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July 12, 2023

BY EMAIL

David K. Wilson
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400-411 Roosevelt Avenue
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Dear Mr. Wilson:

Re: Simple Path Farms
Market Development Final Assessment Determination for periods A-174 and A-175

As per our email agreement, Simple Path Farms Ltd. ("**SPF**") hereby provides the book of documents upon which Intends to rely in relation to its appeal of the levy assessed by the Chicken Farmers of Canada ("**CFC**") for periods A-174 and A-175.

We also provide an overview of our intended legal argument, below.

1) Subsection 5(1) of the Canadian Chicken Marketing Levies Order is Unreasonable

SPF was assessed a levy for chicken not exported during the market development commitment period (as extended).[1] The levy was assessed in accordance with the amounts set out at subsection 5(1) of the *Canadian Chicken Marketing Levies Order*[2] ("***Levies Order***").

The *Levies Order* states that it was made by the CFC pursuant to the *Farm Products Agencies Act*[3] ("***FPAA***").

a) The levy is punitive in nature

When processors enter into contracts with producers for chicken under the Market Development Program, the processor pays $0.445 less per kilogram of live chicken. This is presumably to reflect the lower price that the processor is expected to receive for dark meat on the export market.

[1] SPF Book of Documents, **Tab A**, MD Notice of Assessment Simple Path.
[2] SOR/2002-35.
[3] RSC 1985, c F-4.
[4] *Portnov v. Canada (Attorney General)*, 2021 FCA 171 (CanLII).

A concern arises when chicken purchased under these conditions gets sold in the domestic market. In particular, the processor gets the benefit of the $0.445 discount on the price paid to the producer while marketing the chicken for full price on the domestic market. A levy that was compensatory in nature would accordingly seek to disgorge the $0.445 of additional profit per kilogram from the processor in order to make the farmer whole. In this regard, the funds from the levy could be returned to the specific producer in question or go into a larger fund.

In this case, a levy based on the disgorgement of the premium would total $112,250 for period A-174 (124,000 x $0.445 = $55,180). Such is to be contrasted with the levy actually charged in this case for period A-174 of $198,400. Similarly, for period A-175, a levy based on the disgorgement of the premium would total (43,085 x $0.445 = $19,172.83). Such is to be contrasted with the levy actually charged for period A-175 of $43,085.00.

It is worth noting that the chicken subject to the levy has all now left the country at prices lower than the domestic market.[5] As a result, there is no actual excess profit to disgorge from SPF. The levy therefore serves not only a compensatory purpose vis-à-vis producers, but already has a deterring effect as the processor has to disgorge the premium and then accept a lower price on the export market for the chicken.

Contrary to the reasonable situation contemplated above, the actual levy charged in this case is largely punitive, as opposed to compensatory. Indeed, the magnitude of the levy is close to 4X the benefit received by the processor when purchasing chicken from a producer under the MDP.

As a result, the levies provided for at subsection 5(1) of the Levies Order should be seen as punitive and constituting unauthorized administrative monetary penalties.

b) The FPAA does not authorize a levy that is punitive in nature

As noted above, the Levies Order states that it was made by the CFC pursuant to the *Farm Products Agencies Act*[6] ("***FPAA***").

That authority comes from the definitions set out at section 2, whereby the term "marketing plan" is defined as including for the provision of:

> (f) the imposition and collection by the appropriate agency **of levies** or charges from persons engaged in the growing or production of the regulated product or the marketing thereof and for such purposes **classifying those persons into groups and specifying the levies or charges, if any, payable by the members of each group**; (emphasis added)[7]

As is evident, no mention is made of a levy or fine being imposed for punitive reasons. Instead, the wording is far more consistent with a levy in the nature of a user charge or tax. This is because the levies contemplated would be applied to "groups," as opposed to individuals. A fine or penalty would generally be applied against specific persons in the industry and not to a group.

[5] See SPF Book of Documents, **Tab B**, Spreadsheet titled Committed vs Marketed as of Jan 13 2023.
[6] RSC 1985, c F-4.
[7] *Ibid* at s. 2.

This interpretation is buttressed by the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.[8] In the Agricultural context, Parliament has seen fit to enact a law, being the *Agriculture and Agri-Food Administrative Monetary Penalties Act,*[9] that establishes a uniform system of administrative monetary penalties in the area. Among other things, the statute establishes a tribunal where such penalties can be challenged. Of critical importance, the FPAA is not one of the statutes identified in the definition of "agri-food Act" whereby penalties are sought to be enforced.[10]

The FPAA pre-dates the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, meaning that Parliament can be presumed to be aware of its existence. If the FPAA provided for administrative monetary penalties, one would have anticipated it to have been added to list of statutes.

c) The levies provided for at subsection 5(1) of the Levies Order are inconsistent with the Charter as they are sufficiently disproportionate to the amount required to achieve regulatory purposes so as to constitute a true penal consequence

