

Farm Products Council of Canada

Complaint Committee Report

Turkey Farmers of Ontario

Against

Turkey Farmers of Canada

June 2022



Farm Products Council
of Canada

Conseil des produits agricoles
du Canada

Canada

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Part 1: Introduction

1.1 – Overview of the Complaint

1. A Complaint was filed by the Turkey Farmers of Ontario (TFO or Complainant) against the Turkey Farmers of Canada (TFC or Respondent Agency) on March 22, 2022, regarding a commercial allocation decision made by TFC at the February 14, 2022, meeting.
2. TFO's Complaint focusses on the manner in which the commercial allocation for the 2022-23 control period, which runs from May 1, 2022, to April 29, 2023, was established. More specifically, TFO's Complaint relates exclusively to the way in which the increase of 4.0 million kg was distributed by TFC.
3. The Farm Products Council of Canada (FPCC or Council) Advisory Personnel reviewed the Complaint and prepared a summary of issues report and recommendations to the Council Chairperson. Following the reception of the summary of issues report, the Council Chairperson directed that a pre-hearing conference be held, as per section 17 of the *By-Law Governing the Administration of the Complaints Received by the Farm Products Council of Canada* (Complaint By-Law). The FPCC Chairperson designated Council Vice-Chairperson Ron Bonnett to preside at the pre-hearing conference, which was held on April 14, 2022, by videoconference.
4. Following the pre-hearing conference, a Complaint Committee (Committee) was formed pursuant to paragraph 7(1)(f) of the *Farm Products Agencies Act* (FPAA). In accordance with the Complaint By-Law, Council member Maryse Dubé was appointed to the Committee by the Council Chairperson and was instructed to proceed with a Hearing, which was held on June 3, 2022, by videoconference, with the consent of all parties. Observer status was granted to the Canadian Poultry and Egg Processors Council (CPEPC) and the British Columbia Farm Industry Review Board.

1.2 – Agreed Facts

5. The following facts were agreed to by the Complainant and the Respondent Agency prior to the Hearing held on June 3, 2022.

1.2.1 – National Commercial Allocation Policy

6. At the November 27 and 28, 2019, (TFC 260th) meeting, a motion was unanimously carried by the TFC Board of Directors mandating the Allocation Policy Review Committee to find a new allocation policy for implementation for the 2021-22 control period, which runs from April 25, 2021, to April 30, 2022.
7. TFC's National Commercial Allocation Policy (NCAP), implemented on December 19, 2006, was suspended at the June 2020 (TFC 262nd) meeting. The vote to suspend the NCAP was unanimously supported by the TFC Board of Directors.
8. As of the date of the Complaint being filed by TFO, March 22, 2022, a new commercial allocation policy had not been approved by the TFC Board of Directors.

1.2.2 – 2020-21 Control Period

9. The initial commercial allocation for the 2020-21 control period, which ran from April 26, 2020, to April 24, 2021, was set at 136.0 million kg by the TFC Board of Directors at the April 13, 2020, meeting. The vote was supported by all TFC members with the exception of Quebec, who voted against.
10. The 136.0 million kg allocation represented a 10.6 million kg decrease in commercial allocation over the previous control period (2019-20).
11. The revised commercial allocation for the 2020-21 control period was set at 126.0 million kg by the TFC Board of Directors at the May 8, 2020, meeting. The vote was supported by all TFC members with the exception of Quebec, which voted against the motion.

12. The 126.0 million kg allocation represented a 10.0 million kg decrease in commercial allocation over the previous allocation for the same control period (2020-21). The allocation was reduced pro rata based on the commercial allocation on April 13, 2020, with all members in support of the motion except Quebec, which voted against the motion.

1.2.3 – 2021-22 Control Period

13. The initial commercial allocation for the 2021-22 control period, which runs from April 25, 2021, to April 30, 2022, was set at 134.0 million kg by the TFC Board of Directors at the January 28, 2021, meeting. The vote was supported by nine TFC members, opposed by one member and one member abstained from the vote.

14. The 134.0 million kg allocation represented a 8.0 million kg increase in commercial allocation over the previous control period (2020-21).

15. The revised commercial allocation for the 2021-22 control period was set at 139.0 million kg by the TFC Board of Directors at the July 7-8, 2021, meeting. The vote was supported by eight TFC members and opposed by three.

1.2.4 – 2022-23 Control Period

16. The initial commercial allocation for the 2022-23 control period, which runs from May 1, 2022, to April 29, 2023, was set at 143.0 million kg by the TFC Board of Directors at the November 24 and 25, 2021, (TFC 268th) meeting. The vote was unanimously supported.

