



Suite 16B – 261 Martindale Road
St. Catharines, Ontario, L2W 1A2
Tel: (905) 682-2775/Fax: (905) 682-2357
Toll Free: 1-888-722-4193

Robert A. Wilson
rwilson@wilsonspurrlaw.ca

Geoffrey P. Spurr
gspurr@wilsonspurrlaw.ca

March 31, 2022

Via Email

ATTENTION: *Anik Tracey, Registrar*

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

Madam Registrar:

RE: 03-22-22 Complaint by Turkey Farmers of Ontario ("TFO") regarding Turkey Farmers of Canada allocation decision for the 2022 – 2023 Control Period

We are lawyers for TFO and are submitting this brief Reply to the Agency's Complaint Response. We believe the following will be helpful to Council (and the Agency) as it engages in its preliminary assessment of TFO's Complaint.

TFO is not saying that the Global allocation was distributed on a *pro rata* basis.

TFO is also not comparing historical bases to overbase allocations, as the Agency has purported to do on some of the Tables set out in its Complaint Response. Comparing provinces' percentage market share of the base allocation to their percentage market share of the overbase allocation is not the point.

Rather, TFO's Complaint relates exclusively to the way in which the Agency has purported to distribute the increase of 4,000,000 kgs (the "Increase") made to the previous Control Period's overbase of 139,000,000 kgs. TFO asserts that the Increase in the overbase portion of the proposed 2022/23 allocation will be distributed on an overwhelmingly *pro rata* basis. This is obvious, when the percentage share of the Increase of each province is compared to its percentage share of the prior Control Period's overbase portion of 139,000,000 kgs. After first parsing off 452,905 kgs of the Increase to Nova Scotia, TFC proposes distributing 90% of the balance remaining of the Increase on what effectively equates to a *pro rata*, or market share basis.

TFC itself has said that 60% of this amount was allocated on the basis of market shares. However, TFC claims that a further 30% of this amount was not distributed on a market share basis, but instead on the basis of population. TFC says that population shares do not replicate a *pro rata* distribution because the 2020/21 commercial allocation percentage shares differ from percentage shares based on population. But the question then becomes, how material is the variation?

As shown on the second table on page 7 of the Agency's Complaint Response, six of eight provinces exhibit a percentage difference between population versus allocation of less than 1 and the percentage difference for the remaining two is less than 3. The variation is hardly a persuasive demonstration that the utilization of population produces a marked difference overall, which is why TFO maintains that distribution based on population effectively produces the same outcome as a *pro rata* distribution.

The Agency has also proffered no explanation respecting how any province was given its overbase number as shown at pages 9 and 10 of the Rationale. Similarly, the Rationale offers no explanation as to why Nova Scotia received a preferential share of 452,905 kgs "off the top" of the Increase before TFC's 60/30/10 formula was applied to distribute the remainder. In the context of a Rationale that raises issues respecting whether the Agency properly considered the Criteria, these additional omissions are significant.

For the final 10%, TFO is not suggesting that utilizing the Nielsen data also constitutes a *pro rata* methodology. TFO's point regarding the Nielsen data is that TFC itself has identified the unreliability of it and that it is incomplete, particularly with respect to capturing important further processing markets in Ontario.

As TFO noted in its March 14, 2022 correspondence to the Agency (document C-31), the formula utilized by TFC for the 2022/23 Control Period in relation to the increase has the same flaws as the approach considered and rejected by the Council in 2004.

TFC also is attempting to buttress its Rationale by referring to various Tables which were not before the TFC Directors when the allocation was approved. The key document that Directors considered is Attachment 1 of the TFC Rationale. The formula and the effect of its application was clearly shown and it was approved by TFC as the allocation methodology for the Increase.

In obtaining Council approval, TFC is obliged to show evidence that there was consideration of the Criteria. In its response, the Agency states "there's no evidence in the record before FPCC to suggest that the Agency's consideration of the Criteria was not genuine or not serious". This cannot be the appropriate test for an Agency seeking prior approval. Proof of existence of an action is not shown by there being no proof that it did not occur. There has to be something tangible and in fact, the only actual evidence in the record is Attachment 1, TFC's own document, which shows that the Criteria were not considered.

A Commercial Allocation Policy is the means available to the Agency to demonstrate that the Criteria was properly met. Having a Commercial Allocation Policy is not a precondition for the Agency to establish an allocation but having one would have provided the anchor for the Agency to show that the Criteria was applied, which was the effect of the Commercial Allocation Policy in relation to prior allocations before it was suspended.

Pro rata is both a methodology of distribution and a way to describe the result of a distribution. In the Agency's case, its dominant methodology was *pro rata*, and the result of its distribution has all the hallmarks of a *pro rata* result. By far the largest component of the Global allocation of 176,696,089 kgs is the commercial allocation of 143,000,000 kgs. Yet, the Agency has only mustered two short paragraphs consisting of 11 lines in total in its entire Rationale (page 13) to justify its decision regarding the commercial allocation as described at Attachment 1.

This explains why the absence of a Commercial Allocation Policy is in fact not a "red herring". If in fact it was, then why did the Agency explain its Rationale in Appendix 2 (page 12) by first emphasizing that

"For the 2020/21 and 2021/22 control periods, the Agency established provincial commercial allocations on a one-time basis, with the principle of stability being the foremost consideration. **When setting these two control period allocations it was anticipated that a new Policy could be finalized for the 2022/23 control period, however, this is not the case.** As the Agency does not have a new Policy for 2022/23 control period, the TFC Directors have agreed that **another one-time commercial allocation is required**, as per the motion below from the Web Conference of February 14, 2022". (emphasis added)

TFC recognized the importance of a Commercial Allocation Policy and that having one would have allowed it to move away from the "one-time basis" allocation approach adopted for the 2020/21 and 2021/22 Control Periods. The lack of a Commercial Allocation Policy has again resulted in a "one-time allocation", which TFO's submits is tantamount to seeking "air cover" for an allocation that is divorced from due consideration of the Criteria.

TFO agrees that Council cannot order TFC to adopt a specific Policy: that discretion lies with TFC. TFO's point is that the absence of a Commercial Allocation Policy, when compounded by the failure to provide a meaningful substitute, results in a flawed allocation. This is why TFO has requested that Council direct TFC to utilize such a mechanism in relation to the 2022 allocation; not doing so with perpetuate the existing flaws and continue to constitute a barrier to approval.

TFC regards the over 40 meetings that have produced no result to date respecting a new Commercial Allocation Policy as being a sign of careful progress. TFO is concerned instead that they show intractable deadlock. After more than half a decade, question is whether this pace is tolerable, particularly considering the context of the allocation that TFC is now advancing for approval.

TFC has chosen to remain silent, but that context has been recently summarized by the consultants:

"... allocation has generally been run on a model of: wait and see how the current year turns out, make some adjustments, don't change anything fundamental, and repeat." (C-28, White Paper, page 7)

This statement applies equally to the Increase and in the circumstances, it would be difficult to conceive of one that is more apt.

We look forward to Council's further advice on this matter.

Yours very truly,

WILSON, SPURR LLP



Geoffrey P. Spurr

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c.c. Turkey Farmers of Ontario

c.c. John O'Kane