



National Farm Products
Council

Conseil national des
produits agricoles

Report of the Committee established to inquire into the complaint

By

**The British Columbia Signatories to the Federal-Provincial
Agreement Respecting the Comprehensive Marketing Program for
Turkey in Canada**

Against

The Canadian Turkey Marketing Agency

**Concerning the Canadian Turkey Marketing Agency's Proposed
Quota Allocations for the 2004/2005 Control Period**

December 2004

Canada



December 14, 2004

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TO: Members of the National Farm Products Council

SUBJECT: Complaint Committee Report

Attached is the report of the Complaints Committee established to hear the complaint by the British Columbia signatories to the turkey marketing plan against the Canadian Turkey Marketing Agency's quota allocation methodology and specifically the Agency's proposed quota regulation for the 2004-05 control period.

This report is submitted after due consideration of the written submissions of the parties to this complaint as well as the oral presentations made by the parties at the hearing before the Committee, held on December 1, 2004. The panel was unanimous in endorsing the recommendations outlined at the conclusion of the report.

The Committee hopes that the CTMA members will find the contents of this report helpful as the Agency strives to refine its quota allocation system and to progress toward a renewed Federal-Provincial Agreement.

Respectfully submitted,

Ron O'Connor
Committee Chairperson

Michel Veillette
Committee Member

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**REPORT OF THE COMMITTEE
ESTABLISHED TO INQUIRE INTO THE COMPLAINT BY
THE BRITISH COLUMBIA SIGNATORIES
TO THE FEDERAL-PROVINCIAL AGREEMENT
RESPECTING THE COMPREHENSIVE MARKETING PROGRAM
FOR TURKEY IN CANADA
AGAINST
THE CANADIAN TURKEY MARKETING AGENCY'S
PROPOSED QUOTA ALLOCATIONS FOR THE
2004/2005 CONTROL PERIOD**

INTRODUCTION

The complaint by the British Columbia Minister of Agriculture, Fisheries and Food, the BC Farm Industry Review Board and the BC Turkey Producers Marketing Board (the Board) was originally filed with the National Farm Products Council on December 17, 2003. The grounds for the complaint were, among other things, the failure of the Canadian Turkey Marketing Agency (CTMA or the Agency) to take into account the criteria in the marketing plan when making quota allocations to provinces. The BC signatories asked that the Council direct the Agency to amend its allocation policies to allocate increases in the turkey market in compliance with the criteria in the plan and to encourage market responsiveness. It also asked that the Council direct the Agency to compensate BC and any other signatory province which had not received appropriate allocations from the Agency due to non-compliance with the marketing plan and finally, it asked that the Council not prior approve any quota regulation submitted to it if the Agency has not taken into account the criteria in the marketing plan.

In response to the complaint, the Council wrote to the BC signatories and the Agency on December 22, 2003, advising the parties that it thought a hearing into the complaint was premature, but strongly encouraging the Agency to convene a special meeting of directors for the exclusive purpose of resolving BC's concerns with the proposed allocation methodology and to report on that meeting by the end of February 2004.

The Agency reported on that meeting to Council and to all signatories, and although several meetings were held throughout the year to try to resolve British Columbia's complaint, matters remained unresolved.

By letter of May 7, 2004, the British Columbia signatories notified the Council that they were not satisfied with the progress being made to address their concerns and wished to pursue a hearing into their complaint. The Council advised the BC signatories that, with respect to the relief being sought, it was not within Council's powers to direct an Agency to amend its policies nor provide compensation. However, the Council offered to meet with the BC signatories and the Agency to try to facilitate a resolution of this matter. Those meetings were inconclusive.

By letter of October 12, 2004, the BC signatories confirmed to the Council that they wished to pursue a hearing into this complaint. The relief being sought by the BC signatories was somewhat amended from that which was in the original complaint filed in December 2003.

By letter of October 18, 2004 the Council informed both the British Columbia signatories and the Agency that it would hold a hearing, pursuant to Section 7(1)(f) of the *Farm Products Agencies Act (the Act)*. Pursuant to its *Guidelines for Complaints*, the Council established a Complaints Committee to hear the complaint, comprised of Ron O'Connor, Council Vice-Chairperson and Committee Chairperson and Michel Veillette, Council member.

