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# Agricultural Law NetLetter™

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**Thursday, July 1, 2010 - Issue 204**

Bi-weekly issues are added on Thursdays.

**\*\* HIGHLIGHTS \*\***

- \* A Justice of the New Brunswick Court of Queen's Bench (following a recent decision of the New Brunswick Court of Appeal), has concluded that an Order made by the New Brunswick Minister of Agriculture and Aquaculture under the New Brunswick Marketing of Agricultural Products Act, which required all New Brunswick chicken producers to process their product at a New Brunswick processing facility, exceeded the regulatory power given to the Minister under the Act, and was ultra vires. The Court also concluded that if the Act had given this authority, it would be unconstitutional as trenching on the exclusive federal power to regulate inter-provincial trade and commerce. (*Groupe Westco Inc. v. New Brunswick (Minister of Agriculture and Aquaculture)*, [CALN/2010-018](#), [\[2010\] N.B.J. No. 215](#), New Brunswick Court of Queen's Bench)

**\*\* NEW CASE LAW \*\***

*Groupe Westco Inc. v. New Brunswick (Minister of Agriculture and Aquaculture)*; [CALN/2010-018](#), Full text: [\[2010\] N.B.J. No. 215](#); [2010 NBQB 217](#), New Brunswick Court of Queen's Bench, L.A. LaVigne J., June 17, 2010.

Constitutional Law -- Constitutional Validity of Provincial Laws Which Restrict Movement of Agricultural Products Between Provinces.

Marketing Boards and Commissions -- Constitutional Authority -- Movement of Agricultural Products Between Provinces.

Groupe Westco Inc. ("Westco") applied to the New Brunswick Court of Queen's Bench for an Order quashing an Order made on January 19, 2010 (the "Ministerial Order") by the New Brunswick Minister of Agriculture and Aquaculture (the "Minister") on the grounds that the Order was ultra vires.

Westco is a large producer of live chicken. Westco holds approximately 51% of the New Brunswick chicken production quota. In 2007, Westco became involved in a private commercial dispute with its processor, Nadeau Poultry Farm Ltd. ("Nadeau").

In 2007, Westco entered into a partnership arrangement with Olymel L.P. ("Olymel") which, among other things, operated a chicken processing plant in Quebec. The objective of the Westco/Olymel partnership was to acquire or build a chicken processing facility for Westco in New Brunswick. Westco and Olymel initially attempted, without success, to buy the Nadeau plant. When these negotiations did not succeed, Westco agreed to ship its chicken for processing to Olymel's plant in Quebec until such time as Westco could construct a new processing plant in New Brunswick.

On January 17, 2008, Westco delivered written notice to Nadeau confirming that effective July 20, 2008, it would no longer be supplying Nadeau with chicken. Nadeau was unsuccessful in its attempts to block the loss of Westco as a supplier:

- (a) Nadeau made an application to the Chicken Farmers of New Brunswick (the "Provincial Producers Board" which allots federal and provincial production quota to New Brunswick chicken producers). Nadeau requested the Provincial Producers Board to issue an Order which would require all New Brunswick chicken producers to supply a fixed percentage of their live chickens to the Nadeau plant. The Provincial Producers Board dismissed this application. Nadeau appealed the decision to the Farm Products Commission (a New Brunswick agency which has general supervisory authority over marketing production of various New Brunswick farm products). The appeal to the Commission was dismissed. Nadeau appealed the Commission's decision to the New Brunswick Court of Appeal. On August 20, 2009, the Court of Appeal dismissed Nadeau's appeal;
- (b) Nadeau also instituted proceedings under the Competition Act (Canada) before the Federal Competition Tribunal seeking an Order from the Tribunal that Westco supply Nadeau with live chickens. The Tribunal dismissed the application. Nadeau appealed this decision to the Federal Court of Appeal. This appeal has not yet been heard.

On December 10, 2009, the Province of New Brunswick proclaimed into force an amendment to the National Products Act, S.N.B. 1999, c. N-1.2 to add the following provision:

41.1(2) Despite any other provision of this Act, excluding this section, and despite any provision of the regulations or an instrument made under the authority of this Act, only the Minister may, until the expiration of this section, designate the plants where chicken may be processed.

