

C-1



November 2, 2023

Christopher Hobbs
Simple Path Farms and Poultry Ltd.
520 Rusholme Road
Welland, ON L3B 5N7

RE: Market Development Final Assessment Determination for period A-174 and A-175

Dear Mr. Hobbs,

This letter is with respect to Simple Path Farms and Poultry Ltd.'s ("**Simple Path**") request that the Chicken Farmers of Canada Board of Directors (the "**CFC Board**") waive or reduce the market levy assessment for marketing periods A-174 and A-175 on the grounds that: a) Simple Path was unable to meet its market development commitments as a result of one or more force majeure events as set out in the Force Majeure Guidelines (the "**Guidelines**"), being Annex 1 to the CFC Market Development Policy (the "**Policy**"); and b) subsection 5(1) of the *Canadian Chicken Marketing Levies Order* is unreasonable because it is punitive.

This matter was heard by the CFC Board on October 11, 2023, with presentations being made by Chicken Farmers of Canada Staff ("**CFC Staff**") and by Simple Path.

After having considered the materials filed by the parties and their respective submissions at the October 11th hearing, the CFC Board has decided to deny Simple Path's request for the reasons set out below.

1. Background

Simple Path received market development quota for the periods A-174 and A-175 pursuant to the Policy. On April 26, 2023, CFC Staff assessed a levy of \$241,483.00 for marketing 167,083 kgs of live weight equivalent market development production other than in accordance with the Policy and

the *Canadian Chicken Licensing Regulations*. CFC Staff determined that the following levies are payable by Simple Path:

Period	Revised Commitment	Marketings		Levies			Total Levy
		Periodic Marketings	Under Marketings (1 st Tier)	Under Marketings (2 nd Tier)	Levy @ \$1.00/kg	Levy @ \$0.60/kg	
A-174	250,000	0	124,000	124,000	\$124,000	\$74,000	\$198,400
A-175	139,535	0	126,000	43,083	\$43,083	\$-----	\$43,083
Total							\$241,483

- Commitments expressed in live weight (kg) and Marketings expressed in live weight equivalent (kg)
- Period A-174 runs from January 16 to March 12, 2022
- Period A-175 runs from March 13 to May 7, 2022

Based on Simple Path's submissions and the presentation at the October 11th hearing, the CFC Board understands that Simple Path does not dispute the allegation that it did not meet its market development commitments for the A-174 and A-175 periods in accordance with the Policy and that it does not dispute the way CFC Staff calculated the quantum of the levy.

Rather, Simple Path submits that it should be relieved from paying all or part of the assessed levy based on force majeure and/or on the grounds that the levy, as assessed, is unreasonable because it is punitive.

2. Force Majeure

i. Force Majeure Guidelines

The Guidelines confirm that a market development licensee is relieved from remitting some or all of the levies assessed when a force majeure event applies to justify the failure or inability to market in a manner that accords with the Policy, the *Canadian Chicken Licensing Regulations*, and the *Canadian Chicken Marketing Quota Regulations*.

To be a force majeure event, the alleged event must satisfy all of the following preconditions:

- the event alleged must render the performance of the market development licensee's commitment to market the market development product as required by the Policy and Regulations impossible, not just difficult;

- b) the event must not be reasonably foreseeable; and
- c) the event must be beyond the market development licensee's control.

The Guidelines go on to provide more nuanced guidance regarding the way in which the CFC Board should interpret and apply the preconditions noted above.

ii. Simple Path's Claims that Force Majeure Applies

Based on the materials filed and the submissions made at the hearing, the CFC Board understands Simple Path's position to be that it wanted to comply with its obligations under the Policy but was unable to meet its commitments due to a variety of factors, including:

- a) Simple Path alleges that there was a domestic market shortage and that this shortage was unforeseeable. In support of this allegation, Simple Path has submitted various materials including pricing reports, and submits that it was repeatedly shorted by primary processors. Also, in support of this allegation, Simple Path submitted that at least one local marketing board was "cutting back on MDP kilograms to keep domestic product home for Canadian consumption."
- b) Simple Path submits that it attempted to purchase product from primary processors but was shorted or received product that was not eligible for export and experienced shipping issues. Simple Path submits that had it received the product that it ordered in good faith, it would have had sufficient product to meet its market development commitments.

iii. These Circumstances are not Force Majeure Events

The circumstances outlined by Simple Path are not force majeure events. These circumstances are best described as market challenges or commercial risks that accompany participating in the market development program.