All signatories to the turkey plan and all interested parties were sent a Notice of Hearing by facsimile on October 20, 2004, announcing a hearing date of December 1st and issuing deadlines for the submission of interventions. The British Columbia signatories were asked to provide their written complaint to the Council by October 29, 2004. The Agency provided its response to the complaint on November 12th. All interested persons were invited to make submissions to the Council by November 12th.

As well as the written submission from the British Columbia signatories and the written response by the Canadian Turkey Marketing Agency, written interventions were received from the following:

- The Saskatchewan Minister of Agriculture and Food, the Saskatchewan Agri-Food Council and the Saskatchewan Turkey Producers Marketing Board;
- The Manitoba Turkey Producers;
- The Quebec Minister of Agriculture, Fisheries and Food, the Régie des marchés agricoles and the Fédération des producteurs de volailles du Quebec;
- The Ontario Turkey Producers Marketing Board;
- The Ontario Farm Products Marketing Commission;
- The Nova Scotia Turkey Producers Marketing Board;
- The Alberta Turkey Producers, and;
- The Further Poultry Processors Association of Canada.

A letter of support for the position of the Quebec intervention was received from the Quebec Poultry Processors Association. All documentation was circulated to all of the parties in advance of the hearings

A pre-hearing teleconference was held on November 22, 2004 to discuss procedural issues. This conference, while not intended to discuss any of the substantive matters surrounding the complaint, assisted the parties in understanding the process to be followed at the hearing.

The hearing was held in Ottawa, on December 1st, 2004.

**POSITION OF THE BRITISH COLUMBIA MINISTER OF AGRICULTURE,
FOOD AND FISHERIES AND THE BRITISH COLUMBIA FARM
INDUSTRY REVIEW BOARD**

Complaint

This complaint was filed with the NFPC by the British Columbia (BC) Signatories on December 17, 2003. Both the Minister and the BC Farm Industry Review Board (BCFIRB) are signatories to the Federal Provincial Agreement for Turkey (FPA). The BC Signatories to the FPA are concerned by the failure of the CTMA to establish a market responsive allocation process.

Complaint Process to Date

Following the December 17th, 2003 filing of a complaint, the NFPC advised that a formal hearing was premature and encouraged the CTMA to reconvene for the exclusive purpose of resolving the concerns of the BC Signatories and others, noting that a review of the quota allocation methodology was an urgent matter. The CTMA held meetings in February and March 2004 and at a meeting on April 6 and 7, 2004 adopted an interim allocation methodology for the 2004/05 control period and agreed on a work plan to develop an allocation policy by December 1, 2004 for implementation with the 2005/06 control period.

The BC Turkey Marketing Board actively participated in the CTMA meetings demonstrating that successful promotion and marketing efforts have encouraged market growth in BC. The Board argued that if growth can be shown, any province that has undertaken successful promotion efforts should be rewarded with additional quota, a process that would benefit the entire industry in Canada.

The BC director did not support the April 2004 interim allocation methodology, as 85 percent of the commercial quota allocation was based on pro rata shares, allowing for only minimal market responsive adjustment. Since no serious effort was evident to address BC's concerns regarding allocation methodology, the BC signatories indicated on May 7, 2004 that the complaint would be pursued.

On July 6, 2004 the BC Signatories met with the NFPC Chair and staff to discuss BC's issues and determine what additional steps might be taken to resolve them. Subsequently, in a follow-

up meeting, facilitated by the NFPC, in August 2004, the BC Signatories participated in discussions with the CTMA chair and staff in support of resolving the complaint. No further progress was made at the September and October 2004 meetings of the CTMA as each of the BC Board proposals for a more market responsive allocation policy was rejected by the CTMA directors.

The BC Signatories notified the NFPC on October 12, 2004 that they wished to proceed with the complaint since it was evident that the CTMA is unwilling, in any meaningful way, to establish market responsive policies.

Submissions

The BC Minister and the BCFIRB adopted the submissions of the BC Board and made a number of additional submissions.

In 1998, Federal, Provincial and Territorial Ministers agreed that the FPAs used by the national poultry and egg sectors should be revised to make them more flexible and to allow agencies to better adapt to changing market conditions. The process was to be completed by the end of 1999. This policy direction was reconfirmed at the July 1999 Ministers meeting. The CTMA has not completed a new FPA framework, has failed to meet the policy direction of Ministers and has therefore failed to exercise its mandate.

