

## MEMORANDUM

**TO:** CFC Board of Directors  
**FROM:** CFC Staff  
**DATE:** August 2, 2023  
**SUBJECT:** Market Development Levy Assessment Periods A-174 to A-175 – Simple Path Farms Poultry Ltd.

### A. MDP Levy Assessment for A-174-175

On April 26, 2023, CFC staff forwarded a market development notice of assessment of \$241,483.00 to Simple Path Farms Poultry Ltd. (Simple Path) for marketing 167,083 kilograms live weight equivalent (lwe) of market development production it received in periods A-174 and A-175, other than in accordance with the CFC Market Development Policy and the [Canadian Chicken Licensing Regulations](#) (*Licensing Regulations*). The results of the notice of assessment issued pursuant to [Canadian Chicken Marketing Levies Order](#) (*Levies Order*) are outlined in the table below.

Period	Date	Revised Commitment	Marketings		Levies		Total Potential Levy	
			Periodic Marketings	Under Marketing (1st Tier)	Under Marketing (2nd Tier)	Potential Levy @ \$1.00 / kg		Potential Levy @ \$0.60 / kg
A-174	Jan 16-Mar 12, 2022	250,000	0	124,000	124,000	\$124,000.00	\$74,400.00	\$198,400.00
A-175	Mar 13-May 7, 2022	139,535	126,000	43,083	0	\$ 43,083.00	\$ -	\$ 43,083.00
							Total	\$241,483.00

The assessment at issue was immediately preceded by another CFC MDP levy assessment for periods A-171 to A-173, which Simple Path asked the CFC Board to waive or reduce, arguing that force majeure events prevented Simple Path from meeting its MDP commitments for those earlier periods. The CFC Board decision of February 6, 2023 concluded that Simple Path had not shown circumstances that met the requirements of CFC's Force Majeure Guidelines and upheld the levy assessment of \$1,000,000 in respect of A-171 to A-173 marketings.<sup>1</sup> At the request of Simple Path, the Board agreed to allow Simple Path to pay those levies in installments over 36 months, with

<sup>1</sup> CFC Board Decision re: Market Development Final Assessment Determination for Periods A-171, A-172 and A-173, dated February 6, 2023, CFC Book of Documents ("CFC BOD") Tab A.

interest.<sup>2</sup> Simple Path agreed, on April 10, 2023, to the payment terms and has complied in making monthly payments effective May 1, 2023.<sup>3</sup>

#### **B. Request from Simple Path**

As indicated in s. 11.1(2) and s. 13(2) of the *Levies Order*, a processor can dispute a notice of assessment by providing documents or information, in writing, establishing that the noncompliance was due to an event that:

- a) was not reasonably foreseeable;
- b) rendered it impossible, through no fault of the processor, to market the chicken for an end-use referred to in section 3 of Schedule 2 to the *Licensing Regulations*; and
- c) was beyond the control of the primary processor.

Simple Path's July 12, 2023 letter disputes CFC's notice of assessment, claiming that:

- S. 5(1) of the *Levies Order* is unreasonable, punitive and unauthorized by the *Farm Products Agencies Act*;
- The levies in s. 5(1) are contrary to s. 11(d) of the *Canadian Charter of Rights and Freedoms*;
- Simple Path's failure to comply was due to a force majeure event.

This CFC Staff report addresses the force majeure and factual claims by Simple Path. Legal counsel to Staff have provided separate legal submissions to address Simple Path's legal arguments. Legal counsel to Staff focus particularly on issues as to the scope of what the CFC Board of Directors is legally authorized to decide.<sup>4</sup>

Simple Path's force majeure and factual claims include the following:

- The levy rates in s. 5(1) of the *Levies Order* are punitive as opposed to compensatory, as they are four times higher than required to achieve the regulatory purpose.<sup>5</sup>
- The chicken subject to the levy has now left the country at lower than domestic prices.<sup>6</sup>

<sup>2</sup> CFC Board Decision re: Payment Request on MD Levies Assessed for Periods A-171, A-172 and A-173, dated March 27, 2023, CFC BOD Tab B.

