



December 4, 2023

Via E-Mail: aafc.fpcccomplaints-plaintescpac.aac@agr.gc.ca

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File no. 03447369

Registrar
Farm Products Council of Canada
960 Carling Avenue
Ottawa, ON K1A 0C6

Dear Registrar:

Re: Complaint from Simple Path Farms and Poultry Ltd. pursuant to s 7(1)(f) of the *Farm Products Agencies Act* re Chicken Farmers of Canada's November 2, 2023 Market Development Final Assessment Determination for period A-174 and A-175

We are counsel to Simple Path Farms and Poultry Ltd. ("SPF").

SPF submits this complaint to the Farm Products Council of Canada ("**Council**"), pursuant to 7(1)(f) of the *Farm Products Agencies Act*, RSC 1985, c F-4 ("**FPAA**") and the *By-Law Governing the Administration of the Complaints Received by the Farm Products Council of Canada*, as amended on February 10, 2021 ("**By-Law**") ("**Complaint**").

The Complaint concerns the November 2, 2023 decision of the Chicken Farmers of Canada ("**CFC**"), made pursuant to section 11.2(1) of the *Canadian Chicken Marketing Levies Order*, SOR/2002-35 ("**Levies Order**"), which assessed SPF a levy of \$241,483.00 under CFC's Marketing Development Program for the marketing periods of A-174 and A-175 ("**Final Assessment**").¹

For the reasons below, SPF submits that the Council should exercise its authority under section 7(1)(f) of the *FPAA* to (i) strike section 5(1) of the Levies Order as unreasonable or *ultra vires*; and (ii) set aside the Final Assessment.

In the alternative to (i) and (ii), Council should conclude that the *force majeure* conditions of section 11.2(1) of the Levies Order were met and that CFC should cancel the Final Assessment.

I. Factual Background

A. The Parties to the Complaint

1. The Respondent Agency, CFC, is a body corporate and "marketing agency" within the meaning of section 2 of the *FPAA*. It was established in 1979 by the *Chicken Farmers of Canada Proclamation*, SOR/79-158 ("**CFC Proclamation**").
2. Pursuant to its authorities under the *FPAA* and the CFC Proclamation, CFC has made the Levies Order, the *Canadian Chicken Licensing Regulations*, SOR/2002-22 ("**Licensing**").

¹ November 2, 2023 Letter from T. Klompaker, Chair of CFC to C. Hobbs, SPF ["Final Assessment"].



Regulations") the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 ("**Quota Regulations**"), and the CFC Market Development Policy ("**Policy**").

3. The Complaint, SPF, is an Ontario corporation based in Welland, ON. It is a "primary processor" within the meaning of the Levies Order and holds a market development license issued by CFC pursuant to section 4(1) of the Licensing Regulations. SPF is also subject to the Policy.

B. The Original Assessment

4. On April 26, 2023, CFC issued SPF a Market Development Levy Notice of Assessment advising that SPF had not met its market development commitment under the Policy for the marketing periods A-174 and A-175, and therefore, assessing SPF levies totalling \$241,485.00 ("**Original Assessment**").²
5. On May 26, 2023, SPF provided CFC with notice of its intention to challenge the Original Assessment.

C. SPF's Challenge to the Original Assessment

6. SPF did not dispute that it had failed to meet its marketing development commitments for the periods at issue.
7. However, in written submissions and subsequent oral submissions before the CFC Board of Directors on October 11, 2023, SPF challenged the Original Assessment on the following bases:
 - a. The levies imposed by section 5(1) of the Levies Order (including the Original Assessment) are unreasonable because:
 - i. The levies are punitive in nature and not authorized by the FPAA;
 - ii. The levies do not reflect a proportionate balancing of *Charter* values with their regulatory purpose;

and
 - b. In the alternative, SPF's failure to meet its marketing development commitments was the result of events described in section 11.1(2) of the Levies Order (*inter alia*, an unforeseen domestic market shortage which was out of SPF's control and made its performance impossible) such that CFC must cancel the Original Assessment.

D. The Final Assessment

8. The CFC Board of Directors issued its Final Assessment on November 2, 2023. It denied SPF's challenge and confirmed the Original Assessment.

² April 26, 2023 Letter from Lori Piché, Director of Finance, Chicken Farmers of Canada to C. Hobbs, SPF [Original Assessment].