It is well-established in the case law that an administrative monetary penalty will engage section 11(d) of the *Charter of Rights and Freedoms* where it constitutes a "true penal consequence."[11] This is said to be the case when the amount at issue is out of proportion to the amount required to achieve regulatory purposes. While there are some cases where significant penalties are necessary in order to deter non-compliance with the regulatory scheme, the amount of the penalty should reflect this objective.[12]

In this case, the levies provided for at subsection 5(1) of the *Levies Order* are so out of proportion with amount necessary to serve regulatory purposes that section 11 of the *Charter* is engaged. The impact of the infringement is not proportionate in light of the statutory objectives.[13]

As noted above, the levy necessary to compensate farmers for a processor signing with a producer under the MDP and then never exporting the chicken would be $0.445 per kilogram. A levy that targets delaying export of the chicken would accordingly be somewhat lower, to take into account that the chicken eventually gets exported. A levy of $0.445 per kilogram would accordingly have both a compensatory and deterrence purpose. In this regard, there would be some level of deterrence against conduct that might harm the integrity of the allocation process. It is submitted that a levy of this nature would be reasonable and serve the regulatory purpose.

However, the magnitude of the levies provided at subsection 5(1) of the Levies Order are close to 4X (four times) what is required to achieve the regulatory purpose and accordingly engage section 11 of the Charter. As an example of a comparator, the B.C. Court of Appeal cited with approval cases from the B.C. Securities Commission that imposed monetary penalties of 2-3X the amount that the wrongdoer benefitted from the serious misconduct in the area of securities.[14] Such an amount was stated to "place the administrative

[8] *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 SCR 867.
[9] SC 1995, c 40.
[10] S. 2, SC 1995, c 40: "Agri-food Act" means the *Farm Debt Mediation Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act*, the *Pest Control Products Act*, the *Plant Protection Act*, the *Safe Food for Canadians Act* or the *Seeds Act*.
[11] *Guindon v. Canada*, 2015 SCC 41 (CanLII), [2015] 3 SCR 3, at para 77.
[12] *Ibid.*
[13] *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293 at para. 58.
[14] *R. v. Samji*, 2017 BCCA 415 (CanLII) at para. 82.

penalty in excess of those levied in fraud cases (as described in IAC) where the amounts derived from the misconduct are smaller, without making the amount so large as to exceed the purposes of specific and general deterrence."[15]

In this case, there is no fraud or intentional conduct. As will be set out in more detail below, SPF made numerous efforts to obtain sufficient product to meet its market development commitments but was shorted by other primary processors repeatedly. The notion that SPF would be subject to a penalty of a magnitude greater than what it would for securities fraud demonstrates the penal nature of the provision.

SPF submits that the amount of a levy necessary to achieve the regulatory purpose ought to be quite low. This is particularly the case in a short market, where the imposition of a levy is actually inconsistent with regulatory purposes.

Section 21 of the *FPAA* provides that the objects of the CFC include having due regard to the interests of consumers:

> 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.**[16]

In periods of short supply, the risk of a levy forces product out of the country that is needed domestically, and in doing so deepens a market shortfall. This creates additional market rent and increases the amount of consumer harm from the market undersupply, through either higher prices than necessary or consumers being unable to obtain the regulated product entirely.

This consumer harm is caused by how the supply managed system interacts with free market end consumers. When the market is in a period of oversupply, the free retail market operates as expected. Retail prices rise to the level of supply and demand, but the excess level of supply means that wholesale and retail prices are low. Retailers have no requirement to purchase surplus product from primary processors, so primary processor storage stocks rise. In this case an MDP non-export levy does make sense, as there is no public benefit from additional supply being added to an already oversupplied market.

When the market is in a period of balance, the free retail market operates as expected. As a result, when the market is in balance CFC MDP levies also seem rational for mostly the same reasons. There is no public interest in additional supply fed into an already fully supplied market.

However, when the market is short Canadian consumers are going without, and the free market still operates as expected. Short supply means prices rise at retail, and those with means pay these higher prices while

[15] *Ibid.*
[16] S. 21, RSC 1985, c F-4.

others choose other options. At this point many abandon white meat purchases in favour of a purchase of cheaper dark meat, so the balance of white vs dark consumption changes to the point of equal volumes consumed of dark and light meat. The relative overall increase in dark meat consumption puts purchases in balance, meaning at this point there is no need to balance the bird, and as a result there is no need for a Market Development Policy. At this point, the forced export of domestically produced product – product needed by Canadians – no longer serves any public benefit. There is unmet demand for chicken, be it dark or white, and the threat of a CFC levy at this point no longer serves any public benefit and is actually hurtful as it forces a deepening of a market shortage.

In this case, there was a market shortfall of dark meat and generally, as evidenced by the wholesale prices in the market. As a result, the regulatory purpose for the levy has effectively disappeared. The failure of the order to account for this possibility further contributes to its disproportionate and penal nature.

2) Simple Path Farms Meets the Requirements of Subsection 11.1(2) of the Levies Order

SPF also pleads that its failure to comply with the conditions set out in paragraph 5(3)(d) or (e) of the *Canadian Chicken Licensing Regulations* was due to an event that

(a) was not reasonably foreseeable;

(b) rendered it impossible, through no fault of the primary processor, for the primary processor to market the chicken for an end-use referred to in section 3 of Schedule 2 to the Canadian Chicken Licensing Regulations; and

(c) was beyond the control of the primary processor.

