National Farm Products Council

Conseil national des produits agricoles

Report of the Committee established to inquire into the complaint

By

The Saskatchewan Signatories to the Federal-Provincial-Territorial Agreement for eggs

Against

The Canadian Egg Marketing Agency

Concerning the proposed quota allocation for the period commencing December 28, 2003 and ending December 25, 2004

May 2004

Canada

May 10, 2004

TO: Members of the National Farm Products Council

SUBJECT: Complaint Committee Report

Attached is the Report of the Complaints Committee on the complaints against the Canadian Egg Marketing Agency filed by the Saskatchewan and British Columbia signatories to the egg plan.

In addition to assisting the Council in its deliberations respecting agency quota orders, the Committee sincerely hopes that the CEMA and its members will find the contents of this report to be useful for resolving the issues raised during the hearing and allowing for the continued development of the allocation process to strengthen the current system. The approach we have taken is to offer advice and recommendations as appropriate, and to clearly outline in the Committee's views the separate and distinct responsibilities and authorities of the National Farm Products Council and the Canadian Egg Marketing Agency. The Committee recognizes that the supply management system can best function when there is a true sense of cooperation between producers, industry and governments. We therefore urge all parties to reflect on the benefits they derive from having in place a strong and durable supply management system for eggs and to make the necessary compromises to build on the foundation that was put in place approximately 30 years ago.

The Committee is of the view that egg producers, represented through CEMA are best positioned to resolve the challenges that currently exist amongst the partners. Challenges if left unresolved weaken what was described by one of the intervenors at the Hearing as the "fragile flower" of the agricultural industry.

Respectfully submitted,

Cynthia Currie	Anne Chong Hill	Maurice Giguère
Chairperson of the Committee	Committee Member	Committee Member

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INTRODUCTION

A hearing was held in Ottawa, on March 17th and March 18th by a Complaints Committee (Committee) established by the National Farm Products Council (Council) in response to complaints received in late December 2003 from both the Saskatchewan and British Columbia egg signatories. Both complaints were with regard to the Canadian Egg Marketing Agency's (CEMA) proposed quota order for the period December 28, 2003 to December 25, 2004.

Section 7(1)(f) of the *Farm Products Agencies Act* (Act) requires that the Council inquire into complaints received by it from any person who is directly affected by the operations of an agency. The Council decided to hold separate hearings into these complaints. The Council sent out Notices of Hearing on December 23, 2003 announcing that the hearings would take place on March 17 and
March 18, 2004. Both the Saskatchewan and British Columbia signatories were asked to provide their written complaint to the Council by February 25, 2004. The Agency provided its response to these complaints on March 10th. All interested persons were invited to make submissions to the Council by March 10, 2004. All documentation was circulated to all of the parties in advance of the hearings.

Pursuant to its *Guidelines for Complaints*, the Council established a Complaints Committee to hear the complaints, comprised of Cynthia Currie, Committee Chairperson and Chairperson of the Council and Anne Chong Hill and Maurice Giguère, Council members.

The Committee held a pre-hearing teleconference call with each of the parties to discuss procedural matters before the hearing. A Notice of Pre-Hearing Teleconference was sent to all signatories and two separate teleconferences were held on February 27th. These conferences, while not intended to discuss any of the substantive matters surrounding the complaints, assisted the parties in understanding the process to be followed at the hearing.

At the hearing on March 17, 2004, two procedural matters were dealt with by the Committee. The first was with respect to the Saskatchewan complaint. The CEMA and the Québec signatories had requested during the pre-hearing teleconference call that all submissions and transcripts of the hearing be tabled directly with all Council members. The Committee Chairperson announced that the Committee would make the hearing transcript available to Council members and would table the submissions with members.

The second matter dealt with an allegation in the complaint by the British Columbia signatories that certain members of the Canadian Egg Marketing Agency were in a conflict of interest situation when the decision was made by the Agency with respect to the proposed quota order for 2004. In order to protect the integrity of the hearing process, the Committee had advised all parties by letter of March 11, 2004 that it would seek the views of the parties on this matter, at the commencement of the hearing. The Committee wanted to know whether the parties believed that the Agency had breached section 43 of its by-laws by allowing processor members to take part in the discussions surrounding the allocation of eggs for processing quota, and thereby nullifying the decision.

After hearing the parties' views, the Committee decided that, in the face of a serious allegation of a conflict of interest in the agency decision on which the proposed quota order was based, it would decline to make any recommendations in respect to the proposed CEMA quota order and ruled that it was not competent to determine whether the agency decision which authorized the order was tainted due to an alleged breach of CEMA by-law No. 43 (relating to prescribed requirements in relation to the conduct of board members and conflicts of interest). The suggestion was made by the parties that, as part of its review function under Section 7(1)(d) of the Act, the Council could determine that the proposed order was one which it was required to review and that it therefore had jurisdiction to review the validity of the agency decision behind the order and it would be irresponsible for the Council to delay the review process until this issue was resolved.

In the presentations at the hearing, it was emphasized that the agency was a creature of statute and could only act in accordance with the specific authorities granted to it under the Act. In the Committee's view, the Council is likewise a statutory entity and is similarly constrained in its activities which must also be explicitly found under the provisions of the Act.

The hearing was constituted under subsection 7(1)(f) of the Act which states

> *"7. (1) In order to fulfil its duties, the Council....*
>
> *(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;"*

Subsection 7(1)(f) makes explicit reference to the Council making inquiries and taking "....such action within its powers as it deems appropriate..." in relation to any complaints it receives from persons affected by the operations of an agency. The scope of the inquiries which Council may make are therefore, extremely broad while the remedies which Council may effect are limited to taking actions "... within its powers". In the Committee's view it is accordingly incumbent upon Council to determine which power prescribed for it under the Act may be applicable to assist in the resolution of any bona fide complaint.

In respect to the bylaws of an agency, Section 25 of the Act is the primary provision to be examined.

25. An agency may make by-laws

(a) respecting the calling of meetings of the agency;

(b) respecting the conduct of business at meetings of the agency and the establishment of committees thereof, the delegation of duties to those committees and the fixing of quorums for meetings of the agency and any committee thereof;

(c) subject to the approval of the Council, fixing the fees to be paid to members of the agency other than any members who are paid salaries, for attendances at meetings of the agency or any committee thereof, and the travel and living expenses to be paid to the members of the agency and the members of any consultative or advisory committee of the agency;

(d) subject to the approval of the Council, respecting the establishment, management and administration of a pension fund for the members, officers and employees of the agency and their dependants, the contributions thereto to be made by the agency and the investment of the pension fund moneys thereof;

(e) respecting the duties and conduct of the members of the agency;

(f) prescribing the duties of officers and employees of the agency and the terms and conditions of their employment including the remuneration to be paid to them by the agency;

(g) for the establishment of consultative or advisory committees consisting of members of the agency or persons other than members or both; and

(h) generally for the conduct and management of the affairs of the agency.

It is to be noted that only in subsections 25(c) (i.e. fixing fees to be paid to members of the agency) and 25(d) (i.e. respecting the establishment and operation of a pension fund for members and employees) is there a prescribed requirement that Council must approve a proposed bylaw before it can be enacted by the Agency.

Bylaws establishing rules for members relating to conflicts of interest on the other hand, would be authorized under subsection 25(e) (i.e. respecting duties and conduct of agency members) and do not require Council approval. The Council therefore has no role to play in the creation of such bylaws as the Act has left this matter as one which lies within the Agency's sole and exclusive jurisdiction. The omission of a Council approval requirement would also mean that the interpretation and application of any such bylaw is also similarly a matter over which the Council has no prescribed "power".

It was also suggested by parties to the hearing that the Council had an implied power to interpret CEMA bylaw No. 43 as part of the Council's review function under subsection 7(1)(d) of the Act which states:

> *"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;"*

The language of subsection 7(1)(d) indicates that the Council has a prescribed "duty" to review "...all orders that are proposed to be made by agencies..." which come under the subsection. There is no discretion afforded to the Council within this language. Should an agency propose any regulation, then the Council is required to review it. Parliament has mandated and required the Council to perform this function to emphasize the importance of a second look before an agency, which is deemed under Section 26 of the Act not to be an agent of Her Majesty, may enact a regulation which affects the production and marketing rights of producers of the regulated product defined under the marketing plan.

Where however, as in the case of the British Columbia complaint, a serious question of law arises as to whether the proposed regulation is one which has been duly approved by a decision of the agency made in accordance with the agency's bylaws, then the prescribed review authority of the Council is also put into question. Further, in the Committee's view, the Council has no authority under the Act either expressed or implied to make a final determination of this issue. Where the bylaws contain no provisions for the resolution of disputes pertaining to their meaning and interpretation then, in the Committee's view, the alternatives for a final resolution are limited to either a unanimous agreement of the members of the agency who created the bylaw, or, failing any such agreement, by any affected party having resort to a duly constituted court of law. For the

Council to make such a determination in order to recognize that its duties under subsection 7(1)(d) of the Act are thereby required to be performed would make the Council party to a regulatory process which it knew or ought to have known was defective and therefore beyond or outside the scope of its prescribed "powers" under the Act.

The Committee believes it acted properly in indicating to the parties to the hearing that the primary subject of the hearing and most of the relief being sought by parties relating to the purported proposed agency regulation, may in fact and in law be found to be a nullity as being void *ab initio* and, given that no party indicated they wished to amend the relief they were seeking from the Council, advising parties at the outset of the hearing that the Committee would decline to make any specific recommendations to Council on whether it should approve the proposed agency quota order until the issue of the validity of the agency decision underlying the order was finally resolved.

The Committee noted it was willing to proceed with the hearings and issue a report with observations and findings, but without recommendations. The Committee asked parties to indicate whether they wished to proceed on those terms.

The parties then recessed for further discussion amongst themselves and returned on March 18th with a proposed resolution of the matter. An agreement had been reached with both the British Columbia and Saskatchewan signatories as well as all the interveners present that, subject to certain conditions (see copy of the agreement annexed to this report), the major one of which was that the Council immediately prior-approve an interim quota order (which would include the 2003 EFP allocation to British Columbia) and an interim levy order, the British Columbia signatories would withdraw their complaint and the Saskatchewan signatories would proceed with their hearing before the Committee. The Agreement also referred to certain commitments of the Agency with respect to the setting of quota allocation for the remainder of 2004. The principal commitment bound the CEMA Board, when setting quota allocation and levies effective August 1, 2004, to take into account the results of an independent study of British Columbia's Eggs for Processing (EFP) allocation issues.

The Committee agreed with the terms of the agreement and announced that the Council would meet on March 23, 2004 to consider, for prior-approval purposes, an interim quota and levy order for the period ending July 31, 2004.

The hearing into the Saskatchewan complaint then proceeded.

POSITION OF THE SASKATCHEWAN SIGNATORIES

At the outset, it is important to cite that Saskatchewan's complaint relates only to the allocation of overbase quota, i.e. quota relative to the production of eggs destined for the table market in excess of the levels set out in section 3 of CEMA's Proclamation. That having been said, Saskatchewan's position can best be summarized under five headings: (1) the legal framework governing quota allocation, (2) history of quota allocation issues, (3) supportive arguments against the prior-approval by Council of CEMA's proposed 2004 quota order, (4) comparative advantage and (5) requested resolution.

Legal Framework Governing Quota Allocation

Saskatchewan initially commented on the role of Council vis-a-vis approval of agency orders and regulations. Council has a statutory obligation to ensure CEMA's operations are consistent with the Act, Proclamation and Federal-Provincial Agreement (FPA). Section 7(1) (d) of the Act stipulates that when granting approval to an order, Council must be satisfied that the order is necessary for the implementation of the marketing plan. Where the order is inconsistent with the marketing plan, Council must not approve it.

