

Farm Products Council of Canada

Complaint Committee Report

Simple Path Farms and Poultry Ltd.

Against

Chicken Farmers of Canada

June 2024



Farm Products Council
of Canada

Conseil des produits agricoles
du Canada

Canada

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Part 1: Introduction

1.1 – Definitions and Concepts

1. In Canada, chicken consumers traditionally eat more white meat than dark meat. The Market Development Policy¹ (hereinafter **MDP**) is a policy administered by Chicken Farmers of Canada (hereinafter **CFC** or **Respondent Agency**) to facilitate the planned use of Canadian chicken and to balance consumption between white and dark meat in a manner that doesn't disrupt the Canadian domestic market. The MDP is operationalized at the provincial level, and is referred to by participants as the market development program.
2. The quantity of chicken under MDP is produced by Canadian chicken farmers (hereinafter the **Market Development Quota**) and sold to MDP Licensees (hereinafter the **Market Development Production**).
3. A MDP Licensee is a primary processor that slaughters chicken. Each MDP Licensee voluntarily participates in the MDP and each determines and requests a specific quantity of chicken it wishes to access through the MDP.
4. White meat produced under the MDP is sold by MDP Licensees on the domestic market. Dark meat produced under the MDP must be exported by the MDP Licensees in a specified eight-week allocation period, or in either of the periods immediately preceding or following the allocation period. That represents a total of three periods or 24 weeks (hereinafter **MDP commitments**).
5. A MDP Licensee may reduce the Market Development Production requested, provided the request is made prior to the start of the allocation period² in question. MDP offers flexibility in the cuts that can be marketed as well as flexibility to purchase cuts from other federally inspected primary processors.
6. When a MDP Licensee becomes aware of a *force majeure* event that has or will affect the marketing of the Market Development Production it has committed to market, the primary processor is required to advise CFC immediately, according to Annex 1 of

¹ For more details, see the MDP, pages 14-33.

² For more details on the allocation periods used in this Report, see Appendix A of this Report.

the Chicken Farmers of Canada MDP, which Annex is entitled “*Force majeure* guidelines”.

7. Licensees are required to market their Market Development Production in a manner and for an end-use consistent with the requirements of the MDP, within the prescribed periods. If a MDP Licensee fails to comply with its MDP commitments, a levy is assessed by CFC through a Notice of Assessment (MDP, Paragraphs 9.7. a, 9.7. b, 9.7. c and subsection 9.8).
8. Under subsection 11.1(1) of the *Canadian Chicken Marketing Levies Order* (hereinafter **Levies Order**), within 20 days after the day on which the Notice of Assessment is received, the primary processor may dispute the notice by advising CFC of its intention to do so in writing. Under subsection 11.1(2) of the Levies Order, within 30 days of receipt of the Notice of Assessment, the primary processor may dispute the notice by providing documents indicating that its failure to comply was not reasonably foreseeable, was beyond its control and was rendered impossible through no fault of its own.
9. Pursuant to paragraph 7(1)(f) of the *Farm Products Agencies Act* (hereinafter **FPAA**), a MDP Licensee may ultimately file a complaint to the Farm Products Council of Canada (hereinafter **FPCC** or **Council**), with respect to the imposition of a levy by the CFC.
10. CFC shall not suspend, revoke, or refuse to issue or to renew a market development license where the MDP Licensee establishes that the failure to comply is due to an event that: a) rendered it impossible, through no fault of the MDP Licensee, for the MDP Licensee to market the chicken as per the requirements of the MDP; b) was not reasonably foreseeable; and c) was beyond the control of the MDP Licensee. These three criteria are set out in the Levies Order and mirror the typical criteria in contractual *force majeure* clauses.

1.2 – Overview of the Complaint

11. On December 4, 2023, pursuant to paragraph 7(1)(f) of the FPAA, Simple Path Farms and Poultry Ltd. (hereinafter **SPF** or **Complainant**) filed a Complaint against CFC with respect to a November 2, 2023, decision by CFC regarding subsection 11.1(2) of the

Levies Order. This decision confirmed a levy of \$241,485.00 imposed on SPF under CFC's MDP for the periods A-174 and A-175 (hereinafter **Final Assessment**). CFC responded to the Complaint on December 21, 2023.

12. The grounds for SPF's December 4, 2023, Complaint were twofold. First, SPF claims that subsection 5(1) of the Levies Order is unreasonable or ultra vires. Second, SPF asserts that the collective result of the circumstances described by SPF regarding its failure to comply with its MDP commitments satisfied paragraph 11.1(2) of the Levies Order. SPF claims *force majeure* as those circumstances were unforeseeable, included a significant market shortage and bad faith dealings from other primary processors, and rendered SPF's performance of its MDP commitments impossible.
13. FPCC Advisory Personnel reviewed the Complaint and prepared a summary of issues report and recommendations to the Council Chairperson. Following the reception of this 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* (hereinafter **Complaint By-Law**). The FPCC Chairperson designated Council Vice-Chairperson Bonnie den Haan to preside over the Pre-Hearing conference, which was held on January 26, 2024, by videoconference.
14. In accordance with the Complaint By-Law, a Complaint Committee (hereinafter **Committee**) was formed following the Pre-Hearing conference and the Council Chairperson appointed Council member Maryse Dubé as the Committee Chair and FPCC Vice-Chairperson Bonnie den Haan as an observer. The Committee was instructed to proceed with a Hearing, which was held on April 17, 2024, by videoconference, with the consent of all parties. Intervener status was granted to the Canadian Poultry & Egg Processors (hereinafter **CPEP**).
15. On February 6, 2024, CFC and SPF respectfully submitted on their own initiative, in a common letter, that FPCC's Complaint adjudication mandate could include consideration of questions of law.
16. On March 28, 2024, SPF amended its December 4, 2023, Complaint. SPF's Complaint now rests on a single ground, namely that CFC, in its Final Assessment, erred in finding that the conditions identified in paragraph 11.1(2) of the Levies Order were not met.

The issue of the vires of subsection 5(1) of the Levies Order was removed from the Complaint.