17. The 143.0 million kg commercial allocation set was the appropriate number required to supply the domestic market at the current time.

18. The 143.0 million kg allocation represented a 4.0 million kg increase in commercial allocation over the previous control period (2021-22).

19. The TFC Board of Directors met on February 3 and 14, 2022, to allocate to the provinces the 4.0 million kg increase.

20. At the February 14, 2022, meeting, TFC's Board of Directors voted and approved to allocate the 4.0 million kg increase in the following manner, hereinafter the "60/30/10 formula":

- a. 452,905 kg was attributed to Nova Scotia; and
- b. 3,547,095 kg was allocated based on 60% pro rata of the 2021-22 market shares, 30% based on provincial population and 10% based on Nielsen retail sales data.

21. The vote was supported by British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia. Ontario voted against the motion and the two primary processors and further processors abstained.

Part 2: The Complaint

2.1 – The Complainant: Turkey Farmers of Ontario

22. TFO is the provincial commodity board representing Ontario, with authority to control and regulate the production and marketing of turkey within Ontario. TFO is also a member of TFC by virtue of the *Canadian Turkey Marketing Agency Proclamation* (Proclamation) and is also a signatory of the *Federal-Provincial Agreement in respect of the establishment of a Comprehensive Marketing Plan for the purpose of regulating the marketing of Turkeys in Canada*.

2.2 – Summary of the Complaint

23. TFO's Complaint relates exclusively to the way in which the Respondent Agency has distributed the increase of 4.0 million kg in commercial allocation for the 2022-23 control period. The Complainant asserts the 4.0 million kg increase is distributed on an overwhelmingly pro rata basis and that pro rata allocation methodologies are the antithesis of the over base criteria found in the Proclamation (Proclamation Criteria) and the FPAA subsection 23(2). The Complainant declares that TFC distributed the 4.0 million kg increase in the 2022-23 commercial allocation in accordance with a formula that is

primarily based on provincial market shares. TFO claims that the result of the application of a pro rata formula is tantamount to an abdication by TFC of its objects¹ under the FPAA. The Complainant asserts that the effect of the 2022-23 commercial allocation is harmful to TFO and its provincial stakeholders.

24. TFO claims that TFC did not meet its obligation of “properly, substantively, legitimately, or genuinely” considering or weighing and then applying the six Proclamation criteria. One of those criteria is the principle of comparative advantage of production, which appears both in the FPAA and Proclamation.
25. TFO asserts that, in 2019, when TFC established an allocation and presented its rationale to Council, it proposed to Council that it had applied the Proclamation criteria, and in particular, the principle of comparative advantage of production by reference to the NCAP. According to TFO, the NCAP had mechanisms in it relating to provinces building up further processing (FP) requests through consultation with their processing sector and the NCAP reflected the most practical way for TFC to demonstrate application of the principle of comparative advantage.
26. TFO states that the NCAP was put in place to reflect the whole bird (WB) and FP markets. TFO maintains that the turkey production infrastructure varies across the country and not every province can participate in the growth of the FP market. TFO claims that this has resulted in a market share struggle where provinces with less FP opportunities are trying to hold onto their share of the allocation and growth. TFO argues that the way this is accomplished is by pushing for a pro rata approach. TFO contends that the turkey market cannot be competitive and efficient if, when there is growth, the only allocation methodology is to share the growth.
27. TFO states that the consideration of the Proclamation criteria found in the 2022-23 rationale letter to satisfy Council was an afterthought, once the TFC Board of Directors approved the 2022-23 allocation.

¹ As per section 21 of the FPAA, the objects of an agency are

- (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
- (b) to have due regard to the interests of producers and consumers of the regulated product or products.