Council has no authority to act outside of the terms of the Act, Proclamation and FPA nor has it the authority to permit CEMA to do likewise. Council cannot create or grant exceptions from the terms of these instruments despite arguments that the decision being exempted is good policy, that the decision is a compromise solution, or that the decision is only short term in nature. The content and effect of these instruments can only be changed by way of formal amendment, and until such time as formal change has been finalized, the terms of these instruments must be honoured.

Saskatchewan argues that administrative agencies like CEMA have no independent source of authority. Rather, their powers must be found in the legislation and other legal instruments establishing and regulating their operations, that is, in CEMA's case, the Act, Proclamation and FPA.

The Act provides for the creation, by Proclamation, of marketing agencies with powers relating to the marketing of farm products. The Act also specifies that a Proclamation shall set out the terms of a marketing plan that an agency is empowered to implement (s.17 (1) (c)), and provides for the objects of an agency (s.21), and the powers of agencies (s.22). In addition, S.23 prescribes how a marketing plan is to make the initial allocation of quota and requires that, in allocating additional quota, an agency must consider the principle of comparative advantage of production.

The Proclamation includes as part II, the terms of the marketing plan, i.e. elements relating to quotas and quota allocation, levies, licensing, pricing and general matters. Most importantly, s.2 (4) sets out how quota for production above base levels is to be allocated. That subsection lists five criteria which CEMA must take into account when allocating overbase quota: (1) the principle

of comparative advantage of production, (2) any variation in the size of the market for eggs, (3) any failures by egg producers in any province or provinces to market the number of dozens of eggs authorized to be marketed, (4) the feasibility of increased production in each province to be marketed, and (5) comparative transportation costs to market areas from alternative sources of production.

Finally, Saskatchewan describes the FPA as a legally binding agreement which can only be amended by unanimous approval of its signatories. The Saskatchewan signatories note that Part II of the Schedule to the FPA set out the same criteria as listed in the Proclamation for the allocation of overbase quota.

History of Quota Allocation Issues

The Saskatchewan signatories maintain that the egg industry has evolved in directions not contemplated in the Act, Proclamation and FPA despite the fact that appropriate amendments to these instruments have not been made. Furthermore, the system is vulnerable to challenge, CEMA has in the past and intends in the future to allocate quota based on factors not listed in the Act, Proclamation and FPA, CEMA has continued quota allocation practices in 2001, 2002, 2003 and 2004 which Council warned against using in 2000 and CEMA has not resolved allocation problems as per the directions of Council. Saskatchewan also noted that the National Association of Agri-Food Supervisory Agencies (NAASA), in June 1998, was of the view that the FPA had not kept pace with changes in the industry and that CEMA was operating in a manner which diverged from the strict requirements of that Agreement. Subsequently, in July 1998, Federal-Provincial-Territorial Ministers of Agriculture agreed to seek revisions to the FPAs for poultry and eggs and directed NAASA to undertake an appropriate process.

Saskatchewan set out, in chronological order, a series of events respecting quota allocation beginning with the Agency's decision to allocate an additional 430,000 layers for 1999 based on hen-to-population ratios. Again, for the year 2000, CEMA decided to increase the national regulated flock by 810,274 layers using a formula contained in the St. Andrew's Accord that specified the use of hen-to-population ratios. Signatories from both Saskatchewan and Manitoba filed complaint notices with Council early in 2000 stating that CEMA had failed to consider the criteria in the FPA. It was noted that Council, following receipt of a report from its Committee established to inquire into the complaint dated May 2000, decided to approve CEMA's proposed quota order amendment albeit somewhat reluctantly. It was pointed out that the arrangement, i.e. use of hen-to-population ratios, was to be "one-time" only and that it should be seen as a means of fostering stability for the remainder of the year.

In November 2000, CEMA directors approved recommendations from its Quota Allocation Committee (QAC), namely that increases for the table egg market would be on a 50-50 basis with half being allocated to provinces and territory whose hen-to-population ratio in the previous year is less than the national weighted average and the other half pro-rata to all provinces. The Saskatchewan signatories wrote to CEMA on December 14, 2000 noting their concerns that the

allocation of an additional 810,274 layers in 2000 was being treated as a new base for domestic quota as well as that CEMA intended to use the QAC's recommendations for future quota allocation increases. Council subsequently prior-approved the 2001 quota order although CEMA was advised that the Agency itself could not determine a new base level for eggs destined for the table market. Rather, this is a factor that required the consensus of all provincial and territorial signatories to the egg plan.

Subsequent quota orders for 2002 and 2003 reflecting no change from 2000 levels were prior-approved by Council with no explanation from the Agency as to how the criteria in the Act, Proclamation and FPA were taken into account. With respect to the 2003 quota order, Saskatchewan had requested Council not to prior-approve on the basis that it had been developed in the context of CEMA quota orders for the years 2000 and following and that such orders were not consistent with the allocation procedures in the FPA.

Despite opposition from the Saskatchewan member, the CEMA board of directors agreed to a quota allocation for 2004 at the same level as 2003 with no discussion or consideration of the criteria listed in the FPA. Further, CEMA's letter to Council requesting prior-approval made no reference to the allocation criteria.

Arguments Against Prior-Approval of the 2004 Quota Order

Saskatchewan maintains the proposed 2004 quota order is defective for four reasons which are set out below.

(a) CEMA based its allocation of overbase quota on factors that it was not entitled to consider i.e. factors other than those included in the Act, Proclamation and FPA. The only factors CEMA is entitled to take into account are the ones listed in these instruments. The order is invalid since it allocates overbase quota using hen-to-population ratios and market shares, factors not included in the Act, Proclamation and FPA.

Saskatchewan states that supply management rests on two key principles. Firstly, the problems created by unbridled competition are unacceptable and must be guarded against and secondly, resources should be allocated effectively as possible across the country. To ensure the economically efficient allocation of production, the Act recognizes comparative advantage of production as the basis on which overbase quota is to be allocated. The various factors enumerated in the Proclamation and FPA dovetail closely with the concept of comparative advantage. The Saskatchewan signatories provide examples of this dovetailing relationship in their submission.

Although CEMA does enjoy a measure of discretion, (i.e. it is not directed to allocate specific amounts of quota to specific provinces), it does not follow that it can allocate quota in any manner it sees fit. CEMA may allocate quota only by reference to the criteria expressly listed in the Act, Proclamation and FPA.

Saskatchewan notes that the law requires that an administrative agency must make decisions consistent with its objects and purposes and based on consideration of relevant factors and criteria. Although some discretion may be afforded to consider other factors depending on the legislative scheme involved, those factors must be consistent with its objects. The manner in which an agency's power is to be exercised is a function of the specific language of the legal instruments under which the agency is constituted and operates. In this regard, the FPA is the defining feature of CEMA's situation and distinguishes CEMA from typical administrative agencies. CEMA's decision making criteria are specifically set out in the FPA and there is no provision for CEMA to act on the basis of other factors that it might consider relevant.

On the question of an opinion provided by Mr. Henry Molot, a federal Justice Department lawyer, in 1988, Saskatchewan notes that opinion dealt only with the weight that an agency is required to place on the various allocation criteria listed in the Act, Proclamation and FPA. It did not address the issue of whether CEMA may consider criteria other than those listed in these instruments. Therefore, the Molot opinion has no bearing on whether CEMA can use factors like hen-to-population ratios and market share to allocate quota.

In concluding this argument, CEMA's 2004 overbase allocation can be seen as grounded on hen-to-population ratios, a criterion not listed in the Act, Proclamation or FPA. As well, CEMA's year-to-year extension of the 2000 allocation can be characterized as being a series of overbase allocations based on market share, i.e. each overbase allocation decision since 2000 has been based on the allocation in place for the previous year. Market share is not an overbase allocation criterion listed in the Act, Proclamation or FPA. Hence, CEMA's 2004 quota allocation decision in invalid.

(b) CEMA's 2004 quota order is not based on a legally proper consideration of the criteria specified in the Act, Proclamation and FPA. CEMA proceeded as if the 430,000 layers added to the national flock in 1999 and the 810,274 layers added in 2000 were somehow part of a new base quota. It failed to consider the criteria in the Act, Proclamation and FPA.

Saskatchewan claims that the briefing materials prepared for CEMA members for their November 12, 2003 meeting contained no analysis of any of the factors in the Act, Proclamation or FPA. Further, there was no discussion of them at the meeting. As well, CEMA's December 10, 2003 letter to Council seeking prior-approval made no reference to the allocation criteria. All of this amounts to a failure to act lawfully. To consider or to take

into account cannot be satisfied by disregarding the criteria or by mere passing reference to them. A decision-maker must undertake a genuine substantive consideration before it can be considered to have met its obligations.

The criteria for overbase allocation cannot be considered in a meaningful way in the absence of data. They are not criteria in the nature of factors such as "fairness" which might lend themselves to a kind of intuitive assessment. They can only be understood and assessed against the background of data and analysis. Although CEMA prepared detailed data for the use of the hen-to-population criterion, to Saskatchewan's knowledge, no similar analysis was ever prepared with respect to comparative advantage and the other criteria in the Act, Proclamation and FPA. Furthermore, the impact of each of the mandated criterion is not static or constant over time. For example, the comparative advantage of production of one province versus another is subject to change. Accordingly, CEMA must give the criteria ongoing consideration in order to discharge its obligations. It cannot look at them once and then ignore them.

Saskatchewan points out that Council itself was aware of problems inherent in CEMA's approach when in a letter dated December 18, 2000, Council warned CEMA that, with respect to the table egg market, the approach constituted a new base for the provinces and territory. Council's view was that CEMA alone cannot determine a new base but rather this is a factor requiring the consensus of all provincial and territorial signatories to the egg plan. By extending its earlier allocations through 2004 without any analysis of overbase criteria, CEMA has ignored the prescribed criteria and treated its earlier allocations as a new base level for quota. This is contrary to the Act, Proclamation and FPA.

(c) CEMA's use of hen-to-population ratios and market shares criteria to allocate overbase quota is inconsistent with its objects as stated in s. 21 of the Act. More specifically, allocating overbase quota on either hen-to-population ratios or on market share contradicts the statutory objective of promoting strong, efficient and competitive production and marketing. Similarly, use of these factors is inconsistent with the objective of having due regard for the interests of consumers and producers.

CEMA is required to act in a manner which is consistent with its objects. As a matter of law, it cannot make decisions which contradict those objects. Council itself, in its May 2000 appeal report, commented that "regardless of its present status or past practices though, the discretion afforded to any Agency, as with that of the Council, cannot be said to be unlimited. In every instance it must be viewed as circumscribed by the objects prescribed in s.21 of the Act". Further, Council in that same report, expressly warned against the continued use of hen-to-population ratios and held, in effect, that such use would be inconsistent with CEMA's objects as set out in the Act. Council also made it clear that the approach taken by CEMA was to be a "one-time arrangement only" and that it was a means of fostering stability "for the remainder of the year".

CEMA's approach clearly frustrates s. 21(a) of the Act, to promote a strong, efficient and competitive production and marketing industry. The reference to "efficient" is most significant. It refers to the allocation of production in the market place in the manner which maximizes production of all goods and services in the national economy. In this case, "efficiency"
necessarily refers to the allocation of egg production among provinces in the fashion which is consistent with maximum overall production of goods and services in the national economy.

