Competition Tribunal Tribunal de la Concurrence

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2012 Comp. Trib. 13
File No.: CT-2008-004
Registry Document No.: 744

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 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.
(respondent)

Date of hearing: 20111129
Before Judicial Member: Blanchard J.
Date of Reasons and Order: May 18, 2012
Reasons and Order signed by: Mr. Justice E. P. Blanchard

REASONS AND ORDER REGARDING WESTCO'S REQUEST TO ENFORCE AN UNDERTAKING AS TO DAMAGES

[1] Nadeau Poultry Farm Limited ("Nadeau") gave an undertaking in damages (the "Undertaking") when it was granted a pre-hearing mandatory injunction. However, Nadeau's main application (the "Main Application") under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") was unsuccessful and the respondent, Groupe Westco Inc. ("Westco"), now wishes to enforce the Undertaking.

I. THE BACKGROUND

[2] In an application dated March 17, 2008, Nadeau sought interim relief pursuant to section 104 of the Act. Nadeau asked for an order directing the respondents, including Westco, to continue to supply it with live chickens.

[3] In support of this application, Nadeau filed the affidavit of Anthony Tavares, the former chief executive officer of Maple Lodge Holding Corporation, Nadeau's parent company. In his affidavit, Mr. Tavares provided the Undertaking. It said:

> Nadeau undertakes to abide by any order that may be made against it as a result of the granting by the Tribunal of the interim relief being requested by Nadeau.

[4] Mr. Tavares referred to the Undertaking in a supplementary affidavit filed on June 9, 2008, in the following terms:

> If the Respondents would suffer some monetary damage, which is not admitted but denied, such could be easily recovered if this application is ultimately unsuccessful. Nadeau has undertaken to abide by any order that may be made against it as a result of the granting by the Tribunal of the interim relief being requested by Nadeau.

[5] On June 26, 2008, the Tribunal granted Nadeau's application for interim relief and ordered the respondents to continue to supply Nadeau with live chickens on the usual trade terms (the "Interim Order"). It provided that the requirement to supply would last until a final decision was made on the Main Application. In its Interim Order, the Tribunal noted that Nadeau had provided the Undertaking and even though it does not use the word "damages", Nadeau acknowledged that the Undertaking covers damages.

[6] Nadeau's Main Application was dismissed on June 8, 2009, and Nadeau filed a notice of appeal with the Federal Court of Appeal on September 4, 2009.

[7] On January 22, 2010, the Tribunal found Westco in contempt of the Interim Order (the "Contempt Decision"). The Tribunal found that Westco had failed to comply with the Interim Order by supplying larger, and therefore fewer, chickens to Nadeau than those required by the Interim Order. In a sentencing order dated September 24, 2010, Westco was ordered to pay a fine in the amount of $75,000, and to pay to Nadeau costs fixed in the amount of $250,000. Westco appealed both orders.

[8] On March 18, 2011, the Federal Court of Appeal dismissed Westco's appeal of the Contempt Decision and Westco subsequently discontinued its appeal from the Tribunal's sentencing order.

[9] On June 2, 2011, the Federal Court of Appeal also dismissed Nadeau's appeal from the Tribunal decision dismissing the Main Application. The following day, Westco filed a letter with the Tribunal seeking directions about how it should proceed to enforce the Undertaking. Nadeau, in a responding letter, took the position that Westco could not enforce the Undertaking before first establishing that the Tribunal had jurisdiction.

[10] On August 5, 2011, the Tribunal directed Westco to file this motion to address the following two questions:

1. Does the Tribunal have jurisdiction to enforce an undertaking as to damages?
2. Assuming the Tribunal does have jurisdiction, should leave be granted to Westco so that it can proceed with an application for a hearing relating to the enforcement of the undertaking as to damages?

[11] Both Westco and Nadeau filed materials addressing the above two questions.

[12] Regarding the Main Application, on August 25, 2011, Nadeau filed an application for leave to appeal the Federal Court of Appeal decision of June 2, 2011, to the Supreme Court of Canada. However, on December 22, 2011, the Supreme Court of Canada denied leave. Westco's motion was heard by the Tribunal on November 29, 2011.

[13] I propose to deal with the two issues raised in the Tribunal's Direction of August 5 in turn and will begin by summarizing the parties' positions.

II. DISCUSSION

Issue 1: Does the Tribunal have jurisdiction to enforce the Undertaking?

A. The Parties' Submissions

[14] Westco submits that the Tribunal has the necessary power to enforce undertakings. It argues that that it would be incongruous for the Tribunal to have the jurisdiction to consider an undertaking under section 104 of the Act, but lack the jurisdiction to enforce it.

