that's done?

12 **DR. BARICHELLO:** Yes. The -- you'll see
13 there's more detail on how that's done in the case of chicken on
14 page 11 in the report. And if I could just point out paragraph
15 32, that process? And this, by the way, is from the
16 documentation from the Chicken Farmers of Canada.

17 So processors in each province calculate
18 their expected requirements and then each province, each
19 province's marketing board takes those estimates from the
20 processors in their province, aggregate them up and send that to
21 Chicken Farmers of Canada for them, and then they aggregate
22 these up across all the provinces in Canada, make any
23 adjustments that they see fit, and then they authorize the total
24 production for both Canada first and then for each province
25 second.

Tab 29

have no decision in which producers will ship their raw product to that processor. The only decisions they have freedom to make are the product line they produce, the customers to whom they sell, and the production process they choose to use.

21. Finally, one may ask why this policy regime has remained such a prominent and powerful feature of Canadian agriculture when it is notable for benefitting farm producers so handsomely but at the expense of consumers and sometimes at the expense of processors. In many, but not all, developed countries, farmers receive production subsidies which are transfers of public funds to farmers to expand production and/or increase farm incomes. Supply management does not require such transfers of taxpayers' money. The administrative apparatus, which we describe in more detail below, is self-financing, and so the costs are borne by consumers rather than taxpayers. This means of financing is regressive because the costs paid by a wealthy person are the same as those paid by a less-wealthy person. But the long history of supply management implies that to the politicians the political benefits outweigh the economically less desirable allocation of the costs.

IV THE MACHINERY OF SUPPLY MANAGEMENT IN CHICKEN AND DAIRY

22. Supply management is succinctly described in Poultry Marketplace (2006) as 'a marketing system that requires domestic production and imports to ensure that the supply of a product matches the demand for it and that the prices paid to agricultural producers are steady over time and provide the producers with fair returns'.

23. Until the early 1970s, Canadian government agricultural policy was largely non-interventionist at the federal level. A more interventionist policy was adopted in 1972 with the passage of Farm Products Marketing Agencies Act (FPMAA). For chicken, the Federal-Provincial Agreement for Chicken, signed in 2001², replaced much of the legislation of the FPMAA. The agreement introduced a 'bottom-up' quota allocation process, which we describe below.

24. The underlying motivation in supply management is protection of the producer. The system revolves around regulations that ensure that the producer receives a predictable, steady, and sufficient profit. Each producer receives a 'quota', which is the amount of production, typically the total weight of chicken, that the producer may produce within a certain time-period. The producer is guaranteed a minimum price for his or her production by the marketing board for that product within his or her province. The minimum price of the product is set by the provincial marketing board, and so the

² http://www.chicken.ca/DefaultSite/index_e.aspx?DetailID=180

producer has both a guaranteed market and a guaranteed minimum price. The production goes to a processor who prepares the chicken for onward sale via a wholesaler. The major part of the risk is therefore taken at the processor level. We expand on this outline below.

25. Supply management is commonly described as resting on three 'pillars':

- Production Control
- Price Control
- Import Controls

Much of the responsibility for the three pillars rests at provincial level, but some tasks, such as import control, require federal action. Supply management works because provincial marketing boards are able to set quota levels in such a way that price is kept high enough to reward producers, but not so high that demand is choked off. In economic terms this is inefficient, because deliberate restrictions on supply mean that production is not competitive. We explore these issues in more detail below.

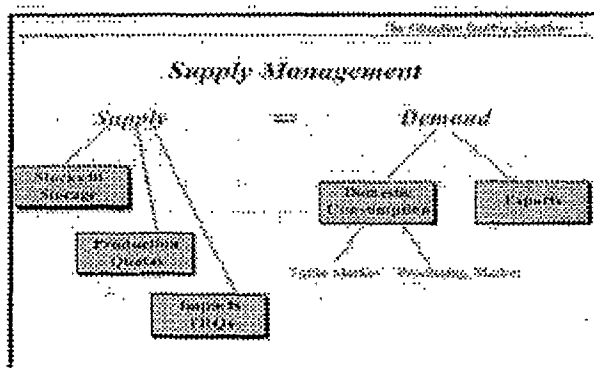


Figure 1. Matching supply with demand. Reproduced from Poultry Marketplace (2006).

26. Pillar 1: Producer discipline. As mentioned above, producers cannot produce any quantity of commodity that they wish. Instead, they are limited to their quota amount. For chicken, quotas are measured in kilograms of live weight. They are required to produce exactly this amount in each quota period, which for chicken is one sixth of a year. The length of the quota period is the normal duration of the time required to raise a chick to a weight suitable for processing. As we discuss below there are penalties for non-compliance.

27. The issuing and holding of quota is crucial to supply management, and so we review the history and current methods of quota issuing. We also review the penalties for under and over production, and trading in quota.

Tab 30

2005 SCC 20, 251 D.L.R. (4th) 577, 332 N.R. 201, [2005] 1 S.C.R. 292, EYB 2005-89279, J.E. 2005-768

gives provincial governments jurisdiction over local works and undertakings.

33 As previously indicated, once the national quota for chicken production is divided among the provinces, a producer must be allotted an individual production quota in order to produce chicken in the province. Chicken producers within each province receive only one individual marketing and production quota.

34 The provincial chicken regulation expresses quotas in square meters of barn space, clearly tying quotas to physical production within Quebec. The quota assigned to each producer in a province does not distinguish between what can be marketed within the province and what can be marketed extraprovincially; rather, the decision whether to market internally or externally is up to each producer once he or she obtains the proper licences (*Canadian Chicken Licensing Regulations*, SOR/81-517). Quebec's chicken producers are free to market their products intraprovincially, extraprovincially or in some combination of the two, so long as they do not exceed their individual quotas.

35 The only requirements imposed on provincial producers wishing to export their product are that they obtain a marketing and production quota from the Fédération and a licence from the federal body. A producer may not engage in the marketing of chicken in interprovincial or export trade without the appropriate licence. The licensing requirement, however, is not onerous. On receipt of a valid application, the federal body is required to issue a licence. For its part, the producer is required to abide by the applicable laws and to make regular reports detailing its extraprovincial sales. The amount of chicken that a producer may export is not specified on the licence and is, in theory, limited solely by the quota amount assigned by the Fédération.

36 It is important to stress that in examining the provincial laws at issue in the *Egg Reference*, both Laskin C.J. and Pigeon J. agreed that they were constitutional because they did not purport to, nor did they in fact, directly control or restrict export trade. The same is true of the provincial scheme in this case.

37 The core character of the provincial legislative component of the federal-provincial chicken marketing scheme is not to set quotas or fix prices for exported goods or to attempt to regulate interprovincial or export trade. As in the *Egg Reference*, its purpose is to establish rules that allow for the organization of the production and marketing of chicken within Quebec and to control chicken production to fulfill provincial commitments under a cooperative federal-provincial agreement. Any impact of this legislation on extraprovincial trade is incidental.

38 With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. The quota system is an attempt to maintain an equilibrium between supply and demand and at-

2005 SCC 20, 251 D.L.R. (4th) 577, 332 N.R. 201, [2005] 1 S.C.R. 292, EYB 2005-89279, J.E. 2005-768

tenuate the inherent instability of the markets. To achieve this balance, it cannot exempt producers who seek to avoid production control limits by devoting all or any of their production to extraprovincial trade.

39 Mr. Pelland also suggested that the Court consider the analysis in *Central Canada Potash* as offering analagous guidance. With respect, however, that case is not applicable. It turned on "the true nature and character" of the operative provincial scheme (p. 75). In *Central Canada Potash*, in fact, Laskin C.J. affirmed the decision of this Court in the *Egg Reference*. At issue was the constitutional validity of provincial regulations in Saskatchewan whereby each producer's share of potash production was allocated based solely on production capacity. It was common ground that at the time the regulations were made, almost all Saskatchewan-produced potash was sold in interprovincial and export trade. The case was decided before s. 92A was added to the *Constitution Act, 1867*, enlarging provincial powers over non-renewable natural resources.

40 Laskin C.J. found that the purpose of the regulations was to regulate the marketing of potash through the fixing of a minimum selling price applicable to the permitted production quota. The only market for which the scheme had any significance was the export market. Citing the *Egg Reference*, he held that while it is true that production controls and conservation measures with respect to natural resources in a province are ordinarily matters within provincial authority, the situation may be different where a province establishes a marketing scheme with price fixing as its central feature. He found Saskatchewan's legislation to be *ultra vires* because it took direct aim at the production of potash destined for export and had the intended effect of regulating the export price.

41 In Mr. Pelland's case, however, quotas are not being imposed on production with a view to limiting interprovincial trade, the hypothetical situation left open by Laskin C.J.'s minority judgment in the *Egg Reference*. Unlike *Central Canada Potash*, where the provincial scheme took direct aim at production destined for export, or the *Manitoba Egg and Poultry* case in which the provincial scheme was designed to restrict or limit the free flow of trade between provinces, the cooperative scheme at issue in this case is designed, like the scheme in the *Egg Reference*, to integrate federal and provincial marketing and production programmes.

42 At best, Mr. Pelland might argue that his production was effectively "choked off" by the reduction of his quota to zero through the penalty provisions of the provincial legislation. It is true that in his case the penalty provisions had this effect. But since the purpose of the provincial legislation is not to strangle export production, and since Mr. Pelland had been entitled, if he so chose, to export his entire quota of chickens, he cannot argue that the limits on his production and marketing contradict the purpose of the provincial legislation.

43 Mr. Pelland had his quota reduced not to control what he exported to extraprovincial markets, but in proportionate and formulaic response to his overproduction, regardless of the intended market. An individual producer like Mr. Pelland receives a single production quota, regardless of marketing destination. The fact that his quota was reduced to zero had nothing to do with a provincial attempt to regulate interprovincial or export trade, and everything to do with a flagrant disregard for his production quota.

Tab 31

1 MS. PRICE: Thank you.

2 And then at the top of that page you talk
3 about what is called bottom-up. Have you just described what
4 you refer to as the bottom-up approach?

5 DR. BARICHELLO: Yes, that's exactly right.

6 And the reason that term is used is because
7 it previously was determined by the Chicken Farmers of Canada,
8 which is considered a top-down process, and that was perhaps
9 considered less accurate. And so they went right to the
10 processors themselves who would be selling the product for their
11 estimates.

12 MS. PRICE: All right.

13 And then what's the intention as to the
14 match between expected demand, if you will, or consumption and
15 the supply? What's intended?

16 DR. BARICHELLO: The intention is for there
17 to be an ample supply of product available for each commodity
18 and by matching up expected consumption, knowing what the
19 producer and the processor price are likely to be and try to
20 make the system work seamlessly.