In 1999, the CTMA adopted a more rigid and less market responsive allocation policy, contrary to the policy expectations of Ministers. Although the BC director voted against the policy, it was adopted by the CTMA with the result being an increasing decline in relative market share for BC. Had the CTMA met the Ministers' deadline of adopting a market responsive system, BC's allocation would have increased gradually over time causing no disruption to producers and processors in other provinces. Instead, the CTMA policy has impaired the viability of the BC turkey processing industry and has resulted in lost market opportunities.

The 2003-2006 NFPC Strategic Plan calls for the completion of the poultry agreements, as well as improved strength, competitiveness, market responsiveness and profitability of Canadian agriculture and the agri-food industry. In correspondence dated December 22, 2003, to the CTMA, the NFPC referred to the 1998 policy direction of Ministers and noted that it considered this to be an urgent matter.

In July 2004, the BC Minister released an economic policy framework providing direction for commodity boards to be responsive to the needs of not only producers, but also processors, consumers and other participants in the BC food system. The policy supports the development of new markets identified at the production, marketing and processing levels to facilitate industry growth and competitiveness. It also supports BC's participation in national supply management systems if provincial allocations are consistent with the growth and prosperity of the BC agri-food industry and support ongoing opportunities for industry growth and new opportunities in primary and further processing.

Federal, Provincial and Territorial Ministers, the NFPC and the BC Government have all established direction for a more market responsive supply management system. The practices of the CTMA respecting quota allocation have been inconsistent with this policy direction.

Relief Sought

Therefore, the BC Signatories request that the NFPC:

- (a) Report to the Minister regarding:
 - (i) the failure of the CTMA's rigid, formulaic allocation policies to conform with its express obligation to take into account the criteria set out in subsection 4(1) of the Proclamation, and with the CTMA's express objects to "promote a strong, efficient and competitive production and marketing industry for the regulated product" and to "have due regard to the interests of producers and consumers"; and
 - (ii) the urgent need for the CTMA to ensure that its allocation policies conform to the Act and the Proclamation, both in form and in substance;
- (b) Recommend to the CTMA that it take immediate steps to ensure that its allocation policies conform to the Act and the Proclamation, both in form and in substance; and
- (c) Advise the CTMA that a comprehensive justification will be required respecting the use of the listed criteria (including consideration of the relative growth in BC's market) in support of any request for the NFPC's prior-approval of any future quota order.

POSITION OF THE BRITISH COLUMBIA TURKEY MARKETING BOARD

Effect of the CTMA's Allocation Policies

For many years, BC has expressed concern that the CTMA's rigid, formulaic allocation policies do not support market responsiveness, resulting in the lack of growth in the Canadian market. These policies prevent BC serving its retail and hotel, restaurant and institutional (HRI) markets despite the fact that through aggressive promotion, BC has the highest per capita consumption in Canada.

In September 2003, CTMA established the global commercial allocation at 128 million kilograms (Mkg). Had the provincial allocation been made with due regard to the criteria set out

in subsection 4(1) of the Proclamation, the difference in allocation to BC is estimated to be as high as 7 Mkg. The CTMA's allocation policies have the following serious consequences:

- (a) The market for turkey in Canada is made stagnant. The Board maintains that per capita consumption could be increased if allocation policies rewarded marketing efforts. Per capita consumption has increased in BC beyond that in the rest of Canada, but BC's allocation fails to increase sufficiently to ensure markets are served.
- (b) Consumer demand in BC has increased 78% between 1981 and 2003. This compares with 27% in Canada.
- (c) Between 1981 and 2003, 33% of the total Canadian retail purchase increase was attributable to BC while BC received only 17% of the total increases to commercial allocation.
- (d) When BC joined the national plan, it produced over 100% of the BC market. In 2003, it produced less than 67% of its market.
- (e) The Board mounted successful promotion campaigns coinciding with unprecedented growth in provincial retail purchases. These campaigns were abandoned since CTMA's allocation policies conferred the benefits to other provinces.
- (f) Growth in the BC market has been substantial, however, growth in BC's production allocation has consistently lagged resulting in a loss of an estimated 7 Mkg per year.
- (g) The gap between BC's market and its allocation has consistently widened since BC's entry into the national plan. The rigid allocation formulas used by the CTMA do not promote a strong, efficient and competitive industry and are suffocating what would otherwise be a vibrant industry.