1.3 – Agreed Facts

17. The following are the Agreed Facts as agreed to by the Complainant and the Respondent Agency prior to the Hearing.
18. In respect of periods A-174 and A-175, SPF requested and received 250,000 kg live weight equivalent (hereinafter **lwe**) and 139,535 kg lwe of Market Development Production, respectively.
19. On March 24, 2022, in light of the restrictions on chicken imports put in place by several countries and the logistical and transportation challenges due to the detection of avian influenza in Canada, the CFC Board of Directors approved a request made by CPEP to provide a one-period extension to all MDP Licensees to meet their MDP commitments for periods A-174 and A-175. This means that MDP Licensees had to the end of period A-176 (July 2, 2022) to meet their MDP commitments for period A-174 and had to the end of period A-177 (August 27, 2022) to meet their MDP commitments for period A-175.
20. On April 26, 2023, CFC staff issued a notice of assessment to SPF pursuant to the *Levies Order* of \$241,485.00 for marketing 167,083 kgs lwe of market development production for the periods A-174 and A-175 in contravention of the MDP and the *Canadian Chicken Licensing Regulations* (hereinafter **Licensing Regulations**).
21. On May 26, 2023, SPF advised CFC it would challenge the Notice of Assessment, claiming that its failure to meet MDP commitments was due to one or more *force majeure* events and that the levies were punitive, unreasonable, and not rationally connected to the purpose of the CFC MDP.
22. On July 12, 2023, SPF provided its submissions to CFC, adding the related claim that the levies are inconsistent with *Charter* values.
23. On July 13, 2023, SPF provided its book of documents to CFC.
24. On August 2, 2023, in response, CFC Staff provided detailed written submissions and documents to SPF, including submissions on legal questions raised by SPF.
25. On August 14, 2023, SPF submitted materials in reply.

26. On October 11, 2023, the matter was argued before the CFC Board of Directors.
27. On November 2, 2023, the CFC Board of Directors issued a Final Assessment Determination for period A-174 and A-175. The Final Assessment rejected SPF's challenge and upheld the Notice of Assessment.
28. On December 4, 2023, SPF filed a Complaint with the Council pursuant to the FPAA asking Council to strike s. 5(1) of the *Levies Order* as unreasonable or *ultra vires*, and to set aside the Final Assessment. In the alternative, SPF requested that Council conclude that it satisfies *force majeure* conditions of s. 11.1(2) of the *Levies Order* and cancel the Final Assessment.
29. Also on December 4, 2023, counsel for SPF made a written request to the CFC Chair, asking that CFC stay the payment of the \$241,485.00 levy until the Complaint's final disposition.
30. On December 5, 2023, in response to SPF's December 4, 2023, request, the CFC Board of Directors decided to hold the requirement of payment by SPF in abeyance pending the outcome of the Complaint to Council.
31. SPF does not contest that it has failed to meet its MDP commitments for the periods at issue.
32. SPF does not contest that CFC has properly calculated the Levies.
33. SPF argues that its failure to meet its MDP commitments was the result of events described in subsection 11.1(2) of the *Levies Order* (*inter alia*, an unforeseen domestic market shortage that was out of SPF's control and made its performance impossible).
34. The CFC Board of Directors does not view the circumstances outlined by SPF as *force majeure* events.

Part 2: The Complaint

2.1 – The Complainant: Simple Path Farms and Poultry Ltd.

35. SPF is an Ontario corporation based in Welland, Ontario. It is a “primary processor” within the meaning of the *Levies Order* and holds a market development license issued by CFC pursuant to subsection 4(1) of the Licensing Regulations.

- 36.** SPF claims that it is a small processor with relatively low plant supply allocation. It benefits from two provincial sources of guaranteed quantity.
- 37.** SPF argues that, unlike every other province where processors can go and buy live chickens, that is not the case in Ontario and Quebec where there is less flexibility due to existing supply rules.
- 38.** SPF's business model relies on chicken bought from other primary processors to cover the majority (90%) of its chicken requirements.
- 39.** SPF indicates that the MDP is used to ensure a five-day work week at its processing plant. SPF asserts that without the MDP, it does not have enough plant allocation to operate five days per week, but rather only three days per week. The three-day work week created staffing issues.
- 40.** SPF indicates that it has informal arrangements (telephone calls, purchase orders) with the other primary processors from which it obtains chicken and relies on the honour system. SPF indicates that trying to enforce any of these arrangements with other primary processors, should they not be complied with, would not be feasible from a business perspective.
- 41.** In order to comply with the MDP, SPF explains that its standard business practice is to purchase whole birds (barbecue birds and 2.8 kg birds) through the MDP and sell them whole on the domestic market for specific customers like restaurants. It also buys dark meat from other primary processors, which it then exports frozen.
- 42.** SPF explains that the MDP allows the supply of these birds, otherwise unavailable, to assist with opening up new domestic markets and provides SPF the ability to compete with other processors.
- 43.** According to SPF, as these birds are by definition small, it is difficult to envisage cutting them up into several pieces and separating the white meat from the dark meat.
- 44.** SPF does not have blast freezer capacity and must work with a cold storage company in order to be able to freeze chicken products to be exported.
- 45.** For SPF, the success of its business model, and therefore the successful marketing of its products, requires a surplus of dark meat available on the market.
- 46.** Furthermore, SPF asserts that a surplus of dark meat is inherent in the MDP itself.

47. SPF alleges that CFC was aware of its business model that required purchasing dark meat on the open market from other primary processors because of its small plant supply allocation.

2.2 – Summary of the Complaint

2.2.1 – SPF Commitments under the MDP

48. SPF does not dispute that it had failed to meet its MDP commitments to export 250,000 kg lwe of chicken dark meat for A-174 and 139,535 kg lwe of chicken dark meat for A-175 in a timely matter and that CFC has properly calculated the levies.
49. SPF acknowledges that CFC demonstrated flexibility in the past for meeting MDP commitments, for example in period A-171, recognizing the extenuating circumstances caused by the floods in British Columbia, and as described in paragraph 19 of this Report, in periods A-174 and A-175.
50. SPF argues that the full effect of the *force majeure* events in this case were not felt until after the start of A-174. Until then, SPF still anticipated being able to acquire export-eligible products on the market. As such, SPF argues that it did not have a basis to request a reduction of its A-174 commitment pursuant to paragraph 7.4.d of the MDP.
51. SPF claims that the effects of the *force majeure* were so significant that it was not possible for SPF to “catch up” in periods A-176 and A-177 due to significant underproduction and shipping disruptions.

