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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 the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the *Competition Act*.

BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant

- and -

INSURANCE BUREAU OF CANADA

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

Table of Contents

I. Concise Statement of Facts

1. A concise statement of facts is contained in Schedule A to the Proposed Notice of Application – Statement of Grounds and Material Facts, which is incorporated by reference into the Memorandum.

II. Statement of the Points in Issue

2. The points in issue are whether the Tribunal should grant leave pursuant to sections 103.1(7) and 103.1(7.1) for the Used Car Dealers Association of Ontario ("**UCDA**") to proceed with the proposed Notice of Application under sections 75 and 76 of the *Act*.

III. Concise Statement of Submissions

(c) The Test on an Application for Leave is Met in Respect of an Application under Section 75 of the Act

3. The test for granting leave in respect of an application under section 75 of the *Act* is set out in subsection 103.1(7), which provides that:

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

4. Prior decisions of the Tribunal have established that leave should be granted where there is "sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice." In particular, in cases under section 75 of the *Act* the applicant must advance sufficient credible evidence to demonstrate that there is a "reasonable possibility" that its business has been directly and substantially affected by a refusal to deal.

> *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77 (Comp. Trib.)

Barcode Systems Inc. v. Symbol Technologies Canada ULC, [2004] Comp. Trib. 1; aff'd 2004 FCA 339

5. In addition, the Federal Court of Appeal and the Tribunal have established that before granting leave, the Tribunal "must be satisfied that each of the elements set out in subsection 75(1) could be met when the application is heard on the merits. This means that there must be 'sufficient credible evidence' to give rise to a *bona fide* belief."

B-Filer Inc. v. The Bank of Nova Scotia (2005), 44 C.P.R. (4th) 214 (Comp. Trib.)

Symbol Technologies Canada ULC v. Barcode Systems Inc., 2004 FCA 339

6. The Tribunal has not defined the term "substantially affected" in detail. In *Chrysler Canada* v. *Canada* it stated that "[t]he 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

7. The Insurance Bureau of Canada ("**IBC**") has supplied vehicle insurance claims data to Auto Check™ for more than 13 years, making possible the growth and success of this business. IBC's termination of its longstanding supply relationship with Auto Check™ will deprive it of an essential input required to continue offering its vehicle accident history service.

8. The provision of vehicle accident history searches based primarily on IBC claims data generates 100% of Auto Check™'s revenues and profits. Auto Check™ accounts for more than half of UCDA's net income. The inability to obtain supply from the IBC Web Claims Search application has begun and will continue to directly and substantially affect UCDA and its Auto Check™ business.

9. Auto Check™ is one of the most important benefits that UCDA offers to its members; indeed, it is viewed by members as a critical service offering. The loss of Auto Check™

for an extended period of time will significantly damage UCDA's credibility and cause reputational harm among existing and prospective dealer members. This will also directly and substantially affect UCDA, including through likely reductions in membership fees, which are a major source of UCDA's revenues.

10. The substantial negative impact on Auto Check™ and UCDA results from the inability to obtain adequate supply of vehicle insurance claims data anywhere in a market on usual trade terms. IBC is the only current source of integrated industry-wide claims data.

11. Auto Check™'s inability to obtain supply is a result of insufficient competition among suppliers of vehicle insurance claims data. IBC is the only current supplier of integrated industry-wide claims data.

12. Auto Check™ is willing and able to meet the usual trade terms to obtain vehicle insurance claims data. UCDA has fully paid its IBC associate membership dues and is paying the $1.00 per hit fee levied by IBC for the Web Claims Search output for Auto Check™.

13. The claims data supplied through the Web Claims Search application is in ample supply. Given the reproducible nature of data, supplying output from the Web Claims Search application to any particular provider of vehicle accident history searches, such as UCDA, does not render it unavailable for supply to others.

14. The Tribunal has established in prior cases that "for a refusal to deal to have an adverse effect on a market, the remaining participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power."

> *Nadeau Poultry Farm Limited v. Group Westco et al.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188
>
> *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.

15. IBC's refusal to supply Auto Check™ is likely to have an adverse effect on competition in the vehicle accident history searches market. As of June 17, 2011, IBC's refusal has resulted in the elimination of Auto Check™, the low-price supplier in the market. This

will allow CarProof, with whom IBC, through CGI and i2iQ, has a preferred business relationship, to preserve and enhance its market power in the downstream market for vehicle accident history searches and require used car dealers to pay higher prices for searches.

16. UCDA therefore submits that it has provided sufficient evidence to support a *bona fide* belief that IBC's refusal to deal satisfies all the elements of section 75 of the *Act*, and that UCDA and its Auto Check™ business are directly and substantially affected in their business by this refusal to deal, and respectfully requests that the Tribunal grant leave to hear this application under section 103.1(7) of the *Act*.

(d) The Test on an Application for Leave is Met in Respect of an Application under Section 76 of the Act

17. Subsection 103.1(7.1) of the *Act* sets out a separate test for granting leave to make an application under section 76 of the *Act*. This test is similar to the test described above for applications under sections 75 and 77 of the *Act*, but adopts a lower threshold in that the applicant need only be "directly affected", and not "directly and substantially affected", by conduct referred to in section 76.

18. Section 76(1) of the *Act* provides that:

> 76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> (a) a person referred to in subsection (3) directly or indirectly . . .
>
> (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
>
> (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

19. Section 76(3) states that:

> 76. (3) An order may be made under subsection (2) against a person who
>
> (a) is engaged in the business of producing or supply a product, … .

20. Section 2(1) of the *Act* defines "product" to include all types of services as well as articles. IBC is engaged in the business of providing various services to its members including the Web Claims Search application.

21. As noted above, IBC initially threatened to terminate supply of the Web Claims Search application to UCDA's Auto Check™ business in June 2010 and has done so effective June 17, 2011.

22. CarProof is the largest supplier of vehicle accident history searches in Ontario. UCDA is a competitor of CarProof, and the low-price supplier in the market. UCDA charges $7 per search for its Auto Check™ service; CarProof charges $34.95 for a similar service.

23. Given the relationships between CarProof, i2iQ, CGI Inc., and IBC, and the discussions between them relating to UCDA's request for the ASP dollar value claims data, it appears that IBC's refusal to continue to supply the Web Claims Search application may have been motivated by UCDA's low pricing policies. The effect of these refusals is to deny Auto Check™, the low-price supplier in the market, access to critical inputs needed to continue offering its vehicle accident history searches. As a result, used car dealers will be required to pay the substantially higher prices charged by CarProof or Carfax. This will ultimately also impact the consumers who buy used vehicles.

24. As set out above, UCDA and its Auto Check™ are directly (and substantially) affected in their business by IBC's refusal to supply the Web Claims Search application.

25. UCDA is unable to establish definitively, without discovery pursuant to the Tribunal's rules, whether IBC's refusal to supply occurred because of concerns about Auto Check™'s low pricing policy. However, there is significant circumstantial evidence related to the large difference between Auto Check™ and CarProof prices, the actions of CarProof, connections between CarProof and i2iQ, and communications between i2iQ

and IBC, that provides reason to believe that IBC's refusal to supply occurred because of Auto Check™'s low pricing policy.

26. UCDA, therefore, respectfully submits that it has provided sufficient evidence to support a *bona fide* belief that IBC's refusal to deal satisfies all the elements of section 76 of the *Act*, and that UCDA is directly affected in its business by this refusal to supply. It therefore respectfully requests that the Tribunal grant leave to hear this application under section 103.1(7.1) of the *Act*.

IV. Concise Statement of the Order Sought, Including Any Order Concerning Costs

27. UCDA seeks an order from the Competition Tribunal providing for the following:

(i) granting leave pursuant to section 103.1(7) for UCDA to proceed with its proposed application under section 75 of the *Act*;

(ii) granting leave pursuant to section 103.1(7.1) for UCDA to proceed with its proposed application under section 76 of the *Act*; and

(iii) awarding UCDA its costs on this application for leave.

V. List of Authorities, Statutes and Regulations to be Referred to

28. The Applicant will refer to the following authorities, statutes and regulations:

(i) *Competition Act*, R.S.C. 1985, c. C-34, as amended, Sections 2(1), 75, 76 and 103.1.

(ii) *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1

(iii) *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38

(iv) *B-Filer Inc. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.

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

(vi) *Nadeau Poultry Farm Limited v. Group Westco et al.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188

(vii) *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77; 2002 Comp. Trib. 41

(viii) *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339

29. Copies of the authorities, statutes and regulations cited above are being provided in a separate Appendix.

Dated at Toronto this 29th day of June, 2011.

On behalf of the Applicant UCDA

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BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant

- and -

INSURANCE BUREAU OF CANADA

Respondent

APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTIONS 75 AND 76 OF THE *COMPETITION ACT* PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

APPENDIX TO THE MEMORANDUM OF FACT AND LAW OF THE APPLICANT

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Index

1. *Competition Act,* R.S.C. 1985, c. C-34, as amended, Sections 2(1), 75, 76 and 103.1.
2. *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1
3. *Symbol Technologies Canada ULC v. Barcode Systems Inc.*, 2004 FCA 339
4. *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38
5. *B-Filer Inc. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.
6. *Chrysler Canada Ltd v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1
7. *Nadeau Poultry Farm Limited v. Group Westco et al.*, 2009 Comp. Trib. 6, aff'd 2011 FCA 188
8. *National Capital News Canada v. Canada (Speaker of the House of Commons)* (2002), 23 C.P.R. (4th) 77; 2002 Comp. Trib. 41

Tab 1

Competition Act (R.S.C., 1985, c. C-34)

PART VIII – MATTERS REVIEWABLE BY TRIBUNAL

RESTRICTIVE TRADE PRACTICES

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

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.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

Price Maintenance

Price maintenance

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(*a*) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(*b*) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(*a*) or requiring them to accept another person as a customer within a specified time on usual trade terms.

Persons subject to order

(3) An order may be made under subsection (2) against a person who

(*a*) is engaged in the business of producing or supplying a product;

(*b*) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(*c*) has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.

Where no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(*a*)(i) or (ii) are principal and agent or mandator and mandatary, or are affiliated corporations or directors, agents, mandataries, officers or employees of

(*a*) the same corporation, partnership or sole proprietorship; or

(*b*) corporations, partnerships or sole proprietorships that are affiliated.

Suggested retail price

(5) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way

suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Advertised price

(6) For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

Where no order may be made

(9) No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(*a*)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(*a*) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(*b*) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(*c*) was making a practice of engaging in misleading advertising; or

(*d*) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(*a*) proceedings have been commenced against that person under section 45 or 49; or

(*b*) an order against that person is sought under section 79 or 90.1.

Definition of "trade terms"

(12) For the purposes of this section, "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426.

Leave to make application under section 75, 76 or 77

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or

(*b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76 or 77, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76 or 77.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave to make application under section 75 or 77

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

Granting leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76 or 77 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76 or 77.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12; 2009, c. 2, s. 431.

PARTIE VIII

AFFAIRES QUE LE TRIBUNAL PEUT EXAMINER

PRATIQUES RESTRICTIVES DU COMMERCE

Refus de vendre

Compétence du Tribunal dans les cas de refus de vendre

75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

Cas où l'article est un produit distinct

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

Définition de « conditions de commerce »

(3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

Application

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. C-34, art. 75;L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.1.

Maintien des prix

Maintien des prix

76. (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois :

a) que la personne visée au paragraphe (3), directement ou indirectement :

(i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada,

(ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

Ordonnance

(2) Le Tribunal peut, par ordonnance, interdire à la personne visée au paragraphe (3) de continuer de se livrer au comportement visé à l'alinéa (1)*a*) ou exiger qu'elle accepte une autre personne comme client dans un délai déterminé aux conditions de commerce normales.

Personne visée par l'ordonnance

(3) Peut être visée par l'ordonnance prévue au paragraphe (2) la personne qui, selon le cas :

a) exploite une entreprise de production ou de fourniture d'un produit;

b) offre du crédit au moyen de cartes de crédit ou, d'une façon générale, exploite une entreprise dans le domaine des cartes de crédit;

c) détient les droits et privilèges exclusifs que confèrent un brevet, une marque de commerce, un droit d'auteur, un dessin industriel enregistré ou une topographie de circuit intégré enregistrée.

Cas où il ne peut être rendu d'ordonnance

(4) L'ordonnance prévue au paragraphe (2) ne peut être rendue lorsque la personne visée au paragraphe (3) et le client ou la personne visés aux sous-alinéas (1)*a*)(i) ou (ii) ont entre eux des relations de mandant à mandataire ou sont des personnes morales affiliées ou des administrateurs, mandataires, dirigeants ou employés :

a) soit de la même personne morale, société de personnes ou entreprise individuelle;

b) soit de personnes morales, sociétés de personnes ou entreprises individuelles qui sont affiliées.

Prix de détail proposé

(5) Pour l'application du présent article, le fait, pour le producteur ou fournisseur d'un produit, de proposer pour ce produit un prix de revente ou un prix de revente minimal, quelle que soit la façon de déterminer ce prix, lorsqu'il n'est pas prouvé que le producteur ou fournisseur, en faisant la proposition, a aussi précisé à la personne à laquelle il l'a faite que cette dernière n'était nullement obligée de l'accepter et que, si elle ne l'acceptait pas, elle n'en souffrirait en aucune façon dans ses relations commerciales avec ce producteur ou fournisseur ou avec toute autre personne, constitue la preuve qu'il a influencé, dans le sens de la proposition, la personne à laquelle il l'a faite.

Prix annoncé

(6) Pour l'application du présent article, la publication, par le producteur ou le fournisseur d'un produit qui n'est pas détaillant, d'une réclame mentionnant un prix de revente pour ce produit constitue la preuve qu'il a fait monter le prix de vente demandé par toute personne qui le reçoit pour le revendre, à moins que ce prix ne soit exprimé de façon à préciser à quiconque prend connaissance de la publicité que le produit peut être vendu à un prix inférieur.

Exception

(7) Les paragraphes (5) et (6) ne s'appliquent pas au prix apposé ou inscrit sur un produit ou sur son emballage.

Refus de fournir

(8) S'il conclut, à la suite d'une demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, qu'une personne, par entente, menace, promesse ou quelque autre moyen semblable, a persuadé un fournisseur, au Canada ou à l'étranger, en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie et que la persuasion a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché, le Tribunal peut, par ordonnance, interdire à la personne de continuer à se comporter ainsi ou exiger qu'elle entretienne des relations commerciales avec le fournisseur en question aux conditions de commerce normales.

Cas où il ne peut être rendu d'ordonnance

(9) L'ordonnance prévue au paragraphe (2) à l'égard du comportement visé au sous-alinéa (1)*a*)(ii) ne peut être rendue si le Tribunal est convaincu que la personne ou catégorie de personnes visée au sous-alinéa avait l'habitude, quant aux produits fournis par la personne visée au paragraphe (3) :

a) de les sacrifier à des fins de publicité et non d'en tirer profit;

b) de les vendre sans profit afin d'attirer les clients dans l'espoir de leur vendre d'autres produits;

c) de faire de la publicité trompeuse;

d) de ne pas assurer la qualité de service à laquelle leurs acheteurs pouvaient raisonnablement s'attendre.

Application

(10) Le Tribunal, lorsqu'il est saisi d'une demande présentée par une personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, ne peut tirer quelque conclusion que ce soit du fait que le commissaire a pris des mesures ou non à l'égard de l'objet de la demande.

Procédures en vertu des articles 45, 49, 79 et 90.1

(11) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits allégués au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée à l'endroit de cette personne en vertu des articles 79 ou 90.1.

Définition de « conditions de commerce »

(12) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

L.R. (1985), ch. C-34, art. 76; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2009, ch. 2, art. 426.

Permission de présenter une demande en vertu des articles 75, 76 ou 77

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76 ou 77, selon le cas.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76 ou 77, selon le cas.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)*a*) ou *b*) ou portant sur une question qui fait l'objet d'une demande que lui a présentée le commissaire en vertu des articles 75, 76 ou 77.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

Observations

(6) Les personnes à qui une copie de la demande est signifiée peuvent, dans les quinze jours suivant la réception de l'avis du Tribunal, présenter par écrit leurs observations au Tribunal. Elles sont tenues de faire signifier une copie de leurs observations aux autres personnes mentionnées au paragraphe (2).

Octroi de la demande

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

Octroi de la demande

(7.1) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article.

Durée et conditions

(8) Le Tribunal peut fixer la durée de validité de la permission qu'il accorde et l'assortir de conditions. La demande doit être présentée au plus tard un an après que la pratique ou le comportement visé dans la demande a cessé.

Décision

(9) Le Tribunal rend une décision motivée par écrit et en fait parvenir une copie à l'auteur de la demande, au commissaire et à toutes les personnes visées au paragraphe (2).

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou (7.1) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75, 76 ou 77.

Application

(11) Le Tribunal ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Enquête du commissaire

(12) Dans le cas où il a déclaré dans le certificat visé au paragraphe (3) que les questions visées par la demande font l'objet d'une enquête et que, par la suite, l'enquête est discontinuée pour une raison autre que la conclusion d'une entente, le commissaire est tenu, dans les meilleurs délais, d'en informer l'auteur de la demande.

2002, ch. 16, art. 12;2009, ch. 2, art. 431.

Tab 2

Competition Tribunal | Tribunal de la Concurrence

Reference: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1
File no.: CT2003008
Registry document no.: 0011

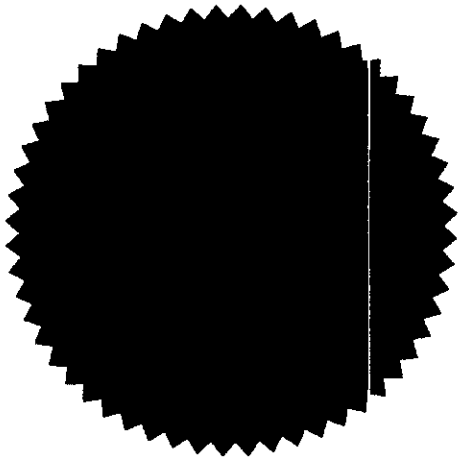
IN THE MATTER OF an application by Barcode Systems Inc., for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, granting leave to bring an application under section 75 of the Act.

B E T W E E N :

Barcode Systems Inc.
(applicant)

and

Symbol Technologies Canada ULC
(respondent)



Decided on the basis of the written record.
Member: Lemieux J. (presiding)
Date of reasons and order: 20040115
Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

[1] Barcode Systems Inc. ("Barcode") has applied to the Competition Tribunal (the "Tribunal") pursuant to subsection 103.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for leave to make an application under section 75 of that Act.

[2] Barcode alleges Symbol Technologies Canada ULC ("Symbol"), a subsidiary of Symbol Technologies Inc. ("Symbol US"), is refusing to supply it with barcode scanners contrary to the provisions of section 75 of the Act and seeks an order, if leave is granted and appropriate findings are made by the Tribunal, that Symbol accept Barcode as a customer on the "usual trade terms" forthwith upon the issuance of such an order.

[3] This application for leave is only the second such application to the Tribunal brought under the recent amendments to the Act providing for what has been termed as "a private access action" because the Commissioner of Competition (the "Commissioner") does not initiate the proceeding.

[4] The first application for leave was decided by Justice Dawson in *National Capital News v. Milliken*, 2002 Comp. Trib. 41 ("National Capital News"), a decision which I endorse entirely.

[5] The test for the Tribunal granting leave is set out in subsection 103.1(7) of the Act. It provides as follows:

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

[6] In this case, the practice that is complained of and that could be subject to an order under section 75 of the Act is Symbol's refusal to sell its products to Barcode after Symbol terminated its ten year relationship with Barcode in March 2003.

[7] I make the following points about the Tribunal's test for granting leave.

[8] What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

[9] I make this observation because Symbol, in its vigorous opposition to leave being granted, described what, in its view, was a highly competitive marketplace and argued that Barcode had provided no evidence as to this requirement as described in paragraph 75(1)(*e*) of the Act.

[10] As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

[11] Justice Dawson in National Capital News, *supra*, described what kind of proof the Tribunal had to have before it in order to have "reason to believe". She concluded that

> . . . .the leave application [must be] supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in [its] business by a reviewable practice [the refusal to deal here], and that the practice in question could be subject to an order.

[12] What this standard of proof means is that the applicant Barcode must advance sufficient credible evidence supported by an affidavit to satisfy the Tribunal that there is a reasonable possibility that its business has been directly and substantially affected because of Symbol's refusal to deal.

[13] The Tribunal measures the evidence on a scale which is less than the balance of probabilities. It is not sufficient, however, that the evidence shows a mere possibility that Barcode's business has been directly and substantially affected by Symbol's refusal to supply.

[14] Barcode's evidence was to the effect Symbol's refusal to supply, either directly or by preventing Symbol distributors or Symbol resellers from doing so, has now caused a substantial loss of revenues to the point where it, if continued, would force Barcode out of business. On December 19, 2003, on petition from the Royal Bank of Canada, an interim Receiver was appointed of all the property, assets and undertakings of Barcode.

[15] Barcode states Symbol's actions also critically impacted its ability to perform its ongoing maintenance contracts.

[16] Barcode asserts that, as of the filing of its application, 50 percent of its employees have been laid off.

[17] Symbol filed written representations and affidavits to counter Barcode. Symbol outlines the reasons why it is not supplying Barcode with the Symbol products. Specifically it denies that Barcode's business has been substantially affected. It says Barcode has not been precluded from carrying on business by any actions attributable to Symbol.

[18] Symbol states, if Barcode suffered any loss, it is because it breached its contract with Symbol or because of factors which have nothing to do with Symbol such as declining market conditions generally, increased competition from suppliers, exchange rate changes and Barcode's failure to meet usual trade terms with its current suppliers.

[19] On an application for leave, it is not the function of the Tribunal to make credibility findings based on affidavits which have not been cross-examined. I note that the Act requires an applicant to support an application for leave by a sworn affidavit while, for a person opposing leave only written representations are contemplated.

[20] These provisions confirm that the Tribunal's role when granting leave is a screening function simply deciding on the sufficiency of evidence advanced.

[21] There may be situations, however, where it can be demonstrated that an applicant's evidence is simply not credible without engaging the Tribunal in weighing contested statements from opposing parties and the applicant. This is not the case here.

[22] I close on a procedural point. Both Symbol and Barcode have sought leave to file additional material as a result of the limited right of reply granted by the Tribunal to Barcode, as an exception in the interest of justice.

[23] In only exceptional circumstances will the Tribunal grant parties a right of reply in leave applications which are to be dealt with expeditiously.

[24] The Tribunal sees no need to have additional evidence before it as proposed by Barcode or Symbol.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[25] The application for leave is granted.

[26] The Tribunal is prepared to expedite the hearing of the application and invites the parties to communicate with the Deputy Registrar of the Tribunal for this purpose.

DATED at Ottawa, this 15th day of January, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

REPRESENTATIVES

For the applicant:

Barcode Systems Inc.

David P. Church

For the respondent:

Symbol Technologies Canada ULC

Colin MacArthur, Q.C.

Tab 3

Date: 20041007

Docket: A-39-04

Citation: 2004 FCA 339

CORAM: RICHARD C.J.
LÉTOURNEAU J.A.
ROTHSTEIN J.A.

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC,

Appellant
(Respondent),

and

BARCODE SYSTEMS INC.,

Respondent
(Applicant).

Heard at Winnipeg, Manitoba, on September 28, 2004.

Judgment delivered at Ottawa, Ontario, on October 7, 2004.

REASONS FOR JUDGMENT BY: ROTHSTEIN J.A.

CONCURRED IN BY: RICHARD C.J.
LÉTOURNEAU J.A.

Date: 20041007

Docket: A-39-04

Citation: 2004 FCA 339

CORAM: RICHARD C.J.

LÉTOURNEAU J.A.

ROTHSTEIN J.A.

BETWEEN:

SYMBOL TECHNOLOGIES CANADA ULC,

Appellant

(Respondent),

and

BARCODE SYSTEMS INC.,

Respondent

(Applicant).

REASONS FOR JUDGMENT

ROTHSTEIN J.A.

INTRODUCTION

[1] This is an appeal by Symbol Technologies Canada ULC (Symbol) from a decision of the Competition Tribunal under subsection 103.1(7) of the *Competition Act,* R.S.C. 1985, c. C-34 granting leave to the respondent Barcode Systems Inc. (Barcode) to make an application to the Tribunal against Symbol. In its leave application to the Tribunal, Barcode alleged that Symbol was engaging in the reviewable restrictive trade practice of "refusal to deal" within the meaning of section 75 of the Act.

[2] Barcode's application before the Tribunal is for an order under subsection 75(1) of the *Competition Act* requiring Symbol to accept Barcode as a customer.

[3] In this appeal, Symbol says that the Tribunal member who granted leave erred in law by refusing to take into account statutory requirements and that the decision to grant leave should be quashed by this Court.

FACTS

[4] The facts are taken from the affidavit of David Sokolow, the President of Barcode. There has been no cross-examination on that affidavit. Symbol is the Canadian subsidiary of Symbol Technologies Inc. (Symbol US). Symbol US is the largest single manufacturer of bar code equipment in the world. Symbol sells and distributes Symbol US products in Canada. In or about 1994, Barcode took over Symbol's distribution in Western Canada.

[5] In or about January 2003, Symbol informed Barcode that it could no longer buy parts for Symbol products. In April 2003, Symbol informed Barcode that it would not accept purchase orders from Barcode. Barcode says that since May 1, 2003, Symbol has refused to deal with Barcode.

RELEVANT STATUTORY PROVISIONS

[6] Until 2002, only the Commissioner of Competition could bring an application before the Competition Tribunal in respect of reviewable restrictive trade practices described in Part VIII of the *Competition Act*, e.g. refusal to deal (section 75) and tied selling (section 77). By amendments to the *Competition Act*, 2002, c. 16, ss. 11.1-11.3, private applicants were given the opportunity to bring applications to the Tribunal, subject to the Tribunal granting them leave to do so. Subsection 103.1(1) of the *Competition Act* provides:

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.	103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75 ou 77. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

[7] The considerations the Tribunal is to take into account in determining a leave application are set out in subsection 103.1(7). To grant leave, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by a reviewable restrictive trade practice that could be the subject of a Tribunal order under sections 75 or 77 of the *Competition Act*. Subsection 103.1(7) provides:

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[8] The reviewable restrictive trade practice relied on by Barcode is refusal to deal. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut_:
(*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,	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(*b*) 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,	*b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
(*c*) 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,	*c*) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
(*d*) the product is in ample supply, and	*d*) que le produit est disponible en quantité amplement suffisante;
(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,	*e*) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
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	le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme

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.	client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

THE ALLEGED ERROR OF LAW

[9] Symbol submits that the Competition Tribunal member who granted leave refused to take account of all the elements of the reviewable practice of refusal to deal set out in subsection 75(1) and therefore erred in law by not taking account of statutory requirements. Symbol's main argument is that the member refused to consider whether Symbol's alleged refusal to deal was likely to have an adverse effect on competition in a market as required by paragraph 75(1)(*e*).

[10] Indeed, in his reasons, the member specifically finds that on an application for leave, the Tribunal is not to have regard to whether the refusal to deal is likely to have an adverse effect on competition in a market. At paragraphs 8 and 10, the member states:

8. What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol's refusal to sell. The Tribunal is not required to have reason to believe that Symbol's refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

10. As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

STANDARD OF REVIEW

[11] Subsection 13(1) of the *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), s. 13; 2002, c. 8, s. 130, provides for a statutory right of appeal to the Federal Court of Appeal from any decision or order whether final, interlocutory or interim of the Competition Tribunal as if it were a judgment of the Federal Court. The unrestricted right of appeal (except in the case of appeals on questions of fact under subsection 13(2)) is an indication of a correctness standard of review.

[12] Whether to grant leave under subsection 103.1(7) is a discretionary decision of the Tribunal. However, the question at issue here is whether, in exercising its discretion, the Tribunal is required to consider all the elements of the restrictive trade practice of refusal to deal set out in subsection 75(1). That is a question of law, a straight question of statutory interpretation. It is the task of the Court to determine whether the Tribunal has exercised its discretionary power within the constraints imposed by Parliament. See *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 38.

[13] This question of statutory interpretation does not engage any particular expertise of the Tribunal. Economic and commercial considerations are not part of the analysis of whether, on a leave application, all the elements listed in subsection 75(1) must be considered. That expertise is not engaged on the question of statutory interpretation at issue here therefore points to the correctness standard.

[14] The basic purpose of the *Competition Act* as described in subsection 1.1 is "to maintain and encourage competition in Canada" and the purpose of section 75 is in furtherance of that objective. When economic and commercial considerations are being considered, deference may be called for. But these considerations are not at issue in the present appeal.

[15] Weighing these pragmatic and functional considerations, I conclude that the standard of review in this appeal is correctness.

ANALYSIS

The legal test in an application under subsection 103.1(7)

[16] In *National Capital News Canada* v. *Canada (Speaker House of Commons)* (2002), 23 C.P.R. (4th) 77, Dawson J., in her capacity as a member of the Competition Tribunal, reviewed the test for the granting of leave under subsection 103.1(7). After citing authorities on the term "reasonable grounds to believe" she stated at paragraph 14 of her reasons:

Accordingly on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

I agree with Dawson J. and adopt her analysis and conclusion as to the test for granting leave under subsection 103.1(7).

[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.

[18] However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(1), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

[19] The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[20] The words of subsection 103.1(1) support this interpretation of the requirements of subsection 103.1(7). Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7). While the standard of proof on the leave application is lower than when the case is considered on its merits, nonetheless, the same considerations are relevant to both and must be taken into account at both stages.

[21] The respondent says that the words in subsection 103.1(7) "that the applicant is directly and substantially affected in the applicant's business" are essentially the words in paragraph 75(1)(*a*) and because there are no words similar to those in paragraphs 75(1)(*b*) to (*e*) in subsection 103.1(7), Parliament did not intend that each element in paragraphs (*b*) to (*e*) need be taken into account on a leave application.

[22] I do not think that is correct. Because subsection 103.1(1) says that "any person may apply", it is theoretically possible for someone other than a person substantially and directly affected to bring a private application. However, Parliament clearly intended to limit private applications to persons who themselves are directly and substantially affected in their businesses by the alleged reviewable practice. I think that is the reason for the use of words in subsection 103.1(7) that are substantially similar to those in paragraph 75(1)(*a*). However, the use of these words does not imply that the statutory elements in paragraphs 75(1)(*b*) to (*e*) need not be considered on a leave application. That is because, on a leave application, the Tribunal must consider whether the practice that is alleged could be subject to an order under subsection 75(1); and it cannot reach that conclusion without considering all the elements of refusal to deal set out in that subsection.

[23] Counsel for Symbol argued that on a purposive interpretation, it should be clear that on a leave application, the Tribunal must have regard to all the statutory elements in subsection 75(1). I agree. The purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition. That is the obvious reason for paragraph 75(1)(*e*). The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

Application of the test for leave to the facts

[24] Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

[25] Is there credible evidence to support a finding that there are reasonable grounds to believe that Symbol's refusal to supply Barcode could be subject to an order under subsection 75(1)? There is evidence that Barcode is substantially affected in its business due to its inability to obtain Symbol's products. Barcode's evidence is that it cannot obtain these products either directly from Symbol or from other Symbol distributors. Barcode says it is willing and able to meet Symbol's usual trade terms and that Symbol's products are in ample supply.

[26] The only real controversy is whether there is evidence that Symbol's refusal to deal is likely to have an adverse effect on competition in a market.

[27] On this point, paragraph 75(1)(*e*) has not been interpreted by the Tribunal or this Court and a leave application is not the appropriate occasion to do so. Therefore, if there are any facts in its affidavit that might meet the requirements of paragraph 75(1)(*e*), the benefit of any doubt should work in favour of granting leave in order not to finally preclude Barcode from its day before the Tribunal.

[28] The evidence of Barcode is that in or about 1994, it took over Symbol's distribution in Western Canada and that by 2002 its annual revenues were in excess of $20 million. Symbol US is the largest single manufacturer of bar code equipment in the world. Barcode's evidence is that if Symbol continues to refuse to supply, Barcode will be forced into receivership, and indeed, the Tribunal member found that on December 19, 2003, Barcode was petitioned into receivership.

[29] From Barcode's evidence, I think it may be inferred, for leave to apply purposes, that there are reasonable grounds to believe that Barcode had somewhat of a presence in the Western Canadian market for the supply and servicing of Symbol's products. Its 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).

CONCLUSION

[30] For these reasons I would dismiss the appeal with costs.

"Marshall Rothstein"

J.A.

"I agree

J. Richard C.J."

"I agree

Gilles Létourneau J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-04
(APPEAL FROM A DECISION OF THE COMPETITION TRIBUNAL DATED JANUARY 15, 2004)	
STYLE OF CAUSE: v. Barcode Systems Inc.	Symbol Technologies Canada ULC
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	September 28, 2004
REASONS FOR JUDGMENT BY:	ROTHSTEIN J.A.
CONCURRED IN BY:	RICHARD C.J.
LÉTOURNEAU J.A.	

DATED: October 7, 2004

APPEARANCES:

Mr. Steven Field	FOR THE APPELLANT/
Mr. Dave Hill	(RESPONDENT)
Winnipeg, Manitoba Ms. Lindy Choy	FOR THE RESPONDENT / (APPLICANT)
Winnipeg, Manitoba	

SOLICITORS OF RECORD:

Hill Abra Dewar	FOR THE APPELLANT/
Winnipeg, Manitoba	(RESPONDENT)
Thompson Dorfman Sweatman	FOR THE RESPONDENT / (APPLICANT)
Winnipeg, Manitoba	

Tab 4

Competition Tribunal | Tribunal de la Concurrence

Reference: *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38
File No.: CT-2005-006
Registry Document No.: 0041

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 103.1 for leave to make an application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an interim order pursuant to section 104 of the *Competition Act*.

BETWEEN:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)

Decided on the written record.
Judicial Member: Simpson J. (Chairperson) sitting alone.
Date of Reasons: November 14, 2005
Reasons signed by: Madam Justice Sandra J. Simpson

REASONS FOR PREVIOUS ORDER DATED NOVEMBER 4, 2005, GRANTING LEAVE TO APPLY ONLY UNDER SECTION 75 OF THE *COMPETITION ACT*

THE INTRODUCTION

[1] B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. (the "Applicants") have applied to the Competition Tribunal (the "Tribunal") pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for leave to make an application under sections 75 and 77 of the Act (the "Leave" or the "Application"). The Applicants seek an order under section 75 directing the Bank of Nova Scotia (the "BNS") to accept the Applicants as customers on usual trade terms, and an order under section 77 prohibiting the BNS from engaging in exclusive dealing.

[2] The Applicants' business involves offering purchasers who hold bank debit cards (the "Purchasers") the ability to use those cards to pay participating vendors (the "Merchants") for the purchase of goods and services over the internet (the "Applicants' Business" or "GPAY"). The Applicants started their business in 1999, but it "took off" in the spring of 2004 and now has approximately 20,000 customers, generates fees of $100,000 per month, and sees enormous potential for further growth. The Applicants' Business is new and unregulated. When it began, no other entity in Canada (including the Chartered Banks) offered a service which allowed debit card holders to pay for their online purchases with their debit cards.

[3] The Applicants began as small business customers of the BNS at its branch in Sherwood Park (the "Branch") near Edmonton, Alberta. As the Applicants' Business grew, it opened numerous accounts at the Branch. In May 2005, the BNS sent a notice terminating the accounts.

THE PROCEDURAL HISTORY

[4] This application has developed as follows:

- Notice of Application, filed on June 20, 2005
- Statement of Grounds and Material Facts filed on June 20, 2005
  - 1st Affidavit of Mr. Raymond Grace, affirmed on June 15, 2005 (the "1st Grace Affidavit")
- Certificate from the Commissioner of Competition dated June 23, 2005 indicating that the matter is not under inquiry and was not the subject of an inquiry which was discontinued because of a settlement
- Representations on behalf of the BNS in Response, filed on July 13, 2005
  - 1st Affidavit of Mr. Robert Rosatelli, sworn on July 12, 2005 (the "1st Rosatelli Affidavit")
  - Affidavit of Mr. David Metcalfe, sworn on July 12, 2005 (the "Metcalfe Affidavit")
- Applicants' Reply Submissions, filed on September 6, 2005
  - 2nd Affidavit of Mr. Raymond Grace, affirmed on September 1, 2005 (the "2nd Grace Affidavit")

- Affidavit of Mr. Joseph Iuso, affirmed on August 29, 2005 (the "Iuso Affidavit")
- Responding Affidavit from the BNS, filed with leave of the Tribunal
  - 2nd Affidavit of Mr. Robert Rosatelli, sworn on September 21, 2005 (the "2nd Rosatelli Affidavit")
- Motion by the BNS for Summary Disposition filed on September 30, 2005 and dismissed by Order of the Tribunal dated October 14, 2005
- Order of the Tribunal dated November 4, 2005 granting Leave under section 75 of the Act

THE FACTS

[5] The Applicants are corporations incorporated pursuant to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Each Applicant is registered extra-provincially in the Province of Alberta and each carries on business in the City of Sherwood Park in Alberta. Mr. Raymond Grace ("Mr. Grace") is the President of all the Applicants. Mr. Grace is the person who dealt with the Branch and opened the Applicants' BNS accounts.

[6] The Respondent, the BNS, is a chartered bank incorporated pursuant to the *Bank Act*, S.C. 1991, c. 46. It carries on business throughout Canada.

[7] In the spring of 2005, the Applicants' Business was operated using bank accounts at the BNS and at the Royal Bank of Canada (the "RBC").

[8] The Applicants' Business uses three services offered by the BNS: (i) E-mail Money Transfers ("EMTs"), (ii) internet banking, which includes bill payee services and (iii) bank accounts (collectively, the "Banking Services"). These services are used to complete the payment, clearing and settlement procedures which allow money to be transferred from the Purchasers to the Merchants.

[9] When Mr. Grace first opened an account for B-Filer Inc. at the Branch in August 1999, the Applicants' Business was the processing of payments through telephone and internet banking. Mr. Grace later opened the NPAY and GPAY accounts. Sometime in early 2004, the Applicants' Business started to expand rapidly because of a relationship it had developed with UseMyBank Services ("UMB").

[10] Mr. Joseph Iuso is the President of UMB and Mr. Grace is its Chief Financial Officer. UMB and GPAY entered into a joint venture agreement in November 2002. It appears from the evidence now before the Tribunal that, as a result of that agreement, Purchasers can pay for a Merchant's goods and services by appointing GPAY as their agent. GPAY can then access Purchasers' bank accounts and effect payment either by direct debit of the funds from their bank accounts to GPAY as bill payee or by EMT of the funds from their bank accounts to GPAY's bank account.

[11] Between the spring of 2004 and the spring of 2005, the Applicants opened over one hundred accounts at the Branch. Mr. Grace says that it was necessary to have a large number of accounts because of the limited number of transactions which could be made each month in each account. The amount of money deposited by the Applicants in their accounts at the BNS between June 1, 2004, and May 31, 2005, was approximately 10 million dollars.

[12] In a letter dated May 11, 2005, the BNS advised the Applicants that, pursuant to the Financial Agreement which customers sign on opening an account, it was giving the Applicants thirty days notice of the termination of their Banking Services, without cause (the "Termination").

[13] In the same month (May 2005), the Interac network announced that it would soon start providing bank customers with a new payment option whereby they could pay for purchases online with their debit cards ("Interac Online"). The Applicants submit that Interac Online is similar to GPAY. However, the BNS says that the businesses are entirely different for the reasons described below.

[14] Every time a Purchaser wishes to make a purchase from a Merchant, it contacts UMB online. When that contact is made, UMB's terms and conditions for the transaction make UMB and GPAY the Purchaser's agents. In the online session with UMB, the Purchaser provides his debit card number and online banking password (the "Confidential Data"). Thereafter, those Data are used to access the Purchaser's bank account and withdraw the amount required to pay for the purchase. The money is then transferred from the Purchaser's bank account to a GPAY account, either by EMT (if the Purchaser's bank account is not with the BNS) or by having GPAY listed as a bill payee (if the Purchaser's bank account is with the BNS). Immediately after the funds are transferred, GPAY advises the Merchant that the funds are available and payment is made.

[15] The evidence about how Interac Online will work is not comprehensive. However, it appears that it may differ from GPAY in the following respects:

- it will operate in real time whereas GPAY involves rapid successive transactions
- it may not involve the appointment of an agent (it is not clear if Interac will be an agent for its members)
- it may not involve disclosure of confidential information outside financial institutions' computers (it is not clear if disclosure to Interac will be outside financial institutions' computers)
- it will not make payments to offshore online casinos

These features will collectively be described as the "Differences".

THE PRELIMINARY ISSUES

A. THE PRODUCT

[16] For the purposes of this Application, the "product" is the Banking Services defined above, i.e. EMTs, internet bank transfers (bill payee service) and bank accounts. These are interrelated services that are all needed for the Applicants' Business, since the Applicants must have a means to obtain payment from the Purchaser (through EMTs or bill payee services) and a location (bank accounts) to make a deposit before paying the Merchant.

[17] Dealing first with EMTs, the Applicants allege that the BNS and the RBC are the only two banks which offer EMTs into business accounts without a charge per deposit in situations in which the recipient is not a bank. This evidence was not contradicted by the BNS. The Applicants further allege that the RBC has refused to increase the volume it processes in the accounts. This suggests that there may be no equivalent substitute suppliers for the BNS' EMT deposit services. The other EMT option for the Applicants would be to use a service called CertaPay, at much greater expense to the Applicants.

[18] The BNS states that the Applicants can carry on their business without EMT, by joining Interac. In response, the Applicants submit that joining Interac is not a viable option at this time because connection services to Interac are not offered online. Today connection services are only available through an Automatic Teller Machine ("ATM") or a point-of-sale ("POS") connector. Neither of these facilities is compatible with the Applicants' services. Further, it appears that it is not possible to establish an indirect connection to Interac through an existing Interac member.

[19] Internet bank transfers (also described as bill payee services) require payees to be listed with financial institutions. The Applicants' evidence shows that, until late 2003, GPAY was listed as a bill payee by six banks: Toronto-Dominion ("TD"), Canadian Imperial Bank of Commerce ("CIBC"), Alberta Treasury Board ("ATB"), Bank of Montreal ("BMO"), RBC and BNS. However, the first three banks terminated the Applicants as bill payees in late 2003 and they have now lost their privileges at the BNS. This constrains the Applicants' ability to do business, and has increased their dependence on EMTs as a means of facilitating debit card payments on the internet.

B. THE MARKET

[20] For present purposes, the parties appear to agree that online debit payment is the market. As noted above, until very recently, the Applicants were the only ones to offer this service, but in May 2005, the Interac Association announced that Interac Online would soon be a reality. Although the BNS submits that Interac Online is completely different from the Applicants' Business, the Tribunal has concluded that

the Differences are not sufficient to support a finding that they do not operate in the same market.

[21] The evidence shows that, at the present, there is no supplier in the market other than the Applicants' Business and that Interac Online will soon enter the market.

C. THE AGENCY RELATIONSHIP

[22] The Applicants submit that they function as Purchasers' agents. The Tribunal accepts that GPAY could be characterized as the agent of the Purchaser because of the terms and conditions under which the Purchaser appoints GPAY as agent for each purchase. The terms and conditions, which appear when the Purchaser uses UseMyBank and GPAY, include the following:

> Online accounts access is provided by you from the Transaction Providers [banks offering online banking services]. By providing Login Information, you authorize UseMyBank and its facilitation service [GPAY] to act as your agent to access, retrieve your Account Information, and make bill payments or email transfer from the web sites of your Transaction Provider on your behalf. You hereby grant UseMyBank and its facilitation service a limited power of attorney, and you hereby appoint UseMyBank and its facilitation service as your true and lawful attorney-in-fact and agent (...). YOU ACKNOWLEDGE AND AGREE THAT WHEN USEMYBANK AND ITS FACILITATION SERVICE ACCESSES AND RETRIEVES INFORMATION FROM THE TRANSACTION PROVIDER, USEMYBANK AND ITS FACILITATION SERVICE ARE ACTING AS YOUR AGENT, AND NOT THE AGENT OR ON BEHALF OF SUCH TRANSACTION PROVIDER.

[23] The Purchaser, by using the services of the Applicants, gives GPAY the authorization to access his account for the purpose of having GPAY withdraw the funds from the Purchaser's account and deposit these funds in a GPAY account. This is done with the understanding that such funds will be credited to the Merchant's account.

THE DISCRETION TO REFUSE LEAVE

[24] In this case, the Tribunal has been asked to exercise its discretion to refuse Leave under subsection 103.1(7) of the Act. The BNS is saying that, even if the requirements of subsection 103.1(7) are met, Leave should be denied.

[25] The BNS bases its submission on the following allegations:

(i) The Applicants' Business involves the disclosure of customers' Confidential Data and jeopardizes the integrity of the Canadian banking system.

(ii) The Applicants' Business could be used to launder money to finance terrorist and other illegal activities.

(iii) The Applicants' Business is being used to facilitate Purchasers' payments for criminal conduct in the form of offshore internet casino gambling.

(iv) Providing Banking Services to the Applicants would place the BNS in breach of Rule E2 of the Rules of the Canadian Payments Association (the "CPA").

(v) The Applicants misrepresented the true nature of their business to the BNS and failed to disclose material information to the Tribunal.

(vi) The BNS, as a matter of policy, does not carry on business with money services businesses such as the Applicants' and the BNS has a contractual right to close the Applicants' accounts and terminate Banking Services.

[26] I will discuss each allegation in turn but before doing so, some comments should be made about the context in which these allegations are presented.

[27] First, as described above, the BNS is about to become the Applicants' competitor as a member of Interac Online. Second, the Applicants' Business grew dramatically in the period from spring 2004 to spring 2005, and the BNS accommodated the Applicants' expanding requirements for internet banking by providing an unusually large number of bank accounts. Third, there is no allegation that the Applicants have engaged in fraudulent conduct or money laundering.

(i) The Disclosure of Confidential Data

[28] There is no issue that, if they choose to use the Applicants' Business, Purchasers must provide their Confidential Data to the Applicants. The BNS says that when its customers provide their Confidential Data to the Applicants, the customers "breach" the BNS cardholder agreement. However, a review of that agreement shows that it expressly contemplates that customers may share their Confidential Data on a confidential basis in a secure environment. In this regard, the agreement states:

> Limitation for Authorized & Unauthorized Use of the Card
> You are liable for all debts, withdrawals and account activity resulting from:
>
> - Authorized use of the card by persons to whom you have made the card and/or electronic signature available.

[29] There is a debate in the evidence about whether a Purchaser's Confidential Data is encrypted at every stage during the time it is in the Applicants' computer and there is debate about whether and how it is stored. As well, there is a debate about the relative efficacy of the parties' fraud detection systems. These are not issues which can be finally resolved at this early stage in the proceedings. I am, however, satisfied that the Applicants' Business makes a sophisticated effort to protect the Purchasers' Confidential Data. It has not been demonstrated that the Applicants' computer and internet security does not create a secure environment and, accordingly, lack of security is not a reason to refuse Leave.

[30] There is evidence that fraud has occurred in connection with the Applicants' Business. The parties agree that there have been twenty fraudulent transfers of funds

totalling $7,000.00. This is a small amount given the scale of the Applicants' Business. As well, there is no evidence of the Applicants' involvement in any fraud and they have reimbursed all the fraud victims. In these circumstances, the evidence of fraud is not of sufficient consequence to justify refusing Leave.

[31] The BNS says that funds in Purchasers' accounts and related credit facilities are at risk of theft by computer hackers because of the disclosure of Purchasers' Confidential Data to the Applicants. Computer hackers are a fact of life. Purchasers who are making internet purchases of goods and services can reasonably be expected to understand the risk. The BNS acknowledges that even services related to banks have been victims of hackers. In these circumstances, although there is a risk, I am not satisfied that it justifies refusing Leave.

[32] The next question is whether to accept the BNS' submission that the Applicants' Business threatens the integrity of the Canadian banking system. The evidence does not support this submission and, were it otherwise, I would expect Parliament to regulate the Applicants' Business to eliminate any such threat.

(ii) Money Laundering

[33] In the absence of any evidence actually linking the Applicants' Business and money laundering, I am not persuaded that speculative concerns about money laundering justify refusing Leave. As the Applicants' Business is conducted entirely by the electronic transfer of funds, all the steps are recorded and presumably can be traced. The BNS refers to a report entitled "Summary of the 911 Commission Recommendation" dated February 25, 2005 and notes that, in response to the 911 attacks, the United States passed legislation which cracks down on illegal internet gambling by barring financial institutions from processing internet gambling transactions. However, in the absence of any evidence that similar legislation exists in Canada or that the Purchasers are gambling illegally, I am not prepared to refuse Leave.

(iii) Criminal Conduct

[34] There is no doubt that the vast majority of Purchasers who use the Applicants' Business are paying amounts owed to offshore internet casinos. I have reviewed sections 202 and 207 of the *Criminal Code*, R.S. 1985, c. C-46, and have concluded that paragraph 202(1)(*e*) could make it an offence for a person in Canada to make an agreement on the internet as a prelude to gambling at an offshore internet casino. However, there would be, among others, issues about the terms and meaning of any such agreement and about whether it was made in Canada.

[35] In the absence of any reference to cases about the criminality of Canadians using the internet to gamble at offshore internet casinos and, in the absence of any evidence about how or where the Applicants' Purchasers arrange their gambling privileges at offshore internet casinos, I am not prepared to conclude that the fact

that the Applicants' Purchasers are paying amounts due to offshore internet casinos is a reason to refuse Leave.

(iv) The CPA's Rule E2

[36] The CPA's Rule E2 became effective on February 3, 2005 (the "Rule"). It applies only to CPA members. It is noteworthy that the Applicants are not members and that the Rule does not govern their conduct. Accordingly, the only question is whether the Rule operates to prevent the BNS from supplying Banking Services to the Applicants.

[37] The relevant portion of the Rule is part 5(a). It reads:

> In all matters relating to the Exchange, Clearing and Settlement of On-Line Payment Items for the purpose of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and the Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation. . . In particular, only that information or data that is necessary to effect the processing of the On-line Payment Item is to be made available to the Acquirer and/or the Payee during the session. For greater clarity, the Payor's personal banking information, such as but not limited to the authentication information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee during the On-line Payment Transaction session.

[38] The BNS submits that the Applicants are the acquirer and/or the payee under the Rule and that the Rule prevents it from dealing with the Applicants because, during the Purchasers' online session with the Applicants, the Purchasers' Confidential Data are disclosed. I do not agree with this submission. In my view, given the Applicants' status as agents, it is the Merchants not the Applicants who should be considered Payees for the purposes of the Rule.

[39] In any event, the Rule does not address the Purchaser's decision to share its Confidential Data with the Applicants on a confidential agency basis. Nothing in the Rule justifies the BNS' refusal to supply Banking Services to the Applicants' Business and, for this reason, the Rule does not provide a basis for exercising discretion to refuse Leave.

[40] The BNS also refers to a statement on the CPA's website (the "Statement"). It reads:

> **PAYMENT SERVICES** that require consumers to provide their on-line user banking ID and password to a party other than their financial institution are not eligible for clearing under this rule. [emphasis added]

[41] When it speaks of payment services, the Statement appears to say that a CPA member cannot clear transactions for non-members if those non-members, such as the Applicants, who are not bound by the Rule, offend its privacy provisions. However, on examination, the Rule itself says no such thing and the Statement is

therefore misleading. The Rule is simply a privacy provision. It does not refer to payment services and does not address eligibility for clearing or impose restrictions on clearing if the privacy requirements it imposes on its members are not met by non-members such as the Applicants.

(v) Misrepresentation and Non-Disclosure

[42] The BNS notes that in Leave applications there is no provision in the Tribunal's Rules for cross-examination on an applicant's affidavit. This fact, it submits, suggests that an applicant bears an onus of full and accurate disclosure which is akin to that imposed when injunctions are sought on an *ex parte* basis. I am not persuaded by this analogy. Leave applications are not made *ex parte*. The BNS has had a full opportunity to express its position.

[43] Although I am therefore not prepared to treat this Leave as if it were *ex parte*, I acknowledge that it would be appropriate to deny Leave if the Tribunal had clearly been misled on a significant and material issue. That said, I have reviewed the BNS' allegations of non-disclosure and have concluded that none can be described as either significant or material. The earlier investigation by the Competition Bureau and the Alberta litigation are not relevant, and the Applicants were entitled to defer the other matters for reply.

[44] The BNS alleges that Mr. Grace made serious misrepresentations in his dealings with the bank which were not disclosed to the Tribunal. The BNS is particularly vexed by the information Mr. Grace supplied when he opened the many bank accounts.

[45] In this regard, there is no dispute that many of the Applicants' accounts at the BNS were opened using the BNS telephone service which is linked to a computer. One of the questions posed by the computer during the call reads as follows:

> And will this account be used to conduct business on behalf of someone other than the named account holder?

[46] The BNS informally describes this as the "money laundering question". In each case, Mr. Grace answered it in the negative and the BNS characterizes his answers as lies. However, in my view, the answers were appropriate. Given that the Applicants' Business is to facilitate the payment of internet debts using debit cards there is no question that the accounts were used for that business.

[47] Further, Mr. Grace's description of the Applicants' Business as "financial collection" in 1999 was accurate at that time. It is clear that, after a slow start in 2002, the Applicants' Business evolved and changed into an active internet debit payment facilitation business in 2004/2005.

[48] As well, the fact that Mr. Grace opened a great many more accounts at the Branch than normal for a small business customer is not a reason to deny Leave in the

circumstances of this case. The number of accounts was not a secret and is explained by the number of transactions required by the Applicants' Business. Further, although Mr. Grace offered to discuss opening commercial accounts, his offers were ignored.

[49] The BNS also alleges that the UMB website untruthfully states that the Applicants' Business complies with the Canadian Code of Practice for Consumer Debit Card Services (the "Code"). However, this allegation is not accurate. The UMB website actually says that UMB "endorses" the Code. Subsection 1(3) of the Code says that "Organizations endorsing the code will maintain or exceed the level of consumer protection it establishes". There is no evidence that the Applicants' Business fails to comply with this provision. This allegation therefore does not justify refusing Leave.

(vi) BNS Policies and Contractual Rights

[50] There is no policy document or other record in evidence to support the BNS' allegation that, as a matter of policy, it does not clear payments to offshore casinos and does not offer accounts and Banking Services to unregulated money services businesses. However, even if such policies were in place, their mere existence would not justify refusing Leave.

[51] Finally, the BNS emphasizes that, under its signed agreements with the Applicants, it has the right to close the Applicants' accounts without cause on thirty days notice. It says that its contractual rights should be respected and Leave denied. However, the Tribunal has jurisdiction to force parties to deal with one another if the requirements of the Act are met. Accordingly, the fact that a termination clause has been applied does not justify the exercise of discretion to deny Leave.

SECTION 75 ANALYSIS

[52] In an application for leave to make an application under section 75, the applicant must show that an order "could" issue under section 75. In *Symbol Technologies ULC v. Barcode Systems Inc.*, 2004 FCA 339, the Federal Court of Appeal held as follows:

> 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.
>
> 18. However, it is important not to conflate the low standard of proof on a leave application with what evidence must be before the Tribunal and what the Tribunal must consider on that application. For purposes of obtaining an order under subsection 75(l), a refusal to deal is not simply the refusal by a supplier to sell a product to a willing customer. The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1).

These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7). That is because, unless the Tribunal considers all the elements of the practice set out in subsection 75(1) on the leave application, it could not conclude, as required by paragraph 103.1(7), that there was reason to believe that an alleged practice could be subject to an order under subsection 75(1).

19. The Tribunal may address each element summarily in keeping with the expeditious nature of the leave proceeding under section 103.1. As long as it is apparent that each element is considered, the Tribunal's discretionary decision to grant or refuse leave will be treated with deference by this Court. But the Tribunal's discretion to grant leave is not unfettered. The Tribunal must consider all the elements in subsection 75(1).

[53] The Tribunal must thus be satisfied that each of the elements set out in subsection 75(1) could be met when the application is heard on the merits. This means that there must be "sufficient credible evidence" to give rise to a *bona fide* belief. The elements of section 75 which the Tribunal must find before issuing an order are the following:

75. (1) ...(*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,

75. (1) ... *a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

[54] The Tribunal has accepted the Applicants' evidence that they could be substantially affected in their business because 50% of their revenue is dependent on the Banking Services provided by the BNS.

[55] The uncontradicted evidence of the Applicants shows that the RBC and the BNS are the only suppliers of Banking Services which allow EMTs into business accounts that are not bank operations. The evidence shows that EMTs are at the heart of the Banking Services and that the Applicants cannot carry on business without them. As a result of the Termination, the RBC is the only EMT supplier left in the market and it has refused to accept more business from the Applicants. Accordingly, the Tribunal could conclude that there is insufficient competition among suppliers.

[56] The Applicants have met the BNS' usual trade terms, in the sense that there have been no allegations that they did not respect the terms of payment or honour their commitments to the BNS or the Purchasers. The BNS disputes that the Applicants met its usual trade terms, since they exceeded the account and monetary limits imposed on small business accounts. However, the Applicants allege that they tried to open a commercial account to accommodate the expansion of their business, to no avail.

[57] The usual trade terms, insofar as this Leave application is concerned, must mean the trade terms which have thus far applied to the Applicants since the BNS allowed the Applicants to operate outside its normal small business account and monetary limits.

[58] The Tribunal is satisfied that it could find that the Banking Services are in ample supply.

[59] The Tribunal also concludes that it could find that the BNS' refusal to supply Banking Services to the Applicants' Business is likely to have an adverse effect on competition in the market for internet debit payments. The Applicants' uncontradicted evidence is that without the Banking Services supplied by the BNS, the revenue from the Applicants' Business is reduced by 50% and the business cannot grow because the RBC has refused to offer additional Banking Services. At the moment, the Applicants are the sole supplier of internet debit payment services so there is no competition to be adversely affected by these changes. However, the evidence shows that Interac Online will soon be operational. In that event, 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.

[60] The Tribunal concludes from this analysis that there is sufficient credible evidence to give rise to a *bona fide* belief that the elements of section 75 could be satisfied.

SECTION 77 ANALYSIS

[61] The Applicants submit that the BNS is practising exclusive dealing in its refusal to continue to supply the Banking Services. From the Statement of Grounds and Material Facts filed by the Applicants, it appears that the Applicants understand "exclusive dealing" in this instance to mean that the BNS, and the other major banks that are part of the Interac network, intend by their actions (i.e. refusing to deal with the Applicants) to be the exclusive purveyors of bank debit payment services by internet.

[62] "Exclusive dealing" is a defined term in section 77 of the Act. It reads as follows:

77. (1) For the purposes of this section,	**77.** (1) Les définitions qui suivent s'appliquent au présent article.
"exclusive dealing" means	«exclusivité»
(*a*) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to	*a*) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client :
(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or	(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,
(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and	(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;
(*b*) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (*a*)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;	*b*) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa *a*)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas.

[63] There is no evidence of exclusive dealing as defined in the Act. For this reason, the Tribunal finds that an order could not issue under section 77. Leave will, therefore, not be granted for the section 77 application.

THE CONCLUSION

[64] For all these Reasons, an order was made on November 4, 2005 granting Leave to apply only under section 75 of the Act.

DATED at Ottawa, this 14th day of November, 2005.

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal.

(s) Sandra J. Simpson

COUNSEL:

For the Applicants B-Filer Inc., B-Filer Inc. doing business as GPAY GuararteedPayment and Npay Inc.:

Mr. Adam N. Atlas

For the Respondent Bank of Nova Scotia:

Mr. F. Paul Morrison
Mr. Glen G. MacArthur
Ms. Lisa M. Constantine

Tab 5

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42
File No.: CT-2005-006
Registry Document No.: 0159

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

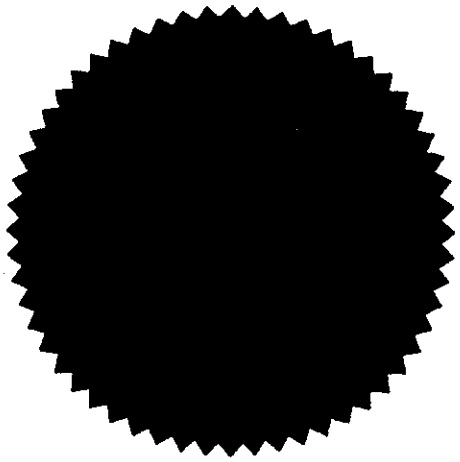
AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc. for an order pursuant to section 75 of the *Competition Act.*

BETWEEN:

B-Filer Inc.,
B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.
(applicants)

and

The Bank of Nova Scotia
(respondent)



Dates of hearing: 20060828 to 20060901, 20060905 to 20060908, 20060925 to 20060929, 20061003, 20061005 to 20061006
Before: Dawson J. (presiding), Mr. L. Bolton and Dr. L. Csorgo
Date of Reasons: December 20, 2006
Reasons signed by: Madam Justice E. Dawson, Mr. L. Bolton and Dr. L. Csorgo

PUBLIC VERSION OF CONFIDENTIAL REASONS FOR ORDER

TABLE OF CONTENTS **Paragraph**

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

[1] The applicants assert that their former banker, The Bank of Nova Scotia, engaged in reviewable conduct by terminating its banking relationship with the applicants, and thus refusing to deal with them. This conduct is said to entitle the applicants to an order pursuant to subsection 75(1) of the *Competition Act,* R.S.C. 1985, c. C-34 (Act). The applicants therefore request that the Competition Tribunal issue an order requiring The Bank of Nova Scotia to supply them with two specific banking services, bill payee services and bank accounts for deposit of e-mail money transfers, that the Bank formerly supplied to the applicants, and which it continues to supply to other banking customers.

[2] In the reasons that follow, the Competition Tribunal finds that:[1]

(1) The applicants have failed to establish that they were substantially affected in their business, or precluded from carrying on business, due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;

(2) The applicants have failed to establish that they were unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;

(3) The applicants have failed to establish that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market; and,

(4) Even if the applicants succeeded in establishing all of the constituent elements of subsection 75(1) of the Act, in any event this would not be a proper case for the granting of discretionary relief to the applicants because they are unable to comply with the contractual terms and conditions pursuant to which the banking services they seek are provided to customers of The Bank of Nova Scotia.

[3] It follows that the application will be dismissed.

[4] The issue of costs will be reserved. If the parties are unable to agree on costs, written submissions are to be filed with respect to costs. The parties are also to file submissions with respect to any required redactions in these reasons for the purpose of publishing forthwith a public version, all as described in more detail later in these reasons.

[5] These issues arise in the following factual context. Unless otherwise noted, the following facts are not in dispute.

II. BACKGROUND FACTS

A. The Parties

[6] The corporate applicants, B-Filer Inc. (B-Filer) and NPAY Inc. (NPAY), are federally incorporated and carry on business in Sherwood Park, Alberta. Their president and controlling shareholder is Raymond Grace. B-Filer carries on business under the name GPAY GuaranteedPayment (GPAY).

[7] Effective December 10, 2002, NPAY entered into a joint venture agreement with UseMyBank Services, Inc. (UMB). The president, chief executive officer and founder of UMB is Joseph Iuso. The profits of the joint venture are split equally between the joint venture partners.

[8] The Bank of Nova Scotia (sometimes Bank or Scotiabank) is one of the five major chartered banks in Canada.

B. The Nature of the Applicants' Business

[9] The applicants describe their business as providing an Internet bank card debit payment service that allows customers to make purchases from participating Internet merchants with payments made directly from the customer's existing bank account (GPAY Services). The principal business of the applicants is the provision of the GPAY Services. The applicants receive all of their significant revenue from the joint venture.

[10] Some of the services needed to provide the GPAY Services are provided by the joint venture partner, UMB. Together, the service provided by the joint venture is referred to as the UseMyBank Service. The joint venture agreement, Exhibit CA-2, delineates the responsibilities of the joint venture partners in the following way. UMB is to: provide facilitation services using existing banking payment systems; provide the front-end interface utilizing components from the NPAY website; direct buyers and sellers to the existing NPAY terms and conditions of use; and, bring on and direct all buyers and sellers who wish to use manual bill payment services to NPAY. NPAY (and through it B-Filer) is to: provide the processing, settlement and reconciliation of all payments processed by UMB; and, bring on and direct all sellers and buyers who wish to use automated bill payment services to UMB.

[11] Mr. Iuso explained that UMB handles the marketing of the UseMyBank Service and the processing of the transactions through the banks. NPAY, and through it B-Filer, handles everything to do with the money, more specifically, the interface with the banks and the settlement with the merchants.

[12] During the applicants' opening statement, through their counsel, they acknowledged, for the first time, that they operate a money services business, as that term is defined in regulations enacted pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* S.C. 2000, c. 17 (PCMLTF Act).

C. How the UseMyBank Service Works

[13] The UseMyBank Service operates as follows:

(i) Online merchants that offer this payment mechanism display the UseMyBank icon on their websites.

(ii) A customer wishing to use the service selects UseMyBank as his or her payment option, and is then transferred to the UseMyBank website.

(iii) There, the customer selects his or her bank from a list of banks.

(iv) To continue, the customer must indicate that he or she has reviewed and agreed to the terms and conditions of use imposed by UseMyBank (whether or not the customer has read those terms and conditions).

(v) The customer then designates the bank account that he or she wishes to debit and enters the user identification and password they have previously established with their bank (together referred to as the customer's electronic signature). All of this is done on the UseMyBank website, which is protected through encryption.

(vi) UMB then uses the customer's electronic signature in order to enter into an online banking session on the customer's bank's website. In order for a bank to learn that its own customer is not conducting the banking session, the bank would have to look at the IP address of the communicating party. If it did this, the bank would see that the transaction comes from UMB. UMB states that the customer's electronic signature is not stored on its server, and the electronic signature never resides on the online merchant's server. While the electronic signature is on the UMB server, it is not encrypted.

(vii) During the course of the online banking session, UMB selects, based on the customer's instructions, which of the customer's bank accounts is to be debited and then directs the payment to GPAY. Where GPAY has bill payee status at the customer's bank (described in more detail below), GPAY is selected as a bill payee and the customer's payment is directed to GPAY as a bill payment. Where GPAY does not have bill payee status, UMB directs an e-mail money transfer (EMT) from the customer's

account to one of GPAY's accounts. During the banking session, the UMB server also gathers information from the bank (such as the customer's name, address and telephone number), which GPAY uses for purposes that include the detection of fraudulent transactions.

(viii) Whether by EMT or bill payment, the money is immediately taken out of the customer's account by their bank, and the funds are placed in an internal bank suspense account.

(ix) UMB then notifies the merchant that there is a confirmation of payment. Later, GPAY receives the funds from the bank. Subsequently, GPAY pays the money to its merchant, deducting its fee.

[14] Mr. Iuso stated that this type of transaction is "meant to be [a] real-time payment processing, like [a] credit card". He agreed that the joint venture can only offer what it describes as a real-time money transfer because UMB itself effects the transaction on behalf of GPAY using the bank customer's electronic signature. The joint venture cannot operate this money transfer business unless bank customers disclose their online banking password and bank identification number to it.

[15] Of the transactions processed by the UseMyBank Service, 98% involve payments to "payment processor gateways" that have online gambling casinos for clients. Put more simply, the vast majority of the joint venture's business, 98% of it, is to transfer monies in order to fund online gaming accounts at casinos located outside of Canada.

D. The Banking Relationship Between the Applicants and The Bank of Nova Scotia

[16] In August of 1999, Mr. Grace attended at the Sherwood Park branch of The Bank of Nova Scotia and opened a single, small business account in the name of B-Filer Inc. carrying on business as GPAY Guaranteed Payment. The Application for Business Banking Services form signed by Mr. Grace described GPAY's business to be one of "financial collection" and estimated the annual sales of the business to be $240,000 per year, with a total monthly deposit balance of $10,000. At that time, Mr. Grace signed and was given a copy of the Bank's Financial Services Agreement. This document set out the terms and conditions related to the operation of the business account.

[17] Exhibits A-33 and A-34 reflect that Mr. Grace also applied in August of 1999 for biller status at The Bank of Nova Scotia. Once accepted, GPAY was listed by The Bank of Nova Scotia as a biller so that the Bank's customers could make online bill payments from their bank accounts to GPAY. Bill payee status is specific to each bank in the sense that, for example, Scotiabank deposit customers can only make online bill payments from their Scotiabank accounts to entities that have obtained biller status from The Bank of Nova Scotia. Similarly, for example, customers of the Royal Bank of Canada (RBC) can only make such payments to entities that have obtained biller status from RBC.

[18] It is agreed that, in 1998 and 1999, GPAY obtained status as a bill payee from each of Canada's five largest chartered banks, as well as from the Alberta Treasury Branches (ATB) and the Fédération des caisses Desjardins du Québec. When the UseMyBank joint venture was launched in December 2002, GPAY used these bill payee facilities to operate the UseMyBank Service as described above. It is also agreed that, at all material times, the applicants maintained business accounts at RBC. The significance of those accounts is that The Bank of Nova Scotia and RBC are the only two banks that permit EMTs to be deposited into small business accounts. The Bank of Nova Scotia does not permit EMT deposits into commercial accounts of entities that are not small businesses. EMT deposits are allowed into personal accounts.

[19] In August of 2003, the Canadian Bankers Association forwarded to a number of banks an Internet alert with respect to the UseMyBank website. The alert originated from the Canadian Imperial Bank of Commerce (CIBC). The concern expressed was the potential for fraud that existed as a result of the disclosure of a bank customer's electronic signature. As a result of this notice, the Bank's security group initiated an investigation. While concern was expressed by representatives of the Bank about the risk posed by the disclosure of a customer's electronic signature, the Bank's response to the investigation was to contact all of its customers who had used the UseMyBank Service in order to warn them that they should not be disclosing their electronic signatures. This response was said by the Bank to reflect the low transaction volumes and low number of customers that were involved.