<sup>3</sup> Countersigned CFC Board Decision re: Payment Request on MD Levies Assessed for Periods A-171, A-172 and A-173, signature dated April 10, 2023, CFC BOD Tab C.

<sup>4</sup> Legal Submissions of Counsel to CFC Staff, dated August 2, 2023, CFC BOD Tab N.

<sup>5</sup> Simple Path Submissions, dated July 12, 2023, p. 3.

<sup>6</sup> Simple Path Submissions, dated July 12, 2023, p. 2.

<sup>7</sup> Simple Path Submissions, dated July 12, 2023, p. 4.



- The levy was applied at a time when there was a market shortfall for dark meat, which was not foreseeable, made it impossible for Simple Path to ship product in the relevant period and was beyond Simple Path's control.<sup>8</sup>
- The MDP levy does not serve a public benefit at time of market shortage.<sup>9</sup>

### C. Context respecting the MDP and MDP levy rates

The intent of the Market Development Policy is to facilitate the planned use of chicken and chicken products in a manner that: (1) does not disrupt the Canadian domestic market; and (2) is consistent with Canada's international trade rights and obligations.<sup>10</sup> The Market Development Policy is not meant to replace or take precedence over federal-provincial quota chicken production. The volume of plant supply made available to individual processors in respect of federal-provincial quota chicken is a matter of provincial responsibility and is not controlled by CFC.

As reflected in the Market Development Policy Guidelines, the intent is also to facilitate the balance of consumption between white and dark meat.<sup>11</sup> Adherence to the marketing timelines and end use requirements associated with the Market Development Policy, as set out in the *Licensing Regulations*<sup>12</sup> and *Levies Order*<sup>13</sup>, is fundamentally important in fulfilling that intent.

CFC prescribes Market Development Policy levy rates in respect of marketing other than in accordance with the requirements of the program through amendments from time to time to the *Levies Order*. The levy rate was initially set at 44 cents per kg and was increased to \$1.00 per kg in 2005. The current two-tier levy rate (\$1.00 per kg, plus \$0.60 per kg if commitments are not met in the following period) was enacted in January 2013.

As explained in the May 2011 Board minutes and April 2011 report to the CFC Board preceding the Board's adoption of the current rate, the present two-tier levy rate was adopted following consultations with provincial boards and downstream stakeholders, led by CFC's Policy Committee.<sup>15</sup> These consultations, and the associated changes to the levy regime, were in response to changes in dark meat prices and exchange rates. The basic concept behind the levy rates was stated to be that "there would be no benefit to market product intended for market development other than in accordance with the Market Development Policy".<sup>16</sup>

<sup>8</sup> Simple Path Submissions, dated July 12, 2023, pp. 5-6.

<sup>9</sup> Simple Path Submissions, dated July 12, 2023, pp. 4-5.

<sup>10</sup> CFC Market Development Policy, amended May 5, 2021, para. 1.2, CFC BOD Tab D.

<sup>11</sup> CFC Market Development Policy Guidelines, amended May 5, 2021, p. 1, CFC BOD Tab E.

<sup>12</sup> *Canadian Chicken Licensing Regulations*, [SOR/2002-22](#) [*Licensing Regulations*].

<sup>13</sup> *Canadian Chicken Marketing Levies Order*, [SOR/2002-35](#) [*Levies Order*].

<sup>14</sup> *Order Amending the Canadian Chicken Marketing Levies Order*, [SOR/2013-3](#), January 17, 2013.

<sup>15</sup> Minutes of CFC Open Board Meeting, dated May 11, 2011, p. 3, CFC BOD Tab F; CFC Staff Memo to CFC Board re: Market Development Policy Levy Rate, dated April 28, 2011, p. 1, CFC BOD Tab G.

<sup>16</sup> Minutes of CFC Open Board Meeting, dated May 11, 2011, p. 3, CFC BOD Tab F.

In the lead up to the 2013 levy rate amendments the option of having floating MDP levy rates was raised. However, this option did not have support in light of the administrative challenges associated with the length of time required to secure levy amendments and carry out related discussions with stakeholders.