2.2.2 – SPF’s Grounds and Rationale for the Complaint

52. According to SPF, CFC guidelines and policies are not binding.
53. SPF indicates that *force majeure* is not discretionary. SPF indicates that the Levies Order requires CFC to issue a notice to cancel or revise the assessment if it is established that failure to comply is due to events described in subsection 11.1(2) of the Levies Order.
54. SPF argues that there was no failure to market the product because it had clients lined up to purchase the product, but that it simply did not have any product.

- 55. SPF claims that the Market Development Production requested and obtained for A-174 and for A-175 was eventually exported, it just couldn't be exported within the timeframe prescribed in the MDP.
- 56. SPF alleges that it wasn't able to respect its MDP commitments due to a series of events that collectively meet the requirements of subsection 11.1(2) of the Levies Order and therefore constitute a *force majeure* event.
- 57. SPF claims the series of events that lead to its inability to comply with its MDP commitments were unforeseeable, resulting in an unprecedented situation that even the Respondent Agency wasn't able to fully foresee.
- 58. SPF submits that these events were beyond its control. SPF argues that it could not influence, let alone control the larger market forces that led to market shortages.
- 59. SPF asserts there are three major categories of events that collectively led to its failure to meet its MDP commitments. These three categories are: (1) sustained market shortage and historical levels of underproduction, (2) SPF was shorted products under its contracts with other primary processors, and (3) issues with blast freezing, labelling and availability of shipping containers.

2.2.2.1 – Sustained Market Shortage and Historical Underproduction

- 60. SPF argues that the two periods in question (A-174 and A-175) were characterized by sustained market shortages and historical chicken underproduction levels leading to a lack of meat supply.
- 61. SPF presented some DeValk Consulting reports from the week ending January 14th, 2022, to the week ending May 27th, 2022, to highlight market shortages. According to SPF, these reports are a good indicator showing the undersupply of drums, thighs, and boneless thighs, all MDP eligible products.
- 62. SPF argues that these reports show that dark meat was unavailable in both the United States and Canadian markets due to avian influenza, euthanasia of broiler flocks, transportation and labour challenges, and increasing record prices in most cut categories.
- 63. SPF asserts that according to paragraph 21(a) of the FPAA, CFC's mandate is, among other things, to promote competitive production. SPF claims that having a fair price is part of being competitive.

- 64. SPF claims that being competitive also means making sure that Canadian consumers are given a plentiful supply of good quality and well-priced chicken while producers are given a fair cost of production for their products at the same time.
- 65. SPF argues that CFC is responsible for consumer protection and should have a metric concerning what is a fair price for consumers, both in the retail space and in the wholesale space.
- 66. SPF argues that when the market is short, Canadian consumers substitute dark meat for white meat, which reduces the quantity of available dark meat that can be exported to meet MDP commitments.
- 67. SPF alleges that even if there was overproduction in periods A-172 to A-174, in anticipation that avian influenza in the United States would eventually impact Canada, the Canadian food service industry was stockpiling a significant amount of product for the rest of the year, which shorted the market. SPF claims this is why the product was not available for the wholesale market even though there was overproduction.
- 68. SPF argues that sustained underproduction caused by avian influenza, from period A-175 onwards also impacted its ability to meet its MDP commitments as the euthanasia of the birds significantly reduced the availability of chicken in the wholesale market.

2.2.2.2 – SPF Was Shorted Significant Amounts of Product

- 69. SPF asserts that a significant number of orders, intended to be exported in order to meet its MDP Commitments, were repeatedly shorted by various suppliers, in breach of their arrangements. To address this issue SPF alleges that it tried to order excess amounts of product without success.
- 70. SPF further argues that its inability to purchase product was not a function of price, but rather of the products' unavailability.
- 71. SPF explain that it does not have any penalty clauses in its contractual arrangements with its suppliers in case of supply shortfalls and argues that penalties would not have guaranteed a timely supply of a product given that none was available.
- 72. SPF asserts it had proposed to CFC that it exports alternatives such as dusted wings and premier Kosher products in order to meet its MDP commitments, but these proposals were rejected.

2.2.2.3 – Specific Labeling and Container Issues

- 73.** SPF alleges an issue with the labeling (“Fresh” instead of “Frozen”) of product that it intended to export, as an additional factor explaining its noncompliance with its MDP commitments for periods A-174 and A-175. SPF asserts that it bought a total of 15 loads of fresh raw material (around 330,000 kg) from one of its suppliers. The products were labeled “Fresh” and directed to a cold storage facility to be blast-frozen. SPF alleges that its supplier did not adequately label the product as “Frozen” and refused to take the product back for relabeling. SPF explains they had no other recourse than to cancel its orders and return the product, because taking the product back to Ontario from Quebec where the blast freezing facility was located, and re-bagging and relabelling the product would cost more than the product was worth.³
- 74.** Furthermore, SPF alleges that given the global context in 2022, delays and disruptions in shipping and container availability resulted in not being able to meet its MDP commitments.

2.2.3 – The CFC Final Assessment’s Direct Effect on SPF

- 75.** According to SPF, it is directly impacted by the CFC’s Final Assessment in two ways:
- 1) First, it imposes a financial burden on SPF’s business operations.
 - 2) Second, the Final Assessment puts SPF’s market development license (and thus the entirety of its business operations) at risk.
- 76.** Subsection 11.2(3) of the Levies Order provides that a primary processor “shall remit the levy [assessed under subsection 11.2(1)] within 35 days after the day on which the final assessment determination is received.” In turn, subsection 9(4) of the Licensing Regulations provides that a market development license “is to be automatically suspended if the holder fails to comply with subsection 11.2(3) of the [Levies Order].” As such, if the total levy amount is not remitted to CFC by December 7, 2023, and CFC does not forebear enforcing of subsection 9(4), SPF’s license to operate as a primary processor will be automatically suspended.

³ See email from Augo Pinho to Alyssa Tomkins, July 11, 2023, (document C-04, page 73).

77. On December 5, 2023, in response to SPF's December 4, 2023, request, the CFC Board of Directors decided to hold the requirement of payment by SPF in abeyance pending the outcome of the Complaint to Council.

2.3 – The Complainant's Recommendation

78. SPF seeks a recommendation from the Committee that Council makes the following conclusion and order the following remedy: "A determination that the *force majeure* conditions were met and, on that basis, further asks the Council to cancel the Final Assessment."

