

COMPETITION TRIBUNAL

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

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 103.1 granting leave to make application under 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*.

BETWEEN:

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

Applicant

AND

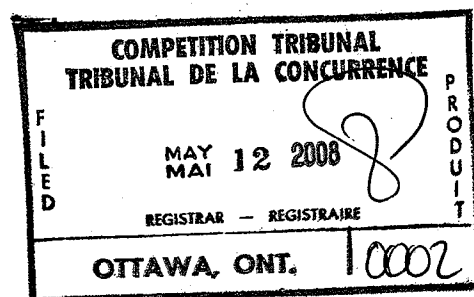
**GROUPE WESTCO INC. AND GROUP DYNACO, COOPÉRATIVE
AGROALIMENTAIRE AND VOLAILLES ACADIA S.E.C. AND
VOLAILLES ACADIA INC./ACADIA POULTRY INC.**

Respondents

NOTICE OF APPLICATION PURSUANT TO SECTION 104 OF THE *COMPETITION ACT*

TAKE NOTICE THAT:

1. The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited ("Nadeau"), will make an application to the Competition Tribunal (the "Tribunal") pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended (the "Act") for interim orders requiring the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms, in the numbers previously provided to Nadeau by the Respondents, pending the hearing of the main Application.



AND TAKE NOTICE THAT:

2. The persons against whom the orders are sought are the Respondents. The addresses of the Respondents are:

- (a) Groupe Westco Inc.
9 Rue Westco,
St-Francois NB E7A 1A5
- (b) Group Dynaco, Cooperative Agroalimentaire
87 Route 132 Ouest
La Pocatière QC G0R 1Z0
- (c) Volailles Acadia S.E.C.
87 Route 132 Ouest
La Pocatière QC G0R 1Z0
- (d) Volailles Acadia Inc./Acadia Poultry Inc.
87 Route 132 Ouest
La Pocatière QC G0R 1Z0

3. Nadeau also seeks directions from the Tribunal for an expedited hearing.

4. Nadeau will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Anthony Tavares, sworn March 14, 2008, and such further or other material as counsel may advise and the Tribunal may permit.

5. Nadeau requests that this Application proceed in English.

6. Nadeau requests that the documents be filed in electronic form.

Dated at Toronto this 17th day of March, 2008.



LEAH PRICE
ANDREA MCCRAE
FOGLER, RUBINOFF LLP
Barristers and Solicitors
#1200-95 Wellington Street West
Toronto, ON M5J 2Z9
Tel: 416 864 9700
Fax: 416 841 8852
E-mail: lprice@foglerrubinoff.com
E-mail: amccrae@foglerrubinoff.com
Solicitors for the Applicant

TO: The Registrar
Competition Tribunal
The Thomas D'Arcy McGee Building
#600-90 Sparks Street
Ottawa, ON K1P 5B4
Tel: 613 957 7851
Fax: 613 952 1123

AND TO: Sheridan Scott
Commissioner of Competition
50 Victoria Street
Gatineau, Québec K1A 0C9
Tel: 819 997 3301
Fax: 819 997 0324

AND TO: Groupe Westco Inc.
9 Rue Westco
St-Francois NB E7A 1A5

AND TO: Groupe Dynaco, Cooperative Agroalimentaire
87 Route 132 Ouest
La Pocatière QC G0R 1Z0

AND TO: Volailles Acadia S.E.C.
87 Route 132 Ouest
La Pocatière QC G0R 1Z0

AND TO: Volailles Acadia Inc./Acadia Poultry Inc.
87 Route 132 Ouest
La Pocatière QC G0R 1Z0

I – STATEMENT OF GROUNDS AND MATERIAL FACTS

A/ The Parties

1. The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm 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 ("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.

2. The Respondent, Groupe Westco Inc. ("Westco"), is a corporation incorporated under the laws of the Province of New Brunswick. Westco is in, among other things, the business of producing chicken, and its chicken production facilities are located in New Brunswick and elsewhere. Westco is vertically integrated in the chicken industry, and also owns or controls hatcheries and transportation facilities in New Brunswick. Westco owns or controls about 50% of New Brunswick's chicken quota.