9. The Final Assessment rejected SPF's submission that its failure to meet its market development commitments were the result of events within the meaning of section 11.1(2) of the Levies Order.
10. The CFC Board found that the circumstances outlined by SPF were not force majeure events. Rather, they were "best described as market challenges or commercial risks that accompany participating in the market development program."³ It further stated that "Simple Path did not provide evidence to demonstrate that its performance was rendered impossible."⁴
11. CFC then declined to address SPF's legal arguments regarding the reasonableness of the levies imposed by section 5(1) of the Levies Order, for the following reasons:
 - a. First, that the "members of the CFC Board are not legally trained to adjudicate questions of law of this nature"⁵;
 - b. Second, that "the CFC Board views it is as inappropriate for it to engage in a debate regarding the quantum of the levy under section 5(1) of the [Levies Order] in the context of a force majeure application."⁶ In particular:
 - i. "The CFC Board would be acting beyond [its] 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";
 - ii. "Issues of policy, such as the quantum of the levy under subsection 5(1) of the [Levy Order] are normally addressed through broad based policy discussions with stakeholders"; and
 - iii. "Article 11 of the Policy will be evaluated on an ongoing basis..."⁷ and
 - iv. SPF's request that CFC revise the amounts set out in the Levies Order "would be inconsistent with the process for the making regulation and orders under the [FPAA]."⁸
12. In its conclusion, the CFC Board "finds that [SPF] has not described circumstances that meet the requirements of the Force Majeure Guidelines [to the Policy]" and that "[a]s such, pursuant to paragraph 9.10 of the Policy, the CFC board assesses [SPF] a levy of \$241,483,00."⁹
13. Consistent with section 11.2(3) of the Levies Order, the Final Assessment further stated that the payment of the levy shall be made to CFC within 35 days.

³ Final Assessment, page 3.

⁵ Final Assessment, page 4.

⁶ Final Assessment, page 4.

⁷ Final Assessment, page 4.

⁸ Final Assessment, page 5.

⁹ Final Assessment, page 5.

II. SPF's Complaint

A. CFC's Operations at Issue

14. Like SPF's earlier challenge, this Complaint is focussed on the reasonableness and legality of section 5(1) of the Levies Order, as well as the resulting Final Assessment that flowed therefrom.

B. The Final Assessment's Direct Effect on SPF

15. The Final Assessment has two direct, significant effects on SPF.

16. First, it imposes a significant financial burden (nearly \$250,000) on SPF's business operations.

17. Second, the Final Assessment puts SPF's market development license (and thus the entirety of its business operations) at risk.

18. Section 11.2(3) of the Levies Order provides that a primary processor "shall remit the levy [assessed under section 11.2(1)] within 35 days on which the final assessment determination is received."

19. In turn, section 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]."

C. Grounds and Rationale for the Complaint

21. The grounds for SPF's Complaint are threefold.

22. First, CFC erred in failing to conclude that section 11.1(2) the circumstances described by SPF in its Challenge satisfied section 11.1(2) of the Levies Order. Those circumstances, which were unforeseeable and included significant market shortage and bad faith dealings from primary processors, rendered SPF's performance of its commitments impossible.

23. Second, CFC erred in declining to consider SPF's legal arguments concerning the reasonableness of section 5(1) of the Levies Order. In finding that its role when assessing SPF's challenge to the Original Assessment was simply to make "factual determinations" regarding force majeure events, CFC took too narrow a view of its mandate.

24. SPF's legal arguments went well beyond a mere "debate regarding the quantum" of the section 5(1) levies, as characterized by CFC¹⁰. In alleging that the levies were punitive in nature, they directly engaged the two stated objects of all FPAA agencies: promotion of a "strong, efficient,

¹⁰ Final Assessment, page 4.



and competitive” regulated industry and having “due regard” to the interests of producers and consumers.¹¹ As such, CFC ought to have considered SPF’s arguments.

25. Third, and in the alternative to the second, if CFC was an the appropriate forum for the consideration of those arguments (and the underlying policy issues), the Council’s broad jurisdiction to consider complaints under section 7(1)(f) of the *FPAA*, together with the process established under the Bylaw, is an appropriate forum.

D. Conclusions and/or Remedies Sought

26. SPF asks that Council make the following conclusions and order the following remedies:

- a. Order that section 5(1) of the Levies Order be struck as unreasonable and/or *ultra vires*;
- b. Order that the Final Assessment be set aside; and
- c. In the alternative, a determination that the conditions of section 11.2(1) of the Levies Order were satisfied and that therefore, an order that CFC Cancel the Final Assessment.

27. SPF also requests an expedited hearing of this Complaint.

E. Documents Relied Upon

28. SPF intends to rely on the documents set out in Appendix A as well as such additional documents it may deem advisable.

29. SPF views some of the documents in Appendix A as confidential, and is aware that CFC may take the same view. As such, SPF is marking all documents “Confidential” in order for the parties to address any disclosure issues with Council. SPF will provide those documents under separate cover.

Sincerely,

Gowling WLG (Canada) LLP

A handwritten signature in blue ink, consisting of a large, stylized initial 'A' followed by a long, horizontal stroke.

Alyssa Tomkins

cc John Wilson (co-counsel, Gowling WLG (Canada) LLP)

¹¹ *FPAA* section 22.