Part 3: The Response

3.1 – The Respondent Agency: Chicken Farmers of Canada

79. CFC is the marketing agency that was created under Part II of the FPAA to regulate the marketing of chicken in interprovincial and export trade in Canada. As per the *Chicken Farmers of Canada Proclamation* (hereinafter **Proclamation**), the CFC Board of Directors is composed of ten provincial chicken board directors, two directors from CPEP representing chicken primary processors, one director from the Further Poultry Processors Association of Canada (hereinafter **FPPAC**) representing chicken further processors, and one director from Restaurants Canada representing foodservice businesses.

3.2 – Summary of the Response

3.2.1 – CFC's MDP and Related Levies

80. CFC argues that the MDP and the related regulations are designed to provide for both flexibility and regulatory guardrails to incentivize compliance, to avoid market disruption and to treat competing processors equitably.
81. CFC underlines that the Market Development Quota requested by SPF is separate from, and in addition to the domestic quota.

82. CFC argues that the levy reflects the need for MDP Licensees to comply with the requirements of an orderly, planned, and non-disruptive production. CFC claims that a levy is only triggered when a primary processor, who has voluntarily chosen to participate in the MDP, nonetheless markets outside the parameters of these regulatory guardrails. CFC states that when the CFC Board of Directors decided to adopt the current two-tiered levy rates in 2011, the purpose of the levy was to make sure that it would not be financially beneficial for a processor to not comply with the MDP.
83. CFC argues that the MDP was developed and refined over the years on a collaborative basis, in consultation with MDP Licensees and the Provincial Commodity Boards that operate MDP within each province. The MDP and levy rates are reviewed on a yearly basis.
84. CFC underlines that related requirements are prescribed in the Licensing Regulations, Levies Order, and *Canadian Chicken Marketing Quota Regulations* (hereinafter **Quota Regulations**), as amended from time to time with the regulatory approval and oversight of the Council.
85. CFC asserts, in response to SPF's argument that all of the chicken that was subject to the levy was eventually exported, that compliance within the set timelines is a key component of the MDP. Marketing or exporting the product after the time allocated within the MDP does not negate noncompliance. In that regard, CFC cited the Dunn-Rite decision⁴ of the Federal Court of Appeal to stress that it's not just a matter of exporting the product but exporting it in a timely manner.

3.2.2 – Force Majeure Claim Procedure

86. CFC alleges that some of the elements presented by SPF in this Complaint (e.g., challenges faced by SPF compared to other primary processors, the impact of fixed plant supply in Ontario, SPF's business model) were not used as evidence during CFC's review of the Original Assessment and were not put before Council in writing before being mentioned in the Hearing.

⁴ *Dunn-Rite Food Products Ltd v Canada (Attorney General)* 2008 FCA 74

87. CFC argues this is contrary to section 30 of Council's Complaint By-Law which requires that each presentation made before the Committee be based on the written Documents and Additional Documents submitted to the Registrar in accordance with this by-law.
88. CFC claims that subsection 11.1(2) of the Levies Order makes clear that a complainant alleging *force majeure* must establish the criteria based on information and documents in writing, and CFC argues that what SPF presented in writing is much narrower than what it was verbally presented with during the Hearing.
89. CFC asserts that SPF has not respected the purpose of the Complaint By-Law, one of which is to ensure the evidence is disclosed in a timely, transparent and efficient manner so that there is a fair Hearing in which all parties can participate to the fullest (Complaint By-Law, paragraph 4(b)). CFC contends that the documentary evidence SPF has provided does not support its claims. CFC asserts that SPF's claims are bold assertions that do not demonstrate *force majeure*, and that despite having a further opportunity to make its case in this Complaint to the FPCC, SPF has failed to satisfy the criteria established in subsection 11.1(2) of the Levies Order.
90. CFC disputes the SPF allegations that CFC knew of SPF's business model regarding MDP, as well as the suggestion that it somehow accepted it, and further argues that it is not the role of CFC to accept or approve of any particular processor's chosen business model.

3.2.3 – CFC's Arguments Against the Complaint

91. As mentioned in Annex I of the CFC MDP, CFC explains that a primary processor must advise of a *force majeure* event when it becomes aware that it will affect its ability to market the product. CFC asserts that SPF advised them of a *force majeure* event for A-174 and A-175, on May 26, 2023, when SPF mentioned it would challenge the Notice of Assessment (which was sent on April 26, 2023), in accordance with subsection 11.1(2) of the Levies Order.
92. CFC argues that typically a *force majeure* would be a singular event, maybe with complicating factors. Subsection 11.1(2) of the Levies Order indicates that a processor may argue its failure to comply was due to "an event" that was not reasonably foreseeable, rendered performance impossible, and was beyond the

control of the processor. CFC asserts that SPF is not claiming a singular event as *force majeure*, but a multitude of events, and in doing so, SPF is pushing the boundaries in terms of the number of events it claims may constitute *force majeure*.

93. CFC underlines that the Levies Order provides that the CFC Board of Directors may only cancel or vary a levy assessment if a MDP Licensee establishes that its non-compliance is due to an event that respects all three criteria of subsection 11.1(2) of the Levies Order.

3.2.3.1 – Criteria 1: Not Reasonably Foreseeable

94. CFC argues that the MDP Guidelines say that assessing whether *force majeure* occurred must include a recognition that markets are subject to inherent risks and uncertainty. As such, CFC claims that *force majeure* must be something that could not have been anticipated or addressed through proper diligence and planning. CFC underlines that the pattern observed across five periods (A-171, A-172, A-173, A-174, and A-175) demonstrates that the events alleged by SPF in this Complaint as constituting *force majeure* were foreseeable. CFC further argues that the SPF reading of the DeValk Consulting reports was selective and subjective.
95. As an example, CFC highlights a statement indicating that in 2021, chicken prices started strong and got stronger during the course of the year⁵. CFC asserts that this statement suggests the price spikes in 2022 were at least partly foreseeable. CFC further argues that the concept that there could be a tight market condition with increased prices was foreseeable and to some extent foreseen. In addition, CFC argues that in the assessment for the A-171 to A-173 periods, SPF raised similar arguments about the failure of its suppliers to deliver eligible product to those raised here, and that as a result the events relied upon to argue *force majeure* for periods A-174 and A-175 were foreseeable.