Simple Path's allegation that there was a tight domestic market would, at most, have rendered Simple Path's performance of its commitments difficult, but it would not have rendered performance impossible. Also, an apparent failure of one or more suppliers to make deliveries as expected (even in breach of the terms of a contract) does not give rise to a force majeure event. This is a commercial risk.

The requirement is that performance be rendered impossible by the alleged force majeure event. Simple Path did not provide evidence to demonstrate that its performance was rendered impossible.

3. Alleged Unreasonableness of Levies Order

Simple Path submits that the subsection 5(1) of the *Canadian Chicken Marketing Levies Order* is unreasonable because: a) the levy is punitive in nature; b) the *Farm Products Agencies Act* does not authorize a levy that is punitive in nature; and c) the levies are inconsistent with Charter values as they are sufficiently disproportionate to the amount required to achieve a regulatory purpose so as to constitute a true penal consequence.

The CFC Board is not prepared to address the allegations advanced by Simple Path that subsection 5(1) of the *Canadian Chicken Marketing Levies Order* is unreasonable in some legal sense, whether that be based on it being allegedly being “punitive in nature” or otherwise being contrary to Charter values. The CFC Board is not equipped to adjudicate legal arguments of this nature and declines to do so for the following reasons.

First, while the CFC Board is assisted by independent legal counsel and its members are experts in their respective fields, the members of the CFC Board are not legally trained to adjudicate questions of law of this nature.

Second, the CFC Board views it as inappropriate for it to engage in a debate regarding the quantum of the levy under section 5(1) of the *Canadian Chicken Marketing Levies Order* in the context of a force majeure application.

The CFC Board’s role in the present context is to make factual determinations regarding the apparent factual existence of a force majeure event as defined by the Policy and whether the alleged force majeure event justifies non-adherence to the Policy in the sense of factual causation. The CFC Board would be acting beyond that mandate under the Policy if it were to turn an application for relief from a levy based on an alleged force majeure event into an adjudication of the levy itself. This would create significant uncertainty regarding the application of the Policy that could have broader impacts across the industry. The CFC Board is not prepared to introduce uncertainty of this nature into the industry through this process.

Issues of policy, such as the quantum of the levy under subsection 5(1) of the *Canadian Chicken Marketing Levies Order*, are normally addressed through broad based policy discussions with stakeholders not as a matter of adjudication involving a single industry participant.

Article 11 of the Policy provides that it will be evaluated on an ongoing basis and revised at the same time as the annual review of the Operating Agreement of the Federal-Provincial Agreement.

Also, it appears to the CFC Board that the approach advocated by Simple Path (i.e., that the CFC Board may revise the amounts set out in the subsection 5(1) of the *Canadian Chicken Marketing Levies Order* in the context of this hearing) would be inconsistent with the process for the making regulations and orders under the *Farm Products Agencies Act* (R.S.C., 1985, c. F-4).

4. Conclusion

Based on the above and having heard the parties' submissions and reviewed the documents on the record before it, the CFC Board finds that Simple Path has not described circumstances that meet the requirements of the Force Majeure Guidelines. As such, pursuant to paragraph 9.10 of the Policy, the CFC Board assesses Simple Path a levy of \$ \$241,483.00. The payment of the levy shall be made to the Chicken Farmers of Canada within 35 days after the day on which this final assessment is sent to Simple Path.

Sincerely,



Tim Klompmaker
Chair

cc: Alyssa Tomkins, counsel to Simple Path Farms and Poultry Ltd.
David Wilson, counsel to Chicken Farmers of Canada
Michael Laliberté, Executive Director of the Chicken Farmers of Canada