A fundamental principle underlying efficiency is comparative advantage of production. Comparative advantage refers to the concept whereby production is allocated among "trading units" in the manner which most effectively engages the resources of each trading unit. But, comparative advantage does not mean cost advantage. Any allocation which equates "comparative costs" with "comparative advantage" is both inconsistent with the concept of comparative advantage and with the promotion of efficiency as required by the Act. The allocation of production using non-economic factors such as hen-to-population ratios and market shares do not have any necessary relationship with the highest and best use of resources and with a degree of certainty, will not reflect an efficient allocation of resources.

CEMA's quota allocation approach also conflicts with the object of having "due regard for the interests of producers and consumers as set out in s.21 (b) of the Act. If production is based on factors such as hen-to-population ratios and market shares, consumers will suffer since resources are not allocated in the most effective fashion and the cost of supply management becomes unacceptably high. The interests of producers in jurisdictions like Saskatchewan are also harmed because they are denied a proper opportunity to participate in the market.

(d) CEMA, by failing to take into account comparative advantage of production and by failing to comply with s.21 of the Act, is invalidating the "social contract" which underpins the national egg supply management system and is thereby threatening the longer term viability of the system. CEMA is wrong in thinking that overbase quota allocation issues can be satisfactorily addressed through an agreement or consensus among its members. The longer term viability of supply management depends on the willingness and ability of the system to respect the interests of downstream stakeholders and of consumers.

When supply management was introduced, consumers were very concerned about the impact of eliminating competition. Key compromises were made and those compromises formed the basis of a kind of "social contract" which underpins Canadian supply management. Prices were to be based on cost of production rather than being market driven, growth in production was to be allocated to those provinces with a comparative advantage and a supplementary import system was designed to prevent shortages and unreasonable price levels. Neither the designers of supply management nor the stakeholders expected that overbase quota would be

allocated equally to provinces or that it would be allocated on the basis of provincial populations. That would run totally contrary to the "social contract" in that it would not ensure efficient production.

Comparative Advantage

Given that CEMA has not undertaken analysis to operationalize the concept of comparative advantage of production, the Saskatchewan signatories did the work necessary to develop a reasonable and practical methodology. A paper dated April 22, 2003 explaining Saskatchewan's methodology was included with the materials filed. Saskatchewan invites Council to review the paper and to endorse it as a reasonable and acceptable basis for taking account of comparative advantage of production in the allocation process.

Requested Resolution

Saskatchewan submits that the issues can be best resolved as follows:

(a) Council should confirm that hen-to-population ratios and market shares are criteria which cannot be used by CEMA to allocate quota unless and until the Act, Proclamation and FPA are amended to expressly provide that they may be considered;

(b) Council should advise CEMA that it must allocate overbase quota by reference only to those criteria listed in the Act, Proclamation and FPA. In this regard, Council should confirm:

(i) that "comparative advantage" does not mean "comparative cost of production", and

(ii) that the formula operationalizing comparative advantage of production developed by Saskatchewan is reasonable and acceptable;

(c) Council should confirm that the 430,000 birds added to the national layer flock in 1999 and the 810,274 birds added in 2000 are not part of a new base quota and must all be allocated in accordance with the criteria listed in the Act, Proclamation and FPA;

(d) Council should establish a deadline by which CEMA must have met with the Saskatchewan signatories and worked out an overbase quota allocation which is consistent with CEMA's legal obligations under the Act, Proclamation and FPA; and

(e) Council should make any further recommendations that it believes would be useful in resolving the current situation.

RESPONSE BY THE CANADIAN EGG MARKETING AGENCY

Preliminary Comments

CEMA maintains that Saskatchewan's real objective is to receive not only an increased quota allocation for 2004 but also the leverage to compel a commitment from CEMA to guarantee Saskatchewan a fixed, disproportionate market share of future growth. For CEMA to provide such guarantee would be contrary to its statutory objects and would threaten the stability of the system.

In preliminary comments, CEMA regrets that this complaint has gone forward to Council noting that Saskatchewan, having been unable to secure support from any of the other signatories, now is turning to Council for additional bargaining leverage. These are matters for negotiation with the other provinces, not litigation. Council itself, has acknowledged that Saskatchewan's concerns should be addressed through the process to revise the FPA. Furthermore, through the RANA process, the QAC process and the FPA negotiations, Saskatchewan has had a full and equal opportunity to participate.

CEMA maintains it is in a difficult position because of Council's refusal to consider the possibility of interim quota and levies orders. Currently, CEMA is without the legal framework necessary to support its core functions. In circumstances where provisions in the regulation that implement core functions of an agency have an expiry date, it cannot have been the intention of Parliament that Council would refuse to exercise its powers in order to foster stability and certainty in the industry during an interim period while Council inquires into a complaint. Without quota allocations and levies, CEMA has no enforceable means to regulate interprovincial and export trade.

Role of Council

It is not Council's role to make quota decisions, but rather to be satisfied that an agency is acting in accordance with the Act and Proclamation as a condition for prior-approving amendments to quota regulations. Council has, over the years, stressed the need to accord agencies a considerable degree of flexibility and independence in quota policy matters. CEMA cites a number of past Council complaint decisions supporting this position. The Agency further contends that Council should be cautious about intervening in a quota allocation decision that is based on a consensus achieved through a carefully structured balance of interconnected and competing interests.

Legal Framework for Making Overbase Quota Allocation Issues

CEMA maintains that Saskatchewan views the criteria set out in the Proclamation as factors subsidiary to the principle of comparative advantage of production and has elevated this principle to the primary, if not ultimately the sole, criterion to be considered when making overbase quota allocation decisions. Saskatchewan's view is not supported by the Act, Proclamation or the FPA.

Under section 23(2) of the Act, CEMA is required to consider the principle of comparative advantage of production in the making of overbase allocation decisions. Parliament has not directed CEMA in the manner in which or the degree to which it must undertake that consideration. Secondly, s.23(2) does not prohibit the consideration of other factors by an agency. CEMA was given the mandate of working with industry partners to manage the egg industry in a manner consistent with the objects of the Act, not the task of acting as a testing ground for economic theories.

Consistent with the flexibility accorded to agencies under s.23(2) of the Act, the CEMA Proclamation does not prohibit consideration of factors other than those listed in s.4(1) of the Proclamation. By s.4(1), signatories agreed that CEMA was required to take into account certain specified criteria. Therefore, the position of Saskatchewan that the criteria listed in the Act, Proclamation and FPA are exhaustive is not supported by the Act, Proclamation or the current FPA.

CEMA has both discretion and flexibility in making overbase quota allocation decisions, a view that is supported by a number of prior decisions of Council. Not only CEMA, but all the national agencies have been guided by these decisions of Council, which in CEMA's view, are consistent with the Act and FPA. They are also consistent with the legal advice the Agency has received from the federal Department of Justice. CEMA further notes the characterization by Council of quota allocations as "policy" matters also accords with the original intent of the FPA signatories. Notably, section 13 of Schedule "C" to the FPA in part states that "the Plan would provide criteria by which the national agency would determine policy with respect to provincial shares of the national market, but would not provide a formula for such adjustment, leaving this as a matter of policy determination from time to time".

Finally, in the matter of flexibility, CEMA refers to a legal opinion provided by Henry Molot, Q.C. of the Department of Justice wherein the Agency is vested with discretion and flexibility when making overbase quota allocations. CEMA also refers to the findings of the Supreme Court of Canada (Oakwood Development Limited vs St. François Xavier) wherein the Court held that a body exercising a statutory decision-making function must take into account all relevant considerations.

Saskatchewan Approach To Comparative Advantage of Production Is Inconsistent With Council's Views

Saskatchewan has asked Council to declare (1) that comparative advantage does not mean comparative cost of production and (2) that the formula operationalizing comparative advantage of production developed by Saskatchewan is reasonable and acceptable. CEMA cites a number of past Council decisions referencing comparative advantage which in its opinion are contrary to the view held by Saskatchewan. In particular, CEMA refers to a Council decision in April 1994

wherein Council stated "production should take place with reference to comparative advantage and that production should be related to identified market requirement in various areas of the country. In other words, the allocation system should be market responsive, to supply the right amount and kind of product, at the time it is required in the places that it is required".

The Proposed Quota Allocation is Reasonable and Consistent with CEMA's Legal Obligations

The decision on November 12, 2003 establishing the federal quota allocations to the provinces was the result of numerous meetings, discussions and consultations leading up to that meeting. Moreover, there were four components to that quota allocation decision, namely: (1) the projected total demand for eggs in 2004 for both federal and EFP quota, (2) an adjustment to registered hen inventory levels resulting from Statistics Canada data on non-registered production, (3) the allocation of federal quota, and (4) the allocation of EFP quota. CEMA acknowledges that Saskatchewan is challenging only the third component, i.e. the allocation of federal quota, but states that all the components must be viewed as a package and not treated in isolation. CEMA then commented on the nature of the three unchallenged components.

CEMA fails to understand how Saskatchewan can claim that the overbase criteria were disregarded in the process leading to the federal quota allocation decision. The criteria were in fact, specifically as construed by Saskatchewan, discussed at length at a series of meetings involving CEMA and CEMA Committees. Other provincial perspectives on the criteria, including comparative advantage, were also discussed at various meetings in the context of considering Saskatchewan's views and proposals.

The process CEMA has followed since June 2000 has been one of consensus-building to address challenges facing the industry. The concerns voiced by Saskatchewan in respect of quota allocation issues have been among the many challenges facing the industry. In November 2002, the CEMA Board determined that given the nature and scope of the issues raised by Saskatchewan that they were most appropriately dealt with at the CEMA FPA Committee that had been formed in 2001. Progress reports were provided to the CEMA Board by the Committee regularly from 2001 through 2003.

Saskatchewan submitted a detailed Position Paper dated April 22, 2003 to the FPA Committee setting out its views on the role that comparative advantage should play in the allocation process. Subsequently, at the June 18, 2003 meeting of the Committee, the Saskatchewan representative made a presentation requesting additional quota for Saskatchewan over a five year period beginning in 2004 plus a guarantee of a fixed share (12.9%) of future growth based on Saskatchewan's interpretation of the overbase criteria. In addition, Saskatchewan proposed that the 810,274 layers initially allocated in 2000 should be reallocated so as to provide Saskatchewan with a higher percent of the growth. Saskatchewan claimed they ought to have received roughly 100,000 more layers than were initially allocated to the province. However, the request to the June FPA Committee meeting was not to reduce the allocations to other provinces, but to provide a

special increase to Saskatchewan of 100,000 layers plus the further guarantee of a fixed (12.9%) portion of future growth.

Saskatchewan did not succeed in convincing other provincial and territorial representatives at the August 12th, 2003 FPA Committee meeting that federal quota should be allocated on the basis Saskatchewan proposed. At that meeting, the CEMA Chairman presented a counter-proposal that would have provided for a 100,000 layer increase to Saskatchewan to be allocated over a period to be determined, including the non-registered production adjustment (50,963 layers). Responding to one of Saskatchewan's concerns, this proposal would have restored Saskatchewan's quota to its original 1972 market share. However, Saskatchewan turned down the offer stating that it did not address their concerns stemming from the allocation. Further, there was unanimous agreement amongst other Committee members that there was no basis to justify going back to their boards and governments with the Saskatchewan proposal.

In correspondence from the Saskatchewan Egg Producers (SEP) Chairman to the CEMA Chairman on August 23, 2003, Saskatchewan proposed to give equal weight to hen-to-population ratios, market shares and its theory of comparative advantage to justify a fixed 12.9 percent of all future quota to Saskatchewan and to reconfigure the 2000 allocation to give an additional 100,000 layers to Saskatchewan. The proposal was not supported by any of the other CEMA Board members at their September 24, 2003 meeting.