3.2.3.2 – Criteria 2: Impossible, Through No Fault of SPF

96. CFC argues that the events relied upon to claim *force majeure* must have made it impossible, not just difficult, to market the committed amounts in accordance with

⁵ See DeValk Consulting Report (document C-04, pages 11-24).

the MDP. CFC underlines that a tight domestic market would at most have rendered SPF's commitment difficult but not impossible. CFC further alleges that the arguments presented concerning the lack of freezing capacity at SPF and the delays experienced using third party flash freezing, along with the corresponding labelling issue, indicate that there was product available to export despite the tight market.

97. CFC asserts that the alleged failure of SPF's supplier to supply the product as raised by SPF in this Complaint, is not in itself enough to conclude that *force majeure* occurred. CFC argues that a failure of a supplier to deliver as expected is a commercial risk.
98. CFC argues that overall, when SPF argued that it was shorted by other processors under the purchase arrangements they had made, SPF was merely alleging bad faith and breach of contract. CFC argues that *force majeure* cannot be founded on speculation.
99. CFC asserts that allowing a processor to claim *force majeure* in situations where compliance was not truly impossible would give an unfair competitive advantage and risks an inconsistent application of the MDP.
100. On the alternative products proposed by SPF to meet its MDP commitments (dusted wings and Kosher products), CFC asserts that all MDP Licensees were informed and knew in May 2021, that these alternative products would not qualify to satisfy MDP commitments.
101. CFC confirms that there were no applications for supplementary imports as a result of market shortages in the period in question⁶. CFC argues that applications for supplementary imports are a standard indicator of a domestic market shortage. If there are no applications the presumption is that the market is not short.

3.2.3.3 – Criteria 3: Beyond SPF's Control

102. CFC argues that under the MDP, *force majeure* cannot be claimed if the MDP Licensee contributed to the event by their own actions or inaction, including by failing to reduce

⁶ Supplementary import permits can be granted by Global Affairs Canada (GAC) under special circumstances, such as when there are market shortages. When both domestic production and global Tariff Rate Quotas (TRQ) are inadequate to supply the market, GAC has a supplementary import policy, which is meant to be the ultimate safety net to ensure the market is supplied.

its current or future MDP commitment in a timely manner. CFC reiterated that SPF did not reduce its MDP commitment as it could have pursuant to paragraph 7.4.d of the MDP.

- 103. CFC asserts that SPF's choice of business model resulted in its MDP noncompliance. CFC asserts that a failure of one or more suppliers to make deliveries as expected is a commercial risk and CFC underlines that the *Force majeure* guidelines⁷ make clear that commercial risks and market conditions do not qualify as *force majeure* events.
- 104. CFC asserts that SPF's business model related to MDP is not planned marketing and is inconsistent with an orderly marketing system. CFC argues that a lack of blast freezing capacity and difficulties in obtaining containers for shipping do not constitute a *force majeure* event.
- 105. CFC argues that whether SPF had customers or not is not the issue, but rather whether SPF complied with its MDP commitments, and if not, if non-compliance can be attributed to a *force majeure* event.
- 106. CFC asserts that no other MDP Licensee, large or small, failed to meet its MDP commitments for periods A-174 and A-175. According to CFC, SPF failed to explain why it alone was unable to meet its MDP commitments during these periods.

3.3 – The Respondent Agency's Recommendation

- 107. CFC contends that SPF has failed to establish the factual or legal basis necessary to support the validity of its Complaint.
- 108. CFC asserts that SPF has failed to show that its admitted noncompliance with its MDP commitments occurred as a result of an event that was not reasonably foreseeable, rendered it impossible to comply, and was beyond its control.
- 109. CFC asks Council to dismiss SPF's Complaint.

⁷ See *Force majeure* guidelines, pages 29-30.

Part 4: Intervener

4.1 – The Intervener: The Chicken Primary Processing Sector of the Canadian Poultry & Egg Processors

- 110.** CPEP is the national association representing poultry and egg processors and in the context of this Complaint; CPEP represents the chicken primary processing sector.
- 111.** SPF is a member of both CPEP and FPPAC.

4.2 – Summary of The Presentation

- 112.** CPEP explained that under the voluntary MDP, chicken primary processors may choose to request an amount of Market Development Production.
- 113.** CPEP emphasized that, as indicated in the directive of the MDP, it must be done without disrupting the domestic market. For each province, the MDP allocation is kept at 16% of the domestic allocation.
- 114.** CPEP underlined the importance that the MDP be applied in the same manner to all processors, even for determining *force majeure* events, which events should remain exceptional.
- 115.** On March 1, 2022, for periods A-174 and A-175, CPEP, on behalf of its chicken primary processing members, sent a letter to CFC asking them to provide an additional period to meet the MDP commitments. The request was linked to trade restrictions imposed by some countries resulting from avian influenza cases in Canada. This request was granted by CFC – see paragraph 19 of the Agreed Statement of Facts section of this report.

Part 5: The Committee's Analysis and Recommendations

5.1 – Legal Framework

5.1.1 – Council's Role

116. 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;*

[...]

5.1.2 – CFC's Role

117. The CFC is the marketing agency responsible for the orderly production and marketing of chicken and chicken 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;*

d) undertake and assist in the promotion of the consumption and use of any regulated product in relation to which it may exercise its powers, the improvement of the quality and variety thereof and the publication of information in relation thereto;

[...]

(j) expend any money received by it through the conduct of its operations, whether by way of licence fees, levies or charges paid by persons engaged in the production or marketing of any regulated product in relation to which it may exercise its powers or otherwise;

5.2 – The Committee’s Analysis

5.2.1 – Force Majeure as a Multitude of Events

- 118.** The Committee would like to start its analysis by reiterating the importance of respecting the Council's Complaint By-Laws to ensure a fair process for all parties. The Committee also acknowledges that SPF did not submit any notice under Annex I of the MDP. It is anticipated that participants in the MDP will respect the provisions of the Policy.
- 119.** The initial question to be considered by the Committee is whether the wording of subsection 11.1(2) of the Levies Order, which refers to “an event”, could cover situations in which there was not a singular event that resulted in noncompliance with the MDP requirements, but rather a collection of unrelated events. Could a multitude of unrelated events collectively constitute *force majeure* and fulfill the criteria of subsection 11.1(2) of the Levies Order?
- 120.** Looking at the caselaw submitted by the parties, the CFC relied on the Supreme Court of Canada (SCC) decision in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* 1976 1 SCR 580. This appears to remain the leading SCC case on the application of *force majeure* in the context of changes to the economic environment. In this case, the argument advanced was that non-availability of markets for a product constituted *force majeure*. In deciding the case, the SCC considered the general nature of *force majeure* clauses and noted that they generally operate to discharge a party when:

“...a supervening, sometimes supernatural event, beyond the control of either party makes performance impossible. The common thread is the unexpected, something beyond reasonable human foresight and skill. Non-availability of markets as a discharging condition is limited to an event over which the respondent exercises no control.”⁸

- 121.** Further the SCC went on to distinguish between nonavailability of markets for all, versus nonavailability of markets for the specific defendant in the case. The Court analyzed the events that occurred and determined that “available market” does not mean an advantageous or profitable market, and that lack of an available market would not cover situations in which lack of an effective marketing plan or inordinate operating costs were the true cause of the failure of the company as opposed to overall changes to the market. In deciding the case, the SCC relied on evidence that St Anne’s competitors were able to remain profitable in the same sector.
- 122.** While relying primarily on the *Atlantic Paper Stock* case and its reasoning that *force majeure* clauses presume “an event”, CFC did acknowledge the “hypothetical possibility” that a series of events might collectively constitute *force majeure*. However, CFC argued that it depends upon the nature of the specific events and the wording of the clause in question. In this respect, both parties to the Complaint seem to be in agreement, as SPF argued that *force majeure* does not have a singular meaning, and that the term *force majeure* needs to be interpreted in the context of the specific applicable clause and the nature of the event.
- 123.** With respect to the caselaw presented by SPF, they argued that *Atlantic Paper Stock* is not applicable to facts in this situation. Instead, they rely upon the cases of *Régie des Marchés Agricoles et Alimentaires du Québec*, *Metson v. R.W. DeWolfe Ltd.*, *Telecom Decision CRTC 2014-419*, and several others.
- 124.** In the case of *Régie*, SPF argued that the court has articulated that a series of events can collectively constitute *force majeure*. In this respect, reliance is placed on the following statement:

« [42] Le caractère exceptionnel, par sa nature même, peut difficilement être défini. À tout le moins, il réfère à une situation particulière imprévue et hors de la volonté du demandeur. Cette situation peut être le fait d’un seul événement, comme un cas de force majeure, ou d’une combinaison

⁸ *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co.* 1976 1 SCR 580 at page 580.

d'événements singuliers qui se produisent dans le contexte des affaires, celui socio-économique ou encore de la vie personnelle et formant une conjoncture unique propre à l'environnement contemporain de ces événements, et qui nécessite une intervention sur les règles applicables. »⁹

125. The Committee is of the opinion that the words “ou d’une combinaison d’événements singuliers qui se produisent dans le contexte des affaires” refers not to the concept of *force majeure*, but rather to that of the exceptional nature represented by the Régie's power of exemption (paragraph 40 of that decision). Consequently, the Committee is not convinced that the Régie decision is directly applicable to this situation.

126. Moreover, the Committee also notes the following statement:

« [49] La planification des Demandeurs en 2019 repose sur un scénario où tout va bien. Malheureusement, ce n'est pas ce qui s'est passé. L'exemption demandée ne peut pas servir à atténuer les conséquences des choix d'affaires des Demandeurs. Elle ne peut se substituer à un régime d'assurance. »¹⁰

127. SPF also argues that the *Telecom* decision supports their argument about a combination of events constituting *force majeure*. In that case, Telus Communications Company [TCC] was responsible for the implementation of a broadband service for several rural and remote communities in Alberta and British Columbia within a certain timeframe. The issue was whether a unique combination of events allowed for Telus to extend a contractual deadline by several months. While a number of events were put forward in support of the extension, the Commission in that decision stated:

“The Commission considers that the 2013 flooding in Alberta was a force majeure event that was beyond TCC's control and that would have contributed to a decrease in TCC's resources for broadband service planning and implementation for several months. The Commission notes that while the winter weather in parts of Canada may have been more severe in 2013-2014 than in recent years, it is hard to measure the associated effects in a given area in TCC's operating territories of Alberta and British Columbia. The Commission considers that the flooding alone would have had a significant effect on TCC's broadband service expansion operations in remote areas, and that the other challenges TCC faced, such as helicopter-based construction processes and complex interactions with First Nations, also affected TCC's implementation timeline.”¹¹

⁹ Régie des Marchés Agricoles et Alimentaires du Québec, decision 12515 February 16, 2024 at page 7.

¹⁰ Ibid at page 8.

¹¹ Telecom Decision CRTC 2014-419, August 7, 2014 at page 6.

128. In the view of the Committee, the extension granted in the *Telecom* case was based primarily on the flooding event. It is therefore difficult to assess the relevancy of the other combined factors in the Commission's analysis of *force majeure* in that case.

129. As noted, SPF also relied on the case of *Metson*. In that case, which was based in nuisance, the court indicated:

“I am satisfied and find as a fact that the contamination of the plaintiffs' water supply was due solely to the run-off from the defendant's land of a mixture of surface water and manure. I accept the evidence of the plaintiffs that the rain over the weekend in question was unusually heavy and that the weather in the preceding weeks was extremely cold. However, I am satisfied and so find that the heavy rain or the extreme cold (or a combination thereof) were not that unusual or unforeseeable as to constitute an Act of God or “force majeure”.¹²

130. While it is clear that there was consideration of a combination of events (rain and cold), the Nova Scotia Supreme Court also alluded to the fact that the runoff that caused the damage was a singular event and that the combined rain and cold were not so unusual or unforeseeable as to constitute *force majeure*. Further, as noted, the claim was in nuisance and does not involve a discussion of *force majeure* in an economic context. As such, it does not appear to prove overly useful in the specific context of this case.

131. The remaining cases provided by SPF were determined based on scenarios and grounds that do not appear similar enough to convince the Committee that they are directly applicable to this situation. Overall, the caselaw provided by the parties has not definitively established in the Committee's view that the criteria set out in subsection 11.1(2) of the Levies Order requiring “an event”, may indeed be fulfilled by a combination of unrelated events. However, the Committee recognizes the need to examine the specific events relied upon by SPF in this case, given the parties have indicated that, in theory, the legal concept of *force majeure* could arguably be met through a series of events.

¹² *Metson v. R.W. DeWolfe Ltd.*, 1980-10-09 Nova Scotia Supreme Court Trial Division at page 2.