[15] Westco relies, in particular, on section 8 of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.) (the "Tribunal Act"), which grants the Tribunal the power to hear applications for interim relief and "any related matters" and which also provides that the Tribunal has, with respect to the "enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record". In this case, Westco argues that its right to apply to the Tribunal for the enforcement of the Undertaking is a "matter necessary or proper for the due exercise" of the Tribunal's

jurisdiction because it arises directly from the issuance and enforcement of the Interim Order and the final decision on the merits. Westco also says that the enforcement of the Undertaking is a "matter related" to the application for interim relief.

[16] Westco further asserts that a party that wishes to enforce an undertaking must apply to the court to which the undertaking was given. Westco also says that the Tribunal is the best forum to enforce the Undertaking because it has knowledge of the dispute and has rendered all of the orders relevant to its motion to enforce the undertaking.

[17] On the other hand, Nadeau asserts that the Tribunal has neither the explicit power nor the implicit power to enforce the Undertaking. In Nadeau's view, the Tribunal does not have an explicit power because the Tribunal Act fails to expressly grant the Tribunal the power to enforce an undertaking as to damages.

[18] Nadeau further submits that such a power cannot be inferred because the doctrine of necessary implication is not applicable in this case. In that regard, it notes that the power to enforce an undertaking, which it describes as the "power to award damages", is not necessary for the administration of the statutory scheme and is not rationally related to the purpose of the regulatory framework of the legislation, that is to say the protection of competition in the marketplace. In Nadeau's view, Westco's request is tantamount to a claim for damages and it is clear from the legislation that the Tribunal has no power to award damages.

[19] At the hearing of the motion, counsel for Nadeau argued that while the Tribunal does not have jurisdiction to enforce the Undertaking, the Federal Court or a Superior Court might have such jurisdiction but did not elaborate further.

[20] On December 13, 2011, after the hearing of the motion, counsel for Nadeau wrote to the Tribunal saying that it had learned for the first time on December 6 that an action for damages in connection with the Undertaking had been commenced by Westco in New Brunswick in June 2011 (the "N.B. Action"). In their letter, counsel indicated that they were bringing this matter to the Tribunal's attention because of the question, which had been raised at the hearing, about whether Westco's claim for damages would or could be litigated in a forum other than the Tribunal.

[21] In a letter filed on December 14, 2011, Westco responded that the N.B. Action had been filed to preserve its rights and that it continued to be of the view that the Competition Tribunal is the appropriate body to enforce the Undertaking. In that regard, it noted that paragraph 24 of the Amended Statement of Claim in the N.B. Action, filed on December 6, 2011, provided that the claim had been filed as a precautionary measure to preserve its rights to enforce the Undertaking.

B. Analysis

[22] Administrative tribunals are creatures of statute which derive their jurisdiction from two sources: (i) express grants of jurisdiction (explicit powers) and (ii) the common law doctrine of jurisdiction by necessary implication (implicit powers) (see e.g. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 38).

[23] In this case, the relevant statutory provisions are found in the Act and the Tribunal Act. They are as follows:

Competition Act	*Loi sur la concurrence*
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.	**104**. (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75 ou 77, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.
…	…

Competition Tribunal Act	*Loi sur le Tribunal de la concurrence*
8. (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the *Competition Act* and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under subsection 124.2(2) of that Act.	**8.** (1) Les demandes prévues aux parties VII.1 ou VIII de la *Loi sur la concurrence*, de même que toute question s'y rattachant ou toute question qui relève de la partie IX de cette loi et qui fait l'objet d'un renvoi en vertu du paragraphe 124.2(2) de cette loi, sont présentées au Tribunal pour audition et décision.
(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.	(2) Le Tribunal a, pour la comparution, la prestation de serment et l'interrogatoire des témoins, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances et toutes autres questions relevant de sa compétence, les attributions d'une cour supérieure d'archives.

(3) No person shall be punished for contempt of the Tribunal unless a judicial member is of the opinion that the finding of contempt and the punishment are appropriate in the circumstances.

[emphasis added]

(3) Personne ne peut être puni pour outrage au Tribunal à moins qu’un juge ne soit d’avis que la conclusion qu’il y a eu outrage et la peine sont justifiées dans les circonstances.