The MDP is reviewed annually by CFC's Allocation Policies and Procedures Committee (APPC), formerly called the Policy Committee. APPC will again examine the current MDP levy rates as part of the upcoming review of the MDP in October 2023.

The character of MDP levies is also reflected in how they are used. Amounts collected through MDP levies go into a CFC fund (the Market Development and Promotion Fund) used to promote the consumption of chicken in Canada,<sup>17</sup> serving to mitigate market disruption associated with marketing outside the authorized parameters of the MDP Policy.

The responsibilities of provincial commodity boards are spelled out in section 4 of the CFC Market Development Policy. Paragraph 4.1(a)(i) states that provincial boards may implement a market development program, if they so choose, and follow the provisions of the CFC Market Development Policy, the *Canadian Chicken Marketing Quota Regulations* and the *Canadian Chicken Marketing Levies Order*.

Section 5 of the Market Development Policy outlines the responsibilities of CFC, including paragraph 5.1(c), which speaks to CFC's role of monitoring each province's market development program for compatibility with the overall Market Development Policy.

#### **D. Simple Path claims and CFC Staff analysis**

Simple Path claim that MDP levy rates are punitive: Simple Path argues that the levy rates are punitive, as opposed to compensatory. Processors, Simple Path indicates, pay \$0.445 less for MDP live chicken per kg to reflect the lower price for dark meat on the export market.<sup>18</sup> According to Simple Path, the MDP levy rates are 4 times higher than required to achieve the regulatory purpose of the levies.

Staff analysis: In addressing Simple Path's claim that MDP levy rates are punitive, Directors should consider the MDP's intent and the regulatory context of MDP levy rates as set out above in Part C.

Simple Path's claim that processors pay \$0.445 less per kg for MDP live chicken to reflect the lower price for dark meat on the export market is lacking in important context, since it refers to the lower price for the entire bird, whereas the products sold through MDP are typically specific parts of birds

<sup>17</sup> CFC Market Development Policy, para. 9.11, CFC BOD Tab D.

<sup>18</sup> Simple Path Submissions, dated July 12, 2023, p. 1.

<sup>19</sup> Simple Path Submissions, dated July 12, 2023, p. 3.



(notably dark meat). Moreover, CFC has no authority over live chicken prices, including prices for market development production. Although CFC does not regularly track market development live prices, staff understands that those prices vary from province to province.

To be effective, the MDP levy rate needs to be sufficient to offset any benefit from marketing MDP chicken outside the parameters of the MDP Policy. For example, leg quarters (LQ) obtain a higher selling price by marketing LQ in Canada, because LQ are substantially more expensive in Canada than in the US.<sup>20</sup> The processor also benefits from a cheaper live bird (0.445\$/kg live). In addition, the processor benefits from extra supply of breasts and wings to be sold in Canada and additional throughput to optimize plant operations.<sup>21</sup>

Simple Path claim re status of MDP chicken received: Simple Path acknowledges that it received the amount of MDP chicken it requested in periods A-174 and A-175, while claiming that the chicken subject to the levy has now left the country at lower than domestic prices.<sup>22</sup>

Staff analysis: This claim has to be assessed in light of the *Levy Order* requirement that chicken be marketed within the market development commitment period, and not thereafter. Directors should also consider whether processors can avoid MDP levies by marketing subsequent to the authorized periods.<sup>23</sup>

Staff also points out that all processors participating in the Market Development Program have already been provided with additional flexibility in commitments for periods A-174 and A-175 in response to a request by CPEPC.<sup>24</sup>

In the event that Directors are of the view that the eventual marketing of the MDP chicken requested should be taken into account, Directors should also consider whether Simple Path has provided evidence to show the marketing destination of the MDP chicken it received in periods A-174 and A-175.

<sup>20</sup> See, for example, Simple Path Book of Documents Tab C, pp. 15-16, citing Ontario vs US leg quarter price differentials in 2021.

<sup>21</sup> For instance, Simple Path raised at the January 18, 2023 CFC Board meeting concerning the periods A-171 to A-173 MDP levy assessment that MDP supply allowed their processing facility to operate more days per week than would be the case with its regular plant supply alone.

<sup>22</sup> Simple Path Submissions, dated July 12, 2023, p. 2.