Grounds for the Complaint

(1) CTMA's Express Statutory Obligations

The CTMA is obliged to conduct itself in a manner consistent with the objects of an agency prescribed in section 21 of the Act and is obliged to take into account the criteria set out in subsection 4(1) of the Proclamation before taking a decision to increase a provincial allocation.

(2) Fettering of the Discretion which the CTMA is Obligated to Exercise

The CTMA has adopted a rigid, formulaic approach to quota allocation. This approach is inconsistent with its express obligation to take into account the criteria set out in subsection 4(1) of the Proclamation and is inconsistent with its express statutory objects. As an example, section 3(b) of CTMA's National Commercial Quota Allocation Policy (NCQAP) specifically provides that "global increases or decreases to the starting point of 132 Mkg will be allocated to the provinces based on their percentage shares at 132 Mkg". Also, section 1.1 (a) of the Export Policy provides that "any province which has exported young turkey grown within quota, will be eligible to apply for export credits".

The Board noted that a useful starting point for an analysis of CTMA's allocation methodologies was an opinion prepared by Mr. Henry Molot of the Department of Justice. Mr. Molot expressed the following conclusions:

- (a) The Act, the Proclamation and the Regulations are drafted so as to provide broad discretion in allotting quota. That discretion is framed in terms of criteria, not rules and the flexibility that this was intended to inject into an agency's decision-making process must not be ignored.
- (b) An agency is bound to consider all of the criteria but is free to weigh any of them as nil. If it ignores a criterion, the decision is not properly made.

By adopting a rigid approach to quota allocation, the CTMA has effectively abdicated its legislative responsibility to exercise a discretion, "which is framed in terms of criteria, not rules". The adoption of rigid formulas precludes an exercise of the very discretion conferred under the Proclamation. How can the CTMA "take into account" the criteria set out in subsection 4(1) of the Proclamation if the decision to increase a provincial allocation is effectively predetermined by the rigid, formulaic policy adopted by the CTMA? The CTMA is vested with broad discretion under the Proclamation, but it is not so broad as to permit it to decline from exercising that discretion, relying instead upon the automatic application of "policies". To support the principle alluded to above reference is made to sections of *Judicial Review of Administrative Action in Canada* (loose-leaf; Canvas back Publishing, Toronto) by Brown and Evans.

The criteria that the CTMA is required to consider cannot be reduced to the rigid formula employed in the NCQAP, or to the eligibility requirements employed in the Export, Breeder and Research Policies. These policies operate as a means to increase provincial allocations without regard to the criteria listed in the Proclamation. Although the CTMA is not restricted to consideration of the listed criteria, it is obliged to take those criteria always into account.

(3) “Lip-Service” to the Criteria Does Not Preclude a Finding of Fettering

While CTMA’s Executive has proposed some modifications to the allocation policies, it is clear that only lip-service will be paid to the criteria in the Proclamation. The Executive has proposed only to comply with the “form” of the Proclamation, but as a matter of substance, the proposals do not contemplate meaningful consideration of the criteria. It was noted that these proposals were rejected by the CTMA.

The Board cited certain sections of the NFPC Complaint Committees’ Reports of May 2000 and May 2004 to emphasize the inherent responsibility of the NFPC to look beyond mere form but rather to look at the substance of an agency’s activities. The NFPC has a broad discretion when conducting its review (of the prescribed terms of the authorized marketing plan and the rationales or justifications provided by an agency) and may have due regard to previous similar orders or regulations and whether the proposed order provides relevant continuity and stability for the regulated industry.

In this case, CTMA’s allocation policies have objectively failed to promote a strong, efficient and competitive industry and they will continue to do so even if the policies are revised to provide “window dressing” that CTMA has taken into account the criteria when no meaningful consideration is actually given.

Statement of Relief Sought

The scope of relief that is available in the context of a complaint is prescribed by subsection 6(1) and paragraphs 7(1)(c), (d), (f), and (l) of the Farm Products Agencies Act.