[20] In December of 2003, GPAY lost the biller status that it held at the Toronto-Dominion Bank (TD), CIBC and ATB. As a result, thereafter, when UMB entered into banking sessions on TD and CIBC websites on behalf of a customer, instead of directing payment to GPAY through a bill payment, UMB would instruct that payment be made to GPAY by way of an EMT. These EMT payments were then deposited into the applicants' business accounts either at The Bank of Nova Scotia or RBC (because, as noted above, these were the only banks which permitted EMT deposits into business accounts).

[21] Both RBC and Scotiabank impose limits on the sending and receipt of funds by EMT. For a send transaction, the limit is $1,000 per day and $7,000 over a 30-day rolling period. A recipient is limited to receiving $10,000 per day and $300,000 over a 30-day rolling period. The rolling limits are set by Acxsys Corporation. Acxsys Corporation, an incorporated for-profit division of the Interac Association, developed the e-mail money transfer service.

[22] On April 15, 2004, Mr. Grace opened a second account at the Bank in GPAY's name. This account was a Money Master for Business (Money Master) account. Mr. Grace testified that this second account differed from the existing original account in that there was no bank charge levied for depositing EMTs. There was also no charge for transferring money from the Money Master account to the current account, so long as the transfer was done online. A fee of $0.65 per transaction was applied to EMT deposits made into GPAY's original current account.

[23] Beginning sometime in 2004, the Bank's Sherwood Park branch began receiving notices that some transactions could not be posted into the applicants' account(s).

[24] Mr. Woodrow, the Sherwood Park branch account manager for small business accounts, testified that, as a result of activity in the applicants' accounts, the branch learned in 2004 that, after 100 transactions occurred in a Money Master account, any remaining debits or credits were put into an unpostable suspense account. Mr. Woodrow further recalled that, through the latter part of 2004, unpostable reports showed that the applicants were exceeding the transaction limits on virtually a daily basis.

[25] Mr. Grace agreed that transactions became unpostable after approximately 100 transactions, and agreed that the applicants encountered significant difficulty with this in 2004.

[26] The reason for this increase in unpostable transactions was that, following the loss of biller status at CIBC and TD, for customers of those banks, payments to GPAY were effected by way of EMTs deposited into the applicants' accounts with The Bank of Nova Scotia.

[27] As a result of the unpostable transactions, a number of new accounts were opened by the applicants at The Bank of Nova Scotia during the second half of 2004. Some accounts were opened by Mr. Grace personally at the Sherwood Park branch, while some were opened as a result of telephone calls Mr. Grace placed to the Scotiabank call centre. Exhibit A-35 summarizes the account openings, detailing the date an account was opened, the name of the account holder, whether the account was opened through the branch or the call centre, and the number of accounts opened each day. Exhibit A-35 is reproduced, verbatim, here:

SUMMARY OF ACCOUNT OPENINGS

Date	Plaintiff	Branch	Call Centre	# of Accounts
August 6, 1999	B-Filer as GPay	√		1
April 15, 2004	GPay	√		1
June 11, 2004	GPay	√		6
October 7, 2004	B-Filer	√		5
November 15, 2004	NPay	√		15
February 25, 2005	B-Filer		√	30
March 1, 2005	NPay		√	1
March 3, 2005	NPay		√	22
March 8, 2005	GPay		√	10
March 9, 2005	GPay		√	17

[28] Thus, it can be seen that, from April 2004 to March 2005, Mr. Grace caused 107 accounts to be opened at the Bank in the names of various applicants. Of the 107 accounts, 80 were opened in the period from February 25, 2005 to March 9, 2005.

[29] Exhibit CA-69 shows the number of deposits the applicants made into accounts at The Bank of Nova Scotia in each month during the period from September 2003 to July 2006. Exhibit CA-62 depicts the amount of the deposits to Scotiabank accounts made each month from

September 2003 to July 2006. In their Statement of Grounds and Material Facts, at paragraph 10, the applicants state that, from June 1, 2004 to May 31, 2005, they deposited approximately $9,929,881.17 into business bank accounts they held at The Bank of Nova Scotia.

E. The Termination of the Banking Relationship

[30] As a result of being notified of the 15 new accounts opened in the name of NPAY on November 15, 2004, Ms. Parsons, manager of the Sherwood Park branch, became concerned about the number of accounts the applicants were opening. At a meeting with Ms. Gibson-Nault, manager of customer service at Sherwood Park, and Mr. Woodrow, she instructed Mr. Woodrow to find out from Mr. Grace why so many accounts were needed and why there were so many unpostable transactions. She also directed that no new accounts were to be opened for the applicants.

[31] In February 2005, the branch became aware that Mr. Grace was opening accounts through the Scotiabank call centre. As a result, Ms. Gibson-Nault spoke to her contact person at the Bank's Shared Services operation who in turn referred her to the Bank's Security and Investigation division in Calgary. As a result of a conversation with a representative of that department, Ms. Gibson-Nault prepared and forwarded an Unusual Transaction Report. The Unusual Transaction Report referenced the number of accounts opened for GPAY, NPAY and B-Filer, the number of EMTs that exceeded the transaction limits so as to trigger unpostable transactions, and the aggregation and transfer of funds.

[32] Also during February and March of 2005, the Bank received six complaints of fraudulent transactions concerning the applicants' accounts. Mr. Grace explained to Mr. Woodrow that these fraudulent transactions occurred because of one of two possible scenarios. In the first, a customer's account might be compromised by a rogue who would then conduct the transaction. In the second, a person, a spouse for example, would see a transaction on a bank statement and question it. The husband or wife who made the transaction would not wish to admit to it and so would deny the transaction (rather than admit to, for example, Internet gambling). In that instance, the transaction would be reported as fraudulent.

[33] Receipt of the Unusual Transaction Report triggered an internal investigation at the Bank. Further information was sought from the branch by Bank officials in Toronto.

[34] In a two-page memorandum dated March 29, 2005, which reviewed the chronology of events, Ms. Parsons and Ms. Gibson-Nault recommended termination of the banking relationship between the Bank and the applicants. The Bank says that, as a result of its internal investigation, it decided to accept the recommendation and to terminate its banking relationship with the applicants.

[35] By a number of letters dated May 11, 2005, The Bank of Nova Scotia gave written notice to the applicants terminating the banking relationship, effective June 15, 2005. Each letter made reference to clause 12.2 of the Financial Services Agreement which provides that the Bank "may

cancel any service to you without a reason by giving you thirty days' written notice". The termination was, in fact, delayed as result of proceedings the applicants brought in the Alberta Court of Queen's bench. After their request for an interim injunction was dismissed by that Court, the applicants' banking services were terminated by the Bank, and their accounts closed on September 28, 2005.

F. Interac Online

[36] On or about May 5, 2005, the Interac Association announced the launch of Interac Online. The service was commenced in June 2005.

[37] Interac Online is a service that also allows customers to purchase products or services through the Internet. If a customer, when on a participating merchant's website, selects Interac Online as the payment option, the customer is directed to an access page which displays the financial institutions that participate in Interac Online. Currently there are three: Scotiabank, RBC and TD. The customer then selects his or her financial institution and is directed to the online banking sign-on page of that financial institution. There, the customer inputs his or her electronic signature. The customer is then directed to a page where he or she selects the account to be debited and confirms the transaction.

[38] Since June 2005, 32 merchants have accepted Interac Online as a payment mechanism.

G. History of this Proceeding and the Relief Sought

[39] This proceeding is brought pursuant to the Tribunal's order of November 4, 2005, which granted the applicants leave to apply for relief under section 75 of the Act. The applicants seek an order requiring Scotiabank to supply them with Scotiabank "Biller Services" and "EMT Business Deposit Accounts". This is the first private application brought before the Tribunal as a result of the amendments to the Act made in 2002, which permitted such private proceedings.

[40] On December 14, 2005, the Tribunal dismissed the applicants' request for interim relief.

III. Applicable Legislation

[41] Subsection 75(1) of the Act contains the refusal to deal provision which is at issue. Subsection 75(1) provides:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*a*) a person is substantially affected in his business or is precluded from	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut

carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

(*b*) 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,

b) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

(*c*) 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,

c) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

(*d*) the product is in ample supply, and

d) que le produit est disponible en quantité amplement suffisante;

(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

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.

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

[42] Subsection 75(1) was amended in June 2002 to allow private access to the Tribunal

when leave is granted under section 103.1 of the Act. The amendment made in 2002 also added paragraph (e) to the Act. This is the first case brought before the Tribunal since paragraph (e) was added to subsection 75(1).

[43] For the purpose of this application, subsections (3) and (4) of section 75 are also relevant. Subsection (3) defines the phrase "trade terms", found in subsection 75(1), to mean "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". Subsection (4) precludes the Tribunal from drawing any inference from the fact that the Commissioner has, or has not, taken any action in respect of the matter raised by the application. This provision has some relevance because, in January 2004, the Commissioner closed her investigation into the applicants' allegation that the refusal of CIBC, TD and ATB to allow GPAY to receive bill payments from their customers contravened sections 75 and 79 of the Act. The Tribunal has given no weight to the fact that the Commissioner's investigation was discontinued. The Commissioner did note that private access to the Tribunal might be available to the applicants.

[44] Section 75 of the Act is set out in its entirety in Schedule A to these reasons.

IV. ONUS AND STANDARD OF PROOF

[45] It is common ground among the parties that the applicants bear the onus of establishing each constituent element contained in paragraphs (a) through (e) of subsection 75(1) of the Act.

[46] The standard of proof to be applied is the civil standard: proof on a balance of probabilities.

V. THE WITNESSES PRESENTED BY EACH PARTY

[47] Before turning to the substance of the analysis of subsection 75(1) of the Act and its constituent elements, it is helpful to identify the witnesses called by each party. A description of the general nature of the testimony they presented in chief is contained in Schedule B to these reasons.

A. The Expert Witnesses

[48] Six individuals testified as experts before the Tribunal, two on behalf of the applicants and four on behalf of the Bank. The applicants' experts were Mr. Jack Bensimon and Dr. Lawrence Schwartz. The Bank's experts were Mr. Christopher Mathers, Dr. James Dingle, Mr. David Stewart and Dr. Frank Mathewson.

(1) The Applicants' Experts

[49] With the parties' agreement, the Tribunal accepted Jack Bensimon as an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and

compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies.

[50] With the parties' agreement, Dr. Lawrence Schwartz was qualified as an "expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

(2) The Bank's Experts

[51] Christopher Mathers was tendered as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. His qualification to provide such opinions was accepted by the applicants.

[52] Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was tendered and accepted as an expert "in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking" as set out in his report.

[53] David Stewart is an attorney practicing in Washington, D.C. He was tendered, and accepted by the applicants, as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualifications to opine on matters relating to state law were put in issue by the applicants, but, after hearing examination and cross-examination on his qualifications, his expertise in this area was accepted by the Tribunal.

[54] Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. His qualifications were conceded as an expert economist, with expertise in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

B. The Lay Witnesses

[55] Twelve other individuals testified before the Tribunal.

[56] The applicants called Mr. Joseph Iuso, Mr. Raymond Grace, Mr. Ryan Woodrow, and Mr. Darren Morgenstern. The Bank called Ms. Margaret Parsons, Ms. Sharon Gibson-Nault, Ms. Susan Graham-Parker, Mr. Colin Cook, Mr. Douglas Monteath, Mr. Robert Rosatelli, Mr. Ronald King, and Mr. David Jones.

(1) The Applicants' Lay Witnesses

[57] Joseph Iuso is the President, Chief Executive Officer, and founder of UMB.

[58] Raymond Grace is the President of both GPAY and NPAY.

[59] Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts.

[60] Darren Morgenstern is the owner of the Ashley Madison Agency, an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options".

(2) The Bank's Lay Witnesses

[61] Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia.

[62] Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch.

[63] Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia.

[64] Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia.

[65] Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank.

[66] Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia.

[67] Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies.

[68] David Jones is Director of Web Business at WestJet.

VI. THE ELEMENTS OF SECTION 75 AND THE ISSUES TO BE DETERMINED

[69] Having set forth the necessary background facts, discussed the applicable legislation, the onus and standard of proof, and identified the witnesses tendered by the applicants and the Bank, we turn to the analysis of whether the applicants have met their onus to establish all of the required elements contained in subsection 75(1). Each element has been put in dispute by the parties. We deal first with paragraph 75(1)(*a*) of the Act.

A. Have the applicants established that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms?

[70] There is no suggestion that the applicants have been precluded from carrying on their business. Thus, it is only necessary to consider whether they have been substantially affected in their business. At the outset, we must determine what test the Tribunal should apply in order to define the relevant product market under paragraph 75(1)(*a*). Before doing so, we note that both the applicants and the Bank addressed the issue of "usual trade terms" under paragraph 75(1)(*c*) rather than under 75(1)(*a*). We also address usual trade terms when we consider paragraph 75(1)(*c*).

(1) The Test to Define the Product Market

[71] The parties disagree on the proper approach for defining the product market under paragraph 75(1)(*a*). In Dr. Schwartz's opinion, the correct approach is the hypothetical monopolist test. Dr. Schwartz stated that he favours this test because it generally avoids the problem of defining markets overly broadly. Dr. Mathewson defines the market based upon the approach adopted by the Tribunal in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff'd (1991) 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (C.A.). In Dr. Mathewson's view, "the operative principle is that other products are substitutes if the purchaser's business is not substantially affected by switching to these other services." Dr. Mathewson testified that he prefers this test because "[i]n refusal to deal cases, and the abuse cases events have already occurred. And so we do have evidence about how the market has responded. We don't have to be hypothetical. It seems to me if we're hypothetical, we're ignoring information; information that's at our fingertips, through the evidence of how the market has actually functioned. And thus the words, functional interchange in terms of substitution, are the operative words in my view."

[72] We find that the proper test is that identified by the Tribunal in *Chrysler* and applied by Dr. Mathewson. We so conclude because this approach is consistent with precedent, and, in our view, is better suited to address the concerns of paragraph 75(1)(*a*) than the hypothetical monopolist test. Our reasons for these conclusions follow.

(a) Precedent

[73] As the Tribunal noted at page 103 in *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, "[w]hile the process of product market definition is clearly founded on economic analysis, the question of the 'relevant' market for the purposes of section 75 depends largely on the construction of section 75 and the identification of its objectives within the context of the *Competition Act* as a whole."

[74] The Tribunal had previously considered the proper approach to the definition of product market in the context of paragraph 75(1)(*a*) in *Chrysler*. There, the Tribunal wrote, at page 10,

that:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies.
>
> [underlining added]

[75] The Tribunal expressly rejected the expert evidence that market definition should be determined from the position of whether Chrysler, the respondent, had substantial market power. Indeed, the Tribunal found that a broad consideration of Chrysler's market power was not required when looking at any specific element of section 75 of the Act.

[76] In *Xerox*, the Tribunal again found, at page 116, that the respondent's market power is not an element that need be established to obtain a section 75 order.

[77] Since the Tribunal's decisions in *Chrysler* and *Xerox*, subsection 75(1) has been amended to include paragraph 75(1)(*e*), which requires a determination of whether the refusal to deal is having, or is likely to have, an adverse effect on competition in a market. Given this amendment, it is necessary to consider whether the addition of paragraph 75(1)(*e*) has changed the context and purpose of section 75 such that the test for markets articulated in *Chrysler* is no longer appropriate for the purposes of 75(1)(*a*).

[78] In our view, while the addition of paragraph 75(1)(*e*) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(*a*). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(1)(*e*) need not be the market of concern in paragraphs 75(1)(*a*) and 75(1)(*b*), the market that best suits the particular context and purpose of 75(1)(*e*) can be separately considered when considering that paragraph of the Act.[2]

[79] For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[80] In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*), as noted by the Tribunal in *Chrysler* at page 23, "[t]he 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." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

(b) The Appropriateness of the *Chrysler* Test

[81] In our view, the *Chrysler* test is better suited than the hypothetical monopolist test to address the concerns of 75(1)(*a*) for two reasons. First, the *Chrysler* test deals directly with the particular person and the business at issue. Second, the *Chrysler* test deals with the effects of a refusal to deal on the affected business rather than the possible effects of a hypothetical price increase in the refused product. Contrary to Dr. Schwartz's opinion, in our respectful view, there is little risk of defining the market overly broadly because the test does not allow for the inclusion of substitutes that have a substantial effect on the business.

[82] Both of these points are elaborated upon below.

(i) Particular Person and the Business at Issue

[83] Dr. Schwartz testified that he relies on the hypothetical monopolist approach to market definition contained in the merger guidelines of the enforcement agencies in Canada and the United States. The *Merger Enforcement Guidelines* of the Canadian Competition Bureau (Bureau) indicate that "a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area in which a sole profit-maximizing seller (a hypothetical monopolist) would impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of the merger" (Canada, Competition Bureau, 2004, at paragraph 3.4). The *Merger Enforcement Guidelines* state, at paragraph 3.1, that "[t]he overall objective of market definition in merger analysis is to identify a set of buyers that could potentially face increased market power due to the merger."

[84] However, for the purposes of paragraph 75(1)(*a*), what is of concern is not a set of buyers but a particular buyer.[3] The hypothetical monopolist test is capable of dealing with a particular buyer but doing so requires markets to be defined with reference to the characteristics of that buyer or to the particular locations of that buyer (see *Merger Enforcement Guidelines* at paragraph 3.9). In the case of 75(1)(*a*), since the only buyer of concern is the one that has been refused supply, in this case B-Filer, there is no need to define a relevant market with reference to the possible particular characteristics of that buyer. In our opinion, it is more appropriate to focus directly and immediately on the buyer that has been refused supply.

(ii) Effects of a Refusal to Deal

[85] The hypothetical monopolist test is ultimately concerned with exercises in market power. To determine the set of products and geographic areas over which a hypothetical monopolist would have market power, a system of determining which products and geographic areas have

price constraining effects on each other is carried out. The mechanism is to ask whether a hypothetical monopolist over a postulated candidate market would be able to impose a significant and non-transitory price increase. If yes, the postulated market is not considered the relevant market, and the exercise is repeated with an expanded candidate market. According to the *Merger Enforcement Guidelines*, at paragraph 3.4, "[i]n most cases, the Bureau considers a five per cent price increase to be significant and a one-year period to be non-transitory."

[86] Dr. Schwartz notes that a refusal to supply is akin to an infinite price increase. He is of the further view that defining markets based on switching observed in response to a refusal to deal, or an infinite price increase, is inappropriate because it can lead to overly broad markets because it can include products that were not good substitutes prior to termination. However, not only is the refusal to supply and the effect of the refusal on the business the concern of 75(1)(*a*), rather than the effect of a significant and non-transitory price increase, but the test used in *Chrysler*, as described above, does not run the risk of finding overly broad markets.

[87] In Dr. Schwartz's view, "when the current product or service is withdrawn completely and no longer available for choice, it is not surprising or helpful to market definition to observe that the buyer chose another alternative." However, this is not the whole of the test. The use of alternatives by the refused business is insufficient to conclude that these alternatives are in the same product market as the refused product. The *Chrysler* test properly applied requires that the use of these alternatives not substantially affect the business at issue. If their use does in fact result in a substantial effect, and they are nonetheless included in the relevant market for purposes of 75(1)(*a*), the market would be overly broad. The correct application of the test does not allow for this possibility.

[88] Consequently, for the above reasons, we conclude that the correct test for defining markets for the purposes of 75(1)(*a*) is the *Chrysler* test as we have articulated it at paragraph 79.

(2) The Relevant Product Market

[89] Having determined the appropriate test for the determination of the product market, in our view, application of that test to the evidence before us leads to the conclusion that the relevant product market is comprised of biller status at the Bank and deposit accounts **[CONFIDENTIAL]** that allow for the deposit of EMTs. Our reasons for this conclusion follow.

[90] The starting point of market definition for the purposes of 75(1)(*a*) is to determine a set of candidate substitutes for the products that have been refused. In this case, the two products that have been refused (and which the applicants seek) are biller status at the Bank and EMT deposit accounts at the Bank. Having determined the set of candidate substitutes, one then determines whether the use of the substitutes by the applicants results in a substantial effect on the applicants' business. If yes, the candidate substitute is not included in the product market.

[91] The set of candidate substitutes raised by the applicants in regard to biller status at the Bank are (i) biller services at other financial institutions, and (ii) EMTs into deposit accounts

(other than Scotiabank deposit accounts since these are unavailable to the applicants), without distinguishing between **[CONFIDENTIAL]** deposit accounts. The applicants argue that neither of these candidate substitutes is acceptable.

[92] The Bank counters that "the relevant product market is at least as broad as the "Biller Services" of the five major chartered banks (it also includes the Biller Services of Alberta Treasury Branches and the Fédération des caisses Desjardins du Québec) and, in addition, includes EMT payments." Its expert, Dr. Mathewson, concludes that "Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT **[CONFIDENTIAL]** deposit accounts."

[93] We note that Dr. Mathewson did not opine or testify that biller services at other banks are part of the relevant market. Rather, he appears to conclude that it remains an open question due to a lack of evidence. We also note that Dr. Mathewson clarifies that EMT deposit accounts include **[CONFIDENTIAL]**.

[94] For the purpose of our analysis we consider each of the following candidate substitutes for biller status at the Bank:[4]

(i) Biller status at financial institutions other than Scotiabank;

(ii) EMT business deposit accounts at RBC; and,

(iii) **[CONFIDENTIAL]**.

[95] In our analysis, we include a candidate substitute in the relevant product market if, and only if, in our opinion its use does not substantially affect the applicants' business. Both parties consider "substantially affected" in regard to the entirety of the applicants' business.

(a) Biller Status at Financial Institutions Other Than Scotiabank

[96] The applicants contend that biller status at "banks that continue to provide that status to B-Filer is not a good substitute for biller status at Scotiabank. Biller status at those other banks allows B-Filer to process payments for those banks' depositors but does not allow it to process payments for Scotiabank depositors." Put more succinctly, the applicants argue that "[t]he fact that GPay has Biller Services from Royal Bank does not assist it in processing bill payments for customers of Scotiabank."

[97] The applicants' argument is essentially that biller status at other financial institutions is not functionally interchangeable for biller status at Scotiabank. We accept this; however, it is hypothetically possible that the Bank's depositors could make use of existing bank accounts or open new bank accounts at other financial institutions where the applicants have biller status and use those accounts, such that the applicants are not substantially affected in their business.[5]

[98] In Dr. Schwartz's view, this type of "shift is unlikely" due to additional inconvenience, additional record-keeping, and increased bank fees. As such, he states that "[i]t is more likely than not that the Scotiabank depositor would choose to bear the price increase that Scotiabank imposes on GPAY Service debit transactions than maintain dual accounts at separate financial institutions." Similarly, he finds it highly unlikely that Scotiabank depositors would close their Scotiabank accounts and switch to another financial institution.

[99] In response, Dr. Mathewson finds that there is no hard evidence of any potential response by consumers: "As any consumer response to a price hike remains an open and unanswered empirical matter, a categorical conclusion which removes all other financial institutions from the market seems unwarranted."

[100] We agree with Dr. Mathewson that consumer response is an open and unanswered question. Consequently, contrary to the Bank's position, due to this lack of information, we find that the relevant product market does not include biller status at other financial institutions. We now turn to the next potential substitute.

(b) EMT [CONFIDENTIAL] Deposit Accounts

[101] In our analysis, we consider EMT business accounts at RBC **[CONFIDENTIAL]**.

[102] Dr. Schwartz concludes that, in regard to the relevant market "in relation to the means of providing online debit payment to Scotiabank depositors", the market includes Scotiabank biller status but excludes business accounts that accept deposits by EMTs. He concludes this on the basis of the hypothetical monopolist test in that "it appears that if Scotiabank had raised the price of biller status to B-Filer by a small but significant amount, B-Filer would have borne this increase rather than switch to processing by way of EMTs because of the costs and disadvantages thereof in comparison to biller processing." While we find that the *Chrysler* test rather than the hypothetical monopolist test is the right one, costs and disadvantages of a candidate substitute are still relevant as these might result in a substantial effect on the business. Consequently, we consider the costs and disadvantages noted by the applicants.

[103] The costs and disadvantages are said by the applicants to be:

(i) Scotiabank charges $1.50 to its depositors per EMT;

(ii) There is a maximum EMT transaction amount of $1,000 and a further aggregate limit of $1,000 per day per depositor;

(iii) There is a 30-minute holding period following an EMT during which a depositor may cancel the EMT;

(iv) Large volumes of EMTs can cause processing problems. There were processing problems with the Scotiabank accounts that the applicants used for processing EMTs; and,

(v) Receipt of EMTs is highly constrained in that only Scotiabank and RBC small business accounts can receive them, and there are daily, monthly, and annual limits on EMT deposits. The daily limit is $10,000.

[104] In contrast, Dr. Mathewson concludes that "Scotiabank Biller Services is not a product market, and the market that includes Biller Services also includes EMT **[CONFIDENTIAL]** deposit accounts." He acknowledges that there are differences between processing payments via Scotiabank biller services and EMTs, the primary differences being the $1.50 fee associated with EMTs, and the $1,000 per day limit on sending EMTs versus the $49,999 payment limit applicable to the Bank's bill payee service. He finds, however, that the effects of the use of EMTs **[CONFIDENTIAL]** by the applicants cannot be said to be substantial.

[105] We agree with both Dr. Schwartz and Dr. Mathewson that there are differences between Scotiabank biller services and EMTs. The costs and disadvantages asserted by the applicants above are largely not in dispute, with the exception of the asserted disadvantage of the effective degree of constraint on the receipt of EMTs (item v above). With respect to the allegation that large volumes of EMTs can cause processing problems (item iv above), we find that there is no evidence to support this statement other than the evidence of the processing problems that the applicants experienced at Scotiabank. We find that the applicants did experience EMT processing problems in regard to the Money Master accounts that they held at Scotiabank but, on the totality of the evidence, the applicants failed to establish that large volumes of EMTs can cause processing problems more generally.

[106] As noted above, the applicants claim that the receipt of EMTs is highly constrained. It is common ground that there are daily, monthly, and annual limits on the value of EMT deposits that can be received. Those limits are: $10,000 per day; $70,000 per seven day period; and $300,000 per thirty day period. Mr. Grace acknowledged that, since the Scotiabank termination, the applicants have been receiving EMTs, as at June/July 2006, into **[CONFIDENTIAL]**. Mr. Grace agreed on cross-examination that the use of these **[CONFIDENTIAL]** accounts has associated with it a capacity to receive EMT deposits of **[CONFIDENTIAL]** annually, replacing the **[CONFIDENTIAL]** in capacity the applicants had at the Bank prior to termination. Not only does this represent a **[CONFIDENTIAL]** increase in deposit capacity, there is some evidence to suggest that this capacity may be greater. Mr. Grace testified that since June/July 2006 he has opened "a few more accounts". Dr. Mathewson also indicated in his report that "[t]here is no evidence on the record that indicates that there are any limits to the number of profiles under GPay's control for receipt of EMT transfers. GPay can increase its capacity to accept EMTs **[CONFIDENTIAL]**." This evidence was not disputed. Consequently, we do not find that "the receipt of EMTs is highly constrained" because of the receiving limits.

[107] Of the differences asserted by the applicants between biller services and EMTs, listed at paragraph 103 above, we find these to be significant only if, as a result of the use of EMTs, the applicants' business is substantially affected. We turn now to the analysis of that issue.

[108] The applicants claim that their business has been substantially affected in two ways. They say they have reduced growth in their revenues and they say there has been a fundamental change in their growth opportunities.

(i) Reduced Growth in Revenues

[109] In regard to the claim of reduced growth in revenues, the applicants note that in the month following the Bank's termination, the applicants experienced a 48% (or $350,000) decrease in the dollar value of the transactions they processed as compared to the month in which the termination took place, i.e., September 2005. The applicants argue that since termination the monthly transaction value for Scotiabank has risen but not surpassed the level in September 2005. By comparison, the applicants assert that the value of transactions from the other five financial institutions have increased markedly since September 2005. In particular, the applicants argue that Bank of Montreal (BMO) dollar value transactions grew at roughly the same rate as those of the Bank prior to the Bank's termination. Since the time of the Scotiabank termination, the transaction values from BMO are said to have grown by 118% relative to September 2005, and by 169% relative to August 2005. By contrast, transaction values from Scotiabank are said to have fallen by 18% as compared to September 2005, and risen by only 13% relative to August 2005.

[110] In his analysis of these same data, Dr. Mathewson notes that the value of Scotiabank transactions in September 2005 was anomalous. He finds, comparing the applicants' average monthly Scotiabank payments from the three month period June-August 2005 to the three month period April-June 2006, that GPAY's Scotiabank payments have now fully recovered their pre-termination levels.

[111] In order to analyse these conflicting submissions, we first consider whether the use of EMT deposit accounts **[CONFIDENTIAL]** to effect transactions by Scotiabank depositors affected the applicants' business by reducing growth in the dollar value of the applicants' transactions. We then consider whether such use substantially affected the business.

[112] For the reasons that follow, we conclude that, post-termination, the applicants did experience an initial decrease in the total dollar value of their Scotiabank transactions. We find this to have been the case regardless of whether the basis for comparison is September 2005, the month in which the termination took place, or some combination of the months immediately before the termination. Since the dollar value of transactions exhibit volatility from month to month (see Exhibits CA-62 and CA-69), absent further analysis it cannot be known what portion of the observed decline can be attributed to the Scotiabank termination. We find that it is possible that some portion of the observed decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions. This, however, might not

fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions. We find, however, that, since the overall decline appears to be limited, and given the aforementioned data volatility, we are unable, on the evidence before us, to conclude what portion of the observed decline is attributable to the Scotiabank termination.

(1) The Applicants experienced an initial decrease in the total dollar value of their Scotiabank transactions post-termination

[113] If September 2005 is used as the base for comparing subsequent monthly dollar values of Scotiabank transactions, then, as at July 2006, the applicants were yet to achieve similar transaction values.

[114] However, we accept Dr. Mathewson's evidence that September 2005 was an anomalous month. The value of transactions in that month was 15.1% higher than the highest previous month (July 2005), or 29.8% higher than the average of the three previous months (June-August 2005). Month-over-month increases of this size are observed in the data: for example, the payment values of RBC transactions increased by 37.8% from July to August 2005, and the payment values of BMO's transactions increased 23.7% from August to September 2005. However, there is the evidence that one Scotiabank customer accounted for $141,159, or 20.7%, of the total value of September 2005 Scotiabank transactions. This individual's set of transactions also accounted for 63.4% of the total value of Scotiabank transactions that were over $1,000 in September 2005. The evidence is that in no previous month for which data are available (June 2004 to September 2005) were Scotiabank transactions for all individuals carrying out transactions over $1,000 even close to the value of transactions carried out by this one individual in September 2005. The closest monthly transaction total for all individuals who carried out transactions over $1,000 was $71,317.57 in August 2005. This is about half the value of the transactions carried out by this one individual in September 2005. Consequently, the evidence establishes in our view that the value of transactions carried out by this one individual in September 2005 was unusual. Since the individual accounted for 20.7% of total transactions in September 2005, we find the total Scotiabank transactions in September to be anomalously high.

[115] Even if we had not found the Scotiabank September transactions to be anomalously high, we would consider comparisons to more than this one month to be informative.

[116] If August 2005 is used as the base for comparing subsequent monthly dollar value of Scotiabank transactions, post-termination, the applicants had lower Scotiabank transaction values each month until and including January 2006. The percentage decline in transaction values comparing October 2005 (the month following termination) to August 2005 is 29.4%. If the three month average transaction value prior to September 2005 is the base for comparison, as was done by Dr. Mathewson, the applicants had lower Scotiabank transaction values each month until and including February 2006. The percentage decline in transaction values comparing October 2005 to the three month average of June-August 2005 is 32.9%.

(2) Since the dollar value of transactions exhibit volatility from month to month, it cannot be known absent further analysis what portion of the observed decline can be attributed to the Scotiabank termination

[117] The business of the applicants is nascent with an established track record that only dates back to September 2003. While the business has exhibited steady, overall growth since that time, the value of transactions at individual financial institutions exhibit significant volatility including significant decreases in dollar value of transactions. For example, transaction values at RBC decreased 29.4% between October and November 2005. Scotiabank itself experienced a 15.7% decrease in the month-over-month value of transactions in the month prior to termination (July to August 2005).

[118] We, thus, find that it is possible that some portion of the observed decline in Scotiabank transactions after September 2005 was attributable to causes other than Scotiabank's termination of the applicants' banking services.

(3) It is possible that some portion of this decline was compensated for by Scotiabank depositors availing themselves of bank accounts at other financial institutions

[119] Mr. Grace testified on cross-examination (without giving the exact number) that as many as half of the Scotiabank customers who transferred more than $1,000 in September 2005 had accounts at more than one bank, and that there was one Scotiabank customer who used the applicants' service who opened a new account after September 2005 at a bank other than Scotiabank.

[120] A table containing information on the applicants' top 20 customers by total paid in May 2006 indicates that one of these customers had bank accounts at Scotiabank and RBC. This customer had $65,815 in transactions at RBC and one $1,000 transaction at Scotiabank in that month.

[121] While there is no direct evidence that any of the Scotiabank depositors who use the applicants' service availed themselves of other bank accounts in response to the Scotiabank termination, we infer from the above evidence that there was a possibility of such action for some unknown portion of Scotiabank depositors. Consequently, we agree with Dr. Mathewson that there is evidence to suggest that "[s]ome customers with an account at both a 'biller services bank' and an 'EMT bank' make GPay payments from both accounts, suggesting that the EMT limits on GPay payments at EMT banks need not have a large negative effect on the total value of GPay payments."

(4) It is possible that Scotiabank depositors availing themselves of other bank accounts might not fully explain the observed period of decline in Scotiabank transactions since there is also evidence of some decline in total transactions over the relevant period

[122] Using September 2005 as the basis for comparison, we find that the applicants experienced a decline in the total dollar value of their transactions, that is, a decline in the total value of transactions processed through all financial institutions, up to December 2005. After that, for each month for which we have data, the total dollar value of the transactions was greater than the total dollar value of transactions in September 2005.

[123] While we have found that September 2005 was an anomalous month in regard to Scotiabank transactions, there is no evidence to suggest this month was anomalous in regard to the applicants' total transactions, and no party suggested any such anomaly. Even though September 2005 was not generally anomalous, it is informative to compare total monthly values post-Scotiabank termination to periods in addition to September 2005. If the comparison is made to August 2005, the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005. If the comparison is made to the three month average of July-September 2005, it remains the case that the only month since the Scotiabank termination that had lower total dollar value transactions was November 2005.

(5) Since the overall decline appears to be limited and given that the data exhibit volatility, we cannot conclude what portion of the observed decline is attributable to the Scotiabank termination

[124] We cannot distinguish between decreases in the dollar value of Scotiabank transactions that are attributable to the Scotiabank termination and those that are attributable to other causes, including fluctuations for which there are no apparent explanations. Nor can we determine the portion of the decrease in Scotiabank transactions that might have been compensated for by Scotiabank depositors availing themselves of accounts at other banks.

[125] As noted above, the applicants' business is a nascent one with little track record and with volatility in growth across financial institutions. In such situations, more analysis is generally required in order to help determine the effect of an inability to obtain supplies of a product.

[126] Analyses that may have shed light on the above were not carried out by the applicants. Such analyses need not be restricted to regression analysis. In this regard, we note that Mr. Grace had the ability to specifically identify and name customers and identify whether they had accounts at more than one financial institution. However, no such evidence was submitted. We agree with Dr. Mathewson that such information would have been valuable. Information that might have proven helpful to the Tribunal includes information on the use of accounts at other banks by Scotiabank depositors to carry out GPAY transactions, any information on regular users who may have stopped using the applicants' services post-termination either permanently or for a significant period of time, or who may have decreased the size of their transactions post-

termination. In this regard, information on the average size and distribution of transactions of Scotiabank depositors pre- and post-transactions may have been informative.

[127] For the reasons described in the preceding paragraphs, we find that the applicants' business may not have been affected in regard to reduced growth in the dollar value of transactions due to their inability to obtain Scotiabank biller services and EMT business deposit accounts at Scotiabank. If they were affected, we find that the decline in the dollar value of transactions was temporary. The total dollar value of transactions processed on a monthly basis was as high as pre-termination (i.e., September 2005) by at least January 2006.

[128] It is possible that the observed decline has had longer term ramifications in that the total value of transactions would have been higher even after December 2005 but for the Scotiabank termination. However, we find that there is insufficient evidence on this point. To indicate that, since Scotiabank termination, transaction values have grown at more rapid rates at other financial institutions, with particular comparison made to BMO, is insufficient to make this point because, as noted above, it is possible that Scotiabank depositors availed themselves of accounts at other banks to make their transactions. Moreover, we agree with Dr. Mathewson's analysis that growth in the applicants' transaction values at bill payee banks is not a good predictor of the growth rates from Scotiabank accounts. Dr. Mathewson compares the monthly growth rate of payments from Scotiabank accounts from January 2004 to August 2005 to that from BMO accounts over the same period. He carries out this comparison through the use of a simple linear regression. We are persuaded by his finding that the estimated coefficient on BMO accounts is statistically insignificant, which implies that growth in transaction values from BMO accounts are associated with zero changes in transaction values from Scotiabank accounts. We also note Mr. Grace's testimony on cross-examination that the applicants did not turn away any transactions post-termination, except in the first two days after termination. Despite this, it is possible that Scotiabank account holders wishing to carry out transactions with the applicants in amounts greater than $1,000 did not do so. We do not, however, have any evidence of this.

[129] In considering whether the applicants were substantially affected in their business due to reduced growth, assuming that there was at least some initial impact, the evidence that the applicants turned away no transactions other than those over a two-day period is relevant. Moreover, the applicants have, without doubt, experienced considerable growth in their transactions since termination. On this last point, Mr. Grace testified on cross-examination that for the 2006 calendar year, he expected that the applicants would process more than $60 million in transactions. This expectation is an increase of about $28 million over the $32.2 million in transactions the applicants processed in 2005. The basis for Mr. Grace's projection is that, as of June 30, 2006, the applicants had already processed transactions ($29.4 million) almost equal to the value of the transactions they processed in all of 2005.

[130] We also note that even if the applicants had experienced a temporary decrease in transactions, Mr. Grace testified that the joint venture earns about 6% on these in revenue, when earnings are calculated to include both foreign exchange and merchant fee revenues. If only merchant fee revenues are included, Mr. Grace testified that the joint venture's revenues are

about 3% of the value of transactions. Once expenses are deducted, the remaining profit is split equally between the joint venture partners. The applicants adduced no evidence concerning the likely impact of any temporary reduction in growth in transactions on profit once all of the above calculations are taken into account.

[131] For the reasons expressed above, we conclude that, on a balance of probabilities, the applicants have not been substantially affected in their business through reduced growth in revenues. We examine next whether they were substantially affected as a result of a fundamental change in growth opportunities.

(ii) Changes in Growth Opportunities

[132] The applicants claim that the termination of their banking services by The Bank of Nova Scotia has substantially affected their business by fundamentally changing their growth opportunities. The applicants argue that they are substantially affected in their growth opportunities because of the $1,000 limit on EMT transfers from Scotiabank (as well as TD and CIBC). The applicants claim that this limitation prevents them from being a viable payment processor for major online merchants, effectively confining them to their present merchant customer base. The applicants concede that, to date, they have been unsuccessful in signing up any significant number of merchants, apart from online casinos and, to a lesser extent, online dating sites. They attribute their initial lack of success to being a new business. They attribute their subsequent lack of success, at least in part, to the TD and CIBC terminations in December 2003, and also the subsequent Scotiabank termination in September 2005 that is the subject of this application.

[133] Mr. Iuso testified that, prior to the termination of biller services by TD and CIBC in December of 2003 (and so prior to the imposition of the $1,000 transaction limit), UMB made marketing approaches to Grocery Gateway, 407 ETR, Air Transat, Red Seal Vacations, Soft Voyage, Rogers, Air Canada, WestJet, Hudson's Bay Company, Sears, Canadian Tire, Fido and LavaLife. None signed up for the UseMyBank Service. On the evidence before us, we find that the applicants' lack of success in gaining "major" online merchants prior to the termination of banking services by CIBC and TD in December 2003 is likely attributable to a variety of reasons. One reason may well be a lack of a track record as a new business. In this regard, we rely upon the evidence of Mr. Jones that his company, WestJet, would consider the length of time a potential supplier had been in business when considering alternate suppliers. At least one potential merchant client, the Government of Canada, advised that it would not use a payment mechanism that required a payor to disclose his or her confidential electronic signature to the payment service provider. The TD and CIBC terminations may have also played a role after December 2003. Again, we rely upon the evidence of Mr. Jones on this point. Mr. Jones' evidence is that WestJet would wish a payment processor to "handle all transactions", suggesting that once the applicants were limited in processing payments over $1,000 at even one bank, their services would become unattractive to a major merchant such as WestJet. This evidence is consistent with that of Mr. Iuso. He testified that, after the TD and CIBC terminations, the UseMyBank Service became less attractive to merchants that sold products or services valued at

more than $1,000. The applicants adduced no evidence as to how the Scotiabank termination worsened this situation. Consequently, it is not clear how the Scotiabank termination exacerbated this pre-existing situation such that there was a "fundamental change" in the applicants' growth opportunities caused by the Bank's termination of banking services.

[134] The applicants rely upon the Federal Court of Appeal decision in *Chrysler* to argue that the fact that other factors may have prevented the applicants from attracting major merchants initially does not mean that the applicants' forced reliance on EMTs after the Bank's termination has not substantially affected their business. In this regard, the Federal Court of Appeal wrote, at page 29, that:

> It is not a requirement of the provision that the refusal to trade and the resulting inability to obtain adequate supplies be the only factor substantially affecting the business: it is sufficient that it have a substantial effect whatever the impact of other factors.

[135] We, of course, accept this to be a binding statement of legal principle. We take from this, that for the purposes of paragraph 75(1)(*a*), the factor of concern is an inability to obtain adequate supplies, and whether this has had a substantial effect on the business.

[136] In the present case, we find that there is no evidence to suggest that the inability to obtain adequate supplies of Scotiabank biller services has substantially affected the applicants' business by fundamentally changing their growth opportunities.

(iii) Conclusion Regarding the Substitutability of EMTs **[CONFIDENTIAL]**

[137] To summarize, we find that the use of EMTs **[CONFIDENTIAL]** by the applicants did not substantially affect the applicants in their business either in terms of revenue growth or growth opportunities. Consequently, we agree with Dr. Mathewson that, by application of the test established in *Chrysler*, deposit accounts **[CONFIDENTIAL]** that allow for the deposit of EMTs are in the same product market as Scotiabank biller services. **[CONFIDENTIAL]**.

[138] **[CONFIDENTIAL]**. A substantial increase in the risk to a business can result in a substantial effect on that business.

[139] **[CONFIDENTIAL]**.

[140] **[CONFIDENTIAL]**.

[141] **[CONFIDENTIAL]**.

(3) Conclusion in Regard to 75(1)(*a*)

[142] In sum, in regard to 75(1)(*a*), we conclude that the appropriate test for defining markets is that found by the Tribunal in *Chrysler*. In this matter, we find, as a fact, that the relevant product market is biller status at the Bank and deposit accounts **[CONFIDENTIAL]** that allow for the deposit of EMTs. Upon termination of banking services by the Bank, the applicants replaced these services with EMTs into **[CONFIDENTIAL]** deposit accounts at other banks, such that, we find, they were not substantially affected in their business either from the perspective of reduced growth in revenues or a change in growth opportunities. It follows that they failed to demonstrate that they are substantially affected in their business due to their inability to obtain adequate supplies of a product anywhere in a market on usual trade terms as paragraph 75(1)(*a*) of the Act requires.

[143] As noted above, the applicants are required to establish that they meet each requirement of subsection 75(1). Thus, the finding that the applicants were not substantially affected in their business as a result of the Bank's termination of banking services is fatal to the applicants' claim.

[144] However, the parties adduced evidence relevant to the other requirements and made submissions with respect to the remaining requirements. In light of that, and in the event we are wrong in our conclusions with respect to paragraph (a), we continue with our analysis.

B. Have the applicants met the onus to establish that they were unable to obtain adequate supplies of the product because of insufficient competition?

[145] As a matter of law, paragraph 75(1)(*b*) of the Act contains two requirements. First, there must be insufficient competition among suppliers of the product at issue. Second, the inability of the refused party to obtain adequate supplies of the product must result from that insufficient competition. In the present case, the material consideration is, in our view, whether the refusal of the Bank to provide the applicants with bill payee status and accounts to receive EMTs was because of insufficient competition.

[146] This causal requirement was considered by the Tribunal in *Xerox*, cited above. There, the Tribunal concluded, at page 116, that insufficient competition must be the "overriding reason" for the refusal to deal. The Tribunal also considered that the "conduct of the complainant or the administrative burden or other costs placed upon a supplier" might well lead it to conclude that the inability to obtain the refused product did not result from insufficient competition, but "rather for objectively justifiable business reasons".

[147] We agree that, as a matter of law, any inference that insufficient competition led to a refusal to deal may be rebutted by evidence that shows an objectively justifiable business reason.

[148] Turning to the evidence before us, for the reasons that follow, we are satisfied, and find as a fact, that the Bank's decision to terminate the applicants' banking services was motivated by objectively justifiable business reasons. Those reasons were:

(i) The use of the UseMyBank Service required the Bank's depositors to violate their Cardholder Agreements. Irrespective of this, the disclosure of a customer's electronic signature exposed the Bank to legal and reputational risks;

(ii) The applicants at all material times failed to meet all of the obligations imposed upon them as a money services business by the PCMLTF Act and associated regulations. This put the Bank at regulatory and reputational risk; and,

(iii) The provision of accounts for EMT deposits to the applicants would likely result in the Bank violating Rule E2 of the Canadian Payments Association. This again posed regulatory and reputational risk to the Bank.

[149] Each reason is considered in turn.

(1) The applicants require disclosure of each customer's electronic signature

[150] As noted above, the applicants require disclosure of each customer's electronic signature. Mr. Iuso agreed on cross-examination that such disclosure gave UMB access to all of the banking services that are accessible online to that customer. This could include access to lines of credit, credit cards and all of the customer's bank accounts. Where, for example, the customer had not identified GPAY as a bill payee, UMB would do so on the customer's behalf.

[151] The ScotiaCard Cardholder Agreement provides:

> You are responsible for the care and safety of the card and your electronic signature. <u>You will keep your electronic signature confidential; secure from all persons without exception</u> and apart from the card at all times. You are liable for all card transactions incurred using your electronic signature.
>
> [underlining added]

[152] Advice provided to cardholders on Scotiabank's website, on a page dealing with the Bank's online security, is as follows:

> Your Scotia OnLine password is confidential and must never be shared with any outside person or company, including:
>
> ...
>
> • Services that collect your card number and password, or any other confidential information, to perform transactions on your behalf or to collect payment from you.

...

In divulging your password, you contravene the terms of your ScotiaCard Cardholder Agreement and you will be fully liable for any unauthorized access to your accounts and all associated losses arising from these disclosures.

[153] These provisions, and other steps the Bank takes, as described in more detail by Mr. Rosatelli, reflect the importance to the Bank of keeping a customer's electronic signature confidential. We accept without reservation Mr. Rosatelli's evidence that:

(i) In the absence of face-to-face transactions and a signature, the password used in conjunction with the ScotiaCard number acts as the authentication of a customer.

(ii) This method of customer authentication is fundamental to the electronic banking system because it is what ensures the security of customer accounts.

(iii) If passwords are compromised, there would be a decrease in customer confidence in the electronic payment system.

(iv) The Canadian Payments Association reports that 20 million electronic payments are processed daily in Canada. Those payments account for approximately $164 billion being exchanged daily through the electronic network.

[154] Confirmatory evidence of the importance of keeping electronic signatures secure was given by Ms. Graham-Parker and by the applicants' expert Mr. Bensimon. On cross-examination Mr. Bensimon agreed that a breach of confidentiality in respect of banking card customer passwords would result in a significant reputational and legal risk for the Bank.

[155] The applicants argue that the evidence does not support the Bank's assertion that it is a breach of the Cardholder Agreement for a customer to voluntarily disclose his or her electronic signature because:

(i) The Cardholder Agreement "acknowledges and permits that there may be authorized uses of the cardholder's electronic signature by others".

(ii) The Bank became aware in 2003 that electronic signatures were being used in the UseMyBank Service, yet it continued to supply banking services to the applicants.

(iii) The Bank has not barred RBC from receiving bill payments from Scotiabank customers, despite the fact that RBC's account aggregation service, CashEdge, also requires disclosure of a customer's electronic signature.

[156] We deal with each submission in turn. In our view, as a matter of law, the Cardholder Agreement, properly interpreted, does not authorize disclosure of a customer's electronic

signature. In arguing the contrary, the applicants rely upon the portion of the Cardholder Agreement that deals with the cardholder's responsibility for account activity. That portion provides, in material part:

> You are liable for all debts, withdrawals and account activity resulting from:
>
> - Authorized use of the card by persons to whom you have made the card and/or electronic signature available.
>
> - Unauthorized use of the card and/or electronic signature, where you have made available for use the card and electronic signature by keeping them together or in such a manner as to make them available for use, until we have received notice of loss, theft or unauthorized use.
>
> You will not be liable for losses in circumstances beyond your control. Such circumstances include:
>
> - Technical problems and other system malfunctions.
> - Unauthorized use of a card and PIN
>
> - after the card has been reported lost or stolen;
> - the card is cancelled or expired or
> - you have reported the PIN is known to another person.
>
> You will be considered as contributing to the unauthorized use of the card and/or electronic signature and will be fully liable for all debts, withdrawals and account activity where:
>
> - The electronic signature you have selected is the same as or similar to an obvious number combination such as your date of birth, bank account numbers or telephone numbers.
>
> - You write your electronic signature down or keep a poorly disguised written record of your electronic signature, such that it is available for use with your card, or
>
> - You otherwise reveal your electronic signature, resulting in the subsequent unauthorized use of your card and electronic signature together.

[157] In our view, this wording is insufficient to contradict the express admonition to keep the electronic signature confidential and secure from "all persons without exception". What the provision does is to make it clear that where the cardholder acts contrary to that obligation, the cardholder will be liable for all resulting transactions, whether specifically authorized or not.

[158] Whether or not, as a matter of law, cardholders indeed breached the terms of the

Cardholder Agreement when authorizing UMB to access their online accounts, the Tribunal, relying upon the evidence of Mr. Rosatelli, Ms. Graham-Parker, and Mr. Bensimon, concludes that the Bank viewed such conduct to pose a material risk to the security of its electronic banking system. The evidence of these witnesses is consistent with the alert issued by the Canadian Bankers Association, referred to above at paragraph 19.

[159] Further support for the view that the Bank had objective and *bona fide* concerns with the applicants' mode of doing business is also found in the potential for fraud in the applicants' accounts. Mr. Grace acknowledged that one potential source of fraud in the applicants' accounts arises when an individual compromises a customer's confidential banking identification and then uses that information to perpetuate frauds through the applicants' accounts.

[160] The legitimacy of the Bank's concern with respect to the potential for fraud is supported by a policy statement of the Canadian Payments Association, approved on December 1, 2004. There, the association noted:

> Fraud perpetrated in the on-line environment has the potential to profoundly impact consumers' financial well-being, create lasting negative public opinion of financial institutions and the payments system overall and to ultimately subject the payment system and its participants to possible legal challenges.

[161] The Tribunal accepts the evidence of Messrs. Monteath, Rosatelli and King that the risk the Bank was exposed to as a result of the disclosure of its customers' electronic signatures (including the risk of fraud) constituted an objectively justifiable business reason that led the Bank to terminate the applicants' banking services.

[162] As to the fact that the Bank learned in 2003 that some customers were using the UseMyBank Service and thus compromising their electronic signatures, we accept Mr. Rosatelli's explanation (which was not significantly impugned on cross-examination) that due to the relatively small number of customers and transactions, the Bank chose at that time to deal with the matter by communicating directly with each customer. Such a response does not, in our view, diminish the genuine and serious nature of the Bank's concern.

[163] We acknowledge that the Bank's witnesses agreed that the Bank had not barred RBC from being a bill payee, notwithstanding the Bank's knowledge that RBC's CashEdge service requires disclosure of a customer's banking number and password. However, the evidence is unchallenged that the Bank has written three cease and desist letters to RBC with respect to the use of electronic signature, and that the Bank is searching for a technical solution so as to block the ability of Scotiabank customers to access their Scotiabank accounts through CashEdge. In those circumstances, we find that the Bank's knowledge of how CashEdge works is an insufficient evidentiary basis upon which to conclude that the Bank was not motivated by objectively justifiable business reasons when it relied upon the disclosure of confidential customer information as one reason for terminating the applicants' banking services.

(2) Ability to Meet Legislative and Regulatory Obligations

[164] It is not in dispute that, in regard to money laundering and terrorist financing, the following legislation is applicable to the Bank and the applicants:

(i) The PCMLTF Act (legislation that is primarily concerned with the disguising of illegitimate funds for use in criminal or terrorist financing);

(ii) The PCMLTF Regulations, SOR/2002-184;

(iii) Financial Transactions and Reports Analysis Centre (FINTRAC) interpretative guidelines as they relate to the PCMLTF Act, which, among other things, set out the reporting and record-keeping requirements of financial institutions and money services businesses;

(iv) Office of the Superintendent of Financial Institutions (OSFI) guidelines, which, among other things, identify some of the steps that federally regulated financial institutions should take to assist their compliance with the various legal requirements related to deterring and detecting money laundering and terrorist financing.

[165] The Bank argues that doing business with the applicants would result in the violation of the following regulations:

(i) The third party determination rule as contained at section 5.1 of FINTRAC Guideline 6G: this rule provides that when a bank determines its account holders are acting on behalf of a third party, the bank must keep a record that sets out the third party's name, address and the nature of the principal business or occupation of the third party. The Bank contends that its consequent record-keeping obligations would be beyond the scope and ability of its existing systems. In particular, the Bank contends that it would be obliged to keep the name, address, and principal occupation for all customers transferring funds to the applicants through the bill payment system, all of the banking customers sending EMTs to the applicants, and all the merchant clients to whom funds are directed. In regard to this last alleged obligation, the Bank argues that it would be impossible for it to do so since the applicants themselves do not have this information.

(ii) The PCMLTF Regulations and the Guidelines as they relate to money services businesses, in particular FINTRAC Guideline 6C which sets out the record-keeping and client identification requirements of a money services business: the Bank argues that the applicants, who admitted to being a money service business only at the commencement of this hearing, are unaware of their consequent reporting and record-keeping obligations. The Bank also argues that the reports the applicants currently make to FINTRAC do not come close to meeting their

obligations. In particular, the Bank argues that the applicants are non-compliant because they do not identify banking customers by reviewing an original piece of identification, do not keep a large transaction record when someone is transferring – either receiving or sending – $10,000 or more using the applicants' services, and do not meet their third party record-keeping obligations. The Bank argues that any failure of the applicants to meet their record-keeping obligations would prevent the Bank from complying with its own record-keeping obligations.

[166] We begin consideration of the above and related issues by reviewing the evidence of the applicants' anti-money laundering expert. Mr. Bensimon provided his opinion that:

(i) The applicants' business is a money services business as defined in the regulations to the PCMLTF Act.

(ii) As a money services business, the FINTRAC rules require the applicants to conduct reasonable due diligence in verifying customer identity, to have appropriate compliance policies and procedures, and to develop, implement and maintain an effective anti-money laundering program.

(iii) The applicants had several anti-money laundering regulatory compliance gaps relating to the following: the lack of a designated compliance officer; the need for enhanced compliance policies and procedures; the need for independent testing of those policies and procedures; and, the need for an ongoing compliance training program.

(iv) The risks that the Bank is exposed to if it does business with the applicants include: deploying resources to regularly monitor the account for suspicious activity; ensuring the applicants have strong internal compliance controls to mitigate the risk of its employees abusing their access to customer bank card numbers and passwords; and taking reasonable steps to ensure the applicants are complying with FINTRAC requirements as a money services business.

(v) On balance, "the MSB [money services business] account of the Applicant represents a low inherent risk for the bank as far as AML [anti-money laundering] risk exposure is concerned."

[167] Mr. Bensimon's opinion was, however, in our view, substantially modified on cross-examination. There he agreed that:

(i) In addition to complying with the PCMLTF Act and regulations, the applicants were obliged to follow other applicable guidelines as they relate to money services businesses.

(ii) Pursuant to Guideline 6C, the applicants had record-keeping and client identification obligations. (We note that Mr. Grace had acknowledged in cross-examination that he was not aware of what the reporting and record-keeping obligations of a money services business were.)

(iii) When the applicants transfer $10,000 or more to one of their merchant customers they are obliged to keep a large cash transaction record, identify the recipient and make a third party determination. (We note that there was no evidence that they do so.)

(iv) Mr. Bensimon had seen no evidence that the applicants complied with their obligation as to proper identification of an individual as articulated in section 4.4 of Guideline 6C.

(v) When the applicants send $10,000 or more out of Canada to a merchant customer, they are required to make a report to FINTRAC. (We note that Mr. Grace testified that such an obligation was only imposed upon the bank that transmitted the funds.)

(vi) For money that is being sent by the applicants to payment processors (which accounts for 98% of the applicants' transactions), the applicants are obliged to record the third party's name, address and principal business or occupation (i.e., to record information with respect to the party to whom the applicants' merchant customer is ultimately transmitting the funds). Mr. Bensimon saw no evidence that the applicants were compliant with this requirement. (We note that Mr. Grace acknowledged on cross-examination that he did not know where the money is sent after it is received by the overseas payment processors.)

(vii) A money services business should have general familiarity with the watch list of non-cooperative countries and territories published by the Financial Action Task Force on Money Laundering, particularly where the business is transmitting millions of dollars offshore. (We note that on discovery, Mr. Grace had testified that it did not matter to the joint venture in which jurisdiction a merchant management company was incorporated, and that he had never been provided with a copy of the watch list.)

(viii) The gaps he identified with respect to the applicants' anti-money laundering regime were consistent with a company or companies that really do not understand or take responsibility for their anti-money laundering obligations.

(ix) If a customer of the Bank did not accept that it was a money services business, and if the customer did not comply with its own anti-money laundering obligations, the Bank could not comply with its own record-keeping and reporting obligations.

(x) With respect to his opinion that the applicants posed a low risk to the Bank if it continued providing services to the applicants, Mr. Bensimon admitted that:

- In preparing his opinion, he had proceeded on the basis that the average transaction processed by GPAY was $82. He was unaware that RBC customers could transfer up to $100,000 at a time. This was a material consideration to his opinion.

- He was unaware that U.S. residents with Canadian bank accounts could use the applicants' service. This was a relevant factor he had not considered. The relevance was that the applicants would also have to contend with the U.S. anti-money laundering regime.

- He was not aware that, until his report was received, the applicants had denied that they carried on a money services business. This elevated the risk to the Bank.

- He was unaware that the applicants had not initially responded to the Bank's request for a copy of the joint venture agreement. Not having the joint venture agreement created an elevated risk exposure to the Bank.

- He was unaware that at times Mr. Grace had been unwilling to disclose the identity of the applicants' merchant customers to the Bank, and instead took the position that the Bank's interest should only be with what happens to the money flowing from the Scotiabank accounts. Mr. Bensimon agreed that Mr. Grace's position was contrary to the Bank's legislated obligation to have a verifiable audit trail.

- He did not know that the applicants had refused to produce to the Bank the contracts with their merchant clients. This provided an elevated risk exposure to the Bank.

- He was unaware that Mr. Grace had no idea where the money went after it was sent by the applicants to their merchant customers. This too provided an elevated risk exposure and cause for concern for the Bank.

- He was unaware that the applicants did not know who owned the payment processing companies to which the applicants sent funds, and did not know the actual business of the payment processors. This was a material gap in the applicants' anti-money laundering plan and it too elevated the risk to the Bank.

[168] In our view, Mr. Bensimon's initial view that the applicants' business represented an

overall low risk to the Bank was substantially discredited by the admissions he made during his cross-examination. As well, in our view, he confirmed the veracity of the Bank's concerns in regard to FINTRAC Guidelines 6C and 6G. We give particular weight to his admission that if a Bank's customer does not comply with its own anti-money laundering obligations, the Bank cannot comply with its record-keeping and reporting obligations.

[169] The evidence of the Bank's anti-money laundering expert, Mr. Mathers, also confirmed the legitimacy and *bona fides* of the Bank's stated concerns. We found Mr. Mathers to be a knowledgeable witness. His opinion was cogent, consistent with the regulatory scheme, and was not significantly impugned on cross-examination.

[170] We accept Mr. Mather's opinion that:

(i) Mr. Grace had provided false information to the Bank when he answered the money laundering question in the course of an account opening. When asked "And will this account be used to conduct business on behalf of someone other than the named account holder?" Mr. Grace had responded "No". (We note that on cross-examination Mr. Bensimon also agreed that this answer was incorrect.) This answer prevented the Bank from meeting its own obligations under the PCMLTF Act and Regulations.

(ii) The products and services of online gaming websites that offer casino gaming and sports wagering can be, and frequently are, used by criminals to launder the proceeds of crime.

(iii) The applicants' business model allows customers to transfer funds to unknown entities and, in part, entities that have not been vetted by the Bank. If the Bank allows such transactions to take place, it may be allowing inappropriate or illegal transactions in violation of the PCMLTF Act.

(iv) Because the applicants' merchant customers are not required to disclose sufficient information to comply with the PCMLTF Act requirements, and because no steps are taken to verify the accuracy of the information provided, the applicants and UMB are at risk of assisting money laundering.

(v) If the applicants operated accounts at the Bank, both UMB and its customers who used the service to transfer funds, would fall within the definition of a third party in the applicable legislation. As a result, the Bank would be obliged to comply with sections 9 and 10 of the regulations to the PCMLTF Act relating to client identification, third party determination and record-keeping (all as described in FINTRAC Guidelines 6C and 6G as discussed above). In order to comply with those provisions, the Bank would be obliged to obtain information and keep records about all of the applicants' customers, including: the banking customers'

name, address, occupation (or the nature of their principal business); and, the nature of the relationship between the banking customer and the applicants.

(vi) The applicants are a very high risk banking client for any Canadian Schedule 1 Chartered Bank.

[171] Mr. Ronald King, the Chief Anti-Money Laundering Officer for the Scotiabank group of companies also testified in regard to regulatory and legislative issues. His evidence was supported by the contents of the Bank's Anti-Money Laundering Handbook, the PCMLTF Regulations, and FINTRAC and OSFI Guidelines. The Anti-Money Laundering Handbook confirms, in our view, that the Bank takes its regulatory obligations seriously and demonstrates that the Bank has developed a standard approach to all businesses that seek its services. As much of Mr. King's evidence was grounded in the Handbook and the regulatory scheme, we accept it as being cogent and credible. As well, we were impressed by Mr. King's obvious knowledge of the regulatory environment, his professionalism, and the balance or fairness he showed in his evidence. His evidence was not significantly modified on cross-examination and we accept his evidence that:

(i) The design of the applicants' business model facilitates anonymity in that the applicants remit bulk payments to a third party which often is a money services business. Because the applicants do not transmit funds to the ultimate beneficiary, the audit trail is severed.

(ii) The Bank's Anti-Money Laundering and Anti-Terrorist Financing Handbook sets out the standards the Bank is expected to apply.

(iii) Even where a potential customer is a high risk customer, and not a restricted or prohibited customer, the Handbook requires that the Bank not enter into a banking relationship where the legitimacy of the source or ultimate destination of funds passing through an account cannot be determined.

(iv) There were a number of factors that caused the Bank concern about continuing a relationship with the applicants. In his words:

> They involve such things as the nature of the business model, that it involved offshore payments; the nature of the business model and that it seemed to have a high percentage of Internet gambling payments that were of grave concern to us. It was also a concern that their process afforded anonymity to the remitter of the funds which would make it attractive and potentially something that could be abused by the money laundering - - a person wishing to launder money. We were also concerned that the seeming weakness in compliance structure within UseMyBank would make it very difficult for them to effectively manage their risks or meet their compliance obligations.

[underlining added]

(v) In the course of the 2005 investigation the Bank conducted in connection with the applicants' business, it was the recommendation of the anti-money-laundering group that the Bank terminate its relationship with the applicants.

[172] From all of this evidence, we take the following: the applicants were not compliant with their anti-money laundering obligations when the Bank decided to terminate the banking relationship; in consequence, the Bank probably could not, and it believed it could not, discharge its own legislated and regulated compliance obligations. We, thus, find that the Bank was motivated by an objectively justifiable business reason, namely a concern that it would not be able to meet its regulatory obligations when it decided to terminate the applicants' banking services.

(3) Rule E2 of the Canadian Payments Association

[173] Dr. James Dingle, a former Deputy Chairman of the Board of Directors of the Canadian Payments Association, testified in connection with Rule E2 of the Canadian Payments Association. His evidence was objectively grounded in the contents of Rule E2 and other Canadian Payments Association documentation, and was presented cogently and with consistency. Because of that, and his significant experience, the Tribunal found him to be a knowledgeable, credible and reliable witness. His evidence was not, in our view, diminished in any significant way on cross-examination. We accept his expert testimony that:

(i) Pursuant to the *Canadian Payments Act*, R.S.C. 1985, c. C-21, the Bank must be a member of the Canadian Payments Association and must adhere to its rules. Those rules govern the exchange, clearing and settlement of various types of payment items.

(ii) Rule E2 of the Canadian Payments Association, implemented February 3, 2005, deals with the exchange, clearing and settlement of electronic online payment items, including EMTs. Section 5(a) of the Rule states:

> In all matters relating to the Exchange, Clearing and Settlement of On-line Payment Items for the purposes of Clearing and Settlement, each Member shall respect the privacy and confidentiality of the Payor and Payee personal and financial information in accordance with applicable Canadian provincial and federal legislation governing the treatment of personal and financial information.
>
> [...]
>
> For greater clarity, the Payor's [i.e. the banking customer's] personal banking information, such as but not limited to the authentication

> information (e.g., user identification and password) and account balance, shall not be made available at any time to the Acquirer and/or Payee [i.e. the applicants] during the On-line Payment Transaction session

(iii) If the Bank were required to continue to offer banking services to the applicants, the Bank either would have to clear the EMTs received from other members of the Canadian Payments Association in breach of Rule E2, or not clear any of the EMTs transferred into the applicants' accounts at the Bank.

(iv) Breach of Rule E2 would expose the Bank to both regulatory and reputational risk, including the risk of compliance proceedings for breach of Rule E2.

(v) The Canadian Payments Association has defined a reputational risk as follows:

> Reputational Risk is the risk of significant negative public opinion that results in a critical loss of funding or customers. This risk may involve actions that create a lasting negative public image of, or loss of public confidence in, the overall operations of a Financial Institution or the payments system…

[174] The applicants do not appear to challenge this evidence. In closing argument they simply observe, correctly, that this rule, while applying to EMTs, does not apply to bill payments that are processed within the Bank. That is bill payments that move from the Bank's customer to the Bank's bill payee, without entering the Canadian Payments Association's Inter Member Network.

[175] Messrs. Monteath, Rosatelli and King testified that the fact the applicants' business requires disclosure of customers' ScotiaCard number and password was one of the reasons the Bank decided to terminate the applicants' banking services. As set out above, we have accepted that evidence and found that to have been the case. Further, Dr. Dingle's opinion provides objective, independent confirmation of the importance to the Bank of the protection of the confidentiality of its customers' electronic signature. His evidence supports the *bona fides* of the Bank's concern about the disclosure of its customers' private banking information and it goes to establishing to our satisfaction that the decision to terminate the applicants' banking services was based upon an objectively justifiable business reason.

(4) Other Business Justifications Raised by the Bank

[176] The Bank also argues that the following objectively justifiable business reasons existed for terminating the applicants' banking services: the applicants' business is likely in breach of section 202 of the *Criminal Code*, R.S.C. 1985, c. C-46 (relating to illegal gambling) and it is probable that the Bank would in turn be in breach of the *Criminal Code* if it is required to provide accounts and services to the applicants; online gambling is prohibited by the laws of the

United States and this too exposes the Bank to the risk of prosecution; and, the Bank is exposed to reputational risk and potential class actions because the applicants receive a profit on foreign exchange that they do not disclose to either the bank customers for whom they are agents, nor the payment processor companies for whom they are trustees.

[177] We deal with the issue of U.S. law below in the context of the discretionary nature of the relief sought.

[178] With respect to the effect of the *Criminal Code* and foreign exchange profit, we do not find the Bank's arguments to be as cogent as those discussed above. However, we do not find it necessary to reach any final conclusion with respect to these two arguments.

(5) Conclusion with Respect to Paragraph 75(1)(*b*)

[179] In our view, the impact, or potential impact, upon the Bank caused by the disclosure of its customers' confidential banking information, and the related potential for fraudulent transactions in the applicants' accounts, the regulatory concerns we have found to exist, and the impact of Rule E2 are such that we are satisfied that the Bank's refusal to supply any services and accounts to the applicants was not due to insufficient competition among suppliers in the market. Rather, the termination of banking services was the result of objectively justifiable business reasons.

[180] In concluding our analysis of this issue, we observe that we have been mindful throughout of the timing of the termination of the applicants' services in light of the launch of Interac Online. Aside from the coincidence of timing, we have found no evidence that would enable us to conclude that the existence or pending status of Interac Online was at all a relevant consideration when the decision was made to terminate the applicants' banking services. Rather, we find as a fact that the termination was done for valid business reasons.

C. Have the applicants established that they are able to meet the usual trade terms?

[181] The Bank argues that the applicants are not able to meet the usual trade terms on which EMT accounts and/or bill payee services are offered. Specifically, the Bank argues that:

(i) EMT accounts are only offered by Scotiabank to small businesses, and the applicants are not now, and at the time of termination were not, a small business.