There are four reasons why Saskatchewan has been unsuccessful at convincing its FPA partners of the merits of its views. First, Saskatchewan continues to look backward, particularly to the 2000 quota that it unsuccessfully challenged before Council, as opposed to looking forward in a manner that can realistically foster a consensus. Second, Saskatchewan has built its position around what provincial signatories view as a contradictory and flawed concept of comparative advantage. Third, Saskatchewan has repeatedly compromised its position by bringing extraneous considerations into the negotiations eg. federal government initiatives relating to grain transportation rates. Fourth, other provincial organizations have understandable difficulty accepting Saskatchewan's suggestions that it alone should be able to re-open the 810,274 layer overbase allocation and should tie the industry's hands by guaranteeing Saskatchewan 12.9 percent of all future table growth irrespective of provincial market considerations.

CEMA maintains that it carefully considered the views advanced by Saskatchewan and all relevant issues, including the prescribed criteria before arriving at the four elements of the proposed quota allocation. Furthermore, CEMA cannot be faulted for declining to reallocate the shares of the federal quota. To do so, in the context of no overall growth in federal quota, would be the very antithesis of market responsiveness and stability. Nor can it be said that CEMA has treated the 2003 federal quota allocation as a "new base". More accurately, the 2004 federal quota allocation is reflective of a decision taken in the context of no material change in circumstances since 2003 which would warrant a change from the 2003 federal quota allocation.

EFP Quota Allocation

Although the distribution of EFP quota was not subject to challenge, CEMA notes that, consistent with the guidance of Council, it continues to refine its EFP Policy with a view to being market responsive and responsible.

Response to Additional Points Made by Saskatchewan

CEMA addressed several points made by Saskatchewan which warrant comment. Following are some of these points (not exhaustive).

- Saskatchewan says that Council must confirm the status and validity of the FPA. CEMA does not consider the validity of the FPA to be in question.

- While Saskatchewan maintains Council must not approve a quota order which is inconsistent with the marketing plan, Council did approve CEMA's quota allocations for 2001, 2002 and 2003.

- Saskatchewan indicates in its submission that CEMA must give the criteria ongoing and active consideration to discharge its obligations. This is precisely what CEMA has done.

Concluding Remarks

CEMA has faced financial pressures associated with the Industrial Product Program but has taken a number of steps to address these problems including developing an alternative reporting system for production and shell egg disappearance as past production data was not accurate. As well, the Agency is improving its Early Fowl Removal Program to reduce seasonally high levels of industrial product and developing a cap on the amount of industrial eggs eligible for levy support.

CEMA has also been committed to develop a new FPA that will modernize and update the contractual underpinnings of the egg marketing system and bring an added measure of both stability and sustainability to the industry. The FPA process is nearing completion with a package of documents distributed to FPA signatories in December 2003. However, FPA issues can only be resolved through good faith and face-to-face dialogue at the FPA negotiating table. FPA problems cannot be solved through litigation.

To grant Saskatchewan the relief it is seeking has a number of significant impacts. One immediate impact will be to significantly heighten the vulnerability of the egg industry to challenge by extending the lapse of the quota and levies orders. Another impact would be to force CEMA to pursue one of four options, all of which are problematic:

- CEMA could engage in a reallocation for 2004 of the overbase quota - an option that would be disruptive in the market place and contrary to sound management practices;

- CEMA could make a special allocation of federal quota to Saskatchewan that would put further pressure on levies;

- CEMA could tie its hands by committing to give Saskatchewan a fixed amount of quota or a fixed proportion of growth in future years; or

- CEMA could attempt to develop a new quota allocation methodology to satisfy Saskatchewan's concerns that would be contrary to the developing consensus surrounding the new draft FPA.

The most serious impact would be the likely destruction of the federal-provincial cooperation that underpins the supply management system for eggs.

For all these reasons, CEMA requests that Council:

(a) prior-approve the proposed amendments to the quota regulations providing for the federal quota allocation and federal EFP quota allocation for 2004; and

(b) prior-approve the proposed amendments to the levies order providing for $0.25 levy accrual.

SUMMARY OF INTERVENER POSITIONS

La Régie des marchés agricoles et alimentaires du Québec

The Régie notes that for many years, CEMA did not apply certain provisions of its FPA. However, all signatories continued to subscribe to the Marketing Plan and, de facto accepted this way of proceeding while recognizing the need for updating it to reflect CEMA's current practices and the new realities in the market place.

The quota allocation methodology and the levy setting mechanism proposed by CEMA reflect the recommendations of the Quota Allocation Committee as well as the proposals made by the FPA Revision Committee. The proposed new FPA resulted from a consensus of nearly all provincial producer boards which assessed the advantages and disadvantages of changes to the allocation of quotas and to the financing of the industrial products program. This agreement represents the best compromise solution towards improving the operations of the egg marketing system.

Any amendment to the major pillars of this agreement may lead to questioning the consensus reached by the FPA Revision Committee. The Régie believes this element has to be taken into account for any decision to revise the quota allocation methodology.

The Régie believes that the CEMA's proposed amendments to its quota and levies orders should receive the approval of the Council.

Egg Producers of P.E.I., P.E.I. Marketing Council, and the P.E.I. Minister of Agriculture, Fisheries, Aquaculture and Forestry

P.E.I. continues to respect its 2004 quota and levy obligations in the absence of a federal quota and levy order in place because P.E.I. believes the actions of CEMA were and continue to be in the best interests of the Canadian egg industry. P.E.I. outlined the benefits derived from the Federal-Provincial Agreement for eggs to industry stakeholders and the reasons for success over the years. The P.E.I. signatories also note that the industry has evolved dramatically over the past thirty years and that the changes which have occurred were not, nor could not, have been envisioned when the Act, Proclamation and FPA were written.

Recognizing the need for change, CEMA has established a committee to renew the FPA. This committee completed its work late in 2003 and awaits comments from signatories.

Although the decision to allocate 430,000 layers in 1999 was on the basis of hen-to-population ratios, this decision was taken only after long discussions with stakeholders and took into account a demonstrated increase in demand for eggs. Similarly, discussion prior to reaching the St. Andrew's Accord was intense albeit the Accord probably did not fall within the Act, Proclamation and FPA. However, CEMA's efforts to resolve differences associated with future quota growth must be commended. The Agency's Quota Allocation Committee discussed allocation issues with stakeholders and made recommendations and although not unanimously accepted, they were in the best interests of the egg industry.

The P.E.I. signatories argue that consideration of comparative advantage only applies when allocating additional quota for anticipated growth to market demand, not demonstrated growth as was the case in 1999 and 2000. Further, comparative advantage is only a principle and when applying the principle, considerable latitude in judgement must be applied. P.E.I. contends that the Agency should consider other elements when anticipated growth is being considered e.g. investment in facilities, market location and demographics.

Although Saskatchewan has developed a credible interpretation of comparative advantage, that is not to say other signatories could not develop a different interpretation. It is doubtful that the writers of the Act, Proclamation and FPA envisioned a debate among all signatories trying to apply the principle of comparative advantage to egg production compared to production in all other goods and services.

The 2004 proposed quota order is consistent with the Agency's by-laws and is consistent with the 2003 quota order approved by Council. CEMA did not violate the Act, Proclamation and FPA when it allocated quota in 1999 and 2000. Therefore, P.E.I. asks Council to dismiss Saskatchewan's complaint and approve the 2004 quota order or alternatively to prior-approve an extension to the 2003 quota and levies orders for 2004.

Ontario Egg Producers (OEP)

Ontario Egg Producers supports CEMA's request for Council's prior-approval of the quota and levies orders for 2004 and shares CEMA's concern about Saskatchewan's abuse of the Council Complaint Procedure. Saskatchewan's real purpose is to carve out a special deal for more federal quota for its producers at the expense of producers elsewhere in Canada.

Saskatchewan has used every opportunity to put forth its views on comparative advantage of production but has consistently failed to convince anyone of the validity of their position. In OEP's view, the Saskatchewan position on comparative advantage is simply wrong. The Quota Allocation Committee process and ensuing recommendations were a demonstration of the consensus building approach which the Agency has fostered to allow the system to operate in achieving its objects under the Act. Saskatchewan was a full participant in that process.

Out of concern for Saskatchewan's position on comparative advantage, the OEP commissioned a study on its implications by JRG Consulting Group. The consultants could find no clear meaning or application for comparative advantage and recognized that this criteria is open to any manner of different interpretations. Furthermore, Saskatchewan's assertion that "comparative advantage does not mean comparative cost of production" is a faulty stretch of economic principles. Comparative advantage has everything to do with relative efficiency of input usage which is about using the fewest scarce resources to produce output and when applied, is about comparative costs.

Saskatchewan's formula for applying comparative advantage is neither reasonable nor acceptable. It is a self-serving assessment of the value of agriculture to the Saskatchewan economy, it has nothing to do with the comparative advantage of egg production. The OEP submission also provides a summary of analysis prepared by its consultants which concluded that Saskatchewan's allocation would likely have been less than the actual allocation received by Saskatchewan today. However, the OEP notes that it is not relying on this analysis and is not advocating any particular definition or application of the principle of comparative advantage of production. As well, the OEP notes that its May 2000 submission to Council which provided an analysis of how the principle of comparative advantage supported the CEMA allocation, remains valid for the 2004 allocation period.

Ontario has consistently been prepared to consider and give weight to additional factors seen necessary by CEMA and the other provinces to maintain a viable egg industry and to achieve the objects of the Act. It is these extra considerations, previously recognized by Council and endorsed by CEMA, which form an important part of the 2004 allocation that is under attack through this

complaint. The OEP does not agree with Saskatchewan's position which would effectively prohibit CEMA from giving any consideration to other factors in the allocation process. CEMA moved past the stated criteria several years ago. These criteria were not ignored, rather, they were considered as part of the process and given the weight they deserve.

This complaint is essentially an attempt by Saskatchewan to continue its opposition to CEMA's 2000 allocation and to obtain a special deal for its own producers. These same issues were dealt with by Council at that time and hence, this proceeding is an unnecessary repetition.

The OEP support CEMA's acceptance of the consensus achieved by the provinces on the appropriate weighting of different criteria and is prepared to work with CEMA and the other signatories to improve the transparency of how various criteria are considered in the future. The OEP also supports CEMA's submissions respecting Council's previous rulings on the Agency's application of the criteria and urges Council to apply those guiding principles in reaching a decision.

La Fédération des producteurs d'oeufs de consommation du Québec (The Federation)

The Federation initially outlined the history of the enactment of the Act and Quebec's role therein particularly noting that the criteria in subsection 2 of section 23 is vague, imprecise, discretionary, arbitrary and liable to dispute. The Federation also takes issue with Council not promptly dismissing the complaint due to the lateness of filing the complaint pursuant to Council's guidelines for complaints. The Federation has criticized Council's decision not to hold discussions with CEMA representatives at Council's December 16th, 2003 meeting but rather to postpone consideration of CEMA's proposed quota and levies orders pending the outcome of the appeal hearing process. Particular information sought by the Federation under the Access to Information Act has yet to be received. The Federation also argues that since the approval of quota and levies orders is the responsibility of the Council itself, the entire Council should have all the documents and itself assess all the evidence provided.

The Federation concludes that Council endangered the supply management system, in circumstances that did not in any way justify it, by not approving the quota and levies regulations submitted by CEMA in December 2003. In particular, the absence of legislation since December 28, 2003 means that anyone who refuses to pay levies is justified in so doing, and that anyone who wishes to produce without quota for interprovincial movement cannot be stopped or sanctioned.