As noted above, the levy was issued at a time when there was a market shortfall of dark meat and generally, as evidenced by the wholesale prices in the market. In addition, there were issues with shipping that further rendered it impossible to ship the product during the relevant period. These issues were not reasonably foreseeable, were not the fault of SPF and were beyond its control.

a) There was a market shortage that was unforeseeable

As confirmed by Robert DeValk in the Commodity Alert Program, leg quarter prices in Ontario in 2021 were well-above 2020 and the five-year average during the peak demand season. Similarly, bone-in thigh meat prices and boneless skinless thighs in 2021 stayed above 2019, 2020 and the five-year average, closing out the year moving even higher.[17] Various reports from Mr. DeValk during the period in which SPF could export the chicken (January to August 2022) confirm that prices remained high, on account of a scarcity in the market.[18] CFC figures also confirm that wholesale prices for legal complex were as high or higher than 2019-2021 during the relevant period.[19]

Aside from economic indicators, SPF itself experienced the effects of the market shortage. During the relevant period, SPF was repeatedly shorted by primary processors. A summary of the orders made and what

[17] SPF Book of Documents, **Tab C, Commodity Alert Program – Wholesale Chicken Prices – 2021 Recap.**
[18] SPF Book of Documents, **Tab D, Commodity Alert Program – Weekly Wholesale Poultry Prices.**
[19] Charts from the CFC tracking of historical prices are included in the most recent Market Information Working Group Discussion, SPF Book of Documents, **Tab E.**

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was actually received per specific invoices is set out in SPF's Book of Documents.[20] Any of the specific invoices referred to therein can be provided upon request. As can be seen, SPF frequently received less than 50% of the dark meat that it ordered. In such situations, SPF tried but was often unable to fill the orders for its customers, meaning that restaurants and retailers were left without product. Examples of this occurring during the relevant period are also found in SPF's Book of Documents.[21]

As a final indication of the extent of the market shortage, it is worth noting that at the end and shortly after the relevant time period, the CFO was cutting back on MDP kilograms to keep domestic product home for Canadian consumption. In March 2022, SPF applied for 250,000 kilograms for period A-177. The CFO reduced this by half to 125,000 kilograms,[22] further demonstrating the extent of the market shortage and the absence of any surplus product available to be exported. Moreover, where prices of white meat rise, there is dark for light substitution and there's a natural balancing of overall demand for the bird, further demonstrating the unreasonableness of the requirement to export in such a situation.

The market shortage cannot be held to have been foreseeable by SPF. Otherwise, the CFC would have foreseen it and increased its allocation accordingly. This was not done, which is understandable given the unpredictable nature of the market at the time.

b) SPF's inability to obtain and export the product in question was not its fault and was due to conditions beyond its control

As noted above, SPF took steps to protect itself via arrangements with other primary processors. As noted above, these arrangements were frequently disregarded by the other party, leaving SPF in the lurch.[23] When product was received, that product was not always eligible for export, notwithstanding SPF having specified such in its order. Examples of this occurring can be found in SPF's book of documents.[24]

Had SPF received the chicken that it ordered in good faith, SPF would have had sufficient product to meet its market development commitments.

In addition to issues obtaining product that were beyond its control, SPF also encountered shipping issues that were equally beyond its control. An example of a situation of this nature can be found in SPF's book of documents.[25]

3) Conclusion

The levies provided for at subsection 5(1) of the *Canadian Chicken Marketing Levies Order* are punitive in nature and not authorized by statute. The provision and the order itself are accordingly unreasonable on that basis alone. The provision is also unreasonable on account of its failure to take into account section 11(d) of the *Charter*, which precludes penalties with a true penal nature. Concerns in this regard are particularly acute

[20] SPF Book of Documents, **Tab F**, Spreadsheet summarizing the orders made and what was actually received per specific invoices.

[22] SPF Book of Documents, **Tab H**, Email exchange with CFO re MDP commitments for A-177.
[23] SPF Book of Documents, **Tab F**, Spreadsheet summarizing the orders made and what was actually received per specific invoices.
[24] SPF Book of Documents, **Tab I**, Examples of [redacted] supplying product that wasn't export compliant.
[25] SPF Book of Documents, **Tab J**, Examples of shipping issues.

in the instance of a short market, where the regulatory purpose all but disappears in the face of consumer harm.

Levies issues pursuant to an unreasonable order are void. Subsection 5(1) of the Levies Order should similarly be struck and amended to include a magnitude for the levies that is rationally connected to the regulatory purpose and context.

In the alternative, SPF submits that its failed to meet its market development commitments on account of a force majeure and should be relieved from payment on this basis as well.

Respectfully submitted,

Gowling WLG (Canada) LLP

Alyssa Tomkins

cc: A. Pinho, C. Hobbs (Simple Path Farms Ltd)