(ii) The applicants cannot comply with the terms of the Bank's Bill Payment Agreement.

[182] The applicants argue, correctly, that the expression "trade terms" is defined precisely and restrictively for the purposes of section 75 in subsection 75(3). For ease of reference that subsection provides:

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.	3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

[183] In response, the Bank argues that restricting EMTs to small businesses, and the terms found in its Bill Payment Agreement are "reasonable technical and servicing requirements".

[184] There are, in our view, two significant difficulties with this submission. First, it is a principle of statutory interpretation that bilingual legislation may be construed by determining the meaning shared by the two versions of a provision. Once a common meaning is found, one must then confirm that such meaning is consistent with the purpose and scheme of the Act. (See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Toronto: Carswell, 2000) at pages 324, 326-329; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at pages 80-81.)

[185] Dictionaries generally define the word "entretien" as "maintenance" or "upkeep". See, for example:

- *Le Robert & Collins Dictionnaire Français-Anglais – English-French* defines entretien as :
(a) (*conservation*) [*jardin, maison*] upkeep; *[route]* maintenance, upkeep; *[machine]* maintenance [...]
(b) (*aide à la subsistance*) *[famille, étudiant]* keep, support; *[armée, corps de ballet]* maintenance, keep [...]
(c) *(discussion privée)* discussion, conversation [...]"
[4th ed., s.v. "entretien"]

- The *Larousse French English/ English French Dictionary* sets out the following definitions:

"servicing" *n.* 1. [of heating, car] entretien *m.* 2 [by transport] desserte *f.*

"entretien" *nm.* 1. [maintenance] maintenance, upkeep [...] 2. [discussion – entre employeur et candidat] interview – [colloque] discussion [...]
[2003 ed, s.v. "entretien" and "servicing"].

[186] Thus, adopting the shared meaning principle of statutory interpretation, one could reasonably conclude that the terms "servicing" and "entretien" refer to the upkeep or maintenance requirements that a supplier imposes on a purchaser so as to ensure that proper services are available to the ultimate purchaser with respect to the product purchased. We find

nothing in that interpretation that is *per se* inconsistent with the scheme or purpose of the Act.

[187] However, that more restrictive interpretation would not, in our view, be broad enough to include the contractual type limitations that the Bank imposes upon its customers by, for example, restricting EMTs to small businesses.

[188] Second, the more restrictive interpretation argued by the applicants appears to be consistent with the legislative history of the provision. We note, parenthetically, that the legislative history, Parliamentary debates, and similar material may properly be considered when interpreting a statute, so long as the history is relevant, reliable and not assigned undue weight. (See Reference re: *Firearms Act (Canada)*, [2000] 1 S.C.R. 783 at paragraph 17; and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 35.)

[189] We find the following comments of the then Ministers of Consumer and Corporate Affairs to be relevant:

- On April 30, 1974, Herb Gray, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs with respect to Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl., 1974). The following was said with respect to "usual trade terms":

> **Mr. Atkey:** Another concern is with the term "usual trade terms", which appears in proposed Section 31.2(b) on page 16. You made reference in an earlier section to the fact that the "usual trade terms" demanded by a distributor or a manufacturer might not only include aspects of price, it might also involve aspects of technical services as a requirement.
>
> **Mr. Gray:** That is right.
>
> **Mr. Atkey:** You say that that would be a reasonable interpretation of the term "usual trade terms". Would you be willing to consider an amendment to specifically provide that that is what it means, because I would suggest there have been some concerns expressed that where distributors or manufacturers are concerned about selling their product or making it available to various retail outlets that service, the extent and the quality of service that is provided in respect to the sale of that product is sometimes as important, or more important, than the actual price, and there is a great fear abroad right now that the phrase "usual trade terms" only refers to price and if there was a broader definition I think it might allay some of those fears, so that the service element which I would suggest to you is of equal concern to the consumer today would be taken into account by the RTPC by virtue of statutory directives.

Mr. Gray: Frankly, I think the type of thing you are talking about is covered in the present wording of proposed Section 31.2(b):

(b)...is willing and able to meet the usual trade terms of the supplier or suppliers of such product in respect of payment, units of purchase and otherwise...
[underlining added]

However, I would be happy to receive suggestions from the Committee if it is felt that this could be further clarified.

I think one would have to be careful not to insert words that might be considered to be unduly remedying and would prevent the Commission from taking into account what might otherwise be considered to be acceptable definitions of the term "usual trade terms" but would not be covered by it. After all, one of the benefits that I think comes from using a form of civil jurisdiction is that there is the potential for flexibility in looking at the vast range of situations that can arise in an economy as complex as our own. But, as I say, I would be happy to have the views or the suggestions of the Committee on this.

[...]
Mr. Jarvis: [...] Can I go on, for a minute, to usual trade terms? Again, I will relate it to the furniture industry; I think it is a good example because it is a highly competitive industry and generally composed of small businesses even at the manufacturing level:

Often a requirement of a furniture manufacturer is not only usual trade terms in respect of payment units of purchase.

I do not know what "and otherwise" might mean, but it may mean the training of that retailer salesman by the manufacturer's marketing staff; it may mean an undertaking by the retailer to supply so many square feet of display room; it may also mean his undertaking to warehouse a certain number of units in various colours. My question is: in the opinion of the Minister and his officials, do the words "and otherwise" as purportedly they modify usual trade terms cover that type of conditions of sale, which is a vital thing in many consumer products?

Mr. Gray: In my view they could cover the type of things you mentioned provided, of course, that on the facts they are usual in that market, strictly as a matter of fact.

> **Mr. Jarvis:** My question is dictated, Mr. Minister, because remembering the interpretation of many of these clauses at law, the words "and otherwise" are often taken – I forget the Latin maxim for this – *ejusdem generis*. I have not heard that since law school, *ejusdum generis*. In other words, the words "and otherwise" can only be taken within the context of respect of payment and units of purchase. You cannot go beyond that in a legal interpretation of those words. That is what I am afraid we might be faced with in so far as the Commission is concerned with the words "and otherwise" here.
>
> **Mr. Gray:** I raised this with our legal draftsmen and they have told me this is not the case. As far as I am concerned, this is an area I am examining for possible clarifying amendment because I personally do not intend the clause to be interpreted in the *ejusdem generis* sense.
>
> [Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 9, April 30, 1974, 2nd Sess., 29th Parl., p. 9:24-25, 9:31-32.]

• When André Ouellet, the then Minister of Consumer and Corporate Affairs, appeared before the Standing Committee on Finance, Trade and Economic Affairs on December 3, 1974, he stated as follows with respect to the refusal to deal clause found in Bill C-2 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess., 30th Parl., 1974):

> I should like also to remind you that many representations have been made to the effect that a manufacturer may legitimately claim the right to refuse to supply a customer if the latter is not in a position to distribute the product adequately from all points of view. We have therefore made an amendment to recognize this right. The commission will not be able to force a supplier to supply a customer if the latter does not satisfy all professional and other requirements that usually govern the marketing of the article concerned.
>
> [...]
>
> [Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 15, December 3, 1974, 1st Sess., 30th Parl., p. 15:12.]

[190] The proposed provision underlined above was ultimately not enacted. This shows an intent to strictly limit what was meant by trade terms. The definition of trade terms is restricted and provides that the phrase "trade terms" "means", as opposed to "includes", the three things

articulated in the definition.

[191] We take from the debates set out above that the parliamentarians' attention appears to have been focused upon the situation prevailing between manufacturers and dealers. However, in subsection 2(1) of the Act, "product" is defined to include an article and a service. In our view, the case may be made that the restrictive definition of "trade terms" in subsection 75(3) of the Act is not appropriate where the product at issue is a service. For example, having regard to the use of the word "entretien" in the French version, it is at least arguable that in the context of the provision of services such as banking services the concept of "units of purchase" and "technical and servicing requirements" have little obvious application. Put another way, in the context of the provision of services, it may be unrealistic and not commercially sound to restrict "trade terms" to those relating to payment, units of purchase and the services that surround those units of purchase.

[192] It may be that this is an issue that should be considered if amendments to the Act are contemplated in the future. For our purpose, in view of our findings with respect to paragraphs 75(1)(*a*) and (*b*), it is not necessary to reach a final decision on this point.

[193] All of this is not to say that a failure by a person to meet other usual contractual terms that do not fall within the definition of trade terms is irrelevant. Such a failure may establish that the inability to obtain a product is not a result of "insufficient competition" within the meaning of paragraph 75(1)(*b*). It may also be relevant to the discretionary nature of the relief available under section 75. In the present case, we deal below with the Bank's restrictions upon EMT accounts and bill payee status when we discuss the exercise of discretion.

[194] It is not necessary for us to consider, and we do not, whether the services are in ample supply as required by paragraph 75(1)(*d*). We do however wish to turn to the final required element found at paragraph 75(1)(*e*).

D. Have the applicants established that the refusal to deal is having, or is likely to have, an adverse effect on competition in a market?

[195] We address this requirement first by considering what is meant by "an adverse effect on competition in a market". We then consider whether the applicants have established that the Bank's refusal to provide them with bill payee status and EMT deposit accounts is having, or is likely to have, an adverse effect on competition in a market.

(1) The Meaning of an Adverse Effect on Competition in a Market

[196] Because paragraph 75(1)(*e*) is new, we find it of assistance in interpreting the phrase "competition in a market" as used in paragraph 75(1)(*e*) to consider how paragraph 79(1)(*c*) of the abuse provisions of the Act has been interpreted. Paragraph 79(1)(*c*) requires consideration of whether the impugned conduct "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market". This provision was considered by the

Federal Court of Appeal in *Canada (Commissioner of Competition) v. Canada Pipe Corporation Ltd.*, 2006 FCA 233, leave to appeal to the Supreme Court of Canada requested. There, at paragraph 36, the Federal Court of Appeal wrote:

> [t]wo aspects of the scope of paragraph 79(1)(c) are immediately evident from the wording. First, the effect on competition is to be assessed by reference to up to three different time frames: actual effects in the past or present, and likely effects in the future. Second, the effect on competition which must be proven to ground an order prohibiting an abuse of dominance is one of substantial preventing or lessening. The requisite assessment is thus a relative one [...].

[197] The similar wording in 75(1)(*e*) in regard to time frames, albeit limited to two rather than three time frames, and the concern with the effect on competition also suggest, in our view, that the paragraph demands a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal.

[198] Comparative analysis in regard to competition in a market requires consideration of relative competitiveness: "... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice ..." (See *Canada Pipe*, cited above, at paragraph 37). This relative comparative assessment was, as noted by the Federal Court of Appeal at paragraph 43, also articulated by the Tribunal in *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 and *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Nielsen).

[199] The *Laidlaw* decision is particularly clear on this point. At page 346, the Tribunal wrote: "[...] the substantial lessening which is to be assessed need not necessarily be proved by weighing the competitiveness of the market in the past with its competitiveness at present. Substantial lessening can also be assessed by reference to the competitiveness of the market in the presence of the anti-competitive acts and its likely competitiveness in their absence."

[200] Thus, we conclude that paragraph 75(1)(*e*) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal. This raises the question of what is meant by "competitiveness".

[201] The "competitiveness" of a market under both the abuse and merger provisions of the Act refers to the degree of market power that prevails in that market. In *NutraSweet*, cited above, the Tribunal wrote, in the context of a section 79 matter, (at page 47) that: "[t]he factors to be considered in deciding whether competition has been or is likely to be substantially lessened are similar to those that were discussed in concluding that [Nutrasweet] has market power. In essence, the question to be decided is whether the anti-competitive acts engaged in by [Nutrasweet] preserve or add to [Nutrasweet's] market power."

[202] In *Nielsen,* cited above, the Tribunal similarly noted, at pages 266 and 267, that: "to paraphrase the words of the Tribunal in *NutraSweet*, in essence, the question to be decided is whether the anti-competitive acts engaged in by Nielsen preserve or add to Nielsen's market power."

[203] In regard to mergers, the Tribunal indicated in *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at page 314, that:

> [i]n assessing the likely effects of a merger, one considers whether the merged firm will be able to exercise market power additional to that which could have been exercised had the merger not occurred. A merger will lessen competition if it enhances the ability of the merging parties to exercise "market power" by either preserving, adding to or creating the power to raise prices above competitive levels for a significant period of time. One considers the degree of any such likely increase and whether by reference to the particular facts of the case it should be characterized as substantial.

[204] This approach was confirmed in other merger decisions including *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385, rev'd 2001 FCA 104, leave to appeal to S.C.C. refused, [2001] 2 S.C.R. xiii. There, however, at paragraph 302, the Tribunal took issue with whether a merger that merely preserved market power lessened competition.

[205] Aside from the jurisprudence cited above, which indicates that a relative assessment of market competitiveness has to do with an assessment of market power, and how it may have changed, this is also suggested by the very nature of the various means by which firms compete.

[206] Adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market (including such product features as warranties, quality of service and product innovation) or a decrease in the variety of products made available to buyers. The question to be answered is whether any of these or other competitive factors can be adversely affected absent an exercise of market power.

[207] Product variety (including variety in terms of differing geographic locations in which the product is sold) in a market characterized by differentiated products is the most obvious potential factor that might be adversely affected in the absence of an exercise of market power. A business' product can be eliminated or made less commonly available through a refusal to deal without the remaining market participants exercising market power. However, in a market that remains competitive subsequent to a refusal to deal, the effect of the disappearance of one firm's product on consumers is negligible. This is the very nature of competitive markets: no single seller has any influence over price or any other factor of competition, including variety. In such a market, one less firm selling a product in a relevant market will either go unnoticed or will allow for a profitable opportunity for entry.

[208] This is similarly the case in regard to the impact of a refusal to deal on price, product quality, and any other factor of competition. Consequently, in our view, 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.

[209] We also note that both Dr. Mathewson and Dr. Schwartz assess the effect on competition as a result of the Scotiabank termination in terms of market power. Dr. Mathewson opined that "[i]n analyzing the potential effect on competition of Scotiabank's terminating GPay's banking services, consideration was given to the possible impact of termination on any hypothetical market power accruing to Scotiabank, in particular to its Interac Online Service." Dr. Schwartz meanwhile noted that the effect of the termination will be insufficient competition and, thus, likely higher merchant fees.

[210] Thus, paragraph 75(1)(*e*) does not differ from what is contemplated in paragraph 79(1)(*c*), section 92 (merger provision) and other sections of the Act. The difference lies in the degree of the effect. Under section 75, the effect must be adverse, while under other provisions the effect must be substantial.

[211] From the plain meaning of the words used by Parliament, we find that "adverse" is a lower threshold than "substantial". As for the requirement that the refusal to deal "is likely to have" such adverse effect, at paragraphs 37 and 38 in *Air Canada v. Canada (Commissioner of Competition,* [2000] C.C.T.D. No. 24; aff'd [2002] F.C.J. No. 424 (FCA), the Tribunal found that a relatively high standard of proof is required to establish the "likely" occurrence of a future event. The Tribunal found that the terms "likely" and "probable" were synonymous. On the basis of the plain meaning of the word "likely", and on the basis of the Tribunal's reasoning in *Air Canada*, we find the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

[212] However, as noted by the Tribunal in *Hillsdown*, at page 314, one cannot consider the degree of any likely increase in market power without reference to the particular facts of a case (including consideration of any facts that may be relevant under section 1.1 of the Act). We now turn to that.

(2) The Effect of Scotiabank's Refusal to Deal

[213] At the outset we observe that for the purpose of paragraph 75(1)(*e*), the market at issue need not be, and, in this case, is not the market of concern in paragraphs 75(1)(*a*) and (*b*). The market of concern under 75(1)(*e*) is the market in which the applicants participate. That said, we are satisfied that, in this case, that market need not be defined. We need first only decide whether Scotiabank's online debit product, Interac Online, and the UseMyBank Service are currently in the same market and/or are likely to be in the same market for future transactions. Absent such actual or expected competition, it is impossible for the refusal to deal to have an adverse effect on competition.

[214] As we stated above, an adverse effect on competition requires that Interac Online's market power be created, enhanced or preserved. If the two services do not compete, and are unlikely to compete, any market power Interac Online may have will be unaffected by any impact a refusal to deal has on the UseMyBank Service. In this regard, we agree with Dr. Mathewson that "[f]or Scotiabank to enhance its market power (with respect to Interac Online) by weakening GPay, GPay must be an effective competitor to begin with, and it must be a more effective competitor than other suppliers of substitute services, such as credit cards. If these two things do not hold, then Scotiabank's refusal cannot increase any hypothetical market power."

[215] We first address the issue of current competition and then turn to potential future competition.

(a) Current Competition

[216] While the applicants concede that a difference between the two services is their respective merchant bases, they contend for the following reasons that Interac Online and GPAY compete:

(i) The UseMyBank Service and Interac Online are functionally nearly identical; and,

(ii) There is no technical or operational characteristic pertaining to the UseMyBank Service that would limit its use to online gaming.

[217] In response to the applicants' submissions on functional substitutability, we note that while functional substitutability is often, if not almost always, a characteristic of products that are in the same product market, functional substitutability alone is not sufficient to support a finding that products compete in the same market. That said, we agree that the UseMyBank Service and Interac Online have at least the potential to compete for at least some subset of merchants. These merchants would have to be Canadian based because, as Mr. Rosatelli testified, Interac Online is only available to such merchants. As to whether Interac Online and the UseMyBank Service currently compete in the same market, both expert economists agree that they do not. We accept that conclusion.

[218] In Dr. Schwartz's view, as set out in his first report, "[t]he major effect on competition arising from Scotiabank's terminations relates to the future market for online debit payment service". In his second report, Dr. Schwartz notes that he agrees "with Professor Mathewson that the GPAY Service and Interac Online are not close "substitutes" currently (although Interac Online's merchants could switch because GPAY is functionally similar) because of the lack of overlap in their respective merchant bases." We agree that Interac Online and the UseMyBank Service do not currently compete and so are not in the same market.

(b) Future Competition

[219] The only competition at issue is future competition. Further, it appears from the applicants' submissions that only a portion of that future competition is at stake: that is

competition for merchants whose transactions include transactions that are over $1,000 (hereafter referred to as "high-value transaction merchants").

[220] The applicants argued in their closing submissions that a major effect on competition "relates to the future market for online debit payment services. The various limitations that using EMTs impose on GPAY constrain its ability to participate in the growing online marketplace. The $1,000 cap that Scotiabank's termination imposes on payments processed by GPAY makes it unlikely to be adopted by major online merchants such as airlines. The limitations on EMT deposits will ultimately prevent GPAY from increasing its processing capacity."

[221] Not all merchants are likely to find the $1,000 limit to be a constraint; for example, the applicants' witness, Mr. Morgenstern of the Ashley Madison Agency, testified that the agency's average ticket sale was $77 and the lifetime revenue per paid member was $147. Moreover, the applicants did not argue that they are constrained as a result of the Scotiabank termination in their ability to pursue merchants who are unlikely to find the $1,000 EMT limit to be a constraint. Consequently, in this decision, we limit ourselves to addressing the potential competition between the UseMyBank Service and Interac Online for high-value transaction merchants.

[222] The applicants assert that the consequence of the $1,000 limit and the associated prevention of competition is likely higher merchant fees.

[223] In response, the Bank argues that "[t]here is no evidence that the payment transfer limit of $1,000 per day for EMT transfers has had any impact on the Applicants' ability to attract main stream merchants. Rather, the evidence is that many merchant prospects declined to subscribe to the Applicants' service because of concerns about the fact that the Applicants' business is premised on disclosure of a banking customer's confidential Internet password and card number. Merchants do not wish to be affiliated with a payment processing service that operates in that manner." Consequently, the Bank contends that it is unlikely that Interac Online and the UseMyBank Service will ever compete, and so it is unlikely the refusal to deal will have an adverse effect on competition.

[224] We find there is no evidence to suggest that the applicants are prevented from competing with Interac Online for high-value transaction merchants as a result of the refusal to deal. As such, the refusal to deal is not likely to have an adverse effect on competition.

[225] In regard to this lack of evidence, Dr. Schwartz noted that "it is not important whether GPAY turns out to be successful or not; competition in the marketplace will decide its future success. The relevant question is whether Scotiabank's termination has an adverse effect on that competition." The applicants further argue that "the purpose of the *Competition Act* is to foster the competitive process, not to pick winners or losers. It may well be that GPAY will not succeed in attracting major merchants even if the cap is removed. But it is clear that with the cap in place, it is very unlikely that GPAY would be attractive to any merchant that regularly has transactions worth over $1,000."

[226] We agree that the purpose of the Act is not to pick winners and losers, and, in particular, that the purpose of paragraph 75(1)(*e*) is not to determine whether one party has been wronged by way of a refusal to deal, but rather to determine whether as a consequence of that refusal there is or is likely to be an adverse effect on competition. While evidence on the likelihood of success of a particular participant in a market may not always be necessary for such a determination, we do find that evidence on the likelihood of participation is necessary. It is not sufficient merely to assert an intent to so participate.

[227] We find that there is no evidence to suggest that the applicants are actively seeking new Canadian based merchants whose transactions would likely include transactions valued at more than $1,000. Nor is there evidence to suggest that the applicants would be actively seeking such merchants but for the Scotiabank termination. We take from Mr. Iuso's cross-examination that there is evidence to suggest that the applicants were seeking such merchants prior to the termination of biller services by TD and CIBC in December 2003. If the Scotiabank termination made a critical difference to whether such merchants continued to be sought, one would expect the applicants to have continued to pursue, at least to some extent, such merchants after the TD and CIBC terminations but not after the Scotiabank termination. As stated earlier in this decision at paragraph 133, there is nothing to suggest that the Scotiabank termination has in any way exacerbated a pre-existing situation.

[228] **[CONFIDENTIAL]**.

[229] To the extent that our finding may be incorrect and Interac Online and the UseMyBank Service would in fact likely compete for large-value transactions but for the refusal to deal, it remains to be shown that they are close competitors in that an important price constraining effect on Interac Online would come from the UseMyBank Service. Out of the possible set of competitors, including credit cards and electronic wallets (such as PayPal), Interac Online and the UseMyBank Service are arguably functionally the most similar but for the important caveat that the UseMyBank Service system requires the disclosure of confidential information. As noted above, not only is functional similarity insufficient to conclude that two products constrain each others' prices, an important functional difference could prove critical to a finding that they do not. We further note Dr. Mathewson's observation that virtually all Interac Online participating merchants accept credit cards. In this context, we observe that the questionable viability of Interac Online suggests the possibility that Canadian Internet merchants are satisfied with these payment means and that these means compete with Interac Online.

(3) Conclusion in Regard to 75(1)(*e*)

[230] In sum, we find that since Interac Online and the UseMyBank Service are not currently in the same market and they are not, on a balance of probabilities, likely to be in the same market in the future in regard to large-value transaction merchants, the refusal to deal is not likely to have an effect on competition. Since the refusal is not likely to have an effect, it is not likely to have an adverse effect.

E. The Discretionary Nature of the Relief Sought

[231] We have determined that the applicants failed to establish that they are substantially affected in their business due to their inability to obtain adequate supplies of a product. They also failed to establish that any such inability was because of insufficient competition among suppliers of the product, and, that the refusal to deal is having, or is likely to have, an adverse effect on competition. It follows that the application should be dismissed.

[232] However, even if the applicants had succeeded in establishing all of the elements contained in subsection 75(1), we are satisfied that this is not a proper case for the granting of discretionary relief.

[233] The discretionary nature of relief under section 75 was considered by the Tribunal in *Chrysler*, where the Tribunal identified a number of factors relevant to the exercise of that discretion. One factor identified by the Tribunal was the reasons for the supplier's decision to discontinue dealing. In our view, this is the most relevant factor to the proper exercise of discretion in this case.

[234] We have previously found that the Bank's refusal to deal was based upon the legal or reputational risks posed by the disclosure of the Bank's customers' electronic signature, the consequent likelihood of Rule E2 of the Canadian Payments Association being breached, and other regulatory concerns.

[235] In our view, the above risks are legitimate and continue. It would neither be commercially reasonable nor consistent with the purpose of the Act to require the Bank to provide banking services to the applicants when to do so would expose it to such risks.

[236] Further, while the applicants seek biller status and EMT deposit accounts, we are satisfied that they do not comply with the reasonable terms that the Bank imposes upon all of its customers as a condition for receipt of those services. In that circumstance, it would be unreasonable to require the Bank to deliver services other than on the commercially reasonable terms it generally imposes.

[237] In respect of biller status, the conditions found in the Scotiabank Electronic Bill Payment Service Agreement include the following:

(i) The bill payee shall not require Bank customers to divulge their ScotiaCard number and/or personal identification number, and/or electronic signature.

(ii) The services provided cannot be used, directly or indirectly, to conduct or act on behalf of a money services business.

[238] The applicants have conceded that they cannot operate their business without bank customers disclosing their confidential banking password and bank card number, that they

operate a money services business, and that they act on behalf of other money services businesses. They cannot, therefore, comply with the terms of the Bill Payment Service Agreement.

[239] We acknowledge that the terms of this agreement have been significantly amended since the applicants first received biller status at the Bank. However, we find that the Bank's amendment of this agreement was not done in any way to target the applicants. We reach this conclusion because we accept as truthful Mr. Rosatelli's evidence that: the agreement was re-drafted in order to allow the Bank to comply with the regulations and additional reporting requirements associated with the new anti-money laundering regulations; the drafting of the new agreement began in late 2003 or early 2004 (significantly before the termination of the applicants' banking services); a number of existing bill payee companies have since been terminated by the Bank because they are not in compliance with the new agreement; and, a number of potential bill payee companies have been declined as a result of being unable to meet the terms of the new agreement.

[240] With respect to EMT deposit accounts, the Bank's evidence that such accounts are only offered to businesses that meet its definition of a small business was not challenged. That definition is a business that does not exceed $5 million in annual deposits or $400,000 in monthly deposits, and does not exceed more than 150 transactions through its accounts in a month.

[241] The reason for these limits was explained by Ms. Graham-Parker, who testified on cross-examination that commercial clients are larger than small businesses, are more complex, with more transactions and larger transaction amounts. EMTs in those circumstances are much harder to control, especially with "the number of employees that would need access". The existence of difficulty in allowing businesses to receive and send EMTs even into small business accounts is supported by the fact that RBC is the only other bank to allow this.

[242] Mr. Grace admitted on cross-examination that the applicants are no longer a small business. They cannot, therefore, qualify for the accounts they seek on the terms the Bank generally imposes.

[243] There is a final factor that militates against the exercise of any discretion in the applicants' favour, and that flows from the fact that about 50,000 Bank customers are residents of the United States. Mr. Iuso agreed that U.S. residents with Canadian bank accounts can and do use the UseMyBank Service, and the Bank has affiliated entities with assets in the U.S. These facts make relevant Mr. Stewart's opinion that:

(i) Online gambling violates both U.S. federal law and the laws of each of the 50 States.

(ii) The U.S. Justice Department had, in July 2006, arrested a British national and executive of an offshore online sports book when the executive made a stopover

at a U.S. airport. The executive has since been indicted for violation of U.S. law by accepting bets from Americans.

(iii) Any business that knowingly permits its services to be used for the purposes of online betting by residents of the U.S. is at risk of being charged with illegally aiding and abetting Internet gambling.

(iv) If the Bank were to receive funds into its accounts held in the name of the applicants from American residents to be used for the purpose of online gambling, the Bank would be committing an offense in the U.S. and would be exposed to the possibility of prosecution.

[244] Mr. Stewart's evidence was not diminished on cross-examination and we accept that requiring the Bank to provide banking services to the applicants would put the Bank at some risk for aiding and abetting acts that are in violation of U.S. law.

[245] As a final observation on this point, during final argument the applicants tendered an extensive two-page undertaking to the Tribunal. The undertaking is attached as Schedule C to these reasons. In it, the applicants undertake, among other things:

(i) To comply with all applicable anti-money laundering legislation in Canada.

(ii) To submit to periodic audits (not more than annually) upon the request of the Bank, such audits to be conducted by a mutually acceptable anti-money laundering expert. They would remedy any differences found on the audit.

(iii) To remedy any deficiencies in their computer security procedures identified by any periodic computer security audit requested by the Bank.

(iv) Not to have biller status with respect to Bank customers not resident in Canada.

(v) To block payments to online casinos or their management companies where the applicants are able to determine that the account holder is resident in the U.S.

[246] As the undertaking was presented only in final argument, there was no evidence with respect to, for example, the feasibility of not having bill payee status with respect to the Bank's U.S. resident account holders, or to the feasibility of blocking certain online payments. Further, the timing of the presentation of the undertaking does, at least, suggest that the undertaking implicitly recognizes the legitimacy of the Bank's concerns about these matters.

[247] Given the timing of the presentation of the undertaking, and the lack of an evidentiary underpinning for it, we are not inclined to give any weight to it. Our view in this regard also recognizes some degree of prior recalcitrance on the part of the applicants that, in our view, casts at least some doubt on whether the undertaking would be effective. We refer here to the

applicants' refusal until their opening statement before us to acknowledge that they are a money services business, and the position they took in this litigation with respect to the relevance of Bank inquiries that were relevant to money laundering and other regulatory concerns.

[248] In sum, the undertaking does nothing to change our view that this is not an appropriate case for the granting of discretionary relief.

[249] We now turn to the reasons for two evidentiary rulings that were dealt with in writing and to certain procedural and closing remarks.

VII. THE RULING IN RESPECT OF THE PROPOSED EVIDENCE OF STANLEY SADINSKY

[250] Rule 47(1) of the *Competition Tribunal Rules*, SOR/94-290 (Rules) requires every party who intends to introduce expert evidence to serve an affidavit of each proposed expert on the other party at least 30 days before the commencement of the hearing. Pursuant to this rule, and the Tribunal's scheduling order, the Bank served the affidavit of Professor Stanley Sadinsky upon the applicants.

[251] In response, the applicants filed a notice of motion, in advance of the commencement of the hearing, in which they sought an order declaring Professor Sadinsky's affidavit to be inadmissible, and awarding them costs. By the agreement of the parties, the motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the Tribunal's final reasons, providing that the affidavit would not be admitted in evidence as the evidence of an expert witness. The issue of costs was reserved until the Tribunal generally addresses costs. What follows are the reasons for that ruling.

[252] After setting out his qualifications, the documentation he had reviewed and the facts that were relevant to his opinion, Professor Sadinsky swore that:

> 14. In the balance of the Affidavit, I provide my expert opinion with respect to the following overarching issue, namely, whether Scotiabank would be in breach of the *Criminal Code* if it were required to provide banking services to the Applicants. In considering this opinion, it is first necessary for me to consider two preliminary issues:
>
> (a) Is it illegal for Canadians located in Canada to place bets with off-shore internet gambling sites?
>
> (b) Is the activity being conducted by the Applicants and their joint venture partner, UseMyBank, in breach of the provisions of the *Criminal Code*?

[253] It was the position of the applicants that this opinion was inadmissible because opinion evidence concerning the interpretation and application of domestic law is inadmissible in

Canadian courts on the ground that it fails to meet the requirement that, to be admissible, expert evidence must be necessary to assist the trier of fact (see *R. v. Mohan*, [1994] 2 S.C.R. 9 at page 20).

[254] In response, the Bank argued that the applicants had failed to cite any authority to support the assertion that the principles articulated in *Mohan* apply to Tribunal proceedings. The Bank submitted that the rules of evidence that apply in court proceedings do not apply in proceedings before an administrative tribunal unless expressly prescribed. The Bank asserted that, for administrative tribunals, relevant expert evidence is admissible, subject to considerations of weight. Further, the Bank argued that, by failing to object to Professor Sadinsky's affidavit when it was filed and considered on the application for interim relief (and by instead producing at that time its own competing expert affidavit), the applicants had waived their right to object. Finally, the Bank argued that the exclusionary rule in *Mohan*, if applicable, did not apply to exclude Professor Sadinsky's affidavit because the Tribunal will admit expert evidence on matters of law when it is logically probative, helpful and will not cause prejudice. Professor Sadinsky's affidavit was said to be helpful because it serves to demonstrate the impact of pertinent provisions of the *Criminal Code* upon the Bank.

[255] Each submission made by the Bank was considered.

[256] As to the applicability of the rules of evidence with respect to the admissibility of expert evidence, the legislative history of the Tribunal reflects an intention to judicialize to a substantial degree the processes of the Tribunal. This is reflected in the Tribunal's establishment as a "court of record" by virtue of subsection 9(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. C-19 (2nd Supp.), the requirement that a judicial member preside over the Tribunal's hearings, and the presence of appeal rights to the Federal Court of Appeal as if a decision of the Tribunal was a judgment of the Federal Court. See, in this regard, the discussion of the Tribunal in *Canada (Director of Investigation and Research) v. Air Canada* (1988), 32 Admin. L.R. 157 rev'd on other grounds [1989] 2 F.C. 88 (C.A.); aff'd [1989] 1 S.C.R. 236. In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1990), 111 N.R. 368; rev'd [1992] 2 S.C.R. 394 both the Federal Court of Appeal and the Supreme Court of Canada confirmed the Tribunal to be an inferior court of record.

[257] Thus, in a number of decisions the Tribunal has applied the principles articulated by the Supreme Court in *Mohan* when considering the admissibility of expert evidence. For example, in *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2003), 28 C.P.R. (4th) 335 at paragraph 36, the Tribunal rejected expert evidence that consisted essentially of legal argument on the ground that the evidence was not necessary as required by the *Mohan* test. See also the rulings of the Tribunal on March 28, 2006 in *United Grain Growers Limited v. The Commissioner of Competition* and on May 9, 10, and 11, 2006 in *La Commissionaire de la Concurrence v. Gestion Lebski Inc. et al.*

[258] The Tribunal therefore rejected the Bank's assertion that, as an administrative tribunal, the Competition Tribunal is precluded from applying the principles of evidence that would apply

to court proceedings. Such submission is inconsistent with the judicialized nature of this tribunal, and inconsistent with prior jurisprudence of the Tribunal dealing with the receipt of expert evidence. The fact that the Tribunal is directed in the *Competition Tribunal Act* to deal with proceedings before it "as informally and expeditiously as the circumstances and considerations of fairness permit" is, by itself, insufficient to preclude application of rules of evidence that have evolved, at least in part, so as to ensure fairness. This direction is, rather, consistent with the fact that the Tribunal is not precluded from departing from a strict rule of evidence when it considers that to be appropriate.

[259] Having regard to Professor Sadinsky's characterization of the overarching issue and the two preliminary issues, as quoted above at paragraph 252, the Tribunal was satisfied that the opinion was in substance an opinion with respect to a matter of domestic law. Thus, the Tribunal was not satisfied that the opinion was necessary, as required by the *Mohan* test. The interpretation of domestic law is within the competence of the Tribunal's judicial members.

[260] Alternatively, even if a more relaxed standard of admissibility was applied, the Tribunal was not satisfied that the evidence contained in the affidavit would be helpful. There is, apparently, no relevant jurisprudence on the points opined upon by Professor Sadinsky. He therefore couched his opinions in terms that "in my opinion, there is a very strong argument that ...". Such views would not be sufficiently probative or helpful to warrant their admission into evidence.

[261] With respect to the Bank's submission that the applicants had waived any right to object to the admissibility of the opinion, the Bank cited no authority to support the view that a failure to object to evidence on an interlocutory motion operates to preclude any objection at trial. Such a result is inconsistent with the fact that the admissibility of evidence is always a matter to be determined by the presiding judicial officer who may raise, on his or her own motion, concerns with respect to the admissibility of evidence.

[262] For these reasons, the evidence of Professor Sadinsky was not received by the Tribunal.

VIII. THE MOTION BY THE BANK TO AMEND ITS RESPONSE TO THE AMENDED NOTICE OF APPLICATION

[263] Prior to the commencement of the hearing, the Bank served the expert affidavit of David Stewart upon the applicants. In this affidavit Mr. Stewart opined that "off-shore on-line gambling violates both federal and state laws in the United States" and that "any business that knowingly permits its services to be used for the purposes of online betting by residents of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling."

[264] In response, also prior to commencement of the hearing, the applicants sought an order declaring the affidavit to be inadmissible on the basis that it was not relevant to an issue pleaded by the Bank in its response. The Bank took the position that the affidavit was admissible, but it

also filed a notice of motion in which it sought leave to amend its response to the applicants' amended application in two respects. The first was to amend paragraph 19 of the Bank's response to read as follows:

> 19. Scotiabank has serious and valid concerns about the legality of the activities of the "vast majority" of the users of the service provided by the Applicants. It is not willing to allow its facilities to be used for activities that could be illegal in Canada, or in any other jurisdiction, in particular the U.S.A., where Scotiabank has a business presence and/or where residents of that jurisdiction have Scotiabank accounts that can be used to transfers *[sic]* funds using the Applicants' services. The association of the Scotiabank brand with the activities of the Applicants could be interpreted by Scotiabank customers as an endorsement of the Applicants' service or suggest legitimization offshore on-line gambling.

[265] The second, but unrelated, amendment sought (foreign exchange profit amendment) was to add as paragraph 21 to the Bank's response the following:

> 21. The Applicants state that they act as agent for the banking customer for the transfer from the banking customer's account to the Applicants' account through either the Bill Payment System or through EMT. The Applicants state they are a trustee of the monies received into their accounts for the merchant customers, who are the beneficiaries of these funds. The Applicants derive a profit on the conversion from Canada funds into U.S. funds of the monies transferred from the bank accounts of Canadian banking customers. The Applicants do not disclose the fact that they make a profit on the conversion of Canadian funds into U.S. Funds to either their banking customer principals or their merchant customer beneficiaries. Scotiabank cannot continue to offer banking services to the Applicants knowing that the Applicants are making an undisclosed profit in these circumstances.

[266] The parties filed written submissions and advised that they did not wish to make oral submissions. Accordingly, the Bank's motion was dealt with in writing by the presiding judicial member. An order issued, for reasons to be delivered with the final reasons, granting leave to the Bank to amend its response as requested. Thus the evidence of Mr. Stewart would be relevant to the amended pleading and admissible. The issue of costs was reserved until the Tribunal generally addresses costs. These are the written reasons for that ruling.

[267] In approaching the issues raised by the parties, the Tribunal assumed, without deciding, that the evidence of Mr. Stewart was not admissible in the absence of the requested amendment to paragraph 19. The issue then became whether the amendments should be allowed.

[268] All parties agreed that the applicable legal principle was that articulated by the Federal Court of Appeal in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.) at pages 9 and 10. There,

the Court wrote:

> [...] while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[269] With respect to the requested amendment to paragraph 19 to expressly plead a breach of American law, the Bank submitted that the amendment did not alter the nature of its defence but rather better particularized its pleading. The applicants responded that the amendment expanded the Bank's defence and that non-compensable prejudice would result if the Bank was allowed to amend its response.

[270] The applicants filed no affidavit evidence establishing prejudice.

[271] Paragraph 19 of the Bank's response, as originally filed, set forth its concerns with respect to potential illegality generally. Evidence filed by the Bank on the motion to amend established that the Bank's concern with respect to American legislation was not new, and ought not to take the applicants by surprise. This is seen from the fact that in response to the applicants' request for leave to bring this proceeding, Mr. Rosatelli had sworn an affidavit that stated that the Bank had branches and employees worldwide, that its securities traded on United States securities exchanges, and so the Bank was subject to a wide variety of American legislation.

[272] Mr. Stewart's affidavit was served on the applicants in accordance with the timetable agreed to by counsel. When the applicants raised their concerns with respect to the relevance of the affidavit, the Bank offered the applicants an extension of three weeks in order to allow the applicants to obtain and file a responding affidavit.

[273] Applying the principle that amendments should be allowed at any stage for the purpose of deciding the real questions and controversies, provided that the amendment does not result in non-compensable prejudice and would serve the interests of justice, it was the view of the Tribunal that the amendment would facilitate the admission of relevant evidence. Given that the applicants sought an order requiring the Bank to provide services to them, the interests of justice would not be served if the Tribunal considered making such an order without knowing whether the order would expose the Bank to criminal liability in the United States.

[274] There was no evidence of non-compensable prejudice to the applicants and an adjournment could have been sought by the applicants to allow them to obtain any responding evidence.

[275] In those circumstances, the Tribunal concluded that the interests of justice required that

leave be granted to amend paragraph 19 of the Bank's response.

[276] With respect to the foreign exchange profit amendment, the Bank again argued that the amendment simply particularized its defence. The applicants again argued that the Bank had known of the issue since June 22, 2006 so that the requested amendment was sought too late.

[277] The Bank's evidence established that on June 22, 2006 the applicants delivered to it a supplementary affidavit of documents that disclosed the 2004 financial statements for NPAY and GPAY, that they were reviewed by counsel on June 24, 2006, after the Bank filed its response to the amended application on June 22, 2006, that Mr. Grace was examined on these documents on June 27 and 28 of 2006, and that, prior to the hearing, the Bank advised the applicants of the Bank's intent to assert at the hearing that the applicants could not make an undisclosed profit in their capacity as agent of the Bank's customers and trustee to the applicants' own merchant customers.

[278] The amendment raised an issue that was seen to be relevant by the Tribunal and there was no evidence or proper articulation as to what prejudice would flow to the applicants if the amendment was permitted. The amendment was, therefore, allowed.

IX. THE CHESS CLOCK PROCEDURE

[279] This is the first proceeding in which the chess clock procedure with respect to hearing time management was employed by the Tribunal.

[280] The process takes its name from the manner in which the length of play is timed in certain games of chess. Generally, parties are allocated a fixed amount of time in order to present their case and are then timed to ensure that they do not exceed their allotted time. A significant benefit that flows from this type of time management is that hearings will conclude in the time allotted. This better allows the parties to know in advance the cost of the hearing, and avoids the delay and additional expense caused by the extension of hearings beyond their original end dates.

[281] In the present case, as part of the case management process, the parties agreed that each side would be given 45 hours in which to present their case. Specifically, each side had 45 hours for their opening statement, direct, cross- and re-examinations, objections to evidence, oral motions, and closing argument. The parties' consent to this time allocation was embodied in a pre-hearing order of the Tribunal.

[282] During the hearing, the court reporter kept track of the time expended by counsel. Each morning the parties received a statement of the time each side had expended up to the end of the prior day, expressed on both a daily and cumulative basis. The Tribunal advised that any dispute with respect to time allocation had to be raised immediately. There were no such disputes.

[283] In the view of all members of the Tribunal, the procedure worked well. The presiding member is not confident that the hearing would have finished on time in the absence of the use of

the chess clock procedure. We have recommended the procedure to other members of the Tribunal.

X. DIRECTIONS TO THE PARTIES REGARDING PUBLIC REASONS

[284] These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, January 12, 2007 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

[285] If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 19, 2007.

XI. COSTS

[286] The issue of costs is, as the parties requested, reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Friday, January 19, 2007, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree costs. If costs cannot be agreed, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

[287] Once the issue of costs has been dealt with, an order will issue dismissing the application and dealing with costs as agreed or as determined by the Tribunal.

DATED at Ottawa, this 20th day of December 2006

SIGNED on behalf of the Tribunal by the panel members

(s) Eleanor R. Dawson

(s) Lorne R. Bolton

(s) Lilla Csorgo

***

[1] We note that, where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

[2] Paragraph 75(1)(*e*) refers to "a market" while paragraph 75(1)(*b*) refers to "the market". This suggests that while the market considered under 75(1)(*b*) is that which is defined in 75(1)(*a*), the market considered under 75(1)(*e*) need not be.

[3] The Tribunal indicated in *Chrysler*, at page 10, that "[w]here products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers". We note that this statement was made specifically in the context of products that are purchased for resale. That said, the manner in which an output product may be altered as a result of a change in an input and the consequent impact it may have on demand by the buyer's customers is always relevant to the extent that it affects the buyer's business. What is ultimately of concern under 75(1)(*a*) is the buyer of the product that has been refused.

[4] Neither the applicants nor the Bank propose any candidate substitutes for EMT deposit accounts that are different to those proposed for biller status. Consequently, we do not separately consider candidate substitutes for EMT deposit accounts.

[5] We note here that this contemplates switching, not directly by the applicants, but by the applicants' customers. This type of switching by the applicants' customers, however, would allow the applicants to make greater use of its bill payee status at other banks in order to serve customers who are, or originally were, Scotiabank depositors.

[288] SCHEDULE A

Section 75 of the *Competition Act*:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*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,	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(*b*) 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,	*b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
(*c*) 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,	*c*) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;
(*d*) the product is in ample supply, and	*d*) que le produit est disponible en quantité amplement suffisante;
(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,	*e*) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
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	le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans

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.

un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

[289] **SCHEDULE B**

The Applicants' Experts

Mr. Jack Bensimon

Jack Bensimon was an expert qualified to give opinion evidence with respect to anti-money laundering programs and policies, and compliance with anti-money laundering regulations in both Canada and the United States. After hearing examination and cross-examination with respect to his qualifications, he was also found by the Tribunal to be qualified to give opinion evidence with respect to anti-fraud programs and policies. Having reviewed the nature of the applicants' business, Mr. Bensimon confirmed that the applicants are operating a money services business as defined in the PCMLTF Regulations. Significant aspects of Mr. Bensimon's opinion were that:

(i) Overall, the risk posed to The Bank of Nova Scotia through the operation of the applicants' accounts is relatively low;

(ii) Notwithstanding, there are material gaps in the anti-money laundering policies and procedures of the applicants that need to be remediated as soon as possible; and,

(iii) The Bank was required, in his view, to take reasonable steps to ensure that the applicants had a basic framework of policies and procedures in place in order to meet the requirements of FINTRAC.

Dr. Lawrence Schwartz

Dr. Lawrence Schwartz was qualified as "an expert economist with respect to competition economics, in particular to market definition, to the impact on competition and impact on the business of GPAY, at least insofar as an economic matter."

In order to determine the relevant product market, the approach used by Dr. Schwartz was the hypothetical monopolist test. He did not prepare his report on the basis that the market referred to in paragraph 75(1)(*a*) of the Act was, or could possibly be, different from the market contemplated in paragraph 75(1)(*e*) of the Act.

In Dr. Schwartz's view, there were three product markets where an adverse effect on competition could occur as a result of the Bank's termination of the applicants' banking services. Dr. Schwartz was of the opinion this termination could result in an inadequate supply due to insufficient competition among suppliers. Those product markets were:

(i) The market for online debit payment service for Scotiabank depositors who purchase at merchant websites, consisting of the UseMyBank Service and Interac Online;

(ii) The market for merchants, where the applicants compete with Interac Online transaction acquirers to offer payment processing services; and,

(iii) In relation to the means of providing online debit payment to Scotiabank depositors, biller status at Scotiabank but excluding business accounts that accept deposit by EMTs.

In his initial report, Dr. Schwartz did not carry out an analysis as to whether the applicants' business had been substantially affected by the termination of banking services by the Bank. He disagreed with Dr. Mathewson's approach to this issue because the applicants' behavior after the banking services were terminated is not information to be considered in the hypothetical monopolist approach to market definition. However, even on the approach used by Dr. Mathewson, Dr. Schwartz concluded that the applicants were substantially affected by the termination because GPAY's total payment value did not surpass its September 2005 level until January 2006. This suggested to him that GPAY's business from other banks did not offset the losses of payment volumes from Scotiabank depositors following termination. Scotiabank payment levels had not yet recovered to September 2005 levels up to and including the last month for which data are available.

The Bank's Experts

Mr. Christopher Mathers

Christopher Mathers was qualified as an expert in matters related to anti-money laundering, fraud, and anti-terrorist financing, particularly in the context of the online gaming industry. Mr. Mathers was of the opinion that the applicants, together with their joint venturer UMB, were operating a money services business.

Mr. Mathers described the three stages of money-laundering and the frequent use of online gaming sites to launder the proceeds of crime. He described some sample money-laundering mechanisms that could be applied to online gaming sites. He described an actual situation, recently identified by the Bank, where there was no apparent connection between the source of a Scotiabank customer's winnings and the online betting site where the winning wager was placed. Mr. Mathers provided comments with respect to Mr. Bensimon's report, described his own experience with offshore Internet casinos, and gave his view with respect to the risk posed to The Bank of Nova Scotia if it provides banking services to the applicants.

Dr. James Dingle

Dr. James Dingle is a retired employee of the Bank of Canada, where he, among other positions, served as the Deputy Chairman of the board of directors of the Canadian Payments Association. He was qualified as an expert in respect of matters relating to Canadian chartered bank operations and risks relating to their day-to-day operations, particularly as relating to payment flows and issues relating to electronic banking as set out in his report. Dr. Dingle testified as to

the purpose and importance of the regulatory mechanisms in place for Canadian banks and gave his view that the manner in which the applicants conducted their business was capable of eroding prudent behavior by bank depositors. He provided his view as to the regulatory risks to which the Bank was exposed as a result of the applicants' business model. Dr. Dingle spoke with respect to the development of Rule E2 by the Canadian Payments Association and gave his opinion that such rule would be breached if payments to the applicants pass through the clearing system. He gave his opinion with respect to the risks arising from the OSFI Guidelines on money laundering, the PCMLTF Act, the *Criminal Code*, and risks to which the Bank was exposed if it dealt with the applicants. He also spoke of the reputational risks to the Bank arising from unauthorized or fraudulent transactions.

Mr. David Stewart

David Stewart is an attorney practicing in Washington, D.C. He was accepted as an expert in United States gaming law, including the federal law of the United States as it relates to Internet gambling. His qualification to opine on matters relating to state law was also accepted by the Tribunal. In Mr. Stewart's opinion, online gaming violates the United States federal law and the laws of each of the 50 states. In his further view, any business that knowingly permits its services to be used for the purpose of facilitating online betting by a resident of the United States is at risk of being charged, at a minimum, with illegally aiding and abetting Internet gambling.

Dr. Frank Mathewson

Dr. Frank Mathewson is a professor of economics and the Director of the Institute for Policy Analysis at the University of Toronto. He was qualified as an expert in industrial organization, and in particular with expertise on matters relating to market power and vertical restraints.

In order to determine the relevant product market, Dr. Mathewson applied the test first described by the Competition Tribunal in the *Chrysler* case. In respect of paragraph 75(1)(*a*) of the Act, he determined that the relevant market is biller services at Scotiabank and EMT deposits **[CONFIDENTIAL]**. In respect of paragraph 75(1)(*e*) of the Act, he opined that the UseMyBank Service and Interac Online are not in the same product market, and products such as credit cards and Interac Online e-wallets are likely to be closer substitutes for Interac Online than the UseMyBank Service.

The Applicants' Lay Witnesses

Mr. Joseph Iuso

Joseph Iuso is the President, Chief Executive Officer, and founder of UMB. He identified the joint venture agreement entered into between UMB and NPAY, and described the respective roles of UMB and the applicants. He explained the technical aspects of UMB pushing payment from a customer's bank account to GPAY's account, the security features in place at UMB, the fraud detection system UMB has in place and the steps taken by UMB to market its services to

various merchants.

Mr. Raymond Grace

Raymond Grace is the President of both GPAY and NPAY. He testified with respect to his dealings with The Bank of Nova Scotia, including the various bank account openings, obtaining biller status, GPAY's experience with EMT deposits at The Bank of Nova Scotia (particularly the difficulty caused when payment items could not be posted to an account when the quantity of payments exceeded 100 transactions) and the termination of banking services. He confirmed the terms of the joint venture agreement between NPAY and UMB, and the responsibilities of his companies under the joint venture agreement. He described the banking services his companies enjoyed with other banks, as well as the termination of banking services by TD and CIBC. He described the relationship between the customer (the buyer of goods or services), the joint venture's client (the merchant or seller) and the joint venture, and how payment is effected to merchant clients. He described the nature of the security checks that the joint venture conducts in respect of the transactions and the joint venture's experience with fraudulent transactions. He explained how transactions were conducted when merchant clients were to receive monies in U.S. funds and the resulting foreign exchange profit. He described his involvement in marketing on behalf of the joint venture, his involvement in reporting transactions to FINTRAC, and how his companies deal with anti-money laundering concerns. Finally, he discussed the conduct of the joint venture's business since the termination of banking services by The Bank of Nova Scotia.

Mr. Ryan Woodrow

Ryan Woodrow is an employee of The Bank of Nova Scotia who at all material times was the account manager for small business accounts at the Bank's branch in Sherwood Park, Alberta. He was the officer responsible for the applicants' accounts. He testified with respect to the account opening procedure generally applicable for small business accounts, how that procedure was followed in August of 1999, October of 2004 and November of 2004 for the accounts of GPAY, B-Filer, and NPAY. He described the nature of the privileges associated with the accounts operated by the applicants, the transaction limits relevant to EMT payments and receipts, and the practical consequences of exceeding a certain number of EMT transactions per month. He also described the criteria the Bank applied in order to determine whether any particular venture was a small business. He testified about the decision not to open any more accounts for the applicants because they no longer qualified as a small business, and the subsequent inquiry concerning Mr. Grace and his accounts conducted by the head-office of The Bank of Nova Scotia in Toronto.

Mr. Darren Morgenstern

Darren Morgenstern is the owner of the Ashley Madison Agency, which is an online dating service that caters to the niche market of people who are in a relationship but are "seeking alternative options". Since July or August of 2003, the Ashley Madison Agency has used

UseMyBank as a payment option, in addition to credit card and direct deposit payment mechanisms. He explained that the decision to add UseMyBank as a payment option reflected the desire of his company to offer as many payment options as possible. Mr. Morgenstern testified that when his company adopted UseMyBank as a payment option there was an almost instant increase in its sales, so that now approximately 23% of all of Ashley Madison's Canadian online services are paid for through UseMyBank. In his experience, while credit card fraud is "rampant" in online transactions, his company has had little or no fraudulent transactions processed through UMB.

The Bank's Lay Witnesses

Ms. Margaret Parsons

Margaret Parsons was at all material times the manager of the Sherwood Park branch of The Bank of Nova Scotia. She testified with respect to the organization of the branch, the Bank's criteria as to what qualified for service as a small business, and the concept of the "connection" between a small business or businesses and its owner/proprietor. She testified with respect to meeting with Mr. Grace when he first wished to open an account and that she referred Mr. Grace to Mr. Woodrow. She testified that she approved the documentation with respect to the opening of an account in the name of B-Filer, carrying on business as GPAY. She testified that she learned in March or April of 2004 of the number of items that were not postable to the applicants' accounts. She also explained that she learned in November of 2004 of the quantity of new account openings by the applicants and described her resulting concern that led to a meeting with Mr. Woodrow and another Bank employee, Ms. Sharon Gibson-Nault. As a result of the meeting she instructed Mr. Woodrow to find out "what [was] going on", specifically why there were so many items that could not be posted to the applicants' accounts and why the applicants were opening so many accounts. She also instructed Mr. Woodrow that there would be no further account openings for the applicants. Later, she learned that, while she was on vacation, Mr. Grace caused 30 new accounts to be opened through a telephone call centre and that a total of 80 new accounts had been opened in a two-week period. As a result, she and Ms. Gibson-Nault prepared a memorandum recommending that the Bank terminate its relationship with Mr. Grace and his businesses. Finally, she testified that when she made this recommendation she did not know what Interac Online was.

Ms. Sharon Gibson-Nault

Sharon Gibson-Nault was at all material times the manager of customer service at the Sherwood Park branch. She testified with respect to her responsibility to review new account openings, her experience in early 2004 with a number of transactions that could not be posted to the applicants' accounts, her concern in November of 2004 with the number of new accounts the applicants were opening and her resulting conversation with Ms. Parsons. She testified that while Ms. Parsons was on vacation, the issue of the significant number of new account openings was referred by her to the Bank's Shared Services operation and that an investigation was commenced. Finally, she testified as to her role in the recommendation made to terminate the Bank's relationship with the

applicants.

Ms. Susan Graham-Parker

Susan Graham-Parker is Senior Vice President of Retail and Small Business Banking for Ontario for The Bank of Nova Scotia. She testified with respect to the regulatory environment in which the Bank functions, and her view of the trust that such an environment engenders in banking customers. She testified with respect to the criteria for small business status at the Bank, and how the criteria applied on a per-connection basis. She described the nature of the Money Master accounts that the applicants operated. She explained the required due diligence at a branch when accounts were opened. She described the transaction limits for sending and receiving EMTs, and testified that for businesses that did not qualify as small businesses, there was no facility for receiving EMTs. She explained the process that is followed when an entity exceeds the small business criteria and how the customer is referred to commercial banking services. She testified with respect to a number of customer security issues, identifying the Scotiabank Cardholder Agreement and the obligation it imposes on customers with respect to the protection of their electronic signatures. She described other documents in which the Bank stresses this obligation to customers. She explained the process when a person holding a valid, written power of attorney seeks electronic access to accounts belonging to the principal. Finally, she expressed her view as to the Bank's concerns with respect to the nature of the business operated by the applicants and the Bank's concerns with the account aggregation service known as CashEdge.

Mr. Colin Cook

Colin Cook is Vice President, Commercial Banking at The Bank of Nova Scotia. He testified as to the process followed when a customer is referred to commercial banking, the criteria that apply to determine when commercial banking services are appropriate, the account opening requirements for a commercial client, and he noted the non-availability of EMT facilities for commercial banking clients. He spoke of his involvement in the development of a project that would enable the Bank to better comply with its Know Your Customer requirements and the due diligence obligations upon the Bank in the ongoing business relationship with a client. He spoke about the flags that should alert the Bank to money laundering concerns, and the nature of the concerns raised by the applicants' business model and their manner of opening accounts. He spoke of the importance of trust in the banking relationship and the key elements of the Know Your Customer rule, identified the Bank's Anti-Money Laundering Handbook and described the Know Your Customer's Customer rule. He concluded by stating that in his view, the applicants would not be accepted as commercial banking clients of the Bank either as of the date of termination, or as of the date of the hearing.

Mr. Douglas Monteath

Douglas Monteath is an assistant general manager of the Shared Services operation of the Bank. He testified as to the nature of the services provided by Shared Services, the involvement of

Shared Services in the decision to terminate the applicants' banking services, the investigation that took place in 2005 into the applicants' business, the concerns that arose as result of that investigation and the factors that led the Bank to its decision to terminate the applicants' banking privileges.

Mr. Robert Rosatelli

Robert Rosatelli is Vice President, Self-Service Banking at The Bank of Nova Scotia. He testified with respect to the significance of the ScotiaCard in electronic banking, described the two constituent elements of a customer's electronic signature, and the steps taken by the Bank to explain to its customers the significance of their electronic signature and the importance of keeping it confidential. He testified with respect to the function of the Interac Association, its network and the security features the network applies to a customer's electronic signature. He testified as to the Bank's efforts to enhance the security applicable to Internet banking, and the steps that the applicants had taken, in his view, to frustrate those enhanced security features. He reviewed the Bank's experience with respect to a number of fraudulent EMT transfers in the applicants' accounts. His testimony then went on to describe the role of CertaPay and Acxsys Corporation with respect to EMTs, the introduction by Acxsys of a 30 minute hold on EMT transactions, and the purpose of this hold. He reviewed the sending and receipt limits applicable to EMTs. Mr. Rosatelli also testified with respect to the development of Interac Online, how it functions from a customer's perspective, the flow of funds, the applicable transaction limits, how Interac Online differs from the UseMyBank Service, and the profitability to date of Interac Online. He identified the merchants that currently use Interac Online as a payment mechanism. He reviewed what is involved in obtaining bill payee status at the Bank, bill payee transaction limits, and he identified both the former and the current Bill Payment Service Agreements, explaining the purpose of the revision to the form of agreement. He described the flow of funds in a bill payment transaction and how, in his view, the applicants are not able to comply with the provisions of the new Bill Payment Service Agreement. Finally, he testified as to his involvement with respect to the applicants' banking services, the investigations of the applicants' accounts that occurred in 2003 and 2005 and the results of those investigations.

Mr. Ronald King

Ronald King is Vice President and Chief Anti-Money Laundering Officer of the Scotiabank group of companies. He testified about the historic money laundering legislative context in Canada, and how money launderers have in the past worked in order to avoid detection. He discussed the creation of the Financial Action Task Force, its annual listing of countries and territories that do not cooperate with anti-money laundering efforts, and the role of OSFI in anti-money laundering efforts. He identified and discussed a number of OSFI and FINTRAC Guidelines. He also described in some detail the Bank's Anti-Money Laundering Handbook, the Know Your Customer's Customer rule, the Bank's obligation to terminate banking relationships in certain circumstances, and the Anti-Money Laundering Handbook's provisions as they apply to money services businesses, unusual transaction reports and suspicious transaction reports. He discussed the role of the Bank's anti-money laundering group in the decision to terminate the

applicants' accounts, and his money laundering concerns with the applicants' business. He concluded with comments on Mr. Bensimon's report and expressed his view that the applicants are not compliant with their own anti-money laundering obligations under the applicable legislation.

Mr. David Jones

David Jones is Director of Web Business at WestJet. He testified with respect to the average dollar purchase of WestJet tickets, the factors that his company would weigh when considering partnering with new payment providers, and his opinion that it would be a "non-starter" for WestJet to partner with an entity that admits that there are periods when the banking customer's password is not encrypted.

[290] **SCHEDULE C**

Undertaking

The applicants undertake that, as a condition of Scotiabank supplying bill payee status, associated bank accounts, and/or accounts for depositing EMTs:

A. Money laundering

1. The applicants will comply with all applicable anti-money laundering legislation in Canada.

2. The applicants will remediate all deficiencies in their anti-money laundering procedures identified by Mr. Bensimon.

3. The applicants will provide copies of all written manuals, procedures, etc, relating to their anti-money laundering procedures to Scotiabank.

4. The applicants will provide the Scotiabank with a list of all current active Merchant Clients.

5. The applicants will provide the Scotiabank with copies of contracts with all new Merchant Clients and the associated industry code and due diligence.

6. The applicants will provide the Scotiabank with a report of the volume of funds sent to each Merchant Client on a frequency to be determined but not more than monthly.

7. The applicants will provide the Scotiabank with annual Financial Statements.

8. The applicants will not process funds where there is reason to believe the funds are destined for a country on the NCCT list.

9. The applicants will submit to periodic audits (not more than annually) upon request of Scotiabank, by an anti-money laundering expert acceptable to both the applicants and Scotiabank.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

10. The applicants will remediate any deficiencies in compliance with anti-money laundering legislation identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

B. Computer security

11. The applicants will submit to periodic computer security audits (not more than annually) upon request of Scotiabank, by a computer security expert acceptable to both the applicants and Scotiabank.

12. The applicants will remediate any deficiencies in their computer security procedures identified by such an audit, and, in addition, will adopt any reasonable best practices recommended by such an audit.

C. Blocking access by persons present in the United States

13. The applicants agree that they will not have bill payee status with respect to customers of Scotiabank that are not resident in Canada.

14. The applicants will block payments to online casinos or their management companies where it is able to determine from the account holder's profile on the Scotiabank online banking website that the account holder is resident in the United States.

General

15. Information provided to Scotiabank by the applicants or UseMyBank is provided on the condition that it be kept confidential by Scotiabank.

DATED AT OTTAWA, ONTARIO this 5th Day of October 2006

B-Filer Inc.	NPAY Inc.	B-Filer Inc cob GuaranteedPayment GPAY
Per: (s) Raymond Grace	Per: (s) Raymond Grace	Per: (s) Raymond Grace
Raymond F. Grace, Pres.	Raymond F. Grace, Pres.	Raymond F. Grace, Pres.

APPEARANCES:

For the applicants:

B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and Npay Inc.

Michael Osborne
Sharon Dalton
Jennifer Cantwell

For the respondent:

The Bank of Nova Scotia

Paul Morrison
Lisa Constantine
Ben Mills
Tanya Pagliaroli

Tab 6

Competition Tribunal | Tribunal de la Concurrence

#185(a)

CT - 88 / 4

IN THE MATTER OF an application by the Director of Investigation and Research under section 75 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

AND IN THE MATTER OF a refusal to supply automotive parts for export by Chrysler Canada Ltd. to Richard Brunet.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

Chrysler Canada Ltd.

Respondent

[redacted]

REASONS AND ORDER

Date of Hearing:

July 4 - 18 and 21, 1989

Presiding Member:

The Honourable Mr. Justice Max M. Teitelbaum

Judicial Member:

The Honourable Mr. Justice Leonard A. Martin

Lay Member:

Dr. Frank Roseman

Counsel For the Applicant:

Director of Investigation and Research

William J. Miller
John S. Tyhurst
John F. Rook, Q.C.

Counsel For the Respondent:

Chrysler Canada Ltd.

Thomas A. McDougall, Q.C.
Anne Mactavish

Amicus Curiae:

Yves Bériault
Madeleine Renaud

COMPETITION TRIBUNAL

REASONS AND ORDER

The Director of Investigation and Research

v.

Chrysler Canada Ltd.

On December 14, 1988, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal ("Tribunal") pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), requesting the following relief:

> 1. An order against the Respondent Chrysler Canada Ltd. (Chrysler) requiring that it forthwith and thereafter accept Richard Brunet (Brunet) as a customer on trade terms usual and customary to its relationship with Brunet for the supply of Chrysler Parts (as hereafter defined) to Brunet; and
>
> 2. Such other and further orders which in the circumstances may be just, including:
>
> a) requiring and directing that Chrysler reverse all steps taken to dissuade any person (including Chrysler franchised dealers) in Canada from conducting business with Brunet with respect to Chrysler Parts;

b) restraining Chrysler from combining or arranging with any other person to refuse, suppress, hinder or delay the supply of Chrysler Parts to Brunet; and

c) directing that Chrysler take all such ancillary and necessary steps and actions to restore Brunet to the position he enjoyed before the actions herein complained of.

In 1977 Richard Brunet ("Brunet") opened and began to operate a business in the City of Montreal, Province of Quebec, commonly known as R. Brunet Company ("RBC"). The business was registered as a sole proprietorship.

Brunet's father had operated a similar business in New York City, State of New York, in the United States of America, under the name of G. Brunet Company. This business was involved in the export of automotive parts, including automotive parts of Chrysler Corporation, Ford Corporation and General Motors Corporation. The automotive parts were exported, in the main, to Colombia, Peru and Venezuela. In November 1974, following the death of his father, Brunet took over the operation of his father's business until 1976 when he came to live in Canada.

Brunet, as had his father, exported automotive parts to markets outside of North America, initially to South America, and later to the Middle East, Scandinavia and the United Kingdom.

Although RBC deals with the sale of automotive parts which it purchases from various suppliers, the present application

pertains to the relationship between RBC and Chrysler Canada and the sale by RBC of Chrysler automotive parts in the export market.

Throughout the proceedings, certain terminology relating to the Chrysler parts has been used. The most frequent references are to two groups of Chrysler parts: "A Parts" and "B Parts". On its price lists, Chrysler[1] identifies its parts by a seven-digit number and by one of the above two letters.

B Parts are commonly known as "captive" parts. Mr. Clifford Roy Burnett ("Burnett"), the recently retired Vice-President of Parts and Service and Technical Programs of Chrysler Canada, who since 1974 had the responsibility through various positions for the parts distribution in Canada, testified that some automotive parts that are considered captive parts may in fact be available from a source other than Chrysler. Generally, however, if an owner of a Chrysler motor vehicle must replace a B Part, the part will have to be obtained from Chrysler. Sheet metal parts or interior mouldings were referred to as clear examples of captive parts that could only be supplied by Chrysler.

A Parts are commonly known as "competitive" parts since these parts are available from a variety of automotive parts

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[1] "Chrysler" without a modifier refers to the entire Chrysler organization in North America.

manufacturers for a particular application. An example of a competitive part would be a shock absorber or a fan belt.

Automotive parts can also be divided according to the use to which the part is put. When reference is made to "service" parts, this is taken to mean parts that are used to repair a vehicle, consequent upon an accident or some other malfunction, as opposed to "aftermarket" parts which are replaced as a matter of course during routine maintenance. The breakdown according to application relates to the captive/competitive dichotomy in the following way: service parts may be both captive and competitive; aftermarket parts are competitive more than captive.

Certain brand names specific to the Chrysler organization also appear in the evidence. "Autopar" is a line of Chrysler parts which comprises only competitive parts and which is marketed only by Chrysler Canada. "Mopar" is a line of Chrysler parts which, in Canada, includes mainly captive parts.

Finally, mention should be made of the "Interparts" programs of Chrysler U.S. Interparts programs involve a bulk purchase of some minimum quantity of an automotive part from a special production run of that specific part. These programs include both captive and competitive parts and are only available through Chrysler U.S.

RBC had its first dealings with Chrysler Canada in 1977 and continued to buy from them until the events that led to the present application. Apart from selling Chrysler parts Brunet dealt with two major suppliers in the United States (described as "Other U.S." in Table 1 below). He has also purchased small volumes of auto parts from several suppliers in Canada. His principal supplier in the U.S. until 1983 was Ford Corporation. His relationship with this company ended in 1985. The "Other U.S." since 1985 consists, for practical purposes, of purchases from a single source of supply on behalf of a particular customer. The purchases from Chrysler Canada dealers relate to the present proceedings. Table 1 divides the sales of RBC by the aforementioned sources of supply since 1984.

TABLE 1

R. Brunet Company

Gross Sales by Line of Business

Year	Chrys. Canada	Chrys. Canada Dealers	Chrys. U.S.	Inter-parts, M.D.*	Other Canada	Other U.S.
1989#	-	26,618	67,630	-	21,706	-
1988	-	119,310	52,734	156,464	23,985	376,648
1987	99,154	223,495	24,126	325,872	78,280	140,890
1986	362,245	-	25,180	171,551	50,920	225,207
1985	259,892	-	20,442	95,235	11,984	338,824
1984	300,394	-	27,813	23,631	57,373	508,370

Notes:

* M.D. = Master Distributors

\# To May 12, 1989 only. Transactions with customers were placed in supplier categories by Mr. Reinke of Arthur Anderson Co. based on the supplier from whom Brunet made the largest purchases in each transaction. As a result, there are some minor discrepancies between the values in the table for 1989 and the actual sources of supply.