As a result of the above, according to the Federation, Council must immediately approve, on an interim basis, the quotas and levies adopted by CEMA on November 12, 2003 and immediately end the danger to which producers are being subjected.

The Federation notes that Saskatchewan has a quota of 971,000 layers, a single grading station and no processing industry. By making a complaint, Saskatchewan has not only succeeded in endangering the supply management system, but it does not make any precise suggestion as to what its 2004 quota should be.

There is no doubt that Saskatchewan's aim is to obtain a higher quota with no clear study of the effect of such an increase on industrial product costs, on the movement of eggs in interprovincial trade and on the compromise the provinces had reached in setting quotas for 2004. To grant the relief sought will mean the destruction of the egg supply management system.

The Federation questions how it can be explained that with such a free market and such comparative advantages, Saskatchewan at present has no processor and a processing quota of 4,880,000 dozen eggs that is only partly used.

The Federation requests Council to dismiss the Saskatchewan complaint and to approve the proposed 2004 quota and levies orders.

Alberta Egg Producers Board

The Alberta Board does not comment on the argument presented by the Saskatchewan complainants.

The Alberta Board says that the effect of Council's decision to not prior-approve the requested quota and levies order for 2004 is an improper response as it:

a) effectively jeopardizes the entire egg marketing system in Canada in that there is no national quota or levies order in effect;

b) places all producers and stakeholders in the industry at risk due to uncertainty and any enforceable means *(sic)* to protect against unauthorized interprovincial marketing; and

c) places into question the legality of funds collected by provincial boards for remittance to CEMA.

The Board says Council should have approved the orders for 2004 on an interim basis. Given the wide discretion provided to Council under s.7(1)(f) of the Act, a more appropriate response would have been to ensure that the system is stable by granting the interim order and thereafter, to deal with complaints.

The quota and levies orders are necessary for the implementation of the marketing plan and Council must approve them. To hold a contrary view means there is no marketing plan at all and this is unacceptable.

New Brunswick Egg Producers (NBEP)

The New Brunswick Egg Producers do not support Saskatchewan's argument that the criteria in the FPA are the only factors CEMA is entitled to take into account when allocating overbase quota. NBEP believe that the criteria are intended to be considered in a much less arbitrary manner in the development of allocation policies. Section 13 of Schedule C to the FPA in part reads, "the Plan would provide criteria by which the national agency would determine policy with respect to provincial shares of the national market, but would not provide a formula for such adjustment, leaving this as a matter of policy determination from time to time". NBEP believe that the authors of the FPA did not intend to provide absolute and unquestionable rules for quota allocation, but rather guidelines to be considered when developing future policy.

NBEP questions Saskatchewan's isolation of the criterion of comparative advantage from the five listed in Schedule A of the Proclamation and further questions the intent of their argument when the result of their proposal for calculating comparative advantage is an allocation that favours Saskatchewan more than any other province. It is not Council's role to determine that the formula developed by Saskatchewan is reasonable and acceptable. That is a policy determination that rests with CEMA. Further, the use of comparative advantage in determining allocations is problematic in that the principle is applied to one single product rather than all goods produced. This is not consistent with the theory of comparative advantage as an economic principle.

NBEP does not support the 1999 and 2000 allocations being reallocated using the FPA criteria. Whether referred to as "interim" or "one time", NBEP does not believe there to be one province which considered the most recent allocations to be temporary or open to retroactive reallocation. Given the long term nature of an egg production cycle as well as the long-term investment required, it would be irresponsible of CEMA to reconsider allocations already made to producers who have made those investments.

CEMA is required by law to submit a quota order each year regardless of any changes in allocations. Unless there is additional overbase quota to be allocated, industry does not consider it to be a new allocation. The 2004 proposed allocation is not a new allocation and Saskatchewan should not be allowed to use the 2004 quota order as the means to re-open discussion on the allocation methodologies established for the 2000 quota allocation. Saskatchewan's challenge to the allocation criteria has an optional forum for resolution in the current FPA renewal process and all three levels of signatories should be encouraged to participate.

Where Council declines to approve a levy or quota order, the egg industry is left in both legislative and operational jeopardy. In such cases, NBEP believes there should be an extension of the expired order so that agency/boards can continue operations, in the interim, in a non-threatening environment.

Nova Scotia Egg Producers and Nova Scotia Natural Products Marketing Council

CEMA's 2000 Quota Allocation Committee's process must be respected by all signatories. It is the basis on which CEMA has been operating since 2000 and is currently being incorporated into a revised FPA. Failure to respect this fragile agreement could re-open the question of provincial allocations and impair the Agency's ability to focus on the future of the system and the new FPA.

The substance of the complaint differs little from that filed by the Saskatchewan and Manitoba signatories in 2000. Nova Scotia believes that provincial differences are best dealt with at the Agency table and there are processes in place to permit this.

Mr. Tim Wiens, Egg Producer from Saskatchewan

Going back on the quota allocations made over the last years, ie. the 430,000 layers and 810,274 layers, would be totally wrong for our national and provincial industries. The above-mentioned allocations are a part of the new base suggested in the FPA proposal. Although difficult to swallow, it does reflect a reality to the ongoing nature of how we do business in this country.

Comparative advantage is a great tool to allocate extra production but why hasn't it been successfully used in the past?

Mr. Wiens questions whether the negotiation process has truly been fully utilized. A new team is leading the charge in Saskatchewan and they may not have had the chance to understand their fellow producers from across the country. When Saskatchewan's comparative advantage paper was added into the overall process, this new team expected immediate results to a concept they believed was irrefutable. History shows that provincial and national interests seldom fall in place overnight, especially when there is a possibility of clawing back gains made in other provinces.

Saskatchewan has been greatly disadvantaged over the last years in agriculture. It is not realistic that Saskatchewan egg producers can sign on to any deal that compounds the problem. It is incumbent on producers across the country to analyse what parts of the Saskatchewan position would be acceptable for a new FPA to be signed. There is room for negotiation between the parties to achieve the objects of both our provincial and national industries.

Ontario Farm Products Marketing Commission

The Commission supports the position of the Ontario Egg Producers for the following reasons. First, although Saskatchewan alleges that the only factors CEMA is entitled to take into account when allocating overbase quota are the ones listed in the Act, Proclamation and FPA, it cannot, nor has it been, interpreted or applied as being restrictive to such criteria. The Commission cites passages in the May 2000 report of the Council in concluding that overbase allocation is not restricted to the criteria contained in the Proclamation or the Act.

Secondly, Saskatchewan alleges that the methodology used by CEMA is inconsistent with its objects as stated in s.21 of the Act. In July 1998, Ministers of Agriculture indicated that national agencies require FPAs to effectively operate the supply management system. CEMA then, through its working committee, proceeded with the formidable task of developing a draft FPA. Although this work is not complete, the Commission is supportive of and committed to working with CEMA and other signatories to finalize an FPA that will be functional for years to come.

The Commission recommends that Council extend the 2003 quota and levy orders to provide a legal basis for CEMA's operations.

Manitoba Minister of Agriculture, Food and Rural Initiatives, Manitoba Farm Products Marketing Council, and Manitoba Egg Producers

The Manitoba signatories contend that certain actions and decisions of the Council, as a result of the complaint filed in 2000 by the Saskatchewan and Manitoba signatories, have contributed to uncertainty and confusion with respect to the appropriate considerations for subsequent quota allocations.

The Manitoba signatories referenced their submission to the May 2000 complaint hearing. In a letter to CEMA dated March 13, 2000 respecting the proposed allocation of 810,274 hens for processing market growth using a hen-to-population formula, Council stated it was not satisfied the order is appropriate for the implementation of the marketing plan nor was it satisfied that the Agency has demonstrated how the overbase criteria in s.4(1) of the Proclamation were taken into account. Furthermore, it does not believe that the proposed amendment is consistent with the objects of an agency as set out in s.21 of the Act. Notwithstanding the above and following the May 2000 complaint hearing, Council agreed to prior approve the proposed quota order.

During the 2000 complaint hearing, Manitoba asked Council to refuse to prior-approve the amendment to the quota order and to direct CEMA to address processor demand through alternative programs (EFP) which would respect s.21 of the Act. However, Council approved the order, in part it seemed, on account of concern about the uncertainty that might have resulted from a refusal to do so. Manitoba maintains that any such uncertainty could have easily been removed by further extending the existing quota order as the Council did for the January 1 to February 27, 2000 period.

Manitoba provides a number of extracts from the May 2000 hearing report relating to allocation procedures and discretion afforded an agency in making allocations and cautioning CEMA as to the continued used of hen-to-population ratios for allocating overbase quota. Council also expected the Agency to address these concerns in terms of any future quota order brought forward for prior-approval. Notwithstanding the above, Council went on to prior-approve CEMA's quota orders in 2001, 2002 and 2003.

The Manitoba signatories request that the Council:

- confirm the status of the continued use of hen-to-population ratios when allocating above base quota,
- clarify what factors the Council considers reasonable for "maintaining and promoting an efficient and competitive industry",
- clarify the decision not to prior-approve CEMA's levy and quota orders for 2004 even though similar conditions of uncertainty prevail in the absence of these orders, as was the case in 2000, and
- clarify what constitutes a given threshold appropriate to the criteria in the plan that Council requires to "satisfy itself" that a proposed order complies with the marketing plan and the Act.

Finally, Manitoba notes that a national Egg for Processing program is now in place to enable provinces such as Saskatchewan to participate in the growth of the domestic processing market.

COMMITTEE FINDINGS

In view of the number of issues raised during the course of the hearing respecting various provisions of the Act and the marketing plan, the Committee will take this opportunity to provide its observations on the Council's role in reviewing Agency orders and regulations and the requirements of the CEMA marketing plan for allocating overbase quota. This will be followed by commentary respecting the alleged inconsistency of the proposed quota order with the Agency's objects, interpretation of the principle of comparative advantage of production, the proposed methodology for quantifying comparative advantage and finally some concluding remarks.

Role of Council in Reviewing Agency Orders

The parties to the hearing made extensive reference to previous complaint hearing decisions of Council and quoted references to the Council's review function under subsection 7(1)(d) of the Act with respect to proposed agency orders or regulations.

Section 7(1)(d) provides

> *"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;"*

In the Committee's view, the language of subsection 7(1)(d) is phrased in terms of a "duty" for Council to perform rather than as a "power" of Council to be exercised over an agency. This is an important distinction as it is consistent with the overall scheme of the Act which, while including requirements for Council approvals for certain agency bylaws and all regulations or orders, does not explicitly provide to Council a directory or supervisory authority or "power" over an agency.

Where the Council declines to give its approval it may provide its reasons for doing so and may even suggest appropriate changes which an agency may wish to consider. In any such event though, the final determination of whether or when to follow the Council's suggestions is solely within the authority of an agency to make and an agency may ultimately decide upon another course of action to deal with the Council's concerns.

Subsection 7(1)(d) clearly provides that the Council must review any order or regulation which an agency proposes to make and which is of a type that the Council, by order, has required to be made subject to this subsection. The Council must then determine or "satisfy itself" that the proposed order or regulation is "necessary for the implementation of the ....plan". Should an agency provide a questionable rationale for the proposed regulation or order, the Council is still required to conduct its own independent review to determine whether the order or regulation is "necessary" for the implementation of the plan.