<sup>23</sup> See, on this topic, Legal Submissions of Counsel to CFC Staff, para. 15, CFC BOD Tab N.

<sup>24</sup> The CFC Board of Directors approved a one-period extension to all market development licensees to fulfill their commitments for A-174 to A-180 (with regard to periods A-174 and A-175, see: CFC Staff Memo to Market Development Licensees, Provincial Board Managers and CPEPC re: Market Development Commitments for Periods A-174 and A-175, dated March 29, 2022, CFC BOD Tab H). This means that Simple Path was provided until the end of period A-176 (July 2, 2022) to meet its commitment for period A-174 and until the end of A-177 (August 27, 2022) to meet its commitment for period A-175.

Simple Path claim re absence of fraud or intentional conduct: Simple Path contends there is no fraud or intentional conduct on its part.<sup>25</sup>

Staff Analysis: The focus of MDP levy application is on marketing practices relative to prescribed requirements as opposed to the intent or good faith of the licensee.

Simple Path force majeure claim: According to Simple Path, the levy was applied at a time when there was a market shortfall for dark meat, which made it impossible for Simple Path to ship product in the relevant period.<sup>26</sup> The market shortage, Simple Path claims, was not foreseeable.<sup>27</sup> Simple Path adds that it was repeatedly shorted by other processors from whom it sought to purchase in the relevant period.<sup>28</sup>

Staff analysis: There are several points Directors should consider in addressing this claim by Simple Path. First, it is important to note that the requirements of the Market Development Policy take into account the inherent variability of market conditions. Processors have flexibility to meet varying market conditions by being able to market in any one of three periods (before, during or after the allocation period in question) and also have the flexibility to reduce their MDP commitments prior to the start of the allocation period.

Second, participation in the MDP is optional and processors submitting applications understand they must meet the MDP Policy obligations.

Third, the MDP Policy is not limited to dark meat and offers various options to meet the commitments over multiple authorized marketing periods. MDP commitments can be met by exporting any cuts of chicken. Moreover, Simple Path's position leaves it unclear whether it was unable to meet its commitments because it could not purchase dark meat domestically, or simply preferred to sell the dark meat it could acquire domestically due to tight market conditions.

Fourth, in terms of overall market conditions it is noteworthy that there were no applications for supplementary imports due to a market shortage in the periods in question. There were also no Market Development levies issued to any other processor participating in the MDP in periods A-174 and A-175. These are factors that Directors may wish to consider in considering Simple Path's allegations that there was a market shortage. Even if Simple Path had difficulty in securing dark meat, however, this may have been due to processor preference to sell dark meat to other customers, who were willing to pay a higher price, in light of the relatively higher domestic price for dark meat.

<sup>25</sup> Simple Path Submissions, dated July 12, 2023, p. 4.

<sup>26</sup> Simple Path Submissions, dated July 12, 2023, p. 5.

<sup>27</sup> Simple Path Submissions, dated July 12, 2023, p. 6.

<sup>28</sup> Simple Path Submissions, dated July 12, 2023, p. 4.



Fifth, there is typically some degree of variability in provincial board and industry allocation recommendations, reflecting differences in perspectives concerning market conditions and market trends. These differences are discussed and weighed as part of the allocation process. This diversity of views was also evident in connection with the allocation concerning periods A-174 and A-175.<sup>29</sup> CFC's rationale letters for periods A-174 and A-175 make no mention of supply shortages, though stronger wholesale prices for wings and whole birds and prices for dark meat compared to the previous year were noted.<sup>30</sup>

Sixth, the Board should also consider its previous findings in respecting similar claims by Simple Path in relation to the MDP levy assessment for periods A-171 to A-173:

The circumstances outlined by Simple Path (on their own or taken together) are not force majeure events. These circumstances are best described as market challenges or risks that accompany participating in the market development program or otherwise result from an application of the known rules set out in the Policy to a licensee participating in the market development program.

A tight domestic market may have rendered performance of Simple Path's commitment difficult. However, the requirement is that performance be rendered impossible by the alleged force majeure event. Simple Path did not provide evidence to demonstrate that its performance was rendered impossible.