The NFPC is required to exercise the powers conferred under paragraphs 7(1)(c), (d) and (f) in the fulfilment of its duties. This conclusion follows from Parliament’s use of the prescriptive “shall” in those paragraphs as contrasted against the use of the permissive “may” in paragraph 7(1)(l).

The Board points out that the NFPC notes, in its Governance Manual, that it cannot direct an agency to take any particular action albeit if a complaint relates to an agency action requiring Council approval, the Council could refuse to give that approval. While the NFPC has taken the view that it cannot direct an agency to take any particular action, it cannot stand idle when an agency, both in form and in substance, is conducting itself in a manner inconsistent with its objects and contrary to the provisions of the Proclamation. Toward this end, the Board cites

section 2.02 (Mission), section 2.04 (Vision) and section 3.09 (Stewardship) of the NFPC Governance Manual, April 2003.

The specific nature of the relief sought is identical to that set out in the position of the BC Minister and the BCFIRB in this matter.

RESPONSE BY THE CANADIAN TURKEY MARKETING AGENCY

Introduction and Overview

In 1973 a FPA was made between the federal government and seven provincial governments including their respective turkey commodity boards (an eighth province, New Brunswick joined in 1974). The FPA contemplated complementary and interlocking legislative instruments at both the federal and provincial levels that would give effect to the comprehensive national marketing plan for turkey. In accordance with the commitments made in the FPA, the Governor-in-Council issued a Proclamation in February 1974 creating the CTMA. The FPA is currently under review following direction from federal and provincial Ministers to develop a renewed FPA. The lack of success in completing this process is due in no small measure to the position of certain provinces (BC included) to treat the FPA renewal as an opportunity to re-negotiate FPA first principles, contrary to the terms of reference set out by the National Association of Agri-Food Supervisory Agencies.

BC charges that CTMA's quota allocation process is flawed because (i) its allocation policies act as a fetter on CTMA's discretion and fail to incorporate the allocation criteria in the Proclamation and (ii) the quota allocation process is not market responsive. CTMA's response is that both its process and policies have been developed with input from all members including BC and the resulting quota allocations have been consistently prior-approved by the NFPC. The quota establishment and allocation processes do take into consideration the criteria and decisions made in respect of quota and allocation further its legislated objects.

The underlying essence of the BC position is that provincial self-sufficiency is a political imperative and a condition of BC's support for the national supply management system. However, provincial self-sufficiency is not an object of the CTMA nor is it part of the criteria in the Proclamation. Even in the first year of CTMA's operations, BC advocated a position that BC would never have agreed to a national marketing scheme where BC does not have production to satisfy its market demand. Not much has changed in BC's position respecting provincial self-sufficiency in 29 years.

The CTMA is operating without an approved Quota Regulation Schedule for the control period commencing April 25, 2004 pending resolution of the issues raised by the BC complaint. The lack of any legal foundation to support its principal functions creates a jeopardy that could have

a deleterious effect on the national marketing plan. Accordingly prior-approval ought to be granted notwithstanding the BC complaint and if NFPC determines that amendments are required as a result of this complaint process, then an amended quota regulation will be submitted by the CTMA.

CTMA members have engaged in consideration of alternatives and amendments to the quota allocation process for an extended period during which time the BC turkey board has been an active and contributing participant. The CTMA has made every effort to review the allocation policy and address the concerns of BC and others but to date these efforts have been unsuccessful.

The Act, the Proclamation and CTMA Policies

The Act sets out CTMA's objects to promote a strong, efficient and competitive industry while having due regard for the interests of producers and consumers. The Act also gives the CTMA direction to implement the marketing plan set out in the Proclamation as well as do what is necessary to exercise its powers or carry out its functions. The principal regulatory mechanism for the implementation of the marketing plan is the development of a quota system. Taken together, the Act and Proclamation provide the CTMA with broad discretion to carry out its mandate including the discretion to develop policies to assist in discharging its statutory mandate.

The impugned policies have been continuously developed and refined as part of a collaborative process involving CTMA committees and directors from the producing and processing sectors.

The current NCQAP, drafted with a stated purpose of determining overbase quota allocations in accordance with the Proclamation criteria, was adopted at the December 8, 1999 CTMA meeting. The current Export Policy was adopted in December 2003 and the Research Policy in December 1994. The initial Primary Breeder and Multiplier Breeder policies were adopted in 1981 and 1987 respectively.