The test of "satisfaction" under subsection 7(1)(d) is, in the Committee's view, a subjective test to be determined solely by the Council. The Committee believes it is also for the Council to determine what the words "necessary for the implementation of the ...plan" mean. In making this latter determination the Council should review the prescribed terms of the authorized plan and the rationales or justifications provided by an agency and should also consider whether the proposed order or regulation is consistent with the objects of the agency pursuant to Section 21 of the Act.

Other than these general guidelines, it is the Committee's view that the Council has broad discretion when conducting its review. It may choose to rely exclusively upon an agency's supporting submissions or, alternatively, may decide to conduct its own independent assessment. The Council may have due regard to previous similar orders or regulations and whether the proposed order provides relevant continuity and stability for the regulated industry. Ultimately though, the Council must be satisfied that the proposed order or regulation is one which may be justified within the terms of the Act and the plan.

The test of "satisfaction" should not necessarily be viewed as an exact science and the Council need only strive to determine whether proposed agency orders or regulations meet the objectives of the Act and the plan. Once the Council has determined that the threshold test of "satisfaction" has been met then it is directed under subsection 7(1)(d) to approve the proposed agency order or regulation. This is a mandatory requirement and it is not open for the Council to direct that the agency must not proceed with completing the process of enacting the order or regulation into law until it has met Council instructions for changes or implementation. On the other hand, the Committee believes it can also be said that unless and until the Council is "satisfied" with the order or regulation, the Council has no authority to give its approval for it to be enacted into law.

As for the agency, even where its proposed order or regulation has received Council approval, the agency may nevertheless decide not to proceed with it and may elect to take some other action or perhaps even submit a new proposed order for Council consideration. Thus while the Council's approval may be a necessary interim step for an order or regulation subject to subsection 7(1)(d), the final determination of whether the regulation is to be enacted into law is solely the responsibility of the agency.

In the Committee's view therefore, the Council approval function under subsection 7(1)(d) of the Act establishes a statutory check or balance on the exercise of the authority delegated to an agency to enact orders or regulations but does not thereby imbue the Council with any directory or supervisory "powers" over an agency. The Committee believes that each body is a "creature of statute" and has a distinct role and independent responsibilities under the Act particularly in respect to the enactment of subordinate legislation.

Requirements of the CEMA Marketing Plan for Allocating Overbase Quota

In their written submission Saskatchewan emphasized that, as an administrative body created by a duly enacted Proclamation, the CEMA was obliged to operate only within the limits of its statutory authority. The Saskatchewan signatories also asked the Committee (and ultimately the Council) to confirm that hen-to-population ratios and market shares are criteria that cannot be used by CEMA to allocate overbase quota unless and until the Act, Proclamation and egg marketing plan have been appropriately amended and that the only criteria which may be used are the five criteria listed in the current egg marketing plan. During their oral presentation Saskatchewan further suggested that while CEMA might use hen-to-population ratios and market shares to determine "whether" to allocate overbase quota it could not use these same criteria in the actual allocation process but was restricted to the five criteria in the plan.

Given the emphasis placed during the hearing upon the enabling legislative instruments under which CEMA was created in preparing this report, the Committee therefore concluded it would be essential for it to review in some detail the applicable provisions in these instruments in order to examine the degree of flexibility which may be available to CEMA for making overbase allocations.

Section 23 of the ***Farm Products Agencies Act*** provides as follows

> *"23. (1) A marketing plan, to the extent that it allocates any production or marketing quota to any area of Canada, shall allocate that quota on the basis of the production from that area in relation to the total production of Canada over a period of five years immediately preceding the effective date of the marketing plan.*

23(2) Idem

> *(2) In allocating additional quotas for anticipated growth of market demand, an agency shall consider the principle of comparative advantage of production."*

Despite the fact they are contained within one section of the Act, each of the subsections in Section 23 comprises a separate prescriptive text with the result, in the Committee's view, that they may be susceptible to different interpretations as to whether or when subsection 23(2) must be applied.

Subsection 23(1) does not appear, on its terms (i.e. when it prescribes that "*A marketing plan, **to the extent that it allocates** any production or marketing quota to any area of Canada,....*") to require that every marketing plan must include allocations of quota.

What subsection 23(1) does indicate though, is that where the terms of a marketing plan have the effect of allocating a production or marketing quota to any area of Canada, any such allocation shall be based upon the proportion of production in that area in relation to the total production in Canada during the five year period immediately preceding the effective date of the marketing plan.

Accordingly therefore, ss. 23(1) establishes a formula which, while not requiring that the terms of a marketing plan must include an allocation to any area of Canada, requires that if any such allocation is made it must be done subject to the "pro rata" formula prescribed in the terms of the subsection. Hypothetically speaking, the Committee believes it could be possible to create a marketing plan with terms that only allocate 50% of the production of the defined regulated product. The division of this allocation would have to be made in a proportional manner as prescribed in subsection 23 (1) of the Act. The remaining 50% market requirement would be left subject to open competition amongst producers.

Subsection 23(2) then provides that " ***In allocating additional quotas****...*" (presumably beyond those which may be made in the marketing plan in accordance with the formula prescribed by ss. 23(1)) "*...for anticipated growth of market demand, an agency shall consider the principle of comparative advantage of production*".

While not "explicit" in its terms, ss.23(2) may therefore "implicitly" mean that any allocation made by an agency beyond the quota amounts provided in the terms of the plan must be for an "*...**anticipated growth of market demand...**"* and that therefore the agency must consider comparative advantage of production for any such additional amount of quota to be allocated. It may even be suggested that where a marketing plan makes no allocation whatsoever in its terms then any and all allocations by an agency must always include the consideration of comparative advantage of production.

On the other hand, because ss. 23(2) clearly indicates that it only applies where the additional allocation is for an "*...**anticipated growth of market demand**...*" it may be suggested that the consideration of comparative advantage is only necessary where the additional allocation proposed is **beyond** the market requirements when the plan was brought into effect (which latter amount, in the example indicated above, would have included both the 50% market requirements allocated in the plan plus the additional previously unallocated 50% portion).

Contrary to the first line of reasoning indicated above, it may perhaps also even be suggested that if subsection 23(1) has no application to a plan (i.e. a plan which makes no allocations whatsoever in its terms), then neither does subsection 23(2) (which refers back to subsection 23(1) when it speaks of "*...**allocating additional quotas...***" to those allocated in the plan). In other words, it may be
reasonable to suggest that an agency administering a plan which makes no allocations in its terms is not ever required to follow the requirements of ss. 23(2) (to consider comparative advantage of production) when allocating quotas.

As the preceding arguments attest and given the potential for such contradictory interpretations, the only secure conclusion the Committee believes one can reach respecting section 23 is that it was only intended to establish prescribed requirements once certain conditions are met in the terms set out in the marketing plan and does not, by itself, impose under the Act, a specific statutory requirement on an agency. In order therefore, to determine the degree and nature of the applicability of Section 23, and more specifically subsection 23(2), the Committee believes one needs to closely examine the terms set out in the CEMA plan.

In particular, Part II of the CEMA marketing plan provides as follows;

"Quota System"

- *(1) The Agency shall, by order or regulation,* ***establish a quota system*** *by which quotas are assigned to all members of classes of egg producers in each province to whom quotas are assigned by the appropriate Board or Commodity Board.*

(2) The Agency, ***in establishing a quota system, shall assign quotas in such manner that the number of dozens of eggs produced in a province and authorized to be marketed*** *in interprovincial and export trade* ***in the year 1973****, when taken together with the number of dozens of eggs produced in the province and authorized to be marketed in intraprovincial trade in the same year, pursuant to quotas assigned by the appropriate Board or Commodity Board, and the number of dozens of eggs produced in the province and anticipated to be marketed in the same year, other than as authorized by a quota assigned by the Agency or by the appropriate Board or Commodity Board,* ***will equal the number of dozens of eggs set out in section 3 of this Plan for the province****.*

(3) For the purposes of subsection 2(2) of this Plan, the number of dozens of eggs set out in this section for a province is the number of dozens set out in Column II of an item of the following table in respect of the province set out in Column I of that item, such number of dozens representing the percentage set out in Column III of that item.

TABLE

	Column I	*Column II*	*Column III*
	Province	*Number of Dozens of Eggs*	*Percentage of Global Allocation*
1.	*British Columbia*	*57,250,000*	*12.055 %*
2.	*Alberta*	*41,344,000*	*8.704 %*
3.	*Saskatchewan*	*22,611,000*	*4.760 %*
4.	*Manitoba*	*54,189,000*	*11.408 %*
5.	*Ontario*	*181,267,000*	*38.161 %*
6.	*Quebec*	*78,647,000*	*16.556 %*
7.	*New Brunswick*	*8,683,000*	*1.828 %*
8.	*Nova Scotia*	*19,504,000*	*4.106 %*
9.	*Prince Edward Island*	*3,028,000*	*0.637 %*
10.	*Newfoundland*	*8,477,000*	*1.785 %*

4. (1) ***No order or regulation shall be made where the effect thereof would be to increase*** *the aggregate of*

(a) the number of dozens of eggs produced in a province and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and

(b) the number of dozens of eggs produced in a province and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board

to a number that exceeds, on a yearly basis, the number of dozens of eggs set out in section 3 of this Plan for the province unless the Agency has taken into account

(c) the principle of comparative advantage of production;

(d) any variation in the size of the market for eggs;

(e) any failures by egg producers in any province or provinces to market the number of dozens of eggs authorized to be marketed;

(f) the feasibility of increased production in each province to be marketed; and

(g) comparative transportation costs to market areas from alternative sources of production.

(2) ***No order or regulation shall be made where the effect thereof would be to decrease*** *the aggregate of*

(a) the number of dozens of eggs produced in the Province of ***New Brunswick, Prince Edward Island or Newfoundland*** *and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade; and*

(b) the number of dozens of eggs produced in the Province of New Brunswick, Prince Edward Island or Newfoundland and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board.

(3) ***No order or regulation shall be made where the effect thereof would be to decrease*** *the aggregate of*

(a) the number of dozens of eggs produced in a province and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and

(b) the number of dozens of eggs produced in a province and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board,

to a number that, on a yearly basis, is less than the number of dozens of eggs set out in section 3 *of this Plan* ***for the province*** ***unless at the same time the number of dozens of eggs produced in each of the provinces****, other than the Provinces of New Brunswick, Prince Edward Island and Newfoundland, and so authorized to be marketed in intraprovincial, interprovincial and export trade* ***is decreased proportionately****.*

(4) Subsection 4(3) does not apply to the ***Northwest Territories****.*

(5) Pursuant to section 23 of the Act, the Agency has determined that the number of dozens of eggs produced in the ***Northwest Territories*** *and authorized to be marketed in interprovincial and export trade in a twelve month period, when taken together with the number of dozens of eggs produced in the Northwest Territories and authorized to be marketed in intraprovincial trade in the same twelve month period, pursuant to quotas assigned by the appropriate Board or Commodity Board, and the number of dozens of eggs produced in the Northwest Territories and authorized to be marketed under quota exemptions in the same twelve month period, will equal 2,725,500 dozens of eggs, except for the period commencing on the day this subsection comes into force and terminating on December 31, 1999, when the number of dozens of eggs produced in the Northwest Territories and authorized to be marketed, either by quotas or by quota exemptions, shall be the product of the number of days in this period multiplied by 7,467.*

(6) No order or regulation shall be made where its effect would be to increase the number of dozens of eggs produced in the ***Northwest Territories*** *and authorized to be marketed in a twelve month period to more than 2,725,500 dozens of eggs, unless the Agency has taken into account the criteria set out in paragraphs (1)(c) to (g).*

(7) No order or regulation shall be made where its effect would be to decrease the number of dozens of eggs produced in the ***Northwest Territories*** *and authorized to be marketed in a twelve month period to less than 2,725,500 dozens of eggs, unless the unanimous consent of the members of the Agency has been obtained.*

(8) ***No order or regulation shall be made pursuant to subsection (1), (3) or (6) unless the Agency is satisfied that the size of the market for eggs has changed significantly."***

N.B.: some of the text has been highlighted and underlined here for ease of reference.