On January 19, 2010, the Minister issued the Ministerial Order in question in the Action which decrees as follows:

Pursuant to subsection 41.1(2) of the Natural Products Act, chapter N-1.2 of the Acts of New Brunswick, 1999, the following plant is designated as the federal inspected abattoir where chicken grown in New Brunswick shall be processed:

Nadeau Poultry Farm Limited 2222 Commercial Street Saint-Francois-de-Madawaska New Brunswick E7A 1B6

The Minister's admitted purpose in decreeing the Ministerial Order was to require that all chicken grown in New Brunswick be processed at the Nadeau plant in order to preserve jobs at the plant [at par. 23].

There were two issues before the Court:

- (a) Whether the Ministerial Order was within the power granted to the Minister by virtue of the amendment; and
- (b) Whether the amendment and the Ministerial Order were ultra vires to the Province of New Brunswick.

Decision: Madam Justice Lucie A. LaVigne held that the Ministerial Order was ultra vires the power granted to the Minister by the amendment and quashed the Order [at para. 36 and 37].

LaVigne, J.A. relied upon the decision of the New Brunswick Court of Appeal in *Nadeau Poultry Farm Ltd. v. New Brunswick Farm Products Commission*, [\[2009\] N.B.J. No. 277](#), [2009 NBCA 48](#), in which the Court of Appeal had concluded that neither provincial or federal law had delegated to the Provincial Producers Board the authority to issue a plant supply allocation order which could affect the right of New Brunswick chicken producers to sell their product to whomever they wish. In the New Brunswick Court of Appeal decision, Robertson, J.A. concluded [at para. 27] that:

27 ... the object of [the federal-provincial scheme for the marketing of live chickens] is not to create barriers to the movement of regulated products, but rather to ensure that federal/provincial production quotas are respected.

Regarding the movement of farm products across provincial borders, Robertson, J.A. stated [at para. 30]:

30. [...] The interlocking federal-provincial legislation, effecting the objectives of the 2001 Federal-Provincial Agreement for Chickens, is predicated on the free movement of this farm product, both within and outside Canada, so long as the "quota" limitation placed on each producer is faithfully observed.

LaVigne, J.A. considered the following issues:

- (a) Whether the Ministerial Order was ultra vires the amendment to the Act.

LaVigne, J.A. observed that the amendment does not prohibit the export of live chickens. It only gives the Minister the authority to designate where chickens are produced in New Brunswick may be processed [at para. 23 and 24].

The amendment is in pith and substance concerned with regulating the chicken processing industry within the province [at para. 24].

LaVigne, J.A. held that on the other hand, the Ministerial Order had the legal affect of requiring New Brunswick producers to process their entire product at a plant within New Brunswick. It restricted the ability of New Brunswick chicken producers to sell their live chickens to process outside the province [at para. 25]. LaVigne, J.A. observed that while the objectives of the Minister were laudable [at para. 28], the Ministerial Order was beyond the authority granted to the Minister under the amendment, stating at para. 29, 31 and 32:

[29] The Ministerial Order purports to require that all chicken grown in New Brunswick be processed in New Brunswick at the designated plant. The effect of the Ministerial Order is to prohibit any New Brunswick chicken from being processed outside New Brunswick. This exceeds the power granted to the Minister under the Amendment.

...

[31] The Ministerial Order decrees that all chicken grown in New Brunswick be processed exclusively within the Province thereby prohibiting exportation for processing outside the Province.

[32] The Amendment authorizes the Minister to designate plants in New Brunswick where chicken may be processed, but not to oblige the producers to have their chicken processed in New Brunswick or to prohibit the export of live chickens from the Province. The Minister has exceeded the power granted to him under the Amendment.

(b) Whether the amendment and the Ministerial Order were unconstitutional.

LaVigne, J.A. considered the alternate argument that a prohibition of inter-provincial movement of New Brunswick chicken for processing was unconstitutional. Although she felt it was not necessary to deal with this argument [at para. 33], she did conclude that if the amendment had that effect, it would be unconstitutional as trenching on exclusive federal power to regulate under provincial trade and commerce, stating at para. 34:

[34] However, had I found that the Amendment was subject to interpretation, I would have interpreted it narrowly as not granting the Minister authority to prohibit the export of chicken from New Brunswick, otherwise the Amendment and the Ministerial Order would be unconstitutional as trenching on exclusive federal power to regulate interprovincial trade and commerce.

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**\*\* CREDITS \*\***

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.

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