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.

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REASONS FOR JUDGMENT

PELLETIER J.A.

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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.* (l990), 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

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