[non souligné dans l’original]

[24] The Tribunal, when hearing applications for interim relief under section 104, considers the principles ordinarily applied by superior courts when granting interlocutory or injunctive relief. In *Canada (Director of Investigation and Research) v. Superior Propane* (1998), 85 C.P.R. (3d) 194, Mr. Justice Rothstein, as he then was, held that this meant that the Tribunal should apply the principles established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. A.G. Canada*, [1994] 1 S.C.R. 311 (see also *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 52). The Tribunal must be satisfied that there is a serious issue to be tried, that irreparable harm would ensue if the interim relief was not granted, and that the balance of inconvenience favors the applicant.

[25] An undertaking as to damages has been described as the “price of an interlocutory injunction” (see *Delap v. Robinson et al.* (1898), 18 O.P.R. 231, at 231). The requirement for undertakings as to damages originated in England, in the 19th century, and while initially only required in *ex parte* applications for injunctions, the practice was extended to all cases of interlocutory injunctions (see, e.g., *Smith v. Day* (1882), 21 Ch. D. 421 (C.A.), at 424).

[26] The requirement was imported into Canada (see, e.g., *Delap v. Robinson et al.* (1898), 18 O.P.R. 231), and is still required today. In *Injunctions and Specific Performance*, Mr. Justice Sharpe of the Ontario Court of Appeal explains the requirement as follows (see *Injunctions and Specific Performance*, (Aurora: Canada Law Book, 2010) at p. 2-44:

> Concomitant with the question of irreparable harm is the requirement of the plaintiff’s undertaking in damages. It is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result.
>
> [emphasis added]

[27] He describes the rationale for the undertaking as to damages as follows (at p. 2-44):

> The rationale for the undertaking is to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined. In the event the defendant succeeds at trial, the interlocutory injunction will have prevented the defendant from acting in accordance with his or her legal rights. The undertaking in damages shifts all or part of that risk to the party who is asking for a pre-trial remedy, the plaintiff.

[28] Superior courts have applied the above rationale for the undertaking when determining the question of irreparable harm under the tri-partite test established by the Supreme Court of Canada in *RJR-MacDonald*. The undertaking as to damages is required by superior courts and many provinces have codified this common law requirement (see, e.g., Rule 373 of the *Federal Courts Rules*, SOR/98-106).

[29] It is therefore open to the Tribunal to consider an undertaking as to damages provided in support of an application for interim relief under section 104 of the Act. Here the Tribunal noted that the Undertaking had been provided by Nadeau in its application for interim relief prior to the issuance of the Interim Order.

[30] An undertaking as to damages is provided to the court and not to a party. As a result, proceedings to enforce the undertaking are generally brought before the court where the undertaking was given. This was explained as follows by Lord Justice Farwell in *Re Hailstone* (1910), 102 L.T. 877 (at p. 880):

> The undertaking was given to the Probate Division; that is an undertaking given to the court. It is not a contract between the parties which either party can sue upon or be sued upon. It is an undertaking given to the court, and to be enforced by the court, and the court only. And I am not aware of any jurisdiction in the Chancery Division or the King's Bench Division to enforce on the part of the President of the Probate Division an undertaking given to that learned judge.

[31] Mr. Justice Robert A. Blair writes in an article "Current Practice and Procedure on an Application for a Pre-Trial Injunction", that a proceeding to enforce an undertaking to damages should be brought before the judge who presided over the trial (see *The Law of Injunctions* (Toronto: Canadian Bar Association-Ontario, 1982) 1 at 17):

> The application [to enforce an undertaking] should properly be made at the conclusion of the trial or when the injunction has been dissolved (although if the latter has occurred prior to trial, the matter may have to stand over until the trial has been completed). <u>If not made at the trial, the application should be made to the judge who originally tried the case, it being a matter within his discretion…</u>
>
> [emphasis added]

[32] The Undertaking has been given to the Tribunal. The N.B. Action will have no bearing on the Tribunal's determination regarding its jurisdiction.

[33] Westco submits that under the legislative framework, the Tribunal has jurisdiction to enforce an undertaking as to damages. I agree.

[34] Section 8 of the Tribunal Act gives the Tribunal jurisdiction to hear and dispose of applications for interim relief filed under section 104 of the Act and "any related matters". In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, the Supreme Court of Canada had to determine whether the Tribunal had the power to punish for contempt *ex*

facie curiae; a power normally reserved for superior courts. At that time, the provision provided that "[t]he Tribunal has jurisdiction to hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto."