21 MS. PRICE: As with all human efforts, I
22 suppose, it's not always successful, but that's the intention;
23 is it?

24 DR. BARICHELLO: That's right.

25 MS. PRICE: Now, just looking back still at

Tab 32

a reduction in his quota allocation to zero and a fine. He appealed to the Supreme Court of Canada, but failed. His reason for appeal was that any restriction on extra-provincial trade was unconstitutional. The court held that the allotted quota was for both intra- and extra- provincial trade, and extra-provincial trade could not justify production in excess of quota. What is unclear is whether he had applied for a CFC licence to transport the chickens to Ontario. If he had no license then he would have been in breach of *Canadian Chicken Marketing Quota Regulations*, para 3, but we can find no record of a prosecution. It is possible that the fine and removal of quota were considered sufficient punishment. An Ontario producer provides an example of under-marketing¹³. The producer, Giannone, had been allocated a federal quota for export to the United States. Giannone however failed to meet the allocation. A deficiency levy was ordered. Giannone appealed, but lost.

39. As we have already shown, strict maintenance of quota levels is central to the supply management system. Quota therefore become valuable in itself. Because quota are controlled at the provincial level by marketing boards, and because provincial marketing board are in general controlled by producers, changes in legislation which might have an adverse effect on the value of quota are strongly resisted. We can see evidence of this in the way that those who wish to enter into chicken production are treated. Clearly, the possession of quota is a sine qua non for those who want to start production, but finding quota at a reasonable price is not a trivial task. As chicken sales increase, so the value of the farms producing the chicken also increases. Therefore the owner of the farm will not wish to see any dilution of quota. A case from Saskatchewan¹⁴, is illuminating. We discuss this case below.

40. A Mr Armstrong wished to start chicken production in Saskatchewan. The provincial marketing board operated a quota waiting list (QWL) which offered quota free to prospective new entrants. Mr Armstrong entered the QWL in 1982. By 2000, eighteen years later, he still had not received any quota and so complained against the chicken marketing board. The review panel noted that

the rights attributed to the holding of quota have attracted considerable value and many non-producers have expressed an interest in obtaining quota. The mechanism for obtaining quota to enter the industry is either through purchase of a licensed production unit or by having received quota by being uppermost on a quota waiting list (QWL) maintained by the CFS

During Mr Armstrong's long wait, chicken production in the province had expanded significantly, but the expansion was dealt with by increasing the quota of those who already held quota, instead of allowing those on the QWL a costless entree to the market. Mr Armstrong's complaint was dismissed, because the provincial chicken marketing board had acted within its powers.

¹³ http://www.nfpc-cnpa.gc.ca/english/publications/committeereport_giannone_2004.html

¹⁴ <http://www.agr.gov.sk.ca/agrifood/Armstrong.htm>

Tab 33

1 if you recognise that ~~the~~ average value of a farmer's quota
2 holdings, by current estimates, would be roughly two million
3 dollars.

4 **MS. PRICE:** Two million dollars (\$2,000,000)
5 for just having a quota~~?~~

6 **DR. BARICHELLO:** Correct.

7 **MS. PRICE:** And I believe you refer to that
8 later on in your report. How do you explain that? I mean how
9 is it that quota has ~~the~~ value and could you just draw the
10 Tribunal's attention to the portion of the report in which this
11 is discussed in a little ~~more~~ detail?

12 **DR. BARICHELLO:** Yes. This would be -- this
13 discussion begins on page 18 and because the quota is in -- so
14 strictly limited and enforced and because the price is very
15 remunerative to the ~~farmers~~ producers producing these products, of course,
16 they are in very, very high demand and yet their supply is very
17 strictly controlled. And as a result, the quota has taken on a
18 value. Furthermore, ~~there's~~ trade in these quotas, so it's not
19 a hidden value. It's an actual market. There's a market for
20 these quotas in most ~~provinces~~ and it's those -- the estimates
21 of the value of those ~~quotas~~ that are what are collected by
22 Statistics Canada, and ~~that's~~ the basics for when I say the
23 "average value of the ~~quota~~ per farm", it's roughly two million
24 dollars.

25 It ~~is~~ rises because of this monopoly that the

1 system implicitly involves and, as a result, because you have
2 high levels of profitability, plus you have limits on the total
3 amount of the quota, the quota takes on these very high values.

4 **MS. PRICE:** On page 7 then you deal with the
5 issue of discipline. At paragraph 20, at the bottom, you turn
6 then to the processor.

7 Do processors face restrictions in terms of
8 obtaining supply of live chicken as a result of the supply
9 management system?

10 **DR. BARICHELLO:** Yes. There's -- because of
11 the system, the total amount of product is fixed. And so if any
12 producer wants to get more, they have to do that at the expense
13 of someone else. So it becomes sometimes difficult to match a
14 processor's wishes with what's available.

15 **MS. PRICE:** And are there in the supply
16 management system any similar legislative restrictions on new
17 processors?

18 **DR. BARICHELLO:** No, it's an open-entry
19 system. So if a new processor wishes to engage, they're free to
20 do so and they would have to meet, of course, the normal health
21 and food safety licences, but it's an open system and they may
22 enter to produce.

23 **MS. PRICE:** At the processor level?

24 **DR. BARICHELLO:** That's correct.

25 **MS. PRICE:** But not at the producer level?

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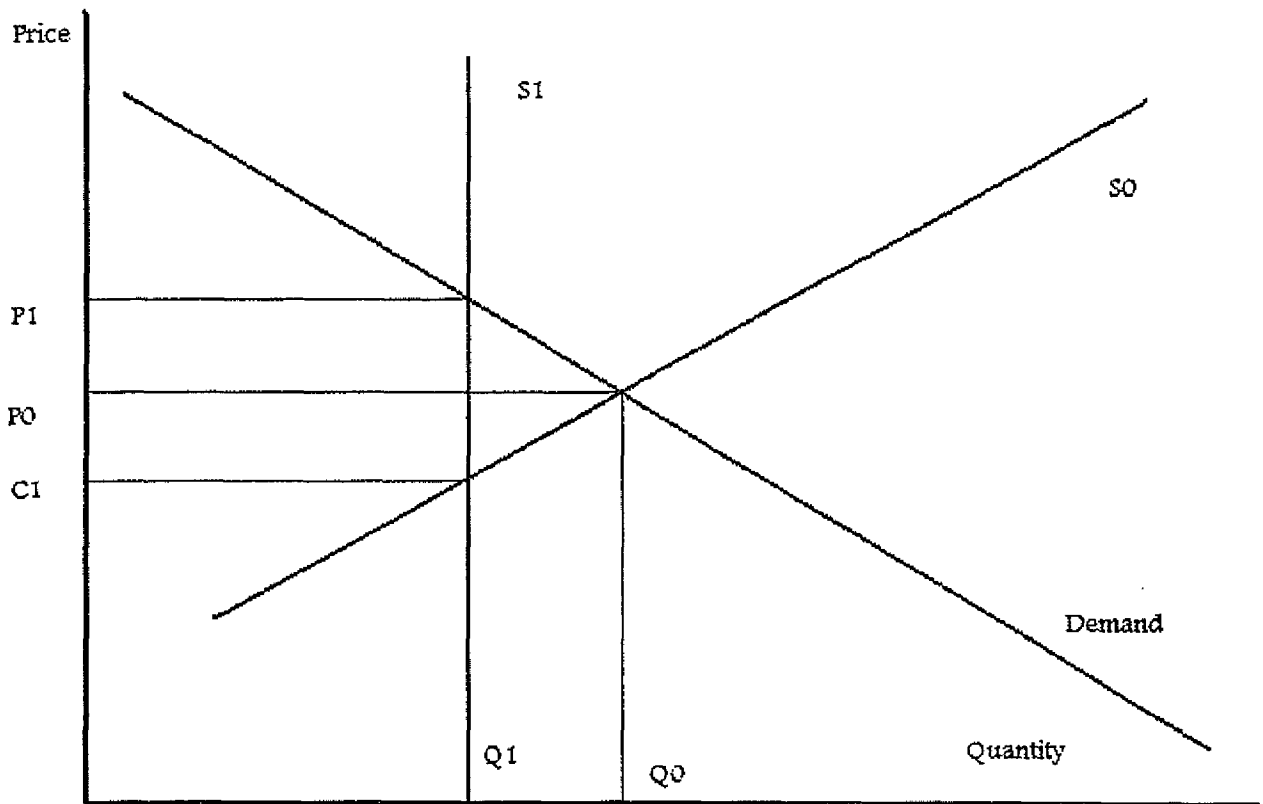


Figure 5.

53. Another feature of this organization of producers and the profitability of this policy regime is that producers have lobbied strongly and effectively to maintain and strengthen the system for the continued benefit of producers. This means maintaining their price levels, continuing the tight restrictions on imported product, and continuing the powers that have existed within the national agencies and provincial marketing boards. What this has done is to reduce considerably the risks faced by producers in this system. There is now no risk about price, no risk from unexpected imports, no risk that imports could affect the domestic price, and virtually no risk about the size of the domestic market. Only two types of risk have remained. There are the biological risks faced by all farmers of disease and related production uncertainties, and these cannot reasonably be removed. The second class of risk is that government policies could change, removing the stability of the existing system and making domestic price, import levels and domestic production levels all uncertain again. What the lobby efforts have done is effectively to remove, or at least significantly reduce, those "policy risks."

54. There is another feature of the existing regime for chicken marketing in Canada that deserves discussion. Above we described how provincial marketing boards set the minimum prices that processors were required to pay. In some cases processors pay a

Tab 35

1 DR. BARICHELLO: Well, and that's right, and
2 so you get some processors even being driven out of business on
3 occasion. That's happened quite commonly. There's been mergers
4 and processors going bankrupt. So that really reveals the risk
5 that I'm referring to in this case.

6 MS. PRICE: All right.

7 And I won't ask you to -- you dealt with the
8 assurance of supply and you referred to that earlier in your
9 testimony, but just for the panel that -- the area of (6).

10 Now, I just want to draw you back then in
11 conclusion to something you said right at the outset of your
12 testimony when you talked about the origins of the supply and
13 management system. And if I heard you correctly you said the
14 supply and management system replaced competition among
15 producers whereby before the system was implemented in the early
16 to mid-'70s they would undercut each other.

17 What's the current status in that regard?

18 DR. BARICHELLO: Current status is that the
19 producers don't have the opportunity to undercut by lowering
20 their price or they have no economic interest in doing this
21 because the marketing board requires that the processor pay a
22 certain minimum price. So all of that potential competition
23 from producers undercutting each other, competing against each
24 other by lower price, that's an avenue that's foreclosed in our
25 supply management system.

Tab 36

57. An appeal hearing in British Columbia, which we will discuss below in more detail, contains some interesting insights. The panel commented as follows:

The difficulty is that the only reason the product is in restricted supply is because of regulation. And in this context, regulators have made the further choice, in the interests of the chicken industry, to de-link the live price (the price processors pay growers) from the wholesale price (the price processors charge their customers). This was done in large part to provide growers with a more reasonable and predictable rate of return. It is now the processor that bears the risk of lower wholesale prices. Grower premiums unrelated to quality or service undermine chicken pricing and add business costs and risks to the processing sector that the pricing sector has sought to balance. The larger the gap between the regulated price and the actual price paid to growers, the more difficult it is for the processing sector to operate in a stable and successful manner and the more difficult it is to compete regionally and nationally. All of which undermines growers' long-term interests, even if it adds money to their pockets in the short term. We do not see the same systemic disadvantages arising where processors occasionally engage in purchasing product from one another, even recognizing that this practice can be viewed as giving certain "premium" benefits to processors.