3. 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. Dynaco owns or leases a total of about 7% of New Brunswick's quota, and co-owns about another 5% with a third party.

4. The Respondents, Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. (collectively, "Acadia"), are jointly owned by Westco and Dynaco. Acadia owns or controls about 16% of New Brunswick's chicken quota.

B/ The Regulation of the Chicken Industry in Canada

5. The production of chicken for the Canadian market is managed under a national supply management system that operates through a coordinated federal-provincial regulatory scheme.

6. At the federal level, the Chicken Farmers of Canada ("CFC"), an agency designated under the *Farm Products Agencies Act*, among other things:

(a) establishes chicken production quotas federally and distributes quota to each member province; and

(b) licences the movement of chicken between the provinces (inter-provincial trade), and outside the country (export trade).

7. The CFC is required to issue a licence for the inter-provincial movement of chicken upon application and payment of the required fee, so long as, among other things, the applicant is in good standing with its provincial commodity board and is in compliance with all applicable federal legislation and regulations. It is a condition of all licences that the licensee must comply with all orders of the applicable provincial commodity board.

8. Provincially, the Chicken Farmers of New Brunswick ("CFNB"), a provincial commodity board established by regulation under the New Brunswick *Natural Products Act*, regulates the intra-provincial production and marketing of chicken in New Brunswick. The quotas allotted to New Brunswick by the CFC are, in turn, allotted to the various producers in New Brunswick by the CFNB.

9. The CFNB has issued a number of Marketing Orders that implement various aspects of its mandate. It is to be noted that Order I sets out as an objective of the provincial marketing plan that "the development of monopolies" be avoided. Order III prohibits the lease or transfer of a producer's license without CFNB approval, and wholly forbids the assignment of chicken quota to any person other than a family incorporated farm in which the holder of the quota is an active shareholder.

10. The effect of the national supply management scheme is to prohibit production and marketing of chicken by anyone other than a person who possesses a quota. It creates a protected market for existing producers (that is, producers who already possess a quota), and prevents entry into the market by new producers. It is, in effect, a sanctioned monopoly.

11. In New Brunswick, the protections offered by the supply management system apply only to producers. Nadeau, a licensed processor, has no protection under the system, since there is nothing that requires any (protected) producer to direct its live chicken supply to any particular processor. Accordingly, there is currently nothing preventing New Brunswick chicken producers from diverting all or any part of their production to processors in another province.

C/ Nadeau's Operations in New Brunswick

12. The St-François Plant was acquired in 1989. At the time of the acquisition, the former owner was insolvent.

13. Nadeau invested tens of millions of dollars over the years to improve and maintain the St-François Plant, eventually turning it into the most modern, low-cost processing plant in Canada.

14. The St-François Plant is Nadeau's only business and is the only chicken processing plant in New Brunswick.

15. 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).

16. 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 about 75% has come from Westco, Dynaco or Acadia.

17. Nadeau is 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.

18. 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.

D/ The Producers

19. Over the last few years, a number of chicken producers in New Brunswick have consolidated their quotas and created three main producer groups that now comprise almost 75% of New Brunswick's live chicken production. The three groups are the Westco group, the Dynaco group, and their "coentreprise", Acadia (collectively, the "**Producers**").

20. This consolidation was effected by means of sale or lease of chicken quota to Westco, Dynaco, or Acadia, as the case may be. There was usually not an accompanying change of "title" over the quota. In other 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, Dynaco or Acadia.

21. Within the supply management context, Westco and Dynaco have achieved a near monopoly position in New Brunswick by acquiring other producers' quotas, and thereby acquiring the right to produce almost 75% of New Brunswick's live chickens.

E/ The Refusal to Deal

22. At a meeting that took place on August 19, 2007, representatives of Westco, together with representatives of Olymel S.E.C. ("**Olymel**") (together, the "**Consortium**"), advised Nadeau that the Consortium wished to purchase the St-François Plant. These representatives further advised that if Nadeau was not willing to sell the St-François Plant to the Consortium at a price acceptable to it, then all of the chicken produced by Westco and Dynaco would be diverted to

Québec, and the Consortium would build its own plant in New Brunswick. Olymel is Nadeau's main competitor in Québec and the Eastern provinces.