28. TFO references the minutes from the February 3 and 14, 2022, meetings as evidence to support this argument.
29. With respect to the February 3, 2022, meeting minutes, TFO calls attention to the fact that the TFC Board of Directors discussed three proposals for the distribution of the 4.0 million kg increase. The first proposal was to distribute the 4.0 million kg increase using an entirely pro rata methodology. The second proposal was to distribute half of the 4.0 million kg increase based on pro rata and the other half based on provincial population. The third proposal was to distribute the 4.0 million kg increase based on a combination of pro rata, provincial population and Nielsen retail sales data. TFO argues that there is little difference in the outcome of the three proposals and that the proposal that TFC ultimately adopts, which is the 60/30/10 formula, equates to an entirely pro rata allocation.
30. In the February 3, 2022, meeting minutes, an adjustment of 452,905 kg to Nova Scotia is discussed prior to distributing the remainder of the commercial allocation increase. TFO asserts that there is no explanation or connection to the Proclamation criteria in the 2022-23 rationale as to why 452,905 kg was allocated to Nova Scotia before distributing the remaining volume to the provinces according to the 60/30/10 formula.
31. TFO submitted a fourth proposal to the TFC Board of Directors to distribute the 4.0 million kg increase the same way the commercial allocation was decreased from 146.6 million kg in 2019-20 to 136.0 million kg in 2020-21, when TFO took a disproportionate cut in commercial allocation. TFO also proposed to include the 452,905 kg allocation to Nova Scotia prior to distributing the remaining volume. TFO acknowledges that its proposal does not satisfy the Proclamation criteria, but its proposal was more equitable relative to the other three proposals that were discussed.
32. With respect to the February 14, 2022, meeting minutes, TFO argues that once it was clear that the 60/30/10 formula was supported by the majority of the TFC Board of Directors, TFC General Manager Mr. Phil Boyd stated that the Proclamation criteria needed to be considered and asked the members if the three options proposed addressed the Proclamation criteria to the members' satisfaction. TFO also draws attention to the fact that Mr. Shawn Heppell, the TFC director representing British Columbia, discusses how the 60/30/10 formula respects the Proclamation criteria and is defensible to FPCC, and that this is the only evidence in these meeting minutes where

directors apply the Proclamation criteria. TFO concludes that this intervention cannot, by itself, be used as evidence that a discussion and consideration of the Proclamation criteria occurred.

33. The Complainant raises concerns with the use of Nielsen retail sales data in the 60/30/10 formula as this data fails to measure turkey markets of significant importance for Ontario, namely retail deli sales and all foodservice sales.
34. When TFC submits its allocation requests to Council for prior approval, it includes a rationale that describes how TFC interpreted and applied the Proclamation criteria, including the principle of comparative advantage of production. TFO argues that the 2022-23 rationale uses the same language as, and is effectively a “cut and paste” of, the 2021-22 rationale. TFO claims that this is of concern as the 2022-23 rationale claims that TFC has taken the Proclamation criteria into account, but there is no evidence of that. TFO believes that the Respondent Agency is simply stating and reciting the Proclamation criteria and that this does not equate to weighing and applying them.
35. TFO maintains that although the 2022-23 rationale reads as measured, serious and genuine, when reading through the minutes from the February 3 and 14, 2022, meetings, the content of what the 2022-23 rationale claims the directors discussed is almost non-existent, relegating the Proclamation criteria as an afterthought once they have decided on an allocation. TFO asserts that there must be evidence to support the proposition that the Proclamation criteria were properly weighed and applied.
36. In response to TFC’s claim that TFO did not provide any evidence that the 2022-23 commercial allocation is harmful to TFO and its stakeholders, the Complainant states that the harm is a reduction in kilograms that were acquired by TFO over many years while the NCAP was in place. That volume has been lost to TFO with the attrition of the 2019-20 commercial allocation and the harm is that TFO has not recovered those kilograms. In addition, TFO also argues that the harm in the public context is to the supply management system when the rules are not followed.

2.3 – The Complainant’s Recommendation

37. As per TFO’s Complaint of March 22, 2022, the Complainant recommends that Council not approve TFC’s 2022-23 allocation until TFC designs and implements a new commercial allocation policy and until TFC establishes the allocation for the 2022-23 control period by properly incorporating a genuine application of the Proclamation criteria and the applicable new commercial allocation policy provisions.

Part 3: The Response

3.1 – The Respondent Agency: Turkey Farmers of Canada

38. TFC is the farm products marketing agency that was created under Part II of the FPAA to regulate the marketing of turkey in interprovincial and export trade in Canada. As per the Proclamation, TFC is represented by eight provincial commodity board members, two members from the CPEPC representing turkey primary processors and one member from the Further Poultry Processors Association of Canada representing turkey further processors.

3.2 – Summary of the Response

39. The Respondent Agency declares that section 4 of Part II of the Proclamation contains both TFC’s quota allocation responsibilities and its discretionary authority. Parliament directed TFC to implement a marketing plan, which is set out in the Proclamation, although it did not direct the Respondent Agency as to how to implement the marketing plan. TFC maintains that Parliament left this to the broad discretion of the TFC members, who are a specialized group of industry stakeholders with broad experience and expertise in turkey production and marketing.

