



Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 7
File No.: CT-2008-003
Registry Document No.: 0029

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 an 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*.

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)



Decided on the basis of the written record.
Presiding Judicial Member: Blanchard J.
Date of Reasons and Order: May 12, 2008
Reasons and Order signed by: Justice Edmond P. Blanchard

**REASONS FOR ORDER AND ORDER GRANTING AN APPLICATION FOR LEAVE
UNDER SECTION 103.1 OF THE COMPETITION ACT**

I. INTRODUCTION

[1] Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the Applicant) applies to the Competition Tribunal (the Tribunal), pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended (the Act), for leave to bring an application under section 75 of the Act. If leave is granted it further seeks orders under subsection 75(1) and section 104 of the Act 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.

[2] Pursuant to subsections 103.1(1) and (6) of the Act, the Tribunal has relied on the affidavit of Anthony Tavares, Chief Executive Officer of Maple Lodge (the Tavares Affidavit), and the written representations of the parties, including the Applicant's reply, in deciding this application for leave.

II. THE PARTIES

[3] The Applicant is a corporation incorporated under the laws of the Province of New Brunswick and 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 employs about 2,300 people and operates two processing facilities in Canada; one in Norval, Ontario and one in St-François de Madawaska, New Brunswick (the St-François Plant). The St-François Plant processes chickens for the Quebec and Maritime markets and is operated by the Applicant.

[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, chicken production quota and chicken production farms. Its chicken production facilities are located in New Brunswick and elsewhere. A brochure published by Westco (Exhibit B to the Tavares Affidavit) indicates that it 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 "Volailles Acadia" has 17%, for a total of 68%. The Applicant states that Westco supplies close to 33% of its live chickens.

[5] The Respondent, Groupe Dynaco, Coopérative Agroalimentaire (Dynaco), is a cooperative registered in the Province of Quebec. Dynaco has interests in certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. The Applicant says that Dynaco supplies 4.6% of its live chickens. It offers a wide range of products and services to meet the needs of agricultural producers and consumers. In Westco's submissions it is conceded that it owns one of Dynaco's 734 shares.

[6] The Respondent, Volailles Acadia S.E.C., created under the laws of the Province of Quebec, is registered as an extra-provincial limited partnership in the Province of New Brunswick, and the Respondent, Volailles Acadia Inc./Acadia Poultry Inc., incorporated under the laws of Canada, is registered as an extra-provincial corporation in the Province of New

Brunswick (collectively Acadia). Acadia also supplies the Applicant with live chickens. The Applicant alleges that Acadia is jointly owned by Westco and Dynaco. In Westco's submissions it is conceded that it has a 25% interest in Volailles Acadia S.E.C.

III. THE RELEVANT FACTS

[7] The production of chicken for the Canadian market is managed under a national supply management system that operates through co-ordinated federal-provincial regulatory schemes. Essentially the Chicken Farmers of Canada (CFC), an agency established under the *Farm Products Agencies Act*, R.S.C. 1985, c. F-4, among other things, establishes chicken production quotas federally and distributes quota to each member province. In New Brunswick, the Chicken Farmers of New Brunswick (CFNB), a provincial commodity board established by regulation under the New Brunswick *Natural Products Act*, S.N.B. 1999, c. N-1.2, 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.

[8] The supply management system applies only to impose live chicken production quotas on producers. There is nothing to require a producer to direct its live chicken supply to any particular processor within or outside New Brunswick. Nor does there appear to be any express restriction on producers becoming involved in chicken processing.

[9] Historically, the Applicant has obtained 100% of its live chickens from New Brunswick producers, of which almost 75% has come from quota now owned by the Respondents. At the time of this application, live chickens were also being supplied to the Applicant from Nova Scotia and Prince Edward Island. A number of chicken producers in New Brunswick have consolidated their quotas into three main producer groups, namely the Respondents, which together produce almost 75% of New Brunswick's live chickens. The undisputed evidence is that while the quotas remain in the names of the original producers, the ownership or control of the production has been transferred to the Respondents. At the time of this application the Respondents are supplying about 48% of the Applicant's chickens.