The first point to note is that, **except for the year 1973**, the CEMA marketing plan does not contain terms which actually allocate quota. Rather, what the plan does is require that the CEMA must establish a "quota system" subject to and in accordance with the rules laid out in the plan. There is also nothing in the plan which suggests that once established the Agency's quota system cannot evolve or be varied over time to meet changing industry circumstances.

In an indirect sense though, in paragraph 4(3) of the marketing plan, by prescribing a prohibition on any decrease in the annual quotas for N.B., P.E.I., or NFLD., it may be suggested that the plan has, if not expressly then by implication, made an allocation in its terms to these provinces and that such allocations, having been made on a pro rata basis based on the requisite five year production period, comply with the requirements of subsection 23(1) of the Act.

Paragraphs 2 and 3 of the plan establish the foundation on which the agency is to operate in making allocations **for the 1973 production year** and the table in paragraph 3 establishes what are often referred to by parties as the base quota numbers and proportional or pro-rata percentages by province related to the total national production during the applicable five year period prescribed in subsection 23(1).

Paragraph 4(1) of the Plan then provides that if an annual allocation to "any province" is to exceed the amount in the table for that province, then the Agency must have "taken into account" the five criteria listed in the same paragraph (one of which is comparative advantage of production). The plan therefore differs from subsection 23(2) (which requires that there must be an additional allocation to that in the plan for an "*...**anticipated growth of market demand**...*") by providing a more restrictive and less ambiguous requirement for the agency to "...take into account..." comparative advantage of production and the other four criteria whenever ***an allocation to any province is to exceed the amount in the table for that province.***

There is though, no other indication in the plan as to how the five "overbase" criteria in the plan are to be defined or applied by the Agency (i.e. what weighting should be applied to each one). The requirement that they be "taken into account' is, in the Committee's view, a mandatory statement that in any system or deliberations of the Agency involving "overbase" quota allocations to any province these five criteria as a group must play an important role. Further, in examining alternative definitions or applications for each of the criteria, the Committee believes that the Agency is required to choose those definitions or terms which best accord with the objects for an agency prescribed under Section 21 of the Act.

At the hearing, questions raised for the Committee to consider included whether the list of criteria was to be regarded as open or closed and whether the Agency could attribute a weighting of zero to the listed criteria and use other criteria which it believed were more applicable to the business considerations underlying allocation decisions. Questions were also asked whether the Agency could even consider criteria which may be inconsistent with its objects in Section 21 of the Act.

In the Committee's view, by always phrasing the discussion in terms of labeled "criteria" the parties are thereby placing inappropriate limitations upon the options otherwise available to the CEMA in establishing a quota system as mandated under the plan. It is not, in the Committee's opinion, a question of whether hen to population ratios or market shares are to be viewed as criteria which can or cannot be employed in the allocation process of the agency. By proceeding in this fashion the Agency would be precluded from the opportunity to consider and include what it believes may be relevant information for making its allocation decisions. The Committee believes that the hen-to-population ratios, while they should not be used exclusively for the overbase allocations, may nevertheless constitute relevant information which may be considered and applied in terms of part or all of the five criteria listed in the plan when determining the necessary provincial allocations.

Rather, the Committee suggests that the focus of the parties should be directed more towards examining the purpose to which any information is to be put. In other words, to what extent should the CEMA use such information to formulate useful proxies for each of the criteria listed in the plan and how may they be reasonably employed in concert with other proxies or information relevant to each of those prescribed criteria. The primary questions then become more a matter of degree (or weighting) of employing appropriate information with the objects prescribed in Section 21 of the Act serving as general guidelines and limiting factors in evaluating and applying various alternative methodologies. In the final analysis though, the Committee believes the Agency should be prepared to clearly demonstrate in its supporting rationale what information it is relying upon and how it has adapted and applied the five criteria to meet changing industry circumstances when making quota allocations.

Alleged Inconsistency of the Proposed Quota Order with the Agency's Objects

The Saskatchewan signatories argue that the use of hen-to-population ratios in allocating quota is inconsistent with CEMA's objects as set out in the Act. Specifically, the use of such ratios do not promote a strong, efficient and competitive production and marketing industry for eggs in Canada. In pursuing this argument, substantial reference was made to Council's May 2000 complaint hearing report.

The Committee would reiterate the findings of the 2000 complaint hearing in cautioning the Agency with respect to the continuing use of hen-to-population ratios for purposes of allocating above base quota to member provinces. It must be remembered however, that the subject of the 2000 complaint involved the allocation of production from 810,274 additional layers designed to meet the increasing requirements of the domestic egg processing market, not the table egg market.

In that particular case, Council questioned the wisdom of making an allocation based on provincial self-sufficiency proxies given the fact that the locational characteristics of the domestic processing market might mitigate against it. In that respect, Council noted that this was to be a one-time only arrangement. Should the Agency continue to use the hen-to-population ratios, the Committee is of the opinion that it is the Agency's responsibility to supply supportive quantitative analysis to show that the ratios demonstrate more efficient production and marketing and is therefore in furtherance of its objects.

There are two distinct markets for eggs in Canada, a table or shell egg market and a processed egg market. Although the existing FPA refers only to the "market for eggs", the Committee is aware that Council has long since recognized that the overbase criteria listed in the marketing plan may not necessarily be the most effective or efficient ones to address growth in both of these markets. In particular, Council has encouraged the Agency to develop allocation methodologies to meet increasing domestic requirements of egg processors which would have minimal impact on the industrial products levy. CEMA cannot view the quota system in isolation of the levy structure. In making allocations which are subject to the industrial products levy, the Agency must take full account of the level and the possible impact of that levy. The Committee is of the belief that while supplying the table market with sufficient product, the maintenance of a reasonable industrial product levy rate is one measure as to whether the Agency is achieving the objects set out in s.21 of the Act.

To the Agency's credit, an "eggs for processing" (EFP) program has been established and implemented, albeit the terms for allocations made under this program do not explicitly reference most of the listed criteria. Obviously, the second criterion listed in the Proclamation, "any variation in the size of the market for eggs", is by definition considered as no EFP allocation would be made in the absence of a proven increase in demand. Although not the subject of this complaint, the Committee views the EFP program as a significant step toward fostering a strong, efficient and competitive egg industry. The Committee further notes that the Council has already gone on record to this effect. The EFP program provides opportunities for producers to increase production if such production makes good business sense without placing undue burdens on the industrial products program. The development and operation of the EFP program only underscores the pressing need to get a renewed FPA in place as soon as possible.

On the question of re-allocating the overbase quota increases made in 1999 and 2000, CEMA submitted that would be the very opposite of something conducive to the objects of the Act and would be destabilizing and unreasonable. The Saskatchewan signatories replied that any adjustment would not be undertaken in a draconian manner where flocks need be destroyed but rather such adjustment can be negotiated and managed in a sensible way over time. Again it should be emphasized that each quota order is a stand alone instrument, it is independent from those coming into force before or indeed following it. Each time an order is made by the Agency, the criteria in the marketing plan must be taken into account when allocations are made above base levels set out in the Proclamation. In this way, the previous year's allocation does not establish a new base for the current year. However, the Committee submits that it would be unrealistic to

implement radically differing allocations for each quota period. Presumably, there are long-term underlying factors that influenced past decisions, and should continue to influence future ones. To stray from this would introduce considerable instability to the industry.

Long-term investment decisions by producers, graders and processors alike hinge upon predictable provincial quota allocations. This is not to say that provincial allocations can never change disproportionally, but rather that adjustments should be made on a gradual longer term basis based on an agreed-upon practical, consistent, measurable and transparent set of criteria. As such and to re-emphasize, there is an urgent need for the egg signatories to negotiate a marketing plan that enshrines such concepts under a new FPA. It is the Committee's view that the industry, represented by CEMA, is best suited to make such decisions, and to the extent possible, governments should stand ready to support them.

In light of the foregoing, the Committee strongly recommends to the Council that each time the CEMA presents a quota order for prior-approval purposes to Council, it be required to provide a comprehensive justification including a detailed analysis outlining how the Agency took into account the criteria listed in the marketing plan. In addition, the Agency's justification must demonstrate how the quota order it submits meets the Agency's objects set out in section 21 of the Act. It is the Committee's position that should this requirement not be met that the Council consider convening a mini-signatories meeting comprised of provincial commodity and supervisory boards, the Agency and Council to determine how best to deal with the allocation issue.

Interpretation of the Principle of Comparative Advantage of Production

In support of their request to Council that "comparative advantage" does not mean "comparative cost of production", Saskatchewan submits their concept of the comparative advantage of production and an example of why comparative advantage does not mean cost advantage. For Saskatchewan, the comparative advantage of production is a concept whereby production is allocated among trading units in the manner which most effectively engages the resources of each trading unit. The submission then provides a hypothetical example where two products are generated more cheaply in one area than in another area. But both areas will gain if they each specialize in the production to which their resources may best be put to use.

The methodology to operationalize their interpretation of the comparative advantage of production was set out originally in a Saskatchewan Position Paper dated April 22, 2003. In the paper, Saskatchewan constructs an index of comparative advantage by province using the following methodology: calculate the percentage of provincial GDP generated by crop and animal agriculture as a share of provincial GDP for the period 1984-2001 (average); total these provincial shares; divide each of the shares by the total of the shares; and multiply the results by 100 to convert these provincial shares to percentages. Saskatchewan then labels the generated provincial numbers as the index of comparative advantage by province.

At the hearing, Saskatchewan submitted two additional notes on the meaning of comparative advantage and the methodology being proposed to operationalize comparative advantage. In the first note, Professor Joel Bruneau of the University of Saskatchewan concurs with the assessment of the meaning of comparative advantage as set out in the Saskatchewan paper of April 2003. He is of the opinion that comparative advantage is always discussed in relative terms. It is the relative productivity (and hence costs) between industries within a country that determines whether or not an area enjoys a comparative advantage. A focus on the costs for one industry cannot establish the presence of a comparative advantage. Professsor Bruneau is of the opinion that the methodology used by Saskatchewan to operationalize the principle of comparative advantage of production appears to be a sensible and reasoned approach. He indicates that the use of GDP shares may not always be an appropriate proxy for relative export shares that are generally used in the economic literature to estimate whether an area has a revealed comparative advantage.

In the second note, Professor Andrew Schmitz of the University of Florida supports the Saskatchewan position that the principle of comparative advantage does not refer to comparative costs. It is wrong to interpret comparative advantage by comparing costs of production or by comparing processing capabilities between economies. He is of the opinion that additional work is needed on the Saskatchewan methodology to operationalize the theory of comparative advantage, although the methodology is a reasonable and acceptable step in the right direction. In his view, comparative advantage should be assessed in the context of a general equilibrium Heckscher-Ohlin model and not the Ricardian model used by Dr. Groenewegen in his support of the CEMA position.

In reply, CEMA submits that Saskatchewan has built its position around what other provincial signatories view as a flawed concept of comparative advantage. CEMA contends that the flaws in the methodology are the use of the proportion of GDP devoted to crops and livestock as a proxy for comparative advantage without regard to other important factors such as transportation costs, proximity to markets, cost of production and past utilization of marketing opportunities.

