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CASE COMMENT: NADEAU v. GROUPE WESTCO – IT'S NOT ENOUGH TO CRY FOWL

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The Competition Tribunal's recent decision in *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*² reinforces the narrow scope of section 75 of the *Competition Act*³ and the limited circumstances in which relief will be available to businesses affected by refusals to deal. The case should serve as a reminder to businesses dependent on major suppliers that they should enter into commercial arrangements to ensure security of supply, rather than gamble on relief from the Tribunal when a refusal to deal takes place.

Background

The Canadian poultry industry is regulated at both the federal and provincial levels. Chicken Farmers of Canada, a federal marketing agency, establishes provincial quotas for chicken production. Provincial marketing boards then allot individual quotas to chicken producers in each province. Chicken producers typically sell live chickens to chicken processors for processing and resale in downstream markets.

In recent years, Nadeau Poultry Farm Limited operated the only chicken processing facility in New Brunswick. The respondents, Groupe Westco Inc., Groupe Dynaco and Volailles Acadia S.E.C. (collectively, the "Respondents"), operated chicken farms in New Brunswick that accounted for approximately 75% of New Brunswick's chicken production.

Prior to 2008, the Respondents supplied Nadeau with all of their chickens for processing, which represented approximately half of Nadeau's chicken supply. In early 2008, the Respondents notified Nadeau of their intention to terminate the supply arrangements.⁴ Nadeau applied for an order under subsection 75(1) of the *Competition Act* to require the Respondents to continue to accept Nadeau as a customer.⁵

The Requirements of Section 75

To obtain relief under section 75, an applicant is required to establish that:

- (a) it is substantially affected in its business or precluded from carrying on business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

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- (b) it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
- (c) it is willing and able to meet suppliers' usual trade terms;
- (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.

As the Tribunal noted in *B-Filer*,⁶ the market for the product referred to in paragraph (a) is the “upstream” market for the product supplied to the applicant – in this case, live chickens. The market referred to in paragraph (e) is the “downstream” market for the product(s) supplied by the applicant – in this case, chicken processing and sales of processed chicken.

The Tribunal's Decision

While the Tribunal agreed that Nadeau would be substantially affected in its business as a result of the Respondents' refusals to deal, it found that Nadeau had failed to satisfy the requirements of paragraphs 75(1)(b), (d) and (e), with the result that Nadeau's application for relief was dismissed. The following is a summary of the Tribunal's conclusions.

Substantially Affected; Adequate Supply; Usual Trade Terms

Given the Respondents' collective market position and the portion of Nadeau's live chicken supply for which the Respondents accounted, the Tribunal agreed that Nadeau would be substantially affected⁷ in its business as a result of its inability to obtain adequate supplies of live chickens anywhere in the upstream market on usual trade terms.⁸ While the Tribunal found that the geographic dimension of the upstream market included not only the provinces of New Brunswick, Prince Edward Island and Nova Scotia (from where Nadeau previously had sourced live chickens) but also those parts of Quebec within a 500 km radius of Nadeau's facility,⁹ the Tribunal also found that the premiums demanded by Quebec-based producers were outside the range of “usual trade terms” within the relevant market as a whole, thereby discounting Quebec-based producers as a source of alternative supply.

Insufficient Competition Among Suppliers

The Tribunal rejected Nadeau's argument that its inability to obtain adequate supplies of live chickens on usual trade terms resulted from insufficient competition among chicken producers. Rather, the Tribunal found that Nadeau's inability to obtain adequate supplies of live chickens resulted from the quota system that capped chicken production within each province.

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Willing and Able to Meet Usual Trade Terms

The Tribunal was satisfied that Nadeau was willing and able to meet the usual trade terms of chicken producers.

Ample Supply

The Tribunal concluded that, because the supply of live chickens was regulated by a quota system, the product was not in “ample supply”, which it defined as supply “available in abundance or to the point that it is considered to be excessive”.

Adverse Effect on Competition

The Tribunal rejected Nadeau’s argument that the Respondents’ refusals to deal were likely to have an adverse effect on competition in the downstream market.¹⁰ In doing so, it rejected the more limited geographic market proposed by Nadeau (which included only the Maritime provinces and Quebec), concluding that the downstream market included Ontario, into which Nadeau and its competitors regularly sold processed chickens.

The Tribunal found that, within the market for processed chickens so defined, concentration was relatively low with four large chicken processors (in addition to several smaller producers) with market shares ranging between 18% and 22%.¹¹ It also found that, while there would be a change in the market shares of the remaining producers if Nadeau were to exit the market, numerous competitors would remain in the market and no producer would have a share of the market of more than 25%. In these circumstances, the Tribunal concluded that the Respondents’ refusals to deal were unlikely to have “a significant impact on the market shares of processors or market concentration” and dismissed Nadeau’s application for relief.