[10] Olymel, a Quebec based processor and the Applicant's primary competitor in Quebec and the Eastern provinces, in consort with Westco wanted to buy the St-François Plant. On August 19, 2007, Olymel and Westco, (the Consortium) informed the Applicant that if it was not prepared to sell at a price acceptable to the Consortium, then all of the chicken produced by Westco and Dynaco would temporarily be diverted to Olymel's processing facility in Quebec while the Consortium built its own plant in New Brunswick. Westco had let it be known that it had always been its intention to integrate processing into its business plan.

[11] Negotiations for the purchase of the St-François Plant between the Applicant and the Consortium failed. As a result, on January 21, 2008, Westco notified the Applicant that it would cease supplying live chickens to the Applicant effective July 20, 2008, by reason of its decision to have its live chickens processed at the Consortium's new New Brunswick plant.

[12] On January 24, 2008, Dynaco advised the Applicant that it would also cease to supply the Applicant with live chickens because the Applicant had sullied its name by referring to Dynaco in correspondence with the New Brunswick Minister of Agriculture. On February 6, 2008, notwithstanding an apology by the Applicant for the mistaken reference to Dynaco in the letter to the Minister, Dynaco confirmed that its supply to the Applicant would terminate in the middle of September, 2008.

[13] By letter dated February 28, 2008, Acadia gave formal notice that it would cease supplying live chickens to the Applicant, effective September 15, 2008.

[14] The Applicant contends that the refusal to deal by the Respondents collectively will reduce by 75% the supply of live chickens from New Brunswick to the Applicant. This translates, on average, to approximately 48% of the 565,800 chickens (i.e. 271,350) processed weekly at the plant. The Applicant's evidence is that it requires a guarantee of 350,000 live chickens per week to stay viable and that the absolute minimum supply required to simply "get by" is 300,000 live chickens per week.

[15] The Applicant's evidence is that losing Westco's 186,230 chickens 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 at the St-François Plant, loss of the Westco chickens alone would reduce profits by about 50% on an annual basis.

[16] The Applicant contends that if the Respondents cut off the Applicant's supply, the St-François Plant will only be able to run at 40% of capacity. Processing would be reduced to just over ¾ of one shift and a majority of the 340 jobs would be lost immediately. According to the Applicant, the viability of the whole plant would be severely compromised.

[17] The Applicant argues that the refusal of each of Westco, Dynaco and Acadia, separately, would substantially affect its business. Together, they might destroy the business completely.

IV. ANALYSIS

[18] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

103.1(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[19] The test to be followed on an application for leave was first applied by Madam Justice Dawson in *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, par. 14. The test as articulated by Madam Justice Dawson was subsequently adopted by the Federal Court of Appeal in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] FCA 339. Pursuant to this test, the Tribunal must determine whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice and that the practice in question could be subject to an order.

[20] In considering a leave application, all the elements of the reviewable trade practice of refusal to deal set out in subsection 75 (1) of the Act must be addressed. See *Barcode*, above, at paragraph 18.

[21] Subsection 75(1) of the Act provides as follows:

75.(1) 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

75.(1) 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 question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce

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

délat, 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.

[22] I will now turn to the first part of the test: whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe that the Applicant is directly and substantially affected in its business by a practice referred to in section 75.

[23] The Applicant's affiant attests that the St-François Plant is the Applicant's only business and that the Respondents' refusals will have a substantial and direct impact on that business. The evidence indicates that the Respondents' refusals will collectively lead to a loss of approximately 48% of its current supply of live chickens reducing the Applicant's operations to approximately 40% of capacity. While the Respondents Dynaco and Acadia submit that their respective refusals cannot substantially affect the Applicant's business because of their small numbers, I am satisfied that there is evidence of ties between the Respondents which leads me to consider, for the purpose of this leave application, the collective impact of refusals by all Respondents.