The panel clearly recognized that in supply management it is the processor who bears the risk, because the processor lacks the protection afforded by supply management. The processor is in a very real sense the 'insulation' between the market and the producer. 'Open contracting' is the term used for unrestricted competition between processors for limited supply. The premia paid by processors to producers can grow large as processors fight for a share of a legally restrained sum of production, and the premia paid add to their risk and may reduce the long-term ability of processors to continue in business. To summarize, when supply is short, and producers have the opportunity to ship chicken to more than one processor, rent-seeking through premia is at the very least a possibility.

VI ASSURANCE OF SUPPLY

58. Clearly, a processing plant represents a considerable capital investment and therefore business risk. Processors will therefore wish to assure themselves that there exists a supply of chicken which will meet their capacity. On the other hand, producers wish to retain some flexibility over their choice of processor. In addition, the consumer market for chicken is dynamic, and some room for expansion and contraction needs to be incorporated. As a result, the links between producer and processor are sometimes contentious, as we discuss below. There are three particularly pertinent references given below in paras 56, 57, and 58..

59. The 2001 Federal-Provincial Agreement for Chicken section 3.05 (a) states that:

...the Provincial Commodity Board²² will consult with its processors using a 'bottom up' approach and, having regard to the market requirements

²² Provinces name their boards differently. See Annex A.

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34. The CFNB took no action to prevent the development of concentration within the production sector. As a result, between them, Westco and Dynaco have achieved a near monopoly over the production of live chicken in New Brunswick.

F/ The Respondents' Threats

35. On January 25, 2007, at a meeting in Atlanta, Georgia, representatives of Westco advised me that:
- (a) Westco was interested in buying or investing in the St-François Plant; and
 - (b) Westco wanted a price increase or additional incentives.
36. I responded that:
- (a) My shareholders would likely not be interested in selling the St-François Plant;
 - (b) A structure that would result in Westco owning a percentage of the St-François Plant and retaining 100% of their live production assets would result in non-aligned shareholder interests and likely eventually lead to conflicts over time. If Nadeau were to pursue discussions for a sale of the St-François Plant, the structure needed to be such that shareholders had the same aligned interests; and
 - (c) Even though the negotiated market price for live chicken in New Brunswick was \$.065 per kg. higher than the negotiated market price in Québec, Nadeau would consider a market based incentive plan for New Brunswick producers.
37. Shortly after the Atlanta meeting, I met with the Board of Directors of Maple Lodge, and they decided that they were not interested in selling a part of Nadeau to Westco. Although their strong desire was to retain the status quo, they agreed that they would be prepared to look at an ownership structure where the Nadeau and Westco assets would be pooled and Westco and Maple Lodge would each own a part of the combined operations. I subsequently communicated this to Thomas Soucy, President of Westco ("Mr. Soucy").

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38. Shortly after the Atlanta meeting, I also developed an incentive plan for New Brunswick producers based on the spread between published industry wholesale selling prices and the fair market price of live chicken negotiated with the CFNB. I am advised by Mr. Landry, and verily believe, that he subsequently communicated the details of the incentive plan to Mr. Soucy.
39. I am further advised by Mr. Landry, and verily believe, that Mr. Soucy initially advised Mr. Landry that he was pleased with the market-based incentive plan. However, when he found out that Nadeau intended to apply the incentive plan to all New Brunswick producers rather than just to Westco, he was not happy and advised Mr. Landry that Westco wanted a premium price higher than the rest of New Brunswick's producers.
40. Nadeau amended its plan so that the incentive to producers in Southern New Brunswick reflected the additional freight to the St-François Plant. Nadeau implemented this plan retroactive to shipments starting January 7, 2007. I am advised by Mr. Landry, and verily believe, that the incentive plan has resulted in Westco, Dynaco and Acadia receiving an additional \$830,000 through the end of 2007 over and above the fair market price for live chicken negotiated with the CFNB.
41. In the intervening period to August 19, 2007 no further mention was made of the incentive plan and no reply was given by Mr. Soucy to Nadeau's proposal to pool and jointly own the assets of Nadeau and Westco. However, in or about mid August, 2007, Mr. Soucy called me and indicated he wanted me to meet with him and Réjean Nadeau, Chief Executive Officer of Olymel S.E.C. ("**Olymel**"). Olymel is our primary competitor in Québec and the Eastern provinces. Accordingly, on August 19, 2007, I met with Mr. Soucy and Réjean Nadeau in Toronto.
42. At the meeting, Mr. Soucy and Réjean Nadeau advised me, on behalf of Westco and Olymel, that Westco and Olymel (the "**Consortium**") wanted Nadeau to sell the St-François Plant to the Consortium. They told me that if Nadeau was not willing to sell it, at a price acceptable to them, then all of the chicken produced by Westco and Dynaco would be diverted to Québec, and the Consortium would then build its own plant in New

Pursuant to the Confidentiality Order dated June 26, 2008, Tab 51 only appears in the Confidential Version of the Applicant's Compendium (filed).

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34. The CFNB took no action to prevent the development of concentration within the production sector. As a result, between them, Westco and Dynaco have achieved a near monopoly over the production of live chicken in New Brunswick.

F/ The Respondents' Threats

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Brunswick. In other words, if Nadeau would not give the Consortium what it wanted, Nadeau's supply would be cut off.]

43. I am advised by Mr. Landry, and verily believe, that he met with Mr. Soucy that same week. Mr. Soucy informed Mr. Landry that he was a member of the Board of Directors of Dynaco, and that he had the authority from Dynaco to make decisions on its behalf.
44. I met again with representatives of Westco on September 6, 2007, in St-François. Present at this meeting on behalf of Nadeau were myself, John Feenstra, Bob May and Yves Landry. Present on behalf of Westco were Bertin Cyr, Yvon Cyr, Rino Levasseur, Luc Morin, and Mr. Soucy. Yvon Cyr is also a member of the Board of Directors of the CFNB.
45. At the meeting, I explained the reasons why Nadeau was shocked at the actions/threats that had been made by the Consortium in August, and I pointed out that, in my view, it was a bad decision for Westco. The Westco representatives were not prepared to reconsider. They said they had given a commitment to Olymel, and could not back down.
46. When I asked why they thought Olymel would be a better partner than Nadeau after we had twenty years of success together, they said it has always been their goal to have an integrated company where THEY (their emphasis) would be the integrators. Mr. Soucy mentioned that after their acquisition of the St-François Plant they planned to demand that all growers shipping to the processing plant also buy chicks from Westco's hatchery.
47. Following our September 6th meeting, by e-mail dated September 20, 2007, I advised Mr. Soucy that Nadeau's first choice was to continue the very successful business relationship it had built over the years. I also advised him that, in the circumstances, our Board of Directors had instructed me to assemble a negotiating team. Attached hereto as Exhibit "E" is a copy of my e-mail dated September 20, 2007.
48. I wrote to Mr. Soucy and Réjean Nadeau (on October 9, 2007) to advise that Nadeau expected that the valuation process would be completed by the end of October, and that

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TAVARES AFF
EXHIBIT "E"

From: Tony Tavares [ttavares@maplelodgefarms.com]

Sent: September 20, 2007 2:26 PM

To: Tom Soucy (westcothomas@hotmail.com)

Cc: Bob May (bobmay@maplelodgefarms.com); John Feenstra (jfeenstra@nadeaupoultry.com)

Subject: Sale Negotiations for Nadeau Poultry Farm Ltd.

Dear Tom,

This is to follow up on our meeting on September 6 with representatives of the Westco group and my meeting on August 19 with you and Rejean Nadeau of Olymel.

The Board of Directors of the Maple Lodge Group has instructed me to put together a team to undertake negotiations for the potential sale of the Nadeau business in accordance with the demands of Westco and Olymel.]

This decision has been a very difficult one for the Maple Lodge shareholders. Nadeau has been an important part of our business for the past 18 years. In addition to the obvious investments of money and capital, we have invested substantial energies in developing a successful sales and marketing strategy for the benefit of all industry stakeholders. Over this time we have clearly demonstrated our commitment to New Brunswick's chicken producers and to serving and expanding the New Brunswick chicken industry. Our first desire is to continue the very successful business relationship we have built with Westco and the other producers of New Brunswick.

You will appreciate that this will not be a sale in the usual course where a number of bidders provide a transparent process to determine fair market value. In order to determine fair market value in our current situation, we will be hiring two chartered business valuers to prepare separate reports on the fair market value of the Nadeau business. These reports will consider Nadeau Poultry's record of profitability as well as earnings multiples for comparable businesses in the food and other industries. The valuations will also obviously reflect that the business is being sold to an important competitor of Maple Lodge. Olymel will realize substantial benefits to their existing operations as a result of their strengthened competitive position in the Eastern Canadian market place and these need to be factored into an assessment of the fair market value of the Nadeau operations.]

We expect to have the valuation reports finalized by October 31 and would expect to be in a position to meet with your negotiation team in early November.

Regards

Tony Tavares

CEO

Maple Lodge Farms

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Nadeau had set aside November 5, 6, and 7 to sit down with the Consortium to begin the negotiation process.

49. Réjean Nadeau called me in response to my email. He asked whether the valuations would take into account "the fact that 80% of our volume was not under our control". I made no response to his comment and told him that, in the absence of a normal selling process open to several potential buyers, the valuations would be the basis on which to start discussions.
50. On November 6, 2007, the parties met in Montreal to begin the negotiation process in connection with the potential sale of the plant (the "**Montreal Meeting**"). In attendance were the following individuals:
- (a) Mr. Soucy and Luc Morin of Westco;
 - (b) Réjean Nadeau, Francine Poirier and Yvan Brodeur (present in the morning only) of Olymel; and
 - (c) myself, Bob May, and John Feenstra of Nadeau, and Nadeau's financial advisor, Grant Robinson.
51. At the Montreal Meeting, Mr. Soucy advised Nadeau that, effective November 6, 2007, Westco had assigned all of its live chicken production to Olymel. Mr. Soucy further advised us that, effective November 16, 2007, all of Dynaco's live chicken supply would be assigned to Olymel. He advised that Olymel would control whether any of Westco's or Dynaco's live chicken would be slaughtered at the St-François Plant on a go-forward basis.
52. We were in effect told by Mr. Soucy that close to 75% of our New Brunswick supply of live chicken would be placed in the hands of Olymel.
53. A further negotiating session was held with the Consortium on December 18, 2007. The meeting took place in Montreal. Present on behalf of the Consortium were Mr. Soucy and Luc Morin (Westco), Réjean Nadeau, Carole Potvin (CFO Olymel), Paul Beauchamp

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am disappointed in what they have done with the government of NB and it was a surprise for me to see what they have done in my back.