Total Gross Sales

Year	Total
1989#	115,954
1988	729,141
1987	891,817
1986	835,103
1985	726,377
1984	917,581

Notes:

To May 12, 1989 only.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand, for the Director of Investigation and Research, Schedules A to H; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989, prepared by B.J. Reinke, C.A.

It is uncontested that Brunet was encouraged by Chrysler Canada throughout his association with it to expand the sale of Chrysler Canada auto parts in the export market. A number of actions were taken by Chrysler Canada in its treatment of Brunet to allow for the needs of his customers who faced particular problems of exchange controls and import permits with time deadlines. The details of some of the particular services provided by Chrysler Canada will be discussed in connection with the definition of market. Brunet undertook to represent the Autopar line at trade shows in South America with posters supplied by Chrysler Canada. On occasion Chrysler Canada referred potential customers to Brunet.

On August 29, 1986, Brunet received a telephone call from a Mr. P.R. Williams, National Parts and Sales and Marketing Manager for Chrysler Canada, who informed Brunet that all his orders with Chrysler Canada had been placed on hold. By letter dated October 8, 1986, in reply to a letter from Brunet dated October 2, 1986, sent to Burnett and dealing with a matter referred to as "Requirement for Britain",[2] Burnett advised Brunet that there was "no longer any organizational responsibility for handling these orders in Canada". This letter went on to state that all orders currently in the system would be processed according to "normal practice and/or availability of supply":

October 8, 1986

Mr. Richard Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

Your letter of October 2, 1986 is received and since there is no longer any organizational responsibility for handling these orders in Canada I have referred your request to Mr. B.J. Lerner in the U.S. Chrysler Export Sales Office who will handle all of your requirements.

All orders currently in the system will be filled and shipped as per our normal practice and/or availability of supply.

Thank you for your inquiry. You will hear from Mr. Lerner's office in the near future.

Yours very truly,

(s) C.R. Burnett[3]

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[2] Exhibit 3, Tab 162.

[3] Exhibit 3, Tab 164.

The orders currently in the system were filled by Chrysler Canada over the following five to six months. No new orders were accepted by Chrysler Canada after October 8, 1986 causing Brunet to try to find alternative sources of supply. In January 1987, Brunet approached several Montreal-area Chrysler Canada dealers in order to source parts to service his customers. It did not take long for Chrysler Canada to become aware that Brunet was purchasing parts from its dealers. This information was relayed to Chrysler Canada's head office by Chrysler Canada field representatives through its Montreal office. Suspicion was also aroused by a large order placed by a Chrysler Canada dealer through the Chrysler Canada computer system. This order contained an unusually large number of older automotive parts, far in excess of normal domestic demand. A representative of Chrysler Canada (head office) contacted the Sales Manager of the Regional Office in Pointe Claire, Province of Quebec, a Mr. Jacques St. Pierre, and asked St. Pierre to have his district managers instruct their dealers not to sell Chrysler automotive parts for export.

This initiative was followed up by a bulletin to all Chrysler Canada dealers dated May 8, 1987:

Bulletin No. 87-37
May 8, 1987

TO ALL DEALERS AND AUTOPAR DISTRIBUTORS
OF CHRYSLER CANADA LTD.

EXPORT PARTS SALES

We have received several inquiries recently from Dealers regarding the sale of Chrysler Parts for **Export Sales** purposes. The requests may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets.

The sales of Mopar and Autopar Parts by Chrysler Canada is strictly to service our Canadian customers, not for export. If you receive an inquiry concerning export sales, please contact your Regional Parts Sales Manager, for referral to our Export Sales Office in Detroit. All Chrysler Canada Export Sales will be handled in this manner.

We would appreciate your co-operation in this matter.

(s) P.R. Williams

P.R. WILLIAMS
National Parts Sales
and Marketing Manager[4]

Bulletin n° 87-37
Le 8 mai 1987

AUX CONCESSIONNAIRES ET DISTRIBUTEURS
AUTOPAR DE CHRYSLER CANADA LTÉE

VENTE DE PIECES POUR L'EXPORTATION

Plusieurs concessionnaires nous ont récemment contactés au sujet de la vente de pièces Chrysler **pour l'exportation**. Les demandes sont peut-être reliées à la parution de certains articles dans la presse déclarant que Chrysler étendrait la vente de certains produits de fabrication nord-américaine aux marchés étrangers.

La vente des produits Mopar et Autopar par Chrysler Canada est strictement réservée à nos clients canadiens et non à l'exportation. Pour toute demande concernant la vente pour l'exportation, veuillez communiquer avec votre directeur régional, secteur vente des pièces, qui en référera au bureau des ventes pour l'exportation à Detroit. Toutes les ventes de pièces pour l'exportation de Chrysler Canada seront ainsi traitées.

Votre collaboration dans cette affaire sera grandement appréciée.

Le Directeur national,
vente et commercialisation
des pièces,

(s) P.R. Williams

P.R. Williams[5]

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4 Exhibit 4, Tab 230 (underlining added).

5 *Ibid.* (underlining added).

Despite the general language of this bulletin, the Tribunal is satisfied, from the testimony of Burnett, that the bulletin *was aimed at preventing Brunet* from obtaining Chrysler parts to service his customers.

> Q. Now, in the second sentence in that first paragraph, it says:
>
> "The request may have resulted from recent articles in the press that Chrysler would be expanding sales of some North American-built products into foreign markets."
>
> Given your evidence to this point on this bulletin, would you agree with me that the specific impetus for the bulletin was Mr. Brunet and not any articles that may have appeared in the press?
>
> A. That is true, although there were articles in the press about Chrysler entering the European market.
>
> Q. But I put it to you that, in the absence of Mr. Brunet's activities, you would not have sent this memorandum.
>
> A. Probably not, sir.[6]

Notwithstanding the issuance of the bulletin Brunet was still able to purchase, with difficulty, Chrysler parts from Chrysler Canada dealers. On September 27, 1987 a second bulletin was issued by Chrysler Canada.[7] This second bulletin was much the same as the first. It emphasized, as did the first, that parts were not to be sold for export and that all requests for parts for export should be

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[6] Cross-examination of Burnett at p. 1534 of the transcript.

[7] Exhibit 16.

referred to the dealer's Regional Manager who, in turn, would refer the matter to the office of Export Sales in Detroit.

Some time after the May 1987 bulletin, Chrysler Canada commenced a review of all of its dealer agreements which culminated in the re-signing of all the Chrysler Canada dealers to new dealer agreements. A clause was inserted in order to restrict parts sales to the domestic market in the following terms:

> Whereas the parties hereto have heretofore entered into a Sales and Service Agreement relating to, among other things, a means for the sale, in Canada, of parts and accessories and other products and services manufactured or distributed by CHRYSLER ... .
>
> And to provide parts to the Canadian domestic market to assure service to those vehicles sold in Canada for the full extent of their service requirements.[8]

Although no sanctions or penalties have as yet been applied against any of its dealers by Chrysler Canada for breach of the clause, Burnett is of the view that the new agreement gives Chrysler Canada the power to terminate the franchise of a dealer who sells parts to Brunet. Changes were also made to the computerized ordering system of Chrysler Canada to flag atypical orders involving large volumes or unusual parts.

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[8] *Parts Wholesale Sales Agreement*, Exhibit 6, Tab 338 (underlining added). See also *Parts Merchandising Sales Agreement*, Exhibit 26.

Section 75 of the *Competition Act*

On the basis of the above facts the Director instituted the proceedings pursuant to section 75 of the Act. Section 75 reads:

> 75. (1) Where, on application by the Director, 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, and
>
> (d) the product is in ample supply,
>
> 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.
>
> (2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.
>
> (3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

In order for the Tribunal to exercise its discretion to make an order pursuant to the section the Director must establish all of the elements contained in each of the paragraphs (1)(a) to (1)(d). Paragraphs (1)(c) and (1)(d) are not in serious dispute. The Tribunal is satisfied that Brunet is willing and able to meet the usual trade terms of Chrysler Canada and that the product is in ample supply. No evidence was led to the contrary. Before turning to the determination of whether the elements of (1)(a) and (1)(b) have been met, it is necessary to establish the meaning of "product" and "market".

Product

Is the product in question Chrysler Canada auto parts as submitted by the Director, Chrysler auto parts, or auto parts in general as submitted by the respondent? The definition of market is closely tied to the answer to this question. The Tribunal is satisfied that the relevant product is, for the reasons explained below, Chrysler auto parts.

Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an

increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(a), the ultimate test concerns the effect on the business of the person refused supplies. Where products are purchased for resale, the effect on the business of the person refused supply will depend on the demand of the person's customers and whether substitutes are acceptable to them. Therefore, the starting point for the definition of "product" under section 75 is the buyer's customers.

Although Brunet's business is the export of auto parts, the definition of the product in relation to Brunet's dealings with Chrysler Canada depends on the demand of customers who purchased Chrysler auto parts. The issue is whether they treated Chrysler auto parts as a distinct product or as one for which they would readily accept substitutes. The evidence shows that Brunet responded to direct orders of customers, that customers *specified* that they wanted genuine Chrysler parts, and that they used numerical codes specific to Chrysler's parts system when ordering. There was no question of substituting parts of other suppliers for those of Chrysler. The product in question is thus Chrysler auto parts.

The respondent submits that subsection 75(2) severely constrains the definition of the product as Chrysler auto parts: "the effect of subsection 75(2) with its reference to class of articles is that the Tribunal must define a product by a genus or class or kind

description, unless the product meets the single exception thereto."[9] The applicant takes the position that the subsection "adds little to the analysis. In a buyer-derived demand situation alternative branded goods are of little utility and the particular sought branded goods will always be of importance."[10]

In the view of the Tribunal subsection 75(2) does not enter into the definition of the product as Chrysler auto parts. The product is Chrysler auto parts not "only because it is differentiated from the other articles in its class by a trade mark, proprietary name or the like".[11] It is not only the existence of the trademark that determines the definition but rather the demand of Brunet's customers. Subsection 75(2) forecloses reliance being placed on trademarks (save for the specified exception) to define products in spite of the existence of acceptable substitutes to customers. This factor, the presence or absence of acceptable substitutes to customers, is of paramount importance in arriving at the appropriate definition of the "product" and was the determining factor in the present case.

The evidence is that it is primarily service parts and within that group mainly captive parts that are ordered from Brunet. This is consistent with the designation of other parts as competitive

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9 Respondent's Memorandum of Law at para. 40.

10 Memorandum of Law of the Applicant at para. 35.

11 *Competition Act*, R.S.C. 1985, c. C-34, as am., s. 75(2) (underlining added).

because for these parts there are numerous alternative sources of supply and active price competition. Looking to the fact that sales by Brunet of the Autopar line, which consists only of competitive parts, were very limited, Chrysler Canada would have the Tribunal exclude the Autopar line from the product definition. The Director has stressed, through the evidence of Brunet, that in Brunet's experience competitive parts are ordered in the same way as captive parts (as a seven-digit number) and with the same insistence on genuine Chrysler parts. Virtually nothing turns on the finding of a distinction; no element of the decision depends on whether the product in question is Chrysler auto parts, captive and competitive, or exclusively captive Chrysler auto parts since the volume of competitive parts ordered from Brunet appears to have been minimal. A finding for Chrysler Canada would require that Brunet's sales and gross profits be modified to exclude sales of Autopar. This was not done by the Respondent's accounting expert. Given the foregoing and the fact that from Brunet's perspective (if not that of his customers insofar as they shop for cheaper sources of supply prior to ordering from Brunet) there is no difference between competitive and captive parts, the Tribunal makes no distinction between captive and competitive Chrysler parts.

The economist, Professor Ralph A. Winter, who appeared as an expert witness on behalf of the respondent, submits that the Tribunal should approach the definition of product and market not from the point of view of Brunet as a buyer, but from the viewpoint

of determining whether Chrysler has substantial market power. This, he submits, can only be done by considering what Chrysler sells and with whom it competes. He concludes that the relevant market is synonymous with the worldwide sale of automobiles since the price of auto parts is established in conjunction with the pricing of vehicles. It is Winter's view that Chrysler's pricing of parts is constrained by the effect this can have on the sale of its vehicles and that it faces very stiff competition in the sale of its vehicles. Winter concludes that since Chrysler does not have substantial market power as a seller of vehicles, its decision to discontinue supplying Brunet was motivated by concerns for efficiency and not to increase its market power.

This argument is presented by Winter in relation to the definition of product and market and also in conjunction with the Tribunal's use of its discretion to grant an order in the event that it finds that all of the elements have been satisfied by the applicant. The Tribunal is satisfied that a broad consideration of Chrysler's market power is not required in determining whether the specific elements of section 75 of the Act have been satisfied but may be relevant in the Tribunal's exercise of its discretion.

Market

Having defined the product as Chrysler auto parts, the Tribunal must now determine the market in which Brunet buys

Chrysler auto parts. The applicant contends that the relevant market comprises Canada, that Chrysler Canada is the sole supplier and Brunet, in the event, is the sole buyer. The respondent submits that the market consists of both the U.S. and Canada, that Chrysler U.S. is the supplier and exporters of Chrysler auto parts are the buyers. The Tribunal is satisfied that the relevant market is Canada, and that the U.S. and Canada are separate markets. This conclusion is discussed in the following section that deals with the differences between purchases from Chrysler Canada and from Chrysler U.S. in small and large volumes.

(a) Parts Purchased in Small Volume

This refers to the number of units of each part and to the fact that the parts are individually packaged. It does not refer to the size of the total order.

The automotive parts purchased from Chrysler Canada or Chrysler U.S. are physically identical. However, Chrysler Canada and Chrysler U.S. each publish separate price lists for these parts. The evidence is that prices in Canada are established with respect to market conditions in Canada. According to the evidence of Burnett, Chrysler Canada used the U.S. price list as a point of departure and made its modifications to price in the light of domestic conditions, subject to meeting the financial tests within Chrysler.

The reason why prices (*denominated in a common currency*) for some parts are cheaper in Canada than in the U.S. was addressed in the evidence of Burnett and, more speculatively, in the evidence of Professors Schwindt and Winter. Burnett states that Canadian prices are primarily cheaper for parts used for older models of cars. He also said that Chrysler Canada tends not to change the prices of inventory until it is necessary to reorder and since the turnover of inventory is much slower in Canada than in the U.S., reordering occurs less frequently and thus price increases lag behind those in the U.S.

Winter hypothesizes that parts prices in Canada fell at the time of the decline in the Canadian dollar as compared to the American dollar in late 1970s. He reasons that Chrysler, in common with other companies, is reluctant to incorporate the effect of exchange rate changes in their prices because this would be too disruptive. Professor Richard Schwindt concludes that prices of vehicles and parts in Canada are more sensitive to import competition than in the U.S. and thus tend to be lower. All the explanations share the common feature that, *whatever the cause, market conditions in the U.S. and Canada are different and the differences are reflected in different parts prices.* The percentage of all Chrysler parts that were priced lower in Canada is not in evidence. The only specific evidence is that it is primarily older parts that are affected.

The evidence generally indicates that customers tended to buy exclusively or primarily from Brunet those parts that were cheaper to source through Chrysler Canada. Parts that were generally less expensive to source in the U.S. were purchased through other suppliers.

In addition to the price differences between Chrysler Canada and Chrysler U.S., there were several other important differences between them as sources of service parts. Chrysler Canada offered Brunet (and thus Brunet's customers) "price protection" against changes in prices between the time of order and delivery. This protection was offered for a period of up to four months, covering two bi-monthly changes in price lists. Only recently, in February 1989, was this protection made available to Brunet by Chrysler U.S.

Furthermore, when an order was sent to Chrysler Canada it responded with an "availability report" which identifies the parts that were immediately available and the length of the delay that would be required in supplying each of the remaining parts.

Brunet also asserts, with some corroboration from correspondence with customers, that Chrysler Canada offered superior service in other ways. Brunet claims that the percentage of orders immediately filled by Chrysler Canada was much higher than was the case with Chrysler U.S. and that the latter tended to fill orders

through a series of relatively small shipments to Brunet's designated port. The result was slower shipment to Brunet's customers and higher costs. Brunet also claims that the accuracy with which orders were filled was higher in Canada than in the U.S. As a result there were fewer customer claims when supply was obtained from Chrysler Canada. The only evidence offered in contradiction is testimony by Burnett to the effect that the "fill rate" on orders received by Chrysler *from dealers* is 95 per cent in the U.S. compared to 96 per cent in Canada. This evidence does not, however, provide any information on Brunet's experience with Chrysler U.S. since Brunet *is not a dealer and does not make typical dealer's orders.*

The Tribunal does not accept Brunet's allegations that it is cheaper to ship to European destinations from a port in Montreal rather than a port in New Jersey. This evidence, given by Brunet, is contradicted by the evidence of a Mr. Jansson, a witness from Sweden who imports Chrysler Canada vehicles and Chrysler parts from Canada.

The importance to Brunet's customers of all of the foregoing differences between sourcing from Chrysler Canada and Chrysler U.S. that are not directly related to differences in the price lists cannot be accurately assessed. To do so would require evidence on whether Brunet's customers chose to source from Chrysler Canada when its prices were *higher* than those set by Chrysler U.S. In the absence of evidence of this kind, or at least evidence of customer

statements that they clearly preferred to source from Chrysler Canada, the Tribunal concludes that these factors *alone* do not create two distinct sources of supply. This conclusion is supported by evidence that Brunet's customers tend to buy parts that are cheaper to source from Chrysler U.S. through other exporters than Brunet. This suggests that whatever problems there might have been in sourcing from Chrysler U.S., they could be overcome by price concessions or other advantages that these other exporters offered Brunet's customers. Insofar as Brunet's customers were concerned, he was a preferred source of supply primarily for parts that are cheaper to source in Canada.

Brunet earned a considerably higher profit margin on parts sourced from Chrysler Canada than on U.S. orders as the Canadian price list necessarily included Canadian federal sales tax and duty on parts imported into Canada. The duty and tax did not apply on parts exported from Canada. The duty and sales tax paid by Chrysler Canada were returned to Brunet and constituted the major part of his profit margin. The higher profitability Brunet earned on parts obtained in Canada put him in a position to offer discounts on the published price lists or to absorb some of the cost of higher prices, as may be the case when he buys from dealers. Thus, customers could be encouraged to purchase Canadian-sourced parts when list prices in the U.S. and Canada were similar. Whether discounts were in fact offered by Brunet is less important than his ability to do so.

Schwindt is of the view that the separate price lists in the two countries and the other differences discussed above create a separate "product bundle" with respect to Chrysler parts sourced in Canada and those sourced in the U.S., even though the parts are physically identical. He concludes that the differences are sufficiently great to create two distinct markets:

> When sourcing his purchases, Brunet considered a number of elements which were important to his purchase decision. These elements include: the physical characteristics of the automotive part; the delivery point; the probability that the order would be filled in a single delivery; the reliability of the supplier in meeting promised delivery dates; the predictability of trade terms; the probability of unauthorized substitutions; the probability of missing, misplaced or damaged goods; the supplier's cancellation policy; and price. Generally the physical characteristics of Chrysler automotive parts supplied by Chrysler Canada Ltd. were identical to those supplied by Chrysler U.S. However, the other elements of the product bundle could differ significantly between these suppliers.[12]

As indicated above, the Tribunal concludes that the critical difference between the two sources of supply is price.

Winter concludes that the physical identity of the parts obtained from the two sources is critical in establishing market boundaries, and since the only difference between the two sources is price (or other claimed advantages that can be translated into a price

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[12] Exhibit 22: Exhibit "A" to the Affidavit of Richard Schwindt, dated June 4, 1989 at p. 7.

difference), parts supplied from Chrysler Canada and from Chrysler U.S. are in the same market:

> Products that are physically identical, and are perfectly substitutable in their end uses are properly regarded as in the same market unless geographical distance and directly related costs preclude their substitutability. Almost all of the items that Professor Schwindt lists, such as higher handling costs of U.S. sourced product, less price protection, less accommodation of timing requests, a stricter cancellation policy, and the unilateral substitution of technically equivalent parts, are equivalent to a higher cost of purchasing from Chrysler U.S., or a higher price paid to Chrysler U.S. The physical products from the two sources were identical; from the buyer's point of view all differences in terms of trade are equivalent to differences in price.[13]

He states that to conclude, as does Schwindt, that Chrysler Canada is in a different market than Chrysler U.S., is to arrive at the odd result that there is one supplier and one customer. He states that the effect of denying Brunet supply from Chrysler Canada is to place Brunet on the same footing as exporters operating from the U.S., whereas before he had the advantage of being able to sell from both price lists and to buy from both sources:

> The prices paid by Brunet to Chrysler U.S. and the trade terms available to Brunet from Chrysler U.S., were the same terms faced by every other distributor of Chrysler parts for export from North America (*supra*, Section II, paragraph 9). If a buyer of a particular article can obtain perfectly substitutable products at a modest or moderate price or cost increase, which price increase puts the buyer on an equal footing with other buyers of the product, then the substitute products should properly be included in the same market definition. The perfect

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[13] Exhibit 29: Report Prepared by Ralph A. Winter, dated June 20, 1989 at para. 9.

> substitutability of the parts from Chrysler U.S. and Chrysler Canada fulfils the essential criterion for inclusion of products in the same market.[14]

Whether Brunet is placed on the same footing as exporters in the U.S. (described by Burnett as the "level playing field") is not relevant to a determination of market definition, but may be relevant in deciding whether the Tribunal should exercise its discretion in issuing an order in the event that the applicant is successful in the present proceedings.

The existence of separate price lists in the U.S. and Canada and the fact that they are intended, according to the evidence of Burnett, to respond to different market conditions in the two countries strongly implies the existence of separate markets. No convincing evidence to the contrary has been presented. The price lists are used by the vast dealer networks in the two countries. It is difficult to believe that anyone would question that dealers in the U.S. and Canada are in separate markets with respect to the purchase of their parts. Yet Winter and the respondent submit that Brunet is in the same market as the numerous U.S.-based exporters with whom he competes for non-North American business. The Tribunal does not accept this conclusion, given that Chrysler Canada and Chrysler U.S. are in separate markets.

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[14] *Ibid.* at para. 10.

In the case of Brunet it is clear that the market niche he occupies is based on the fact that some Chrysler auto parts are cheaper in Canada than in the U.S. The price differences are maintained by Chrysler for its own purposes. Similarly, the apparently anomalous situation where there is a single seller and a single buyer is also a result of Chrysler corporate policy. The decision to allow Brunet to address the non-North American markets from Canada was taken by Chrysler. It would similarly be able, apart from the question of the application of section 75 of the Act, to decide that all non-North American exports will originate in the U.S.

(b) Interparts - Parts Purchased in Large Volume

Are parts purchased under the Interparts programs in the United States in the same market as service parts purchased from Chrysler Canada? Although they are physically identical, parts purchased through Interparts and parts from Chrysler Canada are not generally substitutes and hence are not in the same market. This conclusion follows from the features of the Interparts programs: very large minimum purchase requirements; orders must be placed in advance for later manufacture and hence it may take considerable time for an order to be filled; parts are packaged in bulk rather than individually; prices are much lower than for parts ordered in small volumes. The dollar value of minimum purchases was recently raised by a large multiple in conjunction with the creation of Master Distributors of Interparts. The effect of this change is the virtual

elimination of any substitution that may have occurred between sourcing of service parts in Canada and from Interparts.

The Law

As previously stated, the present application is made pursuant to section 75 of the Act. In order for the Director to succeed in his present application, he must satisfy the Tribunal of the existence of each element contained in the section.

(a) Business Substantially Affected

The establishment of the product and market as being Chrysler auto parts available in Canada allows a consideration of the element found in paragraph 75(1)(a), that is, whether Brunet was "substantially affected" in his "business" by the refusal of Chrysler Canada to supply Brunet with Chrysler auto parts.

The applicant submits that the "business" in issue relates to the "specific line or product within the overall enterprise affected by the refusal", that is, Brunet's business is exporting Chrysler Canada auto parts.[15] The respondent submits that a broader

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15 Memorandum of Law of the Applicant at para. 42.

interpretation is required in light of the definition of "business" found in subsection 2(1) of the Act which states:

> "business" includes the business of
> (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
> (b) acquiring, supplying and otherwise dealing in services.

The respondent submits that the evidence shows that Brunet's "business" is the "export business" or "conceivably his business of exporting automotive parts".[16]

A majority of the Tribunal agrees with the submission of the respondent that the effect on the entire activity of which the refused supplies are a part should be used. It is clear that a fair analysis of the situation in the present case requires that a broader interpretation is required than the one urged by the applicant. The submission of the applicant, if accepted, would be unnecessarily restrictive since this could preclude a proper understanding of the effects of the refusal to supply.

This does not mean, however, that the effect of the refusal to supply can be established solely by examining the overall sales and profit figures. To understand the effect of the refusal to supply, it is necessary to answer the following:

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[16] Respondent's Memorandum of Law at para. 25.

(a) does the product in issue account for a large percentage of the overall business?

(b) is the product easily replaced by other products sold by the business?

(c) does the sale of the product use up capacity that could be devoted to other activities?

(d) is the product used or sold in conjunction with other products and services so that the effect on the overall results of the business may be much greater than indicated by the volume of the product purchased?

Reliance on an examination of the overall business result may be appropriate where it is difficult to do a more disaggregated analysis. This is not necessary in the case of Brunet's business; it is very small, he has few customers and it is possible to inquire meaningfully whether there is a relationship between transactions. Under the circumstances the figures on his overall business provide information for only an initial step in the evaluation. The accountants called as expert witnesses by the parties did not have any particular familiarity with the auto parts export business in

general, or with Brunet's business in particular. They were not, therefore, in a knowledgable position to give evidence on how the refusal of Chrysler Canada to sell to Brunet affected his overall sales and profits. Similarly, Winter, who stated the hypothesis that the capacity formerly used on the sale of Chrysler Canada-sourced parts was redirected to the sale of parts from other sources, was not in a position to confirm the factual validity of this submission.

The figures placed in evidence by the accountants for the two sides were similar and served to confirm that the records maintained by Brunet fairly represented his business transactions. There is agreement that the few discrepancies in their treatments are not of material importance in determining whether Brunet is substantially affected in his business.

The respondent stresses that Brunet had larger sales and profit after Chrysler Canada refused to supply Brunet in 1986 (referred to by the Director as the "cut-off") than in the years preceding it and therefore Brunet was not substantially affected by his inability to obtain supply from Chrysler Canada. As noted earlier, in some cases this type of evidence might be conclusive, but only where it is not possible to analyze how the separate parts of the business are related. The Tribunal is satisfied, through the evidence of Brunet, that the gross sales and profits earned from the sale of other products is totally unrelated, by way of the utilization of

capacity or by way of demand, to the sale of Chrysler parts. The sale of other parts took very little of Brunet's time or that of his assistant and his business could easily have accommodated these additional sales if he had not lost sales of Chrysler parts as a result of his inability to obtain supplies from Chrysler Canada. Similarly, the demand for Chrysler auto parts was independent of the demand for other parts. Accordingly, any changes in the sales of other parts and the gross margins therefrom would have taken place whether or not Brunet's relationship with Chrysler Canada had changed. The same conclusion is applicable with respect to Interparts since service parts and Interparts represent separate markets. There is no reason to believe that Brunet's customers would be influenced to increase their demand for Interparts as a result of Brunet's inability to obtain supply from Chrysler Canada. If the cut-off had any effect on the sale of Interparts it would be a negative one to the extent that Brunet lost customers as a result of Chrysler Canada's refusal to supply auto parts.

Large sales of other auto parts to a single customer in 1987 and in 1988 virtually disappeared during the first four months of 1989. The large sales and resulting gross profits from these transactions were an essential part in the overall sales and gross profit figures that the respondent relies on to state that the cut-off does not have a substantial effect on Brunet's business because overall sales and gross profits did not fall after 1986. The most

recent figures submitted show that overall sales and gross profits are much lower, on an annual basis, than before the cut-off.[17] This illustrates the danger of relying on aggregate data when more specific and relevant information is available. The Tribunal is satisfied that the evidence shows that both the increase in the sales of other auto parts and the subsequent decline are unrelated to the extent to which Chrysler parts are available to Brunet in Canada.

Following the cut-off Brunet was able to obtain parts from Chrysler Canada dealers. Under his arrangement with them he paid them their acquisition cost plus five per cent. It is noteworthy that Canadian-sourced parts were sufficiently more price attractive than those obtainable from Chrysler U.S. that Brunet and his customers preferred to pay the additional five per cent rather than purchase from Chrysler U.S.

A review of the extent to which Brunet was able to replace Chrysler Canada by its dealers must take into account the steps that Chrysler Canada took to discourage its dealers from selling to Brunet. The verbal warnings to particular dealers, the bulletins to all dealers and, finally the re-signing of all dealers to new contracts with a clause that is designed, according to the evidence of Burnett,

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[17] Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989; Table 1, *supra* at p. 7-8.

to give Chrysler Canada the authority to discontinue supplying a dealer in the event that the dealer sells for export, have progressively changed the conditions under which Brunet can buy from Chrysler Canada dealers. Chrysler Canada has modified its computer software to more readily enable it to detect orders that may be intended for export. As a result of these efforts by Chrysler Canada, Brunet is forced to split his orders and to spread them over some time to attempt to avoid detection. There is evidence that three dealers openly sell to Brunet. The evidence is not clear on whether any of them have wholesale dealer status. If they do not, the prices that they pay for captive parts are more than those which Brunet paid to Chrysler Canada. In addition, it must be assumed that the dealers are earning some profit margin on their sales to Brunet, such as the five per cent referred to previously, thus causing Brunet to pay a substantially higher price for the auto parts than that paid by Brunet to Chrysler Canada.

Table 2 shows Brunet's gross profit and sales resulting from purchases from Chrysler Canada, Chrysler Canada dealers and Chrysler U.S. from 1984 to May 1989.

TABLE 2

Gross Sales and Profit*: Parts Sourced from Chrysler Canada, Chrysler Canada Dealers and Chrysler U.S.

1984-1989

Year	Chrys. Canada	Chrys. Canada Dealers	Gross Profit Chrys. Canada & Dealers	Chrys. U.S.	Gross Profit Chrys. U.S.
1984	300,394		49,161	27,813	1,410
1985	259,892		39,407	20,442	1,019
1986	362,245		47,202	25,180	1,885
1987	99,154	233,495	43,554	24,126	1,555
1988	___	119,310	14,706	52,734	4,321
1989**	___	26,618	3,856	67,630	6,140#

Notes:

* Gross profit (or gross margin or mark-up) is gross sales minus cost of goods sold. The Coopers & Lybrand report prepared on behalf of the applicant uses the terminology "mark-up" rather than "gross margin". There does not in fact appear to be any difference between the two terms except when expressed as a percentage, which involves the use of a different denominator. The principal discrepancy between the gross margins of Arthur Anderson and the mark-up of Coopers & Lybrand is with respect to dealers in 1988. Arthur Anderson arrived at a figure of $18,495, which compares to $14,706 in the table. The figures in all other cases are the same or very close. The Arthur Anderson study provided gross margins for fewer years for the categories shown in the table and thus the decision to use the Coopers and Lybrand information was, so to speak, by default.

** January 1 - May 12.

Includes purchases from Chrysler U.S. and from Master Distributors of Interparts.

Sources:

Exhibit 10: Statement of Roman Boyko, C.A. / Richard Joly, C.A., Coopers and Lybrand for the Director of Investigation and Research, Schedules A to D; Exhibit 31: R. Brunet Company Sales, Cost of Sales and Gross Margin for the Period from January 1, 1989 to May 12, 1989.

The effectiveness of Chrysler Canada's efforts in preventing Brunet from exporting from Canada is shown in the above table. There is a marked decline in sales and profits on purchases of Chrysler auto parts in Canada between 1986 and 1988 and on through somewhat more than the first quarter of 1989. The figures for 1989 are taken as providing only an order of magnitude because the period is relatively short. The 1989 figures are based on an analysis by Mr. Reinke of Arthur Anderson & Co. who appeared as an expert witness on behalf of the respondent. Reinke prepared the figures in response to a request made to him during cross-examination. He examined the ledger cards used by Brunet and included only those transactions for which both a purchase and a sale were recorded. In the view of the Tribunal, this was the only reasonable course. Ledger cards on which only one part of a transaction are recorded cannot be included as part of sales for the period in question. Some transactions started in 1988 are part of the partial 1989 figures and it is to be expected that some transactions started between January 1 and May 12, 1989 will be completed and recorded as such after May 12, 1989. There is no obvious bias imported into the 1989 figures by this factor. The only legitimate concern that the volume of sales is understated relates to the possibility that Brunet failed to make entries on the ledger cards for completed transactions. No evidence of this was presented to the Tribunal.

The respondent points to variations in demand that are unrelated to the cut-off as a possible explanation for any decline in sales and gross margins experienced by Brunet. This is a possibility that must be taken into account. Variation in demand certainly accounted for swings in the sale of other auto parts. In considering this factor the Tribunal notes that neither party attempted to provide a benchmark against which the changes in Brunet's sales of service parts might be measured (such as, for instance, the total exports of Chrysler service parts from North America during the years in question). The Tribunal is not satisfied that the large changes in sales experienced by Brunet were caused by variations in demand that are unrelated to the cut-off.

To evaluate the changes in sales and profits experienced by Brunet, it is necessary to determine the meaning of "substantially affected". The applicant submits that "substantially affected" simply means more than a *de minimis* effect. This conclusion is based on the fact that an earlier draft of the Act required only that the person be "adversely affected" which could mean a negative effect to a small degree.

The respondent submits that "substantially" does not simply mean "some" or "to a degree" but rather "major" or "significant". The respondent takes the position that the ordinary dictionary definition should be used in the absence of strong reasons to the contrary. 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.

The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October 1986. The slight rise in 1988 sales of Chrysler U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's. The figures for more than a third of 1989 and the fact that Chrysler Canada has put in place contracts that will permit it to discipline dealers who sell for export suggest that even greater losses may be anticipated in the future.

(b) Inadequate Competition in the Market

The issue as to whether Brunet is unable to obtain supplies because of inadequate competition in the market turns on whether Chrysler Canada dealers are in the same market as Chrysler Canada as suppliers to Brunet. The Tribunal concludes that the restrictions placed by Chrysler Canada on its dealers clearly make them inferior sources of supply to Brunet and that they therefore do not provide adequate competition to Chrysler Canada.

Exercise of Discretion

The Tribunal is satisfied that the Director has proven, through the evidence presented, all of the elements of section 75 of the Act. Once this prerequisite is met, the Tribunal has the discretion to issue an order requiring Chrysler Canada to resume supplying Brunet with Chrysler auto parts within a specified time on usual trade terms.

There are several areas of evidence and argument that bear on the exercise of the Tribunal's discretion. These are: the reasons behind Chrysler Canada's decision to discontinue supplying Brunet; the market position of Chrysler and the changes that it was making in its distribution system; the long association between Brunet and

Chrysler Canada; the unquestioned encouragement that Chrysler Canada provided Brunet; and the manner in which the cut-off was implemented.

(a) The Decision to Discontinue Supply to Brunet

The respondent takes the position that the decision to no longer permit Brunet to buy from Chrysler Canada was taken in response to Brunet breaking one of the conditions attached to such supply, that Brunet not sell to franchised dealers outside of North America in competition with Chrysler U.S.

The existence of such a condition is in dispute. Burnett alleges that this condition, along with the condition that Brunet not divert supplies into the North American market, were clearly set out in a verbal arrangement between himself and Brunet. There is no written agreement between Chrysler Canada and Brunet. Brunet denies that it was ever understood that he was not to sell to Chrysler dealers outside of North America. The Tribunal accepts his evidence.

Associated documentary evidence supports Brunet's position. Correspondence between Chrysler Canada and Brunet corroborates that Chrysler Canada was concerned that parts sold to Brunet not be diverted into the domestic market. Procedures were established to ensure that such diversion was prevented. In contrast, there is no

mention in any of the correspondence between Brunet and Chrysler Canada prior to 1986 that the latter was concerned about the possibility that Brunet might be selling to franchised dealers outside of North America. Concern about Brunet competing with Chrysler U.S. is first raised in May 1986 in connection with Brunet's approach to an "Interparts distributor" (rather than a franchised dealer) in Peru:

May 1, 1986

Mr. R. Brunet
R. Brunet Company
Suite 918
360 St. James Street West
Montreal, Quebec
H2Y 1P5

Dear Richard:

This letter will serve to confirm our telephone conversation regarding your letter of March 19, 1986, to Colonial Motors in Peru. Your letter suggests that in some cases, it is more advantageous to purchase parts from yourself than it is to purchase from Chrysler Corporation. Colonial Motors is an authorized Interparts Distributor.

I would like to remind you that when you are representing Chrysler Canada Ltd. in the export market, your objective is to compliment (*sic*) the Corporation's Interparts Division's sales activities, not to compete for their Distributors' business. We would appreciate your co-operation in this matter.

Yours very truly,

CHRYSLER CANADA LTD.

(s) P.R. Williams
National Parts Sales
and Marketing Manager

cc: C.R. Burnett[18]

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18 Exhibit 3, Tab 134.

The context and the language of the letter create ambiguities. This sole written reference to the claimed Chrysler Canada understanding with Brunet is not persuasive.

Most importantly, sales to a Mr. Karlsson, a franchised dealer in Sweden, took place against a backdrop of a visit by Karlsson to the central Chrysler Canada parts depot. Brunet introduced Karlsson to the manager of the warehouse and sent Burnett a copy of a letter that Brunet sent to the manager following Karlsson's visit. Burnett passed on the letter to Williams, the author of the May 1986 letter referred to above.[19] It is difficult to believe that Brunet would have been so open in presenting and discussing Karlsson if he knew that sales to Karlsson's company would have been in contravention of a condition of purchase from Chrysler Canada. Furthermore, Brunet claims that he was referred to Karlsson by an employee of Chrysler Canada, a Mr. Barton, through a Mr. Hedlund who was acting as Canadian agent for Karlsson. This evidence is not contradicted. It is also undisputed that the same employee, Barton, had referred a Mr. Jansson, a non-franchised dealer in Sweden who had purchased vehicles from Chrysler Canada and needed parts, to Brunet. Burnett states that he did not know that Karlsson was a franchised dealer although Chrysler Canada had access to this information. More critical to the issue is the fact that Burnett never

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19 *Ibid.*

inquired, leaving the impression that whether Brunet was selling to franchised Chrysler dealers outside of North America was of no concern to Chrysler Canada.

(b) Consolidation of Control of Chrysler Exports

Although the evidence does not support the respondent's position that Chrysler Canada had an agreement with Brunet with respect to export to Chrysler franchised dealers, this does not mean that Chrysler was not concerned by such exports. It does not require specific evidence to conclude that the Chrysler export arm would find it embarrassing to have to compete with Brunet for the trade of its dealers. But beyond any such potential embarrassment, it is easy to accept that Chrysler would want to consolidate control of exports in one country and not be concerned with pricing differences between Canada and the United States affecting export markets. One does not have to go so far as Winter and conclude that the motive for consolidating exports is strictly to enhance efficiency in order to conclude that the decision is not solely intended to protect a separate price structure in Canada. Although Burnett denies that the Chrysler organization was in disarray in the early 1980s when Chrysler was in financial difficulty, the evidence shows that plants outside North America were sold off and the sale of Chrysler vehicles through (foreign) Chrysler franchised dealers was stopped. The evidence shows that, in recent years, Chrysler vehicles are once again being sold through (foreign) franchised dealers. It is

easy to understand that Chrysler would want to make organizational changes that can better accommodate its changing distribution system.

The respondent has not attempted to provide a cohesive explanation of the Chrysler distribution system. The principal argument put forward is that Brunet was being placed in the same position as U.S.-based exporters who, according to the evidence of Burnett, numbered somewhat more than one hundred and had combined annual sales of $80 million (U.S.). No details were provided regarding who these firms are, who they sell to or their relation with Chrysler U.S.

The Tribunal must consider that the respondent has not presented any evidence that the granting of an order pursuant to section 75 of the Act would disadvantage the respondent. A point that has been raised in connection with the attempt to prevent dealers from selling for export is that exporting some parts that are in short supply (this applies particularly to older vehicles) could deprive domestic consumers. It strikes the Tribunal that this concern could most effectively be dealt with by having Brunet deal directly with Chrysler Canada. To the extent that Brunet is successful in buying from dealers, Chrysler Canada cannot identify the orders from dealers that are destined for export, which was not the case when it was selling directly to Brunet.

(c) Brunet's Long Association with Chrysler Canada

It is uncontested that Brunet was encouraged throughout his association with Chrysler Canada. A number of actions were taken by Chrysler Canada to accommodate its treatment of Brunet to allow for the needs arising from dealing with customers who faced problems of exchange controls and import permits with time deadlines. Burnett confirmed that Chrysler Canada had encouraged Brunet in his efforts to expand the sale of Chrysler Canada auto parts. Chrysler Canada on occasion referred potential customers to Brunet. In spite of this long and friendly relationship, no attempt was made by Chrysler Canada to resolve any problems that they perceived in Brunet selling to Karlsson in Sweden or attempting to sell to Colonial Motors, an Interparts dealer in Peru. There was no warning that he might be cut off and there was no face-to-face meeting to discuss the situation. Brunet was shown little consideration apart from Burnett agreeing to fill orders received by him prior to the cut-off date.

Conclusion

Section 75 is different than other sections in Part VIII of the Act. The test for whether the elements in the section are satisfied is not the effect on competition or efficiency. These considerations enter, where applicable, in the exercise of discretion.

The Tribunal accepts that Chrysler or Chrysler Canada does not occupy a very strong market position in the automobile industry (even though, as might be expected, it is in a very strong position with respect to the distribution of its products) and that it may have legitimate business interests that it is trying to protect. Weighing against this consideration is the long relationship between Brunet and Chrysler Canada, the manner in which sales to Brunet were terminated, and the fact that the respondent has not made any effort to establish that the granting of an order by the Tribunal would prejudice it in any way. Brunet has been substantially affected by the denial of supplies. He merits relief and it will be provided in the order.

The Tribunal is of the view that a proper balancing of interests in this case might be better accomplished with an order that was limited with respect to time, or perhaps with respect to the category of buyers that would be open to Brunet. Such an order could probably best be achieved through negotiations between the parties.

The Tribunal is satisfied, however, that its authority under section 75 is limited to the issue of an order that requires the respondent to supply Brunet Chrysler parts under the usual trade terms as it had done up to October 1986. Such an order shall issue.

There shall be no order as to costs. The Tribunal is satisfied that it does not have the jurisdiction to order the payment of costs.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.

DATED at Ottawa, this 13th day of October, 1989.

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

(s) M.M. Teitelbaum
M.M. Teitelbaum

Tab 7

Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 6
File No.: CT-2008-004
Registry Document No.: 0532

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. and Groupe Dynaco, Coopérative Agroalimentaire, and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.
(respondents)

Dates of hearing: 20081117 to 20081121, 20081124 to 20081128, 20081202 to 20081203
Before: Blanchard J. (presiding), H. Lanctôt and P. A. Gervais
Date of Reasons and Order: June 8, 2009
Reasons and Order signed by: Mr. Justice E. Blanchard, Mr. H. Lanctôt and Mr. P. A. Gervais

REASONS FOR ORDER AND ORDER

[redacted]

TABLE OF CONTENTS **Paragraph**

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

[1] Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (the "Applicant" or "Nadeau") brings an application for an order directing the Respondents to accept Nadeau as a customer and to supply live chickens to Nadeau on the usual trade terms. The application is made pursuant to section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[2] In the reasons that follow, we[1] find that:

(a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
(b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
(c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
(d) The Applicant has not established that the product is in ample supply; and
(e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[3] Since the Act requires that all of the requirements of subsection 75(1) be met for an order to issue, it follows that the application will be dismissed.

II. BACKGROUND FACTS

A. The parties

[4] The Applicant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited, is a corporation incorporated under the laws of the Province of New Brunswick and is a wholly-owned subsidiary of Maple Lodge Holding Corporation ("Maple Lodge"), which is one of Canada's largest chicken processors.

[5] Maple Lodge employs about 2,300 people and owns 100% of the shares of two chicken processing facilities in Canada, one in Norval, Ontario, which is operated by Maple Lodge Farms Ltd. ("Maple Lodge Farms"), and one in St-François de Madawaska, New Brunswick (the "St-François Plant"). The St-François Plant is operated by the Applicant.

[6] The Respondent Groupe Westco Inc. ("Westco") is a corporation incorporated under the laws of the Province of New Brunswick. Westco is highly integrated in the chicken industry. It owns or controls egg hatching production quota, farms, chicken production quota and chicken production farms. Through its subsidiaries, Westco owns or controls around 50.9% of New Brunswick's chicken production.

[7] The Respondent Groupe Dynaco, Coopérative Agroalimentaire ("Dynaco"), is a co-operative registered in the Province of Quebec. Dynaco has interests in certain chicken production facilities in the Province of New Brunswick. Dynaco is highly integrated in a number of industries, including the chicken industry. Dynaco is the [TRANSLATION] "fifth most significant co-operative in the Province of Quebec".

[8] The Respondent Volailles Acadia S.E.C., created under the laws of the Province of Quebec, is registered as an extra-provincial limited partnership in the Province of New Brunswick, and the Respondent Volailles Acadia Inc./Acadia Poultry Inc., incorporated under the laws of Canada, is registered as an extra-provincial corporation in the Province of New Brunswick (collectively, "Acadia"). Acadia's main activity is the production of chicken and turkey.

B. The poultry supply management system

[9] The events underlying this proceeding occurred in the context of Canada's poultry supply management system. It is therefore useful to understand the workings of that system.

[10] Under Canada's supply management system, the typical set of market-determined economic arrangements is replaced with a detailed and complex set of regulations, akin to a centrally planned economic system. It has been described as being, in effect, a state-mandated cartel arrangement.

[11] Supply management in the poultry sector evolved as a policy response to the interprovincial competition in chicken and egg marketing; also known as the "chicken and egg wars". The policy regime originated in the early to mid-1970s and replaced open, and at times aggressive, competition with mandated market shares enforced by provincial and producer marketing quotas. As a result, the poultry sector is likely the most highly regulated industry in the Canadian economy.

[12] Supply management is commonly said to rest on three pillars, namely production control, price control and import control. We will briefly deal with each of these in turn.

[13] Chicken farmers or producers are limited to producing their quota amounts, which are measured in kilograms of live weight. A producer receives a single quota applicable to all of his or her production regardless of the intended destination. Non-compliance can give rise to penalties. National quotas are set by a federal marketing agency, the Chicken Farmers of Canada (the "CFC"). Its prime responsibility is to ensure that Canadian chicken producers supply a sufficient quantity of product to ensure that the domestic market meets consumer demand. The CFC then allocates provincial quotas of chicken to the provinces. In turn, the provincial marketing boards set individual quotas for producers. Unlike some other provinces, New Brunswick currently does not have regulations requiring producers to direct their live chicken supply to any particular processor. Since 1995, the national quota or the quantities of chicken required have been determined at the provincial level through a process known as the "bottom-up" approach. Under this approach, provincial processors negotiate with provincial marketing boards to determine provincial quota requirements. The provincial requirements are then

aggregated and adjusted, if necessary, by the CFC. The national quota is thus the aggregate of provincial requirements and is set periodically, "every 6 or 7 weeks depending on the year of production" according to the expert evidence adduced.

[14] While there is no legislation preventing the interprovincial trade of chickens, the evidence indicates that relatively few chickens move across provincial borders. In 2005, interprovincial trade in chickens involved only 4% of total Canadian production. A producer wishing to export chickens to another province must obtain a license from the CFC. The license is issued by the CFC as long as the producer is in compliance with statutory regulations.

[15] Farmers may buy and sell their quotas, but certain restrictions apply. One such restriction is that owners themselves must be engaged in the production of chickens. New entrants have little option but to purchase quota from existing farmers, which can prove costly. The cost of quota for an average-size chicken farm in 2007 climbed to $2.25 million. In certain provinces new quotas are reserved for new entrants at no cost, but these quotas are limited. In most jurisdictions, free entry involves a very long wait and is not a realistic option for new entrants. The more realistic approach has been for new entrants to purchase existing quotas from producers. Most new quota allocations are issued to existing producers.

[16] The minimum price at which chickens may be sold in respective provinces is set by provincial marketing boards. Under law, the provincial boards are charged with the task of restricting production so that farmers can earn a reasonable margin, but at the same time they must prevent prices from rising so high that demand is choked off. The evidence would suggest that the boards have been successful, since chicken production in Canada has risen by 77% in the last 15 years. Certain provinces have used the price negotiated in Ontario as the benchmark price for their own negotiations. Since May 2003, the price in Ontario is established by a formula which includes taking into account market conditions, input costs based on a cost-of-production formula, and prices set in neighbouring provinces.

[17] Protection from imports from other countries is also an important feature of the supply management scheme. To import chickens into Canada, a special permit is required. Import quotas, also known as "tariff rate quotas" ("TRQs"), specify the quantity of imports that are allowed, and are allotted annually and not permanently. These quotas are managed by the federal Department of Foreign Affairs and International Trade, whose role it is to allocate the TRQs to individual firms and set and maintain the rules by which they are administered. The TRQs are automatically set at 7.5% of the previous year's production. Allocation procedures vary by commodity and are affected by increases or decreases in demand of the commodity in question and other factors. For the most part, quota holders are likely to have their import quota allotment renewed or re-allocated in subsequent years.

[18] Given the significance of the supply management system and its impact on this case, we shall conduct a comprehensive review of the legislative and regulatory framework of the system later on in these reasons and particularly in those parts relating to paragraphs 75(1)(*b*) and (*d*) of the Act.

C. Nature of the Applicant's business

[19] The Applicant is a primary processor that slaughters live chickens and sells them (in whole or in parts) to further processors and other customers. The Applicant's only business is the St-François Plant, which was acquired in 1989. At the time of the acquisition, the former owner was insolvent. The Applicant has invested millions of dollars over the years to improve and maintain the St-François Plant. It has been the only chicken processing plant in New Brunswick since 1992 and has been slaughtering all of the chickens produced in New Brunswick since 1998.

[20] In February 2002, the St-François Plant was damaged by a fire that resulted in the closure of operations. It was rebuilt as a "broiler plant" and was up and running again in November 2002. During the rebuilding period, the Applicant continued to purchase all of New Brunswick's live chicken production and arranged to have the chickens slaughtered at other processing plants. According to the Applicant, the newly rebuilt St-François Plant is the most modern and efficient chicken processing facility in Canada.

[21] The Applicant currently has about 375 employees. It is the largest employer in the St-François community. At present, it runs one production line with two shifts, averaging sixty hours a week, five days a week.

[22] The Applicant states that it requires a full range of birds within certain weight tolerances in order to meet its customers' specifications. The Applicant offers both air-chilled and water-chilled chicken. Air-chilled chickens, which are considered to be "premium" chickens, are cooled after being eviscerated by using cold air, rather than water. This method prevents the absorption of water thus reducing the amount of moisture in the chicken. Having both systems at the St-François Plant gives the Applicant increased flexibility to satisfy its customers' needs.

[23] The majority of the Applicant's arrangements with its customers are verbal agreements that are entered into by way of a "handshake deal". The only written contract between the Applicant and any of its customers is a **[CONFIDENTIAL]** contract between the Applicant and **[CONFIDENTIAL]** relating to the sale of chicken by **[CONFIDENTIAL]** to **[CONFIDENTIAL]**. The Applicant also has written agreements with **[CONFIDENTIAL]** and **[CONFIDENTIAL]** with regard to their respective specifications and pricing requirements.

D. Nature of the Respondents' businesses

(1) Westco

[24] Westco is a group of chicken and turkey producers. Westco's head office is located in St-François de Madawaska. Through its subsidiaries, it currently owns or controls 50.9% of New Brunswick's quota, which represents an annual volume of 19,367,920 kg of live chickens. Westco presently has approximately 200 employees.

[25] Westco (formerly called Fermes Waska) was created in 1984 by the consolidation of a dozen New Brunswick chicken producers who wanted to increase their buying and negotiating power vis-à-vis egg and meal producers, chick breeders, carriers and processors. A further

consolidation of production quotas occurred during the 1990s, mainly between 1994 and 1998, resulting in an increase in Westco's quota. The consolidation was encouraged by Maple Lodge in order to bring production quota closer to the St-François Plant.

[26] In the early 1990s, Westco started to pursue a project of vertical integration. Westco's vertical integration started gradually, beginning with the purchase of trucks making it possible to transport chips and meal and continuing with the consolidation of meal purchasing to facilitate negotiations for its fabrication and price. Westco then constructed hatcheries, reproduction farms and transport facilities. During Westco's vertical integration, the size of farms also dramatically increased.

[27] Westco is now involved in almost all phases of the production of live chickens including the organic production of manure, the purchase of wholesale grains, egg production, the manufacture of meal, fecundation, chick production, poultry production and transportation. According to Westco, the only phases in which it is not involved are the processing of live chickens and distribution of processed chicken to the retail market.

(2) Dynaco

[28] Dynaco is an agricultural co-operative with over 1,500 members, 655 of which are agricultural producers. It is involved in other fields such as home renovation centers, the sale of petroleum products and transportation.

[29] Dynaco's poultry production represents 1.6% of its total sales figure and Dynaco owns 6.22 % of New Brunswick's chicken production quota.

[30] Dynaco holds 100% of the shares of Les Fermes J.J.C. Bolduc inc. and Les Fermes avicoles Bolduc ("Fermes Bolduc") and also owns 25% of the shares of Cormico Inc. ("Cormico"). Cormico's other shares are owned by La Coop Fédérée ("Coop Fédérée") (25%) and the Cormier family (50%). Its chicken production quota represents 4.98% of New Brunswick's supply. Coop Fédérée is Canada's largest firm in the chicken sector: with revenues of $2.9 billion, this poultry co-operative ranks second amongst all co-operatives. The quota held by Fermes Bolduc is, however, the only New Brunswick production quota over which Dynaco has control with respect to the slaughtering destination.

(3) Acadia

[31] Acadia was created in 2006 to acquire poultry and pig production facilities. Acadia's main activity is chicken and turkey production. It operates four chicken production sites in New Brunswick. Its pig production has been abandoned.

[32] Acadia currently owns or controls 16% of New Brunswick's chicken production quota. Since 2006, Acadia has also been producing the quota for Slipp Farms, a New Brunswick chicken producer, under a leasing agreement. Its quota represents 1.01% of New Brunswick's supply or about 3,679 chickens per week. Acadia does not exert any control over where Slipp Farms' production is processed.

E. Relationship between the Respondents

[33] Westco owns one of Dynaco's 734 shares. Dynaco is a member of Coop Fédérée. Dynaco is also indirectly related to Olymel S.E.C. ("Olymel"), given that Coop Fédérée owns 60% of Olymel. Olymel is a limited partnership formed under the laws of Quebec. It is a primary and secondary chicken processor and is the Applicant's primary competitor in Quebec and the eastern provinces. Olymel currently owns two chicken processing plants, one in Berthierville and another in St-Damase, Quebec. On average, the aforementioned plants process approximately 1.3 million chickens per week. Olymel also owns 50% of Volaille Giannone inc., which operates a chicken processing plant in St-Cuthbert, Quebec.

[34] The shareholders of Volailles Acadia Inc./Acadia Poultry Inc. are the same as the limited partners of Volailles Acadia S.E.C. Acadia is jointly owned by Coop Fédérée (30%), Dynaco (30%), Purdel Coopérative Agro-Alimentaire ("Purdel") (15%) and Westco (25%). Purdel is also a member of Coop Fédérée. Acadia is thus also indirectly affiliated with Olymel, as three of its four co-owners are related to Coop Fédérée.

[35] Rémi Faucher, who testified on behalf of both Acadia and Dynaco in these proceedings, has worked for each of these Respondents. Mr. Faucher was president and administrator of Acadia from May 2006 to July 2008 and was also president and general manager of Dynaco from September 1998 to February 2008.

F. The Applicant's supply of live chickens

[36] When the St-François Plant was acquired in 1989, the birds in the province were split between northern and southern New Brunswick (50/50). At that time, there was another processing plant in Sussex, New Brunswick, which was processing birds from southern New-Brunswick, while the St-François Plant was processing birds from the province's northern part. In 1989, the St-François Plant was in financial difficulty as a result of problems between the previous owners and producers. Consequently, many producers from northern New Brunswick were shipping their birds to Quebec and Ontario for processing.

[37] In or about June 1990, the Applicant entered into negotiations with New Brunswick producers that were shipping their production out-of-province. The Applicant wanted to bring the New Brunswick birds back to New Brunswick to be processed at the St-François Plant. The Applicant agreed to pay the producers $0.065 over the Ontario price instead of the price set by the New Brunswick chicken marketing board, which was about $0.04 over the Ontario board price. The negotiations thus raised the New Brunswick board price (the "NB Board Price") by $0.025.

[38] The Sussex plant closed in 1992, making the St-François Plant the only chicken processing plant in New Brunswick. In late 1995, as a result of poor markets and the suggestion of the then Deputy Minister of Agriculture, the Applicant introduced a "relocation bonus" whereby it split its transportation costs for transporting birds from southern New Brunswick to northern New Brunswick with producers from the north who bought quota from the south. The agreement was that the Applicant would pay $0.03/kg for three years from the date the producer

purchased the quota. Payments under the program started in about 1996 and the last of the quota was purchased in 1998. Accordingly, the program was completed by 2001. As of 1998, the Applicant was processing the totality of the New Brunswick production.

[39] The Applicant began receiving supply from the Respondents in 1990 and was processing the totality of their production at the time the Applicant filed its Notice of Application with the Tribunal on March 17, 2008. The Respondents' production facilities are currently all located within 30 km of the St-François Plant. The Applicant does not have any written contracts with New Brunswick producers, including the Respondents, specifying the number and size of chickens that are to be supplied by those producers to Nadeau. There are also no contractual arrangements between the parties specifying a term for supply.

[40] From 1990 to January 2007, the Applicant always paid its producers the NB Board Price for their chickens, which is $0.065 above the regulated Ontario minimum price. In January 2007, the Applicant developed a market-based incentive plan for producers in New Brunswick (the "Incentive Plan"). The Incentive Plan cost the Applicant $**[CONFIDENTIAL]** in 2007, of which $**[CONFIDENTIAL]** went to the Respondents collectively. Westco gained $**[CONFIDENTIAL]** from the Incentive Plan that year.

[41] Prior to May 2007, the Applicant obtained all of its live chickens from New Brunswick producers, with almost 75% being supplied by the Respondents or their quota-holding predecessors. Due to a plant closure in Nova Scotia in May 2007, the Applicant began to obtain supply from Nova Scotia and Prince Edward Island. When the Notice of Application in this case was filed, the St-François Plant was processing on average about 565,800 chickens per week from the following sources:

Westco	186,230
Acadia	58,670
Dynaco	26,450
New Brunswick, other	94,450
Prince Edward Island	40,000
Nova Scotia	160,000

[42] The Applicant began receiving an additional 25,000 birds per week from Nova Scotia in June 2008 and another 6,250 birds per week in September 2008.

[43] In order to accommodate the surplus of birds coming from Nova Scotia and Prince Edward Island, the Applicant started a second shift, which required it to hire approximately 130 new employees. In order to offset the additional costs incurred by running a second shift, the Applicant needed some assurance that it would receive the Nova Scotia birds for a reasonable time period. The Applicant therefore made a "handshake deal" with certain Nova Scotia producers under which they would send Nadeau their chickens for a period of three years. This "handshake deal" was entered into in May 2007.

G. The termination of the supply relationship

(1) Westco

[44] In January 2007, Westco advised the Applicant of its interest in buying or investing in the St-François Plant. Westco submits that the only way to ensure its future in the poultry industry is to proceed with a complete vertical integration of its operations, which requires Westco to acquire an existing slaughterhouse or to build a new one. During a meeting which was held in Atlanta on January 25, 2007, Anthony Tavares, the president and CEO of Maple Lodge at the time, informed Westco that Maple Lodge's shareholders would likely not be interested in selling the St-François Plant. Mr. Tavares further stated that a structure that would result in Westco owning a percentage of the St-François Plant and retaining 100% of its live production assets would result in non-aligned shareholder interests and would likely eventually lead to conflicts.

[45] Shortly after the meeting in Atlanta, Mr. Tavares met with the Board of Directors of Maple Lodge, which decided that it was not interested in selling to Westco. The Board, however, indicated that it would be prepared to look at an ownership structure in which Nadeau and Westco assets would be pooled and Westco and Maple Lodge would each own a part of the combined operations. This proposal was communicated to Westco, but there was no agreement.

[46] Westco approached Olymel in March 2007 in order to develop a partnership so as to complete its strategy of vertical integration. As mentioned above, Olymel is a chicken processor in Quebec and competes with the Applicant in Quebec and the eastern provinces. The purpose of the partnership was to acquire the assets or shares of the Applicant or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with the Applicant, the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel") which was created pursuant to the New Brunswick *Limited Partnership Act*, S.N.B. 1984, c. L-9.1.

[47] Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if the Applicant was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.

[48] Mr. Tavares met with Westco representatives again on September 6, 2007. During the meeting, Mr. Tavares told Westco's representatives that he was shocked by their decision to partner with Olymel and also stated that he was of the opinion that it was a poor business decision. Westco's representatives did not reconsider.

[49] Following the September 6, 2007, meeting, Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.

[50] On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by the Applicant. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to the Applicant, effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

[51] During the negotiations, the Applicant filed complaints with the New Brunswick Minister of Agriculture and Aquaculture and with Chicken Farmers of New Brunswick (sometimes "CFNB").

(2) Dynaco

[52] The Applicant submits that during the negotiations for the acquisition of the St-François Plant, Mr. Soucy affirmed that he had the authority to speak on behalf of Dynaco and that that is why Dynaco was referenced in the Applicant's correspondence with the Minister of Agriculture and Aquaculture. Dynaco states that Mr. Soucy never had the authority to speak on its behalf. Notwithstanding an apology by the Applicant for the mistaken reference to Dynaco in the letter to the Minister, Dynaco confirmed by two letters dated March 6, 2008, that its chickens would cease arriving at Nadeau, effective September 15, 2008.

(3) Acadia

[53] By letter dated February 28, 2008, Acadia gave the Applicant formal notice that it would cease supplying it with live chickens, effective September 15, 2008. Acadia submits that this was a business decision and states that its decision to cease supplying the Applicant was not influenced by the negotiations that took place between the Applicant and Westco regarding the acquisition of the St-François Plant.

H. History of the proceeding and relief sought

[54] This proceeding is brought pursuant to the Tribunal's order of May 12, 2008, which granted the Applicant leave to apply for an order under section 75 of the Act. The Applicant seeks an order requiring the Respondents to continue supplying the Applicant with live chickens on the usual trade terms and in the numbers previously provided by the Respondents.

[55] On June 26, 2008, the Tribunal granted the Applicant's request for interim relief pursuant to section 104.1 of the Act (the "Interim Supply Order"). The Respondents were ordered to continue to supply the Applicant with live chickens on usual trade terms at the level of weekly supply that was in place at that time, namely 271,350 live chickens, pending the hearing of the main application.

[56] On November 4, 2008, the Applicant filed a motion for an order requiring the Respondents to show cause why they should not be held in contempt of the Interim Supply Order ("Show Cause Motion"). The Applicant alleged that the Respondents breached and are continuing to breach the Interim Supply Order, as the Applicant has been and will continue to be significantly short on deliveries of chicken.

[57] On November 6, 2008, Westco filed a motion for an order or direction regarding the interpretation of the Interim Supply Order. Westco seeks an order to confirm its view that the weekly number of chickens ordered to be delivered to the Applicant is a notional figure based on a hypothetical average weight of 2 kg and that the volume of live chickens to be supplied to the Applicant by the Respondents will :

i. be decreased by the volume of replacement chickens obtained by the Applicant;
ii. vary proportionally and in accordance with the periodic fluctuation of the Respondents' production quotas; and
iii. reflect the Respondents' production schedules.

[58] On February 26, 2009, the Tribunal dismissed the Show Cause Motion with respect to Acadia and Dynaco. It granted the motion with respect to Westco and ordered a show cause hearing. The show cause hearing has not yet taken place and the matter is still outstanding before the Tribunal. Westco's motion for an order or direction regarding the interpretation of the Interim Supply Order will be argued at the show cause hearing.

III. LEGISLATIVE FRAMEWORK

[59] The refusal to deal provision is contained in section 75 of the Act. It reads as follows:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	**75.** (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*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,	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(*b*) 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,	*b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
(*c*) the person referred to in paragraph (*a*) is willing and able to meet the usual trade terms of the	*c*) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de

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.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

(3) Pour l'application du présent article, « conditions de commerce » s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables

d'ordre technique ou d'entretien.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

IV. THE PARTIES' WITNESSES

[60] Before turning to the analysis of the merits of the application before us, it is important to identify all the witnesses who appeared before the Tribunal. A detailed description of their testimony appears in Schedule A to these reasons.

A. The Applicant

(1) Experts

[61] Dr. Richard Barichello, Dr. Roger Ware and Mr. Grant Robinson filed expert reports and testified as experts on behalf of the Applicant.

[62] Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. The Tribunal found that he was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. The Respondents did not take issue with Dr. Barichello's qualifications to give an expert opinion on these matters.

[63] Dr. Roger Ware is a professor of economics at Queen's University. With the parties' agreement, the Tribunal recognized Dr. Roger Ware as an expert in the areas of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms.

[64] Grant C. Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. The Tribunal found that he was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry.

(2) Lay witnesses

[65] Seventeen other individuals appeared on behalf of the Applicant.

[66] Two members of the Applicant's management team testified. The Applicant called Yves Landry, the Applicant's general manager, and Denise Boucher, its office manager.

[67] Anthony Tavares, the former president of the Applicant and Chief Executive Officer of Maple Lodge, and John Feenstra, the former general manager of the Applicant, also gave evidence.

[68] The Applicant called three members of its procurement team to testify about the Applicant's efforts to procure chickens from Quebec. Those members were Tina Ouellette, Léonard Viel and Réjean Plourde.

[69] Further processors of chickens and other customers of the Applicant also appeared before the Tribunal. They are:

> (i) Guy Chevalier, President, Service Alimentaire Desco Inc. ("Desco"). Desco is a further processor and distributor of chicken;
> (ii) Terry Ellis, President, Sunchef Farms Inc. ("Sunchef"). Sunchef is a further processor of chicken;
> (iii) Lyndsay Gazzard, Senior Purchasing Manager responsible for poultry purchases for the Unified Purchasing Group of Canada ("UPGC"). UPGC operates as the purchasing agent for YUM! Restaurants International Canada Ltd.;
> (iv) Corey Goodman, General Manager, UPGC, and Chief Purchasing Officer, Priszm;
> (v) Debbie Goodz, President and CEO, Poulets Riverview Inc. ("Riverview"). Riverview is a further processor and distributor of chicken; and
> (vi) Jeffrey Lloyd McHaffie, the *de facto* vice-president of Puddy Bros. Limited ("Puddy"), in charge of sales and the purchase of poultry products. Puddy is a further processor of chicken.

[70] Kevin Thompson, Executive Director, Association of Ontario Chicken Processors, and Bruce McCullagh, Senior Vice President and General Manager, Poultry Operations, Maple Leaf Consumer Foods ("Maple Leaf"), also testified on behalf of the Applicant. Maple Leaf is a large poultry processing company located in Ontario.

[71] Finally, Andre Merks, a Nova Scotia chicken farmer, and Michael Donahue, Vice-President, Agri Stats, Inc. ("Agri Stats"), were called by the Applicant. Agri Stats is a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America.

B. The Respondents

(1) Expert

[72] Margaret Sanderson was called as an expert by the Respondent Westco. Ms. Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. The Tribunal accepted Ms. Sanderson as an expert in the area of economics,

competition policy and industrial organization, including market definition and the competitive behaviour of firms. The Applicant consented to Ms. Sanderson's expertise.

[73] Ms. Sanderson was the only expert to testify on behalf of the Respondent Westco. Dynaco and Acadia did not call any experts.

(2) Lay witnesses

(a) Westco

[74] Five lay witnesses appeared on behalf of Westco. Westco called two individuals who testified about its operations. They were Thomas Soucy, Westco's Chief Executive Officer and President, and Bertin Cyr, a member of Westco's Board of Directors.

[75] Westco also called two Olymel employees. The vice-president of Olymel's chicken procurement division, Yvan Brodeur, and another Olymel employee, Julie Desroches, gave evidence.

[76] Richard Wittenberg was the last lay witness to testify for Westco. He is a Nova Scotia chicken farmer.

(b) Dynaco

[77] Gilles Lapointe and Rémi Faucher testified on behalf of Dynaco. Gilles Lapointe is Dynaco's chief financial officer and Rémi Faucher is Dynaco's former chief executive officer.

(c) Acadia

[78] As stated above, Rémi Faucher also testified for Acadia as he acted as Acadia's president from 2006 until 2008. He was the only witness called by Acadia.

[79] Before turning to the elements of section 75 and the issues to be determined, we dispose of an outstanding matter: the ruling with respect to objections made by Westco to certain paragraphs found in certain witness statements.

V. THE RULING WITH RESPECT TO WESTCO'S OBJECTIONS TO WITNESS STATEMENTS

[80] Prior to the hearing of the Application, the parties filed witness statements setting out the lay witnesses' evidence in chief in full pursuant to the *Competition Tribunal Rules*, SOR/2008-141 (Rules 68-70). The parties were provided with an opportunity to raise objections with respect to the admissibility of the witnesses' statements or parts thereof. Both the Applicant and Westco raised such objections. In its order dated October 31, 2008, the Tribunal dealt with some of the objections raised by the parties but it reserved its ruling on three of Westco's objections until the final reasons. What follows is the ruling on those objections.

[81] Westco argued that certain statements made in the witness statements of Yves Landry (paras. 74-79), Réjean Plourde (paras. 7-9) and Lyndsay Gazzard (paras. 9-12) (the "Contested Statements") consisted of hearsay evidence and were consequently inadmissible. Westco further stated that the individuals mentioned in the Contested Statements were not identified as witnesses scheduled to appear during the hearing.