5.2.2 – Force Majeure in Regard to Levies Order Criteria

132. The Committee was interested in whether the events invoked by SPF, taken as a whole, might meet the three criteria of *force majeure* described in subsection 11.1(2) of the Levies Order. The three criteria are expressed in the context of “an event” experienced by the party claiming *force majeure*, that was not reasonably foreseeable, that made performance impossible, and that was beyond the control of the party. All three criteria must be met in order for subsection 11.1(2) of the Levies Order to be relied upon to cancel the levy.

5.2.2.1 – Criteria 1: Not Reasonably Foreseeable

- 133.** The Committee first considered whether the combination of events was reasonably foreseeable at the time SPF decided to participate in the MDP for A-174 and A-175.
- 134.** Initially restricted to Southeast Asia in the 2000s and having a strong impact on the poultry sectors of these countries, the H5N1 strain of the virus causing avian influenza has gradually spread around the world, becoming a growing threat to the global poultry industry over the years. The Committee is of the opinion that the potential threats of avian influenza to North American poultry farming, through the migrations of wild birds, were not unknown to specialists in the North American poultry sector in 2021.
- 135.** Despite the arrival in 2022 of the first cases of avian flu in the United States and Canada on commercial farms, the Committee believes that this situation was foreseeable. As for predicting the real impact of these cases of avian influenza on the production levels of the Canadian poultry sector and therefore on wholesale prices, the Committee is of the opinion that although difficult to estimate, avian influenza impacting the Canadian poultry economy was foreseeable at the time SPF decided to participate in the MDP for A-174 and A-175.
- 136.** During the Hearing, SPF indicated that people saw what was happening in the United States with respect to avian influenza and that the expectation was that once the flocks came to Canada, they would bring avian influenza with them, causing an impact. The extent of the impact was unclear, but the fact that AI was coming and could impact the sector was known and therefore foreseen.

- 137.** In addition, for the Committee, as noted in paragraph 19 of the Agreed Facts section of this Report, extending the marketing period at the request of primary processors demonstrates that the CFC has taken into consideration the difficulties faced by all primary processors arising from the issues associated with avian influenza in the United-States and Canada.
- 138.** From the beginning of 2020, the consecutive shutdowns of the various world economies due to Covid-19 slowed down, if not stopped, world trade. The impact of the slowdown in the entire supply chain that Covid-19 had with respect to the availability of labour and warehouses, and with respect to delays in shipping and the consequential impact on container availability, had been present since the end of 2020. This global shortage of container and situation of shipping delays began in 2020 and was augmented throughout 2021. The Committee is of the opinion that when SPF made its MDP applications for A-174 and A-175, SPF could not have been unaware of this new reality in terms of logistics inherent in international trade.
- 139.** SPF operated under a business model in which it used its Market Development Production to fulfill domestic orders and relied on additional product from other primary processors in order to meet its MDP commitments. This commercial decision made by SPF required it to be able to receive additional chicken from other primary processors and suppliers in order to meet its MDP commitment, as opposed to utilizing the received Market Development Production for that purpose and obtaining chicken from other suppliers to meet its domestic contractual requirements.
- 140.** This was a choice made by SPF to prioritize its domestic contracts over its commitment to the MDP. This was a business decision and one that was made in the context of a market that was foreseeably becoming tighter. SPF was free to make its admitted business choice to feed Canadians first, however it must accept the repercussions of that business choice in the context of its MDP obligations. The choice by SPF, regarding the use of the volumes obtained through the MDP, appears to the Committee as a choice that takes into account the risks associated with this business model chosen. This decision includes voluntary and conscious risk-taking by SPF, being dependent on the market and its hazards such as a fluctuation in prices and product availability. In the Committee's view, these market risks were reasonably

foreseeable, and the business model which created the risk and contributed to the failure of SPF to meet its MDP commitment was the choice of SPF.

- 141.** SPF discussed being “shorted” regularly on its orders from other primary processors as one of the elements that, when combined with other factors, constituted *force majeure*. The Committee views the issue of being “shorted” as a foreseeable business risk, particularly in the context of the operations of SPF as described. SPF indicated that its agreements with other primary processors to obtain chicken were done through purchase orders and based on the honour system. It would acquire chicken through purchase orders placed week to week or day to day depending upon availability.
- 142.** SPF further indicated that it had an arrangement with one supplier, but that the extent of chicken provided under it was limited. As well, with respect to another supplier, it was indicated at the Hearing that it would not give SPF any kind of contract, presumably on the basis that SPF was a primary processor in competition with them.
- 143.** Knowing these limitations with obtaining chicken from its competitors, the Committee is of the view that it was foreseeable that, in the context of the business model implemented by SPF whereby it sold its Market Development Production domestically, any shortages in the chicken delivered under its purchasing arrangements would impact its ability to meet its MDP obligations.
- 144.** Regarding the extent of the inflationary context in 2022 and its impact on consumer trends in Canada, although in July 2021 the Bank of Canada (BoC) publicly estimated inflation to be close to 2% for 2022, at the end of 2021, the BoC began to publicly warn of a 2022 potentially marked by significant inflation.
- 145.** The Committee is of the opinion that before the start of the A-174 and A-175 periods, SPF was aware of a potential inflationary context for 2022 that could, by definition, impact consumption trends. Although the exact impact was difficult to quantify, it became increasingly predictable in the months leading up to the start of the relevant periods. SPF could have changed its MDP commitment amount in response to these risks.
- 146.** In addition, SPF had failed to meet its MDP commitment in the three previous marketing periods for reasons similar to those articulated with respect to the two

periods in issue in this Complaint. This suggests to the Committee that the failure to market was due to events and issues that were foreseeable.

- 147.** The technical limitations mentioned by SPF regarding its freezing and labelling capacities appear to the Committee to be inherent in SPF's business choices. SPF was aware of the constraints of its equipment when it voluntarily applied to the MDP, so the issues associated with having to obtain blast freezing services from third parties appear to the Committee to be reasonably foreseeable.
- 148.** Taken individually, the Committee finds that the events relied on by SPF to constitute *force majeure* were reasonably foreseeable prior to the onset of periods A-174 and A-175. The Committee considers that while SPF may not have expected all of these events to arise at the same time when it requested its MDP for A-174 and A-175, the potential for this combination of events was reasonably foreseeable.
- 149.** The possibility of revising MDP requests up to the beginning of the period concerned was not used by SPF. The Committee views this as a conscious choice by SPF, despite the foreseeable risks mentioned above. The Committee is of the view that the first criterion referred to in subsection 11.1(2) of the Levies Order has not been met.

