

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**

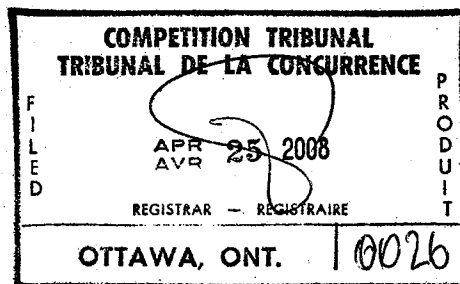
Applicant

AND

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

Respondents

REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*



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
lprice@foglerrubinoff.com
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: Ogilvy Renault, S.E.N.C.R.L., s.r.l.
Suite 1100, 1982 McGill College Street
Montreal, Québec H3A 3C1

Denis Gascon
Eric C. Lebevre
Tel: 514 847 4747
Fax: 514 286 5474
Solicitors for Groupe Westco Inc.

AND TO: Joli-Coeur, Lacasse, Geoffrion, Jette, St-Pierre
Suite 600, 1134 Grande Ave. W.
Quebec, Québec G1S 1E5

Paul Routhier
Paul Michaud
Tel: 418 681 7007
Fax: 418 681 7100
Solicitors for Groupe Dynaco, Co-operative agroalimentaire

AND TO: Lavery, De Billy s.e.n.c.r.l.
Suite 500, 925 Grande Ave. W.
Quebec, Québec G1S 1C1

Pierre Beaudoin
Tel: 418 266 3068
Fax: 418 688 3458
Solicitors for Volailles Acadia s.e.c.

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

**REPLY SUBMISSIONS OF THE APPLICANT
PURSUANT TO SECTION 103.1 OF THE *COMPETITION*
ACT**

A/ The Chicken Marketing System

1. The respondents refer to and rely upon the decision of the Supreme Court of Canada in *Québec v Pelland*. That decision upheld the constitutional validity of the Québec component of the federal-provincial chicken marketing scheme.

*Ref: Fédération des producteurs de volailles du Québec v
Pelland, 2005 SCC 20*

2. The Supreme Court noted (at para. 4) that the purpose of the chicken marketing scheme is to "ensure effective marketing and a dependable supply of chicken to Canadian consumers". The Court describes the function of the federal body (the Chicken Farmers of Canada) as being "to assess the national market and set a global production quota for each province" (at para. 7).

3. Since the scheme contemplates setting periodic supply quotas based on assessment of consumer need, the global amount of chicken that can be produced nationally (and hence provincially) is not subject to any *a priori* limitations. For this reason, chicken is, and will continue to be, in ample supply. As stated by the Supreme Court (at para. 38):

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

4. Although the global number of chickens produced can grow based on consumer demand, the number of producers is limited. As stated in *Pelland* (para. 33), "a producer must be allotted an individual production quota in order to produce chicken in the province". Once possessed of a quota, the producer may (subject to the relevant legislation) market both intra-and extra-provincially. Only producers owning or controlling quota may produce chicken. There is therefore insufficient competition at the production (supply) level of the chicken marketing system. The system creates a sanctioned monopoly in favour of existing quota-holders or owners, such as the respondents. Indeed Mr. Soucy of Westco concedes as much by saying in paragraph 12 of his affidavit, in effect, that the only way to enter the chicken production market is by "buying a production quota belonging to a farmer who wants to sell his quota...".

5. In its decision in *Chicken Farmers of Ontario v. Drost*, the Ontario Divisional Court discusses the goals of the system as administered by the Chicken Farmers of Ontario ("CFO")(at para. 12):

"CFO controls the amount of chicken produced and marketed so that these activities occur in an orderly manner. This enables chicken producers over time to receive a reasonable return and provides stability in the marketplace".

Ref: *Chicken Farmers of Ontario v. Drost*, [2005] O.J. No. 3973
(Div. Ct.), para. 12

6. In New Brunswick, the provincial component of the system is administered by the Chicken Farmers of New Brunswick ("**CFNB**"). The Marketing Orders of the CFNB reiterate the goals and objectives of the system, and reinforce the regulatory protection offered by the system to existing producers such as the respondents. For example:

(a) Marketing Order I (1) describes the object of the marketing plan as:

"...to control the number of chickens raised for marketing within the Province, in such a manner:

(a) As to ensure there is an adequate supply of New Brunswick grown chicken available to the consumer.