[35] Mr. Justice Gonthier, speaking for the majority, concluded that the words "any matters related thereto" did not codify the common law doctrine of implied powers. He held that they gave the Tribunal jurisdiction over matters arising outside of the hearing and determination of a Tribunal application (at pp. 410-411):

> The respondent claimed that the phrase "any matters related thereto" essentially added to the Tribunal's jurisdiction various ancillary matters that may arise in the course of the hearing of an application. Such an interpretation would, in my opinion, fail to give its full meaning to s. 8(1) CTA. It is an established principle of common law, codified to a certain extent in s. 31 of the *Interpretation Act*, R.S.C., 1985, c. I-21, that "[t]he powers conferred by an enabling statute include not only such as are expressly granted but also, by implication, all powers which are reasonably necessary for the accomplishment of the object intended to be secured" (Halsbury's Laws of England, vol. 44, 4th ed., para. 934, p. 586; see also P.-A. Côté, supra, at pp. 76-77). This principle has been recently applied in *Canada (Director of Investigation and Research under the Combines Investigation Act) v. Newfoundland Telephone Co.*, 1987 CanLII 34 (S.C.C.), [1987] 2 S.C.R. 466, and in a line of cases from the Federal Court of Appeal, starting with *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.). Since the Tribunal has jurisdiction to hear and determine Part VIII applications, the common law would have conferred upon it jurisdiction over incidental and ancillary matters arising in the course of the hearing and determination. No need would arise to add the phrase "and any matters related thereto". Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising outside of the hearing and determination of these applications. These matters may include for instance the enforcement of the orders made under Part VIII.
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> [emphasis added]

[36] Guided by the above, I am satisfied that the enforcement of an undertaking, a matter which arises outside of the hearing and determination of the application for interim relief, is a matter that is related to the application. Consequently, the Tribunal has jurisdiction to enforce an undertaking provided to it in the context of an application for interim relief brought under section 104 of the Act.

[37] However, Nadeau submits that the jurisdiction to enforce an undertaking in damages cannot be implied because the power to enforce an undertaking, which it describes as the power to award damages, is not rationally related to the purpose of the legislative framework and is not necessary for the Tribunal to carry out its mandate under the Act. In support of its argument, Nadeau relies on *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 14. At paragraphs 73 and 74 of the decision, Mr. Justice Bastarache,

writing for the majority, dealt with the doctrine of implied jurisdiction. He said:

> 73. The City seems to assume that the doctrine of jurisdiction by necessary implication applies to "broadly drawn powers" as it does for "narrowly drawn powers"; this cannot be. The Ontario Energy Board in its decision in *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:
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> * [when] the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate;
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> * [when] the enabling act fails to explicitly grant the power to accomplish the legislative objective;
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> * [when] the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
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> * [when] the jurisdiction sought must not be one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
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> * [when] the Legislature did not address its mind to the issue and decide against conferring the power upon the Board.
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> 74 In light of the above, it is clear that the doctrine of jurisdiction by necessary implication will be of less help in the case of broadly drawn powers than for narrowly drawn ones. Broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework.

[38] I disagree with Nadeau's submission. Here, the Act expressly contemplates that, in the context of a section 75 application, the Tribunal may issue such interim relief it deems appropriate. The appropriateness of relief is a matter within the discretion of the Tribunal and will turn on the specific circumstances of each case. Here, section 104 allows the Tribunal to issue interim relief in circumstances where it is necessary to maintain the status quo until a determination is made on the allegations of anticompetitive behaviour. It is clear therefore that the Interim Order at issue flows from the Tribunal's mandate under the Act.

[39] The question here is not whether the power to award damages is "rationally related" to the purpose of the statutory framework, but rather whether the power to enforce an undertaking given to the Tribunal is so related. In my view the power to enforce an undertaking and the power to issue an order granting interim relief go hand in hand and one cannot be divorced from the other. I agree with the Federal Court's decision in *Ciba-Geigy Canada Ltd. v. Novopharm Ltd*. (1999), 181 F.T.R. 6 (F.C.) at para. 11, aff'd 2001 FCA 251, where it held that the enforcement of undertakings as to damages is "integral to the Court's awarding of interlocutory

injunctions". In *Re: Hailstone,* Lord Justice Farwell also held that "[t]he power to enforce an undertaking is incidental to the power to grant the injunction" (at p. 880).

[40] I adapt the above reasoning and find that the Tribunal's power to enforce an undertaking is necessarily incidental to the power to grant the injunction.