40. TFC states that the total federal quota is comprised of four components: the commercial allocation, the multiplier breeder allocation, the primary breeder allocation and the conditional export allocation. TFC draws attention to an excerpt from TFO's Complaint letter in which the Complainant states that 'TFO has no objection with the quantum of allocation recommended by TFC in the 2022 allocation'. TFC asserts that this indicates that TFO's Complaint is not about TFC's decision to approve the total federal quota, but about 4.0 million kg, or 2.3%, of the total federal quota and whether or not TFC has taken into account the Proclamation criteria. In addition, TFC makes reference to TFO's Complaint letter in which the Complainant states that 'the 2022 Allocation is harmful to TFO and its provincial stakeholders'. TFC asserts that there is no evidence of any harm to TFO or its stakeholders. TFC claims that the burden of proof rests on TFO to prove on a balance of probabilities to the Committee both of the assertions that the Proclamation criteria were not taken into account and that the 2022-23 commercial allocation is harmful to TFO and its stakeholders.
41. TFC disputes TFO's assertion that the 2022-23 commercial allocation was distributed using an overwhelmingly pro rata methodology. Using the 60/30/10 formula, TFO was allocated 40.2% of the commercial allocation increase whereas, if the market shares from the 2021-22 control period were used when the commercial allocation was set at 139.0 million kg, TFO would have been allocated 39.9% of the commercial allocation increase. In addition, TFC claims that the differences in provincial allocations between the 60/30/10 formula and the market shares from the 2021-22 control period range from -0.8% to 20.2%, which contradict TFO's assertion that the 2022-23 commercial allocation increase was distributed using an overwhelmingly pro rata methodology.
42. TFC asserts the February 14, 2022, meeting minutes indicate that the 60/30/10 formula is the result of an organic and dynamic discussion between the experts appointed with a wide discretion to implement TFC's marketing plan and determine how they each interpret and apply the Proclamation criteria. TFC maintains that the meeting minutes demonstrate a clear exchange of differing views and that does not mean the Respondent Agency did not consider the Proclamation criteria.

43. TFC claims that, at the February 14, 2022, meeting, Mr. Boyd challenges the TFC members to consider if the three options proposed address the Proclamation criteria to the members' satisfaction. TFC asserts that, before the motion to adopt the 60/30/10 formula, discussion on the Proclamation criteria occurred and Mr. Boyd's direct inquiry to all the directors is evidence of that.
44. With regard to allocating 452,905 kg to Nova Scotia prior to allocating the remaining volume using the 60/30/10 formula, TFC asserts that the February 3 and 14, 2022, meeting minutes indicate that all the TFC members were in agreement in principle with this. TFC also asserts that this was to mitigate disproportionately large reductions to Nova Scotia over the previous seven year period due to changes in specifically the WB market.
45. TFC claims that the Proclamation criteria are market factors, and the Respondent Agency has to take those market factors into consideration with the discretion to take other market factors into consideration if they believe they are relevant and important in making an allocation decision. There is no specific measure in the FPAA or in the Proclamation to demonstrate that TFC has taken into account the Proclamation criteria. TFC believes that the February 3 and 14, 2022, meeting minutes indicate that the Proclamation criteria were considered, explained and taken into account.
46. TFC pointed to a 1988 memorandum of law written by Mr. Henry Molot from the Department of Justice that discussed the interpretation of "taking into account" of section 4 of the Proclamation.
47. TFC disputes TFO's claim that the February 3 and 14, 2022, meeting minutes are the only evidence where directors apply the Proclamation criteria. TFC claims that Appendix II of the 2022-23 rationale is a detailed explanation of how the Respondent Agency interpreted and applied the Proclamation criteria. TFC states that it also considered other market factors that are not part of the Proclamation criteria, more specifically, provincial population and provincial retail sales of turkey. TFC maintains that the Proclamation criteria are not a closed set of consideration factors and that the Respondent Agency is entitled to its discretionary decision making power to consider other factors when it considers them to be relevant and appropriate.
48. In response to TFO's assertion that the 2022-23 rationale uses the same language as and is effectively a cut and paste of the 2021-22 rationale, TFC argues that in the absence of drastic market changes, there would not be any significant changes to those

considerations and how the rationale is explained. TFC claims that it is unfair to compare rationales from different allocations as each allocation is a fresh blank slate.

49. With respect to using market shares as information the Respondent Agency might consider relevant to set quota allocations, TFC asserts that base allocations were established by Parliament and the entire system of supply management of turkey began this way. TFC argues that, in theory, if an allocation was distributed entirely pro rata, provided that the Respondent Agency considered the Proclamation criteria, weighted them appropriately and provided Council with a rationale that supported TFC's decision, this allocation could be prior approved by Council.