(b) To provide an opportunity for the maximum number of residents in New Brunswick to earn a living in the marketing of chicken.

(c) To ensure a reasonable rate of return from the sale of chicken and to ensure a continuity of supply.

(d) To avoid the development of monopolies which could result in excessive cost to the consumers of chicken.

(e) To avoid a curtailment of the overall supply in the event one or more producers cease to market chicken."

(b) Marketing Order III (11) provides that the Province's marketing quota "shall be allocated by the Board on a *pro rata* basis to *existing producers*" (emphasis added).

(c) Marketing Orders VII and IX deal with the prices to be paid by processors, and other conditions for the sale of chicken by a producer to a processor. These Orders provide that the minimum prices paid shall be those fixed from time to time by the CFNB.

7. As a result, existing producers are fully protected in New Brunswick, in that the producer board (the CFNB) sets minimum prices intended to ensure "a reasonable return", and new entrants are essentially barred from the producer end of the market.

8. The system does not contemplate that producers like the respondents will use their protected monopoly to attack competition at the unprotected processing level of the market. The respondents' purpose is to drive Nadeau out of business. Once Nadeau is gone, this leaves the field open for Olymel, together with Westco and its cohorts, to corner the processing market in Eastern Canada from a base of the "guaranteed supply" provided by the system to the respondents.

9. Nadeau's lack of a guaranteed supply was admittedly a huge bargaining chip, in Olymel/Westco's minds, in their "negotiations" with Nadeau. They offered Nadeau a fraction of the going concern value for the St-François Plant, in large part because of "l'absence de garantie d'approvisionnement". (Soucy Affidavit, at paras. 46, 47).

10. The respondents' conduct in this matter is clearly inimical to the purpose and objects of the *Competition Act*, as well as to the purpose and objects of the chicken marketing system, as the latter is described in the court decisions referred to above.

B/ Producer Premiums

11. Mr. Soucy complains in his affidavit (at paras. 16, 30, 31, 33, 34, 35, 66) about Nadeau's alleged failure in previous years to pay sufficiently high "premiums" to New Brunswick producers.

12. However:

(a) Nadeau has always paid *at least* the price fixed by the CFNB in accordance with the system referred to above, and these prices have clearly permitted Westco and the other respondents to grow and prosper. It should be noted in this connection that the CFNB fixed price for New Brunswick chicken is much higher than the prices set in Québec (Tavares affidavit para. 36(c));

(b) Soucy concedes (Soucy affidavit paras. 16(b), 33(a)) that Nadeau increased the prices ("premiums") paid to New Brunswick producers in April 2007. This amounted to an additional \$830,000 in the respondents' pockets in 2007 (Tavares affidavit, para. 40);

(c) In any event, the respondents' decision to refuse to deal with Nadeau had nothing to do with price:

(i) The respondent Westco's stated reason was:

"puisque nous avons établi un nouveau partenariat avec Olymel s.e.c."

(Tavares Affidavit, Exhibit "F");

(ii) The respondent Dynaco's stated reason was the allegedly false representations made by Mr. Tavares about Dynaco to the CFNB and others, as a result of which Dynaco allegedly "a perdu confiance envers Maple Lodge et Tony Tavares". (Tavares Affidavit, Exhibit "N"); and

(iii) The respondent Volailles Acadia gave no reason at all. (Tavares Affidavit, Exhibit "M").

13. Mr. Soucy also argues (Soucy Affidavit, at para. 58), that Nadeau could obtain replacement supplies of chicken if:

(a) it went around asking all of the producers in Québec to divert some or all of their production from their current processors to Nadeau; and

(b) it paid higher prices ("premiums") to these producers (presumably than they currently receive).

14. These assertions are entirely speculative. As can be seen from Mr. Soucy's own affidavit (at para. 18(b)), in the months since Westco gave notice of termination of supply (of its 186,230 birds per week), Nadeau has only been able to acquire 25,000 birds. Moreover, these birds were acquired from Nova Scotia, where, as stated in Mr. Tavares' affidavit (para. 76) the one remaining processor is unable to fully service the Nova Scotia production market. By contrast, it

is undisputed that there is ample processing capacity in Ontario and Québec. It is unlikely that Ontario and Québec processors would react kindly to efforts by Nadeau to poach their existing supply.