[82] The Applicant indicated that the Contested Statements did not consist of hearsay as they were not put into evidence for the purpose of proving the truth of their contents. The Applicant argued that the Contested Statements were rather offered as proof that the assertions were made to these witnesses. The Applicant submitted that the assertions were fact evidence that could be given orally by the witnesses during the hearing and stated that there was no requirement that persons named in a witness statement appear on a party's witness list. The Applicant further argued that the Contested Statements were relevant to the issues in the litigation and had probative value.

[83] With respect to paragraph 77 of the statement of Mr. Landry, the Applicant argued that it did not constitute hearsay evidence as Mr. Landry was providing his own testimony as to the identity of Mr. Morin.

[84] Hearsay is testimony or written evidence of a statement made to a witness by a person who is not called as a witness, the statement being offered to show the truth of the matter stated therein. The main concern underlying the admissibility of hearsay lies in the inability to test the truth of the statement or assertion through cross-examination. Therefore, written or oral statements "are inadmissible, if such statements [...] are tendered either as proof of their truth or as proof of assertions implicit therein." (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Markham: Butterworths, 1999) at 173).

[85] Upon reviewing the Contested Statements and considering the arguments of the parties, we admit the statements for the purpose of establishing the fact that they were indeed made and not to prove the truth of their contents. To that end, the Contested Statements are not hearsay. We now turn to the elements of section 75.

VI. THE ELEMENTS OF SECTION 75 AND THE ISSUES TO BE DETERMINED

A. Onus and standard of proof

[86] The burden of proof rests on the Applicant who must establish each constituent element contained in paragraphs (*a*) through (*e*) of subsection 75(1) of the Act on the balance of probabilities.

B. Has the Applicant established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms pursuant to paragraph 75(1)(*a*) of the Act?

[87] Market definition is the first issue. This question will be assessed from two perspectives: the product market and the geographic market where the Applicant might reasonably be expected to look for supplies of live chickens. We will deal with each in turn.

(1) The relevant product market

[88] In its Notice of Application, the Applicant seeks 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." In its Notice of Application and Reply (the "Pleadings"), the Applicant deals only with numbers of live chickens and does not mention that the chickens must be within a given weight range. However, in its submissions, the Applicant takes the position that the "product" for the purposes of paragraph 75(1)(*a*) is live broiler chickens, in a full range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg.

[89] The Respondents are of the view that the "product" is clearly live chickens since this is the product described in the Applicant's Pleadings. Further, the Respondents contend that this is the product that meets the test for determining the product market articulated in *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42.

[90] In *B-Filer*, the Tribunal adopted the approach to the definition of product market in the context of paragraph 75(1)(*a*) set out in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1, aff'd (1991), 38 C.P.R. (3d) 25; [1991] F.C.J. No. 943 (QL) (F.C.A.), where it is stated that the ultimate test concerns the effect on the business of the person refused supplies. In *B-Filer*, the Tribunal restated the test in the following terms at paragraphs 79 and 80 of its reasons:

> [79] For purposes of clarity, we articulate the "*Chrysler* test" as follows: For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.
>
> [80] In regard to the meaning of "substantially" as used in paragraph 75(1)(*a*), as noted by the Tribunal in *Chrysler* at page 23, "[t]he 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." In our view, for example, a person would be considered substantially affected in his business or precluded from carrying on business if switching to other products resulted in the person's business moving out of the market in which it currently participates.

[91] It is noteworthy that the Tribunal in *B-Filer* took into consideration whether the addition of paragraph 75(1)(*e*) had changed the context and purpose of section 75. The Tribunal ruled that the market of concern in 75(1)(*e*) need not be the market of concern in paragraphs 75(1)(*a*) and 75(1)(*b*), and therefore the addition of 75(1)(*e*) did not change the ultimate concern of 75(1)(*a*). We are also of that view.

[92] The Tribunal finds that the proper test for determining the product market is the above-stated test articulated in *B-Filer*, which is based on the substitutability of products. The application of that test to the evidence leads us to the conclusion that the relevant product market here is live chickens without regard for weight. Our reasons for this conclusion now follow.

[93] The evidence indicates that a number of the Applicant's customers require chickens that meet certain specifications particularly in respect to size. **[CONFIDENTIAL]**.

[94] Since its reconstruction after the 2002 fire, the St-François Plant has been producing only "broiler chickens". Mr. Feenstra's evidence, on cross-examination at the hearing, is that broiler chickens range in size between 1.7 and 2.4 kg live weight. We note that a "broiler" is defined under Order II of the New Brunswick Chicken Marketing Board as a chicken which is not more than 2.65 kg live weight.

[95] The above evidence is of little assistance in determining whether chickens in the Applicant's stated size range, namely a minimum of 1.71 kg and a maximum of 2.4 kg, can be substituted by smaller or larger chickens without substantially affecting the Applicant's business. The Applicant has not established the impact of losing supply of live chickens within the stated size range on its business. For instance, we do not know if the Applicant had the option of processing and marketing larger or smaller birds in the event that it lost its supply of all chickens in the stated size range. The Applicant's evidence focuses essentially on the loss of live chickens, not live chickens of a given size.

[96] While there is some evidence relating to the Applicant's size requirements, the Applicant's expert, Dr. Ware, made no case for a narrower market. Dr. Ware does not explicitly refer to the size of chickens. In discussing the product market under paragraph 75(1)(*a*), he refers only to the "market for selling live chicken". At paragraph 35 of his report, he acknowledges the difficulty in obtaining birds that meet the size and quality requirements of the Applicant's customers, but no further discussion on the issue is found in his report. Ms. Sanderson, in her expert report, expresses the view that "the relevant product market is not in dispute here, it is live chicken". We find there is insufficient evidence to establish that chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg cannot be substituted by other chickens.

[97] Further, the Applicant's Pleadings do not specify that the live chickens at issue are chickens in a range of sizes from a minimum of 1.71 kg to a maximum of 2.4 kg. As stated above, the Notice of Application deals with a broader product market, live chickens. It would have been open to the Applicant to move to amend its Pleadings, but it did not. In the absence of such an amendment, it is our view that it would be unfair for the Respondents to be required to address the issue of a narrower product market without notice.

[98] The Applicant has therefore failed to establish that the product market is defined more narrowly to include only those birds in the stated size range. In this respect, the Applicant has failed to meet its onus. We therefore find the product market for the purposes of paragraph 75(1)(*a*) of the Act to be "live chickens".

(2) The relevant geographic market

(a) Positions of the parties

[99] There is no agreement between the parties as to the definition of the relevant geographic market.

[100] It is the Applicant's position that the relevant market is limited to the Province of New Brunswick. The Applicant argues, in the alternative, that even assuming replacement supply can be obtained from Quebec producers, this supply cannot be obtained on usual trade terms. The Applicant's expert, Dr. Ware, expresses the opinion that, because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it is "neither economic nor efficient" for the Applicant to replace the Respondents' supply with supply from locations farther away in Quebec. In reaching this conclusion, Dr. Ware points to the level of interprovincial trade. He notes that, at present, between 4% and 5% of Quebec-grown chickens are shipped outside the province and that this level will reach 14% if the Respondents' supply is replaced with supply from Quebec. In Dr. Ware's view, it is unlikely that such a level of export would be permitted by the Quebec governmental agencies in the long run.

[101] The Respondents contend that the relevant geographic market includes New Brunswick, Quebec, Nova Scotia and Prince Edward Island, and submit that the Applicant can source live chickens from producers in Quebec without being substantially affected. Ms. Sanderson is of the opinion that Quebec producers can provide a ready alternative to replace the Respondents' supply and, in support of her conclusion, points to the following factors:

(i) The Applicant's current live chicken shipments include shipments from more distant locations, such as Nova Scotia and Prince Edward Island;

(ii) A substantial volume of chickens is produced in regions that are located within a reasonable distance from the St-François Plant such as the Quebec City, Beauce and Central Quebec regions;

(iii) There are no regulatory restraints preventing the Applicant from sourcing chickens in Quebec;

(iv) The Applicant's survey indicates that Quebec producers are willing to supply Nadeau live chickens at a reasonable cost; and

(v) The costs associated with Quebec supply such as shrinkage, transportation and birds that are dead on arrival at the processing plant ("DOAs") are not so high as to make it uneconomic for the Applicant to source chickens from Quebec.

(b) Analysis

[102] There is no dispute that New Brunswick forms part of the geographic market. However, at the outset, we reject the contention that the geographic market in the instant case is confined to New Brunswick. At a minimum, the market would include Prince Edward Island since Nadeau has obtained and expects to continue to obtain supply from that province. Both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens. The undisputed evidence is that Prince Edward Island is a long term supplier.

[103] It is useful to discuss the approach we adopt in order to define the geographic market. The Tribunal acknowledged in *Chrysler* that, because of the language used in paragraph 75(1)(*a*), the market definition analysis under that paragraph would be different from the analysis usually performed under other sections of the Act. The Tribunal held at page 10 as follows:

> Products and markets can only be meaningfully defined in a particular context and for a particular purpose. The approach to defining these terms may be entirely different where, as in the case of a merger, the ultimate test is whether the merger will substantially lessen competition and the definition must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition. In the case of paragraph 75(1)(*a*), the ultimate test concerns the effect on the business of the person refused supplies.

[104] As stated above, the Tribunal relied, in *B-Filer*, on the above paragraph in *Chrysler* and developed the "*Chrysler* test" to determine the relevant product market under paragraph 75(1)(*a*). While the Tribunal was not required to consider the geographic market definition, it nevertheless noted that the "correct test for defining markets" (our emphasis) for the purposes of paragraph 75(1)(*a*) is the *Chrysler* test which it articulated as follows:

> For the purposes of 75(1)(*a*), products are substitutes, and so are included in the same market, if a person is not substantially affected in his business (or if the person is not precluded from carrying on business) as result of switching to these other products.

[105] In *Chrysler,* the Tribunal did not explicitly allude to the proper test for defining the relevant geographic market. It based its conclusion on the geographic market on functional indicators, in particular, the existence of different price lists from Chrysler, the only supplier for Canada and the United States. The existence of price differences is one of the functional indicators referred to in the Competition Bureau's *Merger Enforcement Guidelines*. Therefore, the test in *Chrysler* for defining the geographic market essentially consisted of the simple application of these functional indicators.

[106] In the instant case, there is evidence of functional indicators which support the contention that parts of Quebec should be included in the geographic market. These indicators are those summarized from the evidence of Ms. Sanderson at paragraph 101 above and which essentially consist of the location of current suppliers; the relative proximity of potential Quebec suppliers

to the St-François Plant based on the Applicant's survey; significant volumes of chickens in Quebec being located at a reasonable distance, around 500 km, from the St-François Plant; and the absence of regulatory restraints preventing the Applicant from sourcing chickens in Quebec.

[107] We are of the view that consideration of these functional indicators is the preferred approach to defining the geographic market in the instant case. These indicators will be comprehensively dealt with below. As will be seen, they clearly support including that part of Quebec within 500 km from the St-François Plant as part of the geographic market. We find support for our position in the results obtained in the procurement survey conducted by the Applicant, which indicate that numerous Quebec suppliers within 500 km of the St-François Plant are willing to supply chickens to the Applicant. Indeed this radius was acknowledged in Ms. Sanderson's report; she states that "... chicken from Quebec (at the very least from within 500 km of St. Francois) should comprise part of the relevant geographic market for Nadeau's live chicken volumes."

[108] In the circumstances of this case, the proper approach is to consider the above-mentioned functional indicators discussed in Ms. Sanderson's evidence. We find support for our approach to defining the geographic market in the expert evidence adduced before us.

[109] Neither Ms. Sanderson nor Dr. Ware expressed a formal opinion as to the limits of the relevant geographic market for the purposes of paragraph 75(1)(*a*). Nor did they explicitly set out the test that should be applied to determine the market. While they were silent on the exact parameters of the relevant geographic market, both experts did address the question of whether the Applicant can obtain supplies in Quebec.

[110] Dr. Ware testified that the determination of the relevant geographic market in this case poses some difficulties:

> But the important point here is, especially with respect to the geographic market, is that it really is a construct; that we--it's not actually the case that necessarily a supplier who is just outside that boundary plays no role in this market at all. Neither is it the case that every supplier that's inside that boundary plays an equal role in competition.

[111] To the extent that geographic market definition is a pre-condition for analysis under paragraph 75(1)(*a*), it is to suggest a definition that includes a geographic area within which an applicant might reasonably be expected to look for supplies following a refusal to deal. This geographic market may include areas from which supplies of live chickens are currently obtained by the Applicant and could, in this case, therefore include New Brunswick, Prince Edward Island and Nova Scotia. Further, the geographic market could also include areas where an applicant might reasonably be expected to seek supplies and may therefore include, pursuant to the evidence adduced, geographic areas that are similarly placed in relation to an applicant's existing sources of supply. This method reflects the approach adopted by the experts who gave their opinions before the Tribunal.

[112] We are of the view that, in this case, the geographic market also includes parts of Quebec. Both Dr. Ware and Ms. Sanderson turned to that province to determine whether obtaining supplies from that province is a reasonable possibility for the Applicant. Mr. Robinson, an expert who testified on behalf of the Applicant, based one of his four scenarios on the assumption that the Applicant can replace the Respondents' supply with Quebec-grown chickens and examined the effect of such replacement supply on the Applicant's business.

[113] We agree that the geographic market includes parts of Quebec where the Applicant might reasonably be expected to look for supplies of live chickens. The evidence adduced shows that many producers in Quebec located within 500 km of the St-François Plant are no farther than the distance between the Applicant's current suppliers and its St-François Plant. For example, the Applicant processes chickens from Prince Edward Island producers, and the distance between these producers and the St-François Plant is approximately 650 km. As explained above, both Mr. Feenstra and Mr. Tavares testified that the Applicant will continue to process these chickens.

[114] Further, as stated above, there are no regulatory impediments to interprovincial shipments. A producer must obtain a license from the CFC pursuant to the *Canadian Chicken Licensing Regulations*, SOR/2002-22. After having obtained such a license, the producer can export chickens in accordance with the conditions set out in the *Canadian Chicken Licensing Regulations*.

[115] Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebec-based processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

[116] To support his view, Dr. Ware refers to the Applicant's submissions in an application brought before the Chicken Farmers of New Brunswick in which it stated that "... the industries in Ontario and Quebec undertook negotiations because interprovincial trade reaching 5 to 7% of total production was considered a crisis situation." In his examination in chief, he admitted that he was not an expert in this particular field.

[117] After a careful review of the evidence, we conclude that it is insufficient to support Dr. Ware's hypothesis. The evidence establishes that provincial processing associations have expressed concerns about interprovincial trade. Mr. McCullagh testified that the Quebec and Ontario processing associations have approached their respective governments to advise them "that interprovincial trade has the jeopardy of creating an unsustainable premium war". According to Mr. Brodeur, over the last few years, attempts have been made to address these concerns, but, up until now, no solution has been found. Mr. Robinson, the Applicant's expert who was recognized by this Tribunal as having expertise in the chicken processing industry, stated that the increase in interprovincial trade would have a significant impact on the

competitive price to acquire live supply, but he did not confirm the evidence adduced by Dr. Ware according to which Quebec stakeholders would intervene to limit such trade.

[118] We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

[119] In summary, given the absence of regulatory restrictions and the proximity of many Quebec producers to the Applicant's St-François Plant, we agree that parts of Quebec should be included in the geographic market for the purposes of the analysis performed under paragraph 75(1)(*a*).

[120] Regarding Nova Scotia chickens currently processed by the Applicant at its St-François Plant, apart from the three-year arrangement involving the delivery of 160,000 chickens per week, there is evidence of limited supply being sourced from Nova Scotia. In June and September 2008, the Applicant sourced an additional 31,250 chickens per week from Nova Scotia. While there is a paucity of evidence regarding Nova Scotia supply, we nevertheless conclude that Nova Scotia is part of the geographic market because chickens are currently being sourced from there and because the evidence also indicates that the Applicant is not processing these chickens at a loss.

[121] The geographic market will therefore comprise New Brunswick, Prince Edward Island, parts of Quebec which extend to a radius of 500 km of the St-François Plant and Nova Scotia. The parties did not suggest that any other geographic areas be considered.

[122] We now turn to the analysis under paragraph 75(1)(*a*) and consider the following question.

> **(3) Is the Applicant substantially affected in its business because of its inability to obtain adequate supplies of live chickens anywhere in a market on usual trade terms?**

[123] The analysis under paragraph 75(1)(*a*) sets out a number of components that require definition, in particular the phrases "substantially affected" and "usual trade terms".

(a) The meaning of "substantially affected"

[124] We turn first to the meaning of "substantially affected". The Tribunal dealt with the expression in the *Chrysler* case, and concluded that the ordinary dictionary meaning should be given to the word "substantially", and that it required showing "more than something just beyond *de minimis*". The Tribunal, in that case, went on to state that, "[w]hile terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations" (*Chrysler*, at p. 23). In *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007 Comp. Trib. 6, the Tribunal also held that the term

"substantial" in respect to the expression "substantially affected" carries meanings such as "important" and "significant" (*Sears*, at para. 31).

[125] The parties disagree on the meaning to be given to this phrase. The Applicant submits that terms such as "large, significant, important and substantial" capture the concept of a substantial effect on a business. In support of its argument, the Applicant points to the *Chrysler* case.

[126] The Respondent Westco adopts a different approach. In its submissions, it argues that the Tribunal has never really dealt with or specifically defined "substantially affected" or any of the various components of paragraph 75(1)(*a*) and invites the Tribunal to do so in this case.

[127] The Respondent Westco argues that paragraph 75(1)(*a*) contemplates two circumstances: first, that the refusal substantially affects the Applicant in "his business" ("son entreprise"), and second, that it precludes "a person" from "carrying on business" ("ne peut exploiter une entreprise"). In the latter case, the Respondent contends that this could only mean that the refusal would effectively preclude a new entrant from entering the market because no reference is made to the Applicant's existing business ("his business"). In the Respondent's view, the rules of statutory interpretation require that the terms "substantially affected" and "precluded from carrying on business" be read together. The Respondent contends that this approach is consistent with the case law, since the term "substantially affected" would be given its usual and ordinary meaning in accordance with the case law (*Chrysler* and *Sears*), but would be qualified by the expression "precluded from carrying on business". Consequently, the required magnitude of the "substantial effect" would be such that it would approach an applicant being unable to continue in business. The Respondent therefore submits that an enterprise that is not affected to the point of it being unable to carry on business does not meet the test of "substantially affected" for the purposes of paragraph 75(1)(*a*).

[128] With respect, and for the reasons that follow, we reject the Respondent's above interpretation of "substantially affected" in paragraph 75(1)(*a*).

[129] The applicable principle of statutory interpretation, also known as "the modern approach to interpretation", was endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. At paragraph 21 of that decision, Mr. Justice Iacobucci wrote:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Coté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)); Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[130] In accordance with this approach to statutory interpretation, we will first consider the words of paragraph 75(1)(*a*), and in particular the following words which are at issue: "a person is substantially affected in his business or is precluded from carrying on business". The sole issue here is whether the two circumstances contemplated in the provision should be read together as suggested by the Respondent. In our view, the above-cited words, read in their grammatical and ordinary sense, contemplate two separate circumstances. The phrase "substantially affected in his business" is not qualified by the phrase "or is precluded from carrying on business" (emphasis added). Had Parliament intended this to be so, it would have used the word "and" and not "or" in linking the two phrases. Support for the proposition that Parliament intended two separate scenarios by the provision is found in the 1975 House of Commons committee debates. The Minister responsible for the legislation, in response to questions from committee members, indicated that the purpose of the clause was to protect someone who was in business from being put out of business and to allow the entry of others in the market. We reproduce below the relevant passages from the transcripts of the committee debates.

> **Mr. Clarke** (Vancouver Quadra): What was the intent of the clause then?
>
> **Mr. Ouellet**: Well, under certain conditions to make sure that the refusal to deal could become a reprehensible action.
>
> **Mr. Clarke** (Vancouver Quadra): But was it the purpose of that clause to protect someone who was in business from being put out of business?
>
> **Mr. Ouellet**: Yes. But we would like to allow the entry of others, because if we add too many conditions the refusal to deal will never become a reprehensible activity.
>
> **Mr. Clarke** (Vancouver Quadra) Did the Minister say, Mr. Chairman, that they did want to prevent the entry of others or they did not want to prevent the entry of others?
>
> **Mr. Ouellet**: To facilitate the entry of others.
>
> **Mr. Clarke** (Vancouver Quadra): That is what I thought. But the way I read the recommendations from the Senate Committee they are suggesting the present wording would discriminate against someone who wanted to enter that field and their recommendation was designed, in their description, to facilitate the entry of someone into the field. Their criticism is - and I will see how it is worded here. It says:
>
> > The Committee does not consider that the reviewable practice jurisdiction should be available to someone who has never been in business.

And it recommends the deletion of the words "or is precluded from carrying on business".

Mr. Ouellet: The way the proposal made by the Senate has to be understood is that they want to deal with people that are already in the business. We feel it would be too restrictive.

Mr. Clarke (Vancouver Quadra): Do you mean that the Senate recommendation is the opposite of what I have been saying?

Mr. Ouellet: As suggested by the Senate, it will narrow the protection that we are giving, and we do not want to go that far.

Mr. Clarke (Vancouver Quadra): Perhaps the definition hangs on the word "precluded" – precluded from carrying on business, and the way you are reading that is, "or is prevented from entering business,"? Is that the idea?

Mr. Ouellet: Yes.

(Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl. 1st Sess., No. 46 (May 12 1975) at 46:14 - 46:15).

[131] In this case, the Applicant is already in the business of processing chickens and is not seeking to enter the market. In order to meet the test of "substantially affected" for the purposes of paragraph 75(1)(*a*), the Applicant need not demonstrate that it is affected by the refusal to the point of it being unable to carry on business. Rather, it is required to establish on a balance of probabilities that it is affected in an important or significant way. This interpretation is in accordance with the above-cited principle of statutory interpretation and with the case law of the Tribunal.

[132] Having defined "substantially affected", we now turn to the meaning of "usual trade terms".

(b) The meaning of "usual trade terms"

[133] "Usual trade terms" is relevant to section 75 in three ways. First, under paragraph 75(1)(*a*), it must be established that an applicant is unable to obtain adequate supplies on the usual trade terms; second, an applicant must be willing under paragraph 75(1)(*c*) to meet those trade terms as a condition of supply; and third, any order issued under section 75 must be based on the usual trade terms. We turn now to the paragraph 75(1)(*a*) requirement.

[134] Subsection 75(3) of the Act defines trade terms as follows:

75(3) For the purposes of this section, the expression "trade terms" means terms in	**75(3)** Pour l'application du présent article, « conditions de commerce »

respect of payment, units of purchase and reasonable technical and servicing requirements.	s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

[135] Paragraph 75(1)(*a*) speaks of supply of a product on "usual" trade terms. Reference to the dictionary definition of "usual" is helpful. The *Canadian Oxford Dictionary* (2004) defines "usual" as follows: "such as commonly occurs or is observed or done, customary, habitual ...". *Webster's Ninth New Collegiate Dictionary* (1986) provides the following definition: "Normal; commonly or ordinarily used; found in ordinary practice or in the ordinary course of events".

[136] The term "usual" qualifies the statutorily defined expression "trade terms" in paragraph 75(1)(*a*). Applying the ordinary meaning to the term, we are left with trade terms that are ordinarily used or found in ordinary practice in a market. The specific terms which are ordinarily used will, of course, vary and depend on the circumstances in each case. Further, there may be a need to interpret the words and phrases used in the definition of "trade terms" found in subsection 75(3), in particular, for our purposes: "terms in respect of payment".

[137] The parties disagree on the elements to be included in defining "usual trade terms". In reference to the statutory definition in subsection 75(3), the Applicant argues the term "usual trade terms" must have a correlative meaning and therefore refers to the practice that had been in place between the contending parties in terms of price, units, etc. before the refusal to supply. It is the Applicant's contention that the "usual trade terms" in place between each of the Respondents and the Applicant entailed the following elements:

(a) delivery of chickens in a full range of broiler sizes, namely, from 1.71 kg to 2.4 kg;

(b) the CFNB regulated price, which equates to the Ontario base price plus $0.065/kg, plus applicable CFNB size premiums, where applicable;

(c) delivery of chickens grown within 30 km of the St-François Plant, thus resulting in minimal transportation costs, minimal DOAs, and minimal shrink;

(d) payment pursuant to the Marketing Orders of the CFNB, namely net 7 days; and

(e) delivery each and every week of chickens in numbers averaging about:

(i) from Westco, 186,230 chickens per week;

(ii) from Acadia, 58,670 chickens per week; and

(iii) from Dynaco, 26,450 chickens per week,

for a total supply from the Respondents of about 271,350 chickens per week.

[138] The Respondents argue that subsection 75(3) provides a complete definition of "trade terms" and as such can only refer to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". The Respondents contend that the definition

does not include price or volume and that, had Parliament wanted price to be included in "trade terms", it would have said so expressly and not used the phrase "terms in respect of payment" in its definition. Further, the Respondents argue that since paragraph 75(1)(*d*) requires that the product be in ample supply, it was not contemplated that volume be a concern. It is consequently argued that the Tribunal would not have the jurisdiction to grant the Applicant's request and order the Respondents to continue to supply "in the numbers previously provided to Nadeau by the Respondents". It is also argued that since the product market is live chicken, and not chickens of a specified weight, there is no basis here to support size or weight of the chickens as a usual trade term.

[139] We are of the view that "usual trade terms" must be determined in relation to a defined market at a particular time. The applicable time frame in this case is generally at about the time the Respondents gave notice of their refusal to continue to supply. For the purposes of this application, we have also determined above that the product is live chickens and that the geographic market includes parts of the Province of Quebec as well as New Brunswick, Nova Scotia and Prince Edward Island.

[140] What then are the applicable "usual trade terms" that are ordinarily used or found in ordinary practice in the geographic areas? We do not accept the Applicant's submission that the applicable terms are those which reflect the very agreements, in terms of price, units supplied etc., that prevailed between the Respondents and the Applicant prior to the refusal. Parliament did not provide that the Applicant need only establish its inability to obtain supply on the "same" trade terms, for the purposes of paragraph 75(1)(*a*). Had it intended this, it would have expressly provided so, as it did elsewhere in the Act. See section 80 of the Act where reference is made to "same" trade terms.

[141] In our view, the plain reading of the provision leaves no doubt that the trade terms are not those specific to the parties, but rather those that are viewed from the perspective of all processors competing for live chickens in the defined market generally. In such a market, the usual trade terms are identified and customarily come to be expected by suppliers of live chickens.

[142] Price is clearly the most important element influencing trade in chickens. It is a commodity product and is sold largely on the basis of price. In the context of supply management, if price were not important, the marketing board would have felt no need to set a minimum price. It is difficult therefore to divorce trade terms from price. The issue here is whether the expression "terms in respect of payment" is to be interpreted to include price and, in particular, premiums. We respectfully reject the Respondents' position on the question and, for the reasons that follow, find that "terms in respect of payment" must be interpreted to include price in the circumstances.

[143] We acknowledge that the issue has never been dealt with before by the Tribunal. In *Chrysler*, the Tribunal ordered Chrysler Canada to accept the complainant as a customer for the supply of Chrysler parts "on trade terms usual and customary to its relationship with [the complainant] as the said terms existed prior to [the date that the complainant was first refused supply]" (at p. 28). In that case, there was but one supplier and one customer. The Tribunal has not yet identified the "usual" trade terms involving a business with multiple suppliers and

customers. If "terms in respect of payment" includes price, it could be argued that the Tribunal's order in *Chrysler* prevented Chrysler Canada from ever raising its price to the complainant. Since the Tribunal recognized the regular fluctuation in Chrysler Canada's prices, this would appear not to have been the Tribunal's intention. If price, however, is not to be included as a usual trade term, there would be nothing to prevent a supplier, even one subject to a section 75 order, from raising its prices to a person to the point that this person can no longer afford to purchase from the supplier. This would render the provision ineffective, particularly in cases where a complainant was the sole purchaser in a market.

[144] While there is no dispute that "terms in respect of payment" includes credit terms and acceptable methods of payments, in the context of paragraph 75(1)(*a*), we are of the view that price is also included. Otherwise, a complainant who is unable to obtain adequate supplies in a market because prices are higher than the usual price would have no possibility of relief under the provision, simply because other usual terms of payment are in place. For example, in the instant case, it would matter little if the credit terms and the methods of payment available in the market for processors were the usual terms prevailing in that market, if the amount to be paid in order to obtain live chickens was increased by suppliers to an amount higher than the usual price paid for live chickens in that same market. In essence, the only term of payment that really matters in the circumstances here is price.

[145] Under supply management, price is essentially the principal trade term. As discussed above, the minimum price is set by the respective provincial marketing boards. Whether this minimum price set by the marketing board translates into a usual trade term will depend on the circumstances. In this case, the ultimate price paid by chicken processors in the market may be higher than the minimum price. This will depend on a number of factors, not the least of which is the premium paid to producers. A premium is an amount over the board price paid by processors to producers. Therefore, the notion of price as a "usual trade term" is best expressed, for our purposes, in terms of a range of prices. This approach recognizes the dynamic reality of a competitive market and would be particularly helpful in the event that the Tribunal were to issue an order to continue supply on "usual trade terms", since it would allow for flexibility by not binding the parties to a fixed price. The range of prices for our purposes would include minimum board prices set by the provincial marketing boards from time to time, plus the applicable premium, which would likely also vary by reason of competitive market forces.

(c) Applicant's inability to obtain adequate supplies on usual trade terms

[146] Having determined the meaning of "substantially affected" and "usual trade terms", we will now turn to the question of whether the Applicant has established that it is substantially affected in its business because of its inability to obtain adequate supplies anywhere in a market on usual trade terms.

[147] The parties disagree markedly on whether the suppliers are likely to provide adequate replacement supplies on usual trade terms. Quebec is important in the instant case because it is the most likely source of replacement chickens for the Applicant.

[148] The Applicant, at the time it filed its application, processed around 94,450 chickens from southern New Brunswick, 40,000 chickens from Prince Edward Island, and 160,000 chickens

from Nova Scotia. On the evidence, there is no dispute that it is unlikely the Applicant can obtain the required additional volumes of chickens to replace the Respondents' chickens from southern New Brunswick or Prince Edward Island. In respect to New Brunswick and Prince Edward Island, the evidence shows that the Applicant currently processes all of the New Brunswick and Prince Edward Island supply.

[149] The 160,000 chickens from Nova Scotia were to be made available for a period of three years, and there is little evidence to indicate whether this volume of chicken would be available in the long term. Since the Interim Supply Order, the Applicant has secured an additional supply of around 31,250 chickens per week from Nova Scotia. However, we do not know the terms, if any, on which the Nova Scotia producers that are continuing to supply ACA Co-Operative Ltd. ("ACA"), the only Nova Scotia processor, would be willing to switch to the Applicant. No survey of Nova Scotia producers was conducted by the Applicant in order to ascertain the availability and terms of supply from Nova Scotia, as was done in Quebec. Nor did the experts address this issue. As a consequence, we are unable to make a finding regarding the terms on which additional supply could be acquired from Nova Scotia.

[150] This leaves Quebec as the only source of additional supply about which we actually know the possible terms of supply. Therefore, producers located in parts of Quebec are the most likely source of replacement supply for the Applicant. In order to determine whether the Applicant can obtain supplies from these producers on the usual trade terms, it is useful to define the relevant usual trade terms that are applicable to live chickens in Quebec.

(i) The relevant usual trade terms

[151] In order to determine whether the Applicant has met its burden in establishing that it is unable to obtain adequate supplies of live chickens anywhere in the market on "usual trade terms", it is necessary to clearly define the usual trade terms in this case. By definition, "trade terms" includes "terms in respect of payment", which we have interpreted to include price. It also includes "units of purchase" and "reasonable technical and servicing requirements". No issues regarding technical and servicing requirements are raised in this case. The only issue in respect to trade terms is the price of the replacement chicken.

[152] In order to assess whether the Applicant is able to obtain adequate supplies "on usual trade terms", the usual price for live chickens in the market must be determined. As stated above, in the circumstances, that price will consist of a range of prices. In order to determine the usual range of prices, we turn to the evidence adduced and in particular the evidence regarding premiums.

[153] Determining the range of prices for live chickens in those relevant parts of Quebec will indicate the "usual trade terms" for those chickens. The price usually paid by the Applicant is not necessarily the applicable "usual trade term". It is rather the usual price for live chickens paid by processors in the market. For our purposes, these processors are mostly Quebec-based processors and, as indicated in our earlier analysis on the geographic market, these processors would be competing in the area where the Applicant is likely to find its replacement chickens. They are paying the Quebec board price set by the Quebec marketing board, Les Éleveurs de volailles du Québec, which is $0.065 below the NB Board Price, plus a premium. Significant evidence was

adduced regarding premiums. Premiums currently being paid by Quebec processors will afford the best evidence of the usual prices being paid by processors in the market and are the best indicator of usual trade terms.

[154] The evidence on premiums stems principally from efforts made by the Applicant's procurement team following the Tribunal's Interim Supply Order dated June 26, 2008. The Applicant's management team instructed the procurement team to begin making efforts to inquire about the availability of chickens from Quebec producers. Initially, calls were made to a list prepared by the Fédération des producteurs de volailles du Québec in the year 2000 containing the names of 700 Quebec producers. In total, attempts were made to contact 454 producers. Many could not be contacted by reason of incorrect phone numbers, phone line disconnection and number changes. This comes as no surprise, given that the list of names and contact information was over eight years old. Many producers did not respond to the initial telephone message, and of those that did, only 67 requested a meeting with a procurement agent of the Applicant. Call logs were kept and turned over to the Applicant's procurement agents for follow-up. These call logs were eventually filed in evidence.

[155] The Respondents contend that the Applicant's procurement effort or survey of Quebec producers was essentially undertaken as a result of the Tribunal's Interim Supply Order and was not a serious effort to obtain replacement chickens in Quebec. In its Interim Supply Order, the Tribunal found that there was a duty to mitigate damages. At paragraph 37 of its reasons it wrote:

> I reject the Applicant's contention that it had no duty to mitigate. It could not sit idly by and make no attempt to secure additional live chickens when faced with the loss of about half of its supply. However, what is adequate mitigation will turn on the circumstances of each case.

[156] The Respondents point to a number of deficiencies in the Applicant's procurement effort. They argue that the Applicant's procurement team did not have a mandate to close a deal or sign contracts for supply with any of the Quebec producers called. They point to Mr. Feenstra's testimony, where he attests that the procurement team was "[t]o gauge what the opportunities are to procure chickens in Quebec". He also asserted on examination for discovery that he was not hopeful of the outcome of the procurement survey and that he would not initiate negotiations with Quebec producers who were not willing to sell their supply of live chickens at a price that is equal to or lower than the NB Board Price. They point to the testimony of Ms. Ouellette, where she attests that Mr. Landry had ordered her to end her calls to Quebec producers even though 196 producers had yet to be contacted by the Applicant's procurement team.

[157] There is evidence, essentially uncontested, to support a finding that the Applicant's procurement effort was not designed with the objective of securing sufficient live chickens from Quebec to replace all the chickens lost as a result of the Respondents' refusal to supply. However, whether or not the Applicant's efforts were genuinely motivated by a desire to obtain replacement chickens from Quebec is essentially not material to the question of whether replacement chickens are actually available on usual trade terms from Quebec. While the procurement effort is not a perfect gauge of the opportunities available in Quebec, it does provide evidence to assist in answering the question. The call logs reflect information obtained as a result of the procurement efforts. While this information has been interpreted differently by

the experts, it is essentially unchallenged. Further, the members of the procurement team consisting of Ms. Ouellette, Mr. Plourde and Mr. Viel gave testimony regarding the procurement efforts. In our view, they did so in a forthright manner, and we find their testimony to be credible.

[158] Ms. Ouellette was tasked with placing the initial call to producers in Quebec for the purpose of inquiring as to whether they were interested in meeting with the Applicant to discuss the possibility of supplying chickens. In determining which producer to call, Ms. Ouellette attests that she considered the geographic location of each producer *vis-à-vis* the location of the St-François Plant. She stated that the majority of the calls were placed to producers that were located east of Montreal. Ms. Ouellette kept call logs for each call placed. Of the producers with whom she spoke, 67 requested a meeting with a "Nadeau procurement agent". She then gave the call logs containing the contact information of each interested producer to either Mr. Plourde or Mr. Viel, who were responsible for the follow-up.

[159] Mr. Plourde eventually met with 39 producers between July 14 and September 19, 2008. During these meetings, he made detailed notes which were annexed to the call logs. Mr. Plourde attests that the Quebec producers he met demanded the following pricing arrangements before they would agree to moving their production to the Applicant, namely **[CONFIDENTIAL]**; and payment of premiums in addition to the Quebec board price, ranging from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]**/kg.

[160] Mr. Viel, who is the Applicant's manager of sales and transportation, assisted the procurement team when Mr. Plourde was on vacation. He met with 11 Quebec producers in the week of July 21, 2008, and also made detailed notes during these meetings, which notes he attached to the call logs provided by Ms. Ouellette. Mr. Viel attests that the producers he met with indicated they would consider moving their production to the Applicant on pricing arrangements which would include **[CONFIDENTIAL]** and premiums ranging from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]**/kg. Mr. Viel further stated that each producer would be able to supply between **[CONFIDENTIAL]** and **[CONFIDENTIAL]** heads per eight-week quota period.

[161] As indicated above, in order to determine the usual trade terms for live chicken in Quebec, it is helpful to examine evidence of the "usual" premium paid by processors in that geographic area. The survey of the Applicant's procurement team tabulated data of premiums actually paid by Quebec processors to producers in that province. This evidence was considered by the experts. Ms. Sanderson attested that among all of the producers who offered the Applicant supply at a requested premium of $**[CONFIDENTIAL]**/kg, the highest premium that the producer receives from its current Quebec customer is $**[CONFIDENTIAL]** above the Quebec board price. Based on the procurement surveys conducted by the Applicant, Ms. Sanderson aggregated the premiums that are currently received from Quebec processors and divided these by the total number of kilograms offered. She found that the weighted average premium that is currently received by the surveyed producers from processors is $**[CONFIDENTIAL]**/kg above the Quebec board price. The evidence indicates that the survey conducted by the Applicant's procurement team covered less than **[CONFIDENTIAL]**% of the Quebec quota owned by producers located within 500 km of the Applicant's plant in St-François. The producers surveyed

that did not specify a premium and those that indicated that they would not supply the Applicant represented **[CONFIDENTIAL]**% of the total quota within 500 km of the St-François Plant.

[162] While it is difficult to determine from the above evidence what premium would be sought by those producers that were not surveyed, the evidence provides a good indication of the premiums currently being paid by Quebec processors to producers in the relevant area of Quebec. Further, the evidence adduced in respect to the "Projet Westco" (the "Projet Westco Report"), a 2007 report prepared by Olymel regarding a possible partnership with Westco, indicates that the premiums paid by Olymel for its Quebec live supply in 2006 is $**[CONFIDENTIAL]**/kg above the Quebec board price. Mr. Brodeur's witness statement confirms that Olymel's current premium is in the order of $**[CONFIDENTIAL]**/kg above the Quebec board price.

[163] The above evidence in respect to premiums paid by Quebec processors is not speculative, nor is it contested. It represents direct evidence of premiums that are actually being paid by processors in the relevant areas of Quebec. While the survey does not tabulate the premiums paid by all processors in Quebec, the data is sufficiently complete to allow us to determine a range of premiums that are usually paid by processors in that part of the Quebec market covered by the Applicant's procurement survey, which includes that area within 500 km of the St-François Plant. We find that premiums range from $**[CONFIDENTIAL]** and $**[CONFIDENTIAL]** over the Quebec board price. It follows that usual trade terms for Quebec chickens, in this instance, would include prices within that stated range of premiums above the Quebec board price.

[164] We note that Quebec prices including the premiums are very close to the NB Board Price. As mentioned above, both the Quebec board price and Ontario board price are $0.065 below the NB Board Price. The Serecon Report, a consultant's report on the assessment of the broiler chicken industry in Nova Scotia published in July 2008, indicates that "there is no real historical pattern of a consistent spread in price between Nova Scotia and Ontario" and that "[f]or the past few periods (about the past year), the spread has been somewhat consistently 6.5 cents". We also know that the Applicant pays Nova Scotia producers the NB Board Price. Mr. Wittenberg testified that the Nova Scotia board price was "somewhat higher" than the NB Board Price, but he did not know the exact board price. Mr. Merks testified that "historically", the Nova Scotia board price was $0.02 below the NB Board Price. We are satisfied on the evidence that the Nova Scotia and New Brunswick board prices are very close.

(ii) Are supplies available on usual trade terms?

[165] We now turn to considering whether the Applicant is able to obtain supplies of chickens in Quebec on usual trade terms or within the stated price range. Both Mr. Robinson and Ms. Sanderson considered the data obtained from the Applicant's procurement survey.

[166] In his expert report on behalf of the Applicant, Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed this chicken could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation cost and shrink; and that the appropriate chickens can be found for the sizes necessary for the customers. Mr. Robinson assumed, based on conversations the Applicant's

management team had with Quebec producers, that a minimum premium of $**[CONFIDENTIAL]**/kg over the Quebec board price would have to be paid.

[167] Ms. Sanderson stated that because of the assumptions adopted in both the Ware and Robinson reports, these reports overstate the potential impact that the loss of the Respondents' supply of live chickens would have on the Applicant. She stated that the assumed premium is far above the premiums currently and historically paid in Quebec. She first estimated the premium needed to obtain chickens from Quebec producers to be in the area of $**[CONFIDENTIAL]**/kg. After corrections were made in the affidavits of Ms. Boucher, Mr. Viel and Mr. Plourde, and based on additional testimony, Ms. Sanderson revisited her opinion on the premiums that the Applicant would have to pay above the Quebec board price in order to obtain chickens from Quebec. Her revised opinion was that that premium would be in the area of $**[CONFIDENTIAL]**/kg. She explained that in coming to this opinion, she assumed that the producers in Quebec that the procurement team did not meet or contact would respond in the manner as those that were contacted. In other words, the premiums requested by the producers that did respond were extrapolated and applied for the purpose of her analysis to all producers from Quebec in the market.

[168] The parties therefore take different approaches in reviewing the data obtained from the Applicant's procurement survey. On premiums, each of the two experts disputes the appropriateness of the different assumptions made by the other. In the end, we note that neither expert takes issue with the accuracy of the data collected. It is not disputed that, at a minimum, a premium of at least $**[CONFIDENTIAL]**/kg would have to be paid, which is higher than the premiums we have determined to be within the usual trade terms (i.e. $**[CONFIDENTIAL]**/kg - $**[CONFIDENTIAL]**/kg).

[169] The Applicant contends that two other factors bear on the question of whether the Applicant can obtain chickens in Quebec on usual trade terms. First, the concerns expressed by a number of witnesses regarding interprovincial trade and premium wars; second the specific characteristics of co-op producers and their significance in the market place. It is useful to review the evidence adduced in respect to these factors.

(iii) Premium wars

[170] There is significant evidence adduced, essentially on behalf of the Applicant, regarding concerns in respect to growing interprovincial trade in live chickens. Mr. McCullagh, the vice-president of Maple Leaf, expresses the view that increased interprovincial trade is "a jeopardy to processing companies". He says that the supply management system affords protection to Canadian chicken producers and allows for sustainable farm earnings. He attests that the system further insulates chicken farmers from competition by reason of the national quotas which are allocated to provinces based upon a market share system and governed by an interprovincial agreement.

[171] Mr. McCullagh expresses the view that any attempts by the Applicant to source chickens from Quebec would be very expensive and that such a strategy is highly unlikely to succeed. If, however, the strategy were successful, he attests that Quebec processors who lose supply to the Applicant would seek to regain chickens by offering premiums to producers in other provinces,

such as Ontario. According to Mr. McCullagh, the outcome would be that downstream processors, retailers, food service operators and consumers would incur greater costs, and chicken producers would receive an unfair financial benefit by leveraging power allotted to them through the quasi-monopoly afforded to them through supply management regulations.

[172] At the hearing, Mr. McCullagh testified that Maple Leaf was extremely concerned with the developments in interprovincial trade because of the tremendous risk that premiums will be driven to unsustainable levels for the industry. **[CONFIDENTIAL]**. He also expressed the view that this premium war had the potential, by reason of the limited supply of chickens owing to quotas, to escalate to encompass the entire industry.

[173] The executive director of the Association of Ontario Chicken Processors, Mr. Thompson, expressed similar views in regard to premium wars. He explained that under supply management, no province is able to increase its share of national chicken production beyond its historical market share. Processors that lose supply to an interprovincial competitor have little choice but to retaliate by providing increased premium incentives to induce local producers to return to processors within their own province, if they wish to stay in business.

[174] Mr. Thompson expresses the view that the interprovincial movement of chicken is a weakness in the regulated supply system. He attests that the provincial percentage share of national production is effectively fixed. He argues that because of this, the only avenue outside of consolidation where processors may seek additional supply is by "raiding" the producers selling to their competitor in neighbouring provinces.

[175] This aspect of interprovincial trade in chicken is also acknowledged by Mr. Brodeur, who testified on behalf of the Respondent Westco. In his testimony, he attests that the pressure from Ontario processors attempting to source chickens from Quebec is now very strong and growing. He recognized that this could have an upward effect on premiums. He also testified that it was essentially smaller processors that were involved in Quebec-Ontario interprovincial trade of chickens and that the "big players" were essentially not involved. He considered Olymel, Exceldor, Maple Leaf and Maple Lodge to be the big players. He testified that Maple Lodge and Exceldor did trade but only for smaller volumes.

[176] Both Mr. Tavares and Mr. Feenstra testified to the effect that increased interprovincial trade in chickens would spark a price war that would increase costs for any processor and would further erode profits. They expressed the general reluctance of major processors to become involved in interprovincial trade of chickens for this reason. Mr. Feenstra stated that he had been involved in premium wars in the past and that the net effect of a premium war is a huge hit on the processing sector because if they want supply, processors have no choice but to pay the premiums demanded by the producers.

[177] Professor Barichello stated in his report that relatively little interprovincial trade in chickens takes place in Canada. The bulk of this movement is between Ontario and Quebec. He reported that in 2005, interprovincial trade in chickens involved only 4% of total Canadian production. He is of the opinion that because the quantity of output is fixed under supply management, producers can only increase their margin by demanding a higher price from the processor, or by making their operations more efficient, or both.

[178] Dr. Ware, in examination in chief, explained that even if the Applicant were able to source all of the Respondents' chickens from Quebec, this would represent an increase in demand for supply of chicken from Quebec by about 10%. He says that in a supply management system where the total amount of chicken produced in Quebec is regulated and cannot be expanded, this could only occur by bidding supply away from other chicken processors. This would cause price increases in the form of escalating premiums.

[179] While there are no regulatory restrictions on interprovincial trade in chickens, **[CONFIDENTIAL].** We know that under supply management, supply is limited. In these circumstances, it is understandable that to attract supply away from other processors, a higher price would have to be offered.

[180] We are prepared to accept that the evidence supports the contention that circumstances surrounding interprovincial trade in live chickens and premiums could lead to upward pressure on the price of live chickens in the market. In our view, however, this is no more than the result of competition between processors in a market where the aggregate supply of live chickens remains unchanged. The underlying theme of the evidence of processors and their representatives cited above is that processors should not have to compete for live chickens because such competition would result in higher prices and a "premium war" amongst processors. This evidence is self-serving. It should come as no surprise that in a market where supply is limited, competition for that supply usually results in higher prices. In the instant case, the issue is not about "premium wars", but rather the supply of live chickens. The issue of the supply of live chickens will be comprehensively dealt with below when we consider the "ample supply" requirement under paragraph 75(1)(*d*) of the Act.

(iv) Co-op producers and their significance in the market place

[181] The evidence indicates that the Exceldor co-op is an important processor with approximately 47% of the Quebec slaughter. This is similar to Olymel's share. The Exceldor co-op is made up of and owned by 260 member suppliers or producers. The Exceldor producers receive a dividend based on the Co-op's performance at the year's end. In his report, Mr. Robinson expresses the view that Exceldor's status as a co-op represents yet another barrier to the Applicant in its effort to source chickens from Quebec. He refers to the philosophy of co-op members that would favour having their product processed in a plant they own so that they may benefit from year-end dividends. Apart from making up these dividends, the Applicant would have to overcome this different philosophy of co-op members who favour the co-op business model over the Applicant's for-profit model. Mr. Robinson expresses the view that it may not be possible to entice any significant number of producers or chickens from Exceldor members no matter what price is paid by the Applicant. Given the significance of Exceldor's share of Quebec slaughter, this represents another significant hurdle for the Applicant.

(v) Conclusion regarding the Applicant's ability to obtain chickens in Quebec on usual trade terms

[182] The evidence reviewed above indicates that even if the Applicant were able to access the necessary volume of chickens to replace the Respondents' from Quebec producers, it would only be able to do so at premiums that exceed those considered within the range of usual trade terms.

Ms. Sanderson conceded that the Applicant would have to pay a premium of $**[CONFIDENTIAL]** above the Quebec board price to obtain replacement supplies, whereas we have found the usual trade terms in that market regarding premiums to be between $**[CONFIDENTIAL]** and $**[CONFIDENTIAL]** above the Quebec board price. In all of the circumstances, we find that the Applicant is unable to obtain adequate supplies of live chickens anywhere in the market on usual trade terms.

(d) Is the Applicant substantially affected in its business?

[183] We now turn to the question of whether the Applicant is substantially affected in its business due to its inability to find adequate supplies of live chickens anywhere in the market on usual trade terms. We will first review the evidence adduced by the parties, in particular the expert reports.

(i) The Applicant's evidence

[184] The reports of Mr. Robinson and Dr. Ware deal directly with the elements of paragraph 75(1)(*a*). We turn first to the evidence of Dr. Ware.

[185] Dr. Ware notes that the Respondents supply almost one half of the chickens processed by the Applicant and that if this supply were redirected to rival processing facilities, the Applicant would lose over half its revenue. Dr. Ware indicates that "[t]here is no economically feasible source of supply whereby Nadeau can make up this shortfall in supplies of live chicken". He further states that replacing such a volume would take at least months if not years and that the only economically comparable replacement would have to come from New Brunswick. With respect to the market for selling live chickens, Dr. Ware is of the opinion that the Applicant would not be able to bid supply away from producers outside New Brunswick because those producers are already contractually committed to other processors; that not all producers raise chickens that meet the Applicant's size and quality requirements; and that very high premiums would have to be paid to producers in Quebec to attract them away from current processors. Dr. Ware relies on the affidavit evidence of Mr. Tavares in support of these claims. He also indicates that because of high transportation costs "it is neither economic nor efficient for [the Applicant] to replace the large amount of supply from the respondents with supply from greater distances."

[186] With respect to the market for purchasing live chickens, Dr. Ware's observations are not based on any independent analysis. He does not seek to quantify the costs the Applicant would incur to replace the Respondents' live chicken supply.

[187] Mr. Robinson gave evidence with respect to projected earnings of the Applicant. He was asked to review the Applicant's operations to assess the impact of the withdrawal of the Respondents' birds, namely 271,350 birds per week. Mr. Robinson approached his task by developing the following four different scenarios involving:

1. the loss of the Respondents' chickens;

2. replacement of the Respondents' birds with birds from Quebec;

3. the loss of the Respondents' birds and Nova Scotia birds; and

4. replacement of the Respondents' birds with birds from Quebec and loss of Nova Scotia birds.

[188] In developing the four models, Mr. Robinson used the 12-month period ending June 30, 2008, as the base period for his analysis (the "Base Period"). This period included supply from the Respondents as well as Nova Scotia and Prince Edward Island. Mr. Robinson reasoned that this period represented an appropriate base since it not only represented the current operations of the Applicant but was also representative of the performance the Applicant could achieve "on a long term basis" through good and poor periods. In his testimony, Mr. Robinson refers to very strong prices in the poultry market for the first six months of the Base Period ending December 31, 2007, and a very weak market for the remainder of the period.

[189] Mr. Robinson made certain assumptions in respect to the replacement of the Respondents' birds with birds from Quebec. He assumed that these chickens could be obtained in Quebec, but that premiums would have to be paid to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; and that the appropriate chicken could be contracted for the sizes necessary for the customers. As stated above, Mr. Robinson assumed, based on conversations the Applicant's management team had with Quebec producers, that a minimum premium of $**[CONFIDENTIAL]**/kg would have to be paid on the Quebec board price. He also assumed that, as a result of having to haul the birds up to six hours, the Applicant would have to compensate producers for higher DOAs, higher transportation costs and higher shrink. This would amount to an additional $**[CONFIDENTIAL]**/kg on top of the live price premium.

[190] Mr. Robinson concluded that in all four scenarios, the Applicant's operations are negatively impacted to a significant degree.

(ii) The Respondents' evidence

[191] Ms. Sanderson acknowledges that certain costs are higher when sourcing live chicken from Quebec rather than from New Brunswick, such as transportation costs, shrink and mortality. She notes that the regulated minimum board price paid to Quebec producers is $0.065/kg lower than that paid to New Brunswick producers. Ms. Sanderson factors in the additional costs to the Applicant to purchase replacement chickens for volumes lost because of increased mortality and shrink for more distant shipments. She is of the opinion that the Applicant would be able to replace all of the Respondents' chickens with chickens from Quebec at an additional cost of approximately $**[CONFIDENTIAL]**. This would cover additional costs associated with premiums, shrink, DOAs and transportation. In Ms. Sanderson's view, this would still leave the Applicant with operational earnings of approximately $**[CONFIDENTIAL]**, which is more than **[CONFIDENTIAL]**% over the Applicant's average earnings from operations between 1998 and 2007.

[192] Ms. Sanderson expresses the opinion that, because of the assumptions essentially about the size of the premiums in the Robinson and Ware reports, their estimate of the potential impact on the Applicant from the Respondents' shifting their supply of live chickens from the Applicant to Sunnymel is overstated.

(iii) Positions of the parties

[193] It is the Applicant's position that it is substantially affected by the refusal and relies on the evidence of Mr. Robinson. Mr. Robinson testified that without the Respondents' supply, the Applicant's earnings from operations would drop by $**[CONFIDENTIAL]** from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]** using the Base Period as a comparator. He testified that, assuming that the Applicant incurred additional costs for transportation and for DOAs and shrink, and assuming that the Applicant would be required to pay a premium of $**[CONFIDENTIAL]** over the Quebec board price to access replacement chickens in Quebec, the Applicant's earnings from operations would drop by $**[CONFIDENTIAL]** from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]**.

[194] The Respondents argue that the Applicant is not substantially affected by the refusal. They contend that the evidence supports their submission that the Applicant would be able to replace the Respondents' chickens with chickens from Quebec and in doing so would be able to maintain historic levels of processing which would result in earnings that would allow it not only to survive but also to be viable.

[195] The Respondents point to the Applicant's own procurement initiative, which concluded that within a 600 km radius of the Applicant's plant in St-François, a significant volume of live chickens is available from Quebec producers upon payment of certain premiums over the Quebec board price.

[196] The Respondents also rely on the opinion of the Applicant's expert, Mr. Robinson, who testified using the same approach as that used by Ms. Sanderson, that the Applicant would incur additional costs of $**[CONFIDENTIAL]** in order to procure replacement chickens from Quebec and would be left with earnings of over $**[CONFIDENTIAL]**. The Respondents argue that even earnings of this magnitude approach the Applicant's average yearly earnings prior to the arrival of the Nova Scotia and Prince Edward Island chickens, and that the Applicant therefore cannot be "substantially affected" by their refusal even if the Applicant had to replace all the Respondents' chickens with chickens from Quebec producers.

[197] The Respondents essentially argue that chickens are available in the market to replace the chickens currently supplied by the Respondents in sufficient quantities and on trade terms that would allow the Applicant not only to survive but to be viable based on the survival and viability thresholds set by Mr. Tavares in his testimony. Mr. Tavares attested that the Applicant "requires a guarantee of 350,000 chickens per week to stay viable", but later stated that a weekly supply of 300,000 live chickens would allow the Applicant to get by, that "getting by" referred to "viability in the long term" and that "[d]epending on the markets, it could mean losing a lot of money".

[198] Further, the Respondents contend that even if the Applicant failed to replace any of the Respondents' chickens, its current supply from Nova Scotia and Prince Edward Island and other producers in New Brunswick would allow the Applicant to maintain processing such that it would achieve 108.5% and 93.05% of its self-declared survival ("getting by") and viability thresholds respectively. In the Respondents' view, given the above considerations, the Applicant cannot be substantially affected in its business by reason of the refusal.

[199] The Respondents Dynaco and Acadia argue that their respective refusals cannot substantially affect the Applicant's business because of their small numbers.

(iv) Analysis

[200] Earnings are a meaningful indicator of the performance of an enterprise. In order to assess the impact of the refusal at issue on the Applicant's business, it is therefore useful to consider the Applicant's earnings over time. The projected impact on future earnings by the refusal will be a helpful guide in determining whether the Applicant's business is substantially affected by the refusal.

[201] The evidence of both Mr. Robinson and Ms. Sanderson addresses the question of projected earnings of the Applicant. As discussed above, various models were developed by Mr. Robinson and reviewed by Ms. Sanderson. We review below certain relevant aspects of this evidence.

[202] Mr. Robinson's first scenario involved the loss of the Respondents' chickens. He concluded that without those chickens, the Applicant's earnings would drop by $**[CONFIDENTIAL]** from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]** using the Base Period as a comparator. Ms. Sanderson assumed that the Applicant would be able to replace the Respondents' chickens with Quebec-sourced chickens, and she did not provide an estimate of the Applicant's earnings if it could not obtain supply on usual trade terms. She is of the opinion that the Applicant would incur an additional cost of almost $**[CONFIDENTIAL]** if it were to replace the Respondents' chickens with Quebec-sourced chickens.

[203] Of the four scenarios considered by Mr. Robinson, the one that least affects the Applicant's business is the second scenario, which assumes that the Respondents' birds are replaced with Quebec birds and that the Nova Scotia and Prince Edward Island birds continue to be processed by the Applicant. If the Applicant can demonstrate that under this scenario its business is substantially affected by the refusal, there will be no need to consider the other scenarios developed by Mr. Robinson, including his first scenario in which the Applicant's earnings will drop to $**[CONFIDENTIAL]**.

[204] In the second scenario, Mr. Robinson makes the following assumptions: that chicken could be obtained in Quebec but that premiums would have to be paid to Quebec producers to entice them away from their current processor; that the Applicant would be responsible for DOAs, transportation costs and shrink; that the appropriate chickens could be contracted for the sizes necessary for the Applicant's customers. As mentioned above, Mr. Robinson assumed a premium of $**[CONFIDENTIAL]**/kg of live chicken based on conversations between the Applicant's management and Quebec producers.

[205] As a result of this analysis, Mr. Robinson identified that the earnings from operations would drop by $**[CONFIDENTIAL]** from $**[CONFIDENTIAL]** to $**[CONFIDENTIAL]** and that the St-François Plant would continue to operate **[CONFIDENTIAL]**. In Mr. Robinson's opinion, under this scenario, as with the other three he developed, the removal of the Respondents' chickens would have a significant impact on the profitability of the operations and, by extension, on the viability of one of the "most efficient processing plants in Canada".

[206] Ms. Sanderson disagreed with the size of the premium that Mr. Robinson assumed would have to be paid by the Applicant to Quebec producers. Initially, she was of the view that a more realistic premium would be $**[CONFIDENTIAL]** over the Quebec board price. Ms. Sanderson was of the opinion that after taking into account the differences in board prices, premiums and transportation costs, and the cost of purchasing additional chickens to replace the lost volumes from increased mortality and shrink, the total incremental cost to the Applicant to source live chickens from Quebec instead of the Respondents is $**[CONFIDENTIAL]**/kg of live weight, which represents **[CONFIDENTIAL]**% of the Applicant's total cost of sales for the 12-month period ending June 2008. In Ms. Sanderson's opinion, this would leave the Applicant with earnings of $**[CONFIDENTIAL]** for the period, as opposed to over $**[CONFIDENTIAL]** estimated by Mr. Robinson.

[207] As discussed earlier, these figures were revised by Ms. Sanderson as a result of corrected data adduced during the trial. As explained above, her estimate of earnings for the period was revised to $**[CONFIDENTIAL]** after corrections were made to affidavits and additional evidence was provided. This now represents a drop of approximately $**[CONFIDENTIAL]** from estimated earnings of $**[CONFIDENTIAL]**. Her revised opinion was that the premium would be in the area of $**[CONFIDENTIAL]**.

[208] On cross-examination, Ms. Sanderson agreed that a reduction in earnings of "**[CONFIDENTIAL]**" is in an order of magnitude of **[CONFIDENTIAL]** %. She acknowledged that **[CONFIDENTIAL]** % is "a large number" (the actual reduction is in the order of **[CONFIDENTIAL]** %). She nevertheless went on to express the opinion that the Applicant would not be substantially affected or precluded from carrying on business by reason of the refusal, because its earnings from operations would be comparable with historical levels.

[209] Ms. Sanderson stated her opinion as follows on examination in chief at the hearing:

> Yes. So – given I find that they're going to be able to earn profits – earnings from operations that are in the range of **[CONFIDENTIAL]**, which is **[CONFIDENTIAL]**percent higher than the average over '98 through to 2007 and about, if you exclude the year of the fire. So given that their earnings are within the range of historical levels, they're certainly not precluded from carrying on business if they get replacement supply.
> And I would also conclude that they're not substantially affected given their earnings are comparable to historical levels.

[210] It is noteworthy that Mr. Robinson's assessment regarding the Applicant's reduction in earnings relative to the Base Period is in the order of a **[CONFIDENTIAL]** % reduction.

[211] In terms of transportation costs, Ms. Sanderson compared the live-haul cost of chickens from Quebec with the Applicant's average live-haul cost for all of New Brunswick.
Mr. Robinson accepts Ms. Sanderson's live-haul cost of $**[CONFIDENTIAL]**/kg for Quebec chickens, but argues that she should have compared that cost with the live-haul cost for the Respondents' chickens. Had this been done by Ms. Sanderson, Mr. Robinson maintains that the result of her analysis would have essentially been the same as his. If the analysis undertaken by both experts assessed the incremental costs of replacing the Respondents' chickens with Quebec

chickens, then the approach advocated by Mr. Robinson would necessarily produce a more accurate result in terms of incremental costs, as it relates to the replacing of the Respondents' birds.

[212] While we agree with Mr. Robinson's approach, we disagree with his estimate ($**[CONFIDENTIAL]**) of the live-haul cost for the Respondents' chickens. We agree with Ms. Sanderson that this estimate must be incorrect because Mr. Landry testified that the cost of transporting live chickens from southern New Brunswick to the St-François Plant varies between $**[CONFIDENTIAL]** and $**[CONFIDENTIAL]**, and that 15% of the Applicant's New Brunswick supply comes from southern New Brunswick. He added that the Applicant's average transportation cost for New Brunswick chickens is around $**[CONFIDENTIAL]**/kg. The freight costs associated with the Respondents' live chickens must therefore be approximately $**[CONFIDENTIAL]**/kg, since the Respondents' supply represents 85% of the Applicant's New Brunswick supply. The incremental transportation costs of supplying the replacement birds, approximately $**[CONFIDENTIAL]**/kg, are therefore part of the additional costs of replacing the Respondents' birds, and these costs, together with premiums, constitute the main factors affecting the cost of live chickens to be obtained from Quebec. Premiums also represent the main area of disagreement between the two experts.

[213] It is not disputed that Nadeau will incur additional costs when sourcing chicken in Quebec because of DOAs and shrinkage. With respect to DOAs, Mr. Landry testified that if a load arrives at the St-François Plant with a DOA rate of 1% or more, the Canadian Food Inspection Agency will conduct an investigation. If this rate is 3% or higher, the Agency will impose a fine.

[214] There is general agreement between Mr. Robinson and Ms. Sanderson in respect of DOA/shrink costs. Mr. Robinson finds that Nadeau's shrink and DOA percentages would be **[CONFIDENTIAL]**%. There is, however, a different approach in respect to losses associated with replacing DOAs and shrink. Ms. Sanderson does not factor in lost profits, since these chickens are replaced with new purchases.

[215] Both experts agree that, as a result of the Applicant having to replace all of the Respondents' chickens with chickens from Quebec, earning from operations will drop, relative to the Base Period, to a range from $**[CONFIDENTIAL]**to $**[CONFIDENTIAL]**. Ms. Sanderson's opinion acknowledges this reduction in earnings but reasons that the Applicant is not substantially affected or precluded from carrying on business as a result, because this range of earnings is comparable with historic levels. Historic levels are defined by Ms. Sanderson as the average earnings between 1998 and 2007, excluding the year of the fire.

[216] The Tribunal accepts that the approach taken by both parties regarding the Applicant's earnings is the correct one for assessing the projected earnings of the Applicant as a result of the refusal. With respect, however, we reject Ms. Sanderson's conclusion on "substantial effect" for the reasons that follow.

[217] On cross-examination, Ms. Sanderson agreed that a **[CONFIDENTIAL]**% reduction in earnings is "a large number" but was of the opinion that the Applicant was not substantially affected. Her opinion is based on the choice of a different comparator period. In her analysis, Ms.

Sanderson adopts the period 1998-2007 in support of her conclusion. In her view, excluding the year of the fire, this period reflects the historic performance of the Applicant in terms of earnings. Her analysis consequently fails to take into account the subsequent period, when earnings from operations were significantly higher as a result of the arrival of additional chickens from Nova Scotia and Prince Edward Island. In our view, this approach does not fairly reflect the Applicant's circumstances. It is an approach that would purport to measure the impact of the refusal on the basis of the Applicant's historic performance and not its current circumstances. Such an approach would not allow for consideration of growth and dynamic expansion of an enterprise in assessing the effect of a refusal to deal under paragraph 75(1)(*a*). We agree, however, that current earnings should not be considered if they reflect unusual or non-recurring circumstances.

[218] Here, for reasons that are particular to this case, the Applicant saw its processing capacity increase significantly for a three-year period as a result of certain agreements with Nova Scotia and Prince Edward Island producers. A second shift had to be set up at the Applicant's plant and additional employees had to be hired. In many ways, this was a planned expansion of production, although potentially not for an indefinite period. This is not comparable with an exceptional event such as a fire or other act of God, which arguably would not be reflective of normal operations.

[219] While the Applicant's earnings from operations since 2007 indicate a significant increase in earnings over prior years, they are nevertheless earnings that resulted from business decisions which were made in the context of an expansion of operations owing to particular circumstances. The substantial effect on the Applicant's business by reason of the Respondents' refusal must, in our view, be considered in the context of this increased capacity and, by extension, the Applicant's increased earnings, because this is the Applicant's current business situation. To conclude otherwise would be inconsistent with the provision which requires that the Applicant be substantially affected in "his business". The fact that the Applicant's earnings are above its historic average is of no consequence. What matters, for the purpose of paragraph 75(1)(*a*), is the effect of the refusal on the Applicant's current business. In our view, it is therefore appropriate to consider the Applicant's recent increase in earnings in assessing the effect of the refusal on the Applicant's business.

(v) Conclusion on paragraph 75(1)(*a*)

[220] In summary, we agree with Mr. Robinson that the Base Period is the appropriate comparator period in the circumstances. The increase in earnings over the historic average, reflected in the selected Base Period, is representative of the Applicant's current business earnings and is therefore a proper basis upon which to consider the effect on the Applicant's business that may be caused by reason of the Respondents' refusal to supply.

[221] In the result, we find that a reduction in earnings of **[CONFIDENTIAL]**% relative to the Base Period is significant and important in the circumstances of this case. We therefore find that, on the basis of the evidence and arguments adduced, replacing the Respondents' chickens with Quebec chickens will have a substantial impact on the Applicant's business. Given our above determinations, we find that the Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade

terms. Because of the effect of the refusal on earnings explained above, we are of the view that our conclusion would have been the same under any of the Robinson scenarios. Therefore, by reason of the projected impact on the Applicant's earnings, the Applicant would be substantially affected in its business.

[222] Certain other options in terms of supply, which are potentially plausible, were simply not argued before the Tribunal: for instance, the possibility of replacing one half of the Respondents' supply from Quebec producers, as opposed to all of it. The impact on the Applicant's business was not considered by the experts, nor did the parties advance arguments on such a scenario and, in these circumstances, we decline to speculate on its effect on the Applicant's profits.

[223] On the evidence, and upon consideration of the arguments advanced by the parties, for the above reasons, we are satisfied that the Applicant has met its burden under paragraph 75(1)(*a*) of the Act.

[224] We now turn to consideration of the requirement under paragraph 75(1)(*b*).

C. Has the Applicant established that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market pursuant to paragraph 75(1)(*b*) of the Act?

(1) Parties' Submissions

[225] The Applicant contends that it is unable to obtain adequate supplies of live chickens because of insufficient competition among suppliers in the market. It submits that as a result of the supply management scheme, chicken producers are completely insulated from competition. The Applicant states that it is in fact the processors who fight among themselves to offer ever-increasing prices to producers.

[226] The Respondent Westco contends that the insufficient competition referred to in paragraph 75(1)(*b*) must be assessed in light of the overall context of the Act and can only refer to situations in which a competitor or competitors have a dominant position or a monopoly, or in which there is a lack of competition as a result of any kind of collusion. It submits that there are a considerable number of suppliers in the relevant market and that there is no evidence of collusion among them, which indicates that there is no issue of insufficient competition. Westco further states that not only are there several competitors, but the evidence also shows that chicken producers are indeed willing to compete and supply the Applicant with their production upon payment of premiums over and above the board price set by regulatory authorities. The Respondents Dynaco and Acadia also submit that there are enough producers in the relevant market to conclude that there is sufficient competition.