3.3 – The Respondent Agency's Recommendation

50. As per TFC's Response of March 28, 2022, TFC recommends that Council dismiss the Complaint and that the 2022-23 allocation be approved by FPCC as expeditiously as possible. At the time of its Response, TFC also recommended that, if the Complaint process were to continue, Council prior approve the 2022-23 allocation so that the interlocking federal-provincial regulatory regime necessary for the orderly marketing of turkey remains in place.

Part 4: The Committee's Analysis and Recommendations

4.1 – Legal Framework

51. Taking into account the Agreed Facts and all of the documents, submissions, evidence and information provided by the parties, the Committee clearly understood the issues of the Complaint and the positions of both parties.

52. Sections 9.12 and 9.16 of TFC's By-Law No. 1 provide TFC members with the opportunity to amend or rescind a decision made at a previous meeting. In its letter of March 14, 2022, to the Respondent Agency, the Complainant requested that TFC rescind the motion made at the February 14, 2022, meeting to allocate the 4.0 million kg increase

according to the 60/30/10 formula. Although it does not preclude TFO from filing a Complaint with FPCC, the Committee is satisfied that the Complainant availed itself of the internal review process outlined in TFC's By-Law No. 1.

4.1.1 – Council's Role

53. Council's role and its statutory authorities are listed in the FPAA:

Duties of Council

6 (1) *The duties of the Council are*

- (a) *to advise the Minister on all matters relating to the establishment and operation of agencies under this Act with a view to maintaining and promoting an efficient and competitive agriculture industry;*
- (b) *to review the operations of agencies with a view to ensuring that they carry on their operations in accordance with their objects set out in section 21 or 41, as the case may be; and*
- (c) *to work with agencies in promoting more effective marketing of farm products in interprovincial and export trade and, in the case of a promotion-research agency, in promoting such marketing in import trade and in connection with research and promotion activities relating to farm products.*

[...]

Powers of Council

7 (1) *In order to fulfil its duties, the Council*

[...]

- (d) *shall review all orders and regulations that are proposed to be made by agencies and that are of a class of orders or regulations to which the Council, by order, provides that this paragraph is applicable and, where it is satisfied that the orders and regulations are necessary for the implementation of the marketing plan or promotion and research plan that the agency proposing to make the orders or regulations is authorized to implement, the Council shall approve the orders and regulations;*

[...]

(f) *shall make such inquiries and take such action within its powers as it deems appropriate in relation to any complaints received by it from any person who is directly affected by the operations of an agency and that relate to the operations of the agency;*

[...]

54. Therefore, Council, in fulfilling its duties, can either approve an agency's orders and regulations or disapprove them where it is not satisfied that the orders and regulations are necessary for the administration of the agency's marketing plan. Council cannot order an agency to adopt an allocation policy; that discretion lies with the agency. Despite the Complaint, both parties recognized at the hearing that Council in its decision cannot instruct TFC to specifically "design and implement a new commercial allocation policy".

4.1.2 – Council's Oversight

55. The parties have both expressed their view that previous Council decisions are not binding on future matters. *Res judicata* does not apply, and the Committee agrees. However, the parties have recognized that the principles set out and interpreted by Council in its previous decisions may be relevant to the resolution of future disputes.

56. The Committee is of the opinion that several sections of the "*Report of the Committee established to inquire into the complaint by the Manitoba and Saskatchewan signatories to the federal-provincial agreement respecting the comprehensive marketing program for eggs in Canada against the Canadian Egg Marketing Agency (CEMA) (2000)*" (hereinafter the "*Report of the Egg Complaint Committee - May 2000*") find application in this case, including the following:

The scheme enacted by the paragraphs under subsection 7(1) of the Act as its purpose that 'where it is satisfied' the orders and regulations 'are necessary for the implementation of the marketing plan', the Council 'shall approve the orders or regulations'. Implicit in this language is the requirement that, as a condition precedent to the approval process, the Council must first satisfy itself in this regard and that once a finding of such 'satisfaction' occurs, the Council is

thereafter required, by a mandatory statutory obligation, to approve the orders or regulations which it has under consideration. The determination of what constituted 'satisfaction' though, is a discretionary power solely within the purview of the Council.

57. Consequently, the resulting question for Council when reviewing TFC's proposal, is as follows: "is Council satisfied with TFC's 2022-23 allocation proposal?"