I understand they do not want to sell however they had an opportunity to do it with us and they refused the fact that I want to buy and not build beside at least gives them value. I fear to understand why they are doing this resistance this plant could be worthless if I bail out. The Interprovincial Movements will not be stopped. There has been recent court case and even in Supreme Court and they have always given the right to the farmer to sell to whom ever he wishes to sell to.

Because they have lobbied the government and mess with farm product commission I have no choice but to act on this.

⇒ I lost all faith in their willing to negotiate in good will while I thought all was going right they played in my back not respecting the fact that they still were getting my product.

⇒ Last night I have given Olymel all of my product for them to control where they will process it.

⇒ I have also spoken to the COO of Coop Fédéré and at the next Share holders meeting of Accadia Poultry I will put a motion on the table that Accadia does the same as Water

... will have a drastic impact in the short

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49. Réjean Nadeau called me in response to my email. He asked whether the valuations would take into account "the fact that 80% of our volume was not under our control". I made no response to his comment and told him that, in the absence of a normal selling process open to several potential buyers, the valuations would be the basis on which to start discussions.

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(Senior VP Procurement Olymel), and Yvan Brodeur (VP Procurement Olymel). I attended on behalf of Nadeau, along with Bob May, Grant Robinson and John Feenstra.

54. At the meeting, the Consortium handed out a summary document whose "bottom line" showed a value of approximately 25% of the amount arrived at by our valuers. Réjean Nadeau stated that other transactions (which we considered to be similar) included a payment for guaranteed supply, which he said that Nadeau does not have in New Brunswick. Réjean Nadeau mentioned this three separate times, and further stated that the valuation for the St-François Plant has to be less as a result. Réjean Nadeau said we could not expect to be paid anything for amounts earned from processing the Producers' birds.
55. The Consortium concluded by suggesting a valuation approach based on a "bricks and mortar" or asset-based approach. In effect the Consortium assigned no value to any of the work and goodwill that we had created in the business for the past eighteen years. They also provided comparative replacement values for two of Olymel's plants in Québec at values which I believe are well below the replacement cost of the Nadeau plant. The resulting amount is not even remotely close to a reasonable value for the St-François Plant.

G/ The Respondents Give Notice of Termination of Supply

56. On January 21, 2008, John Feenstra received a letter from Westco, giving formal notice that Westco would cease supplying live chickens to Nadeau, effective July 20, 2008. Westco indicated that its reason for doing so was its partnership ("**partenariat**") with Olymel. Attached as **Exhibit "F"** is a copy of this letter.
57. Attached as **Exhibit "G"** is a copy of our letter of response to Westco's notice of cessation of supply, dated January 23, 2008. As can be seen, we requested that Westco rescind the notice, failing which we advised that we would seek our legal remedies.
58. On January 24, 2008, Rémi Faucher, CEO of Dynaco ("**Mr. Faucher**"), advised Mr. Landry of Nadeau that Dynaco would also cease supplying live chickens to Nadeau. Mr. Faucher indicated that its reason for doing so was that Nadeau had "sali le nom de

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Mr. Bertin Cyr, of Westco, praised Nadeau for its actions at that time, saying that Nadeau had managed the crisis as professionals. Attached as Exhibit "E" is a copy of press clipping (dated October 30, 2002) quoting Mr. Cyr.

21. In paragraphs 9 and 22 of the Soucy Affidavit, and in the Cloutier Affidavit and the Faucher Affidavit, it is pretended that there is no connection between the Respondents. The Respondents parse chicken supplies as if to suggest that each Respondent acts independently. However, the history of events, the interlocking boards, the co-ordinated (identical) positions taken in response to Nadeau's application, as well as the admitted ownership connections, all make it clear that the Respondents are in fact acting in concert. Even the CFNB recognizes this (see para. 5 of the CFNB Decision, at Exhibit "E" of the Soucy Affidavit):

[Westco] has also been able to group together as one entity about 51% of New Brunswick's chicken quota. ...Through other strategic alliances and partnerships, it can be argued that Westco has at least some influence on another \pm 21% of New Brunswick's chicken quota..."

22. Accordingly, from Nadeau's perspective, what is at issue is the threatened termination by the Respondents of the supply of 271,350 birds per week, or close to 75% of Nadeau's historic supply (46% of Nadeau's current supply, inclusive of the additional 25,000 Nova Scotia birds acquired in April). The loss of this large a volume will undoubtedly cause irreparable harm to Nadeau.
23. In reply to paragraph 36 of the Soucy Affidavit, the problem with the Dun Rite contract was that the birds supplied by Westco were too big. Despite this, Nadeau carried out its part of the contract, which was of one year's duration only.
24. In reply to paragraphs 50(a) to 50(c) of the Soucy Affidavit, Mr. Soucy has not produced the contract with Olymel, so I am unable to test these assertions . I note, however, that Mr. Soucy admits (Soucy Affidavit, para. 41(c)) that the contract has been in place since at least September, 2007. Accordingly, Westco was never negotiating in good faith with

Nadeau. Its sole intention was and is to weaken or destroy Nadeau, to eliminate a competitor to Olymel/Westco. As Westco's "partner", Olymel is acting in concert with Westco in seeking to drive Nadeau out of business, to its advantage, as was explained in my previous affidavit. Westco and Olymel should not be permitted to hide behind their own contract with each other to evade the scrutiny of this Tribunal, and their conduct is subject to its jurisdiction.

25. In reply to the comments in paragraph 50 of the Soucy Affidavit concerning Westco/Olymel's new plant, as far as I am aware, Westco/Olymel have yet to even purchase land, let alone take any concrete steps towards construction. Indeed, as recently as June 5, 2008, Mr. Soucy has stated that the new plant might be built in Québec, and not in New Brunswick at all. He is quoted by Radio-Canada as saying:

"Il y a des chances qu'elle soit logée à 10 ou 15 kilomètres à l'ouest de Saint-François, sur la frontière du Québec".

Attached at **Exhibit "F"** is a copy of the relevant press clipping.

26. With regard to the comments in sub-paragraphs 50(f) and 50(g) of the Soucy Affidavit concerning Nadeau's employees:

- (a) In a radio interview aired on June 5, 2008, a transcript of which is attached hereto as **Exhibit "G"**, Mr. Soucy stated that Westco has approached Nadeau's union ("on avait aussi entendu avec les employés ou avec l'union chez Nadeau") to offer employment to Nadeau's employees ("des packages etc. et même stabiliser leurs salaires"). It is apparent from this interview that Mr. Soucy fully believes that job losses are the inevitable result of the Respondents' refusal to supply Nadeau. Otherwise why bother to make promises to Nadeau's employees?
- (b) In any event, no written offer has been received by the Union representing Nadeau's employees, as can be seen from **Exhibit "H"** attached hereto dated June 4, 2008.

Pursuant to the Confidentiality Order dated June 26, 2008, Tabs 83 to 93 only appear in the Confidential Version of the Applicant's Compendium (filed).

Tab 94

Canada Federal Statutes

Competition Act

Part VIII -- Matters Reviewable By Tribunal

Restrictive Trade Practices

Refusal to Deal

s 75.

Federal English Statutes reflect
amendments current to November 26, 2008
Federal English Regulations are current to
Gazette Vol. 142:24 (November 26, 2008)

75.

75(1) Jurisdiction of Tribunal where refusal to deal

Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

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

footing with other persons who are able to obtain adequate supplies of the article in Canada.

75(2) When article is a separate product

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

75(3) Definition of "trade terms"

For the purposes of this section, the expression "**trade terms**" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

75(4) Inferences

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

R.S.C. 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37(w);
2002, c. 16, s. 11.1

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END OF DOCUMENT

Canada Federal Statutes French

Concurrence, Loi sur la

Partie VIII -- Affaires que le tribunal peut examiner [Intertitre modifié, L.R.C. (1985), ch. 19 (2e suppl.), art. 45.]

☐ Pratiques restrictives du commerce [Intertitre modifié, L.R.C. (1985), ch. 19 (2e suppl.), art. 45.]

☐ Refus de vendre [Intertitre ajouté, L.R.C. (1985), ch. 19 (2e suppl.), art. 45.]

s 75.

Federal French Statutes reflect

amendments current to November 12, 2008

Federal French Regulations are current to

Gazette Vol. 142:23 (November 12, 2008)

75.

75(1) Compétence du Tribunal dans les cas de refus de vendre

Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

- a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
- b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
- c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
- d) que le produit est disponible en quantité amplement suffisante;
- e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en ques-

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

75(2) Cas où l'article est un produit distinct

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

75(3) Définition de « conditions de commerce »

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

75(4) Application

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

L.R.C. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.1

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when leave is granted under section 103.1 of the Act. The amendment made in 2002 also added paragraph (e) to the Act. This is the first case brought before the Tribunal since paragraph (e) was added to subsection 75(1).

[43] For the purpose of this application, subsections (3) and (4) of section 75 are also relevant. Subsection (3) defines the phrase "trade terms", found in subsection 75(1), to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". Subsection (4) precludes the Tribunal from drawing any inference from the fact that the Commissioner has, or has not, taken any action in respect of the matter raised by the application. This provision has some relevance because, in January 2004, the Commissioner closed her investigation into the applicants' allegation that the refusal of CIBC, TD and ATB to allow GPAY to receive bill payments from their customers contravened sections 75 and 79 of the Act. The Tribunal has given no weight to the fact that the Commissioner's investigation was discontinued. The Commissioner did note that private access to the Tribunal might be available to the applicants.

[44] Section 75 of the Act is set out in its entirety in Schedule A to these reasons.

IV. ONUS AND STANDARD OF PROOF

[45] It is common ground among the parties that the applicants bear the onus of establishing each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act.

[46] The standard of proof to be applied is the civil standard: proof on a balance of probabilities.

V. THE WITNESSES PRESENTED BY EACH PARTY

[47] Before turning to the substance of the analysis of subsection 75(1) of the Act and its constituent elements, it is helpful to identify the witnesses called by each party. A description of the general nature of the testimony they presented in chief is contained in Schedule B to these reasons.

A. The Expert Witnesses

[48] Six individuals testified as experts before the Tribunal, two on behalf of the applicants and four on behalf of the Bank. The applicants' experts were Mr. Jack Bensimon and Dr. Lawrence Schwartz. The Bank's experts were Mr. Christopher Mathers, Dr. James Dingle, Mr. David Stewart and Dr. Frank Mathewson.

(1) The Applicants' Experts

[49] With the parties' agreement, the Tribunal accepted Jack Bensimon as an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and

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There does not in fact appear to be any difference between the two terms except when expressed as a percentage, which involves the use of a different denominator. The principal discrepancy between the gross margins of Arthur Anderson and the mark-up of Coopers & Lybrand is with respect to dealers in 1988. Arthur Anderson arrived at a figure of \$18,495, which compares to \$14,706 in the table. The figures in all other cases are the same or very close. The Arthur Anderson study provided gross margins for fewer years for the categories shown in the table and thus the decision to use the Coopers and Lybrand information was, so to speak, by default.

** January 1 - May 12.

Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the Director of Investigation and Research, Schedules A to D; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989.

The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a de minimis effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

The cut-off resulted in a decline of over \$200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S.-sourced parts, perhaps because of the

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Tab 111

1 out the purpose of the report -- of the study, could you
2 indicate please for the Tribunal what the purpose of the study
3 was?

