Competition Tribunal | Tribunal de la Concurrence

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

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

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

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the *Competition Act*.

B E T W E E N:

Nadeau Ferme Avicole Limitée/
Nadeau Poultry Farm Limited
(applicant)

and

Groupe Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire, and Volailles Acadia S.E.C. and Volailles Acadia Inc./
Acadia Poultry Inc.
(respondents)

Date of hearing: 20080623
Presiding Judicial Member: Blanchard J.
Date of Reasons and Order: June 26, 2008
Reasons and Order signed by: Justice Edmond P. Blanchard

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

I. INTRODUCTION

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

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

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

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

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

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

II. THE TEST FOR INTERIM RELIEF

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

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

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

III. ANALYSIS

A. Serious Issue to be tried

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

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

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

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

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

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

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

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

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

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

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

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

B. Irreparable Harm

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

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

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

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

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

3. an immediate impact on the viability of the St-François Plant. The Applicant asserts that it has developed long term supply relationships with New Brunswick producers which allowed it to develop stable and profitable markets for its products. It contends that it depends on live chickens supplied by the Respondents without which the St-Francois Plant will only be able to operate at 40% capacity or just over ¾ of one shift per day. The Applicant claims that the majority of the 340 jobs at the plant will be lost if supply from the Respondents is cut off, and the viability of the whole plant would be severely compromised.

[20] Mr. Tavares' affidavit further attests that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable." However, on cross-examination, he stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by and that "getting by" referred to "viability in the long term" and that "[d]epending on the markets, it could mean losing a lot of money." He also stated that after the Respondents cut off supply, the Applicant will have a supply of 294 450 live chickens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[37] Here the Applicant is dealing in a commodity, live chickens. On the evidence, there is nothing exclusive about the live chickens the Applicant requires in order to operate. Save for the complications and additional costs associated with the transportation of live chickens from longer distances, which may be significant, a chicken is a chicken. I reject the Applicant's contention that it had no duty to mitigate. It could not sit idly by and make no attempt to secure additional live chickens when faced with the loss of about half of its supply. However, what is adequate mitigation will turn on the circumstances of each case.

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

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

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

C. Balance of Inconvenience

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

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

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

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

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

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

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

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

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

D. Tribunal's Discretion to Issue Interim Relief

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

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

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

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

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

IV. CONCLUSION

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

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

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[56] The Application for Interim Relief is granted.

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

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

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

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

DATED at Ottawa, this 26th day of June 2008.

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

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

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Éric C. Lefebvre
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