[227] In the alternative, the Respondents contend that the evidence in the Tribunal's record shows that the cause of any inability on the Applicant's part to obtain replacement birds has nothing to do with a lack of competition among suppliers of live chickens. It is rather because of the following three factors that came to light during the hearing, namely, the Respondents' objectively justifiable business reasons for the refusal, the workings of the supply management system and the level of competition among processors.

(2) Analysis

[228] Pursuant to paragraph 75(1)(*b*) of the Act, the refused party must demonstrate that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers in the market. As was set out in *B-Filer*, paragraph 75(1)(*b*) of the Act contains two requirements. First, there must be insufficient competition among suppliers in the relevant market. Second, the inability of the refused party to obtain adequate supplies of the product must be by reason of that insufficient competition. The Tribunal, in *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, considered the causal requirement of the provision and concluded as follows, at page 116:

> In addition, the refusal to supply must occur "*because* of insufficient competition among suppliers of the product". That is, the overriding reason that adequate supplies are unavailable must be the competitive conditions in the product market.
>
> (emphasis added)

[229] The Tribunal must therefore determine whether the Applicant has established that insufficient competition among suppliers in the market is the overriding reason why it is unable to obtain adequate supplies of the product in the market. The product and geographic markets, for the purposes of paragraph 75(1)(*b*), are the same as those which have been defined pursuant to paragraph 75(1)(*a*). The relevant geographic market therefore consists of New Brunswick, Prince Edward Island, parts of Quebec within a 500 km radius of the St-François Plant, and Nova Scotia.

[230] The Tribunal has not yet had an opportunity to determine the meaning of "insufficient competition". In *Xerox* and *Chrysler*, the Tribunal defined the relevant product market in a very narrow manner, and it was therefore not difficult for the Tribunal to conclude that there was insufficient competition among suppliers in the market. The Tribunal noted that the level of competition among suppliers will depend on the facts of the particular case. The Tribunal also stated the following in *Xerox*, at page 116:

> Clearly a market composed of numerous suppliers acting independently would not qualify. (It is also very difficult to conceive of a case before the tribunal where so many of a multitude of suppliers would refuse to supply an individual that his business could be "substantially affected". One would postulate that if one supplier did not want the business, another would be more than happy to earn the extra revenue.)

[231] We now turn to an assessment of the competitive conditions in the market. The evidence on the record shows that there are many suppliers in the relevant market. Data provided by the Chicken Farmers of New Brunswick indicate that in 2007 there were 38 chicken producers in New Brunswick, 82 producers in Nova Scotia, 7 producers in Prince Edward Island and 760 producers in Quebec. Statistics from Les Éleveurs de volailles du Québec indicate that in 2006 there were 85 producers in the Beauce region, 62 producers in the Québec region and 22 producers in the Côte-du-Sud region, all of which are located in Quebec within 400 km of the

St-François Plant. From this data, the Tribunal can conclude that there are, in fact, numerous producers located in the relevant geographic market.

[232] The evidence adduced at the hearing shows that over the last few years a number of chicken producers have consolidated their quotas and that some producers have formed alliances to reap financial benefits. Further, the evidence demonstrates that some producers are related, as they are members of the same co-operatives. The evidence does suggest some lack of independence among producers in the New Brunswick market. In fact, Mr. Feenstra has indicated that only eight nominal quota holders in New Brunswick are independent from the Respondents. The Respondents together produce almost 75% of New Brunswick's live chickens. Mr. Feenstra, however, also acknowledged that he is not aware of that degree of concentration in any other Canadian province. In fact, no evidence was adduced regarding such concentrations in Nova Scotia, Prince Edward Island or parts of Quebec. Furthermore, evidence adduced by the Applicant concerning its efforts to seek replacement supply of live chickens in Quebec clearly demonstrates that producers are acting independently. Results from the Applicant's survey show that producers were in fact offering live chickens to the Applicant at different prices above the board price. Under these circumstances, there is insufficient evidence to conclude that there is either collusion or a lack of independence amongst producers in the market as a whole.

[233] Normally, the presence of numerous suppliers acting independently is a strong indicator of sufficient competition. However, the parties in this matter are operating within the supply management system, which is governed by a detailed and complex set of regulations. We must therefore consider the impact, if any, of the supply management system on competition among suppliers in the market.

[234] As discussed above, under supply management, the minimum price for which chicken may be sold in respective provinces is set by the provincial marketing boards. Production is also restricted to quota holders and limited by a producer's quota allocation.

[235] The Applicant asserts that as a result of the supply management system, chicken producers do not compete amongst themselves. Mr. McCullagh indicated that the supply management system has been a "quasi-monopoly for chicken producers" and Dr. Ware indicated that "[w]hatever the merits of such a system, there is no doubt that competition is restricted by it, as entry is precluded completely and the competitive battles for market share which create benefits for consumers and foster incentives for innovation are also completely absent".

[236] The purpose or objects of the acts and regulations governing the supply management system are not intended to limit competition. The CFC was created in 1978 by order in council pursuant to section 16 of the *Farm Products Agencies Act* ("FPAA"), R.S.C. 1985, c. F-4. Section 21 of the FPAA identifies the objects of a farm product agency:

21. The objects of an agency are	**21.** Un office a pour mission :
(a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and	a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité;

(b) to have due regard to the interests of producers and consumers of the regulated product or products.	b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés.
(emphasis added)	(nos soulignements)

[237] As an agency created under Part II of the FPAA, the CFC has the power to implement a marketing plan for chicken pursuant to the terms of the proclamation establishing it (see s. 22(1) FPAA). Some of the terms of that plan are found in the 2001 Federal Provincial Agreement for Chicken. The purpose and objectives of that agreement are as follows :

1.01 This Agreement provides for an orderly marketing system for chicken coordinated in a flexible and market responsive manner having appropriate safeguards so as to provide consistency, predictability and stability in accordance with the following objectives:	**1.01** Le présent Accord établit un système de commercialisation ordonnée du poulet coordonné de façon flexible et axée sur le marché, comportant les mesures de protection nécessaires pour assurer l'uniformité, la prévisibilité et la stabilité en conformité avec les objectifs suivants :
(a) to optimize sustainable economic activity in the chicken industry;	(a) optimiser l'activité économique durable dans l'industrie du poulet;
(b) to pursue opportunities in both domestic and international markets;	(b) rechercher des débouchés tant sur le marché national que sur le marché international;
(c) to enhance competitiveness and efficiency in the chicken industry; and	(c) améliorer la compétitivité et l'efficacité dans l'industrie du poulet;
(d) to work in the balanced interest of producers, industry stakeholders and consumers.	(d) travailler dans l'intérêt mutuel des producteurs, des intervenants de l'industrie et des consommateurs.
(emphasis added)	(nos soulignements)

[238] The Applicant's expert, Dr. Barichello, has indicated that competition, within the context of the supply management system, can exist among producers in the provinces in which premiums are paid, albeit not below the minimum price established by the board:

> **Ms. Healey**: So to the extent - - so there's that range, minimum price and up; that's an area in which producers could engage in competition?
> **Dr. Barichello:** That's correct.
> **Ms. Healey:** You want 6 cents for your birds; I'll agree to 4.5?
> **Dr. Barichello**: Right.

[239] However, Dr. Barichello also stated that there was a relatively modest scope for competition within the market, as the margin within which producers could compete was limited. He also added that "[n]ormal competitive pressure would be when you would be able to also lower your required price such as below the minimum price".

[240] The Tribunal accepts that the margin in excess of the regulated minimum price that Quebec producers receive is relatively small. In our view, however, it is competition among individual producers that keeps this margin relatively small. What matters is that the price received by producers (including the margin in excess of the regulated minimum price) is determined by competition among producers. As for Dr. Barichello's contention that the minimum price set by the provincial board restricts competition, we are of the view that the regulated minimum price does not itself limit a producer's ability to compete effectively unless the aggregate market supply set by the marketing board exceeds demand at the regulated minimum price. In that case, the regulated minimum price would prevent the competitive price adjustment required to clear the market. There is no evidence that competition in the relevant market is currently inhibited in this way.

[241] Significant evidence was adduced to the effect that prices received by producers in Quebec exceed the minimum price set by the marketing board. Such evidence was outlined under the paragraph 75(1)(*a*) analysis and will not be repeated here. Suffice it to say that the Tribunal is satisfied that prices received by producers in Quebec generally include a premium above the regulated base. As Dr. Barichello has conceded, this premium and thus the price received by each producer can be determined by competition among individual producers.

[242] Furthermore, some Quebec producers canvassed during the Applicant's procurement survey indicated that they were seeking the same price as other producers were getting. This is consistent with price-taking behaviour and supports the finding that an individual producer cannot set the price and that the price ultimately paid is set by the competitive forces in the market.

[243] The restrictions on entry and expansion established by the supply management system have an impact on competition, but inelastic market supply does not itself imply that there is insufficient competition among suppliers in the market.

[244] In our view, while supply management restricts the available aggregate supply and makes it less price-responsive, it does not give any one producer any price-setting power. The inability of the Applicant to obtain adequate supplies on the usual trade terms is not the result of insufficient competition among individual producers. The existence of inelastic market supply is not incompatible with the market price being set by competition among individual producers in the market.

[245] Apart from producers in Quebec, there is very little evidence regarding the prices producers in Nova Scotia and Prince Edward Island are receiving relative to their respective regulated minimum prices. We know that in New Brunswick, there is an Incentive Plan in place. We are unable, therefore, to make a conclusive finding as to whether and how the regulated minimum prices in those provinces might have affected competition among producers.

[246] To conclude, we are of the opinion that the Applicant has failed to establish that there is insufficient competition among suppliers in the relevant market for the following reasons: the number of producers in the market; the absence of any evidence that producers, except for the Respondents, are not acting independently; and our conclusion that supply management in and of itself does not establish that there is insufficient competition among individual producers.

[247] Even if there were a finding of insufficient competition among suppliers, we would nevertheless still be of the view that the Applicant has not met its burden under paragraph 75(1)*(b)* of the Act. There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens. As will become evident from our discussion of ample supply for the purposes of paragraph 75(1)*(d)* later in these reasons, the limit on aggregate supply has a very significant impact on the question of whether the Applicant is able to obtain adequate supplies of chickens in the market.

[248] Therefore, for the purposes of paragraph 75(1)(*b*), we conclude that the Applicant has not established that it is unable to obtain adequate supplies of chickens because of insufficient competition among suppliers in the market.

D. Has the Applicant established that it is willing and able to meet the usual trade terms pursuant to paragraph 75(1)(*c*) of the Act?

[249] The Applicant contends that it has always met the usual and customary terms of trade. The testimony of the Applicant's representatives, Mr. Feenstra, Mr. Landry, and Mr. Plourde, indicates that the Applicant is willing to meet the usual trade terms with respect to Quebec supply. There appears to be no dispute that the Applicant is willing and able to meet the usual trade terms.

[250] On the evidence, we are satisfied that the Applicant is willing and able to meet the usual trade terms of the suppliers of live chickens.

E. Has the Applicant established that the product is in ample supply pursuant to paragraph 75(1)(*d*) of the Act?

[251] The Tribunal has dealt with this element of the provision only once. *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28, is the only case in which the Tribunal has made a determination in respect to ample supply. It decided that the product, Harley-Davidson motorcycles, was not in ample supply and consequently declined to grant an interim order. The Tribunal held, at paragraph 19, that "section 75, and, therefore, interim orders under section 75, are meant to deal with situations in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser."

[252] In *Quinlan's*, the Tribunal acknowledged that the product was in ample supply some months of the year, but found that it was not appropriate to order interim supply, in the

circumstances, because the product was not in ample supply at the time the order to supply was sought.

[253] In the circumstances of this case, the supply of the product, live chickens, is regulated under the supply management system. The system strictly controls the supply of live chickens in Canada through a quota system. Under supply management, each producer may only produce live chickens in accordance with its quota in a given period. A producer faces a significant penalty if it exceeds its quota. The system does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment formula designed to strike a balance between chicken production and consumer demand. The issue here is whether, under these circumstances, live chickens can be said to be in ample supply for the purposes of paragraph 75(1)(*d*).

(1) The supply management system

[254] Before proceeding further, it is useful to fully understand the complex supply management system in place for the production of live chickens in Canada and to appreciate how that system functions. To that end, we will review below the various statutory and regulatory provisions which underlie the system, applicable federal-provincial agreements and certain orders issued by provincial marketing boards which are material to the issues in this case.

(a) Chicken Farmers of Canada and the 2001 Federal- Provincial Agreement

[255] As mentioned above, the Chicken Farmers of Canada was created in 1978 by order in council and implements a marketing plan pursuant to the terms of the 2001 Federal-Provincial Agreement for Chicken (the "FPA"). Schedule A to the FPA is known as the *Chicken Farmers of Canada Proclamation*, SOR/79-158. This document establishes the CFC and the quota system. Under section 6 of the Proclamation, the CFC shall establish a quota system for the signatory provinces by which quotas are allotted to chicken producers in each province to which quotas are allotted by the appropriate board. The CFC Board of Directors is comprised of the following persons:

(i) ten members representing the producers of each provincial marketing board;
(ii) two persons appointed by the Canadian Poultry and Egg Processors Council;
(iii) one person appointed by the Canadian Restaurant and Food Service Association;
(iv) one person appointed by the Further Poultry Processors Association of Canada; and
(v) one national chairperson elected from among the chairs of the provincial marketing boards.

[256] Under section 3.01 of the FPA, each Provincial Commodity Board agrees to limit chicken production pursuant to the quotas:

3.01 In the fulfillment of their obligations under section 2.05, the Provincial Commodity Boards each agree:	**3.01** Dans le cadre de la réalisation de leurs obligations en vertu de l'article 2.05, chaque office de commercialisation

	provincial convient :
(a) to limit the total quantity of chicken produced in their respective provinces, and marketed, to the quota allocation as determined from time to time by reference to this Agreement;	(a) de limiter la quantité totale de poulet produite et commercialisée dans leur province respective à l'allocation de contingents déterminée, de temps à autre, conformément au présent Accord;
(b) to establish the minimum prices at which live chicken may be sold in their respective provinces; and	(b) d'établir des prix minimums de vente du poulet vivant dans leur province respective;
(c) in conjunction with CFC, to implement and maintain a coordinated system of quota allotment that is auditable by CFC, where the basic effects as between provinces are similar.	(c) de mettre en œuvre et de maintenir, en collaboration avec les PPC, un système coordonné d'allocation de contingents qui peut être vérifié par les PPC lorsque les effets de base entre les provinces sont similaires.
(emphasis added)	(nos soulignements)

[257] Schedule B to the FPA is known as the Operating Agreement and its purpose is to set out the fundamentals of the operation of the marketing system for chickens.

[258] Schedule B distinguishes "federal quota" from "provincial quota". It defines "federal quota" as "the quantity of chicken expressed in live weight that a producer is entitled to market in interprovincial and export trade in a period, and is allotted to the producer by the Provincial Commodity Board on behalf of CFC". This is different from the "provincial quota" defined as "the quantity of chicken expressed in live weight that a producer is entitled to market in intraprovincial trade in a period, and is allotted to the producer by the Provincial Commodity Board."

[259] It appears, however, that the provinces adopt as the provincial quota the exact share assigned by the CFC. Justice Abella, in *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20; [2005] 1 S.C.R. 292, acknowledged that this is the accepted practice in the industry. She states at paragraph 8 that "[e]ach provincial body ... adopts as its intraprovincial production quota the exact share federally assigned to it."

[260] It is also accepted that the system provides for a granting of authority in respect of allotting federal quotas and administering them in accordance with the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 (see subsection 2(1) of the *Chicken Farmers of Canada Delegation of Authority Order*, SOR/2003-274). This was recognized by Justice Abella in *Pelland*, where she wrote at paragraph 9 of the Court's decision that "[i]n order to facilitate the integration of production and marketing quotas, the federal body delegates its authority to regulate the marketing of chickens in interprovincial and export trade to the provincial body".

[261] This regulatory scheme provides strict limitations on quotas. Section 9 of the *Canadian Chicken Marketing Quota Regulations* provides the following limits:

9. The Provincial Commodity Board of a province must allot federal quotas to producers in the province in such manner that the aggregate of the following numbers of kilograms of chicken that is produced in the province, and authorized to be marketed, during the period referred to in the schedule will not exceed the applicable number of kilograms of chicken set out in column 2 of the schedule in respect of the province for that period:	**9.** L'Office de commercialisation d'une province doit allouer des contingents fédéraux aux producteurs de cette province de manière que la somme des nombres de kilogrammes de poulet ci-après, exprimés en poids vif, qui sont produits dans une province et dont la commercialisation est autorisée au cours de la période visée à l'annexe, n'excède pas le nombre de kilogrammes de poulet, exprimé en poids vif, visé à l'annexe pour cette province, pour la période en cause :
(a) the number of kilograms of chicken authorized to be marketed by producers in interprovincial or export trade under federal quotas allotted on behalf of CFC by the Provincial Commodity Board;	a) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché interprovincial ou d'exportation, au titre des contingents fédéraux alloués au nom des PPC par l'Office de commercialisation de la province;
(b) the number of kilograms of chicken authorized to be marketed by producers in intraprovincial trade under provincial quotas allotted by the Provincial Commodity Board; and	b) le nombre de kilogrammes de poulet que les producteurs sont autorisés à commercialiser sur le marché intraprovincial, au titre des contingents alloués par l'Office de commercialisation de la province;
(c) the number of kilograms of chicken anticipated to be marketed by producers under quota exemptions authorized by the Provincial Commodity Board.	c) le nombre de kilogrammes de poulet que les producteurs prévoient de commercialiser en vertu des exemptions de contingents autorisées par l'Office de commercialisation de la province.
(emphasis added)	(nos soulignements)

[262] The schedule referred to in the above provision sets the quota allocation for an eight-week production period. The system provides for periodic adjustments to the schedule. We reproduce in Schedule B to these reasons a recent schedule issued covering the quota period of January 4, 2009, to February 28, 2009.

[263] The FPA also provides for a specific quota allocation procedure (see sections 3.01 to 3.10 of the FPA) (the "quota allocation procedure") and for subsequent adjustments to the quotas set

in the initial procedure (see sections 4.01 to 4.11 of the FPA) (the "quota adjustment procedure"). We will briefly review these two regulatory procedures.

(b) The quota allocation procedure

[264] Section 3.02 of the FPA provides that, for six periods at a time, the CFC will establish the initial base for each province pursuant to a formula which takes into account the previous year's level. Each provincial commodity board may make a request to adjust the initial base allocation for one or more of the six periods provided that the adjustments for any period do not exceed 5% and the total of the bases for the six periods does not change (s. 3.03).

[265] Further, prior to each period, each provincial commodity board also makes a written quota allocation request to the CFC in the following manner:

3.05 ...	**3.05** [...]
(a) in accordance with the procedures, if any, established pursuant to section 5.01 below, the Provincial Commodity Board will consult with its processors using a "bottom up approach and, having regard to the market requirements proposed by those processors will arrive at the estimated provincial market requirements prior to the submission of the quota allocation request for the period to CFC;	(a) l'office de commercialisation provincial consulte ses transformateurs, conformément à la procédure, s'il y en a une, qui est établie en vertu de l'article 5.01, en utilisant une approche «ascendante» et, après avoir examiné les besoins de marché proposés par ces transformateurs, estime les besoins du marché provincial avant de soumettre aux PPC la demande d'allocation de contingents pour la période;
(b) in accordance with the procedures, if any, established pursuant to section 5.02 below, Provincial Commodity Boards in each region shall consider discussing market conditions and estimated market requirements in the region prior to the submission of the quota allocation request by each Provincial Commodity Board to CFC; and	(b) les offices de commercialisation provinciaux de chaque région envisagent de discuter, conformément à la procédure, s'il y en a une, qui est établie en vertu de l'article 5.02 ci-dessous, des conditions de marché et des estimations des besoins du marché dans la région avant de présenter la demande d'allocation de contingents aux PPC;
(c) in submitting its quota allocation request to CFC for a period, each Provincial Commodity Board will provide to CFC the rationale for the request which will enable CFC to fulfill its obligations under the *Farm Products Agencies Act*, including those in section 23(2).	(c) lorsqu'il présente sa demande d'allocation de contingents aux PPC pour une période, chaque office de commercialisation provincial fournit aux PPC la justification de la demande, ce qui permet aux PPC de s'acquitter de leurs obligations en vertu de la Loi sur les offices des produits agricoles, y compris

celles qui sont prévues au paragraphe 23(2).

(emphasis added) (nos soulignements)

(c) The quota adjustment procedure

[266] The Operating Agreement also sets out certain rules regarding adjustments to the quota allocation. Temporary changes to the regional range are possible in certain circumstances (see s. 4.02). For provinces in a region ("region" is defined in section 2.01 of the Operating Agreement), the regional range shall allow for quota allocation changes of up to 5%. An adjustment to the regional range, which is not temporary and which establishes a new regional range requires a special vote of the CFC (s. 4.01).

[267] Further, section 4.07 provides that a provincial board may request a quota allocation that exceeds the provincial range for one or more periods to accommodate exceptional circumstances ("provincial range" means the percentage change from the base for a province for a period). Section 4.06 provides that "[f]or a province, the provincial range shall allow for quota allocation changes of up to eight (8) percent" and "[a]n adjustment to the provincial range, other than pursuant to section 4.07, requires a special vote" of the CFC.

[268] What emerges from the above provisions of the FPA is that any adjustments to quotas are made provincially and/or regionally. The system provides for adjustments to be made on a "macro" level, that is, for all producers within a province or a region.

[269] The evidence adduced before the Tribunal does not contradict the above summary of the supply management system. We note, in particular, the evidence of Mr. Feenstra in his reply affidavit, wherein he confirms that the "bottom-up" approach was implemented across Canada in or about January 1995. He further attests that during the period leading up to the new approach, processors had experienced shortages of chickens for so long and thought they could sell a lot more chicken. According to Mr. Feenstra, this shortage led to a recommendation to increase volumes and prices substantially. Mr. Feenstra further testified that the market could not handle the increase and that a significant oversupply of chickens resulted across Canada.

(2) Positions of the parties

[270] The Applicant argues that the product here is in ample supply. It takes the position that the Respondents can and do raise enough chickens and just want to deprive the Applicant of them. It is argued that the purpose of paragraph 75(1)(*d*) is to ascertain whether the supplier, through no fault of its own, is unable to supply the Applicant with the product. Alternatively, the Applicant argues that the purpose of the supply management system as a whole is to ensure a match between supply and demand or, in other words, to ensure ample supply to meet consumer needs. The Applicant also relies on a statement made by Mr. Brodeur, who stated at the hearing that there is too much supply ("Il y a trop d'approvisionnement").

[271] The Respondents argue that the product is not in ample supply. It is argued that ample supply must be assessed not in relation to the Applicant's need, but rather in relation to what is available in the relevant market or from the supplier from whom an obligation to supply is sought. The focus must be on the suppliers' capacity to offer product in the relevant market. The Respondents contend that live chickens are not generally a product in ample supply because the supply management system regulating the chicken industry expressly limits the quantities that may be supplied by producers in a given period. In the Respondents' view, this is the primary reason chickens are not available in ample supply.

[272] Further, the Respondents argue that section 75 is not intended to apply to situations where a supplier's particular production capacity is limited, nor is it intended to oblige the Tribunal to arbitrate an agreement between customers who are seeking access to a limited supply of products. It is argued that the section provides for only one remedy, namely acceptance of the customer on usual trade terms. If the product were in ample supply, there would be no need for an order stipulating a volume or to allocate supply, since the suppliers in the market would have available capacity to meet the needs of the person who has been refused supply. Conversely, the Respondents maintain that if, in order to accomplish its purpose, an order should need to specify a volume to ensure supply to a customer at the expense of another, the product then would not be in ample supply, and the conditions of section 75 would not have been met.

[273] Finally, the Respondents maintain that it does not matter whether the product is no longer available because it is reserved for an innocent third party, as in *Quinlan's*; or whether it is no longer available by reason of a business decision by the Respondent Westco to vertically integrate its operations. The supplier simply does not have "ample supply" of the product because there is no excess capacity available to meet the demand.

(3) Analysis

(a) Meaning of "ample supply"

[274] Defining "ample supply/quantité amplement suffisante" in the context of paragraph 75(1)(*d*) is essentially a question of legal interpretation. It is now accepted law that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

[275] The word "ample" is defined by both the *Canadian Oxford Dictionary* (2004) and *Webster's Encyclopedic Dictionary of the English Language* as plentiful, abundant, extensive and more than enough. *Le Petit Robert de la langue française* (2006) defines "amplement" as "abondamment" and "en allant au-delà du nécessaire". This is to be contrasted with the word "adequate" found in paragraph 75(1)(*a*), which is defined by the *Canadian Oxford Dictionary* as sufficient, satisfactory, and barely sufficient. The *Webster's Encyclopedic Dictionary of the English Language* defines "adequate" as equal to or sufficient for a special requirement.

[276] A different meaning of "supply" was therefore intended in each paragraph. In its grammatical and ordinary sense, ample therefore means more than a sufficient or adequate supply. It means supply available in abundance or to the point that it is considered to be excessive. Ample or abundant supply must then be considered in the context of the object and scheme of the Act, the object of the particular provision, and the intention of Parliament.

[277] The purpose of the Act is set out in section 1.1. It essentially provides that the purpose of the Act is to maintain and encourage competition in Canada. It includes, among other objectives, doing so in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and product choices.

[278] In *Xerox*, the Tribunal had occasion to consider the constitutionality of section 75 of the Act. In finding the provision to be within Parliament's legislative authority and constitutionally valid, it commented on the purpose of the provision. At page 78 of its decision, the Tribunal wrote:

> Section 75 can certainly be characterized as ancillary to the main purpose of the legislative scheme as well as having an intimate connection thereto. The immediate effect of an order to supply is to open up channels of distribution and free competitive forces hindered by lack of access to supplies. The section's objective is to promote or preserve competition. Section 75 operates within the same regulatory parameters as do the other provisions of Part VI.

[279] We agree with the above characterization of the objective of the provision. The goal of promoting and maintaining competition is also reflected in the scheme of the Act. The scheme under section 75 of the Act provides for certain conditions which, when met, render a refusal to deal, an otherwise legal act, a reviewable practice. Two of these conditions make express reference to competition being affected. In paragraph 75(1)(*b*), it must be established that there is insufficient competition among suppliers in the market, and paragraph 75(1)(*e*) requires that it be shown that the refusal to deal is having or is likely to have an adverse effect on competition in the market. Therefore, a refusal's impact on competition is a central focus of the provision. Once it is established that competitive forces are hindered by the refusal or the lack of access to supplies, the Tribunal may, pursuant to section 75 of the Act, order that one or more suppliers of a product in a market accept the Applicant as a customer on usual trade terms. As stated by the Tribunal in *Xerox*, the effect of the remedy under section 75 is to open up channels of distribution and free competitive forces hindered by lack of access to supplies.

[280] The term "ample supply" must be interpreted harmoniously with the above discussed purpose of the Act and scheme. Supply is not ample when suppliers generally would be inhibited from growing or even changing the nature of their business, or be forced to ration supplies between current and potential future customers because supply is limited. A product is in ample supply when its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels, such as involvement in the downstream processing market.

[281] A remedy under section 75 would not be available in circumstances where a refusal to supply was caused by reason of a shortage of supply in general as a result of a strike, scarcity of raw materials, or by reason of an upstream supplier going out of business. In such circumstances, supply is constrained by reason of factors beyond anyone's control. As a consequence, a supplier is unable to meet demand in the market, by reason of supply being limited. It follows that the product is therefore not in ample supply. This view finds support in the 1974 transcripts of committee proceedings before the House of Commons when Bill C-7 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl.) was being debated. The issue being debated was a refusal where the product was in short supply. The following question was put to the minister responsible, followed by his response:

> **Mr. Frank**: Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.
>
> To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.
>
> At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure that they were not shorting them. Consequently, they refused to sell to these dealers that had unfortunately found themselves ex-customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they had not supplied before?
>
> **Mr. Gray**: No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.
>
> (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 29th Parl. 2nd Sess., No. 9 (April 30, 1974) at 9:34)

[282] Bill C-7 died on the order paper, but the provision at issue was eventually brought back under a different bill. The above exchange is therefore relevant and would appear to support an intention by the minister to have the provision apply only where there is evidence of ample supply of the product in the market. What is also suggested is that in cases where product is in short supply, a supplier would not be required to ration limited supplies of a product in a manner that prevents existing customers from obtaining the quantities they wish to purchase.

[283] The above factors support a definition of "ample supply" consistent with that articulated by the Tribunal in *Quinlan's*. The words "ample supply", read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, are meant to deal with situations in which the product is in ample supply, in the sense that suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers.

(b) Are "live chickens" a product in ample supply in the circumstances of this case?

[284] As can be observed from the above review of the supply management system for live chickens in Canada, the system as structured does provide for adjustments in the total supply of live chickens. This adjustment is fixed at each production period through a complex adjustment mechanism designed to strike a balance between chicken production and consumer demand. Essentially quotas are adjusted by the CFC when consumer demand for chicken increases or decreases. This is measured by what industry participants refer to as a "bottom-up" process which starts when processors gauge changes in consumer demand for chicken. According to Mr. Brodeur, any increase in demand translates into a corresponding increase in what is known as the "meat margin". The "meat margin" measures the difference between the minimum board prices for live chickens set by the provincial marketing board and the aggregate of the prices paid for processed chickens at both the primary and secondary stages of transformation. These prices are not regulated and are set by market forces. Therefore, when the prices for processed chickens either rise or fall, the "meat margin" increases or decreases. This reflects an increase or decrease in consumer demand. It is when the "meat margin" exceeds historic levels that the CFC is led to conclude that supply and demand for chickens in Canada is not in equilibrium, and as a result there is a need to increase production quotas in order to satisfy increased consumer demand. The evidence indicates that, historically, such an adjustment has served to reduce prices at both the wholesale and retail levels. The converse is also true. When the "meat margin" is below historic levels, quotas may be reduced. As seen above, such adjustments in quotas, if any, can only occur at the end of an eight-week production period.

[285] We are satisfied that the above review of the supply management system in Canada as it relates to chickens properly reflects the system under which the parties to this application are operating and were operating at the time of the filing of the application. It is a system that does not allow for an immediate or timely response to changes in market conditions as would be the case in an unregulated market.

[286] The system in place provides for supply to be adjusted at the "macro" level. Quotas may be increased nationally and even on a provincial level as a result of increased consumer demand. However, under the system, there is no assurance that a particular supplier who wishes to increase production can obtain the increased quota that it needs to meet its business plan. Indeed the evidence of Mr. Feenstra indicates that adjustments in the system are made across the system and that an increased quota over a previous period is divided up on a pro-rata basis between each existing producer. That is of little assistance to individual producers who wish to accommodate additional customers.

[287] Under the system, aggregate supply is maintained at adequate levels to meet consumer demand. The level of supply is essentially fixed for any given period. Increases in quotas are made only after the market data is computed and assessed at various levels of administration in the system for a given period. When quotas are adjusted, they are adjusted on an aggregate basis and distributed on a pro-rata basis among existing producers. This takes time, and in the meantime, a producer is unable to increase production to meet increased demand. A producer can only supply more if it acquires production quotas from another producer, and processors can only increase capacity and grow in the market by obtaining additional supply by accessing supply that is destined for another processor, since total supply is limited by the system.

[288] As can be seen from the above review of the supply management system, the main focus has been to ensure stability and a reasonable rate of return for producers and an adequate supply for consumers. Indeed, on the latter point, the Marketing Plan issued under Order I of the Chicken Farmers of New Brunswick (see Schedule C) uses such language. The plan provides that one of its objects is to ensure that there is "adequate supply of New Brunswick grown chicken available to the consumer". Under the supply system as discussed above, the product cannot be said to be in ample supply, in the sense that it is available on a timely basis to individuals wishing to expand or develop their businesses. This is a consequence, in particular, of the time lag required for an adjustment in aggregate supply and of the apportioning of any adjustment among all suppliers.

[289] In accordance with the definition of "ample supply" set out earlier in these reasons, and in the circumstances of this case, its follows that the product, live chickens, cannot be said to be in ample supply as that term is understood for the purposes of paragraph 75(1)(*d*) of the Act.

[290] The Applicant further argues that "(s)ubsection 75(1)(d) cannot be interpreted so as to permit the malefactors to profit from their own misconduct". The Applicant maintains that the Respondents "embarked on a deliberate and conspiratorial course of conduct, as far back as August 2006, whose sole purpose and object was to attempt to force an improvident sale of the Nadeau Plant". In support of its argument, the Applicant relies on evidence adduced by different witnesses which indicates that the Respondents were strategizing to acquire the St-François Plant at below market value by threatening to cut off supply to the Applicant if it was not prepared to sell. A number of e-mails and other correspondence were adduced in evidence, including exchanges between the Respondents and their respective officials that support elements of the Applicant's allegation.

[291] As stated earlier, the Respondents argue that the prime reason that motivated their decision to refuse supply to the Applicant is their decision to have their birds processed by Sunnymel. This would allow for continued vertical integration of Westco's enterprise. In essence, the Respondents say that it was no more than a business decision.

[292] We are of the view that we need not decide whether the Respondents' conduct, which led to its decision to terminate supply to the Applicant, is misconduct, as alleged by the Applicant, or tough negotiations motivated by a business decision, as argued by the Respondents. In our view a determination is not necessary in the circumstances because of our above finding that there is

not "ample supply" of chickens in the market. In the context of a section 75 application, for a remedy to be available, all the requirements in subsection 75(1) must be met.

[293] We now turn to the final requirement under subsection 75(1) and consider whether the refusal is having or is likely to have an adverse effect on competition in a market.

F. Has the Applicant established that the refusal to deal is having or is likely to have an adverse effect on competition in a market pursuant to paragraph 75(1)(*e*) of the Act?

[294] Under paragraph 75(1)(*e*), the market of concern is different from the market defined for the purposes of paragraph 75(1)(*a*). Our analysis will involve the "downstream market". We will begin by defining this market, which includes defining the relevant product market and the relevant geographic market.

(1) Relevant product market

[295] Neither party disputes that the product market includes processed chicken. The only question is whether "further processed chicken" and "air-chilled chicken" constitute separate and distinct product markets. The parties adopt different approaches to this question.

[296] In its Pleadings, the Applicant states that the refusal to deal is likely to have an adverse effect on competition "at various levels of the market for chicken". The Applicant's final submissions also refer to "sub-markets". Dr. Ware refers to both the market for "processed chicken" and the "market for further processed chicken" in his reports. In his examination in chief, Dr. Ware stated that there can be subcategories within the broad category of processed chicken such as air-chilled chicken, but said that he "didn't have even close to adequate data" that would allow him to make that identification. He also stated, however, that the market for further processing of chicken constituted another product market in this case.

[297] The Respondents assert that the relevant product market is processed chicken. Ms. Sanderson's report also refers to "processed chicken". In cross-examination, when asked whether air-chilled products are different from water-chilled products, Ms. Sanderson stated the following:

> They may be different products, but they may be part of the same relevant product market. So for example, because this happens with differentiated products, it may be the case that you're unable to increase the price of an air-chill product by a substantial amount, because if you were to do that, customers will substitute to water-chill products. If there's sufficient substitution possibilities between those products at a market level, then they might be part of the same relevant product market even though they're distinguished from each other.

[298] With regards to air-chilled chicken and water-chilled chicken, we acknowledge, as did Dr. Ware, that they may well be "subcategories for processed chicken". However, there is

insufficient evidence on the record to support a conclusion that they are separate product markets.

[299] We come to the same conclusion with respect to further processed chickens. There is a paucity of evidence on this issue. Counsel for the Applicant acknowledged that stakeholders do not always agree on the definition of "further processing". This disagreement may lie in the fact that there are different types of further processing operations such as boning, cutting, and cooking. Mr. Donahue referred to different "grades of further processing" and responded as follows in cross-examination when asked about the Applicant's processing operations: **[CONFIDENTIAL]**

[300] Dr. Ware described the product market for further processed chicken as "basically anything that happens to the chicken after it's been killed and possibly cut up". However, without further evidence, we are unable to conclude on the record before us that further processed chicken constitutes a separate product market.

[301] We therefore find that the product market for the purpose of paragraph 75(1)(*e*) is processed chicken. We agree that further processed chicken forms part of the same relevant product market in the circumstances.

(2) Relevant geographic market

[302] The parties disagree on the definition of the relevant geographic market. The dispute turns on whether Ontario or parts of Ontario should be included in the geographic market.

(a) Positions of the parties

[303] In its Pleadings, the Applicant submits that the relevant geographic market for the purposes of paragraph 75(1)(*e*) is Quebec and the Maritimes. In its submissions, however, the Applicant takes the position that provincial boundaries are artificial boundaries and distances itself from a formal definition of the geographic market. When asked about the Applicant's submissions concerning the relevant geographic market, counsel for the Applicant stated:

> All right. In my argument I don't look at geographic. I think if you remember Dr. Ware said, he said provincial boundaries are somewhat artificial lines that are drawn and they may not be relevant for the purpose of the market analysis. Because the real question is, is what is the market that's affected?
> ...
> My point though is that in trying to draw --I submit that it's somewhat artificial to use geography as the defining characteristics of the behaviour of a market where the element that is concern is the impact, wherever it may fall, of the particular behaviour. We have to look at the impact of the behaviour wherever it may fall, and if it falls within three miles of Toronto, fine, but if it falls 1,000 miles away it's still relevant for the purpose of the 75(1)(e) analysis.

[304] Dr. Ware did express the view that relevant markets need not necessarily coincide with provincial borders. Using provincial boundaries, however, he found that the "best definition" of the geographic market is one that consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island.

[305] The Respondents are of the view that the relevant geographic market is the region comprising Ontario, Quebec and the Maritimes.

(b) Analysis

[306] Dr. Ware is of the opinion that the hypothetical monopolist test should be used to define the relevant geographic market, but expresses the view that the data are insufficient to determine the precise boundaries of the market pursuant to such a test:

> My conclusion was, and is, that the geographic market for processed chicken is likely -- well, let me put it this way, well described by the boundary of Quebec, New Brunswick and the maritime provinces, not including Newfoundland, but it's certainly smaller than the boundary of those same provinces and the Province of Ontario. That's my conclusion. The reason -- so my reasoning that I have used in reaching this conclusion is indirect. It's indirect because, as I said, I don't have the ability -- I mean, what I need to do to make a formal precise conclusion of that kind is I need to -- I need to actually estimate the ability of a hypothetical monopolist who controlled the supply within Quebec, New Brunswick and the other maritime provinces too if they were to act as one to increase the price. That would give me the answer. That would give me a precise answer, but I don't have the ability to do that. I need a lot of data on demand elasticities and supply, behaviour of all the relevant producers. I don't have that information, but I do have indirect information and there are various indirect indicators that one can use to assess whether or not the geographic market is, in a sense, broad or relatively narrow. And, again, I do stress that because this is both a spatially and a product differentiated market, that geographic market definition is going to be a rather fuzzy sort of concept because if you have -- you know, clearly these producers are separated by space. We're talking about a lot of territory here.

[307] Instead, Dr. Ware therefore relies on indirect indicators, namely (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of Nadeau's products; (2) concerns expressed by Nadeau's customers regarding its possible exit from the market; (3) the apparent clustering of processors; (4) transportation costs; (5) price relationships between different geographic areas as described in the *Merger Enforcement Guidelines*; and (6) the regulatory limitation of the aggregate supply of chickens available to the market.

[308] Ms. Sanderson is not explicit about the test she uses to define the geographic market. The evidence on which she relies includes (1) Nadeau's and Olymel's historic shipping patterns; (2) shipping distances; (3) transportation costs; and (4) price comparisons.

[309] While the usual approach to market definition under paragraph 75(1)(*a*) is based on the ability of the applicant to substitute in favour of alternative service or material inputs without being substantially affected, the Tribunal clarified in *B-Filer*, as mentioned earlier in these reasons, that the approach need not be the same under paragraph 75(1)(*e*):

> [78] In our view, while the addition of paragraph 75(l)(*e*) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal result in adverse effects on competition, this amendment does not change the ultimate concern of 75(l)(*a*). That concern, as stated in *Chrysler*, is the effect on the business of the person refused supply. Since the market of concern under 75(l)(*e*) need not be the market of concern in paragraphs 75(l)(*a*) and 75(l)(*b*), the market that best suits the particular context and purpose of 75(l)(*e*) can be separately considered when considering that paragraph of the Act.

[310] Therefore, the conventional hypothetical monopolist approach to market definition which, in essence, relies on the practical indicia suggested in the *Merger Enforcement Guidelines*, can be used under paragraph 75(1)(*e*).

[311] Both the Applicant and the Respondents ultimately make use of the practical indicia suggested in the *Merger Enforcement Guidelines* and commonly used in connection with geographic market definition in merger cases to support their proposed market definitions. Practical indicia include transportation costs, price relationships, shipping patterns and trade views.

[312] Our approach to determining the relevant geographic market will involve considering the above-mentioned practical indicia as well as the following indicators suggested by Dr. Ware: (1) the predicted effect of a hypothetical Nadeau/Olymel merger on the price of the Applicant's products; (2) concerns expressed by the Applicant's customers regarding the Applicant's possible exit from the market; (3) the apparent clustering of processors; and (4) the regulatory limitation of the aggregate supply of chickens available to the market. We will consider each of these indicators in turn.

(i) The predicted effect of a hypothetical Nadeau/Olymel merger

[313] Dr. Ware is of the opinion that an Olymel/Nadeau merger would result in an increase of approximately **[CONFIDENTIAL]**% in the price of processed chicken. **[CONFIDENTIAL].** On the assumption that the geographic market would consist of Ontario, Quebec and the Maritimes, Nadeau would hold a 7% market share in such a market. Dr. Ware reasons that a "7% market share" is not sufficient to produce a price increase of nearly 2% and concludes that these data point to a narrower geographic market.

[314] Ms. Sanderson notes that the **[CONFIDENTIAL]**. She adds that Dr. Ware did not question the Nadeau management team's belief or provide any analysis to support the **[CONFIDENTIAL]**% price increase upon which he founded his opinion. She also notes that Olymel's managers, "who are in a more informed position to assess Olymel's ability to raise

prices to Olymel customers should the Partnership acquire the St. François facility", did "not identify price increases as part of their internal valuation of the acquisition".

[315] We note that the Projet Westco Report indicates that **[CONFIDENTIAL]**. While this may represent Olymel's view, this does not necessarily imply either higher prices in general or a **[CONFIDENTIAL]**% price increase in particular.

[316] We are also of the view that Dr. Ware's opinion regarding the effect of a hypothetical merger on the price of processed chicken is of little assistance in determining the geographic market. Dr. Ware's market share analysis is incomplete in its own terms in that it does not appear to take into account the combined market share of the merging parties. Further, apart from the belief of the Applicant's management team reflected in the Robinson Report, there is simply no explanation to support the conclusion that the merger would result in a **[CONFIDENTIAL]**% price increase.

(ii) Concerns expressed by the Applicant's customers

[317] As a second indicator, Dr. Ware cites the concerns of some of the Applicant's customers that prices would increase and service would deteriorate if the Applicant were to cease to be a competitor. He points, for example, to a letter written by Ms. Goodz, the president of Riverview, who wrote that "[i]f the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur". Dr. Ware is of the opinion that these customers would not be concerned if the geographic market were broader, that is, if it included Ontario processors; the fact that these customers expect prices to rise and supplies to be restricted indicates that the geographic market is significantly smaller.

[318] In her report, Ms. Sanderson closely examines each of the letters cited by Dr. Ware and notes that in many cases, alternative sources of supply exist.

[319] Complaints by customers will be dealt with more comprehensively later in these reasons when we consider the adverse effect on competition. In the absence of further corroborating evidence to support complaining customers' concerns about price increases and supply shortages, very little can be concluded in terms of their impact on geographic market definition.

[320] First, as pointed out by Ms. Sanderson, many of the complaining customers did not investigate alternative sources of supply in the event the Applicant is unable to continue supplying chickens. This was the case of the general manager of UPGC, also Priszm's chief purchasing officer, who admitted in cross-examination that he had not sought out other sources of supply.

[321] Second, there is no evidence to establish the relative importance of these complaints in respect to the geographic definition of the market. For instance, Puddy, one of the largest complaining customers, is located in the Greater Toronto Area and is closer to Ontario processors and Quebec processors than it is to the Applicant. Consequently, Puddy's complaint does not point to a narrower geographic market.

[322] On the evidence, it is difficult to assess the relative importance of customers' complaints and concerns. Many of the complaints are not based on the geographic proximity of competing suppliers. For these reasons we find this indicator to be of little utility in determining the geographic market and consequently conclude that no inference can be drawn for defining the geographic market.

(iii) The apparent clustering of processors

[323] Also regarded as being instructive by Dr. Ware is a map of Eastern Canada (Figure 1 in his Expert Report) that appears to show that there is a cluster of processors around the Toronto area. Dr. Ware testified that :

> ...there are two distinct clusters of poultry processing plants in Eastern Canada. Given the significance of transportation costs, the cluster of processing plants west of Toronto are unlikely to be part of the same market as those in Quebec, New Brunswick and Nova Scotia (the plant in Newfoundland is supplied by, and supplies to, only Newfoundland).

[324] While admitting that this was not a "super scientific approach", he stated that these clusters illustrate "a kind of density of economic activity that they are more likely - the ones close together - are more likely to be in the same geographic area than the ones that are further away".

[325] While Dr. Ware's definition of clustering is somewhat vague, we accept the general proposition that plants that are close together are more likely to be in the same geographic market than plants that are further away from each other. There are, however, many factors (such as the availability of the requisite inputs) that bear on the location of plants. Whether plants in different locations are in the same geographic market depends on the characteristics of the product concerned, in particular, the distance over which it can be shipped economically. Looking at plant locations is simply the starting point of the analysis required to determine the boundaries of the geographic market. In the circumstances, this indicator is of little assistance in defining the geographic market.

(iv) Regulatory limitations

[326] At paragraph 23 of his first report, Dr. Ware also suggests that another reason why geographic markets for processed chicken are smaller than might be expected from their basic manufacturing characteristics is because the supply elasticities for live chickens are kept low by supply management policies. If the price of processed chicken rises in one area, potential importers will have to bid chicken away from consumers in other areas.

[327] Ms. Sanderson responds that the inelasticity of the supply of live chickens is common throughout Canada and that there is no reason to believe that it is possible to distinguish Quebec and the Maritimes from Ontario or the rest of Canada on this basis.

[328] It is true that under the marketing board regime, additional chickens can be shipped to one geographic area only by diverting them from another, but this is also true within individual provinces. We therefore agree with Ms. Sanderson that there is no reason to distinguish Quebec and the Maritimes from Ontario on this basis.

(v) Transportation costs

[329] In his first report, Dr. Ware relies on the Projet Westco Report to conclude that the Applicant's transportation cost for processed chicken is $**[CONFIDENTIAL]**/kg. In her expert report, Ms. Sanderson states that if the transportation cost is $**[CONFIDENTIAL]**/kg, it is less than **[CONFIDENTIAL]**% of the average price of processed chicken; she therefore notes that large shipments of processed chicken can be made over substantial distances because of low transportation costs. In this regard, she testified that the analysis should focus on the cost to ship processed chicken relative to the price, rather than the cost of processed chicken.

[330] At paragraph 20 of his reply report, Dr. Ware points to data on sales for quota period A-76 to conclude that the average transportation cost as a proportion of the sale price is not **[CONFIDENTIAL]**%, but rather **[CONFIDENTIAL]**%. Prior to the hearing, Westco objected to paragraph 20 and other paragraphs of Dr. Ware's reply report on the basis that it failed to constitute a proper reply to Ms. Sanderson's report. In an order dated November 7, 2008, the Tribunal held that the evidence would be admitted; Westco was granted the latitude to address this issue at the hearing (see *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.,* 2008 Comp. Trib. 31).

[331] Dr. Ware testified that transportation costs matter because customers say they matter and because the figure of **[CONFIDENTIAL]**% is significant. He failed, however, to explain the significance of **[CONFIDENTIAL]**% or to point to any customer who stated that transportation costs matter *per se*.

[332] In her examination in chief, Ms. Sanderson testified that the figure of **[CONFIDENTIAL]**% is incorrect, as it is the result of an error in the sales data on which Dr. Ware relied. She found that transportation costs for Nadeau averaged **[CONFIDENTIAL]**% of its sales revenue of 2007. Ms. Sanderson testified that it is significant that transportation costs are less than 5% of the price of the product because this would allow competitors to undercut a 5% price increase by a hypothetical monopolist.

[333] We agree with Ms. Sanderson that Nadeau's average transportation cost was **[CONFIDENTIAL]**% of the average price of its products in 2007. As an average, however, it does not tell us what the fixed component (loading and unloading) of transportation costs is and how the variable component of transportation costs increases with distance. As a consequence, it does not speak conclusively to the boundaries of the geographic market. Nevertheless, Nadeau's average transportation cost does reflect the cost of relatively large shipments in excess of 1,000 km because we know that one of the Applicant's largest customers, **[CONFIDENTIAL]**, is located in Mississauga, Ontario. The evidence that the Applicant's transportation costs for processed chicken averaged **[CONFIDENTIAL]**% of the price of its products certainly implies that transportation costs are not prohibitive even over significant distances. It could also imply

that transportation costs would not prevent an Ontario processor from undercutting a 5% price increase by a New Brunswick or Quebec producer and vice versa. The stated 5% price increase refers to the hypothetical monopolist test as articulated in the *Merger Enforcement Guidelines*[2].

(vi) Price comparisons

[334] The expert economists make a variety of price comparisons, none of which are entirely satisfactory.

[335] At paragraph 21 of his initial report, Dr. Ware refers to paragraph 3.25 of the *Merger Enforcement Guidelines*, which states that "[e]vidence that prices in a distant area have historically either exceeded or have been lower than prices in the candidate geographic market by more than transportation costs may indicate that the two areas are in separate relevant markets, for reasons that go beyond transportation costs". He then compares retail prices for various cuts of processed chicken in Ontario, Quebec and New Brunswick because wholesale price data are sparse. Dr. Ware finds that retail prices of processed chicken are higher in New Brunswick than in Ontario and assumes that this implies that wholesale prices are also higher.

[336] In her report, Ms. Sanderson notes that a review of the retail price data for the products set out in Dr. Ware's report shows that the average retail price for those products is $**[CONFIDENTIAL]**in Ontario, $**[CONFIDENTIAL]**in Quebec, and $**[CONFIDENTIAL]**in New Brunswick, making average prices 17% lower in Ontario and 20% lower in Quebec than in New Brunswick. At first glance, this would mean that Quebec is not in the same market as New Brunswick and that therefore Quebec-based Olymel does not compete with the Applicant. Ms. Sanderson finds that such a conclusion is nonsensical and that conclusions of this type cannot be drawn from retail price comparisons. **[CONFIDENTIAL]**.

[337] In his reply report, Dr. Ware uses another source of data to construct average wholesale prices for the Applicant's sales by province. Dr. Ware conducts an analysis of Nadeau's 2007 sales and finds that when the analysis is confined to products sold in all three provinces, the weighted average wholesale price was $**[CONFIDENTIAL]**in Ontario, $**[CONFIDENTIAL]**in Quebec and $**[CONFIDENTIAL]**in New Brunswick. **[CONFIDENTIAL]**.

[338] At the hearing, Ms. Sanderson produced a price comparison of the average Ontario, Quebec and New Brunswick prices of the Applicant's five biggest-selling products in Ontario. Ms. Sanderson testified that these top five products represent **[CONFIDENTIAL]**% of the Applicant's sales in Ontario. Her bar graph is reproduced as Table 1 below.

Table 1

[CONFIDENTIAL]

[339] Ms. Sanderson stated that this comparison shows that the prices are basically the same. **[CONFIDENTIAL]**.

[340] During her cross-examination, Ms. Sanderson agreed that **[CONFIDENTIAL]** of the **[CONFIDENTIAL]**products sold in all three provinces were priced higher in New Brunswick than in Ontario. Further, **[CONFIDENTIAL]** of the **[CONFIDENTIAL]** products were priced higher in New Brunswick than in both Quebec and Ontario. Ms. Sanderson stated that this was consistent with the weighted average price being **[CONFIDENTIAL]** in New Brunswick than in Ontario.

[341] Both experts agreed that a comparison of the Applicant's weighted average wholesale prices of products sold in all three provinces, Ontario, Quebec and New Brunswick, in 2007 was the most informative. As mentioned above, the comparison was confined to **[CONFIDENTIAL]** products sold in all three provinces. The results were as follows: Ontario, $**[CONFIDENTIAL]**/kg; Quebec, $**[CONFIDENTIAL]**/kg; and New Brunswick, $**[CONFIDENTIAL]**/kg. The Applicant's weighted average price in Ontario was **[CONFIDENTIAL]** and its price in Quebec **[CONFIDENTIAL]** than in New Brunswick during 2007.

[342] The extent to which the observed differences in the weighted average prices are due to differences in the mix of products sold in each province and to the average size of the customers in each province is unclear. The same is true of the extent to which these averages might vary from year to year. The above data support the contention that differences amongst the three provinces are relatively small. There is no expert evidence on price differentials that would allow for any inference to be drawn with respect to the relationship between prices in Prince Edward Island and Nova Scotia and the remainder of the market.

[343] With respect to the differences between New Brunswick and Quebec prices, the Applicant has already defined New Brunswick and Quebec as being in the same geographic market. The observation of price differences between New Brunswick and Quebec merely serves to emphasize that there is a certain amount of underlying price variability within a geographic market.

(vii) Shipping Patterns

[344] In Ms. Sanderson's view, processed chicken can be shipped economically for considerable distances. She notes that the Applicant's revenues from sales in Ontario account for **[CONFIDENTIAL]**% of the Applicant's sales revenues whereas the Applicant's revenues from sales in New Brunswick and Nova Scotia account for **[CONFIDENTIAL]**% and **[CONFIDENTIAL]**% respectively of the Applicant's sales revenue. She states that the Applicant's furthest Ontario customer is located **[CONFIDENTIAL]**km from the St-François Plant. Relying on the Applicant's customer data for quota period **[CONFIDENTIAL]**, she concluded that the Applicant makes frequent and large shipments of processed chicken every day to very distant customers, including customers based in Ontario. In her opinion, the fact that the Applicant can profitably ship processed chicken to Ontario is clear evidence that Quebec and Ontario processors can profitably ship to customers located in New Brunswick and Nova Scotia.

[345] Ms. Sanderson also finds that the Applicant's customers based in Quebec and Ontario have access to alternative nearby processors and that in many instances, the closest processing facility is not the Applicant's plant.
[346] She adds that Olymel makes **[CONFIDENTIAL]**% of its sales in Ontario and that over **[CONFIDENTIAL]**% of those sales are made to customers located in the Greater Toronto Area. Ms. Sanderson concludes that, given that Olymel can profitably ship processed chicken 475 km to Toronto, Ontario processors could profitably ship their products the same distance in the other direction:

> ... it is self-evident that Ontario-based processors in the GTA can also profitably ship product to Montreal and throughout Quebec, which they do. Consequently, the prices that Olymel charges to its Quebec customers are influenced by competition from Ontario processors and as a result, Nadeau's prices to its Quebec customers are also influenced by Ontario processors given the competition that exists between Nadeau and Olymel for sales in Quebec.

[347] In cross-examination, Ms. Sanderson conceded that she had no direct evidence of Ontario processors' shipping their products to customers in New Brunswick. She also agreed that Olymel does not have significant sales in New Brunswick. In her report, Ms. Sanderson stated that Olymel makes more sales to customers in the western provinces than it does to customers in the Maritimes.

[348] We find the fact that Olymel sells only a small amount of processed chicken in New Brunswick does not support the position that Ontario is not part of the relevant market. Dr. Ware has defined the relevant market to include both New Brunswick and Quebec so that the lack of sales by Olymel (a Quebec-based processor) in New Brunswick merely emphasizes that a producer in a relevant geographic market need not have sales in every part of it at all times.

[349] It is not disputed that the Applicant ships processed chicken to Quebec and Ontario and that Olymel also does so. There is some evidence that processed chicken is shipped from Ontario to Quebec and the Maritimes. Mr. McHaffie testified that Ontario-based Puddy delivers to **[CONFIDENTIAL]**.

[350] The Brodeur affidavit states that Olymel buys 210,000 birds per week from other primary processors but that the great majority of these purchases are from Exceldor. Mr. Brodeur states that Olymel has purchased chicken for further processing from Ontario processors such as Maple Leaf and from the United States. Ms. Goodz testified that **[CONFIDENTIAL]**.

[351] Mr. Brodeur testified that McDonald's chicken nuggets are all made in Ontario and that Costco in Ontario is supplied by Exceldor.

[352] Based on the above evidence, we find that processed chicken can be and is shipped profitably for fairly long distances, over 1,000 km in one major instance. A considerable fraction of Nadeau's and Olymel's sales are in Ontario's Toronto area. Olymel ships some processed chicken products further still. While there is no reason to believe that processed chicken could

not be shipped equivalent distances to customers east of Ontario, there is less evidence of such shipments.

(viii) Trade views

[353] In her expert report, Ms. Sanderson relies on the Serecon Report to the effect that Nova Scotia must compete in a national chicken market despite being located in a high-cost region. The Serecon Report refers to the fact that current production in Nova Scotia exceeds consumption within the province and that this is why "NS chicken has to compete with production from outside the region not only in NS but also in Quebec and Ontario".

[354] In cross-examination, Mr. Feenstra agreed that the Applicant competes with Ontario and Quebec processors for its business in the Greater Toronto Area and that it competes with Ontario processors that want to sell into Quebec for the Quebec business. During his examination for discovery, he stated that "[p]rocessed product travels across the country back and forth all the time".

[355] A number of witnesses testified that they consider Ontario and Quebec to be in the same market. Mr. McHaffie stated that "Ontario processors can sell into Quebec at their whim and Quebec processors can sell here at their whim". Mr. Brodeur expressed the view that Quebec and Ontario constitute a single market. Mr. Ellis stated that Sunchef competes with processors in Ontario and Quebec.

(ix) Analysis and conclusion

[356] It is not disputed that Quebec and Ontario are in the same geographic market. Counsel for the Applicant conceded this:

> We have not suggested that Ontario and Quebec are not in the same market with each other. There's no question that there's competition between Ontario and Quebec. And you heard Mr. Lefebvre talk about a central Canada market. That's right through the evidence, not just of our witnesses but of all of them. Ontario and Quebec compete with each other.
>
> The issue, in my respectful submission, for this Tribunal is not that at all, not this issue, but rather the issue as to whether there is competition between Ontario and New Brunswick, because the question was whether the scope of the geographic market -- we, as I told you at the outset, accept that it's New Brunswick and Quebec. The question is does it extend as far as Ontario?

[357] As mentioned above, Dr. Ware finds that the relevant geographic market consists of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Ms. Sanderson is of the opinion that the relevant market consists of Ontario, Quebec and the Maritimes. The experts thus agree that New Brunswick and Quebec are in the same market. Further, the Applicant concedes that Quebec and Ontario are in the same market. If Ontario and the Maritimes are both in the

same market as Quebec, it is difficult to escape the conclusion that they are in the same market as each other. The implication is that Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island are part of the same geographic market.

[358] Put another way, Quebec processors compete with Ontario-based processors as well as with New Brunswick and Nova Scotia-based processors. Quebec processors discipline and are disciplined by both Ontario and Maritime-based processors.

[359] Put yet another way, according to the Applicant's argument, even if Nadeau were to disappear, Olymel would continue to be disciplined by competition from Ontario processors as well as from Exceldor and ACA on the **[CONFIDENTIAL]**% of its sales that are in Quebec and Ontario. There is nothing on the record to indicate that this competitive discipline would not apply to any sales that Olymel or any other competitor might make to customers located in New Brunswick in the event that Nadeau disappears.

[360] In our view, the evidence relating to both the practical indicia suggested in the *Merger Enforcement Guidelines*, including transportation costs, price relationships, shipping patterns and trade views, and the indicators relied on by Dr. Ware support the argument that the Ontario processors should be included in the relevant geographic market. The relevant geographic market is therefore defined to include processors in New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

[361] Having defined the relevant product and geographic market for the purposes of paragraph 75(1)(*e*), we now turn to the requirement that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

(3) Adverse effect on competition in a market

(a) Meaning of adverse effect on competition

[362] We first consider what is meant by "an adverse effect on competition in a market". We begin with the position advanced by the parties.

[363] The Applicant submits that by deliberately omitting the word "substantial" and using the word "adverse", "Parliament must be taken to have accepted that a remedy should be granted at the suit of a private litigant on a showing of *any* non-trivial adverse effect on *any* market" (emphasis in original).

[364] The Respondent Westco submits that adverse effect, while a lower threshold than substantial effect, must still incorporate a notion of market power or dominant market position; it cannot just be a trivial reduction in competition. Westco contends that the test established in *B-Filer* does not admit a finding of adverse effect on competition if only one competitor is affected and notes that protecting competition cannot be reduced to protecting competitors or a select handful of them.

[365] In *B-Filer,* beginning at paragraph 195, the Tribunal had occasion to consider the final element of subsection 75(1) of the Act. It conducted a comprehensive review of the case law in interpreting the phrase "competition in a market". It was guided by prior decisions that dealt with how paragraph 79(1)(*c*) of the abuse of dominance provision of the Act had been interpreted. The Tribunal in *B-Filer* agreed that paragraph 75(1)(*e*) demands a relative and comparative assessment of the market in two time frames, namely with the refusal to deal and without the refusal to deal. It concluded as follows at paragraph 200 of its decision:

> Thus, we conclude that paragraph 75(1)(*e*) of the Act similarly requires an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal.

[366] The Tribunal went on to consider what is meant by "competitiveness". It considered the case law on the issue under the abuse and merger provisions of the Act. The Tribunal noted that adverse effects in a market are generally likely to manifest themselves in the form of an increase in price, the preservation of a price that would otherwise have been lower, a decrease in the quality of products sold in the market or a decrease in the variety of products made available to buyers. The Tribunal noted that these and other competitive factors can only be adversely affected by the exercise of market power. The Tribunal applied this reasoning to the refusal to deal provision and concluded:

> Consequently, in our view, 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.

[367] The Tribunal then distinguished between the term "substantial" found in other provisions of the Act and the term "adverse" used in section 75. It found that the difference lies in the degree of the effect and that "adverse", according to its plain meaning, is a lower threshold than "substantial".

[368] Regarding the requirement that the refusal to deal "is likely to have" such adverse effect, based on earlier case law, the Tribunal found the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable" and not merely possible.

[369] We agree with and adopt the approach articulated in *B-Filer*, above, regarding the meaning of adverse effect on a market. Consequently, our analysis under paragraph 75(1)(*e*) will require consideration of whether the refusal creates, enhances or preserves the market power of the remaining market participants. In *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1, the Tribunal noted that "[m]arket power is generally accepted to mean an ability to set prices above competitive levels for a considerable period". In that case, the Tribunal recognized that this valid conceptual approach is not one that can be readily applied. It held that the factors that need be considered in evaluating market power will vary from case to case but ordinarily include indicators such as market share and entry barriers. As indicated above in *B-Filer*, the impact on indicators such as price, quality and variety of the product must also be considered in assessing adverse effect. It is also understood that without

market power there can be no adverse effect in a market. Our analysis under paragraph 75(1)(*e*) will therefore lead us to consider the following indicators in the circumstances of this case:

1. Market share and market concentration;
2. Barriers to entry;
3. Impact on prices;
4. The effect of the refusal on rivals' costs;
5. Impact on quality and variety of the product;
6. Possible foreclosure of supply to other processors in the market; and
7. Impact of possible elimination of an efficient processor.

[370] Before proceeding to our analysis of the above indicators, it is useful to first set out the respective positions of the parties on adverse effect under paragraph 75(1)(*e*) of the Act.

(b) Positions of the parties on "adverse effect on competition"

[371] The Applicant submits that the evidence adduced establishes the likelihood of many scenarios involving adverse effects on competition in various markets and sub-markets. In its written submissions, the Applicant states that these adverse effects include the following:

(a) the adverse effect on competition entailed by the increase in "live price" caused by a "premium war";
(b) the adverse effect on competition resulting from the "raising of a rival's costs", in that it is admitted that Nadeau is a rival of Olymel's (the Partnership) and the refusal to deal will admittedly (at a minimum) raise its costs;
(c) the adverse effect on non-price dimensions of competition, namely product quality, product choice and service;
(d) the adverse effects on the price (money) dimension of competition, given the likelihood that the live cost increases caused by a premium war, if these cannot be passed on by Nadeau and other processors to their customers;
(e) the likelihood that the elimination of Nadeau would create market power for Olymel in the Maritimes, where it previously had none ("un percée sur le marché des Maritimes");
(f) the "raising of rival's costs" among Nadeau's customers who are competitors of Olymel's at the further processing levels of the market;
(g) Olymel's enhanced market power *vis-à-vis* the other players in the market, even assuming that the geographic dimensions of the market encompass Ontario; and
(h) the possible elimination of the most efficient chicken processing plant in Canada.

[372] In the Applicant's argument, any of the adverse effects listed above would flow from the Respondents' refusal to supply. We summarize below the Applicant's explanation of the alleged adverse effects.

[373] The Applicant contends that the resulting premium war amongst processors will lead to an increase in the cost of price of live chickens which will generate "severe repercussions on the price of chicken at the retail level". The Applicant submits that raising its costs has an anti-

competitive effect because it would weaken the Applicant to the benefit of Olymel. It is further argued that the Respondents' refusal to supply will threaten the Applicant's very viability and that its elimination will have an immediate effect on product quality and availability throughout the Maritimes. The Applicant states that many of its customers are also further processors that compete directly with Olymel. It is argued that the weakening or elimination of the Applicant would prohibitively increase its costs, even if it is able to obtain supply, and thus imperil its businesses. Finally, the Applicant contends that it "operates the most modern and efficient processing plant in Canada" and that for this reason alone, its elimination would have an adverse effect on competition in the market.

[374] In oral argument, counsel for the Applicant argued that except for (g) listed above, which provides for a market power analysis, none of the alleged adverse effects require an exercise of market power by Olymel. It is argued, for instance, that the disappearance of a processor that is unable to remain viable has nothing to do with Olymel's market power but is nonetheless an adverse effect on competition.

[375] In his report, Dr. Ware relies largely on the possible shift in market share from Nadeau to Olymel to support his inference that the alleged refusal to deal would have an adverse effect on competition. He argues that if Olymel were to experience the same increase in market share as a result of a merger or acquisition, the Competition Bureau would deem the merger or acquisition concerned as likely to lessen competition substantially and would challenge it.

[376] The Respondent Westco submits that the guidelines on mergers and abuse of dominant position state that there is no market power where market share is below a threshold of 35%. It argues that Westco's refusal will not create, maintain, or enhance the market power of Westco or any other entity in the relevant market because no entity will have a sufficient market share as a result of the refusal to supply, even if Nadeau ceased its operations. Westco further submits that the evidence shows that the other indicia of market power, be they direct or indirect, have not been met in this case.

[377] Ms. Sanderson focuses on the question of whether Olymel would gain market power or enhance it as a result of the refusal. To answer this question, Ms. Sanderson suggests the following analytical steps: (1) define the relevant market; (2) examine the position of the firm concerned with that of other firms in the market (using market share and concentration); (3) examine the ability of customers to switch suppliers; and (4) examine the ability of rivals to expand their supply. In her view, the inference of an adverse effect cannot be drawn on the basis of market share and concentration evidence alone.

[378] In his reply report, Dr. Ware states that the increase in Olymel's market share coupled with what he calls the degradation in product quality and disruption in supply to certain customers resulting from Nadeau's possible inability to continue to supply them constitutes an adverse effect on competition. Dr. Ware relies on affidavits filed by certain customers of the Applicant to support his conclusion that the refusal will decrease quality and disrupt supply. In support of his conclusion, Dr. Ware points to the Projet Westco Report wherein it is stated that **[CONFIDENTIAL]**.

(c) Analysis

[379] As stated earlier, we adopt the approach set out in *B-Filer*, which provides that for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. As a consequence we necessarily reject the Applicant's submission that the exercise of market power need not be established for there to be an adverse effect on competition in a market.

[380] We acknowledge that neither Westco, nor any of the Respondents for that matter, are involved in the slaughter of chickens or the sale of processed chicken. Strictly speaking, the Respondents have no market share in this downstream market. However, the arrangement under which Olymel will process the Respondents' chickens is a **[CONFIDENTIAL]**partnership. While the interests of this Sunnymel partnership are not fully aligned with those of Olymel, it is reasonable to treat the Sunnymel partnership and Olymel as a single entity for purposes of the analysis of the competitiveness of the Ontario-Quebec-Maritimes market for processed chicken. We therefore accept that adverse effect under paragraph 75(1)(*e*) may be analysed by measuring the impact on the market power of the said partnership.

[381] We now turn to the above-mentioned indicators which we will consider in our evaluation of market power.

(i) Market share and market concentration

- *Evidence of the parties*

[382] Having defined the geographic market for processed chicken as Quebec, New Brunswick, Nova Scotia and Prince Edward Island, Dr. Ware calculates the market shares of the processors in Table 4 of his expert report as follows:

Nadeau	**[CONFIDENTIAL]**%
Olymel	**[CONFIDENTIAL]**%
Exceldor	**[CONFIDENTIAL]**%
ACA Co-op	**[CONFIDENTIAL]**%
Other (Quebec)	**[CONFIDENTIAL]**%

[383] The Herfindahl-Hirschman Index ("HHI") is a common measure of industry concentration that takes into account all participants in a relevant market and gives proportionately greater weight to the market shares of larger firms. The HHI is defined as the sum of the squares of the respective market shares of each competitor in the market.