With respect to Simple Path's claim that it was repeatedly shorted by other processors in the relevant timeframe and the market was undersupplied, Directors should consider the parallels to similar claims Simple Path made in respect of the A-171 to A-173 assessment. In relation to that earlier assessment, Staff pointed out the following:

With respect to Simple Path's claims related to under-supply during the periods in question, Directors will need to consider whether variations in domestic allocations and production on a period-by-period basis can qualify as a force majeure event in relation to a primary processor that has failed to meet its market development commitments. If Directors consider that alleged under-supply in one or more periods is somehow relevant, they will further need to consider whether, on the basis of the documents and information provided, Simple Path has established that its noncompliance was due to a force majeure event related to under-supply. Finally, Directors will also need to consider that Simple Path continued to market below its commitment levels until Period A-178 (Aug 28 - Oct 22, 2022)....

<sup>29</sup> See Period A-174 Allocation Summary Sheet, dated September 28, 2021, CFC BOD Tab I and Period A-175 Allocation Summary Sheet, dated December 9, 2021, CFC BOD Tab J.

<sup>30</sup> Rationale Letter re: Prior Approval for Allocation Period A-174, dated October 7, 2021, CFC BOD Tab K; Rationale Letter re: Prior Approval for Allocation Period A-175, dated December 15, 2021, CFC BOD Tab L; Follow-up Letter re: Prior Approval for Allocation Period A-175, dated January 26, 2022, CFC BOD Tab M.

Simple Path public benefit claim: In support of its position that MDP levy rates are unauthorized, Simple Path claims that the levy does not serve a public benefit at time of market shortage. In periods of short supply, Simple Path contends, the risk of a levy forces product out of the country that is needed domestically, and in doing so deepens a market shortfall.<sup>31</sup>

Staff analysis: Simple Path's submission that MDP chicken should be re-directed to the domestic market in periods of tight supply does not account for the collateral impact of such marketing both on processors who participate in the MDP in keeping with their commitments and on processors not participating in the MDP, who have to compete against unexpected supply procured at a lower price.

Simple Path's claim also presumes that there was a market shortage in the relevant period, including periods A-174 and A-175. As previously discussed, in periods A-174 and A-175 there were a range of perspectives as to the relative tightness of the market as reflected in allocation related discussions concerning those periods. Also, as noted earlier, there were no requests for supplementary import permits due to market shortages in that timeframe.

#### **E. Directors' Consideration**

CFC Directors are being asked to consider Simple Path's claim that their failure to comply with the conditions of the MDP was due to events of *force majeure*, pursuant to s. 11.1(2) of the *Levies Order* and be relieved from payment of the levy assessment.

Based on the above, CFC Directors will need to consider whether the documents or information provided by Simple Path establish that their failure to comply was indeed due to an event that was not reasonably foreseeable, rendered it impossible for Simple Path to market its chicken for an end-use prescribed in the *Licensing Regulations*, and was beyond their control. Pursuant to section 11.2(1) of the *Levies Order*, if the failure was due to a *force majeure* event, the CFC Directors will issue a notice that cancels the notice of assessment. In the event that the *force majeure* event was the cause of a failure to comply in respect of only a portion of the marketings that were not made in accordance with the conditions of licence, the CFC Directors will revise the assessment and issue a Final Assessment Determination to Simple Path of \$241,485.00 for periods A-174 and A-175, for marketing 167,083 kilograms live equivalent of market development production it received, other than in accordance with the CFC Market Development Policy and the licence it holds.

The August, 2, 2023 submissions by legal counsel to CFC staff indicate that, if the Board agrees with CFC staff's observations regarding factual assertions by Simple Path, it may be unnecessary for Directors to engage with the legal arguments by Simple Path. The same submissions indicate that the CFC Board of Directors has neither express nor implied authority to decide questions of law. In addition, the submissions also indicate that there is no need to determine the CFC Board of Directors'

<sup>31</sup> Simple Path Submissions, dated July 12, 2023, pp. 4-5.



jurisdiction over questions of law to the extent Simple Path's dispute can be resolved on factual grounds.

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