[41] Contrary to Nadeau's submissions, it is also my view that the fact that the Tribunal has jurisdiction over the enforcement of an undertaking in damages does not mean that the Tribunal has a general jurisdiction over damages. In *The Principles of Equitable Remedies*, I.C.F. Spry explains the difference between an undertaking as to damages and a claim for damages as follows (see 8th ed. (Pyrmont, N.S.W.: Lawbook Co., 2010), at pp. 654-655):

> It is clear that the making of the interlocutory order itself cannot involve a breach of the rights of the defendant and also that any acts of compliance with, or execution of, an interlocutory injunction cannot be regarded as unlawful, whatever the court might have done at the interlocutory application had it been more fully informed and whatever may be decided ultimately at the final hearing; and accordingly the use of the word "damages" would be inappropriate here if it were intended to suggest that a breach of legal or equitable rights may have taken place. The better view appears to be that when, in an undertaking of this nature, reference is made to an order as to damages it is intended simply to ensure that there will be an obligation on the part of the plaintiff to abide by any order that is subsequently made directing him to make a pecuniary recompense to the defendant for any prejudice or loss that he may have suffered.

[42] For all these reasons, I conclude that the power to enforce an undertaking is necessary to accomplish the objectives of the Act and is essential to the Tribunal's mandate. In other words, the Tribunal has jurisdiction to enforce an undertaking in damages.

Issue 2: Should leave be granted to Westco so that it can proceed with the enforcement of the Undertaking?

A. The Parties' Submissions

[43] Nadeau argues that the Tribunal should refuse to exercise its discretion in favour of Westco and deny leave to enforce the Undertaking. Nadeau advances the following arguments in support of its position. First, Nadeau argues that Westco should not be entitled to enforce the Undertaking because it has "failed to purge its contempt".

[44] Second, Nadeau alleges that Westco does not come to the Tribunal with "clean hands". It contends that Westco's failure to comply with the Interim Order was motived by the prospect of financial gain and bad faith. Nadeau argues that Westco lacked "candour and good faith towards the Tribunal" at the time it opposed Nadeau's application for interim relief. Nadeau sets out various examples where, it says, Westco adduced evidence that "was misleading at best, or out-and-out false at worst".

[45] Westco filed, as part of its response opposing Nadeau's application for interim relief, the affidavit of Thomas Soucy, chief executive officer of Westco, sworn on May 29, 2008. Nadeau alleges that in this affidavit, Mr. Soucy swore that if the Tribunal granted the application, Westco would default on its contractual obligation to supply Olymel with live chickens as of July 20, 2008, whereas evidence adduced later on in the proceedings showed that there was no binding contract in place at the time Mr. Soucy's affidavit was sworn.

[46] In this affidavit, Mr. Soucy also indicated that Westco's profits from the sale of its live chickens to Olymel, pursuant to the partnership agreement, would be superior to those resulting from its dealings with Nadeau. He further attested that Olymel would share with Westco a percentage of the profits generated by the processing of the live chickens. Nadeau alleges that Mr. Soucy, at a later stage in the proceedings, testified that the anticipated profits had not materialized and that Westco had not received any profits on the sale of the Westco chickens because Westco had failed to meet a precondition of its profit-sharing agreement with Olymel.

[47] Finally, Nadeau submits that special circumstances exist such that the Tribunal should deny Westco's request to enforce the Undertaking. In that regard, it relies on the above arguments and, more particularly, on the fact that Westco was found in contempt of the Interim Order.

[48] Westco submits that Nadeau has failed to establish that special circumstances exist and that it should therefore be allowed to proceed with its application to enforce the Undertaking. Westco asserts that in the specific context of this case, it would be unjust for it to be prevented from proceeding with the enforcement because of the contempt order. Westco asserts that the following factors ought to be considered. Westco contends that it has already been punished for the contempt and that Nadeau has filed a claim with the Court of Queen's Bench of New Brunswick to recover the losses and damages it allegedly suffered as a result of Westco's failure to comply with the Interim Order. Westco further contends that it has supplied a significant number of larger chickens to Nadeau and that for approximately three months of the interim period, it was in compliance with the Interim Order.

[49] Westco also submits that the facts of this case can be distinguished from those found in *Gu v. Tai Foong International Ltd.* (2003), 168 O.A.C. 47 (Ont. C.A.), leave to appeal to SCC refused, 29684 (April 4, 2003), a decision on which Nadeau relies. In Westco's view, its conduct did not defeat the purpose of the Interim Order or prevent it from accomplishing its most important objectives.

B. Analysis

[50] The hearing related to the enforcement of an undertaking as to damages is usually described as "an inquiry into damages". Generally, after a plaintiff loses at trial or the interlocutory injunction is dissolved, the defendant may move for an inquiry as to damages. Justice Sharpe wrote that "[t]he appropriate procedure is for the defendant to apply to the trial judge for an order directing an inquiry as to the damages the defendant has suffered" (see Sharpe, at 2-48).