In support of its position on the interpretation of comparative advantage, CEMA referred to the intervention of the Ontario Egg Producers which included analysis by Dr. John Groenewegen of J.R.G. Consulting Group. Dr. Groenewegen disagrees with the Saskatchewan submission that comparative advantage does not mean comparative cost of production. In his view, comparative advantage has everything to do with relative efficiency of input usage and when operationalized is about comparative costs. He is of the opinion that Saskatchewan's formula for operationalizing comparative advantage is not reasonable and acceptable. Saskatchewan's use of GDP ratios measures the value of agriculture to the provincial economy, not the comparative advantage of egg production.

When academic and consulting economists put forward alternative theoretical models and interpretations of the meaning of the principle of comparative advantage of production, the Committee can only conclude, in light of the fact that papers were tabled during the complaint hearing and not discussed in detail, that considerable effort still needs to be made by the parties if

they wish to adapt this economic concept to the domestic supply-managed egg industry. It is the Committee's view that experts in the field and the Agency are best suited to deal with this issue. These models are an attempt to highlight the key issues but can seldom be applied completely to an actual industry due to the nature of the simplifying assumptions underlying the models. This is particularly the case when an attempt is made to apply a theoretical pure-competition model to an industry operating under supply management.

Based on the evidence it received, the Committee cannot confirm Saskatchewan's request that comparative advantage does not mean comparative cost of production. The Committee is of the view that the principle of comparative advantage of production is initially an assessment process that may be used as part of an allocation process. An assessment may suggest that one type of production be emphasized rather than another type but various obstacles may prevent additional production from taking place. Comparative assessments are normally based on data and may include available cost data. As well, the example submitted by Saskatchewan is driven by a comparison that finds one area producing "more cheaply" than the other. This type of comparison surely involves an estimate of some measure of cost. The need for a comparison of relative productivities or costs is also set out by Professor Bruneau.

For interpreting the principle of comparative advantage of production, the Committee understands Saskatchewan's position to be that the phrase should be primarily interpreted using economic concepts applied in international trade. In general, however, the principle is located in legislative provisions for industries operating under supply management, more specifically, s. 23(2) of the Act. When supply management was introduced for these industries, it was "understood" by participants that prices were to be based on the cost of production rather than being market driven. This is another reason to include cost data in comparative assessments.

The Committee is of the view that the principle of comparative advantage of production is still open to interpretation in the application of the Act and Proclamation. It is the responsibility of CEMA to interpret this phrase within the objects of an agency, as set out in Section 21 of the Act:

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 power; and

b) To have due regard to the interests of producers and consumers of the regulated product or products.

The Committee is willing to provide some considerations for CEMA if it decides to turn to the task of interpreting the principle of comparative advantage of production for the egg industry. First, the textbook definition of the principle of comparative advantage is sometimes referred to as the principle of comparative cost. In the textbook referred to in the Saskatchewan submission, Professors Samuelson and Scott twice refer to the theory of comparative advantage **or** comparative cost before they restate the principle as quoted in the submission by Saskatchewan. Thus, it appears that the authors are suggesting that cost may be substituted for advantage in interpreting the principle of comparative advantage of production.

Second, in economics, cost has two basic definitions. One definition refers to opportunity cost which is the value of the alternatives or other opportunities that have to be foregone in order to achieve another object. The other definition is the total money expenditure or outlays necessary to achieve an object.

These two concepts of cost can be distinguished and they may, but need not, be equivalent. CEMA may want to consider incorporating both concepts of cost into its interpretation of the principle of comparative advantage of production.

Proposed Methodology for Quantifying Comparative Advantage

Saskatchewan requests that Council confirm that the formula to operationalize comparative advantage of production set out in their Position Paper of April 2003 is reasonable and acceptable. Saskatchewan further submits that it is not the only methodology, it is not finely tuned, but it is an illustration of how it is possible to make comparative advantage a working criterion. Both Professors Bruneau and Schmitz support this methodology, but with some qualifications.

CEMA submits that the flaws in the methodology proposed by Saskatchewan were pointed out to Saskatchewan's representatives at various meetings. The flaws are the use of GDP ratios as a proxy for comparative advantage without including transportation costs, proximity to markets, cost of production, and past utilization of marketing opportunities. Dr. Groenwegen is of the opinion that the methodology is not reasonable and acceptable because it measures the value of agriculture to the economy, rather than the comparative advantage of egg production.

The Committee confirms the need to be transparent in estimating the comparative advantage of production and commends Saskatchewan for proposing a methodology that would be transparent.

The Committee realizes the need to use proxy statistical data in a methodology designed to reflect comparative advantage of production. The Committee further suggests that more effort is needed to indicate how proxy data might reflect comparative advantage especially in the sense of opportunity costs.

Finally, the Committee considers the final calculation in the Saskatchewan methodology to be a set of unweighted provincial proportions. They are not an index in the statistical sense of having a base period and subsequent current values relative to the base period. As a consequence, the Committee accepts the parties' views that further work is needed to operationalize the methodology.

Summary and Conclusion

Set out below is a brief summary of the Committee's findings and some concluding remarks.

- Subsection 7(1)(d) of the Act provides that Council must review any order or regulation which an agency proposes to make and must satisfy itself that the proposed order is necessary for the implementation of the marketing plan. The test of satisfaction is a subjective test to be determined solely by the Council. Further, the Council has broad discretion when conducting its review.

- Section 23 of the Act was only intended to establish prescribed requirements where certain conditions are met in the terms of the marketing plan and does not, by itself, impose a specific statutory requirement on an agency.

- There is nothing in the marketing plan which suggests that once established, the Agency's quota system cannot evolve or be varied over time to meet changing industry circumstances.

- Although there is no indication in the marketing plan as to how the listed criteria are to be defined or applied, there is a mandatory requirement that they be taken into account. In determining definitions or applications of the criteria, the Agency is required to choose those which best accord with the objects of the Agency prescribed under section 21 of the Act.

- In the year 2000, the Complaint Committee was concerned that the hen-to-population ratios were being used exclusively for the overbase allocation at that time. The current Committee believes that the hen-to-population ratios, while they should not be used as the "exclusive" basis for an overbase allocation, may nevertheless constitute relevant information which may be considered and applied in terms of part or all of the five criteria listed in the plan when determining the necessary provincial allocations.

- There is a pressing need to complete the FPA renewal process if only to explicitly recognize the existence of two distinct markets for eggs, table and processing, and to set out appropriate allocation methodologies to deal with demand changes in both of these markets.

- Until such time as the FPA and Proclamation are amended, a comprehensive justification is required from the Agency respecting usage of the listed criteria in the Proclamation in support of any request for Council's prior-approval of a quota order. Otherwise, it is recommended that Council convene a mini-signatories meeting to deal with the allocation issue.

- In the matter of a difference of meaning between comparative advantage and comparative cost of production, when academic and consulting economists put forward alternative theoretical models and interpretations of the meaning of the principle of comparative advantage of production, the Committee can only conclude, in light of the fact that papers relating to this concept were tabled during the complaint hearing and not discussed in detail, that considerable effort still needs to be made by the parties if they wish to adapt this concept to the supply-managed egg industry. It is the Committee's view that experts in the field and the Agency are best suited to deal with this issue.

- The Committee accepts the parties' views that further work is needed to operationalize the methodology to define and quantify comparative advantage of production.

The Committee notes that considerable reference was made during the hearing to the May 2000 Complaints Committee report, the 2000 quota order which was subsequently approved by the Council and a multitude of previous Council decision reports over the past twenty years. Although some reference is made herein to the May 2000 report, the Committee would emphasize that given the evolving nature of the industry, past decisions, while useful for providing important contextual information on the roles of Council and the Agency, the Act and the Plan, should not be treated strictly as constituting precedents binding upon Council. This hearing is not simply a continuation of the 2000 complaint hearing. Obviously, circumstances can change over time as well as the Council members appointed to hear and decide on these complaints. Also, the particular nature and structure of the egg industry plays an important role in formulating complaint decisions i.e. the existence of an industrial products program fully funded by downstream stakeholders in the egg industry may impact heavily on decisions relating to quota allocation disputes, a factor which would not otherwise be considered when hearing similar complaints related to the chicken, turkey and broiler hatching egg industries.

As a concluding comment, the Committee submits that the supply management system for eggs has been very beneficial to producers as well as downstream stakeholders. The system has contributed significantly to the economies of all provinces and the Northwest Territories. However, if left unresolved, challenges to the system particularly in the areas of quota allocation and levies will inevitably weaken the system that all egg producers want to preserve. The Committee was encouraged to hear comments from the Chairman of CEMA that: "the will is there from the signatories to get a resolution that will serve the interests of the whole industry, including the egg producers of Saskatchewan". The Committee recommends in the strongest way that the CEMA and Saskatchewan Egg Producers meet on an urgent basis to seek that "resolution".

With respect to the work CEMA is doing to redraft its Federal/Provincial/Territorial Agreement (FPTA), the Committee is of the view that if the issues between Saskatchewan and CEMA remain unresolved there can be no substantive progress on finalizing the FPTA. The allocation policy of the Agency is the core of this Agreement and as such the development of an allocation policy agreeable to all parties must be the Agency's highest priority. The Committee was encouraged that none of the parties to the complaint hearing objected to Council prior-approving interim quota

and levies orders. The Committee encourages the CEMA and Saskatchewan to pick up on this spirit of cooperation during the period that these quota and levies orders are in place.

ANNEX

Agreement of the Parties and Attending Intervenors to the Complaints by the Signatories to Saskatchewan and British Columbia

Read into the Record of the Proceedings Conducted By the Complaints Committee on March 18, 2004.

1. The B.C. Signatories withdraw their complaint to Council on the understanding that the CEMA Board will present for prior approval an interim allocation and interim levies for a period ending on July 31, 2004. The interim allocation will be based on an extension of the 2003 quota allocation until July 31, 2004, including the non-registered production adjustment and the 25,000 layer EFP allocation to Alberta. The B.C. non-registered production adjustment will be postponed as previously agreed.

2. As a consequence, the conflict of interest allegation is no longer being pursued by B.C. and is not a live issue before the Complaints Committee.

3. Except for Saskatchewan, the parties and interveners in attendance would ask that Council prior approve the interim quota allocation and levy order forthwith. Saskatchewan will not object to Council granting interim prior approval, but it is understood that Saskatchewan is not conceding the validity of CEMA's interim quota allocation.

4. The terms of this Agreement are contingent upon the Complaints Committee:

   (a) agreeing to recommend that Council prior approve the interim quota allocation and levies order by (date to be provided to the parties and interveners by the Committee, that is satisfactory to the parties and interveners), assuming they are made by the CEMA Board on the basis described above;

   (b) making a preliminary determination that the Saskatchewan complaint will not be rendered moot if Council grants prior approval of the interim quota allocation and levies, and

   (c) agreeing to then proceed to hear the complaint. As provided in Council's Complaint Guidelines, following the oral hearing the Committee will deliberate and present its written findings to Council as soon as possible.

5. The CEMA Board will set quota allocation and levies, effective August 1, 2004, taking into account the results of the independent study of B.C. EFP allocation issues. The independent study will present conclusions based on data from: (a) the date of the commencement of EFP utilization in B.C. until January 31, 2003, and (b) February 1, 2003 to January 31, 2004.

6. In setting the quota allocation and levies to be effective August 1, 2004, CEMA will duly consider, in good faith, the findings and recommendations of Council, if any, respecting the Saskatchewan complaint.

7. This Agreement shall not preclude judicial review or appeal routes concerning the Saskatchewan complaint being pursued.