5.2.2.2 – Criteria 2 and 3: Impossible, through no fault of SPF and beyond SPF's Control

- 150.** Could the combination of the events described have prevented SPF, through no fault of its own, from marketing the chicken obtained under its MDP application for periods A-174 and A-175?
- 151.** The Committee was interested in the notion of “through no fault of its own”. SPF explained in this Complaint that its business model was to sell the volumes obtained under the MDP on the domestic market, and then to undertake to buy the necessary dark meat on the export market, in order to meet its commitments under the MDP. This two-step approach is a business choice that was made by SPF.
- 152.** The Committee considers that SPF is solely responsible for the risks generated by this choice of business model. By choosing to sell the MDP volumes on the domestic market and being reliant on other suppliers to obtain the chicken needed to comply with its MDP obligations, the Committee considers that SPF has significantly increased the risks of not being able to meet those obligations. The Committee considers that with such an approach, SPF has made itself dependent and vulnerable

to the vagaries of the domestic market. Therefore, the Committee is of the opinion that the business model adopted by SPF resulted in its inability to meet its commitments to the MDP. In the Committee's opinion, the second criterion referred to in the Levies Order is therefore not met.

- 153.** Although SPF made efforts to overcome the impacts of this combination of events that occurred, SPF's choice of business model is what exposed it to the levels of business risk that ultimately lead to its inability to meet its MDP commitments. SPF has argued throughout that the chicken that it was required to market, was eventually marketed, and that it just required a longer time period to do so.
- 154.** However, as noted, the system of supply management is dependent upon orderly and planned marketing of products so as to not disrupt the domestic market. All processors were given additional periods to comply as a result of border restrictions from avian influenza. Nonetheless, even with the additional periods provided, SPF could not get the product marketed within the set timeframe, while all other processors were able to do so.
- 155.** SPF indicated that it took every action that it could to meet its MDP commitments, however it did not take the step of reducing its market development commitment in the time period in which this could be done. SPF continued, despite having failed to comply with its MDP commitments for the three prior consecutive periods, to believe that it could nonetheless meet its commitment through other actions – for instance by trying to market other products that CFC had already indicated were not eligible for the MDP.
- 156.** It would seem more reasonable for SPF to have reduced its MDP commitment given its situation. However, SPF's requested amount of MDP appears to have been determined to allow for a five-day workweek of chicken processing for its staff. SPF did indicate at the Hearing that a MDP commitment amount of 250,000 kg lwe provided sufficient chicken supply for a five-day workweek rather than a three-day workweek.

5.3 – The Committee’s Recommendation to Council

- 157.** Based on the evidence that was presented and the Committee’s conclusions, the Committee is of the opinion that looking at the cases submitted, and agreeing with the proposition of both parties that in order to determine whether the conditions of *force majeure* are present, the situation must be examined within the context of the wording of the specific provision in question and the nature of the event, the Committee is of the opinion that this particular series of events in this particular context cannot be relied upon to constitute *force majeure*, and excuse the failure of SPF to meet its MDP commitments.
- 158.** To find that the unrelated series of events that occurred in this case and that have been relied upon by SPF constitute *force majeure* would be to extend the concept of *force majeure* and its exceptional nature beyond what, in the Committee’s view, was intended.
- 159.** Further, in this particular situation, the specific clause in question in the Levies Order references “an event”. Even if the Committee broadens the interpretation of “an event” and considered it to cover “events”, which the Committee does not believe is an appropriate interpretation of the specific clause in issue, the Committee nonetheless has not been convinced by the evidence that the criteria found in subsection 11.1(2) of the Levies Order have been met, either through the impact of an event, or several events, that SPF is relying upon, to excuse its non-compliance.
- 160.** Looking more specifically at the situation in the context of a supply managed industry, one of the safeguards is that the “marketing” of Market Development Production chicken must be completed within certain periods. Only in the most exceptional of circumstances would *force majeure* be found to exist in the context of the controlled supply management system.
- 161.** SPF is not new to the supply management system and is aware of the rules. Further SPF understands that the MDP is voluntary, that it presents certain challenges, and should be well aware of the issues such as the need for additional time when having to rely on third parties for blast freezing the product for export, and appropriate labelling.

- 162.** SPF argued that the criteria of subsection 11.1(2) of the Levies Order must be examined in light of the very specific situation of SPF as a small player in the chicken industry and that the conditions that might result in *force majeure* for SPF would not be the same conditions that might result in *force majeure* for a larger player.
- 163.** The Committee has considered this argument and agrees with the position put forward by CPEP, the Intervenor in this case. CPEP pointed out in its presentation that participation in the MDP is voluntary, that participants know the rules, and that each period is determined on a bid-by-bid basis that can be changed, meaning that MDP participants can change their allotment.
- 164.** Participation in the MDP must be done without disrupting the domestic market, and consequently the rules for the MDP are very strict and very clear. Every participant in the MDP commits to market as required and every participant is subject to the same rules. It was also noted by CPEP during the Hearing that it is essential that the MDP apply to all participants in the same manner. This would also be the case with the situation of *force majeure*.
- 165.** The criteria for *force majeure* are part of the Levies Order, and there is a need to ensure that rules (including *force majeure*) are applied consistently to all processors. The rules are not decided by a company on a case-by-case basis.
- 166.** The Committee agrees that the rules need to be clear and to be applied to all in the same manner regardless of the size of the company.
- 167.** The Committee is of the opinion that *force majeure* does not apply to foreseeable business risks. In the context of economic factors, *force majeure* should be resorted to when an event beyond the control of the party makes performance impossible as opposed to being relied upon when an event makes performance difficult or commercially impractical.
- 168.** To conclude, the Committee recommends that the Council reject the Complaint submitted by SPF.

Appendix A – CFC Allocation Periods

A “period” means the length of time, as established by Chicken Farmers of Canada, during which chicken produced in a province is authorized to be marketed (*Chicken Farmers of Canada Operating Agreement*, paragraph 2.01 (I)). This length of time is currently set at 8 weeks.

Period	From	To
A-171	August 1, 2021	September 25, 2021
A-172	September 26, 2021	November 20, 2021
A-173	November 21, 2021	January 15, 2022
A-174	January 16, 2022	March 12, 2022
A-175	March 13, 2022	May 7, 2022
A-176	May 8, 2022	July 2, 2022
A-177	July 3, 2022	August 27, 2022