[384] Dr. Ware calculates the HHI for this market to be 3062. He also describes Olymel as "the dominant processor" in that market. Ms. Sanderson correctly points out that the market shares Dr. Ware reports do not support the characterization of Olymel as dominant given Exceldor's market share of **[CONFIDENTIAL]**%.

[385] We have concluded that the geographic market is broader than the one defined by Dr. Ware and that it should include Ontario-based processors. This has the effect of reducing both the market shares of the processors listed in Dr. Ware's Table 4 and the market concentration.

[386] We note, however, that even according to his own definition of the geographic market, Dr. Ware's estimates of market share and market concentration are imperfect. The market shares Dr. Ware reports are based on *slaughter* (number of chickens slaughtered) rather than sales of processed chicken to customers in the relevant market. However, slaughter data were the only data available to the experts and the Tribunal.

[387] It is known that **[CONFIDENTIAL]**% of Olymel's total sales are to customers in Ontario. According to Dr. Ware's definition of the relevant geographic market, these would be "exports". Similarly, the Applicant "exports" **[CONFIDENTIAL]**% of its sales to Ontario. There is little evidence regarding Exceldor's sales outside the market as defined by Dr. Ware. It is also the case that Olymel, Exceldor, the Applicant and ACA are not the only processors competing in the geographic market as Dr. Ware defines it. There is some evidence that Ontario processors compete in this market. For example, Mr. Feenstra testified that it is safe to assume that the Applicant competes with the Ontario processors that want to sell into Quebec. In addition to excluding the "export" sales of Olymel, Exceldor, the Applicant and ACA, a proper market share calculation would include the share of "imports" from Ontario and elsewhere.

[388] Dr. Ware conceded in cross-examination that including only the sales that were made within the relevant market "might be a better way to do it". He stated, however, that he did not have the necessary data to make those calculations:

> **Ms. Healey**: Right. Okay. So back to the issue of assessing shares of sales in Quebec and the Maritimes: You would only include the sales that were made within those provinces; correct?
> **Dr. Ware**: I would -- I think I would like to have done that. Of course, I didn't have those data.
> **Ms. Healey**: Fair enough, Dr. Ware. I'm not-- I'm not suggesting that you did.
> **Dr. Ware**: But I -- I think I would have preferred that, yes.

[389] We have found that the relevant geographic market for the purposes of paragraph 75(1)(*e*) includes Ontario processors. Ms. Sanderson examines the market shares in this broader geographic market, but these shares are also based on slaughter and therefore include sales that are made outside the relevant market and ignore sales of chickens that are slaughtered outside the relevant market (imports). However, we find that the misstatement of market shares is likely to be less serious than was the case with the more narrowly defined market advocated by Dr. Ware because exports from and imports to the broader market are absolutely and proportionately smaller. In particular, Olymel makes **[CONFIDENTIAL]**% of its sales outside of Quebec and the Maritime provinces but only **[CONFIDENTIAL]**% of its sales outside of Ontario, Quebec and the Maritime provinces. Similarly, Nadeau makes **[CONFIDENTIAL]**% of its sales outside Quebec and the Maritime provinces but only **[CONFIDENTIAL]**% of its sales outside of Ontario, Quebec, New Brunswick and Nova Scotia.

[390] Maple Lodge Farms is among the Ontario processors in the relevant geographic market. The Applicant and Maple Lodge Farms are wholly-owned subsidiaries of Maple Lodge. It is clear that as a wholly-owned subsidiary, the Applicant's interests are fully aligned with those of Maple Lodge. It is therefore sensible to assume that Maple Lodge Farms and the Applicant conduct themselves with an eye to their joint profitability and to treat them as a single entity (Maple Lodge) for the purpose of analyzing the state of competition in this market.

[391] The processors' market shares (based on weekly slaughter) in the relevant geographic market in 2007 are found in Exhibit A to Mr. Soucy's affidavit of May 29, 2008. While they have their defects, we accept these data to be an adequate reflection of the market shares of processors in the market for that period. Based on these data, the shares are as follows[3]:

Maple Lodge Farms/Nadeau	22.6%
Maple Leaf	17.9%
Olymel	17.9%
Exceldor	18.5%
ACA	5.1%
Cargill	5.1%
Port Colborne	3.8%
Grand River	2.6%
Other Ontario	3.8%
Other Quebec	2.6%
(Total	99.9%)

[392] The HHI in the relevant geographic market in 2007 was 1579.[4] Maple Lodge Farms/Nadeau had the largest market share (over 22%) with Maple Leaf, Exceldor and Olymel all grouped at around 18%. For purposes of comparison, taken by itself, the Applicant's share of this market would have been 7.2%.

[393] As stated above, the Applicant advances a number of scenarios where there would be an adverse effect on competition. Some of these assume that the Applicant will remain a market participant, although with higher costs as a result of the refusal; in other scenarios it is no longer a participant. Dr. Ware acknowledged these scenarios:

> And as I say, there are sort of a number of possible scenarios here. One, ranging -- and we already went through this. I don't want to -- perhaps you don't want to spend a lot of time on this, but ranging from Nadeau, ceasing to process -- ceasing to replace, not being able to replace the chicken that it's currently getting from New Brunswick. Two, it being able to -- possibly being able to replace after a delay perhaps but at a significantly higher price. So both those cases, it seems to me, would amount to an adverse effect on competition.

[394] In its analysis, the Tribunal decided that it would be helpful to develop the scenarios described by the Applicant and Dr. Ware to determine the likely impact on market shares and, where possible, on market concentration if the scenarios played out.

- *Possible scenarios and the resulting impact on market share*

[395] We agree that a number of scenarios are possible. The Respondents' refusal to supply takes place against an uncertain backdrop. The Sunnymel partnership has stated its intention to build a processing plant in New Brunswick, but it has not commenced construction, and the Applicant argues that it will not do so. According to the evidence adduced, the Sunnymel partnership is proceeding with certain tests, such as testing the groundwater, to determine the best location for a new processing plant. Witnesses have also testified that ACA may expand its Nova Scotia plant and that Maple Lodge may participate in that expansion. There is also considerable disagreement regarding the success that the Applicant is likely to have in replacing the Respondents' birds, both in terms of the price premium to be paid and the number of birds it will succeed in obtaining. Also in dispute is the point (in terms of weekly slaughter) at which the Applicant's St-François Plant would cease to be a viable operation.

[396] The suggested implication of the foregoing is that the refusal could impact market shares and market concentration in a variety of ways. We agree that a number of scenarios are possible and some are more likely than others. It is therefore useful to consider a number of these scenarios and the resulting impact on market share for each. In considering these alternatives, an analysis of market share and market concentration (as measured by the HHI) is helpful in assessing the market power implications of each scenario.

Scenario 1

[397] One possible scenario is that the Applicant is able to replace all of the Respondents' birds from sources in Quebec. Given the operation of the Quebec supply guarantee (VAG), the net effect of this would be to leave Maple Lodge Farms/Nadeau's market share unchanged while increasing Olymel's market share at the expense of Exceldor and other Quebec processors. In this scenario, given the increase in exports from Quebec to New Brunswick, the VAG allocated to each Quebec processor, including Olymel's allocated share, would be reduced. In this regard, it is difficult to understand the basis for Dr. Ware's assertion at paragraph 14 of his reply report, that "[t]here is every reason to believe that Olymel's production of processed chicken would increase by the volume of redirected chicken". On cross-examination, Dr. Ware acknowledged that he had not taken the VAG into consideration. He also stated that Olymel's market share would, however, increase in this scenario and added that he was not qualified to predict the effect of the VAG on concentration and market shares. We are unable to compute the HHI for this circumstance because of insufficient data.

Scenario 2

[398] Another possibility is that the Applicant is able to replace approximately half of the Respondents' birds from sources in Quebec. **[CONFIDENTIAL]**. Dr. Ware is of the opinion that 136,000 birds per week is the "absolute maximum" Nadeau would be able to obtain in Quebec. The net effect of this would be to reduce Exceldor's and Maple Lodge Farms/Nadeau's respective market shares and increase Olymel's. Here, too, the data available do not make it possible to compute the HHI.

Scenario 3

[399] Yet another possibility is that the Applicant is unable to replace any of the Respondents' birds but is able to retain the balance of the New Brunswick birds as well as the Prince Edward Island and Nova Scotia birds it is presently processing. According to Mr. Robinson, the Applicant would remain profitable under these circumstances; in his view, the Applicant's earnings would drop from $**[CONFIDENTIAL]**to $**[CONFIDENTIAL]**. In this case, Olymel would slaughter the Respondents' 271,350 chickens and, as a result, its market share would go up by 3.5 percentage points to 21.4% and Maple Lodge Farms/Nadeau's share would go down to 19.1%. The HHI would decline from 1579 to 1570. That is, by the well-known market concentration measure used by Dr. Ware, the market would become *less* concentrated. The reason for this is that a processor with a smaller market share (Olymel) is increasing its share at the expense of a processor with a larger market share (Maple Lodge Farms/Nadeau). This reduces the share inequality in the market and, in turn, reduces the HHI.

[400] In his discussion of this scenario at paragraph 16 of his reply report, Dr. Ware states that an increase of Olymel's market share by 3.5 percentage points, coupled with evidence on quality degradation and supply disruption, would satisfy the threshold requirement for an adverse effect on competition. Keeping aside the issues of supply disruption and quality degradation for the moment, it does not appear analytically sound to infer an adverse effect on competition on the basis of an increase in the market share of *one firm*, when the *overall* measure of market concentration (the HHI) is decreasing, if only by a small amount.

Scenario 4

[401] Another possibility is that the Applicant is unable to source any birds from Quebec and that it ultimately loses the Prince Edward Island and Nova Scotia birds to ACA. In this event, the St-François Plant would likely be closed and the remaining New Brunswick birds might go to either ACA or Olymel. In this scenario, we assume that the remaining New Brunswick birds go to ACA. In this event, as explained above, Olymel's market share would go up to 21.4%, Maple Lodge Farms/ Nadeau's share would go down to 15.4% and ACA's share would go up to 8.8%. The HHI would fall to 1494. If ACA gets the Prince Edward Island and Nova Scotia birds, but the remaining New Brunswick birds go to Olymel, ACA's market share would be 7.7% and Olymel's 22.5%, and the HHI would be 1524.

Scenario 5

[402] Another possibility is that the Applicant is unable to source any birds from Quebec and ultimately loses its Prince Edward Island and Nova Scotia birds and remaining New Brunswick birds to Olymel. We are of the view that, on a balance of probabilities, this scenario is not likely. The Applicant is more likely to be able to obtain supply to replace at least some of the Respondents' chickens. In this scenario, Olymel's market share would go up to 25.1%, Maple Lodge Farms/Nadeau's share would be 15.4%, and ACA's would remain unchanged. The HHI would be 1615. This could be regarded as the worst-case scenario from a competition perspective. In this scenario, the refusal would result in an increase in the HHI, implying a more concentrated market. The HHI would increase from 1579 to 1615 or 36 points. In their expert

reports, both Dr. Ware and Ms. Sanderson referred to thresholds at which mergers can be challenged or blocked. In this case, to provide a frame of reference, a merger of two firms each of which had a market share of 4.25% would increase the HHI by 36 points. A merger of this nature would be within the safe harbours stated in the *Merger Enforcement Guidelines*[5]. We fully appreciate, however, that the experts' reference to safe harbours is in the context of mergers and that a different threshold applies; namely a "substantial" lessening or prevention of competition and not an "adverse effect" pursuant to paragraph 75(1)(*e*).

Conclusion

[403] Based on the above, we find that the refusal to supply will likely not have a significant impact on market shares of processors or market concentration. Even the worst case scenario, scenario 5, results in only a very small increase in the HHI.

(ii) Barriers to entry

[404] The assessment of barriers to entry is usually part of the assessment of market power. None of the experts discussed barriers to entry directly. Neither Dr. Ware nor Ms. Sanderson incorporated considerations on barriers to entry into their market power analyses.

[405] There is very little evidence of the kind usually used in the assessment of barriers to entry on the record. We have no systematic information on the historic entry-and-exit pattern, although there are statements to the effect that the chicken processing industry has become more consolidated over time. For instance, in a document prepared by Agriculture and Agri-Food Canada on the Canadian chicken industry, one can read that "the poultry industry has become concentrated over the years" and that "[w]hile the concentration ratio has stabilized in the recent years, concentration in the industry might continue to occur in the future".

[406] Concerns about cost-related barriers to entry normally center on diseconomies of small scale and sunk costs (specialized investments required for entry). We have very little information on these factors, although Dr. Barichello does state that "[c]learly, a processing plant represents a considerable capital investment and therefore business risk". With respect to regulatory barriers to entry, we have some information: given that the supply of live chickens is fixed by the marketing boards, a new entrant abattoir would have to bid against incumbents for live birds. Although some chicken producers may have relationships with co-ops, having to bid against incumbents for birds does not necessarily place an entrant at a disadvantage. The problem for new abattoirs comes with the provincial allocation systems in place in Ontario and Quebec, which allocate incumbents their historic share of provincial slaughter. These allocation schemes provide for some exceptions. Dr. Barichello stated that there is an "open sign-up pool"[6] in Ontario. Also, new entrants can bid inter-provincially. The impression remains, however, that the provincial allocation schemes make new entry into processing at the abattoir level difficult. Entry into further processing would not be subject to the same regulatory barrier. While there is evidence that there are barriers to entry in primary processing, there is little to indicate that the refusal would increase them or prevent them from eroding.

[407] While it is clear that barriers to entry do exist, they are one of many factors to be considered in assessing market power. In our view, the existence of barriers to entry is not in itself determinative.

(iii) The effect of the refusal on the price of processed chicken

[408] With respect to the link between the Respondents' refusal to supply and the price of processed chicken paid by consumers, four issues are raised in argument, namely (1) the price increase that is implied by the change in Olymel's market share and in the HHI; (2) contractual provisions bearing on the ability of processors to pass premiums along to customers; (3) statements by processors regarding their ability to pass price increases along; and (4) the implications of supply management for processors' ability to raise the price of processed chicken. We will deal with each of these in turn.

- *The effect of the change in market shares and the HHI on the price of processed chicken*

[409] Dr. Ware testified that he did not model the effect of the change in market concentration on the price of processed chicken. He explained that he had not been asked to undertake such an analysis and that he did not have enough data to do so. He explained that "because...we have a standard of the adverse effect on competition rather than a substantial lessening on competition ... any lessening or any change in market structure in the direction of increasing concentration would constitute an adverse effect on competition" and that "if you add that to the increasing costs arising from an increase in premiums and an increase in live transport costs plus the effect on the further processing market, then that would amount to an adverse effect on competition". The first statement would appear to require some qualification. An increase in concentration could be the result of pro-competitive forces at work. For example, an increase in concentration may occur if a more efficient firm attracts customers from a less efficient rival. In any event, as stated above, the refusal in this case could well decrease concentration. In the worst-case scenario, it would increase concentration by a very small amount.

- *Contractual limitations on the ability of processors to pass on increases in premiums to their customers*

[410] Dr. Ware contends that if the Applicant attempted to replace the Respondents' birds by acquiring birds in Quebec, the result would be an increase in premiums paid by the Applicant and other processors, and these premiums would be passed on to consumers. Dr. Ware believes that some of the Applicant's contracts with its customers "are of a cost plus form in which their cost -- Nadeau's cost increase would automatically be represented in their prices to the customers". During her cross-examination of Dr. Ware, counsel for the Respondent Westco made reference to several cost-plus contracts. According to Westco, these contracts do not allow the Applicant to pass on its premiums to its customers. Below, we review the provisions in a number of these contracts.

[411] Clauses **[CONFIDENTIAL]**of the Applicant's contract with **[CONFIDENTIAL]** stipulate the following:**[CONFIDENTIAL]**.

[412] **[CONFIDENTIAL]**.

[413] On this evidence, while **[CONFIDENTIAL]** may be able to pass an increase in the NB Board Price on to **[CONFIDENTIAL]**, it is unclear if any other increase can be passed on.

[414] The Applicant's contract with **[CONFIDENTIAL]** sets out the following pricing formula: **[CONFIDENTIAL]**.

[415] We have limited evidence to explain how the contracts described above work in practice. On the whole, they appear to provide for prices to be fixed at least for a set time period. It is unclear as to how and when cost increases can be passed on, if at all. There is simply insufficient evidence to determine, based on these contracts, how increases in cost to the Applicant, caused by "premium wars", could be passed on to customers.

- *Processors' statements regarding their ability to pass on cost increases to their customers*

[416] At paragraph 101 of her report, Ms. Sanderson stated that "[t]he record is filled with statements from processors indicating that they have no ability to raise prices to customers". In that regard, she referred to the statements made by Mr. Feenstra and two of the Applicant's customers. Cara, a full-service restaurant operator, indicated in a letter that its business is very price-sensitive and that there is "virtually no room to increase prices to our customers". In a letter addressed to the Applicant, the following concerns are expressed on behalf of La Préférence, another customer:

> Eliminating Nadeau from the supply chain, by way of shut down or purchase from a competitor of there's [sic] will only tighten the supply of fresh raw products, and ultimately I foresee an increase in the price of poultry.
>
> An increase in the price of poultry will hurt La Preference's bottom line. Our clients will not pay for the increase in price for simply having fostered a controlled supply.

[417] In her testimony, Ms. Sanderson stated that the fact that costs were going up did not necessarily mean that prices of processed chicken would go up. She expressed the opinion that processors were worried about a premium war because they could not pass the higher premiums on to their customers.

[418] Mr. Brodeur stated that it would be very difficult for a processor to pass these costs on to customers and consumers. In his evidence, he gave three reasons to explain his view. He said:

> 7.16. À la connaissance du Témoin, advenant une augmentation des coûts d'approvisionnement en poulets vivants causés par une hausse des primes versées aux éleveurs, il serait très difficile pour un transformateur ou un surtransformateur

d'exiger un prix plus élevé de la part de ses clients et ultimement, des consommateurs. Cela s'explique par les trois raisons suivantes :

1ère raison: produits substituts

7.16.1. Il existe une « concurrence croisée » entre le poulet et les autres viandes telles que le bœuf et le porc. Le Témoin a pu constater, au fil de ses années d'expérience dans l'industrie, que lorsque les prix des Produits transformés et surtransformés augmentent, les consommateurs se tournent vers le porc ou le bœuf, ce qui a résulté en une baisse de la demande des clients d'Olymel pour ses Produits transformés et surtransformés. Cette réalité a aussi été constatée dans le rapport des PPC, joint à la présente déclaration à la pièce YB-16, à la page 41. En effet, chez les Canadiens, la consommation d'un type de viande se fait naturellement au détriment d'un autre type.

2e raison: coûts des inventaires

7.16.2. Les coûts associés à la conservation en inventaire des Produits transformés et des Produits surtransformés sont élevés et motivent les abatteurs, transformateurs et surtransformateurs à vendre leurs produits rapidement. De plus, une fois congelé, le produit perd de sa valeur en raison des frais qui devront être encourus pour le décongeler et des limitations concernant l'utilisation de cette viande.

3e raison: augmentation prévisible des contingents

7.16.3. Advenant une hausse des prix de vente, les contingents de production des poulets vivants sont rapidement ajustés à la hausse afin de ramener les « marges viande » des transformateurs à leur niveau historique.

7.16.4. Il faut savoir que les données produites par la firme Express Markets Inc. (EMI), dont les résultats sont utilisés par les organismes de réglementation dans leur évaluation des besoins en poulets de la population canadienne, ne tiennent pas compte des primes payées aux éleveurs dans le calcul de la «marge viande» des transformateurs. Dans les calculs effectués par ces organismes de réglementation, la «marge viande» des transformateurs correspond à l'écart entre les prix de gros moyens (données EMI) et prix de référence du poulet vivant en Ontario.

7.16.5. Or, lorsque cette marge augmente au-delà d'une moyenne historique, ceci peut laisser présager un manque de viande sur le marché domestique et les contingents de production de poulets vivants seront normalement ajustés à la hausse, ce qui aura pour effet d'augmenter la quantité de produit disponible pour les abatteurs et, par le fait même, de réduire les primes versées aux éleveurs.

> 7.17. Selon l'expérience du Témoin, il n'y a pas de relation directe entre les primes payées aux éleveurs pour les poulets vivants et les prix de vente en gros et au détail des Produits transformés et surtransformés. En effet, la variation des prix de ces produits est principalement causée par les fluctuations de l'offre et de la demande et par les variations de prix des autres viandes transformées. Quant aux primes payées aux éleveurs, celles-ci dépendent notamment de la concurrence entre les abatteurs et de la rentabilité relative de l'industrie.

[419] Some processors stated, however, that they would attempt to pass on the increased costs to their customers. In a letter addressed to the New Brunswick Farm Products Commission, Kevin Thompson, on behalf of the Association of Ontario Chicken Processors, stated that processors would "attempt to [pass] the additional costs on to their customers causing increases in the price of chicken at the retail meat counter and an adverse impact on consumption which will in turn lead to lower production for all chicken farmers". In his view, "...consumers who already pay higher prices in Canada to support supply management will unjustly pay even more".

[420] Mr. McCullagh, at paragraph 14 of his affidavit, states that processors will look to and need to pass on the costs to their retail and foodservice customers, who, in turn, will seek to increase prices to consumers.

[421] However, Mr. Feenstra testified that it is very difficult for processors to pass on the costs of a "premium war" to the end consumer as consumers are willing to pay only so much for their chicken. In cross-examination, Dr. Ware responded to Mr. Feenstra's testimony as follows:

> **Ms. Healey**: If Mr. Feenstra were to advise the Tribunal that it is very difficult to pass along the cost of a premium to a consumer or consumers are only willing to pay so much for chicken, would you have any reason to doubt Mr. Feenstra's comments in that regard?
> **Dr. Ware**: Yes, I would because it is possible that economists take a bit more of a detached view of how markets work than people who are embroiled in the everyday decision-making and, as I said, these premiums are not just going up to Nadeau. These premiums are going to go up way across Quebec and if that were to happen, that would be, you know, a market-wide increase in costs and it's hard for me to imagine that a market-wide increase in costs would not be reflected in the price of chicken.

[422] Dr. Ware is distinguishing between the ability of the Applicant or that of any other individual competitor to pass on cost increases that they may have incurred and the ability of processors as a group to pass on a market-wide increase in the premiums they pay for live chicken. Competitive pressure normally limits the ability of individual competitors to pass on cost increases that they have incurred. In the absence of supply management, a market-wide increase in costs is more likely to be passed on as Dr. Ware has stated. It is the Tribunal's view, however, that supply management itself limits processors' ability to pass on even a widespread increase in the premiums they pay for live birds. We will now turn to that issue.

- *Limitations posed by supply management on the ability of processors to increase price*

[423] Supply management reduces the ability of processors to raise the price of processed chicken and also attenuates any link between price and concentration that might otherwise exist. The supply of live chickens in Canada is determined by producer-controlled provincial marketing boards coordinated by a national marketing board, the CFC. Dr. Barichello explains the regulatory process by which the supply of live chickens is determined:

> 1. Processors calculate their requirements for production.
> 2. Each province's marketing board aggregates processors' requirements within their province.
> 3. Provincial marketing boards send their aggregates to the CFC.
> 4. The CFC makes any necessary adjustments and then authorizes a total production for each province.

[424] According to Dr. Barichello, national chicken quota is set by the CFC for a six- to seven-week production period, and farmers cannot deviate materially from their quota. Thus, there is a continuous flow of live chickens coming to market. The quantity is determined by regulation, and the birds must be processed and sold to consumers. It is normally not possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the case at hand, it would appear very difficult to raise the price of processed chicken without simultaneously restricting the amount offered on the market. The weekly flow of chicken into the market is not under the control of any one processor.

[425] The evidence also points to a recent instance in which processors jointly lobbied the CFC for a reduction in the national quota and were successful; the CFC reduced the allocation for period A-87. Mr. Landry testified as follows with respect to the request made by the processors:

> **Mr. Lefebvre**: Une des dernières questions que j'ai pour vous. Pourquoi tant vouloir baisser la production de poulets?
> **Mr. Landry**: C'est comme je t'ai expliqué, c'est que le prix de vente, c'est un marché contrôlé, c'est là qu'est la demande. Puis quand le prix vivant du poulet vient trop élevé--
> **Mr Lefebvre**: Oui.
> **Mr. Landry**: --- pour le prix de vente que les abattoirs peuvent faire, les retours sont pas bons. Donc, c'est une des raisons pourquoi que le système est révisé à toutes les huit semaines.

[426] The limited information provided about this one incident is insufficient to support the inference that processors exercise the kind of control over supply management that would be necessary for them to increase the price of processed chicken as and when they wish. This is particularly so given the complex nature of quota adjustments provided for in the supply management system.

[427] As indicated in our earlier review of the supply management system, a "bottom-up approach" is contemplated in order to determine if quota adjustments are required. The mechanism is designed to strike a balance between chicken production and consumer demand. In essence, quotas are adjusted as a result of changes in that demand.

[428] We find that it would normally not be possible to sustain a price increase in a market if supply and demand conditions remain unchanged. In the absence of an increase in consumer demand or a reduction in supply, there is no reason to believe that prices will rise.

[429] The Applicant contends, in essence, that the price increases caused by "premium wars" will be passed on to customers and consumers. In the event that the Applicant is able to obtain all of its replacement birds from Quebec, the concern is that this would result in "premium wars" that would squeeze processor margins. It is argued that processors would then attempt to pass on premium increases to customers. It is our view that other factors, such as consumer preferences, being equal, an increase in the price of processed chicken cannot be sustained in the absence of a further restriction in supply by the marketing boards. Here, any "premium war" would be the result of excess processor demand for live chickens. There is little evidence to suggest that the marketing boards would respond to excess processor demand for chickens by reducing quotas and thus further restricting supply. This would only make things worse, because processors would then be competing for an even smaller supply of chickens. It is our view that it would be more logical for marketing boards to attempt to mitigate any premium increase by increasing quotas to ensure that there would be sufficient chickens for all processors. In that case, prices would fall.

[430] For the above reasons, we find that the price increases to processors caused by "premium wars" are not likely to be passed on to customers or consumers without an accommodating reduction in supply by the marketing boards. We also question whether a further restriction of supply would remedy or even be seen as a remedy for a deterioration of processor margins caused by "premium wars".

(iv) The effect of the refusal on rivals' costs

[431] The Applicant further argues that to the extent that processors cannot pass on the increased live costs caused by a "premium war", their viability will be threatened. It also argues that the refusal will substantially raise the Applicant's costs and that the raising of these costs would have an anti-competitive effect because it would weaken the Applicant to the benefit of Olymel. Dr. Ware states as follows in his examination in chief:

> **Ms. Price:** Can I just stop you there for a minute and ask a question arising from what you said? This concept of raising rivals' costs, I believe that there's been a fair bit of evidence that Nadeau and Olymel do compete in the primary processing market. Does that concept that you've just described apply not only to the further processors whose costs might be raised as you've described but also to Nadeau itself in the event it has to go into Quebec?
> **Dr. Ware:** It could, yes. Yes, it could. We don't know -- you're basically saying does it apply to the processing market, the primary processing market?

Ms. Price: As well.
Dr. Ware: Yes. Well, it certainly could. We don't know -- and I didn't really directly address this, but we don't know how much premiums will be bid up in Quebec to other processors as a result of them being bid up to Nadeau.
Ms. Price: Right.
Dr. Ware: But they certainly will be bid up to some extent because as I was saying before the break, if Nadeau is going to bid 10 percent of the supply of Quebec chicken out of Quebec, it's going to do that by raising the price, and you raise the price -- when you raise the price that they pay, that's going to increase the price to everyone else too.

[432] "Raising rivals' costs" is a term described in section 4.2 of the Competition Bureau's *Enforcement Guidelines on the Abuse of Dominance Provisions* and can be described as a set of anti-competitive strategies that a dominant incumbent firm might use to inhibit the expansion of smaller competitors or the entry of new competitors, thereby entrenching its dominance. The Guidelines note that in order for the raising of rivals' costs to be a profitable strategy for the dominant firm, the burden of the cost increase concerned must fall more heavily on the rivals of the dominant firm than on the dominant firm itself.

[433] The Tribunal has found that, for the purposes of paragraph 75(1)(*a*), if the Applicant replaced the Respondents' birds with birds from Quebec, its costs would increase and it would be substantially affected as a consequence. The question here is whether the evidence supports that the raising of rivals' costs would be the result of the refusal and, if it does, whether this implies that competition in the Ontario-Quebec-Maritimes market for processed chicken would be adversely affected. The answer is that it does not. The reasons are as follows.

[434] First, the conditions for the successful pursuit of a strategy of raising rivals' costs do not appear to exist in the relevant market. Olymel, the recipient of the Respondents' birds, is not dominant in the relevant market, and the receipt and retention of the Respondents' birds would not come close to making it so. Indeed, there is no dominant firm in the relevant market. There are several other large, if not larger, competitors (Maple Leaf, Maple Lodge, Exceldor) and numerous smaller ones. Second, there is little in the evidence to indicate that a price war for live chickens would be less burdensome to Olymel than to other processors. In his testimony, Dr. Ware refers to a market-wide increase in processors' costs that is the result of their bidding more aggressively for live birds.

[435] To the extent that cost increases resulting from the refusal are confined to the Applicant, it is unlikely that any cost increases experienced by the Applicant could be passed on to consumers in the form of higher prices. Indeed, it is central to the Tribunal's determination under paragraph 75(1)(*a*) that the Applicant would be substantially affected by the refusal, that it could not simply pass the higher cost of acquiring replacement birds in Quebec on to its customers. The evidence relating to the possibility that costs increases experienced by the Applicant could be passed on to consumers is summarized above. Further, Mr. Robinson assumed that the price at which the Applicant sells processed chicken would remain unchanged in scenario 2, where the Applicant is able to replace the Respondents' chickens with birds from Quebec. The ultimate limitation on the ability of the Applicant or other processors to increase the price of processed

chicken is that they do not control the supply of chickens to the market. Control of supply lies with the marketing boards.

(v) The effect of the refusal on the quality and variety of processed chicken available to consumers

[436] Dr. Ware states as follows at paragraph 25 of his reply report:

> There are compelling reasons also to believe that the refusal to deal will lead to severe declines in quality in some cases, which are sufficient in themselves to constitute an adverse effect on competition.

[437] Dr. Ware cites an example of what he sees as a decline in quality, the evidence of **[CONFIDENTIAL]**, which is that if the Applicant were to close, **[CONFIDENTIAL]** would lose a source of **[CONFIDENTIAL]**, and replacement sources would be further away and more costly. **[CONFIDENTIAL]**.

[438] Ms. Sanderson responds that if the Applicant were able to replace the Respondents' birds, there is no issue. If the Applicant were unable to replace the Respondents' birds, **[CONFIDENTIAL]** would still have a variety of realistic alternatives. One possibility is that Sunnymel builds a plant in New Brunswick. Exceldor and ACA could also supply **[CONFIDENTIAL]** without greatly increasing the shipping distance.

[439] Ms. Gazzard stated in her affidavit that UPGC and Olymel have been in negotiations to replace the Applicant as a source of supply. Olymel has apparently stated that it has the capability of filling UPGC's requirements but has not quoted a price. She stated that they had also approached Exceldor about replacing the lost Nadeau volume. Exceldor believed, however, that their price would not be commercially viable to UPGC.

[440] There is evidence of complaints by certain customers of the Applicant, in particular Puddy, relating to their inability to obtain chickens of the required quality and variety should they no longer be supplied by the Applicant. Mr. McHaffie stated as follows:

> By contrast, our purchases from Olymel have declined significantly since 2006. This is because of quality and service problems. The quality problems have included bruising, cuts, neck skin left on, missing parts, (such as wings), and the like. Service problems include late delivery and short delivery. Olymel, for reasons unknown, has been unresponsive to our requests for improvement. As we are unable, in our view, to obtain sufficient supplies to meet our needs from elsewhere in Québec, it has been a major advantage for us to have Nadeau as an alternative source of fresh killed chicken.

[441] Given the distances processed chicken is routinely shipped, a need to find a new (possibly more distant) source of supply does not necessarily qualify as a decline in quality. There are several post-refusal scenarios under which Priszm and Puddy would not experience any need to change suppliers, for instance, if the Applicant were to replace some or all of its lost

supply. In the event that they have to change suppliers, there are several other options open to Priszm and Puddy whereby they need not go much further afield for supply. Nor is it necessarily the case that the need to change suppliers qualifies as an adverse effect on competition. Changing suppliers is part of the normal process of competition. Given the consolidation that has occurred among chicken processors, customers have presumably changed suppliers in the past although there is not much in the way of evidence on this point.

(vi) Possible foreclosure of supply to other processors in the market

[442] Dr. Ware also cites a possible lessening of competition in what he calls the "market for further processed chicken" as another manifestation of the adverse effect on competition flowing from the refusal. He cites the affidavit of Ms. Goodz of Riverview and the affidavit of Mr. Ellis of Sunchef. Both Ms. Goodz and Mr. Ellis express the concern that, as a competitor, Olymel would not supply them or would not supply them on reasonable terms. Also, at paragraph 28 of his report, Dr. Ware cites the affidavit of Mr. McHaffie of Puddy. Mr. McHaffie explains that Puddy has had quality and service problems with Olymel and that Olymel has been unresponsive to its request for improvement. We now turn to the evidence of some of the Applicant's customers in that respect.

Riverview

[443] Ms. Goodz testified that both Olymel and Exceldor have refused to supply Riverview. She stated as follows at paragraph 17 of her affidavit:

> My ability to continue to supply my specialized product at an acceptable price depends on my ability to obtain supplies from Nadeau. Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off, and we will no longer be able to continue in this business.

[444] Ms. Sanderson responds to these concerns at paragraph 77 of her report. She states that Ms. Goodz' concerns would not arise if the Applicant is able to replace the Respondents' birds. She states that alternate suppliers such as Exceldor, Abattoir Agri and Lilydale are closer to Riverview than Nadeau is and that Maple Lodge Farms and Maple Leaf are not much further away. Lilydale is no longer an alternative for Riverview as it is going out of business, and Exceldor is questionable as Ms. Goodz has testified that it has refused to supply her. Ms. Goodz also stated that some suppliers cannot meet her size requirements. Ms. Goodz conceded under cross-examination that **[CONFIDENTIAL]**. Ms. Sanderson further stated that even if Riverview were forced out of business, it is small enough that there would be no adverse effect on the market for processed chicken.

Sunchef

[445] Sunchef is a further processor of chicken located in Montreal. **[CONFIDENTIAL]**

[446] Mr. Ellis states at paragraph 16 of his affidavit that if the Applicant's supplies are cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated:

> This would have a major adverse effect at our level of the market. It would permit Olymel to increase its dominance and market power, at the expense of other businesses like ours.

[447] At paragraph 15 of his affidavit, Mr. Ellis makes the same claim as Ms. Goodz as to the crucial role that continued supply from Nadeau at the same level plays with respect to the future of his business:

> Should Nadeau go out of business, reduce its business, or be acquired by Olymel, I foresee that our supplies will be reduced or cut off and that we will no longer be able to continue in this business.

Puddy Brothers

[448] Puddy is a further processor located in Mississauga, Ontario. According to Mr. McHaffie, it currently purchases whole birds from Exceldor (**[CONFIDENTIAL]**%), Nadeau (**[CONFIDENTIAL]**%) and Olymel (**[CONFIDENTIAL]**%). According to paragraph 9 of Mr. McHaffie's affidavit, Puddy has been in business since 1884 and began purchasing from the Applicant in about 2004 or 2005. Since 2006, it has reduced its purchases from Olymel because it has not been satisfied with its service. Mr. McHaffie states that Puddy cannot buy from Ontario primary processors, which are much closer than Nadeau, because they are also engaged in further processing, and the requirements of Ontario processors exceed the Ontario slaughter.

[449] Mr. McHaffie states that if the Applicant were unable to continue as a viable business, Puddy would be forced to buy more from Olymel, and its service might be worse. He concludes that if the Applicant were to close or be taken over by Olymel, competition in the market would definitely be hurt. He admitted under cross-examination, however, that he had not taken his concerns regarding inadequate supply up with the CFC.

Desco

[450] Mr. Chevalier testifies that Desco competes directly with Olymel and Exceldor and that they have refused to supply Desco at reasonable prices. At paragraph 7 of his affidavit, he states that if the Applicant's supplies of live chicken were reduced or cut off, Desco's ability to compete effectively against Olymel would be reduced.

[451] Ms. Sanderson responds to Mr. Chevalier at paragraph 78 of her report. She states that there would be no issue if the Applicant is able to replace the Respondents' birds. Ms. Sanderson also calculates that Desco's purchases from Nadeau account for **[CONFIDENTIAL]**% of its annual chicken purchases, indicating to her that Desco has many other suppliers available to it. She states that Desco currently obtains fresh-killed chickens within 72 hours from the United States and that the Ontario processors as well as ACA could provide chicken within the same

delivery time. Ms. Sanderson also states that if Desco were to go out of business, this does not mean that prices for processed chicken would rise.

[452] In cross-examination, Mr. Chevalier conceded that the Applicant's supply accounts for a small percentage of Desco's supply.

Analysis

[453] We earlier determined that further processed chicken is not a separate product market. We have little evidence regarding the respective market shares of the stated further processors Riverview, Sunchef, Puddy and Desco. We note that Mr. McHaffie stated in cross-examination that further processors are numerous. When questioned on the matter, he stated that he thought that there are more than 50 further processors in Ontario and 5 to 15 in Quebec.

[454] Both Riverview and Sunchef maintain that any diminution of their supply of chicken from the Applicant would be disastrous. Puddy concludes that it would be forced to return to a longstanding supplier, Olymel, with whom it has recently become disenchanted. This assumes, of course, that the Applicant is put out of business. There are many possible scenarios short of the worst-case scenario in which the St-François Plant closes and all the Applicant's birds go to Olymel. In the event of the worst-case scenario where the St-François Plant closes and Riverview and Sunchef are denied chicken from all other sources and are obliged to close, there is insufficient evidence to infer that this would have an adverse effect on competition in the relevant market which is the Ontario, Quebec and Maritimes market for processed chicken. This is essentially because of the size of that market, the apparent number of further processors in the market, the marketing boards' ultimate control of supply in the market and the paucity of evidence to show that complaining further processors cannot obtain supply elsewhere.

[455] We further note that there are several reasons why customer complaints might not be given significant weight in the determination of whether the probable effect of the refusal competition in the market is or is likely to be adverse. First, some of the complaints appear to have been orchestrated. For example, as explained above, some of the letters sent to the Applicant by some of its customers regarding the Respondents' refusal contain paragraphs that are virtually identical to those found in a draft letter prepared by the Applicant. This letter, which was apparently provided to Riverview and Cara, includes the following two paragraphs:

> Our business is a "pennies" business. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.
>
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices would rise, and supply problems would occur. We are therefore opposed to any reduced competition.

[456] The evidence adduced shows that similar paragraphs are found in letters sent to the Applicant by Riverview and Cara:

> [Riveriew]
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would definitely foresee that prices would definitely rise, and supply problems would occur. We are therefore strongly opposed to any reduced competition in this market.
>
> [Cara]
> Our business is very price sensitive. There is virtually no room to increase prices to our customers. Accordingly, any increase in raw price or transportation costs would have an immediate adverse effect on our bottom line.
>
> If the Nadeau plant were to shut down, or even if it were to be acquired by a competitor, I would foresee that prices could rise, and supply problems could occur. We are therefore extremely concerned with any reduced competition.

[457] Second, notwithstanding the evidence adduced on behalf of certain customers, in particular Sunchef and Riverview, that they would be put out of business should the Applicant cease operations, we are not persuaded that this result is likely. Some complaining customers have not attempted to investigate alternate sources of supply and have simply asserted that it would be either unavailable or too costly. While the complaining customers assert that specific suppliers approached were either unwilling or unable to supply chickens to required specifications, there is insufficient evidence to establish that these further processors were unable to obtain the chickens they require from other suppliers in the market. Further, at this time, no one appears to have complained about the situation to the CFC, the regulatory body responsible for determining the supply of chickens available to processors as well as being the most capable of remedying their perceived supply problems.

[458] Third, many customer complaints focus on a limited set of scenarios, to wit, the possibility of the Applicant's closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that the Applicant will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual or business on a reduced scale. This reduced scale could be quite consistent with the Applicant's historic supply of chickens, before it added an extra shift to accommodate the Nova Scotia and Prince Edward Island birds. In the event that the Applicant were to operate at a reduced scale, it might well arrange to continue to supply those customers who rely most on it and allow customers that are less concerned about their alternatives to seek supply elsewhere. This could also be true of some complaining customers who have only recently entered into contracts with the Applicant or increased their purchases from the Applicant.

[459] The quality degradation issue appears to be overblown to the extent that it is related to incremental shipping distances. In many cases, complaining customers have alternate sources of supply that are closer than the Applicant. The most common source of concern appears to be the tension between the abattoirs and the further processors rather than distance. This issue is

market-wide and cannot turn on the actions of the St-François Plant. The Applicant itself engages in some further processing (Kentucky Fried Chicken birds) and its sister, Maple Lodge Farms, is also integrated into further processing. There are apparently 50 further processors in Ontario, even though the major abattoirs in Ontario (Maple Lodge Farms and Maple Leaf) are integrated into further processing. It appears that there are market opportunities for specialists in further processing and that these opportunities will not depend on the conduct of or the scale of operations at the St-François Plant.

[460] A need to change suppliers does not necessarily equate with a supply disruption. The aggregate supply of chickens coming to market remains the same regardless of where the Respondents send their birds. The capacity to process chickens would remain the same unless the St-François Plant actually closes. Even then, the Sunnymel partnership may build a new plant, and/or ACA may expand, perhaps with the participation of Maple Lodge. It appears that some of the customers who have submitted evidence in this proceeding have changed their mix of suppliers in the past, some quite recently. This is a normal part of doing business, and it is not clear that any special significance should be attached to the fact that some of the Applicant's current customers are obliged to make further changes in their mix of suppliers.

[461] In the event that the worst-case scenario prevails and some of the Applicant's current customers are adversely affected, the question remaining is whether this can be regarded as an adverse effect on competition in the market. There is no evidence of concern among purchasers of processed chicken who are not current Nadeau customers. Nor is there much in the way of evidence regarding the portion of the market accounted for by Nadeau's complaining customers. Given the limited likelihood of the worst-case scenario prevailing and the lack of evidence regarding the portion of the market that would be affected if it did prevail, the complaints of the Applicant's customers are not sufficient to support an inference that the Respondents' refusal is likely to have an adverse effect on competition in the market.

(vii) Impact of possible elimination of an efficient processor

[462] The Applicant argues that it operates the most modern and efficient processing plant in Canada and that for this reason alone, its elimination would have an adverse effect on competition in the market. In this regard, the Applicant relies on the statistics compiled by Mr. Donahue and the affidavit of Mr. Robinson.

[463] Mr. Donahue, as explained above, works for Agri Stats, a statistical research and analysis firm that offers benchmarking services for the poultry industry across North America. At the Applicant's request, he prepared a report about the St-François Plant. He testified that the Applicant's wage rates **[CONFIDENTIAL]**and that the Applicant **[CONFIDENTIAL]**.

[464] According to Dr. Ware, **[CONFIDENTIAL]**are an example of the greater efficiencies obtained by the Applicant. He is of the opinion that any adverse effect on competition will be quantitatively more severe if processing at the St-François Plant were replaced by the processing of chickens at a less efficient plant.

[465] Mr. Robinson, at paragraph 6 of his affidavit, states that **[CONFIDENTIAL]**.

[466] The evidence adduced does not establish that the Applicant operates the most efficient processing plant in Canada. When asked about the findings of his report, Mr. Donahue simply stated that **[CONFIDENTIAL]**.

[467] Further, given the paucity of evidence regarding the efficiency of other processing plants in the relevant market, we cannot agree with Dr. Ware that any adverse effect would be quantitatively more severe if another processing plant processed the Respondents' chickens. As stated earlier, we find it unlikely that the Applicant would close. However, if it were to close, any new plant built by Sunnymel could benefit from the same sources of efficiency **[CONFIDENTIAL]**.

(d) Conclusions for paragraph 75(1)(*e*)

[468] As stated above, for a refusal to deal to have an adverse effect on a market, the remaining market participants must, as a result of the refusal, be placed in a position of created, enhanced or preserved market power. This analysis requires a relative and comparative assessment of the market with the refusal to deal and that same market without the refusal to deal. The level of competitiveness in the presence of the refusal to deal must be compared with the level that would exist in the absence of the refusal. It must then be determined whether the effect on competition, if any, is "adverse". In *B-Filer*, the Tribunal found that "adverse" is a lower threshold than "substantial".

[469] Paragraph 75(1)(*e*) refers to two time frames: the present and the future. In the instant case, because of the Interim Supply Order, the refusal to deal is not having an adverse effect on competition at present because the Respondents have not yet ceased supply. Indeed, in their arguments, the parties referred to the likely effects of the refusal to deal.

[470] We are satisfied that neither Olymel nor any other processor in the market currently exercises market power. For comparative purposes, the market we consider at the outset, without the refusal, is a market consisting of numerous processors; many small processors and a number of larger ones including Maple Lodge, Maple Leaf, Exceldor and Olymel. We will now summarize the results of our above analysis of the effect of the refusal to deal.

[471] We have considered a number of different scenarios of the Applicant's circumstances resulting from the refusal. We have compared the effect of the refusal on market shares under five different scenarios and found that the results of this comparison are normally not associated with any concern about enhanced market power. We recognize, however, that the market shares upon which these calculations or other estimates of market concentration are based are not entirely accurate because they are based on slaughter rather than sales of processed chicken to customers in the relevant market. The parties failed to adduce any other evidence regarding market shares.

[472] In assessing market power, we have also considered a number of other factors. The first factor considered is barriers to entry. We find that while barriers to entry into processing at the abattoir level exist, there is little to indicate that the refusal increases them or keeps them from

decreasing. The next factor considered is the likelihood of an increase in the price of processed chicken. We find that there are good reasons to doubt that any increase in costs incurred by processors as a result of increased competition for birds can be readily passed on to consumers. Given the level of demand, it is impossible to sustain an increase in the price of a product without decreasing the quantity of the product offered in the market. Processors can only indirectly influence the supply of chickens through the regulatory process in which they constitute only one group of stakeholders.

[473] With respect to the effect of the refusal to deal on further processors, we find that this does not constitute an adverse effect on competition. If the Applicant is able to replace the Respondents' birds, these processors will not be affected by the refusal. If the Applicant is obliged to reduce the amount it supplies to some further processors, alternative sources of supply exist. In this regard, it is important to re-emphasize that the refusal does not restrict the supply of chickens coming to market. Only the marketing boards can do that. In the event that some of the complaining further processors were to suffer some form of competitive disadvantage, there remains the question of the significance of this to the market as a whole. The Applicant failed to adduce evidence regarding the competitive significance of the complaining further processors. Given the absence of evidence regarding the significance of these market participants from the perspective of competition in the market, we cannot draw the inference that harm suffered by them constitutes an adverse effect on competition in the market.

[474] The Applicant has failed to establish that it is likely that its customers will experience a disruption in supply and a reduction in quality. There are several plausible scenarios in which there are no adverse effects on complaining customers as a result of the refusal. In the event that some of the Applicant's customers actually do experience a decline in the quality of service or a disruption of service that is beyond the adaptation that is part of the normal competitive process, this effect would be confined to a very small fraction of the market and, because of the paucity of evidence in this regard, would not mean that the effect on competition could be qualified as "adverse" from the perspective of the market as a whole.

[475] Based on the above comparative assessment of the market with the refusal to deal and that same market without the refusal to deal, we find that the Applicant has failed to establish that the refusal to deal is having or is likely to have an adverse effect on competition in the market. None of the factors discussed above, taken individually, support a conclusion that the Respondents' refusal is having or is likely to have an adverse effect on competition in the market. We are also of the view that, taken together, these factors lead to the same result. We find that, as a result of the refusal to deal, Olymel would not be placed in a position of created, enhanced or preserved market power. Instead the post-refusal market situation would be fluid, with the potential for a range of possible shifts in market share and changes in market concentration that are ambiguous in their implied effect on competition and, in any case, so small that they would normally pass without notice.

[476] We note that earlier in these reasons, we developed a number of different scenarios to assist us in our analysis under paragraph 75(1)(*e*). We have found that, in all cases, there would be no adverse effect on competition. It is therefore unnecessary to determine which of the scenarios is most likely. The evidence on many material factors is not conclusive. For instance,

we do not know if the ACA plant in Nova Scotia will expand and if it does, whether Maple Lodge will be involved. Nor do we know whether or when the Sunnymel partnership will build its proposed New Brunswick plant. We would be speculating on such matters. We are, however, as stated earlier, satisfied on the whole of the evidence that the Applicant will likely succeed in obtaining supply to replace at least some of the Respondents' chickens. Therefore to the extent that a finding of a likely scenario is required, we are of the view that the scenarios which provide for the Applicant's being able to replace some of the Respondents' chickens are, on a balance of probabilities, more likely.

[477] Finally, we agree with the Respondents' contention and with the evidence of Ms. Sanderson who is of the opinion that, while the refusal does not have or is not likely to have an adverse effect on competition in the relevant market, a remedial order might have such an effect. The processor allocation systems maintained by provincial marketing boards limit intra-provincial competition for live birds. The allocation systems have the effect of fixing the share of the provincial slaughter accounted for by each abattoir in the province. This reduces the ability of one abattoir to attract business from another. A way around this is for an abattoir to purchase live birds from another province, but processors have generally been reluctant to do this on a significant scale. The tacit arrangement to avoid interprovincial competition for live birds has been justified, as arrangements of this nature so often are, by the argument that interprovincial competition for live birds would raise their price and this would be ruinous to processors. In our view, an attempt by the Applicant to acquire live birds in Quebec can be viewed as a departure from the tacit arrangement not to compete interprovincially for live birds. From this perspective, a remedial order that ties the Respondents' birds to the Applicant and to New Brunswick would be anti-competitive in all of the circumstances.

VII. CONCLUSIONS

[478] For the above reasons, we find that:

(a) The Applicant has established that it is substantially affected in its business due to its inability to obtain adequate supplies of a product anywhere in a market on usual trade terms;
(b) The Applicant has failed to establish that it is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market;
(c) The Applicant has established that it is willing and able to meet the usual trade terms of the suppliers of the product;
(d) The Applicant has not established that the product is in ample supply; and
(e) The Applicant has not established that the refusal to deal is having or is likely to have an adverse effect on competition in a market.

[479] As a consequence, the application will be dismissed.

[480] These reasons are confidential. To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions that must be made to these confidential reasons in order to protect properly confidential evidence. The

parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, July 10, 2009 setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

[481] The issue of costs is reserved. The parties are to meet and endeavour to reach agreement with respect to costs. On or before Monday, July 20, 2009, they should communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs. If there is no agreement, the Tribunal will receive written submissions as to costs, as it will more particularly direct.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[482] The application is dismissed.

[483] The issue of costs is reserved. On or before Monday, July 20, 2009, the parties shall communicate with the Registry in order to advise as to whether they require any further time in order to attempt to agree on costs.

[484] On or before Friday, July 10, 2009, the parties are to jointly correspond with the Tribunal setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons.

DATED at Ottawa, this 8th day of June 2009

SIGNED on behalf of the Tribunal by the panel members

(s) Edmond P. Blanchard

(s) Henri Lanctôt

(s) P. André Gervais

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1 We note that, where the words "Tribunal" or "we" are used and the decision relates to a matter of law alone, that decision has been made solely by the presiding judicial member.

2 Sections 3.5 and 3.6 of the *Merger Enforcement Guidelines* state as follows:

> **3.5** The market definition analysis begins by postulating a candidate market for each product of the merging parties. For each candidate market, the analysis proceeds by determining whether a hypothetical monopolist controlling the group of products in that candidate market would be able to impose a five per cent price increase assuming the terms of sale of all other products remained constant. If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the postulated candidate market is not the relevant market, and the next-best substitute is added to the candidate market. The analysis then repeats by determining whether a hypothetical monopolist controlling the set of products in the expanded candidate market would be able to profitably impose a five per cent price increase. This process continues until the point at which the hypothetical monopolist would impose and sustain the price increase for at least one

product of the merging parties in the candidate market. The smallest set of products in which the price increase can be sustained is defined as the relevant product market.

3.6 The same general approach applies to assessing the geographic scope of the market. In this case, an initial candidate market is proposed for each location where the merging parties produce or sell the relevant products. As above, if buyers are likely to switch their purchases to sellers in more distant locations in sufficient quantities to render a five per cent price increase by a hypothetical monopolist unprofitable, the location that is the next-best substitute is added to the candidate market. This process continues until the smallest set of areas over which a hypothetical monopolist would impose and sustain the price increase is identified.

(emphasis added)

3 Both Ms. Sanderson and Dr. Ware used market shares based on slaughter; shares of further processors are therefore not included in their calculations.

4 For purposes of calculating the HHI, the "Other Quebec" processors are treated as one. If there is more than one, this results in a slight overstatement of the HHI. "Other Ontario" processors are treated as three equal sized processors. The reason for this is that the smallest Ontario processor that is identified (Grand River) processes 200,000 birds per week. Unidentified Ontario processors slaughter a total of 300,000 birds per week. It is reasonable to assume that the largest unidentified processor is smaller than Grand River. Given this, the total slaughter by unidentified Ontario processors could be allocated in a variety of ways. The assumption made here is that three unidentified Ontario processors are each slaughtering 100,000 birds per week. Given the very small portion of the market involved, the assumption made regarding the composition of the unidentified segment of the market makes very little difference to the value of the HHI.

5 See s. 4.12 of the *Merger Enforcement Guidelines*.

6 He explained that the pool "...provides some flexibility for producers to choose the processor with whom they wish to do business as well as allowing some differential growth among processors" and that there "...is no long-term requirement for a producer to continue to sell to the same processor."

[485] SCHEDULE A

The Applicant's Experts

Dr. Richard Barichello

Dr. Richard Barichello is an associate professor at the University of British Columbia where he teaches in the areas of agricultural policy, food markets and international agricultural development. He was qualified as an expert in the field of agricultural economics with a specialization in regulated markets, especially supply management, quota markets, trade policy and the analysis of government policy. Dr. Barichello testified about the origins and purpose of supply management in the poultry industry and gave his view that the underlying motivation of the supply management system was the protection of the producer. He described the regulations governing the supply management system and described the workings of that system including quota setting and allocation, import control, and price control. He spoke about the barriers to entry in chicken production and he provided his view that competition among producers was limited. He also testified with respect to premiums and the importance of assured continued supply for chicken processors.

Dr. Roger Ware

Dr. Roger Ware is a professor of economics at Queen's University. He was qualified as an expert in the areas of economics, competition policy and industrial organization, including market definition and competitive behaviour of firms. Dr. Ware opined on the product market and geographic market for both the 75(1)(*a*) analysis and the 75(1)(*e*) analysis. In respect of paragraph 75(1)(*a*) of the Act, he referred to the product as being live chickens. Dr. Ware acknowledged the difficulty in obtaining birds that would meet the size and quality requirements of the Applicant's customers. As for the geographic market under paragraph 75(1)(*a*), Dr. Ware gave his opinion that because of high transportation costs and high premiums to attract Quebec farmers already bound by contracts with Quebec processors, it was neither economic nor efficient for the Applicant to replace the Respondents' supply with supply from greater distances in Quebec.

In respect of paragraph 75(1)(*e*), Dr. Ware was of the opinion that the product market was processed chickens and that the geographic market consisted of the Maritimes and Quebec. Dr. Ware also testified with respect to the magnitude and dimensions of adverse effects on competition as a result of the refusal to deal. Dr. Ware opined that the increase in market power of Olymel in the processed chicken market would inevitably lead to higher prices and worsening conditions in other dimensions for customers.

Grant Robinson

Mr. Grant Robinson is a chartered accountant who has worked as an outsource chief financial officer for Maple Lodge. He was qualified to give evidence as an accountant, including his expert opinion on the area of the chicken processing industry. Mr. Robinson developed the

following four scenarios to assist the Tribunal in understanding the impact of the removal of the Respondents' birds on the Applicant's operations:

i. loss of the Respondents' chickens;
ii. replacement of the Respondents' birds with birds from Quebec;
iii. loss of the Respondents' birds and Nova Scotia birds; and
iv. replacement of the Respondents' birds and loss of Nova Scotia birds.

He provided his view that the Applicant would be substantially affected in its business in all of the abovementioned scenarios. In order to develop his scenarios, Mr. Robinson made assumptions regarding transportation costs, shrink, DOAs and premiums which would have to be paid by the Applicant to source replacement supply in Quebec.

The Applicant's Lay Witnesses

Yves Landry

Yves Landry is the general manager of the St-François Plant. He testified about the plant's operations, the requirements of Nadeau's customers and Nadeau's arrangements with its customers. He talked about the range of birds supplied by the Respondents to Nadeau and their refusal to deal. He stated that Nadeau began to receive 25,000 additional birds per week from Nova Scotia in early June 2008 and that on September 15, 2008, Nadeau began to receive 6,250 additional chickens per week from Nova Scotia. He testified that one of the reasons why Nadeau had not made extensive efforts to procure supply in Quebec was the concern that those efforts would lead to a premium war. He also testified about Nadeau's efforts to procure chickens from Quebec. He spoke about Nadeau's transportation costs and DOAs.

Denise Boucher

Denise Boucher is the office manager at the St-François Plant. She is responsible for assembling financial data and is familiar with the records and the operations of the St-François Plant. Ms. Boucher's evidence consisted of adducing a number of financial documents into the record.

Anthony Tavares

Anthony Tavares is the former chief executive officer of Maple Lodge and former president of Nadeau. Mr. Tavares described the supply management system and Nadeau's operations in New Brunswick. He spoke about New Brunswick producers and chicken production in New Brunswick. Mr. Tavares also testified with respect to the Respondents' threat of the removal of their birds from the Applicant and of the Respondents' termination of supply. Mr. Tavares referred to the substantial detrimental effect the refusal to deal would have on the Applicant and to the difficulty the Applicant would have in replacing the Respondents' chickens. Mr. Tavares spoke about the current situation and indicated that the Applicant was willing to continue to meet all of the usual trade terms and to pay fair market price to the Respondents for the continuation of supply of live chickens.

John Feenstra

John Feenstra was the general manager of Nadeau from 1989 to 2006. He talked about Nadeau's initial attempts to obtain supply from New Brunswick producers in the early 1990s, the chicken industry including the legislative scheme in place in New Brunswick and the operations of the St-François Plant. He testified about Nadeau's negotiations with Westco regarding the purchase of the St-François Plant and the effect on Nadeau's business of the Respondents' refusal to supply. Mr. Feenstra explained that an "all-out premium war" would be created if Nadeau were required to purchase chickens from Quebec.

Tina Ouellette

Tina Ouellette is part of the procurement team at the St-François Plant. She testified about her role in the procurement effort to source live chickens from Quebec. She indicated that she was charged with making the initial telephone calls to Quebec producers for the purpose of inquiring as to whether or not they would be interested in meeting with a representative from Nadeau to discuss the possibility of supplying the St-François Plant with live chickens. Ms. Ouellette described the procedure she followed when making the calls to producers. She stated that she contacted 454 producers and that 67 producers were interested in meeting with a Nadeau procurement representative. Ms. Ouellette also indicated that a number of producers could not be reached for a variety of reasons and that others could not supply the Applicant because they produced other types of poultry or had sold their quota.

Léonard Viel

Léonard Viel is the manager of sales, transportation and the garage at the St-François Plant. He stated that he was asked to assist the procurement team to attempt to source chickens from Quebec when another member of the procurement team was on vacation. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying Nadeau with live chickens. He also outlined the pricing arrangements sought by potential Quebec producers before they would consider moving their production to the St-François Plant and the volume of live chickens they were willing to supply the Applicant.

Réjean Plourde

Réjean Plourde is part of the procurement team at Nadeau. He testified with respect to his part of the procurement effort, which was to meet with producers who had indicated to Ms. Ouellette that they may be interested in supplying the Applicant with live chickens. He also testified with respect to the instructions he received from Mr. Landry regarding his task to seek replacement supply in Quebec and stated that he did not have the authority to sign contracts. He indicated that he had met with 39 producers and that he had made detailed notes of these meetings. He testified about the pricing arrangements sought by Quebec producers before they would consider moving their production to the St-François Plant. He also testified with respect to the procedure he followed when meeting with Quebec producers.

Guy Chevalier

Guy Chevalier is the president of Desco, a further processor and distributor of chickens. He stated that Desco competes directly with Olymel and Exceldor in the Quebec market and that as a result it cannot purchase fresh-killed chickens from them at reasonable prices. He further stated that Desco has no difficulty obtaining supply at reasonable prices from Nadeau. Mr. Chevalier indicated that he purchased processed chickens from the United States by purchasing importation quotas from processors that did not utilize them. He further testified about the procedure applicable to processors seeking to obtain supplementary importation quotas from the CFC.

Terry Ellis

Terry Ellis is the president and a major shareholder of Sunchef, a further processor located in Quebec. He described the nature of Sunchef's business and the contractual relationship between Sunchef and Nadeau. He stated that Sunchef entered into a contractual relationship with Nadeau in 2007 in order to ensure sufficient supply for its biggest customer. He further stated that, since their arrangement came into effect, the birds supplied by Nadeau had been of high quality and of the type and size requested. Mr. Ellis also indicated that Olymel was unwilling to supply fresh-killed chickens to Sunchef at a reasonable price and that although he currently purchased processed chickens from Exceldor, it could not meet all of its needs. Mr. Ellis stated that Nadeau had always been an effective competitor to Exceldor and Olymel and said that if Nadeau's supplies of live chickens were cut off or curtailed, its ability to compete with Exceldor and Olymel would be reduced or eliminated. According to Mr. Ellis, this would have a major adverse effect at Sunchef's level of the market. He further stated that should Nadeau go out of business or be acquired by Olymel, he foresaw that Sunchef's supplies would be reduced or cut off and that he would no longer be able to continue in that business.

Lyndsay Gazzard

Lyndsay Gazzard is the senior purchasing manager of UPGC. She testified about UPGC's long and mutually beneficial relationship with Nadeau. She stated that Nadeau had for a long time supplied all of the fresh chickens used in KFC restaurants in New Brunswick, and, in the last two years, supplied 98% of KFC restaurants in Nova Scotia and Prince Edward Island. She further stated that UPGC had no difficulty obtaining all of its requirements for Atlantic Canada from Nadeau at a reasonable price. She testified about UPGC's purchasing requirements and trends, including procurement from Olymel and Exceldor. She also testified about the problems arising from Westco's change in production size. Lastly, she indicated that she remained concerned about UPGC's ability to obtain birds of the required size and specifications in the event that live chicken supply to Nadeau was disrupted.

Corey Goodman

Corey Goodman is the chief purchasing officer for Priszm LP and the general manager of UPGC. Priszm operates about 45 KFC restaurants in New Brunswick and Nova Scotia, and UPGC is a non-profit association that operates as the purchasing agent for all KFC restaurants in Canada. Mr. Goodman stated that he was concerned about the impact of any reduction in the supply of

live chickens to Nadeau, as it would result in increased costs, reduced freshness and operational complexities with respect to obtaining replacement supply. He further stated that Olymel and Exceldor were already very powerful players in the market and that with Nadeau weakened or gone, there would be even less competition.

Debbie Goodz

Debbie Goodz is the president and CEO of Riverview which is a further processor located in Ste-Sophie, Quebec. Ms. Goodz described Riverview's business and its supply requirements and specifications. She indicated that Riverview purchased the vast majority of its supplies from the Applicant and that it had always been content with the Applicant's service, quality and price. Ms. Goodz stated that her ability to continue to supply her specialized product at an acceptable price depended on her ability to continue to obtain supplies from the Applicant. She indicated that she was unable to obtain chickens from Olymel and that she could not obtain alternative supplies from elsewhere because of transportation issues, price concerns and size requirements. Ms. Goodz also indicated that she had never complained to the CFC regarding the unavailability of supplies. Ms. Goodz expressed her view regarding the current state of competition and stated that if the Applicant's supplies of live chickens were cut off or curtailed, its ability to compete with Olymel would be reduced or eliminated, thus causing a major adverse effect at Riverview's level of the market.

Jeffrey Lloyd McHaffie

Jeffrey Lloyd McHaffie is a consultant to Puddy and its *de facto* vice president, in charge of sales and purchases of poultry products. He has over 20 years' experience in the poultry industry. Puddy is a further processor of fresh-killed chickens, specializing in "case-ready" chicken for the retail supermarket. Mr. McHaffie testified about Puddy's strict specifications for its incoming supplies of chickens and stated that Nadeau has consistently been able to meet its exacting quality and freshness requirements. He also testified about Puddy's difficulties in obtaining supply from Ontario and western Canada and he discussed the service and quality problems associated with Olymel's products.

Kevin Thompson

Kevin Thompson is the executive director of the Association of Ontario Chicken Processors ("AOCP"). He has been involved with the Ontario chicken industry since 1978. He stated that maintaining a supply of live chicken was essential for a processor as without supply, processors become less competitive and less able to meet the needs of their customers. He described the plant supply allocation systems in place in Ontario and Quebec and the supply management system in place in Canada. He stated that it was disconcerting to the AOCP that Nadeau's only alternative may be to enter into an interprovincial premium war to try to replace 50% of its live supply if the Respondents were able to unilaterally withdraw their live chicken production from Nadeau. He testified on the detrimental effects of interprovincial trade via premium wars and concluded that the consequences of a premium war for the processor community as a whole, its customers and for consumers were all negative. He indicated that the interprovincial movement of live chickens is really a weakness in the regulated supply system and one that must ultimately

be addressed if supply management is to be sustained. He further stated that if Nadeau elected not to source chickens from Quebec or if it decided to close or to sell to one of the other processors in the region, there would be a substantial adverse effect on competition in the marketplace in Quebec and eastern Canada.

Bruce McCullagh

Bruce McCullagh is the senior vice president and general manager of poultry operations at Maple Leaf. He has over 12 years' experience in the poultry industry. He described the nature of the supply management system including the manner in which the system shields chicken producers from competition. He also testified about the plant supply allocation systems in place in Ontario and Quebec. Mr. McCullagh discussed the detrimental effects of interprovincial trade including the creation of unsustainable premium wars. He stated that interprovincial trade is a systemic problem in the poultry industry and that the government needs to look at possible amendments to the current regulatory regime to address this issue. Mr. McCullagh also testified about Maple Leaf's involvement in the interprovincial procurement of live chickens.

Andre Merks

Andre Merks is a Nova Scotia producer. He has been farming broiler chicken, turkeys and layer eggs for over thirty years. Mr. Merks spoke of the "handshake deal" he entered into with the Applicant following the closure of the Maple Leaf plant in Nova Scotia. He discussed the reasons why he had decided to send his production to the Applicant instead of ACA. Mr. Merks spoke of the concerns expressed by Nova Scotia producers with respect to the chicken industry in Nova Scotia. He also testified with respect to a meeting that took place in October of 2008 between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Michael Donahue

Michael Donahue is the vice-president of Agri Stats, a company that offers benchmarking services for the poultry industry across North America. He described the procedure used by Agri Stats to collect and analyze data. Mr. Donahue explained the report that he had generated for the St-François Plant and indicated that, in the areas he had examined the St-François Plant would be competitive with the Canadian industry.

Westco's Expert

Dr. Margaret Sanderson

Margaret Sanderson has held a number of positions with the Competition Bureau including the position of Assistant Deputy Director of Investigation and Research for the Bureau's Economics and International Affairs Branch. Ms. Sanderson was qualified as an expert in the area of economics, competition policy and industrial organization, including market definition and the competitive behaviour of firms. Ms. Sanderson testified with respect to paragraphs 75(1)(*a*) and 75(1)(*e*) of the Act. With respect to paragraph 75(1)(*a*), Ms. Sanderson expressed the opinion

that the issue was not in dispute and that the product market was live chickens. To determine whether or not the Applicant would be substantially affected in its business, Ms. Sanderson looked at the cost of replacing the Respondents' birds with birds from Quebec. She was of the opinion that the Applicant could source live chickens from producers in Quebec without being substantially affected and thus concluded that Quebec-based chickens were substitutes for the live chickens supplied by the Respondents.

In respect of paragraph 75(1)(*e*), Ms. Sanderson was of the opinion that the relevant geographic market for determining whether there was an adverse effect on competition was at least as large as Ontario, Quebec and the Maritimes. She examined Nadeau's and Olymel's historic shipping patterns, shipping distances, transportation costs and prices to make this determination. In Ms. Sanderson's view, the refusal would not provide Olymel with market power and would not cause an adverse effect on competition.

Westco's Lay Witnesses

Thomas Soucy

Thomas Soucy is the president and chief executive officer of Westco. He testified about Westco's activities and operations. He discussed the consolidation of production quota in New Brunswick and Westco's plans for complete vertical integration. He testified about Westco's business relationship with the Applicant and provided his view that the Applicant had abused its monopoly power in New Brunswick. Mr. Soucy described the conception of Sunnymel and discussed Sunnymel's plan to acquire or construct a new processing plant in New Brunswick. He also testified about Westco's negotiations with the Applicant regarding the purchase of the St-François Plant and with respect to the Applicant's ability to obtain replacement supply of live chickens in Quebec.

Bertin Cyr

Bertin Cyr is a Westco shareholder and has been chairman of Westco's Board of Directors since 2003. He testified about the history of the corporation as well as its plans for complete vertical integration. Mr. Cyr described the steps toward vertical integration that had been taken by Westco in the past and he provided his view that complete vertical integration, by acquiring an existing processing plant or by building a new one, was Westco's only way to ensure its long term survival in the poultry industry. Mr. Cyr testified about Westco's business relationship with the Applicant and indicated that Westco's desire to vertically integrate was also motivated by the fact that the Applicant had abused its position. Mr. Cyr also spoke of Westco's past attempts to enter into a partnership with the Applicant.