4.1.3 – TFC's Role

58. The TFC is a marketing agency responsible for the orderly production and marketing of turkeys and turkey meat in Canada. The FPAA states its missions and the means to achieve them as follows:

Objects

21 The objects of an agency are

- 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*
- b) to have due regard to the interests of producers and consumers of the regulated product or products.*

Powers

22 (1) Subject to the proclamation by which it is established and to any subsequent proclamation altering its powers, an agency may

[...]

- b) implement a marketing plan the terms of which are set out in the proclamation establishing it or in any subsequent proclamation issued under subsection 17(2) in respect of it;*
- c) prepare and submit to the Council (i) a marketing plan, if it is not empowered to implement a marketing plan, or (ii) any amendments to the marketing plan that the*

agency is empowered to implement, that it considers appropriate for the attainment of its objects;

[...]

Where Marketing Plan Makes Allocation

23 (1) *A marketing plan, to the extent that it allocates any production or marketing quota to any area of Canada, shall allocate that quota on the basis of the production from that area in relation to the total production of Canada over a period of five years immediately preceding the effective date of the marketing plan.*

(2) *In allocating additional quotas for anticipated growth of market demand, an agency shall consider the principle of comparative advantage of production.*

4.1.4 – TFC's Consideration of the Proclamation Criteria

59. In addition to the requirements under the FPAA, TFC must consider the Proclamation criteria when making an order or regulation such as the one before the consideration of the Committee:

4 (1) *No order or regulation shall be made where the effect thereof would be to increase the aggregate of*

- a) the number of pounds of turkey meat produced in a province and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and*
- b) the number of pounds of turkey meat produced in a province and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board*

to a number that exceeds, on a yearly basis, the number of pounds of turkey meat set out in section 3 of this Plan for the province unless the Agency has taken into account

- c) the principle of comparative advantage of production;*

- d) any variation in the size of the market for turkeys;*
- e) any failures by turkey producers in any province or provinces to market the number of pounds of turkey meat authorized to be marketed;*
- f) the feasibility of increased production in each province available to be marketed;*
- g) the existing production and storage facilities in each province; and*
- h) the comparative transportation costs to market areas from alternative sources of production.*

(2) No order or regulation shall be made pursuant to subsection (1) unless the Agency is satisfied that the size of the market for turkeys has changed significantly.

60. The Committee has previously provided its views in respect of the discretion of an agency and Council's oversight role. Specifically, in the *Report of the Egg Complaint Committee – May 2000*, it stated as follows:

Past Council decisions have afforded a wide discretion to an agency in applying criteria contained in a marketing plan. These decisions can therefore be said to have, over time, established rules of practice for the exercise of agency discretion in the making of quota orders which suggest that the requirement for the Council to 'satisfy itself' under the Act will occur where the Council had concluded that a given threshold appropriate to the criteria in the plan has been achieved in the contents of the proposed order or regulation. In other words, Council has not required in the past that agencies demonstrate their proposed orders are the best possible orders to regulate the industry but only that they fall within a range which comply with the marketing plan and the Act.

[...]

In every instance it must be viewed as circumscribed by the objects circumscribed in Section 21 of the Act. When criteria are developed by an agency which differ from those in the plan or where criteria in the plan are applied in a manner which have an effect contrary to the objects in Section 21, then the actions of an agency may fall into a classification of being unreasonable.

[...]

Ultimately though, it is the Council which determines the source, nature and level of evidence or proof which it requires in order to satisfy itself that the proposed order or regulation has achieved the necessary threshold to gain approval.

61. In making orders or regulations, agencies must not only comply with the requirements of section 21 of the FPAA, they must also “take into account” the Proclamation criteria. Both the Council as well as the Federal Court² have provided its views on the notion of “take into account”, indicating that this consideration must be careful and meaningful every time the allocation is established even if, in the end, the agency decides to give no weight to one or more criteria in its marketing plan.

62. Moreover, the Committee provided a good summary of the legal considerations of the criteria in the December 2004 NFPC Report into the BC Complaint as follows:

In other words, the six listed criteria must play an important role in the allocation deliberations of the Agency. As to how the Agency defines and applies each of the criteria, the Committee is of the opinion that such determinations must be in accord with the objects of an agency as prescribed under section 21 of the Act [FPAA].

[...]

Past Council decisions have afforded a wide discretion to an agency in applying criteria contained in a marketing plan (or indeed any other criteria), albeit this discretion cannot be said to be unlimited. Given that the context in which the obligation to take into account the six listed criteria involves the making of a quota order, the CTMA is required to give careful and meaningful consideration when determining how and the extent to which each criterion should be applied.