4 DR. BARICHELLO: It was to review supply
5 management in Canada as to its various general features and with
6 specific reference to the question of competition at the
7 producer level in the chicken and dairy sectors in five
8 provinces.

9 MS. PRICE: And you set out in this section
10 an overview of supply management in general, starting at
11 paragraph 6. Could you please explain what you said and
12 indicate for the Tribunal an overview of the supply management
13 system?

14 DR. BARICHELLO: Well, in the supply
15 management system in Canada, in its essence, is a cartel,
16 really, arrangement that is backed by legislation, in other
17 words state sanctioned, and it substitutes some detailed
18 regulations that basically supplant what would normally be a
19 market-determined set of economic arrangements. And so it
20 specifies key economic parameters for the industry and the
21 industry participants must follow those rules and take those
22 parameters as given.

23 MS. PRICE: Is it an unusual system among
24 world agricultural systems?

25 DR. BARICHELLO: Yes, it involves a level of

Tab 112

What Do the Following Words Mean?

"Substantially affected"

A business would be substantially affected if the product refused accounted for a large portion of its sales and was essential to its continued profitability or survival.

The overall effect of the refusal also depends on whether the product could be easily replaced by another product or related line of business, or whether the product must be used or sold in conjunction with others.

"adequate supplies of a product"

Someone who is refused supplies must pursue all alternate sources of supply, taking into account price, quality, delivery time and profit margin.

If the cost of a replacement product makes sales unprofitable, this would not be considered a reasonable alternative.

An article that is different from others by a trade mark or trade name is not a separate product, unless it dominates the market. Therefore, a refusal to supply a national brand would not raise a concern under the law, if another national or regional brand or generic equivalent were suitable replacements.

"lack of competition among suppliers"

If other suppliers are willing to supply the would-be customer, or if the inability to obtain adequate supplies is the result of a supplier's legitimate business decision and not for anti-competitive reasons, this condition may not be satisfied.

"usual trade terms"

A would-be customer must be able to meet the supplier's usual credit terms, purchase requirements, and reasonable technical and service requirements.

"ample supply"

If there is a shortage of the product resulting from, for example, a fire at a plant, raw material shortages, limited production capacity or inventories, this condition would not be met.

« adverse effect on competition »

A would-be customer must establish that the refusal to supply not only harms his/her business, but also that the competitive situation in a market is affected negatively.

What Happens After I Contact the Bureau to Make a Complaint?

Bureau staff will ask about your situation and market conditions to check whether the required conditions have been met. If they have, Bureau officers will begin confidential interviews and a review of records, documents and other sources of information. The Bureau can also apply to the courts for subpoenas or use other compulsory means to continue its investigation.

The Bureau conducts its investigations in private and keeps confidential the identity of the source and the information provided. However, if someone has important evidence about an offence under the Act, that person may be asked to testify in court.

How Does the Bureau Resolve Refusal to Supply Complaints?

Where appropriate, the Commissioner will open discussions to obtain voluntary compliance with the law. Sometimes, this is all the action needed to correct the situation.

A more formal solution would involve the registration of a consent agreement with the *Competition Tribunal* when all parties agree to a solution that will restore competition in the marketplace. The Competition Tribunal is like a court, chaired by a judge and independent of any government department.

If voluntary compliance cannot be achieved, the Commissioner may file an application before the Competition Tribunal for an order to remedy the situation. To overcome the effects of a refusal to supply, the Competition Tribunal may issue an order requiring that one or more suppliers accept the customer who was refused supply.

Private Access to the Competition Tribunal

The *Competition Act* allows a person to apply directly to the Competition Tribunal for a hearing when it believes that the actions of a supplier meet all the requirements under the refusal to supply provisions.

The Bureau produces CD-ROMs and publications on various aspects of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. To find out more about our CD-ROMs and publications, contact the Information Centre:

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This publication is only a guide. It provides basic information about the Competition Bureau and the acts it administers. For further information, you should refer to the full text of the acts or contact the Competition Bureau at one of the numbers listed above.

1 30, and what do you conclude?

2 DR. WARE: Well, maybe if I could just
3 alight for a second on paragraph 27 ---

4 MS. PRICE: Sure.

5 DR. WARE: --- because this is important, I
6 think. There really is another product market here, the market
7 for further processing of chicken which is basically anything
8 that happens to the chicken after it's been killed and possibly
9 cut up. It might involve cooking of some kind or breading, so
10 on and so on and so on, various kinds of preparation.

11 The point here is that the customers of
12 Nadeau's who are further processors such as Riverview and
13 Sunchef, for example, are direct competitors of Olymel.

14 And once again, that market in which they
15 compete -- so they being Sunchef, Riverview, Poulet Riverview
16 and Olymel, that is the market for further processed chicken.
17 There are within a region a small number of competitors.

18 By essentially undertaking an action which
19 will lead to an increase in the cost of those processors --
20 sorry, those further processors, Olymel is, in effect, engaging
21 in a practice which is known in antitrust economics as raising
22 rivals' costs.

23 In effect, what it means is that if you can
24 do anything which leads to your rivals having to pay more for
25 their supplies and you're in an oligopolistic market, then what

1 that's going to do is disadvantage them and advantage you. It's
2 going to lead you to have -- increase your market share at the
3 expense of your competitors and your profits at the expense of
4 your competitors.

5 So there is -- that is an adverse effect on
6 competition which is distinct from just simply thinking about an
7 increase in price or a deterioration in quality.

8 MS. PRICE: Can I just stop you there for a
9 minute and ask a question arising from what you said?

10 This concept of raising rivals' costs, I
11 believe that there's been a fair bit of evidence that Nadeau and
12 Olymel do compete in the primary processing market.

13 Does that concept that you've just describe
14 apply not only to the further processors whose costs might be
15 raised as you've described but also to Nadeau itself in the
16 event it has to go into Quebec?

17 DR. WARE: It could, yes. Yes, it could.
18 We don't know -- you're basically saying does it apply to the
19 processing market, the primary processing market?

20 MS. PRICE: As well.

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

25 MS. PRICE: Right.

Tab 113

1 birds is a fresh meat market. It's not a frozen meat market,
2 primarily; is that not correct?

3 M. BRODEUR: Bien, le marché de Québec et
4 Ontario, c'est de la viande fraîche. Ceux qui aiment beaucoup
5 de viande surgelée, on parle de tout ce qui est consommé dans
6 les chaînes de restauration, les pépites de poulet, les burgers,
7 tout ce qui est vendu en épiceries en aliments surgelés, c'est
8 quand même des volumes importants dans le surgelé dans les
9 produits sur-transformés. Alors ---

10 MR. FOLKES: Yes, I agree with you, sir, but
11 I'm not referring to further process. That's the data below.
12 Do you understand what I'm referring to?

13 Now, according to this document, if I'm
14 reading it correctly, if I look at the columns under October
15 2007, and the next column says change or variation between '08
16 and '07, I see that the total storage stocks in this category
17 are up by 24.8 percent year over year.

18 Do you see that?

19 M. BRODEUR: Oui, oui.

20 MR. FOLKES: And does that indicate to you
21 that there's a good supply of chicken in the marketplace?

22 M. BRODEUR: Oui. Il y a trop
23 d'approvisionnement. C'est d'ailleurs ce qu'on mentionne au PPC
24 à chaque période, que les inventaires sont trop élevés.

25 MR. FOLKES: Yes. Thank you. You

Tab 114

Canada Federal Statutes

Competition Act

Part VIII -- Matters Reviewable By Tribunal

Restrictive Trade Practices

Mergers

s 92.

Federal English Statutes reflect
amendments current to November 26, 2008
Federal English Regulations are current to
Gazette Vol. 142:24 (November 26, 2008)

92.

92(1) Order

Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

- (a) in a trade, industry or profession,
- (b) among the sources from which a trade, industry or profession obtains a product,
- (c) among the outlets through which a trade, industry or profession disposes of a product,
or
- (d) otherwise than as described in paragraphs (a) to (c),

the Tribunal may, subject to sections 94 to 96,

- (e) in the case of a completed merger, order any party to the merger or any other person
 - (i) to dissolve the merger in such manner as the Tribunal directs,
 - (ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or
 - (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to

take any other action, or

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

92(2) Evidence

For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S.C. 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37(z.7)

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Canada Federal Statutes French

Concurrence, Loi sur la

Partie VIII -- Affaires que le tribunal peut examiner [Intertitre modifié, L.R.C. (1985), ch. 19 (2e suppl.), art. 45.]

Fusionnements [Intertitre ajouté, L.R.C. (1985), ch. 19 (2e suppl.), art. 45.]

s 92.

Federal French Statutes reflect

amendments current to November 12, 2008

Federal French Regulations are current to

Gazette Vol. 142:23 (November 12, 2008)

92.

92(1) Ordonnance en cas de diminution de la concurrence

Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet :

- a) dans un commerce, une industrie ou une profession;
- b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;
- c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;
- d) autrement que selon ce qui est prévu aux alinéas a) à c),

le Tribunal peut, sous réserve des articles 94 à 96 :

- e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :
 - (i) de le dissoudre, conformément à ses directives,
 - (ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

92(2) Preuve

Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R.C. (1985), ch. 19 (2^e suppl.), art. 45; 1999, ch. 2, art. 37

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[208] This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as result of the refusal, of created, enhanced or preserved market power.

[209] We also note that both Dr. Mathewson and Dr. Schwartz assess the effect on competition as a result of the Scotiabank termination in terms of market power. Dr. Mathewson opined that “[i]n analyzing the potential effect on competition of Scotiabank’s terminating GPay’s banking services, consideration was given to the possible impact of termination on any hypothetical market power accruing to Scotiabank, in particular to its Interac Online Service.” Dr. Schwartz meanwhile noted that the effect of the termination will be insufficient competition and, thus, likely higher merchant fees.

[210] Thus, paragraph 75(1)(e) does not differ from what is contemplated in paragraph 79(1)(c), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect must be adverse, while under other provisions the effect must be substantial.

[211] From the plain meaning of the words used by Parliament, we find that “adverse” is a lower threshold than “substantial”. As for the requirement that the refusal to deal “is likely to have” such adverse effect, at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition)*, [2000] C.C.T.D. No. 24; aff’d [2002] F.C.J. No. 424 (FCA), the Tribunal found that a relatively high standard of proof is required to establish the “likely” occurrence of a future event. The Tribunal found that the terms “likely” and “probable” were synonymous. On the basis of the plain meaning of the word “likely”, and on the basis of the Tribunal’s reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is “probable” and not merely possible.

[212] However, as noted by the Tribunal in *Hillsdown*, at page 314, one cannot consider the degree of any likely increase in market power without reference to the particular facts of a case (including consideration of any facts that may be relevant under section 1.1 of the Act). We now turn to that.