23. The representative of Westco, Thomas Soucy, specifically stated that he had authority to speak on behalf of Dynaco.

24. Negotiations with the Consortium took place at meetings held on November 6, 2007, December 18, 2007 and January 28, 2008. The negotiations ultimately broke down at the end of January, 2008, in part because the Consortium was prepared to pay only a fraction of the "going concern" value of the St- François Plant.

25. At the negotiating session that took place on November 6, 2007, Westco advised Nadeau that, effective November 6, 2007, Westco had "assigned" all of its live chicken production to Olymel. Westco further advised Nadeau that, effective November 16, 2007, all of Dynaco's live chicken supply would be "assigned" to Olymel.

26. On January 21, 2008, Westco sent a letter to Nadeau, giving formal notice that Westco would cease supplying live chickens to Nadeau, effective July 20, 2008. This notice of termination was confirmed by a letter dated February 7, 2008.

27. On January 24, 2008, Rémi Faucher, Directeur Général (CEO) of Dynaco, advised Yves Landry, the plant manager of the St-François Plant, that Dynaco would also cease supplying Nadeau with live chickens. On February 6, 2008, Mr. Faucher confirmed that supply from Dynaco and Acadia would terminate in mid-September, 2008.

28. On February 28, 2008, Acadia formally advised Nadeau that Acadia would cease supplying live chickens, effective September 15, 2008.

29. By two letters dated March 6, 2008 (amended by two letters dated March 10, 2008 to correct the quota period reference), Dynaco gave notice to Nadeau that its chickens would cease arriving at Nadeau, effective September 15, 2008.

30. As a result of the refusal to deal by Westco, Acadia and Dynaco, by mid-September, 2008, almost 75% of Nadeau's supply of live birds from New Brunswick will be cut off.

D/ Substantial Detrimental Effect

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

32. 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

33. 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. As a result, Nadeau has been receiving Nova Scotia chicken (160,000) and P.E.I. chicken (40,000) since May, 2007. However, the current level of supply is not guaranteed. There remains one viable plant in Nova Scotia, and Nadeau's current supplies from Nova Scotia will likely eventually be re-directed to that plant.

34. The St-François Plant is highly dependent on the Westco and Dynaco groups for the supply of live chicken. Nadeau requires a guarantee of 350,000 chickens per week to stay viable. The absolute minimum Nadeau requires to simply "get by" is 300,000 chickens per week. Thus, if Westco, Dynaco and Acadia divert their chickens elsewhere, Nadeau will suffer substantial detriment.

35. Each 100,000 chickens represent approximately 150,000 kgs. of saleable product with a selling value of approximately \$3 per kg., or \$450,000. The profit on this volume would be approximately \$.50 per 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 profit of more than \$139,000 *per week*. Because of the high level of fixed costs, loss of the Westco birds alone would reduce profits by about 50% on an annualized basis.

36. Because the supply management system creates monopoly production rights for producers and all production is already allocated to other processing plants, Nadeau would be unable to replace the lost volumes from other sources.

37. If Westco, Dynaco and Acadia cut off Nadeau's supply, the St-François Plant will only be able to run at 40% of capacity (just over $\frac{3}{4}$ of 1 shift). Nadeau would be unable to continue to employ its employees. A majority of the 340 jobs would be lost immediately, and the viability of the whole plant would be severely compromised.

38. Even a short interruption of supply would lead to irreparable harm for Nadeau.

39. Nadeau supplies reliable and predictable amounts of chicken to its customers, in a timely manner, that meet specific weight requirements for each individual customer. Nadeau requires a

full range of chickens (with different sizes and weights, etc) to be able to continue to meet volume and size commitments. Interruption of supply would create an immediate inability to fulfill the needs of Nadeau's customers. This would cause immediate damage to the relationships Nadeau 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.

E/ The Competitive Market Would Suffer

40. If the St-François Plant shuts down, or even if its production is lessened by the substantial degree represented by the Dynaco, Westco and Acadia chickens, this would result in a substantial lessening of competition in the chicken market in Québec and the Maritimes. Concerns about the impact of lessened competition on customers have been expressed to Nadeau by a number of customers, including Prizm Inc. (Kentucky Fried Chicken), and Cara Operations Ltd. (Swiss Chalet, Kelsey's and others).