[...]

² *Saskatchewan (Agriculture, Food and Rural Revitalization) v. Canada (Attorney General)*, 2006 FC 345; Inquiry into the complaint by La Fédération des producteurs de volailles du Québec, the Nova Scotia Chicken Producers Board and the Newfoundland Chicken Marketing Board against the decision of the Canadian Chicken Marketing Agency respecting the third period 1994 quota allocations; Report of the Committee established to inquire into the complaint By The British Columbia Signatories to the Federal-Provincial Agreement Respecting the Comprehensive Marketing Program for Turkeys in Canada Against The Canadian Turkey Marketing Agency Concerning the Canadian Turkey Marketing Agency's Proposed Quota Allocations for the 2004/2005 Control Period (referred to by the Complainant in the record as the December 2004 NFPC Report into the BC Complaint).

This is a legal requirement which is not to be taken lightly.
(our emphasis)

63. Notwithstanding the different set of circumstances, the Committee is of the opinion that the interpretation and qualification in the *Report of the Egg Complaint Committee – May 2000* of what constitutes 'taken into account' of the criteria are applicable in the present case.

4.1.5 – Additional Remarks

64. Before applying this legal framework to the facts of the case, the Committee wishes to make additional remarks.

Results of an Allocation and the Allocation Methodology

65. TFO's representative mentioned during the June 3, 2022, hearing that it would be unlikely that a 100% pro rata allocation would respect the principles of section 21 of the FPAA. He added that the three proposals during TFC's deliberations produced almost identical results for each of the provinces. The Committee is of the opinion that the results of a calculation methodology should not be confused with the nature of the allocation methodology. One should not rely on the results produced by a methodology to invalidate the methodology itself.

66. The Committee is of the view that each allocation stands on its own merit and the Proclamation criteria must be taken into account each time TFC establishes the allocation.

The Scope of Council's Jurisdiction

67. In accordance with the powers conferred to Council by the FPAA, the Committee is of the view that Council has the statutory mandate to review an agency's orders and regulations in their whole and not only the elements that the parties bring to its attention. In that regard, the Committee acknowledges that in the 2022-23 commercial allocation, it was agreed that Nova Scotia be awarded 452,905 kg from the over base and TFO has not particularly emphasized this allocation to Nova Scotia as part of the dispute.

Nonetheless, Council has a statutory mandate to approve or not approve an allocation irrespective of the specific issues raised by parties and all aspects of the quota regulation are considered.

4.2 – The Committee’s Analysis

68. While a policy is not required for TFC to set the commercial allocation, prior to its suspension, the NCAP facilitated TFC’s demonstration to Council that it had taken into account the Proclamation criteria when establishing an allocation. This said, whether or not an allocation policy is in place, TFC must still demonstrate that the Proclamation criteria are taken into account.
69. Regarding the Complainant’s claim that TFC used an overwhelmingly pro rata approach to distribute the over base portion of the 2022-23 commercial allocation and that the 60/30/10 formula equates to an entirely pro rata allocation, the Committee is of the view that the process the Respondent Agency followed is of greater importance than the actual provincial distribution of the allocation. The Committee acknowledges that TFC has discretionary authority when establishing allocations as stated in the *Report of the Egg Complaint Committee – May 2000*, which includes considering other factors that may be relevant and appropriate but must nonetheless carefully and meaningfully take into account the Proclamation criteria when establishing an allocation above the base allocations.
70. The Committee recognizes that Council’s presence at the Respondent Agency’s meetings is not an obligation under the FPAA or the Proclamation. Nevertheless, as Council was not invited to attend the February 3 and 14, 2022, meetings, the Committee is left with no alternative than to rely on the minutes from those meetings, in addition to the 2022-23 rationale to determine whether or not TFC has carefully taken into account the Proclamation criteria.
71. In the February 3, 2022, meeting minutes, reference to the Proclamation criteria is made by two directors, by Mr. Matt Steele, the TFC director representing Ontario, and Mr. Heppell. Mr. Steele voices his concern that the proposals being discussed do not meet the Proclamation criteria. Mr. Heppell makes reference to the Proclamation criteria and

that it is the role of FPCC to determine whether or not they have been taken into account. No other TFC member makes reference to the Proclamation criteria during the February 3, 2022, meeting and there is no evidence of an in-depth discussion of them.

72. In the February 14, 2022, meeting minutes, Mr. Heppell and Mr. Steele are the only TFC members who make reference to the Proclamation criteria, although other directors echo Mr. Heppell's comments. The few references to the Proclamation criteria are made only after the 60/30/10 formula has been introduced for discussion.