(2) The Effect of Scotiabank’s Refusal to Deal

[213] At the outset we observe that for the purpose of paragraph 75(1)(e), the market at issue need not be, and, in this case, is not the market of concern in paragraphs 75(1)(a) and (b). The market of concern under 75(1)(e) is the market in which the applicants participate. That said, we are satisfied that, in this case, that market need not be defined. We need first only decide whether Scotiabank’s online debit product, Interac Online, and the UseMyBank Service are currently in the same market and/or are likely to be in the same market for future transactions. Absent such actual or expected competition, it is impossible for the refusal to deal to have an adverse effect on competition.

Pursuant to the Confidentiality Order dated June 26, 2008, Tabs 116 to 119 only appear in the Confidential Version of the Applicant's Compendium (filed).

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13. However, should this strategy have any success, then Québec processors who have lost supply to Nadeau will seek to regain chicken by offering premiums to producers in the province of Ontario. The resulting outcome is that processors' costs will rise across multiple provinces in an attempt to secure chicken supply for their processing plants.
14. Faced with rising premiums, processors will look to and need to pass on these costs to their retail and foodservice customers who, in turn, will seek to increase prices to consumers.
15. The outcome of this supply threat in New Brunswick would be that downstream processors, retailers, foodservice operators and consumers would incur greater costs, and chicken producers would receive an unfair financial benefit by leveraging power allotted to them through the quasi-monopoly afforded to them through supply management regulations.

Conclusion

16. The Competition Tribunal must ensure that abuse of supply management privileges cannot be used to jeopardize the millions of dollars of investments that processors have made in Canada or drive unnecessary costs into the Canadian chicken industry. Providing for assurance of supply within the Province of New Brunswick is critical to a successful conclusion to this situation.

SWORN before me at the City of
Oakville, in the Province of Ontario, this
23rd day of September, 2008.

A Commissioner for taking affidavits.

} _____
Bruce McCullagh

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period, reducing the supply to be allocated under the respective provincial processor allocation systems.

6. Ontario has traditionally been a net importer of live chicken from Quebec. This has changed recently with certain Quebec processors aggressively recruiting chicken in Ontario. This has forced Ontario processors to retaliate, by recruiting Quebec producers through paying premiums. Premiums are payments made to growers in addition to the regulated live chicken price set by the provincial marketing boards. Premiums are an undesired feature of supply management that is unintended by the legislation.

7. The amount of chicken grown in Canada is established by Chicken Farmers of Canada ("CFC") for blocks of time known as quota periods, which are each 8 weeks long. The amount of chicken established by CFC to be grown in a quota period is known as the "allocation". The national allocation established by CFC for a quota period is then allocated among the provinces based on what in practice, are fixed market shares. That is to say, within the national supply management system there is no ability for any province to increase its share of national chicken production beyond its historical market share.

8. Live price premiums also escalate as the processors within the province, facing lost live supply, retaliate by providing increased premium incentives to induce local producers to return to supply the processors within their own province. Live chicken costs for all processors escalate as premiums spread through the system, as processors strive to retain their supply base,

9. Maintaining a processors' live supply base is everything to a processor. Without live supply a processor is not in business. If their live supply is eroded they become less competitive as their fixed costs increase on a saleable kilogram basis and they are less able to meet the needs of their customers. Processors will go to extraordinary lengths to maintain their live supply base as if they do not; it is likely to cause them to eventually go out of business. Conversely there is a significant reason for a processor to attempt to increase its supply base. These dynamics are accentuated in our supply managed system as supply is regulated and only licensed quota holding farmers may grow live chicken. As supply management has evolved in Ontario and Quebec, the scene of substantial premium wars in the past, the processor allocations systems I have discussed have been implemented in order to mitigate these senseless supply share battles among

processors which really amount to a zero sum gain for the chicken processors and only serve to increase costs to processors and consumers.

10. As set out in Exhibit "A", increased live chicken costs create hardship for those processors who are in weaker financial condition and for those who cannot pass these additional costs on to their customers. For those processors who are successful in passing on additional costs to their customers, the cost of chicken increases dramatically for their customers and for the end consumer of chicken. On average, about 68% of each live chicken purchased from a producer is eventually sold as meat, after deducting portions of the chicken that are not saleable for human consumption. A processor must therefore attempt to surcharge his end customer 22 cents per processed kilogram to recover a 15 cent per live kilogram premium paid to the farmer. Assuming a retailer marks up the processed product 40%, a 15 cent per kilogram live price premium means a 31 cent price increase for chicken at the consumer meat counter. Premiums are in addition to regulated live chicken prices which have already escalated dramatically in the past 2 years to compensate producers for increased feed and fuel prices. Since early 2007 the regulated live price has increased by over 40 cents per kilogram, which is about a 38 percent increase.

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Each of the anti-competitive acts listed in section 78 require the dominant firm to *actively initiate* some action.... None of the listed acts are triggered simply by the dominant firm *not doing something or refusing to assist*....

(emphasis added)

588 While the respondents did not advance this argument in relation to the specific allegation we are dealing with here (or, in fact, in relation to any specific allegation), it certainly seems relevant to the question of whether Tele-Direct should be obliged to recognize advertising in independent directories as counting towards Tele-Direct's commissionability requirement of a minimum of 20 directories. As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition. Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct.

589 It is, therefore, not sufficient, in circumstances such as these, to argue the general proposition. Nothing can be determined by simply labelling the alleged anti-competitive "act" as "doing something" (active) or "not doing something" (passive). The anti-competitive effect of the conduct of the respondents, whether "active" or "passive", must be weighed against any business justification in order to conclude whether there has or has not been a substantial lessening of competition. That can only be done by reference to the evidence. On this point, Tele-Direct only argued the general proposition.

(ii) Targeting/Raising Rivals' Costs

• Reaction of Tele-Direct

590 Before turning to the evidence it is necessary to consider what the Director means when he alleges that "targeting/raising rivals' costs" is an anti-competitive act. There is a growing body of literature dealing with "raising rivals' costs" ("RRC"). The theory was proposed as a similar but more credible route to market power than predatory pricing because it does not depend on short-term price cutting beyond what is profit-maximizing followed by later recoupment. With RRC, it is not necessary to cause the rivals to exit, no "deep pockets" are necessary and the additional profits are gained immediately.[FN229] Typically, an RRC strategy involves increasing rivals' costs by raising the price of some scarce input which in turn results in the rival reducing its output.[FN230] In other words, there is a relatively immediate output reduction in the market concerned. Only two elements of the act alleged by the Director seem to bear any resemblance to this conception of RRC -- the audiotext affair and litigation and threats of litigation. As we shall see, the remaining actions of Tele-Direct relating to pricing, incentives and advertising did not result in output reduction in the markets in question. The considerations involved in RRC can provide little assistance in evaluating the allegations relating to those reactions of Tele-Direct in competitive markets or the "targeting" aspect of this act.

591 The Director has not attempted to explain what is meant by targeting in any detail, perhaps regarding the term as largely self-explanatory. It is, however, far from being a household word in competition law. While we have no reason to discourage novel approaches to discerning potentially anti-

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competitive conduct that might fall within section 79, we do see considerable difficulty in applying the targeting concept. It is always difficult to distinguish between anti-competitive practices and normal competition. The conduct in question may be generally benign and it is only in certain contexts that it is anti-competitive. The difficulty is even more pronounced in this case, given the actions on the part of Tele-Direct that the Director would have the Tribunal, if not prohibit completely, certainly restrict.

592 In argument counsel for the Director described the nature of targeting as follows:

The reason that acts of predation or near-predation can be anti-competitive is because the firm is dominant in a larger market. The danger is that, rather than bringing the public the benefit of competition in a limited area, what is happening is that in the long-term analysis the dominant firm is leveraging its market power from its broadly-dominated market into specific targeted areas where competition enters, with a view to either eliminate that competition entirely or, as in the situation here where the expressed intent fell a bit short of that, to ensure that the competition didn't move into any other markets and to raise their costs so that those companies would know that it was not going to be a profitable enterprise to continue their expansion.

What we are suggesting is that this is really a test of degree, that we have in at least one of the markets evidence which is very close to predation. What we have is such a tightly focused and overwhelming marshalling of the dominant resources of the company to these targeted areas that there is a need for a remedy.

...

... While one may formulate various tests that would have different requirements in terms of the super-normal targeted response, this is probably the clearest case imaginable in terms of the absolutely overwhelmingly aggressive nature of the response to these targeted markets.[FN231]

Counsel clarified that "leveraging" in this context means the use of monopoly rents from other markets to subsidize near-predatory behaviour in the markets in question.[FN232]

593 One of the ordinary meanings of the word "target" is

anything that is fired at or made an objective of warlike operations ... [FN233]

In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.

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respondent cannot disavow responsibility for the reasonably foreseeable consequences of its acts, a respondent might nevertheless be able to establish that such consequences should not, in the context of the paragraph 79(1)(b) inquiry, be considered the intended "purpose" or "overall character" of the acts in question. In appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was performed. To be relevant in the context of paragraph 79(1)(b), a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts. The appropriate application of the valid business justification doctrine in the context of paragraph 79(1)(b) will be further considered below, in my discussion of the Tribunal's analysis in the case at bar.

(2) The Tribunal's paragraph 79(1)(b) decision

[74] In the case at bar, it would appear that the Tribunal correctly articulated the legal test. At paragraph 171 of its reasons, at the outset of its review of the Tribunal's definition of "anti-competitive acts" in its previous cases, the Tribunal stated:

In order to determine whether acts are anti-competitive, the Tribunal must consider the nature and purpose of the acts in question, as well as the impact they have or may have on the relevant market. (*Nielsen* at 257; *Laidlaw* at 333; *NutraSweet* at 34) In both *Tele-Direct* and *Laidlaw*, the Tribunal assessed the alleged anti-competitive practices by taking into account what effect they had had on competitors. [Emphasis added.]

In the course of quoting a longer passage from *Tele-Direct*, the Tribunal reproduced (at paragraph 178)

se décharger de la responsabilité des conséquences raisonnablement prévisibles de ses actes, le défendeur pourrait néanmoins se révéler capable d'établir que ces conséquences, dans le contexte de l'analyse que commande l'alinéa 79(1)b), ne devraient pas être considérées comme le « but », l'« objet » ou la « nature générale » des actes en question. Si le contexte s'y prête, la preuve d'une justification commerciale valable du comportement en cause peut l'emporter sur l'intention réputée découlant des effets réels ou prévisibles de ce comportement, en montrant que ces effets anti-concurrentiels ne constituent pas en fait l'objet prépondérant dudit comportement. Essentiellement, la justification commerciale valable forme une autre explication possible des motifs du comportement attaqué. Pour être pertinente dans le contexte de l'alinéa 79(1)b), la justification commerciale doit être une raison fondée sur l'efficacité ou proconcurrentielle du comportement en question, raison attribuable au défendeur, qui se rapporte aux effets anti-concurrentiels et/ou à l'intention subjective de ce comportement et leur fait contrepoids. Je reviendrai plus loin sur l'application appropriée de la doctrine de la justification commerciale valable au contexte de l'alinéa 79(1)b) lorsque j'examinerai l'analyse effectuée par le Tribunal dans la présente affaire.