15. More importantly, what Mr. Soucy is in reality advocating is a live chicken premium price war.

16. Since there are a limited number of producers in each province, any Québec processor whose producers divert supply to Nadeau will be forced to retaliate by further increasing prices to its own or other processors' producers. This would create huge additional costs for all processors. These additional costs, if they cannot be passed on to consumers, may drive other processors out of business, thus further reducing competition at the processor level of the chicken market.

17. Further, it should be noted that the *Competition Act* does not contemplate that an applicant is required to offer to pay exorbitant prices to other suppliers in order to obtain replacement products. Subsections 75(a) and (c) emphasize that the relevant enquiry is whether adequate supplies can be obtained "on *usual* trade terms" (emphasis added). It is clear that Nadeau cannot obtain replacement supplies anywhere in the market on the usual and customary trade terms previously in effect between Nadeau and its suppliers.

Ref: See, for example: B.-Filer Inc. v. Bank of Nova Scotia, 2005 Comp. Trib. 38, at para. 57

C/ Chicken is in Ample Supply

18. The respondents argue that, because the various regulatory bodies fix quotas (maximum numbers) for chicken production on a federal and provincial basis, there is not an "ample supply" within the meaning of subsection 75(1)(d) of the *Competition Act*. (Westco Submissions, para. 139; Dynaco Submissions, para. 12; Acadia Submissions, para. 11).

19. This is not correct. Supplies allocated to existing producer quotas are adjusted every eight weeks following a consultative process between the federal body (Chicken Farmers of

Canada) and the provincial producer boards (such as the CFO and the CFNB). The process is intended to ensure that there is an ample supply of chicken to meet consumer needs.

20. For example, in Exhibit "B" to Mr. Soucy's affidavit (at p. "45/269") the Chicken Farmers of Canada notes that its "main responsibility" is to ensure the production of the "right amount" of chicken to "meet consumer needs". In Exhibits "B" and "D" to Mr. Soucy's affidavit, he includes data demonstrating that production of chicken has increased substantially in the last few years, no doubt in response to consumer demand. In New Brunswick alone, as stated in paragraph 18(f) of Mr. Soucy's affidavit, chicken production increased by close to 60% in the period from 1990 to 2000. Westco's own volume has increased by over 10,000 chickens *per week* since 2006 (Soucy affidavit, para. 8(e)).

21. There is no doubt that there is an "ample supply" of chicken, however one defines the "market".

D/ This Application is Not "Premature"

22. Westco argues (Submissions, paras 79-86) that, because it will continue to supply Nadeau until July 20, 2008, Nadeau is precluded from now seeking leave under s. 103.1(7) of the *Competition Act*. Westco is presumably saying that Nadeau must wait until supply has already ceased and it has suffered irreparable harm, then return to the Tribunal to seek leave.

23. That cannot be a correct statement of the law. The Courts have long recognized that it is proper to intervene to *prevent* irreparable harm, rather than to wait until it is too late:

"This is manifestly wrong. The fact that the harm sought to be avoided is in the future does not make it speculative. An applicant for an injunction does not have to wait for the damage to occur before seeking relief. In fact, the principal purpose of an interlocutory injunction is to prevent threatened harm before it happens. It is the likelihood of harm, not its futurity, which is the touchstone".

Ref: Horii v. Canada, [1992] 1 F.C. 142 (F.C.A.), at para 13

"Then it was submitted that, as no actual injury had resulted to the plaintiff through the action of the defendant, its application for relief was at least premature. If any right possessed by the plaintiff was in danger of being illegally destroyed or impaired by defendant, then it was perfectly entitled to avert an impending disaster by an application to the Court for protection. Considering the nature of its business, if the source of supply were cut off, even for a short time, it would result in serious injury. While the mere prospect or apprehension of injury or belief to that effect will not be sufficient to warrant an injunction, still if the intention to do the act complained of be proved to exist or if an act is threatened, which in the opinion of the court, if completed, would give a ground of action, there is a foundation for the exercise of the jurisdiction..."