41. If Nadeau disappears or its output is significantly reduced, Olymel would be able to significantly increase prices for fresh raw poultry in Québec and the Maritimes. As well, reduced sources of supply would have an adverse impact on customers' ability to obtain timely, quality products to their required specifications.

42. Westco has stated its intention to force all producers to buy chicks from its hatchery once Westco has its own processing plant. In addition, with Nadeau gone, Westco would be able to demand that other producers of live chickens accept lower prices, thus reducing their viability.

43. The impact of the Producers' actions would reverberate at all levels of the chicken market.

F/ Balance of Convenience

44. There is an ample supply of live chicken in Canada. In Ontario and Québec, plant allocation systems enforced by the relevant provincial chicken boards ensure a measure of fairness as between producers and processors. The lack of such a system in New Brunswick has permitted the Respondents to first create, and then abuse a near-monopoly over chicken production.

45. If the Respondents are required to maintain their existing supplies of chicken to Nadeau pending the hearing of this application, they would suffer no harm. They would continue to receive fair market value for their chickens, and all of their production would continue to be purchased by Nadeau in accordance with past practice.

II: BASIS FOR INTERIM ORDER PURSUANT TO SECTION 104

46. Section 104 of the Act provides:

Interim order

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.

Terms of interim order

(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.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

47. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, Sopinka and Corry JJ., speaking for a unanimous Supreme Court of Canada, held that the following three-part test applied when considering applications for interlocutory injunctions (at paragraph 43):

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application 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.

48. However, in the context of an application under section 75 of the Act, a mandatory supply order is not an extraordinary remedy, and proof of irreparable harm is not required. As stated by the Tribunal at paragraph 24 of its decision in *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, [2004] C.C.T.D. No. 26 (Comp. Trib):

One of the principles applied by Superior Courts in dealing with interim orders requires the Judge to have regard for all 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 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.

49. The evidence before the Tribunal demonstrates that there is a serious question to be tried in these proceedings under section 75. There is no question that the Respondents will refuse to deal with the Applicant. The Applicant has demonstrated that this refusal to deal will have a substantial detrimental effect on the Applicant's business, and is likely to have an adverse impact on competition in the market. The Applicant is willing and able to meet the usual trade terms, and the product is in ample supply, but the Applicant will be unable to obtain supplies elsewhere, because of inadequate competition among suppliers of live chicken in the market.

50. The Applicant will suffer substantial detriment if interim relief is not granted. If Westco, Dynaco and Acadia cut off Nadeau's supply, the St-François Plant will only be able to run at 40% of capacity (just over ¾ of 1 shift). Nadeau would be unable to continue to employ its employees. A majority of the 340 jobs would be lost immediately, and the viability of the whole plant would be severely compromised. There would be a permanent loss of markets, customers, and goodwill. The St-François Plant is Nadeau's only business. If it shuts down, the Applicant will be destroyed.

51. Interim orders, like interlocutory injunctions, have as one of their purposes, the preservation of the status quo pending the hearing of the main application. The status quo in this case is that Nadeau buys all the live chicken produced by New Brunswick's chicken producers (at premium prices), and has done so for the last 18 years. There would be no prejudice to the Respondents in requiring them to continue to supply Nadeau, as they have done for so many years, pending the hearing of the main Application.

52. The balance of convenience clearly favours the Applicant.

53. The Applicant therefore respectfully requests that the Tribunal make an interim order requiring the Respondents to continue to supply live chickens to the Applicant, in the quantities previously supplied, on the usual trade terms.

54. In support of the foregoing, the Applicant relies on the Affidavit of Anthony Tavares, sworn March 14, 2008.

Dated at Toronto this 17th day of March, 2008.



LEAH PRICE
ANDREA MCCRAE
FOGLER, RUBINOFF LLP
Barristers and Solicitors
#1200-95 Wellington Street West
Toronto, ON M5J 2Z9
Tel: 416 864 9700
Fax: 416 841 8852
E-mail: lprice@foglerrubinoff.com
E-mail: amccrae@foglerrubinoff.com

Solicitors for the Applicant