[51] There is a strong presumption in favour of an inquiry into the enjoined party's damages and the discretion to relieve a party from its undertaking is a narrow one (see *Gu v. Tai Foong International Ltd.* (2003)*,*168 O.A.C. 47 (Ont. C.A.) at para. 70, leave to appeal to SCC refused, 29684 (April 4, 2003). The parties agree that when exercising this discretion, the Tribunal should apply the principles of equity (see *City of Toronto v. Polai*, [1970] 1 O.R. 483 (Ont. C.A.)).

[52] The Supreme Court of Canada, in *Vieweger Construction Co. v. Rush & Tompkins Construction Ltd.*, [1965] S.C.R. 195, had to consider the circumstances in which an inquiry into damages can be ordered. At that time, some courts had been of the view that an inquiry could only be ordered if the plaintiff had, by the suppression of facts or misrepresentation, improperly obtained the injunction. Others had taken the position that the request for an inquiry as to damages should be granted unless exceptional circumstances dictated otherwise; a view subsequently endorsed by the Supreme Court of Canada in *Vieweger*. Mr. Justice Spence held as follows for the Court (at pp. 206-208):

> I turn now to the appellant company's claim for damages flowing from the interim injunction granted on October 13, 1959, and continued on the motion to vacate. The learned trial judge in refusing the appellant company's claim for such damages adopted the principle stated by Hyndman J. in *McBratney et al. v. Sexsmith* [1924] 2 W.W.R. 455.], at p. 459, as follows:
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> > The law is well settled that it does not follow that because an interlocutory injunction is dissolved before or after trial the successful defendant is therefore or in any event entitled to damages. The test is whether the plaintiff, by the suppression of facts, or misrepresentation, or maliciously, improperly obtains the injunction.
>
> It would appear that the proper test was laid down by the Court of Appeal in *Griffith v. Blake* [(1884), 27 Ch. D. 474.]. There, the Court of Appeal was concerned with a dictum of the late Master of the Rolls in *Smith v. Day* [(1882), 21 Ch. D. 421.], to the effect that the undertaking as to damages only applies where the plaintiff has acted improperly in obtaining the injunction, and all the members of the Court expressed dissent with that view. Baggallay L.J. said, at p. 476:
>
> > If the Defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction.
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> And Cotton, L.J., said at p. 477:
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> > But I am of opinion that his dictum is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are *special circumstances to the contrary*. (The italicizing is my own.)

> Counsel for the respondent company before this Court agreed to such statement of the principle, but submitted that in this case there were special circumstances as it had not been shown that the respondent company obtained the injunction by any perjury or misrepresentation and that since two judges in the Trial Division and three judges in the Court of Appeal were of the opinion that the respondent company was entitled to its injunction, if this Court were of the other view it would be an example of judicial error and not any misrepresentation by the respondent company which caused the injunction to issue.
>
> I am of the opinion that these circumstances do not constitute such "special circumstances" as were in the mind of Cotton L.J. There are examples of plaintiffs who are public bodies and who acted in the public interest to hold the situation in statu quo until the rights were determined. There are other cases where the defendant, although he succeeded upon technical grounds, certainly had been guilty of conduct which did not move the Court to exercise its discretion in his favour. In these cases, the Court has found the "special circumstances" which entitled it to refuse a reference as to damages. Here, the respondent company throughout has insisted that very considerable items of heavy construction machinery be held so the defendant could not use them and therefore make any profit from them, and that situation continued for months until the respondent company's use for the equipment ended. I am of the opinion that it is an ordinary case of an injunction granted upon a plaintiff's application and upon the plaintiff's undertaking, and that the plaintiff should be required to make good its undertaking. I would, therefore, direct that there be a reference in the ordinary course of procedure in the Province of Alberta to determine such damages and that the appellant company be granted judgment for such damages and the costs of the reference.
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> [emphasis added]

[53] Guided by the above jurisprudence, I am satisfied that the Tribunal, when exercising its discretion, can take the respondent’s conduct into consideration.

[54] In *Gu*, the Ontario Court of Appeal upheld a trial decision dismissing the plaintiffs’ application for an inquiry as to damages. The injunction at issue provided that the defendants had the exclusive right to exploit commercially certain refrigerants and technologies in Canada, the United States and Mexico, and the defendants had provided an undertaking in damages. The trial judge found that the plaintiffs had breached the injunction by carrying on business in the United States and he denied their application for an inquiry as to damages.