Commentary

The *Nadeau* case reminds us that the *Competition Act* is designed to protect competition, not competitors. Even though the Tribunal agreed that Nadeau would be “substantially affected” in its business – and indeed might be eliminated as a competitor – as a result of the Respondents’ refusals to deal, it concluded that this would not amount to an “adverse effect” on competition in the downstream market. While the Tribunal declined to establish a specific threshold for determining when an effect on competition resulting from a refusal to deal would be regarded as “adverse” – instead, it merely reaffirmed that determining whether there has been an “adverse effect on competition” is similar to determining whether there has been a “substantial lessening of competition”, the difference being one of degree – the result of this case suggests that, in a relatively unconcentrated market, even the elimination of a competitor as a result of a refusal to deal will not meet the “adverse effect” test.¹²

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The case also reinforces the narrow scope of section 75 and elaborates on the requirements necessary to establish entitlement to relief. While, in many cases, it appears that it will be relatively easy for applicants to establish that the requirements of paragraphs 75(1)(c) and (d) have been met, paragraphs 75(1)(a), (b) and (e) would appear to present fairly high hurdles.¹⁴

Finally, *Nadeau* should serve as a reminder to businesses dependent on major suppliers to enter into commercial arrangements that will ensure security of supply. Somewhat surprisingly, *Nadeau*'s supply arrangements with the Respondents were not set out in a formal agreement. *Nadeau*'s failure to ensure supply through appropriate contractual arrangements placed it in a position where it was subject to the whims of its suppliers and limited its avenues of recourse in the event that its supplies were curtailed.

Since section 75 was amended in 2002, no applicant has obtained relief for a refusal to deal. In fact, in the 40-year history of section 75, only two applications for relief have been successful,¹⁵ and both cases would likely be decided differently today. Apart from the broader policy issue of whether section 75 (like section 77) continues to serve any useful purpose – it may be the case that the reviewable trade practices covered by these sections would be better dealt with as abuses of dominance under section 79 of the *Competition Act* – the history of section 75 suggests that relief will be available in rare instances at best.

Notes

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² (2009), 2009 Comp. Trib. 6 (Competition Trib.) [*Nadeau*].

³ R.S.C. 1985, c. C-34, as amended.

⁴ The Respondents' decisions to terminate their supply arrangement with *Nadeau* were driven, in part, by Groupe Westco's plan to vertically integrate its operations, which included entering into a partnership with Olymel S.E.C., a Quebec-based chicken processor, to build a new processing facility in New Brunswick.

⁵ *Nadeau* also obtained an interim supply order against the Respondents, which required them to continue supplying chickens to *Nadeau* pending the section 75 hearing. See *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc. et al.* (2008), 2008 Comp. Trib. 16 (Competition Trib.).

⁶ *B-Filer Inc. et al. v. The Bank of Nova Scotia* (2006), 2006 Comp. Trib. 42 (Competition Trib.) [*B-Filer*].

⁷ The Tribunal rejected the Respondents' argument that an applicant under section 75 is required to prove that it has been affected to the point of being unable to carry on business. Consistent with the view it expressed in *Chrysler*, the Tribunal confirmed that a section 75 applicant need only establish that, on a balance of probabilities, its business was affected in an important or significant way – something beyond mere *de minimus*. See *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Trib.) [*Chrysler*].

⁸ The Tribunal observed that "trade terms" as defined in subsection 75(3) of the *Competition Act* includes "terms in respect of payment", which the Tribunal concluded includes price. See *Nadeau*, *supra* note 2 at paras. 142-145.

⁹ This reflected the distance that *Nadeau* was then sourcing live chicken supplies within the Maritime provinces.

¹⁰ The Tribunal adopted the approach it used in *B-Filer*, which assessed "adverse effect" in light of whether a refusal to deal creates, enhances or preserves market power of the remaining market participants. In *B-Filer*,

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the Tribunal also held that “adverse” is something less than “substantial”; that the level of competitiveness must be assessed both with the refusal to deal and without it; and that the likelihood of an adverse effect requires proof that such an event is “probable”.

¹¹ Within this market, Nadeau’s parent company, Maple Lodge Holding Corporation, had a share of approximately 22%, which included Nadeau’s share of approximately 7%.

¹² In an address to the Senate Committee on Banking, Trade and Commerce, former Commissioner von Finckenstein stated that, in his view, a small firm’s exit from the market, which would reduce competitors and product choices for consumers, would be sufficient to constitute an adverse effect: see Competition Bureau, “Speaking Notes for Konrad von Finckenstein on Bill C-23: An Act to Amend the Competition Act and the Competition Tribunal Act” (24 April 2002).

¹³ An applicant’s willingness and ability to meet suppliers’ usual trade terms will not be an issue in most cases. Similarly, in many cases, the fact that the relevant product is in ample supply will not be an issue. A quota system, which limited supply, made the facts of this case somewhat unique.

¹⁴ The requirement that a private applicant establish that a refusal to deal is likely to have a substantial effect on its business would appear to represent the greatest obstacle to private applicants. Since the *Competition Act* was amended in 2002, only two applications for leave under section 75 have proceeded to a hearing on the merits. Unlike most private applicants, Nadeau was able to establish – both on its application for leave and at the hearing on the merits – that the respondents’ refusal to deal would substantially affect its business.

Paragraphs (b) and (e) each present special challenges. An applicant under section 75 is required to establish that its inability to obtain adequate supplies of a product is the result of “insufficient competition among producers”, which in this case was affected by the existence of a quota system. Nadeau’s failure to convince the Tribunal that not even its exit from the market would amount to an “adverse effect on competition” provides insight into the manner in which the Tribunal interprets paragraph 75(1)(e) – and may interpret the similar requirement of section 76 of the *Competition Act* – in addition to the need, as in all competition cases, to advance properly defined markets.

¹⁵ *Chrysler*, *supra* note 7, and *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Competition Trib.).