Ref: Steeves Dairy Ltd. v. Twin City Co-operative Milk Producers Assn., [1926] 1 W.W.R. 25 (BCSC), at para 21

24. This principle has been applied by the Competition Tribunal in *Robinson Motorcycle Limited v Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13, a decision that Westco fails to mention in this context.

25. In that case, Fred Deeley Imports Ltd. ("**Deeley**") gave notice on or about January 16, 2004, that it would cease supplying Robinson Motorcycle Limited ("**Robinson**") with Harley-Davidson motorcycles and parts, effective July 31, 2004. On July 16, 2004, about two weeks *prior* to the cessation of supply, the Tribunal granted leave under subsection 103.1(7). The Order states (at para. 5), among other things, that:

"(a) the Competition Tribunal could conclude that Robinson is precluded from carrying on business following the termination of its longstanding arrangement as an exclusive Harley-Davidson dealer".

E/ **Adverse Effect on Competition**

26. The respondents allege, incorrectly, that Nadeau is a "monopolist". In the next breath, they concede (correctly), that Nadeau in fact currently faces fierce competition in Eastern Canada, principally from Excelor (P.Q.) and Olymel (P.Q.).

See Westco Submissions, paras. 143, 146, Soucy Affidavit, at para. 63

27. These concessions bolster Nadeau's argument that the respondents' refusal to supply chickens to Nadeau will render it unable to effectively continue in business, since other processors, and in particular Olymel, are not being denied supplies.

28. Westco argues (at para. 146) that the destruction of Nadeau will not adversely affect competition, because there will eventually (at some unspecified time in the future) be a "remplacement" Westco plant in New Brunswick, and there are other plants elsewhere in Eastern Canada.

29. This argument is disingenuous at best.

30. In the first place, the disappearance of Nadeau, coupled with guaranteed supply from Westco, Dynaco and Acadia (not to mention the fact that Nadeau's other suppliers will be deprived of their customer) would undoubtedly strengthen Olymel at the cost of other players in the processor market, and would enable it to raise prices and limit supply. Nadeau has already provided substantial uncontradicted evidence of the effect this would have on customers (Tavares Affidavit, Exhibits O, P, Q).

31. Secondly, even assuming that someday Olymel/Westco do build a new plant in New Brunswick, this would by no means be a replacement for Nadeau. In fact, such would simply serve to further strengthen Olymel's position and increase Westco's dominance, with the adverse effects on competition noted in Mr. Tavares' affidavit. As stated by the Tribunal:

"...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".

Ref: B-Filer Inc. et al v The Bank of Nova Scotia,
2006 Comp. Trib. 42, at para. 208

32. In any event, at the leave stage, it is sufficient to provide evidence that the Tribunal *could* (not "must") conclude that there would likely be an adverse effect on competition. The potential elimination of the business of the applicant meets this test. The following extracts from decisions made under s. 103.1 illustrate the foregoing:

(a) "...the Competition Tribunal could conclude... that the elimination of Quinlan (presently in Huntsville) is likely to have an adverse effect on a competition for those customers (including those in North Bay) who, as a practical matter, will be able to deal only with the Harley-Davidson dealer in Lively (near Sudbury)"

*Ref: Quinlan's of Huntsville Inc., and Fred
Deeley Imports Ltd., [2004] Comp. Trib.
15, at para. 7*

(b) "...the Tribunal could find that there would likely be an adverse effect on competition because the Applicants' Business will not have the Banking Services it needs to function as a viable competitor".

*Ref: B-Filer Inc. v. Bank of Nova Scotia, 2005
Comp. Trib. 38, at para. 59, aff'd 2006
CarswellNat 1759 (F.C.A.)*

(c) "[Barcode's] difficult financial situation reflected by its receivership could be likely to impede its ability to be an effective competitor in that market, thereby having an adverse effect on competition in that market. The evidence may not be strong but I think it is sufficient to constitute reasonable grounds to believe that Symbol's alleged refusal to deal could be the subject of an order under subsection 75(1)".