[24] The Tribunal has not accepted the Respondents' submissions that the business to be examined is that of Maple Lodge. Rather, when considering an application for leave under section 103.1 of the Act, the Tribunal must examine the "applicant's business". The Applicant is not Maple Lodge.

[25] The uncontested evidence before the Tribunal indicates that the Respondents will cut off supply shortly. In my view, one should not have to wait until harm actually occurs before bringing an application under subsection 103.1(1) of the Act (see also *Robinson Motorcycle Limited v. Fred Deely Imports Ltd.*, 2005 Comp. Trib. 52, where leave was granted before supply was scheduled to cease).

[26] I am therefore satisfied that the Tribunal has reason to believe that the Applicant is directly and substantially affected in its business by the Respondents' refusals.

[27] I will now turn to the second part of the test, the factors in subsection 75(1) of the Act.

[28] As I explained above, the Applicant's affiant attests that the Respondents' refusals will have a substantial and direct impact on the Applicant's business. The parties appear to agree at this stage that the "product" at issue for the purposes of paragraph 75(1)(a) is live chickens.

[29] The Respondents contend in their written submissions that the Applicant adduced no evidence to establish the geographic market or show what efforts were made by the Applicant to secure alternate supplies.

[30] However, the Applicant's affiant attests that "Nadeau cannot obtain replacement supplies of live chicken from within or outside New Brunswick ..." and that "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.”

[31] Given the uncontested evidence that all the Respondents are about to cut off supply to the Applicant, I am satisfied that the Tribunal could conclude that the Applicant’s business is substantially affected due to its inability to obtain adequate supplies of live chickens.

[32] With respect to paragraph 75(1)(b) of the Act, the evidence shows that 74.18% of the chicken quota in New Brunswick is in the hands of the three Respondents. The production of chicken for the Canadian market is managed under a national supply management system. However, that system leaves producers free to sell to the processors of their choice at negotiated prices above a regulated minimum. It is noteworthy that Westco concedes in its submissions that there is “vigorous” competition in the production of live chickens.

[33] In these circumstances and considering the fact that 75% of the New Brunswick supply is controlled by the Respondents, the Tribunal could conclude that the Applicant is unable to obtain adequate supplies of live chickens because of insufficient competition among suppliers.

[34] With respect to paragraph 75(1)(c), the Respondents do not appear to challenge the evidence that the Applicant is willing and able to meet the Respondents’ usual trade terms. In any event, I am satisfied that the Tribunal could conclude that the Applicant is willing and able to meet the usual trade terms of the suppliers.

[35] Paragraph 75(1)(d) requires that the product be in ample supply. The evidence indicates that the Respondents’ ability to supply the Applicant has never been a problem. The Supreme Court of Canada has recognized that “[t]he quota system is an attempt to maintain an equilibrium between supply and demand and attenuate the inherent instability of the markets” (see *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20, at par. 38). I am satisfied in the circumstances that the Tribunal could conclude that live chickens are in “ample supply”.

[36] The market at issue for the purposes of paragraph 75(1)(e) is the market in which the Applicant participates, involving the sale of processed chickens. The Applicant’s affiant attests that the refusals could lead to the closure of the Applicant’s processing plant, thereby eliminating a major competitor in the market place. He explains that the closure of the St-François Plant “...would result in a significant reduction of competition in the chicken market in Quebec and the Maritime provinces.” In the circumstances, I am satisfied that the Tribunal could conclude that the refusals are likely to have an adverse effect on competition in a market.

[37] For these reasons, I conclude that the Tribunal “could” make an order requiring the Respondents to supply the Applicant.

[38] The Tribunal has therefore reason to believe that the Applicant is directly and substantially affected in the Applicant's business by a practice referred to in section 75 that could be subject to an order under that section. Accordingly, leave is granted.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[39] The Application for leave to apply under section 75 of the Act is granted.

DATED at Ottawa, this 12th day of May 2008.

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

(s) Edmond P. Blanchard

COUNSEL:

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