[55] The Court of Appeal stated as follows:

> 67 We shall examine his reasons further in light of the applicable principles. There can be no doubt that Gu's [the plaintiff] violation of the injunction was a highly relevant factor. His complaint was that the Lam Group's [the respondents] interlocutory injunction prevented him from exploiting a business that was rightfully his. However, the facts as found and, it is important to observe, not challenged on

this appeal, showed that by reason of his deliberate violations the injunction did not have this effect. In seeking the inquiry as to damages, he did not come to court with "clean hands": see *City of Toronto v. Polai*, [1970] 1 O.R. 483 (C.A.) at 493-94.

68 Gu, in making light of his conduct, appears to be submitting that a violation of an injunction should not count for much and that the enjoined party should still be entitled to pursue his claim for damages - setting off, it would seem, what he gained by his violation against the damages he incurred. This approach trivializes an injunction.

69 In upholding the trial judge's conclusion we do not intend to lay down the proposition that in any case where an enjoined party has breached the injunction he or she, for this reason alone, will not be entitled to an inquiry as to damages. All potentially relevant factors, including the nature of the breach, should be taken into account in determining the equities of the case before a decision is made.

70 Further, applying what was said by this court in *Nelson Burns*, supra, we emphasize that the undoubted discretion that a judge has to relieve a party from its undertaking is a narrow one. We have no doubt that there is a strong presumption in favour of an inquiry into the enjoined party's damages.

71 In this case the violation of the injunction was not inadvertent or of a minor nature. Such a violation, depending on the other features of the case, might not ultimately count against an enjoined party. The violations in this case, however, were deliberate and flagrant and we cannot say that the trial judge erred in giving them the weight that he did and in not giving the weight that the Gu Group submitted should be given to the Lam Group's conduct. See *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.) at 719 respecting appellate review relating to "error[s] in principle".

72 With respect to the Lam Group's conduct, although the trial judge's reasons are not as clear as they might be, we are satisfied that he took its conduct into account even if it could not be characterized as "an abuse of process". We accept that it would be too rigid an approach to consider the enjoining party's conduct as a factor against directing an inquiry into damages only if it amounted to an abuse of process.

73 In summary, we are satisfied that in determining whether an inquiry was warranted, the trial judge considered all of the relevant factors and, in the exercise of his judgment, gave predominant weight to the Gu Group's contraventions of the injunction. We are not persuaded that he erred in arriving at this conclusion.

[56] While I agree with the Ontario Court of Appeal decision in *Gu* that a breach of an injunction without more does not necessarily disentitle a party to enforce an undertaking in damages, I do find in the circumstances of this case, for the reasons that follow, that Westco’s conduct is such that special circumstances exist to deny the inquiry as to damages.

[57] In the contempt proceeding, the Tribunal found that Westco had failed to comply with the Interim Order and its spirit. Not only had Westco been supplying fewer chickens to Nadeau than required by the Interim Order, it had also been growing and supplying larger chickens knowing that Nadeau required a full range of chickens including smaller chickens. The Tribunal concluded as follows in that regard:

> [69]…Instead, it [Westco] knowingly supplied fewer heavier chickens, arguing that it met its obligation under the Interim Order, because it delivered the equivalent volume of chickens in kilograms. This allowed Westco to continue with the implementation of changes to its long term production plan which resulted in the production of larger chickens for Olymel. The record indicates that the average size and weight of chickens produced by Westco continued to increase from the time of the Interim Order to the bringing of the contempt application, and afterward. In my view, Westco knowingly failed to supply the number of chickens required in the Interim Order.
>
> [70] I also reject Westco's argument that it at all times complied with the spirit of the order. As acknowledged by Westco, the underlying rationale of the Interim Order was to ensure that the level of supply that Nadeau had previously enjoyed be maintained. In the context discussed above, particularly in respect to Nadeau's size requirements, Westco cannot be said to be in compliance with the spirit of the Interim Order. Westco was aware of these requirements and nevertheless pursued its business plan to produce larger chickens; thereby failing to supply the number and size of chickens it had been supplying to Nadeau prior to the Interim Order. In the result, Westco failed to maintain the status quo or respect the spirit of the Interim Order.

[58] As noted above, this decision was upheld by the Federal Court of Appeal (see *Groupe Westco Inc. v. Nadeau Poultry Farm Limited*, 2011 FCA 106).

[59] Further, in its sentencing order, the Tribunal concluded that Westco had been motivated by the prospect of financial gain:

> [65] Mr. Soucy testified that Westco did not profit from the contempt. In his affidavit in support of Westco's opposition to Nadeau's request for interim relief, dated May 29, 2008, Mr. Soucy indicated that Westco would make additional profits in the magnitude of $[CONFIDENTIAL] per week selling its chickens to Olymel rather than Nadeau. According to Mr. Soucy, important cost-savings would be realized by sending larger chickens to Olymel. He stated that given Westco's profit-sharing agreement with Olymel, Westco would also earn additional profits on the sale of Westco chickens which had been processed by Olymel. However, during his testimony at the sentencing hearing, Mr. Soucy indicated that the anticipated profits had not materialized. He also submitted evidence indicating that chickens sold to Olymel were sold at the same price as those sold to Nadeau during the interim period.