Section 3 of the NCQAP, which provides for an allocation increase based on provincial percentage shares, has yet to be used because it is a fundamental premise of the NCQAP that it will only be engaged when the global quota exceeds 132 Mkg. in a control period. That level has not been achieved since the policy was approved in 1999. The overbase allocation reached its highest level of 132 Mkg., on a preliminary quota basis for the 1995/96 allocation, however, it was subsequently reduced to 128.2 Mkg. At the September 1995 CTMA meeting, the Agency agreed that, until the global quota again reached 132 Mkg., provinces would increase in quota allocation on the same basis that their quota allocation had been reduced from the global quota of 132 Mkg. Since global quota is still below 132Mkg., the September 1995 agreement and principles continue to guide CTMA's quota allocation decisions.

The NFPC does not prior-approve CTMA regulations unless it is satisfied that the regulation is necessary for the implementation of the marketing plan. The conclusion to be drawn is that

CTMA allocation policies have produced quota allocations that satisfy the test. Further, the NFPC would not prior-approve a Quota Regulation Schedule that was based on a policy not complying with the Act and Proclamation.

Although the CTMA policies have been assailed as rigid and formulaic, even the allocation alternatives proposed by BC have been “formula” based. The use of a formula ought not to be problematic unless it is demonstrated that it results in the CTMA failing to meet its statutory objects. There is no evidence to that effect. Although BC asserts that, as a result of CTMA’s policies, it is not self-sufficient, numerous decisions from the NFPC have made it clear that it would be an error for an agency to put provincial self-sufficiency at a level of statutory object or on par with the Proclamation criteria.

The CTMA policies are not drafted in language that is comparable to either the test illustration relied upon by BC or to the language of the policy employed by the Ontario Securities Commission in the Ainsley Financial Corp. case. The CTMA policies do not resemble subordinate legislation, they are not couched in mandatory terms and there are no punitive provisions for non-compliance. Further, the policy in that case was directed at securities traders and dealers outlining what business practices were acceptable and how transgressions would be addressed. It is important to appreciate the contrast of such a policy with the CTMA’s policies that are designed to assist the CTMA in its legislative function, i.e. its decision-making exercise in the creation of quota orders.

The text illustration relied upon by BC amplifies CTMA’s point by noting that Brown and Evans tells us that an agency may not fetter its discretion by “mechanically applying” or “automatically following” policies, rules, guidelines or precedent. CTMA cannot be a slave to those policies but rather has to retain its independent judgement when making decisions. The language of CTMA’s policies is significantly distinguishable from the kind of policy language that might be considered to fetter an agency’s discretion. CTMA then provides a number of examples where over the past years it has been flexible and responsive in exercising its independent judgement.

The assertion that the market for turkey is stagnant due to CTMA’s policies is overly simplistic. In order to assess whether an industry is market responsive requires scrutiny of data beyond one point of reference such as national per capita consumption (PCC). CTMA makes the following points in support of its argument:

- value of turkey consumed at retail has increased from approximately \$145 million in 1979 to \$385 million in 2003;
- although total PCC has been static, there has been substantial growth in specific retail segments of PCC particularly in processed and value-added products and cut-up turkey;

- the allegation that CTMA's policies are suffocating what would otherwise be a vibrant BC industry is not supported by the facts. Average farm size in BC since 1983 has almost doubled and is far ahead of growth elsewhere. The same trend exists for farm cash receipts;
- BC's allocation has kept pace with retail sales in the province. In the years around 1981, BC's growth in commercial quota on a kilogram basis has been higher relative to retail sales growth; and,
- BC's commercial allocation growth between 1979 and 2003 of 59.6% compares to an average growth of 27.9% in the other member provinces.

The real issue is whether the industry is strong, efficient and competitive. The following supports an affirmative response:

- over the last two decades, the number of producers declined by 50 while quota allocations increased by 35 Mkg and the value of turkey production by \$100 million;
- there are a plethora of innovative turkey products marketed by Canadian processors; and,
- turkey products imported into Canada between the 1970's and now have changed from whole birds to boneless skinless breast meat. As well, access to the Canadian market has increased due to NAFTA and WTO commitments. The net effect is an additional 10Mkg of forgone domestic production replaced by imports or roughly 8% of the commercial quota for 2004/05.

