

File No.: **CT-2008-003**

Registry Document No.:

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 75 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 75 of the *Competition Act*, R.S.C. 1985, c. C-34 as amended (the "Act") for an Order directing 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.

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE		P R O D U I T
F I L E D	MAR 17 2008 REGISTRAR — REGISTRAIRE	
OTTAWA, ONT.		10003

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 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.

4. Nadeau requests that this Application proceed in English.

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

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



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AND TO: Groupe Westco Inc.
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AND TO: Groupe Dynaco, Cooperative Agroalimentaire
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AND TO: Volailles Acadia S.E.C.
87 Route 132 Ouest
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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 co-ordinated 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 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 almost 75% has come from Westco, Dynaco or Acadia.

D/ The Respondents' Refusal to Deal

17. 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**").

18. 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.

19. 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.

20. 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.

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

22. 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, in part because the Consortium was prepared to pay only a fraction of the "going concern" value of the St- François Plant.

23. 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.

24. 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.

25. 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.

26. On February 28, 2008, Acadia provided formal notice that it would cease supplying live chickens to Nadeau, effective September 15, 2008.

27. 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.

28. 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

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

30. 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

31. 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.

32. 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 may not be able to "get by", and will definitely suffer enormous loss of revenue.

33. 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.

34. 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.

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

36. 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

37. 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. 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.

38. 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.

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

F/ Balance of Convenience

40. 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.

41. If the Respondents are required to maintain their existing supplies of chicken to Nadeau 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 APPLICATION PURSUANT TO SECTION 75

42. Subsection 75(1) of the *Competition Act* provides:

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

Competition Act, R.S.C., 1985, c. C-34, s. 75

43. The Tribunal has never specifically defined "substantially affected", however the Tribunal made the following statement in *Chrysler Canada v. Canada (Competition Tribunal)*:

The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.

Chrysler Canada Ltd. v. Canada (Competition Tribunal) (1989), 27 C.P.R. (3d) 1

44. The evidence on this application demonstrates:

(a) That the Respondents have a near-monopoly on the production of live chicken in New Brunswick;

(b) That live chicken is in ample supply;

(c) That the Respondents will refuse to deal with Nadeau;

(d) That the refusal to deal with Nadeau will have a direct and substantial effect on Nadeau's business, in that Nadeau will be deprived of over almost 75% of its historic supply of live chickens (about 48% of its current supply);

- (e) Nadeau is willing and able to meet the Respondents' usual trade terms;
- (f) Nadeau is unable to obtain adequate supplies of live chicken from other sources, because of insufficient competition among suppliers in the market; and
- (g) The refusal to deal is likely to have an adverse effect on competition at various levels of the market for chicken in the geographic area.

45. The actions of the Respondents are activities described in section 75 of the Act, and it is appropriate in all the circumstances that the Tribunal order the Respondents to accept Nadeau as a customer on the usual trade terms.

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

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



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