> [66] I am satisfied that, given the reduced number of chickens delivered to Olymel by Westco during the interim period, Westco did not earn the additional profits foreseen by Mr. Soucy in the affidavit described above. However, in light of his affidavit evidence, I do not accept Mr. Soucy's testimony that Westco realized absolutely no additional profit. The difficulty is that the Tribunal does not have sufficient reliable evidence to quantify those profits. Accordingly, they cannot be considered when determining the amount of the fine. Nevertheless, the fact that Westco breached the Interim Order for the prospect of financial gain will be treated as an aggravating factor.
>
> [emphasis added]

[60] Further, in its Direction of October 2008, the Tribunal advised the parties that the Interim Order clearly expressed the level of weekly supply of chickens in number of live chickens and not in terms of weight. At that time, Nadeau had written to the Tribunal alleging that Westco had supplied substantially fewer chickens than the number required under the Interim Order. The relevant paragraphs of the Direction dated October 16, 2008, read as follows:

> **4.** AND UPON noting that the Interim Supply Order clearly expresses the level of weekly supply of chickens to be provided to the Applicant by the Respondents in number of live chickens and not in terms of weight of the said chickens;
> …
> **6.** AND UPON it being clear that the Respondents' weekly supply of live chickens to be adjusted in accordance with the provisions of the Interim Supply Order is to be expressed in number of live chickens and not in terms of kilograms or weight of the chickens;
> …
>
> THE TRIBUNAL DIRECTS THAT:
>
> **8.** The Respondents' weekly supply of live chickens to be provided to the Applicant pursuant to paragraphs 57 and 58 of the Interim Supply Order will continue to be expressed in number of live chickens.

[61] Notwithstanding the Interim Order and subsequent direction by the Tribunal, Westco continued to supply heavier chickens to Nadeau and continued to argue at the contempt hearing, which was held in November 2009, that it had complied with the Interim Order because it had delivered the equivalent volume of chickens in kilograms.

[62] The Tribunal's findings in the contempt proceeding lead me to conclude that for a significant period of time after the issuance of the Interim Order, namely from September 14, 2008, to June 8, 2009, Westco's conduct defeated the very purpose of the Interim Order; that is to maintain the status quo in terms of the number and size of chickens to be delivered to Nadeau. It is my view that Westco showed a deliberate and flagrant disregard for the Interim Order.

[63] Westco argues that it has already been punished for its contempt and should consequently be entitled to recover the damages incurred by reason of the Interim Order. I disagree. The fine imposed by the Tribunal was for Westco's contempt of the Interim Order. By paying the fine, that contempt vis-à-vis the Tribunal is purged. However, this does not mean that Westco's conduct is not a relevant factor to be considered by the Tribunal in deciding whether to order a damages inquiry.

[64] The fact that Nadeau commenced an action to recover damages resulting from the breach in New Brunswick is a factor that should be given little weight in deciding whether an inquiry ought to be ordered. Such an approach would, in essence, involve the weighing of damages incurred against what is gained from the violation. This would serve to trivialize the injunction (see *Gu*, at para. 68).

[65] Having considered all of the potentially relevant factors including the factors advanced by Westco and more particularly described in paragraph 48 above, I am satisfied that "special circumstances" are present in this case which entitle the Tribunal to refuse a reference as to damages. Consequently, in the exercise of my discretion, I deny Westco's request for an inquiry as to damages. An order will issue to this effect.

[66] Given the above determination, it is unnecessary to address Nadeau's other arguments and, in particular, its allegation that Westco lacked candour and good faith towards the Tribunal at the time it opposed Nadeau's application for interim relief.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[67] Westco's request to enforce the Undertaking is denied.

[68] Costs are awarded to Nadeau in the lump sum of $5,000.00 inclusive of disbursements.

DATED at Ottawa, this 18th day of May, 2012.

SIGNED on behalf of the Tribunal by the Presiding Judicial Member.

(s) Edmond P. Blanchard

APPEARANCES:

For the applicant:

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Leah Price
Ron Folkes

For the respondent:

Groupe Westco Inc.

Éric C. Lefebvre
Martha A. Healey
Alexandre Bourbonnais
Stephen Nattrass