73. The meeting minutes provide perspective on the limited discussion that took place in regards to the allocation and the Committee is of the view that the discussion does not reflect a careful and meaningful consideration of the Proclamation criteria nor does it reflect the rationale proposed by TFC in support of its proposed allocation. In fact, it would seem that the 60/30/10 formula that TFC proposed was mainly an attempt to get as many of the members to agree to an allocation method that would be suitable to them all or at least to as many as possible. The TFC Board of Directors seems to have decided on the 60/30/10 formula as a compromise of the four proposals that were presented. There was little mention and a lack of discussion on the principle of comparative advantage of production when the four proposals were discussed by the TFC members, despite the requirements under subsection 23(2) of the FPAA and the Proclamation. Additionally, the Committee is unclear how TFC members decided to incorporate Nielsen retail sales data in the 2022-23 commercial allocation. In the February 3, 2022, meeting minutes, some TFC members expressed some reservations regarding the use of Nielsen retail sales data, but the discussion surrounding how these members were convinced to adopt a formula that included this data is unclear to the Committee. The Committee is not stating the retail sales data is not a relevant factor that could be used in setting an allocation, but the basis of the Respondent Agency's decision and how it relates to the criteria when setting the 2022-23 commercial allocation is absent.

74. The Committee is not able to conclude that the Respondent Agency carefully and meaningfully took into account the Proclamation criteria when setting the 2022-23 commercial allocation. The Committee is of the opinion that the 2022-23 rationale is not an accurate reflection of what the February 3 and 14, 2022, meeting minutes indicate the TFC members discussed. Although Council considers the rationale in deciding whether or not TFC has met its requirements under the FPAA and Proclamation, the

evidence presented by TFO demonstrates the lack of a meaningful discussion by TFC members in respect of the 2022-23 commercial allocation. While the rationale itself may demonstrate that the Proclamation criteria were not ignored, the Council, in line with its oversight role and given the facts as presented, is of the view that it must consider evidence beyond the rationale and examine TFC's deliberations to establish whether the Proclamation criteria were given careful and meaningful consideration. In this case, based on the February 3 and 14, 2022, meeting minutes, the Proclamation criteria were not given such consideration and were therefore not taken into account during the allocation process.

75. The Committee views TFC's argument on harm as being unconvincing. The Committee is of the opinion that the concept of harm is not central to its decision. Notwithstanding that, the failure to carefully and meaningfully take into account the Proclamation criteria when establishing an allocation above the base allocations in the Proclamation is the harm.

76. Regarding the 452,905 kg of quota allocated to Nova Scotia, TFC explained that this allocation was made to mitigate disproportionately large reductions to Nova Scotia over the previous seven year period. The Committee is of the view that no evidence was provided to demonstrate that the Proclamation criteria were taken into account with respect to setting the commercial allocation.

4.2 – The Committee's Recommendation to Council

77. Based on the evidence that was presented and the Committee's conclusions, the Committee is of the opinion that TFC did not carefully and meaningfully take into account the Proclamation criteria when it established the 2022-23 commercial allocation. As such, the Committee recommends that Council not approve TFC's Amendment to the Schedule to the Canadian Turkey Marketing Quota Regulation (1990) for 2022/2023 that was received by FPCC on March 16, 2022.

4.3 – The Committee’s Recommendations to the Respondent Agency

78. The Committee notes the Respondent Agency’s decision to suspend the NCAP prior to a new commercial allocation policy being developed and implemented. Although the Committee acknowledges TFC’s ongoing efforts in developing a new allocation policy, suspending the NCAP and operating without one has left the Respondent Agency’s allocation determination vulnerable. The Committee strongly recommends that TFC continues to work towards developing a new commercial allocation policy.
79. The Committee acknowledges that Council does not have the authority to direct TFC to develop a commercial allocation policy. However, the Committee recommends that TFC members have a comprehensive discussion regarding the most appropriate way to carefully and meaningfully take into consideration the Proclamation criteria when setting allocations.
80. As an oversight body, it is important that Council is able to review the operations of agencies to ensure that they carry on their operations in accordance with their objects set out in section 21 of the FPAA and statutory obligations. As such, the Committee recommends that TFC include Council in relevant discussions relating to quota allocations.
81. In TFC’s meeting minutes, it is unclear which members are voting in favour of the motion and which members are opposed. The Committee recommends that the votes at the Respondent Agency’s meeting are recorded more clearly to indicate which members voted in favour of and against motions related to allocations.