Yvan Brodeur

Yvan Brodeur is vice-president of procurement at Olymel. He described the nature of Olymel's business including its processing and procurement activities. He described the supply allocation system in place in Quebec and he discussed interprovincial trade of live chickens. Mr. Brodeur also spoke about the conditions of purchase of both live and processed chickens. He discussed

transportation costs associated with transporting live chickens as well as transportation costs associated with transporting processed chickens. Mr. Brodeur also testified about Olymel's clients and their location from Olymel's processing plants.

Julie Desroches

Julie Desroches is an environmental project officer at Olymel. She testified about her involvement in Sunnymel's project to build a new slaughterhouse in New Brunswick and the steps that had been taken to date in the construction project. She also spoke of the circumstances which had led to the project being delayed and she discussed Sunnymel's future construction plans for the new slaughterhouse in New Brunswick.

Richard Wittenberg

Richard Wittenberg is a chicken producer in Nova Scotia. He testified on the closure of the Maple Leaf plant in Nova Scotia and spoke of the "handshake" agreement he entered into with the Applicant following the closure of that plant. He also testified with respect to a meeting that took place on October 15, 2008, between Nova Scotia producers and Maple Lodge concerning Maple Lodge's possible involvement in the modernization of the ACA plant.

Dynaco's Lay Witnesses

Gilles Lapointe

Gilles Lapointe is the director of finance for Dynaco. He testified with respect to Dynaco's corporate structure and the nature of its business. He described Dynaco's production quota and indicated that it consisted of 6.22% of New Brunswick's total production quota. Mr. Lapointe testified about Dynaco's decision to cease supplying the Applicant with live chickens. He also described how co-operatives operate and why it was beneficial for Dynaco to send its production to Sunnymel.

Rémi Faucher

Rémi Faucher is the general manager of Dynaco. He testified about Dynaco's corporate structure and the nature of its business and chicken production. He spoke of the reason why Dynaco decided to cease supplying the Applicant with live chickens and stated that it was essentially based on the deterioration of its business relationship with the Applicant and on the business opportunities offered by Sunnymel.

Acadia's Lay Witnesses

Rémi Faucher

Rémi Faucher is the former president and director of Acadia. He testified about Acadia's corporate structure and the nature of Acadia's business. Mr. Faucher spoke of Acadia's quota and indicated that it consisted of 16% of New Brunswick's total production quota. He also

testified about Acadia's decision to cease supplying the Applicant with live chickens and indicated that it was a business decision. He also spoke about the financial advantages involved in sending Acadia's production to a processing facility owned by Olymel.

[486] SCHEDULE B

Schedule to the *Regulations Amending the Canadian Chicken Marketing Quota Regulations*, SOR/2009-4

SCHEDULE *(Sections 1, 5 and 7 to 10)*

LIMITS FOR PRODUCTION AND MARKETING OF CHICKEN FOR THE PERIOD BEGINNING ON JANUARY 4, 2009 AND ENDING ON FEBRUARY 28, 2009

	Column 1	Column 2	Column 3
Item.	Province	Production Subject to Federal and Provincial Quotas (in live weight) (kg)	Production Subject to Federal and Provincial Market Development Quotas (in live weight) (kg)
1.	Ont.	65,725,554	2,920,000
2.	Que.	53,105,045	5,400,000
3.	N.S.	7,014,256	0
4.	N.B	5,716,109	0
5.	Man.	8,390,996	394,950
6.	B.C	29,212,807	4,089,793
7.	P.E.I	754,057	0
8.	Sask.	7,015,829	982,216
9.	Alta.	18,430,359	400,00
10.	Nfld. and Lab.	2,825,158	0
Total		198,190,170	14,186,959

ANNEXE *(articles 1, 5 et 7 à 10)*

LIMITES DE PRODUCTION ET DE COMMERCIALISATION DU POULET POUR LA PÉRIODE COMMENÇANT LE 4 JANVIER 2009 ET SE TERMINANT LE 28 FÉVRIER 2009

	Colonne 1	Colonne 2	Colonne 3
Article	Province	Production assujettie aux contingents fédéraux et provinciaux (en poids	Production assujettie aux contingents fédéraux et provinciaux d'expansion du marché (en poids vif)

		vif) (kg)	(kg)	
1.	Ont.	65 725 554	2 920 000	
2.	Qc	53 105 045	5 400 000	
3.	N.-É.	7 014 256	0	
4.	N.-B	5 716 109	0	
5.	Man.	8 390 996	394 950	
6.	C.-B	29 212 807	4 089 793	
7.	Î.-P.-É	754 057	0	
8.	Sask.	7 015 829	982 216	
9.	Alb.	18 430 359	400 00	
10.	T.-N.-L.	2 825 158	0	
Total		198,190,170	14 186 959	

1.

[487] SCHEDULE C

Sections 1 and 2 of Order I - Chicken Farmers of New Brunswick Marketing Plan

1. The object of the marketing plan is 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.

2. There shall be established a periodic marketing limit being the number of kilograms of chicken live weight which can be raised for marketing within the Province in conformity with the objectives of the plan.

1. Le but du plan de commercialisation est de réglementer l'élevage du poulet destiné à la commercialisation dans la province, de façon à :

a) assurer au consommateur un approvisionnement adéquat de poulets produits au Nouveau-Brunswick,

b) offrir à un nombre maximum de résidents du Nouveau-Brunswick l'occasion de gagner leur vie dans la commercialisation du poulet,

c) assurer un profit raisonnable de la vente de poulets et assurer un approvisionnement continuel.

d) éviter la réalisation de monopoles qui pourraient entraîner un coût excessif au consommateur, et

e) éviter une réduction de l'approvisionnement global advenant le retrait d'un ou de plusieurs producteurs de la commercialisation du poulet.

2. Une limite de commercialisation périodique est établie, correspondant au nombre de kilogrammes (poids vif) de poulets pouvant être élevés à des fins de commercialisation dans la province, conformément aux objectifs du plan.

APPEARANCES :

For the applicant

Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited

Leah Price
Ron Folkes
Andrea McCrae
Joshua Freeman

For the respondents

Groupe Westco Inc.

Eric C. Lefebvre
Martha Healey
Denis Gascon
Alexandre Bourbonnais
Geoffrey Conrad

Groupe Dynaco, Coopérative Agroalimentaire

Olivier Tousignant

Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

Valérie Belle-Isle

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110602

Docket: A-342-09

Citation: 2011 FCA 188

CORAM: **NADON J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

NADEAU FERME AVICOLE LIMITÉE/
NADEAU POULTRY FARM LIMITED

Appellant

and

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

Respondents

Heard at Ottawa, Ontario, on January 18, 2011.

Judgment delivered at Ottawa, Ontario, on June 2, 2011.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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NADEAU POULTRY FARM LIMITED

Appellant

and

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

Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

TABLE OF CONTENTS

1) INTRODUCTION

[1] Between January and September 2008, each of the respondents advised the appellant, whose business consists of slaughtering chickens, that they would cease supplying it with live chickens within a matter of months. The respondents' collective action, if carried into effect, would deprive the appellant of approximately 50% of its supply of live chickens. The appellant commenced a private prosecution under section 75 of the *Competition Act,* R.S.C. 1985, c. C-34 [the Act], which makes a refusal to deal a reviewable practice under certain conditions. The Competition Tribunal (the Tribunal) issued an interim supply order to preserve the status quo while it considered the appellant's complaint.

[2] On June 8, 2009, in a decision reported as *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 6 [Reasons or Tribunal's Reasons], the Tribunal dismissed the appellant's complaint that the respondents' refusal to deal was a breach of section 75 of the Act. The Tribunal found that the appellant had failed to establish that:

a. it was unable to obtain adequate supplies of live chickens because of insufficient competition among the suppliers of the product in the market;

b. the product was in ample supply; and

c. the respondents' refusal to deal was likely to have an adverse effect on competition in the market.

[3] The appellant appeals from the Tribunal's decision. Because all of the conditions set out in section 75 must be present before the appellant can succeed, the appellant must persuade the Court that the Tribunal erred with respect to each of these conclusions. For the reasons which follow, I am of the view that it has not done so and I would, therefore, dismiss the appeal with costs.

2) THE PARTIES

[4] The appellant, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited (Nadeau) is a wholly owned subsidiary of Maple Lodge Holding Corporation (Maple Lodge), one of Canada's largest chicken processors. Nadeau operates a large, modern chicken processing plant located at St. François de Madawaska in northern New Brunswick. Nadeau's plant has been the only chicken processing plant in New Brunswick since 1992.

[5] The respondent Groupe Westco Inc. (Westco) is a highly integrated chicken producer. It owns or controls egg hatching production quota, farms, chicken production quota, and chicken production farms. Directly or indirectly, Westco owns or controls approximately 50% of New Brunswick's chicken production quota.

[6] The respondent Groupe Dynaco, Coopérative Agroalimentaire (Dynaco) is a Quebec co-operative with interests in chicken production facilities in New Brunswick. Dynaco owns 6.22%

of New Brunswick's chicken production quota. The respondents Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc. (collectively Acadia) are extra-provincial entities registered to do business in New Brunswick. Acadia owns or controls 16% of the New Brunswick's chicken production quota.

[7] The respondents are interrelated. For present purposes, it is sufficient to know that Westco is a member of the Dynaco cooperative. Dynaco owns 30% of the shares in Acadia while Westco owns 25%.

[8] Another important participant in the poultry production system is Co-op Fédérée, the largest firm in the chicken sector in Canada. Dynaco is a member of Co-op Fédérée which owns 60% of Olymel, a Quebec based processor and Nadeau's primary competitor in Quebec and the eastern provinces. Co-op Fédérée also owns 30% of Acadia.

3) THE POULTRY SUPPLY MANAGEMENT SYSTEM

[9] The production of poultry in New Brunswick, as in the rest of Canada, is subject to an elaborate supply management scheme established by the Government of Canada and administered in each province by a provincial marketing board in so far as it concerns producers within the province. The scheme is complex and all encompassing. A full description of the operation of this system is found at paragraphs 9 to 18 and 254 to 269 of the Tribunal's Reasons. For the purposes of this decision, the relevant features of the scheme are as follows.

[10] The amount of poultry which a producer may produce and bring to market is determined by a quota set by the provincial marketing board. A producer may not exceed its production quota. The quota is fixed every eight weeks or so through a process tied to consumer demand for poultry. In most provinces, increases in the total quota are allocated proportionately between existing producers.

[11] The minimum price for which producers may sell their live chickens is also set by the provincial marketing board (the board price). The Ontario board price serves as bench mark for several other provinces, including Quebec and New Brunswick. The New Brunswick board price is $.065 per kilogram live weight higher than the Ontario board price while the Quebec board price is the same as the Ontario board price.

[12] Although the poultry marketing scheme allows for imports of poultry from outside Canada, imports are tightly controlled and, as a result, they play no role in the present dispute.

[13] While the production of poultry and the price to be paid for it is highly regulated, the slaughter and processing of the poultry thus produced is not subject to the same degree of regulation. With some exceptions, producers may sell their production to the processor of their choice, even if that processor is located in another province. Processors, such as Nadeau, may pay producers a premium in order to obtain their product. Nadeau has done so on a number of occasions (Reasons at paras. 37-40). Quebec processors regularly pay their suppliers a premium over the Quebec board price (Reasons at para. 153).

[14] While the poultry supply management system attempts to maintain equilibrium between poultry production and consumer demand, it does not seek to regulate the activities of the processors. Thus processors' decisions to add or reduce processing capacity have no impact on poultry producers' quotas. As a result, the equilibrium between consumer demand and production quotas is not necessarily reflected in the relationship between production quotas and the processing industry's capacity. There is no shortage of processing capacity in the sense that all producers' quotas are taken up by processors. But it is open to individual processors to increase their processing capacity faster than production quotas are increased, or for new processors to enter a market in which supply and demand are already closely matched.

4) THE DISPUTE BETWEEN THE PARTIES

[15] Westco is a highly integrated player in the poultry industry. It lacks only a processing plant in order to be a fully vertically integrated operation. In January 2007, Westco advised Nadeau of its interest in acquiring an interest in its plant, or in buying it outright. Maple Lodge, Nadeau's parent company, advised Westco that it was not interested in selling the St. François plant. Maple Lodge was of the view that an arrangement by which Westco owned a portion of Nadeau while retaining 100% of its production assets would lead to an undesirable non-alignment of shareholder interests.

[16] After consideration of the situation by its board of directors, Maple Lodge indicated its interest in an arrangement in which Maple Lodge and Westco would each own a portion of the combined operations of Westco and Nadeau. Westco did not respond to this proposal.

[17] In the meantime, Westco was engaged in discussions with Olymel with a view to forming a partnership to implement its vertical integration strategy. The course of events is set out in the Reasons at paragraphs 46-47 and 49-50:

> The purpose of the partnership was to acquire the assets or shares of [Nadeau] or to acquire property and construct, start up, own and operate a new chicken processing plant. Westco and Olymel thus worked out a business plan envisaging the acquisition of the St-François Plant or, in the event that negotiations failed with [Nadeau], the construction of a new processing plant in New Brunswick. The partnership between Olymel and Westco is the Sunnymel Limited Partnership ("Sunnymel")...
>
> Thomas Soucy, Chief Executive Officer of Westco, contacted Mr. Tavares [President and Chief Executive Officer of Maple Lodge] in mid-August 2007 and said that he wanted Mr. Tavares to meet with him and Réjean Nadeau, President and Chief Executive Officer of Olymel. At the meeting, Mr. Tavares was advised that Westco and Olymel wanted to buy the St-François Plant. He was told that if [Nadeau] was not willing to sell the St-François Plant, all of the chickens produced by Westco would be diverted to Quebec and Sunnymel would then build its own plant in New Brunswick.
>
> ...
>
> Following [a subsequent meeting], Mr. Tavares advised Mr. Soucy that although its first choice was to maintain the status quo, Maple Lodge's Board of Directors had, given the circumstances, instructed him to assemble a negotiating team.
>
> On November 6, 2007, the parties started negotiations for the sale of the St-François Plant. The purchase price offered by Sunnymel was less than 25% of the value attributed to the St-François Plant by [Nadeau]. The negotiations therefore broke down and, on January 17, 2008, Westco gave written notice that it would cease supplying its live chickens to [Nadeau], effective July 20, 2008, and that its chickens would be diverted to Olymel in Quebec pending Sunnymel's construction of a new slaughterhouse in New Brunswick.

[18] Following the breakdown of negotiations between Westco and Nadeau, Dynaco gave Nadeau notice on March 6, 2008, that it would cease supplying it effective September 15, 2008. Acadia gave notice of its intention to cease supplying Nadeau, effective September 15, 2008, by means of a letter dated February 28, 2008.

[19] Nadeau puts a different cast on the facts. It argues that Olymel and Westco conspired to reduce competition by putting one of Olymel's biggest competitors out of business. It points to evidence which shows that Olymel and Westco were in touch long before any approach was made to Nadeau or Maple Lodge. The Tribunal decided that it did not have to determine the nature of Westco's conduct because, on the view which it took of the relevant principles, such a characterization would not change the legal result (Reasons at para. 292). I agree with the Tribunal and do not propose to cast my analysis more broadly than required by the terms of subsection 75(1) of the Act.

5) SECTION 75 OF THE ACT

[20] At this point, it may be useful to reproduce section 75 of the Act:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that	75. (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :
(*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,	*a*) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;
(*b*) 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,	*b*) que la personne mentionnée à l'alinéa *a*) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;
(*c*) 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,	*c*) que la personne mentionnée à l'alinéa *a*) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

(*d*) the product is in ample supply, and	*d*) que le produit est disponible en quantité amplement suffisante;
(*e*) the refusal to deal is having or is likely to have an adverse effect on competition in a market,	*e*) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,
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.	le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

6) THE DECISION UNDER APPEAL

[21] The Tribunal's decision is very long, 484 paragraphs, and extremely detailed. For the purposes of this part of my reasons, it is only necessary to summarize the substance of the Tribunal's decision on the elements of section 75, subject to a more detailed review when dealing with the grounds of appeal raised by the appellant.

[22] In order to deal with paragraph 75(1)(*a*), the Tribunal was required to define a number of terms used by economists in their analysis of competition issues. The first was the relevant product market, which it defined as the market for live chickens, without reference to any weight restrictions. The Tribunal found that Nadeau had failed to show that live chickens within the weight range it had specified (1.71 to 2.4 kilograms) could not be replaced by chickens outside that range.

[23] The Tribunal defined the relevant geographic market as New Brunswick, Prince Edward Island, those parts of Quebec within a 500 kilometre radius of Nadeau's plant, and Nova Scotia.

[24] The Tribunal dealt at some length with the definition of "usual trade terms", inquiring whether price was included among the "usual trade terms". It noted that "usual trade terms" is defined at subsection 75(3) of the Act as referring to "terms in respect of payment, units of purchase and reasonable technical and servicing requirements". The Tribunal found that usual trade terms are not the specific terms in effect between the parties prior to the refusal to deal, but rather those terms which are considered usual from the perspective of all processors competing for the product in the relevant market.

[25] The Tribunal went on to find that "terms in respect of payment" include price, expressed as a range of prices.

[26] Having defined the relevant terms, the Tribunal then considered whether Nadeau had established that its business would be substantially affected because it could not obtain adequate supplies of live chickens on the usual trade terms in the relevant geographic market. For the purposes of this analysis, the Tribunal considered whether Nadeau could replace the live chickens it receives from the respondents by live chickens from Quebec on the usual trade terms. The Tribunal concluded that Nadeau would be required to pay Quebec producers a premium in order to induce them to deal with it and, further, that the premiums it would have to pay would be outside the range of prices which constitute the usual trade terms.

[27] The Tribunal then considered whether this inability to obtain live chickens on the usual trade terms would substantially affect Nadeau's business. It used earnings as the relevant indicator of a business' performance. The Tribunal found that replacing the live chickens that Nadeau receives from the respondents with live chickens from Quebec would result in a significant reduction of earnings relative to earnings in the appropriate reference period. In the Tribunal's view, this meant that Nadeau would be substantially affected in its business if it had to replace the respondents' supply of live chickens with live chickens from Quebec.

[28] As a result, the Tribunal concluded that Nadeau had satisfied the conditions set out in paragraph 75(1)(*a*) of the Act.

[29] The Tribunal then addressed paragraph 75(1)(*b*) of the Act, specifically whether Nadeau's inability to obtain adequate supplies of live chickens from Quebec on the usual trade terms was the result of insufficient competition among suppliers of live chickens in the relevant geographic market.

[30] The Tribunal accepted that, for the purposes of this analysis, the relevant product and geographic markets were the same as those considered in the analysis with respect to paragraph 75(1)(*a*).

[31] In addressing the question of "insufficient competition", the Tribunal referred to a previous Competition Tribunal decision with respect to refusal to deal, *Canada (Director of Investigation and Research) v. Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83, [1990] C.L.D. 1146 [*Xerox*], in

which the Tribunal commented that a market composed of numerous suppliers acting independently would not be considered a market in which there was insufficient competition. The Tribunal also reviewed the effect of the poultry supply management system on competition between suppliers of live chickens. It concluded that Nadeau had failed to establish that there was insufficient competition among suppliers in the relevant market because of the number of suppliers and the absence of any evidence that they were not acting independently.

[32] The Tribunal went on to say that, even if it had found that there was insufficient competition among suppliers, it would nonetheless have concluded that Nadeau had not discharged its burden under paragraph 75(1)(*b*). The Tribunal expressed its reasoning on this point as follows at paragraph 247 of its Reasons:

> There is inadequate evidence to establish that the competitive conditions of the market are the overriding reason why the Applicant is unable to obtain adequate supplies of the product. The overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the Applicant is unable to obtain adequate supplies of live chickens.

[33] The Tribunal then turned its attention to whether Nadeau met the conditions set out at paragraph 75(1)(*c*) of the Act; it had no difficulty in coming to the conclusion that Nadeau was indeed willing and able to meet the usual trade terms of suppliers of live chickens.

[34] The next issue which the Tribunal considered was whether the product, live chickens, was in ample supply in the relevant geographic market, as required by paragraph 75(1)(*d*) of the Act. The Tribunal began by asking itself what was meant by "ample supply". It concluded that "ample supply" means a situation in which suppliers are not obliged to choose between serving new customers and continuing to supply existing customers at historic rates. Next, the Tribunal

examined the operation of the poultry supply management system and found that the production quotas and the pro-rata distribution of increases in the overall quota for live poultry meant that producers were not able to increase their production to supply new or growing markets. Producers were thus constrained in their ability to serve new customers while continuing to serve existing customers at historic levels. The product, therefore, was not in ample supply.

[35] The last element in the analysis, paragraph 75(1)(*e*), is whether the refusal to deal is likely to have an adverse effect on competition in a market. The Tribunal began by recognizing that the market in issue under paragraph 75(1)(*e*) is not the market considered under paragraphs 75(1)(*a*) and (*b*), it is the "downstream" market.

[36] The Tribunal was required to define the relevant product and geographic markets, this time in relation to the downstream market. It found that the relevant product market was processed chicken, including further processed chicken. Processed chicken is chicken which has been boned, cut up or cooked while further processed chicken was defined by one witness as "basically anything that happens to the chicken after it's been killed and possibly cut up" (Reasons at para. 300).

[37] After reviewing a number of factors, the Tribunal defined the relevant geographic market as New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Ontario.

[38] As to the meaning of "adverse effect on competition in a market", the Tribunal accepted, at paragraph 366 of its Reasons, the finding in a prior decision of the Tribunal, *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 208, that:

> [F]or a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power.

[39] The Tribunal noted that neither Westco, nor any of the other respondents, had any share in the downstream market and therefore could not have market power in that market. Market power "is generally accepted to mean an ability to set prices above competitive price levels for a considerable period", *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 at 28, [1990] C.L.D. 1078. However, the Sunnymel partnership formed between Olymel and Westco would participate in the downstream market. For that reason, the Tribunal found that the adverse effects of the refusal to deal could be analysed by measuring its impact on the market power of the partnership.

[40] After examining a number of indicators of market power, the Tribunal concluded that no one participant in the relevant market currently has market power. Its examination of the same factors led the Tribunal to conclude that the respondents' refusal to deal with Nadeau would not create, enhance or preserve the market power of any of the current participants in the relevant market. The Tribunal noted that the refusal to deal would not change the total volume of chicken available to the downstream market so there should be little effect on consumers. To the extent that further processors might experience some form of competitive disadvantage as a result of Nadeau's inability to supply them, the Tribunal was unable to conclude that this would constitute an adverse effect on competition in the relevant market as a whole.

[41] Since Nadeau failed to establish three of the five conditions required by subsection 75(1), the Tribunal dismissed its application for an order requiring the respondents to continue providing it with a supply of live chickens.

7) ISSUES IN THE APPEAL

[42] In order to succeed, Nadeau must persuade this Court that all of the conditions set out in subsection 75(1) have been satisfied. Since the Tribunal found that Nadeau had established that it met the requirements of paragraphs 75(1)(*a*) and (*c*), this appeal turns on the Tribunal's decision with respect to paragraphs 75(1)(*b*), (*d*), and (*e*) of the Act.

[43] There are two limits to this Court's ability to review the Tribunal's conclusions: the restricted right of appeal from the Tribunal's findings of fact, and the standard of review.

[44] Section 13 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), imposes a limitation on Nadeau's right of appeal:

13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.	13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.
(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.	(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale

[45] A party may only appeal the Tribunal's conclusion on a question of fact with leave of this Court. As no such application for leave has been made, Nadeau is precluded from attacking the

Tribunal's conclusions of fact. While Nadeau has an unfettered right of appeal on questions of law, subject only to the question of the appropriate standard of review, it has no right of appeal with respect to questions of fact.

[46] This leaves the issue of appeals on questions of mixed fact and law. The distinction between questions of fact, questions of law, and questions of mixed fact and law, was laid out in the Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35, 71 C.P.R. (3d) 417:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[47] For purposes of appealing a question of mixed fact and law, Nadeau must take the facts as the Tribunal found them. It cannot, under cover of challenging a question of mixed fact and law, revisit the Tribunal's factual conclusions.

[48] It follows from this that the question of the standard of review on a question of fact does not arise in this case, since leave has not been granted to appeal a question of fact. The parties are agreed that the standard of review for questions of law is correctness and the jurisprudence of this Court is also to that effect (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 at paras. 39-72, [2001] 3 F.C.185 (F.C.A.) at paras. 59-92). The parties are also agreed that the standard of review of questions of mixed fact and law is reasonableness.

8) ANALYSIS

a) Did the Tribunal err in finding that Nadeau failed to establish that it was unable to obtain adequate supplies of live chickens because of insufficient competition among the suppliers of the product in the market?

[49] Nadeau raises four issues, which it describes as errors of law, with respect to the Tribunal's findings in relation to paragraph 75(1)(*b*). I will deal with these four issues but not in the same order as they were raised by Nadeau:

i. The Tribunal erred in concluding that the Quebec Chicken Marketing Board would not intervene to limit inter-provincial trade in chickens if Nadeau's replacement efforts resulted in a significant increase in the volume of chickens being exported from Quebec;

ii. The Tribunal erred in concluding that the limit on aggregate supply, resulting from the supply management system, was the overriding reason why Nadeau could not obtain adequate supplies of live chicken following a refusal to deal by the respondents;

iii. The Tribunal erred in finding that Nadeau failed to establish that there was insufficient competition between suppliers of live chicken when it accepted that the poultry supply management system created a state-mandated cartel among chicken producers; and

iv. The Tribunal erred in applying the wrong legal test to determine if there was insufficient competition among suppliers.

[50] I turn now to consider each of these issues.

i) The Tribunal erred in concluding that the Quebec Chicken Marketing Board would not intervene to limit inter-provincial trade in chickens if Nadeau's replacement efforts resulted in a significant increase in the volume of chickens being exported from Quebec.

[51] The Tribunal heard evidence from Dr. Ware, an economist retained by Nadeau, that the Quebec Chicken Marketing Board would intervene to limit inter-provincial trade in chicken if Nadeau succeeded in persuading a substantial number of Quebec producers to divert their product to

its plant. The Tribunal set out the substance of Dr. Ware's evidence on this point as follows (Reasons at para. 115):

> Dr. Ware, however, expressed the opinion that, if the Applicant were to replace the Respondents' supply with Quebec-grown chickens, an intervention by Quebec governmental agencies would be likely. In his view, the resulting increase in interprovincial trade will have a direct impact on Quebec's VAG ("volume d'approvisionnement garanti"). The Quebec Chicken Marketing Board, under the VAG, fills interprovincial demands of processors located outside the province, before allocating live chicken supply to Quebec processors under the Quebec processor allocation system. Therefore, the greater the volume of supply sold to processors located outside Quebec is, the smaller the volume available to Quebec-based processors will be. In Dr. Ware's view, it is unlikely that a high level of interprovincial trade, around 14%, would be permitted by the Quebec governmental agencies in the long run.

[52] The Tribunal then considered the evidence in support of Dr. Ware's hypothesis and rejected it (Reasons at para. 118):

> We find that there are no regulatory impediments to interprovincial trade and that while processing associations have expressed concerns about interprovincial trade, the evidence is insufficient to conclude, on the balance of probabilities, that an increase in interprovincial trade between Quebec and New Brunswick would induce a drastic intervention by Quebec governmental agencies.

[53] Having found that there was no barrier to interprovincial trade in live chickens, and that this was not likely to change, the Tribunal went on to find that Quebec was part of the relevant geographic market.

[54] On appeal, Nadeau argues that the Tribunal erred in law in concluding as it did. Nadeau argued that this Court must take judicial notice of a regulation adopted by the Régie des marchés agricoles et alimentaires du Québec, after the Tribunal's decision was issued, which imposed a moratorium on sales of live chickens to out-of-province buyers. According to Nadeau, this

demonstrates that the Tribunal erred in law in including Quebec in the geographic market for the purposes of paragraphs 75(1)(*a*) and (*b*).

[55] The difficulty with this argument is that it turns on the effect to be given to the evidence of Dr. Ware who was testifying as to regulatory context. He was offering an opinion as to a possible regulatory response in the event that certain events occurred. In effect, he was offering an opinion as to the probable course of events in the future. In her reasons in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at 478, 18 D.L.R. (4th) 481 [*Operation Dismantle*], Wilson J. described such evidence as evidence of "intangible facts":

> What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand.

[56] Dr. Ware's evidence did not raise a question of law, even though the change in the regulatory context would take the form of a change in the regulation or other instrument having legal effect. Nadeau's attempt to undermine the Tribunal's conclusions with respect to Quebec's response to increased exports of live chickens is an attack on a finding of fact, a course which is not open to it in this appeal. While this Court may take judicial notice of changes in the law of a province, and while a Court should not shut its eyes to the real world in which its decision will be implemented, it would be unfair to the respondents for this Court to simply take judicial notice of one or more regulatory changes without giving the respondents the opportunity to put those changes in context by leading evidence of their own. This is particularly so since the regulations which Nadeau put to us appeared to have their origins in a dispute between the Quebec and Ontario

marketing boards, which was not at all the basis upon which Dr. Ware offered his opinion. In short, I decline to take judicial notice of the changes in the Quebec regulatory scheme because they amount to a challenge to one of the Tribunal's findings of fact and to do so would be unfair to the respondents.

[57] Nadeau cited, in support of its position, jurisprudence from the Supreme Court of Canada. In *Cusson v. Robidoux*, [1977] 1 S.C.R. 650 at 656, 10 N.R. 592 [*Cusson*], the Supreme Court held:

> As Duff J. accepted in [Boulevard Heights v. Veilleux (1915), 52 S.C.R. 185] (at p.192), a court of appeal must decide on the basis of the situation existing when it renders its judgment, and not necessarily on the basis of the situation that existed when the trial judge ruled.

[58] The decision in *Cusson* was reaffirmed in the Supreme Court of Canada's decision in *Devine v. Quebec (Attorney General),* [1988] 2 S.C.R. 790 at 805, (*sub nom. Allan Singer Ltd. v. Quebec (Attorney General)*) 90 N.R. 48 [*Devine*]. Nadeau provided the Court with a number of other authorities to the same effect.

[59] The jurisprudence relied upon by Nadeau deals with a different question than that raised by the evidence of subsequent changes to the Quebec regulatory context. The cases relied on by Nadeau deal with the effect of a change in the law to be applied to a case where that law has changed between the time of trial and the hearing of the appeal. In *Cusson*, the issue was the retroactive application of a change in limitation periods. In *Devine,* the issue was the effect to be given to a constitutional override. In both cases, and the many others to the same effect cited by Nadeau, the issue was the law to be applied by the Court to the facts of the case before it. That is not the case here.

[60] As a result, this argument fails.

ii) The Tribunal erred in concluding that the limit on aggregate supply, resulting from the supply management system, was the overriding reason why Nadeau could not obtain adequate supplies of live chickens following a refusal to deal by the respondents.

[61] At the start of its analysis with respect to paragraph 75(1)(*b*), the Tribunal noted that the disposition had two branches. An applicant must show, first, that there is insufficient competition in a market and, second, that its inability to obtain adequate supplies is due to that insufficient competition. The second branch involves a conclusion as to causation, a question of fact: see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 70 and 159, [2002] 2 S.C.R. 235; *Operation Dismantle, supra* at para. 79; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 16, 140 D.L.R. (4th) 235.

[62] In this case, the Tribunal found that Nadeau failed to show that there was insufficient competition but went on to say that even if it had, the Tribunal was persuaded that "the overwhelming evidence indicates that the limit on aggregate supply which results from the supply management system is essentially the reason why the applicant is unable to obtain adequate supplies of live chickens" (Reasons at para. 247). In other words, the Tribunal's conclusion on insufficient competition was overtaken by its findings as to the cause of Nadeau's inability to obtain adequate supplies.

[63] Nadeau seeks to challenge the Tribunal's determination of the cause of its inability to obtain adequate supplies by arguing the facts: see Appellant's Memorandum of Fact and Law at paras. 55-57. However, since the appellant did not obtain leave to appeal any question of fact, it is bound by

the Tribunal's conclusion as to the cause of its inability to obtain adequate supplies of chicken. This ground of appeal fails.

iii) The Tribunal erred in finding that Nadeau failed to establish that there was insufficient competition between suppliers of live chicken when it accepted that the poultry supply management system created a state-mandated cartel among chicken producers.

[64] Nadeau also argues that the Tribunal erred in not giving effect to its own statement that the poultry supply management program amounted to a state-mandated cartel among chicken producers. According to Nadeau, cartels, by their nature, are anti-competitive, whether they are large or small. The Tribunal ought to have followed its statement on the nature of the poultry supply management system to its logical conclusion and found that there was insufficient competition among poultry producers.

[65] This ground of appeal has no merit. The reference to a cartel in the Tribunal's Reasons was simply a report of a statement made by others which the Tribunal did not endorse. Specifically, the Tribunal wrote, at paragraph 10 of its Reasons:

> It [the poultry supply management system] has been described as being, in effect, a state-mandated cartel arrangement.

[66] There is no basis for the assertion that the Tribunal adopted this statement as its own.

iv) The Tribunal erred in applying the wrong legal test to determine if there was insufficient competition among suppliers.

[67] Nadeau argues that the Tribunal erred in law holding that the number of producers in the market, and the absence of any evidence that they were not acting independently, was the appropriate test for insufficient competition under paragraph 75(1)(*b*) of the Act. The correct test,

according to Nadeau, is to compare the terms upon which live chickens are available from alternative sources to the terms upon which they were available from the parties who are refusing to deal. Nadeau bases this argument upon the dictionary definition of competition adopted by the New Brunswick Court of Appeal in *McMillan (J. & A.) Ltd. v. McMillan Press Ltd.* (1989), 99 N.B.R. (2d) 181 at para. 16, 27 C.P.R. (3d) 390, as "...the effort of two or more parties acting independently to secure the business of their party by offering the most favourable terms."

[68] Nadeau cites, in support of its argument, passages from the Tribunal's decisions in *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.*, 27 C.P.R. (3d) 1, [1989] C.C.T.D. No. 49 [*Chrysler Canada*], and *Xerox, supra*. In *Chrysler Canada*, Nadeau says, the Tribunal found that there was insufficient competition because the alternative sources of supply were inferior sources, essentially because their price was substantially higher than the price previously charged by Chrysler Canada. Similarly, Nadeau argues that in *Xerox*, the Tribunal decided that there was insufficient competition because the alternative sources of supply were neither adequate nor economically viable.

[69] Whatever the merits of Nadeau's argument on this point, it too has been overtaken by the Tribunal's conclusion that the supply management system was the cause of Nadeau's inability to obtain adequate supplies of live chicken. Insufficient competition in a market is relevant only to the extent that it can be shown to be the cause of Nadeau's inability to obtain adequate supplies. Here, the Tribunal found that insufficient competition among producers was not the cause of Nadeau's supply difficulties.

[70] As a result, I conclude that Nadeau's appeal from the Tribunal's decision with respect to the application of paragraph 75(1)(*b*) to the facts of its case fails.

b) Did the Tribunal err in finding that live chickens were not in ample supply?

[71] The Tribunal began its analysis of the requirements of paragraph 75(1)(*d*) by distinguishing between "adequate supply", the term used in paragraphs 75(1)(*a*) and (*b*), and "ample supply", the term used in paragraph 75(1)(*d*). It referred to various dictionaries, both French and English, and concluded that while an "adequate supply" was essentially a sufficient supply, no more than enough, an "ample supply" was a "supply available in abundance or to the point that it is considered to be excessive" (Reasons at para. 276).

[72] The Tribunal then considered this definition in light of the objects and purposes of the Act, which are to promote and to maintain competition. It concluded that supply was not ample "when suppliers generally would be inhibited from growing or even changing the nature of their business or be forced to ration supplies between current and potential future customers because supply is limited". It went on to find that a product was in ample supply when "its availability is not in issue when a supplier considers whether to develop its business by seeking new customers and/or new distribution channels..." (Reasons at para. 280).

[73] The Tribunal referred to the transcripts of parliamentary committee hearings in support of its position that the product was not in ample supply when there was a shortage of supply for reasons such as strikes, scarcity of raw materials, or the failure of upstream suppliers. The Tribunal relied on the following exchange from the Parliamentary committee hearings (Reasons at para. 281):

> **Mr. Frank**: Mr. Chairman, Mr. Minister, unfortunately I do not have the legal mind that most members of this committee apparently have and this disturbs me to some degree, to the effect that, when this bill gets passed, if it ever does, just what in actual fact may happen.
>
> To clarify one particular area, which, no doubt, you can adjust to suit other areas: in the fertilizer business back in the winter, there was some degree of concern at the lack of products for dealers to sell. As a specific example, a company that supplied dealers went out of business and the dealers that were supplied by them naturally could not have the product unless they were able to acquire it from other manufacturers.
>
> At that particular time, the other manufacturers felt that they wanted to protect their dealers and make sure they were not shorting them. Consequently, they refused to sell to those dealers that had unfortunately found themselves customers of this other company. Now, would this particular area here change that particular picture? In other words, would it make it necessary for these manufacturers to sell to dealers that they not supplied before?
>
> **Mr. Gray**: No, because in the situation you have outlined it would appear that the product in question was not in ample supply, and in order for the Commission to make an order requiring a supplier to supply somebody, it would have to find that the product was in ample supply.

[74] Commenting on this exchange, the Tribunal made two observations: first, that this exchange supported the view that the provision was intended to apply only when there was evidence of ample supply of the product in the market; and, second, that a supplier would not be required to ration limited supplies of a product and so prevent existing customers from obtaining the same quantity of the product they had received in the past.

[75] In coming to its final conclusion on the meaning of ample supply, the Tribunal referred to a prior Tribunal decision dealing with ample supply, *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 [*Quinlan's*]. In that case, Quinlan's, a long standing vendor of Harley Davidson Motorcycles, was advised that its dealership agreement would not be renewed. Quinlan's invoked the private prosecution provisions of the Act and applied for an interim supply

order against Fred Deeley Imports Ltd., (Deeley) the Canadian distributor of Harley Davidson motorcycles.

[76] The evidence before the Tribunal was that Deeley obtained its supply of Harley Davidson motorcycles from the U.S. factory, the sole supplier of Harley Davidson motorcycles in the world. At the time of the application, Deeley had a confirmed number of units available to it, which it had fully allocated to members of its dealer network. Consequently, motorcycles which it might be ordered to supply to Quinlan's would have to be taken from the units previously allocated to other dealers. The Tribunal framed the issue before it as follows (*Quinlan's, supra* at para. 17):

> The question raised by these facts is whether, in the present situation, in which all of the 2005 H-D motorcycles have been allocated to dealers and in which dealers have been advised of their allocations and have picked the specific motorcycles they want, it is possible to conclude that the 2005 year H-D motorcycles are in ample supply.

[77] The Tribunal was of the view that section 75 of the Act was intended to deal with situations "in which the product is readily available and unencumbered in the sense that it has not been sold or promised to another purchaser" (*Quinlan's, supra* at para. 19). On the evidence before it, the Tribunal concluded that the only time Harley Davidson motorcycles were in ample supply was before Deeley placed its order with the factory. The Tribunal went on to find that, while it had been shown that Harley Davidson motorcycles were in ample supply at some times of the year, they were not in ample supply at the time the application was made.

[78] In the present case, the Tribunal held that it should define "ample supply" in a manner consistent with the Tribunal's decision in *Quinlan's*. It concluded that the words "ample supply" were meant to deal with "situations in which the product is in ample supply, in the sense that

suppliers are not obliged to choose between serving new customers and continuing to supply historic quantities to existing customers" (Reasons at para. 283).

[79] The Tribunal then applied that definition to the facts of the market for live chickens. The Tribunal noted that the poultry supply management system is designed to meet consumer demand for poultry products. There are mechanisms for adjusting the level of supply to respond to changes in consumer demand but those mechanisms do not allow for a timely response to changes in market conditions. In addition, these mechanisms operate at the "macro" level with increases in quota being allocated provincially and then, pro-rata, to existing producers. This leaves no room for individual producers to increase production to meet increased demand from processors. In light of all these factors, the Tribunal decided that the product, live chickens, could not be said to be in ample supply in the sense that it was "available on a timely basis to individuals wishing to expand or develop their businesses" (Reasons at para. 288).

[80] Finally, the Tribunal addressed Nadeau's argument that the respondents should not be permitted to take advantage of their conduct, intended to force the sale of the Nadeau plant at an improvident price. The Tribunal found that it did not have to deal with the respondents' motives because of its conclusion that live chickens were not in ample supply.

[81] Nadeau argues that the Tribunal misinterpreted the Act. It says that "ample supply" deals only with the situation in which there is a shortage of supply as a result of factors beyond the supplier's control. This must be the case, it says, because a supplier who refuses to deal with a particular customer must have another market for the product it refuses to sell to the complainant.

[82] Nadeau makes the point that the respondents should not be allowed to divert their product from one processor to another and, by so doing, create a lack of ample supply with respect to the first processor which shelters them from prosecution under section 75 of the Act. Nadeau argues that the scheme between the respondents and Olymel to drive it out of business is profoundly anti-competitive and should be treated as such.

[83] Nadeau further argues that the facts of this case are not comparable to the facts in *Quinlan's*. In this case, the respondents had no other pre-existing customer in the sense that they had historically sold all of their New Brunswick production to Nadeau. No one else had a prior claim on the product which they sold to Nadeau. As a result, the product was readily available and in ample supply.

[84] In summary, Nadeau's argument is predicated on the fact that, as between itself and the respondents, there is an ample supply of chicken. The fact that the respondents have chosen to divert that supply does not reduce the amount of the supply. The number of chickens being produced has not changed. There are still enough chickens being produced to meet consumer demand. The product is therefore in ample supply.

[85] The question whether or not a product is in ample supply is a question of mixed fact and law. The definition of ample supply is a question of law; it consists of interpreting the words "in ample supply" in paragraph 75(1)(*d*) of the Act.

[86] The jurisprudence on the meaning of "ample supply" is sparse. The subject was considered explicitly in *Quinlan's* and was mentioned in *Chrysler Canada* and *Xerox*, cited above. Both of the latter cases deal with sole suppliers. In each case it was assumed, without more, that the product was in ample supply. Presumably, this flows from the fact that in each case, there was no suggestion that the supplier lacked the means to supply both the complainant and the balance of the market for the products in issue. *Quinlan's* was another sole supplier case in that Deeley was the exclusive Canadian distributor of Harley Davidson motorcycles.

[87] This case differs from the jurisprudence in that it deals with a refusal to supply in the context of a multi-supplier market for a commodity product, in that any live chicken can be substituted for any other live chicken (subject to certain weight parameters which are not relevant here). Where there are multiple sources of supply, one would expect that a customer who is refused supply by one supplier could obtain replacement supplies from other suppliers at competitive prices because other suppliers either have the product in inventory or can increase production to meet increased demand. This capacity to increase production to meet increased demand appears to me to be an indicator of a market in which a product is in ample supply.

[88] I agree with the Tribunal's conclusion on the issue of ample supply but I would formulate the test in terms of what constitutes ample supply rather than what constitutes a lack of ample supply. I would say that a product is in ample supply when producers of that product have the capacity to increase production in a timely way to meet increases in demand for the product. Where there is a lack of capacity to increase production to meet increases in demand, the result is product shortage, which requires suppliers to choose between supplying existing customers at historic levels

and supplying new customers. Product shortage also results in price increases which, as the Tribunal found, was likely to occur (at least in the market for live chickens) if the respondents' refusal to deal were allowed.

[89] In my view, the Tribunal did not err in law in defining ample supply as it did, though I would reformulate the test in positive terms.

[90] When it came to apply the definition of ample supply to the facts of the present case, the Tribunal found that, in the context of the poultry supply management system, producers cannot increase their production to meet new demand from processors. Quotas are fixed by reference to consumer demand, not processor demand, so that the quota system is essentially unresponsive to changes in demand by processors.

[91] Producers can only respond to increases in processor demand by diverting their production from one processor to another in exchange for a premium. A market in which increased demand for a product can only be accommodated by diverting supplies from one customer to another is not a market in which the relevant product is in ample supply. The Tribunal's conclusion on this point is reasonable.

[92] As a result, I would not give effect to this ground of appeal.

c) Did the Tribunal err in finding that Nadeau had failed to establish that the respondents' refusal to deal was likely to have an adverse effect on competition in the market?

[93] In the course of dealing with this element of subsection 75(1), the Tribunal considered a number of issues, only some of which were challenged by Nadeau before us. The issues raised by Nadeau are the following:

> (i) The Tribunal erred in limiting the relevant market, for purposes of paragraph 75(1)(*e*), to the "downstream" market;
>
> (ii) The Tribunal erred in not identifying the market for air-chilled chicken as a separate product market;
>
> (iii) The Tribunal erred in failing to properly appreciate the adverse effect of the respondents' refusal to deal on the quality or availability of products; and
>
> (iv) The Tribunal erred in failing to properly consider the effect of the elimination of an efficient competitor.

[94] I will now consider each of these issues in turn.

i) The Tribunal erred in limiting the relevant market, for purposes of paragraph 75(1)(*e*), to the "downstream" market.

[95] The Tribunal began by defining the market in issue in paragraph 75(1)(*e*) as the "downstream" market, that is, the market into which Nadeau sells. Nadeau challenges this definition and argues that the Act permits the Tribunal to consider adverse effects in "a" market which, it says, means any market, including the market in which Nadeau buys live chickens. It argues that the evidence shows that the respondents' refusal to sell will result in an increase in the premiums paid to Quebec producers in order to persuade them to sell to Nadeau, resulting in an increase in prices in the "upstream" market. This, it says, is evidence of an adverse effect on competition in "a" market.

[96] In my view, this analysis is flawed. Paragraph 75(1)(*e*) is one of a number of elements which must be satisfied before a supply order will be made. Paragraph 75(1)(*a*) requires the

complainant to show that it is unable to obtain adequate supplies of a product on usual trade terms due to insufficient competition. Paragraph 75(1)(*b*) requires the complainant to establish that insufficient competition is the reason for its inability to obtain adequate supplies. Since paragraphs 75(1)(*a*) and (*b*) deal with the complainant's supply problems, both must refer to the upstream market - the market in which the complainant is a buyer.

[97] It would be redundant for the legislation to require, as a condition for the granting of a supply order, that the complainant show a further distortion of the upstream market for live chickens - a market which is, hypothetically, already marked by insufficient competition. In my view, the statutory reference to "a" market is a reference to any relevant product or geographical market into which the complainant sells. As a result, I am of the view that the Tribunal did not err in law in considering only the "downstream" market in this portion of its analysis.

[98] This is consistent with the fact that paragraph 75(1)(*e*) was introduced into subsection 75(1) at the same time as the right to pursue a private prosecution. In my view, the requirement that the complainant show an adverse effect in a market was designed to avoid private prosecutions based on injury to an individual market participant without any impact on the relevant markets themselves. B.A. Facey and D.H. Assaf, the authors of *Competition & Antitrust Law*, 3rd ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 336, expressed a similar view, based on materials issued by the Competition Bureau:

> Originally, section 75 did not contain a competition test requirement that the refusal to deal "is having or is likely to have an adverse effect on competition in a market." This element was added in connection with the amendment to permit private actions in order to filter out specious claims and address legitimate stakeholder concerns over the risks of strategic litigation by private parties.

[99] The object of competition legislation is to protect consumers, and to protect market participants only to the extent that doing so can be shown to protect consumers.

ii) The Tribunal erred in not identifying the market for air-chilled chicken as a separate product market.

[100] In its submissions to the Tribunal, Nadeau identified the relevant product market for the purposes of subsection 75(1) as follows (Affidavit of Roger Ware, sworn September 22, 2008, at para. 10, Confidential Appeal Book, vol. 4, p. 1437 [emphasis added]):

> There are potentially three product markets at issue in this case. If we start at the level of the purchasers of processed chicken and move back down the chain of production, they are:
>
> i. the market for processed chicken;
>
> ii. the market for purchasing live chicken; and
>
> iii. the market for selling chicken.

[101] Nadeau's expert, Dr. Ware, qualified this assertion somewhat with his subsequent statement that "the technique of air-chilling, practiced by Nadeau and Olymel in producing their processed chicken may have created a distinct product market for higher quality, higher priced product" (Affidavit of Dr. Ware, *supra* at para. 11).

[102] In his evidence in chief, Dr. Ware referred to the fact that anti-trust economists have a precise definition of product markets and that some sub-products in the processed chicken market could satisfy those definitions. Dr. Ware gave two examples of such sub-products, air-chilled chicken and chicken below a certain weight. He concluded, however, "...we didn't have even close

enough to adequate data that would allow us to make that identification" (Confidential Transcript vol. 2, p. 672).

[103] The Tribunal accepted Dr. Ware's evidence at face value and concluded that there was insufficient evidence on the record to support the conclusion that air-chilled chicken constituted a separate product market (Reasons at para. 298).

[104] In this Court, Nadeau argued that the Tribunal erred in failing to find that air-chilled chicken constituted a separate product market for purposes of paragraph 75(1)*(e)* of the Act. It says the Tribunal erred in law in not considering other evidence of a separate product market in air-chilled chicken.

[105] Nadeau then cites the decision of this Court in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557, 185 N.R. 321 rev'd [1997] 1 S.C.R. 748, 209 N.R. 20, as authority for the proposition that certain factors ought to be considered in determining whether products are in separate markets. Nadeau then examines the facts in the light of these factors and concludes that the Tribunal ought to have concluded that air-chilled chicken constituted a separate product market.

[106] The approach adopted by Nadeau is curious to say the least. Its own expert was of the view that the data was insufficient to allow an anti-trust economist to determine whether air-chilled chicken constituted a separate product market. Dr. Ware was no doubt aware of evidence upon

which Nadeau bases its argument on this point. Nadeau asks this Court to come to a different conclusion than did its own expert.

[107] The Tribunal heard Dr. Ware and it heard all of the evidence to which Nadeau now makes reference. It concluded that Dr. Ware was correct and that there was insufficient evidence to support the conclusion that air-chilled chicken was a separate product market. Given that this is a question of mixed fact and law, I am unable to see how the Tribunal's decision on this issue could be said to be unreasonable. This ground of appeal fails.

iii) The Tribunal erred in failing to properly appreciate the adverse effect of the respondents' refusal to deal on the quality or availability of products.

[108] Nadeau argues that the Tribunal erred in failing to give effect to the evidence of a number of its customers that the disappearance of Nadeau from the market would result in a decrease in the quality and availability of products in the market. Nadeau then reviews excerpts of the evidence of these customers in an attempt to illustrate its point.

[109] This line of argument is, it seems to me, an attack upon the Tribunal's findings of fact, territory upon which this Court cannot tread. The Tribunal carefully set out the testimony of the various witnesses called by Nadeau and noted their comments with respect to quality and availability of products. In the end, the Tribunal did not give this evidence the effect which Nadeau wished, for the reasons which it set out at paragraphs 455 to 461 of its Reasons. Nadeau seeks to have this Court reweigh this evidence in the hope we will come to a different conclusion than did the Tribunal. This is simply an appeal on a question of fact for which leave was not granted.

[110] In any event, the premise of this argument is that, absent a supply order, Nadeau will cease to exist. The Tribunal came to no such conclusion. It found that Nadeau would be unable to obtain adequate supplies of live chickens *on the usual trade terms*, meaning that it would have to pay a premium in excess of that which it was currently paying in order to source live chickens from Quebec producers. This would likely result in a significant loss of earnings but it does not mean that Nadeau would not be profitable or that it would necessarily operate at a loss. As a result, the premise underlying this line of argument is unproven.

[111] The Tribunal did not accept the hypothesis that Nadeau would disappear from the market if no supply order was made, as it pointed out at paragraph 458 of its Reasons:

> [M]any customer complaints focus on a limited set of scenarios, to wit, the possibility of the [Nadeau's] closing or being acquired by Olymel. There are many other possible scenarios. A likely scenario is that [Nadeau] will be able to replace some but not all the Respondents' birds from Quebec sources. It could be business as usual on a reduced scale. ...

[112] For both of these reasons, this ground of appeal cannot succeed.

iv) The Tribunal erred in failing to properly consider the effect of the elimination of an efficient competitor.

[113] This argument has already been addressed in the preceding section. The Tribunal did not accept that the respondents' refusal to sell would necessarily result in a closure of Nadeau's plant. As the Tribunal stated "... we find it unlikely that [Nadeau] would close" (Reasons at para. 467).

[114] That said, this line of argument is another attempt to have this Court reconsider and reweigh the evidence in the hope that it will come to a different conclusion than did the Tribunal. The effect of the closure of Nadeau's plant is a pure question of fact, perhaps an "intangible fact". There is no

legal component to this question. Nadeau cannot finesse this problem by saying that the Tribunal committed an error of law in failing to consider all relevant facts. The issue is not whether the Tribunal considered all the evidence, but rather the conclusions the Tribunal drew from that evidence. The Tribunal's findings of fact cannot be challenged in this appeal.

[115] It is worth repeating, however, that the premise underlying this line of argument is one which the Tribunal did not accept.

[116] In the result, I am of the view that the Tribunal's conclusion that the respondents' refusal to supply would not have an adverse effect on a market is reasonable. Nadeau has not persuaded me that there is a basis on which this Court could interfere with the Tribunal's decision.

d) Did the Tribunal err in finding that Nadeau was substantially affected in its business due to its inability to obtain adequate supplies anywhere in a market on usual trade terms?

[117] This issue was raised by the respondents in their memorandum of fact and law. The respondents did not cross-appeal since they do not seek any change in the Tribunal's disposition of Nadeau's application. However, they take the position that if Nadeau is able to persuade us to set aside the Tribunal's conclusions with respect to paragraphs 75(1)(*b*), (*d*) and (*e*), then they seek to persuade us that the Tribunal erred in its conclusions with respect to paragraph 75(1)(*a*). Since all five elements of subsection 75(1) must be satisfied before a supply order will be made, the respondents' success on this issue would require us to dismiss the appeal even though Nadeau had succeeded with respect to the grounds of appeal which it had raised.

[118] In light of the conclusion to which I have come with respect to paragraphs 75(1)(*b*), (*d*) and (*e*), it is not necessary for me to address this issue.

9) CONCLUSION

[119] In order to succeed on this appeal, Nadeau must persuade us that the Tribunal committed a reviewable error in its treatment of each of paragraphs 75(1)(*b*), (*d*) and (*e*) of the Act. Subsection 75(1) requires that each of its elements be satisfied before the Tribunal may issue a supply order. I have not been persuaded that the Tribunal erred in law or came to an unreasonable conclusion with respect to any of the elements which it considered in deciding that Nadeau had not established that:

a) its inability to obtain adequate supplies of live chicken on usual trade terms was due to insufficient competition;

b) live chicken was in ample supply at the relevant times; and

c) the respondents' refusal to supply had an adverse effect on competition in a market.

[120] As a result, I would dismiss the appeal with costs.

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-342-09
APPEAL FROM AN ORDER OF THE COMPETITION TRIBUNAL, DATED JUNE 8, 2009, FILE NO. CT-2008-004	
STYLE OF CAUSE:	Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited and Groupe Westco Inc. and Groupe Dunaco, Coopérative Agroalimentaire and Volailles Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 18, 2011
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	NADON J.A. TRUDEL J.A.
DATED:	June 2, 2011

APPEARANCES:

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Ron E. Folkes	FOR THE APPELLANT
Denis Gascon Eric Lefebvre Martha A. Healey Alexandre Bourbonnais	FOR THE RESPONDENT Groupe Westco Inc.
Olivier Tousignant	FOR THE RESPONDENT Groupe Dynaco, Co-Opearative Agroalimentaire

Valérie Belle-Isle	FOR THE RESPONDENT Volailles s Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

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Lavery, De Billy S.E.N.C.R.L. Quebec, Québec	FOR THE RESPONDENT Volailles s Acadia S.E.C. and Volailles Acadia Inc./Acadia Poultry Inc.

Tab 8

Competition Tribunal | Tribunal de la Concurrence

Reference: *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41
File no.: CT2002005
Registry document no.: 0004

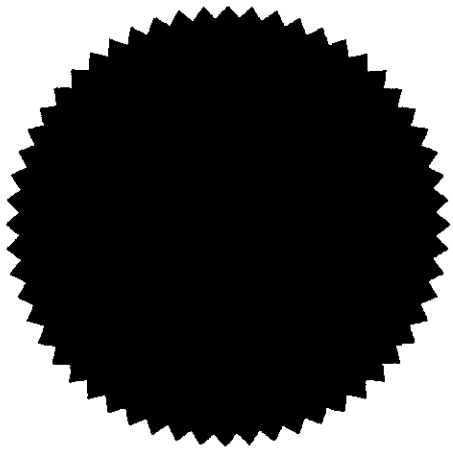
IN THE MATTER OF an application by Mr. Robert Gilles Gauthier, carrying on business as The National Capital News Canada, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, for leave to make an application under section 75 of the Act.

B E T W E E N :

The National Capital News Canada
(applicant)

and

The Honourable Peter Milliken, M.P.
(respondent)



Decided on the basis of the written record.
Member: Dawson J. (presiding)
Date of reasons and order: 20021213
Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

I. INTRODUCTION

[1] This is the first application to the Competition Tribunal ("Tribunal") brought by a party other than the Commissioner of Competition ("Commissioner"). Pursuant to recent amendments to the *Competition Act*, R.S.C. 1985, c. C-34, ("Act") an application by a party other than the Commissioner can only be commenced if leave is granted by a judicial member of the Tribunal.

II. RELEVANT FACTS

[2] Mr. Robert Gilles Gauthier ("applicant") filed, pursuant to subsection 103.1(1) of the Act, an application for leave ("leave application") to make an application under section 75 of the Act ("application") against the Honourable Peter Milliken. Mr. Milliken is named in his capacity as Speaker of the House of Commons ("Speaker"). Sections 75 and 103.1 of the Act are attached to these reasons as Schedule A.

[3] In substance, Mr. Gauthier, as proprietor of The National Capital News Canada ("National Capital News"), seeks an order under section 75 of the Act requiring that he and his associates and employees be provided with access to the Parliamentary Press Gallery, without becoming a member of Canadian Parliamentary Press Gallery Inc., and without " . . . being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official."

[4] Contained within the leave application is a statement of grounds and material facts on which the applicant relies. The applicant also filed an affidavit sworn by him in support of the leave application. The applicant asserts that he has been substantially affected in his business, and is significantly precluded from carrying on business, due to his alleged inability to obtain full access to substantial supplies of information and to essential services (including listing on the Press Gallery journalist list) that are provided to his competitors by the Speaker. The Speaker is said to control such access on behalf of the Parliament of Canada. The affidavit describes the history of the National Capital News and its business environment, its alleged need to gain access to sources of information related to the Parliament and Government of Canada and the difficulties encountered over the years to obtain access. Exhibits attached to the affidavit consist of: (1) a copy of a March 25, 1994, letter from Mr. Brian A. Crane, Q.C., counsel for the Speaker of the House of Commons at the time; (2) a letter dated November 10, 1989, from Mr. Marcel R. Pelletier, Q.C., the House of Commons Law Clerk and Parliamentary Counsel, confirming that there has been no legislation ceding a certain power to the Parliamentary Press Gallery; (3) an order of the Ontario Court (General Division) dated January 8, 1996, prohibiting Mr. Gauthier from coming onto the premises of the Canadian Parliamentary Press Gallery; and (4) a letter dated October 16, 1995, from M.G. Cloutier, the Sergeant-at-Arms, House of Commons, confirming there is no restriction on Mr. Gauthier's access to the buildings on Parliament Hill on the same basis as other visitors, with the exception of access to the Press Gallery premises.

[5] The affidavit does not describe in any detail the facilities and services provided to the media by the Speaker, the physical location of the Parliamentary Press Gallery, or the location at which other services are provided.

[6] The Speaker did not file any material in reply to the leave application. While a respondent to a leave application is not required to make any response, the Tribunal would generally be assisted by relevant material and submissions filed by a respondent in opposition to a leave application.

III. THE TEST FOR THE GRANTING OF LEAVE UNDER SECTION 103.1 OF THE ACT

[7] The test for the granting of leave is contained in subsection 103.1(7) of the Act. It provides as follows:

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

[8] In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.

IV. THE REQUIREMENT OF "REASON TO BELIEVE"

[9] While the phrase "reason to believe" is new to the Act, it has been judicially considered in other contexts. In *Regina* v. *Rollins*, 80 C.C.C. (3d) 385, the British Columbia Supreme Court considered the phrase as it was contained in section 756 of the *Criminal Code*, R.S.C. 1985, c. 27 (1st Supp), which generally allowed a justice to place an offender in custody for observation where there was *reason to believe that evidence might be obtained* as a result of the observation that would be relevant to dangerous offender proceedings. The Court concluded that the expression "reason to believe" requires *reasonable grounds* for the "reason to believe". McKinnon J. wrote, at page 395, that:

> I accept that s. 756 *requires reasonable grounds for the "reason to believe."* That is a precondition to the belief and in most cases will come from the medical opinion but might come from other sources as well; however, in any event, there nevertheless exists the requirement that the court's opinion must be supported by the evidence of at least one medical practitioner. There are, therefore, criteria which offer controlled direction in the exercise of the court's discretion and an ability to obtain a "settled meaning" in relation to the wording or test enunciated in s. 756 which can be used in each application.

> I find that s. 756 is a broad test that is not unduly vague and which does set forth an "intelligible" standard, albeit not a difficult one to meet. (emphasis added)

[10] I accept that the requirement that the Tribunal has "reason to believe" does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant's allegations that he has been so affected.

[11] As to the nature of the evidence required to establish reasonable grounds upon which to believe that an applicant has been directly and substantially affected, the Federal Court has considered the standard of proof required to show the existence of reasonable grounds for a belief.

[12] In *Canada (Attorney General)* v. *Jolly*, [1975] F.C. 216 (C.A.), the Federal Court of Appeal was asked to determine whether there were "reasonable grounds for believing" that an organization, with whom the respondent was associated, was a subversive organization. The Court concluded that, even after *prima facie* evidence had been adduced by the respondent denying the fact, it was only necessary for the Minister to show the existence of reasonable grounds for believing the fact. It was unnecessary for the Minister to go further and establish the subversive character of the organization. The Court stated at paragraph 18:

> . . . But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. *It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing* that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal. (emphasis added)

[13] Subsequently, in *Chiau* v. *Canada (Minister of Citizenship and Immigration)* (C.A.), [2001] 2 F.C. 297, the Federal Court of Appeal, when asked to determine the proper interpretation of the term "reasonable grounds" in the context of paragraph 19(1)(c.2) of the *Immigration Act of Canada*, R.S.C. 1985, c. I-2, stated at paragraph 60:

> As for whether there were "reasonable grounds" for the officer's belief, I agree with the Trial Judge's definition of "reasonable grounds" . . . as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "*a bona fide belief in a serious possibility based on credible evidence.*" See Attorney General of Canada v. Jolly, [1975] F.C. 216 (C.A.). (emphasis added)

Leave to appeal to the Supreme Court of Canada was denied (see [2001] S.C.C.A. No. 71).

[14] Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

V. APPLICATION OF THE TEST TO THIS LEAVE APPLICATION

[15] I turn now to whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe that:

> (1) the applicant is directly and substantially affected in his business by a practice referred to in section 75 of the Act; and
> (2) the alleged practice could be subject to an order under section 75 of the Act.

[16] It is the second element of the test which I consider to be dispositive of the leave application. I conclude that, for the following reasons, the applicant has failed to establish that the alleged reviewable practice could be subject to an order under section 75 of the Act.

[17] The order sought by the applicant against the Speaker is an order that:

> . . . pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal . . . full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay . . . (application, paragraph 10)

[18] In the statement of grounds and material facts the applicant alleges that access to the services which he seeks is controlled by the Speaker, " . . . who controls such access on behalf of the Parliament of Canada." (application, paragraph 3) The evidence adduced by the applicant in his affidavit as it touches on this point is as follows:

> 6. I have invested 20 years of my life and more than my own financial resources into this business and have been seriously impeded by the Speaker of the House of Commons who finances and controls the facilities and services provided for the media by the House of Commons.
>
> . . .
>
> 17. The House of Commons provides substantial facilities and services made available to members of the media and which allow journalists and their employers to earn their living and realize serious commercial rewards.
>
> . . .

36. The facilities and services provided by the House of Commons fall under the direct control of the Speaker of the House of Commons who has the sole authority to determine who may have access to the Press Gallery facilities and services.

. . .

38. The power to regulate the admission of strangers to the precincts of Parliament, including the Press Gallery, resides with Parliament alone and has customarily been exercised by the Speaker. (Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. London: Butterworths, 1976.)

39. There has been no delegation of that power by either Parliament itself nor the Speaker of the House of Commons to the privately-owned Canadian Parliamentary Press Gallery Corporation, as confirmed by the House of Commons Law Clerk and Parliamentary Counsel, in his letter 10 November 1989 to the applicant's Legal Counsel at that time, **being Exhibit "B" to this my affidavit.**

40. The applicant alleges that the Speaker is the sole person in control of the media facilities and services and therefore to the resultant commercial benefits derived by journalists and publishers who have access.

41. The Speaker has the duty to administer these publicly-funded facilities and services in a fair manner pursuant to the provisions of the *Competition Act.*

[19] The applicant is, I believe, correct that it is the Speaker who alone has the power to control access to any part of the House, including the Press Gallery. What is significant, however, is that the Speaker does so through constitutional powers and parliamentary privilege.

[20] The origin and nature of parliamentary privilege was reviewed by the Supreme Court of Canada in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. There, Justice McLachlin, as she then was, writing for the majority noted that Canadian legislative bodies possess those historically recognized inherent constitutional powers which are necessary to their proper functioning. Writing with respect to the historical tradition of parliamentary privilege, Justice McLachlin stated at pages 378 to 379:

> . . . It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.
>
> The Parliamentary privilege of the British Parliament at Westminster sprang originally from the authority of Parliament as a court. Over the centuries, Parliament won for itself the right to control its own affairs, independent of the Crown and of the courts. The

courts could determine whether a parliamentary privilege existed, but once they determined that it did, the courts had no power to regulate the exercise of that power. One of those privileges, held absolutely and deemed to be constitutional, was the power to exclude strangers from the proceedings of the House.

[21] Justice McLachlin went on to confirm that Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies (page 381), and, added at page 383, that:

> . . . *If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.* (emphasis added)

[22] As to the scope of that exclusive jurisdiction, at page 384 Justice McLachlin wrote:

> . . . *The parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function.* So defined, *the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges.* Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. *The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function?* A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory. (emphasis added)

[23] One of the specific privileges discussed by Justice McLachlin was the parliamentary privilege to eject strangers from the House and its precincts. She observed that this ancient privilege was now reposed in the Speaker "who alone has the power, whenever he or she sees fit, to order the withdrawal of strangers from any part of the House" (page 386). This privilege is necessary because the legislative chamber is at the core of the system of representative government (page 387).

[24] J.P. Joseph Maingot, Q.C., in *Parliamentary Privilege in Canada,* 2nd Ed. (Montreal: McGill-Queen's University Press, 1997) enumerates the rights, privileges and powers of the Senate and House of Commons in Chapter 11. One such privilege is the right to regulate internal affairs free from interference. This is said to include the right to administer internal affairs both within its precincts and beyond the debating chamber.

[25] No evidence or information was provided to suggest that any of the facilities or services that the applicant seeks fall outside the scope of Parliamentary privilege. The applicant asserts that the facilities and services which he seeks are provided by the House of Commons, and are

financed and controlled by the Speaker who exercises Parliament's power to regulate the admission of strangers to its precincts.

[26] Applying the principles articulated in *New Brunswick Broadcasting*, cited above, to the evidentiary record before me, I am satisfied that the Speaker's alleged refusal to grant to the applicant full access to the Parliamentary Press Gallery facilities and services is an exercise of the parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. Such privilege also encompass the power to adjudicate and apply those privileges.

[27] A similar conclusion was reached by the Ontario Court (General Division) in *Gauthier* v. *Canada (Speaker of the House of Commons)*, (1994), 25 C.R.R. (2d) 286 where Madam Justice Bell found that the Court did not have jurisdiction to review the Speaker's decision to deny the plaintiff access to the precincts of Parliament.

[28] Just as a court may not examine a particular exercise of these privileges, I conclude that the Tribunal is without jurisdiction to embark upon such examination. The Tribunal is, pursuant to section 9 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), a court of record and principles of Parliamentary privilege are as important and applicable to it as they are to other courts. Therefore the practice complained of could not be the subject of any order of the Tribunal under section 75 of the Act.

[29] It follows that the Tribunal does not have, and can not have, any basis upon which to believe that the practice complained of by the applicant could be subject to an order. This requirement of subsection 103.1(7) of the Act is not met and therefore the application for leave must fail. In view of this conclusion it is unnecessary to consider whether the applicant adduced sufficient evidence to meet the first element of the test for leave.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[30] The leave application is denied.

DATED at Ottawa, this 13th day of December, 2002.

SIGNED on behalf of the Tribunal by the judicial member.

(s) Eleanor R. Dawson

[31] Schedule A: Legislative References to sections 75 and 103.1 of the Act.

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)

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(*a*) is the subject of an inquiry by the Commissioner; or

(*b*) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(*a*) or (*b*) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

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

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

REPRESENTATIVE

For the applicant:

Robert Gilles Gauthier, carrying on business as the National Capital News Canada

Robert Gilles Gauthier

For the respondent:

The Honourable Peter Milliken, M.P.

not represented

File No.: .....

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Used Car Dealers Association of Ontario for an Order pursuant to section 103.1 granting leave to make application under sections 75 and 76 of the *Competition Act*.

BETWEEN:

Used Car Dealers Association of Ontario

Applicant

- and -

Insurance Bureau of Canada

Respondents

RESPONSE OF MASTERCARD INTERNATIONAL INCORPORATED TO THE MOTION FOR LEAVE TO INTERVENE OF CANADIAN BANKERS ASSOCIATION

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