*Ref: Barcode Systems Inc. v. Symbol
Technologies Canada ULC, 2004
CarswellNat 3582, at para. 29 (F.C.A.)*

F/ Nadeau Has Met the Test for Leave

33. Westco rightly points out that the leading case on the test for leave under s. 103.1 is the Federal Court of Appeal's decision in *Barcode Systems Inc. v. Symbol Technologies Canada ULC (supra)*.

34. That case made it clear that there must be evidence before the Tribunal concerning, and the Tribunal must consider, all the elements set out in subsection 75(1) of the *Competition Act*.

35. However (*Barcode*, para. 17):

"The threshold for an applicant obtaining leave is not a difficult one to meet. It need only provide sufficient credible evidence of what is alleged to give rise to a bona fide belief by the Tribunal. This is a lower standard of proof than proof on a balance of probabilities which will be the standard applicable to the decision on the merits".

36. It is submitted that Nadeau has more than satisfied this low test.

75(1)(a) Substantial Effect on Nadeau's Business

37. It is undisputed that the respondents' refusal to deal will deprive Nadeau of 271,350 chickens *per week*, or about 48% of Nadeau's current production of 565,800 chickens per week. Even in the absence of anything else, this would satisfy the test.

38. However, Nadeau has gone further. The uncontradicted evidence of Mr. Tavares (Tavares affidavit at paras. 77-85) is that the loss of these birds will result in, among other things:

- 50% reduced profits on an annualized basis (Westco birds alone)
- lay-off of the majority of the 340 employees at the St-François Plant
- an immediate inability to fulfill customer needs and consequent loss of confidence and loss of goodwill.

75(1)(a) Unable to Obtain Adequate Supplies on Usual Trade Terms

39. The respondents have not denied Mr. Tavares' evidence (para. 80) that all of the production of other producers is already allocated to other processors. They argue, instead, that Nadeau should emulate Olymel, and divert production away from other processors. They admit that such efforts would require Nadeau to pay higher (probability much higher) prices than Nadeau had been paying in the usual and ordinary course of its dealings with the respondents. Accordingly, even assuming replacement supplies could be obtained on a timely basis to avoid disaster (an entirely speculative, highly doubtful proposition), such supplies could most certainly not be obtained on "usual trade terms".

75(1)(b) Insufficient Competition Among Suppliers

40. As a result of the protected status of existing quota holders under the chicken marketing system, there is no meaningful competition among chicken producers at all. There is no doubt that Nadeau's inability to obtain adequate replacement supplies is because of the "insufficient competition" among suppliers of live chicken.

75(1)(c) Willingness to Meet Usual Trade Terms

41. This is not disputed.

75(1)(d) The Product is in Ample Supply

42. This issue is addressed at length above. There is ample evidence of "ample supply".

75(1)(e) Effect on Competition

43. There is sufficient credible evidence contained in Mr. Tavares' affidavit, and the Exhibits thereto, coupled with the concessions made by the respondents (as discussed above) to more than meet the low threshold on this issue, as set out in *Barcode, supra*.

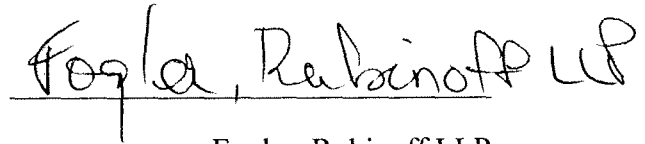
G/ Conclusion

44. The applicant respectfully submits that it has more than met the test for leave set out in s. 103.1(7) of the *Competition Act*. The applicant respectfully requests that the Tribunal grant leave to the applicant to apply for a remedy under s. 75 of the *Competition Act*.

45. Nadeau repeats its request that the proceedings be conducted in English.

Respectfully Submitted

April 25, 2008

Handwritten signature in black ink that reads "Fogler, Rubinoff LLP". The signature is written in a cursive style and is positioned above a horizontal line.

Fogler, Rubinoff LLP
Barristers & Solicitors
95 Wellington Street West
Suite 1200
Toronto, ON M5J 2Z9

Leah Price
lprice@foglerrubinoff.com

Andrea McCrae
amccrae@foglerrubinoff.com

Solicitors for the Applicant