2) La décision rendue par le Tribunal sous le régime de l'alinéa 79(1)b)

[74] Dans la présente espèce, il semblerait que le Tribunal ait correctement formulé le critère juridique applicable. On peut lire ce qui suit au paragraphe 171 de l'exposé de ses motifs, au début de son examen de la définition que donne sa jurisprudence de l'expression « agissements anti-concurrentiels » :

Pour établir si des agissements donnés sont anti-concurrentiels, le Tribunal doit prendre en considération la nature et l'objet de ces agissements, ainsi que l'incidence qu'ils ont ou peuvent avoir sur le marché pertinent. (*Nielsen*, à la page 257; *Laidlaw*, à la page 333; et *NutraSweet*, à la page 34.) Dans *Télé-Direct* aussi bien que *Laidlaw*, le Tribunal a évalué les agissements dont on alléguait le caractère anti-concurrentiel en tenant compte de leurs effets sur les concurrents. [Non souligné dans l'original.]

Citant un long passage de *Télé-Direct*, le Tribunal a reproduit (au paragraphe 178) la phrase clé qu'on trouve

the key sentence from *NutraSweet*, at page 34, to the effect that the feature common to anti-competitive acts is that they are all performed for a “purpose”, namely “an intended negative effect on a competitor that is predatory, exclusionary or disciplinary”. This formulation was also repeated in the concluding section of the Tribunal’s decision (at paragraph 284).

[75] However, despite this correct articulation of the test, the Tribunal’s analysis of the salient features of the applicable legal test is a cause for concern. At the end of the portion of its paragraph 79(1)(b) analysis entitled “The Law”, the Tribunal summarized as follows its understanding of key aspects of the legal test (at paragraph 191):

The Tribunal [in *Tele-Direct*] has stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if a practice does not appear to have an exclusionary effect or cause detriment to the consumer, it cannot be said to be anti-competitive. [Emphasis added.]

[76] This statement is incorrect, in at least two respects.

[77] First, for the purposes of paragraph 79(1)(b), a link need not be proven between the impugned practice and a decrease in competition. Quite simply, such a causal link is not part of the legal test for an anti-competitive act. Moreover, an emphasis upon evidence of this type runs the risk of obscuring the correct focus of the paragraph 79(1)(b) test. An anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. The focus of analysis is thus on the act itself, to discern its purpose. The questions as to whether a decrease in competition in the market is evident, or whether any such decrease can be causally attributed to the impugned practice, are not directly relevant for this task. Certainly, such findings are not requisite elements of the test for an anti-competitive act.

à la page 65 de *NutraSweet*, comme quoi les agissements anti-concurrentiels ont pour caractéristique commune d’avoir un « but » particulier, à savoir d’entraîner un « effet négatif intentionnel sur un concurrent [. . .] [effet qui] doit être abusif, viser une exclusion ou une mise au pas ». Le Tribunal a aussi répété cette formule dans la conclusion de sa décision (au paragraphe 284).

[75] Cependant, bien que le Tribunal ait ainsi formulé correctement le critère juridique applicable, son analyse des caractères saillants de ce critère pose problème. À la fin de la partie de son analyse de l’application de l’alinéa 79(1)(b) intitulée « Le droit », soit au paragraphe 191, le Tribunal résume comme suit son interprétation des aspects principaux de ce critère juridique :

Le Tribunal a déclaré [dans *Télé-Direct*] qu’il doit y avoir un lien entre la pratique attaquée et la diminution de la concurrence. En outre, ne peuvent être considérées comme anti-concurrentielles les pratiques qui ne se révèlent pas avoir d’effet tendant à exclure ou causer de préjudice aux consommateurs. [Non souligné dans l’original.]

[76] Cette proposition est erronée, au moins à deux égards.

[77] Premièrement, pour l’application de l’alinéa 79(1)(b), il n’est pas nécessaire d’établir un lien entre la pratique attaquée et une diminution de la concurrence. L’établissement d’un tel lien de causalité ne fait tout simplement pas partie du critère juridique applicable aux agissements anti-concurrentiels. En outre, en mettant l’accent sur la nécessité d’une preuve de cette nature, on court le risque de faire dévier ce qui doit rester l’axe du critère de l’alinéa 79(1)(b). Un agissement anti-concurrentiel est un comportement ayant pour but un effet négatif intentionnel sur un concurrent, effet qui doit être abusif, ou viser une exclusion ou une mise au pas. L’analyse doit donc être axée sur le comportement lui-même, dont il s’agit de discerner le but. Les questions de savoir si l’on peut constater une diminution de la concurrence sur le marché ou si la cause d’une telle diminution peut être attribuée à la pratique attaquée ne sont pas directement pertinentes à l’égard de cette tâche. De telles conclusions ne sont certainement pas des éléments nécessaires du critère de l’existence d’un agissement anti-concurrentiel.

[78] Obviously, if an act is to be found anti-competitive, there must be evidence linking the impugned practice to the requisite intended negative effect on a competitor; the practice must be found to cause or at least contribute to the intended negative effect. Such a negative effect on a competitor must also be found to be the “purpose” of the practice in question, and to this end, all relevant factors must be taken into account and weighed to determine if the requisite purpose is established. One must remember, however, that in the context of paragraph 79(1)(b), evidentiary factors are relevant only in so far as they shed light upon the paragraph 79(1)(b) statutory test, that is upon the purpose of the act vis-à-vis competitors. Evidence concerning other types of effects of the impugned act that are not related to competitors—while perhaps pertinent in respect of the paragraph 79(1)(c) assessment of competition—are not directly relevant for paragraph 79(1)(b). Similarly, evidence concerning the general competitive state and structure of the relevant market, and whether such features can be causally attributed to the impugned act, are not the direct focus of the paragraph 79(1)(b) analysis, and are more properly considered under paragraph 79(1)(c). In short, paragraph 79(1)(b) simply concerns whether the act displays the requisite intended effect on competitors; it is not directly concerned with the state of competition in the market or the general causes thereof. In directing itself to the contrary, and requiring proof of a causal link between the impugned act and a decrease in competition, the Tribunal erred.

[79] Second, the Tribunal appears mistakenly to suggest in the above-quoted passage that the impugned practice’s effects on the consumer should or could be considered within the paragraph 79(1)(b) analysis. However, contrary to what the Tribunal implies in the above quotation, “detriment to the consumer” is not a relevant independent consideration for the purposes of paragraph 79(1)(b), as evidence of this type does not relate directly to whether an act has the requisite defining characteristic of an intended negative effect on

[78] À l’évidence, pour que la pratique attaquée puisse être déclarée anti-concurrentielle, il doit y avoir des éléments de preuve qui en démontrent le lien avec le facteur nécessaire qu’est l’effet négatif intentionnel sur un concurrent : il faut établir que cette pratique cause ledit effet ou, à tout le moins, y contribue. Il faut aussi établir qu’un tel effet négatif sur un concurrent constitue le « but » ou l’« objet » de la pratique en question, et il faut à cette fin prendre en considération et apprécier tous les facteurs pertinents. On doit cependant se garder d’oublier que, dans le contexte de l’alinéa 79(1)b), les facteurs de preuve n’ont de pertinence que dans la mesure où ils éclairent l’application du critère juridique de cet alinéa, c’est-à-dire le but de la pratique par rapport aux concurrents. La preuve concernant d’autres sortes d’effets du comportement attaqué qui ne sont pas liés aux concurrents, si elle peut se révéler pertinente à l’égard de l’évaluation du niveau de concurrence sous le régime de l’alinéa 79(1)c), n’a pas de pertinence directe relativement à l’alinéa 79(1)b). De même, les éléments de preuve concernant la structure et l’état généraux de la concurrence sur le marché pertinent et le point de savoir si la cause de ces caractéristiques peut être attribuée à la pratique attaquée n’intéressent pas directement l’analyse relevant de l’alinéa 79(1)b), et doivent plutôt être examinés sous le régime de l’alinéa 79(1)c). Bref, l’alinéa 79(1)b) pose purement et simplement la question de savoir si le comportement considéré a sur les concurrents l’effet intentionnel de la nature requise; il n’a pas de rapport direct avec l’état de la concurrence sur le marché ou ses causes générales. En orientant son analyse dans le sens contraire et en exigeant la preuve d’un lien de causalité entre la pratique attaquée et une diminution de la concurrence, le Tribunal a commis une erreur.

[79] Deuxièmement, dans le même passage cité plus haut, le Tribunal paraît se fonder sur l’idée erronée que l’on devrait ou pourrait prendre en considération les effets de la pratique attaquée sur les consommateurs dans le cadre de l’analyse relevant de l’alinéa 79(1)b). Or, contrairement à ce que le Tribunal laisse entendre dans ce passage, le « préjudice aux consommateurs » n’est pas un facteur indépendant pertinent à prendre en considération pour l’application de l’alinéa 79(1)b), étant donné que les éléments de preuve tendant à établir

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8. Live price premiums also escalate as the processors within the province, facing lost live supply, retaliate by providing increased premium incentives to induce local producers to return to supply the processors within their own province. Live chicken costs for all processors escalate as premiums spread through the system, as processors strive to retain their supply base.

9. Maintaining a processors' live supply base is everything to a processor. Without live supply a processor is not in business. If their live supply is eroded they become less competitive as their fixed costs increase on a saleable kilogram basis and they are less able to meet the needs of their customers. Processors will go to extraordinary lengths to maintain their live supply base as if they do not; it is likely to cause them to eventually go out of business. Conversely there is a significant reason for a processor to attempt to increase its supply base. These dynamics are accentuated in our supply managed system as supply is regulated and only licensed quota holding farmers may grow live chicken. As supply management has evolved in Ontario and Quebec, the scene of substantial premium wars in the past, the processor allocations systems I have discussed have been implemented in order to mitigate these senseless supply share battles among

processors which really amount to a zero sum gain for the chicken processors and only serve to increase costs to processors and consumers.

10. As set out in Exhibit "A", increased live chicken costs create hardship for those processors who are in weaker financial condition and for those who cannot pass these additional costs on to their customers. For those processors who are successful in passing on additional costs to their customers, the cost of chicken increases dramatically for their customers and for the end consumer of chicken. On average, about 68% of each live chicken purchased from a producer is eventually sold as meat, after deducting portions of the chicken that are not saleable for human consumption. A processor must therefore attempt to surcharge his end customer 22 cents per processed kilogram to recover a 15 cent per live kilogram premium paid to the farmer. Assuming a retailer marks up the processed product 40%, a 15 cent per kilogram live price premium means a 31 cent price increase for chicken at the consumer meat counter. Premiums are in addition to regulated live chicken prices which have already escalated dramatically in the past 2 years to compensate producers for increased feed and fuel prices. Since early 2007 the regulated live price has increased by over 40 cents per kilogram, which is about a 38 percent increase.

11. If Nadeau elects to attempt to recruit producers in Quebec more aggressively and replace the live chicken it now receives from the respondents, even more upward pressure will be placed on premiums in Ontario and Quebec. Nadeau's live chicken cost will escalate, as will its transportation costs, as it sources live supply farther and farther away. This will increase the cost structure of all processors in Central Canada because, as explained earlier, all processors will be forced to match the escalating premiums in an attempt to maintain their live supply. The end result of the respondents' actions in removing their supply from Nadeau will be increased costs at the expense of processors and consumers without any resulting value or benefit to either. Of course processors cannot sustain these higher costs in the long term if they are unable to pass these costs on to their customers and some may be forced out of business. Alternatively the supply of live chicken in Canada will need to be dramatically reduced in order to drive processor selling prices higher. The bottom line is that the consequences of a premium war to the processor community as a whole, as well as to their customers and consumers, are all negative.

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[202] In *Nielsen*, cited above, the Tribunal similarly noted, at pages 266 and 267, that: “to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen’s market power.”

[203] In regard to mergers, the Tribunal indicated in *Canada (Director of Investigation and Research) v. Hilldown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at page 314, that:

[i]n assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise “market power” by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

[204] This approach was confirmed in other merger decisions including *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385, rev’d 2001 FCA 104, leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii. There, however, at paragraph 302, the Tribunal took issue with whether a merger that merely preserved market power lessened competition.

[205] Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.

[206] Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.

[207] Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business’ product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm’s product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.

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acquired or established pursuant to shareholder agreements, management contracts and other contractual arrangements involving corporations, partnerships, joint ventures, combinations and other entities.⁶ In addition, loan, supply and distribution arrangements that are not ordinary-course transactions and that confer the ability to materially influence management decisions of another business (that is, financing arrangements and terms of default relating to such arrangements; long-term contractual arrangements or pre-existing long-term business relationships and the economic significance of these relationships) may constitute a "merger" within the meaning of section 91.⁷

- 1.13 In determining whether the acquisition or establishment of a significant interest constitutes a merger, the Bureau examines the relationship between the parties prior to the transaction; the likely relationship between the parties subsequent to the transaction; the access that an acquiring party obtains to confidential business information of the target business; and any evidence of intentions to affect the behaviour of the target business or to change the behaviour of the acquiring party.

PART 2 – THE ANTI-COMPETITIVE THRESHOLD

Overview

- 2.1 As set out in section 92(1) of the Act, the Tribunal may make an order when it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.
- 2.2 In general, when evaluating the competitive effects of a merger, the primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition such as quality, product choice, service, innovation, and advertising especially in markets where there is a significant level of non-price competition.⁸ To simplify the discussion, unless otherwise indicated, the

⁶See for example *Shell Canada Products Ltd. / Pay Less Gas Co. (1972) Ltd.*, Canada, Annual Report, Director of Investigation and Research, Competition Act, March 31, 1991 at p.8, where the Bureau determined that contractual arrangements collectively resulted in obligations of Pay Less to Shell that would give Shell a considerable measure of control over the business operations of Pay Less and therefore constituted the establishment of significant interest.

⁷See *D.I.R. v. Dennis Washington et al.*, Second Amended Notice of Application, Statement of Grounds and Material Facts (December 17, 1996), CT-1996/001 (Comp.Trib.), hereinafter "*Seaspan Statement of Grounds*") at ¶ 8. The Bureau's determination that a significant interest was acquired or established was based on several factors including: the indirect acquisition of voting equity interest; the acquisition of equity warrants; board representation; the purchase of senior subordinated debentures; and the terms of a Joint Investment Agreement between Dennis Washington and the largest shareholder of Seaspan.

⁸As noted by the Tribunal in its first decision in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (August 30, 2000), CT-1998/002 (Comp. Trib.) (hereinafter "*Superior Propane*"), at ¶ 504, a decline in service levels may reduce real output of the industry.

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term *price* in these guidelines refers to all aspects of firms' actions that affect the interest of buyers. References to an increase in price include an increase in the nominal price and a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.⁹

- 2.3 These guidelines describe the analytical framework for assessing market power from the perspective of a seller of a product or service [hereinafter "product" as defined in section 2(1) of the Act]. Market power of sellers means the ability of a single firm or group of firms to profitably maintain prices above the competitive level for a significant period of time.
- 2.4 The analytical framework is equally applicable when assessing market power by buyers of a product.¹⁰ Market power of buyers means the ability of a single firm or group of firms to profitably depress prices paid to sellers (for example, by reducing the purchase of inputs) to a level that is below the competitive price for a significant period of time.
- 2.5 The analysis of competitive effects falls under two broad theories of competitive harm. Competitive harm may result when market power is exercised unilaterally or through coordinated behaviour.
- 2.6 A unilateral exercise of market power can arise when a merger enables the merged entity to profitably sustain higher prices than would otherwise exist in the absence of the merger without relying on an accommodating response from its competitors.
- 2.7 A coordinated exercise of market power can arise when a merger reduces the competitive vigour in a market by, for example, removing a particularly aggressive competitor or enabling the merged entity to coordinate its behaviour with that of its competitors. In this case, higher prices post-merger are profitable and sustainable only because other competitors in the market have accommodating responses.¹¹
- 2.8 Where a merger is not likely to have market power effects, it generally cannot be demonstrated that competition is likely to be prevented or lessened substantially as a result of the merger, even though the merger might have implications for other industrial policy objectives that are beyond the scope of the Act.

⁹The Bureau's analysis is not confined to pricing measures and will consider any impact on quality, product choice, service, etc., to the degree that competition is substantially lessened or prevented.

¹⁰See for example *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) (hereinafter "*Hillsdown*") at 299 where the Tribunal stated that it could analyse the competitive effects of the merger from the perspective of a monopsonist (a buyer of the rendering material) or a monopolist (a seller of rendering services). It concluded that no significant difference resulted from the two characterizations.

¹¹Previously, the Bureau referred to a coordinated exercise of market power as "interdependence". This change in terminology is not a change in the Bureau's approach to analyzing market power. Further explanation of the anti-competitive effects that may arise from a coordinated exercise of market power is found in Part 5 of these guidelines.

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- an acquisition that prevents or limits the introduction of new products.¹⁵

Substantiality

2.13 When the Bureau assesses whether competition is likely to be substantially prevented or lessened, it evaluates whether the merger is likely to provide the merged entity (unilaterally or in coordination with others) with an ability to materially influence price.¹⁶ In doing so, it considers the likely magnitude, scope and duration of any price increase that is anticipated to arise as a result of the merger. Generally speaking, the prevention or lessening of competition is considered to be "substantial" where:

- the price of the relevant product(s) would likely be materially greater in a substantial part of the relevant market¹⁷ than it would be in the absence of the merger [hereinafter "material price increase"],¹⁸; and
- the material price increase is not likely to be eliminated by existing or new competitors within two years.¹⁹

2.14 The Bureau does not apply a numerical threshold for the material price increase.²⁰ Instead, its conclusions about whether a lessening or prevention of competition is

enhances CWS's market power over such capacity and prevents competition substantially."

¹⁵See for example News Release – "Competition Bureau Resolves Concerns in Pfizer's Acquisition of Pharmacia", April 11, 2003 (hereinafter "*Pfizer/Pharmacia*") where the Bureau concluded that competition would be substantially prevented by the merger of two companies whose products under development (that is, in the "pipeline") would compete in the same relevant product markets once they were introduced. See also *Commissioner of Competition v. Bayer AG et al.*, Statement of Agreed Facts (May 31, 2002), CT-2002/003 (Comp. Trib.), (hereinafter "*Bayer/Aventis Statement of Agreed Facts*") at ¶ 116 where the Commissioner concluded that "in the absence of the Acquisition, the market would likely enjoy significantly greater potential competition from Bayer's newly-introduced product".

¹⁶As discussed above at ¶ 2.2, "price" is shorthand for other dimensions of competition. Also, as noted in *Superior Propane*, *supra* note 8 at ¶ 258, there is no requirement under the Act to find that the merged entity will likely raise the price (or reduce quality, service or product choice) but rather that the merged entity has the ability to do so.

¹⁷The material price increase need not occur throughout the entire relevant market. Competition may be substantially lessened or prevented even if, for instance, only some buyers will face higher prices.

¹⁸In prevent cases, a determination that prices will likely be materially higher with the merger generally means that price levels are expected to fall (or quality, etc. is expected to increase) in the absence of the merger.

¹⁹A two year period is typically used as a rule of thumb, recognizing that some time is required for potential competitors to become aware of a material price increase, to develop products and marketing plans, to build facilities or make adjustments to existing facilities, and to achieve a level of sales sufficient to prevent or eliminate a material price increase.

²⁰A material price increase is distinct from (and may be less than) the "significant and non-transitory price increase" that is used to define relevant markets as described in Part 3. What constitutes a "materially greater" price varies from industry to industry. In the present context, materiality includes not only the magnitude and scope but also the sustainability of the price increase.

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1 MR. LEFEBVRE: I'd ask you to turn to
2 Exhibit A of your own affidavit please.

3 (SHORT PAUSE/COURTE PAUSE)

4 MR. LEFEBVRE: I'd suggest to you, sir, that
5 ---

6 MR. GOODMAN: I can correct myself. I think
7 you're right. I think it was earlier than that. It may have
8 been January if I recall.

9 MR. LEFEBVRE: In 2008. Very well.

10 MR. GOODMAN: Yeah.

11 MR. LEFEBVRE: And as Chief Purchasing Agent
12 for Prizm is it safe to assume that you have put together some
13 type of a contingency plan or a plan "B" should this Tribunal
14 decide that, in fact, Nadeau is not entitled to continued
15 permanent supply from Westco?

16 MR. GOODMAN: We have some thoughts about
17 what we might do but I don't think there is a documented plan
18 that we've settled upon actually, no.

19 MR. LEFEBVRE: And what do your thoughts at
20 this stage entail?

21 MR. GOODMAN: Well, obviously the current
22 situation's untenable. There is -- our requirements and our
23 specifications call for kill plus six fresh bird, and as it
24 stands right now the contingency that's in place, as of today,
25 is that we're getting an awful lot of frozen product. So we're

1 at a bit of a loss as to what we might do in the event that the
2 situation is not resolved. So frozen product is not really
3 satisfactory to us.

4 MR. LEFEBVRE: Now, you're telling me what
5 you can't do and won't do.

6 MR. GOODMAN: Yeah.

7 MR. LEFEBVRE: You've not told me yet what
8 your thoughts are. Do you have any or not?

9 MR. GOODMAN: Well, I do.

10 MR. LEFEBVRE: Then please share them with
11 the Tribunal.

12 MR. GOODMAN: The thoughts are that we'll
13 have to make alternate arrangements and seek other supply. But
14 we haven't done that and we're hoping that the situation's
15 resolved.

16 MR. LEFEBVRE: So if the Tribunal were to
17 decide in a few weeks that Nadeau's not entitled to relief under
18 Section 75 and you lose your supply you have nothing planned in
19 order to compensate for that sourced chicken?

20 MR. GOODMAN: No, as it stands we'll have to
21 accept frozen birds but it's not going to be -- it's not going
22 to be acceptable.

23 MR. LEFEBVRE: I have no further questions
24 for the witness.

25 THE CHAIRPERSON: Maître Lefebvre, in your

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