The Turkey Quota Process

The establishment and allocation of quota is a process that encourages flexibility and discussion. The process, although it involves the use of policies, also relies on input from directors and other stakeholders. Quota decisions and amendments to the quota regulations are adopted pursuant to CTMA's by-laws requiring a majority of seven members authorized to market at least 50% of total marketings.

The 2004/05 quota allocation decisions were made at a meeting in April 2004. CTMA did not adopt the allocation based on the NCQAP nor was it based on the 1994 policy as amended by the 1995 agreement among directors. When the allocation results were considered, changes were made that resulted in the allocation to some provinces increasing while others decreased. The approved allocation was recognized to be based on an interim allocation methodology. BC was one province where the allocation was increased over that which would have been made under the September 1995 agreement without any further independent consideration, flexibility and exercise of discretion.

The Allocation Criteria in the Proclamation

The Proclamation in Part II, section 3, sets out the poundage of turkey meat each province or area was authorized to produce and market at the outset of the marketing plan (known as base allocations). Section 4(1) of Part II specifies that no quota order shall be made to increase production and marketing to a level greater than that set out in section 3 unless the CTMA has taken into account six listed criteria. Finally, section 4(2) of Part II provides that no order is to be made pursuant to section 4(1) unless the CTMA is satisfied that the size of the market has changed significantly.

Reference is made by the CTMA to a legal opinion prepared by Mr. Henry Molot of the federal Department of Justice in 1988 respecting CTMA's overbase policy. The Molot opinion addressed a number of questions and provided several general conclusions applicable in a consideration of the CTMA's decision making discretion as follows:

- a) "take into account" means adverted to or looked at or given some weight, even if that weight is nil;
- b) weighing and weighting criteria is part of CTMA's discretionary power;
- c) the criteria in Part II s.4 must all be adverted to by the CTMA;
- d) based on the information at hand it is open to the CTMA to give no weight to any factor;
- e) dividing the overbase into parts is permissible as a refined method of weighting considerations;
- f) the Act and Proclamation are drafted to provide the CTMA with a broad discretion in respect of allotting quota; and,
- g) that broad discretion is framed as criteria as opposed to rigid rules providing the CTMA with flexibility in carrying out its mandate.

The NFPC has confirmed, in past appeal decision reports, that the CTMA has the discretion to assign no weight to the Proclamation criteria and has discretion to consider additional criteria provided that it is done to further the statutory objects of the Agency.

The CTMA developed the current NCQAP in 1999 which addresses the Proclamation criteria. Previous allocation policies (including the one to produce the 2004/05 quota regulation) also address the criteria. CTMA members took into account the criteria in the development of the allocation policies. Another example of taking account of the criteria is in the development of the breeder policies. No weight was given to the criteria in these cases as it would have been illogical to do so. Rather other, more logical criteria were developed that allowed for breeder

allocation decisions that promoted a strong, efficient and competitive industry. With the development of policies such as the NCQAP, the CTMA has not reviewed the Proclamation criteria each time it made quota orders, believing that those criteria were appropriately addressed in the policies.

Disposition Sought by the CTMA

As the complainant, BC has the onus to prove that the CTMA policies are not compliant with the Act and Proclamation. The CTMA submits that BC has failed to discharge that onus and accordingly there is no basis to make a report to the Minister. Appropriate justification has been provided in support of the 2004/05 quota regulation schedule and CTMA requests prior-approval on an expedited basis.

SUMMARY OF INTERVENER POSITIONS

Saskatchewan Minister of Agriculture and Food, Saskatchewan Agri-Food Council and Saskatchewan Turkey Producers Marketing Board

The Saskatchewan Signatories request that the NFPC (i) direct the CTMA to review its proposed quota allocation policy in the interests of introducing factors responsive to the principle of comparative advantage of production and (ii) ensure that no changes are made to the Proclamation or the FPA that fail to address the requirement of section 23(2) of the Act to respect the principle of comparative advantage of production.

Saskatchewan claims that CTMA's actions perpetuate an allocation policy that prevents access to quota in a manner that is consistent with statutory requirements. The allocation methodology employed involves considerations which are irrelevant and improper in that CTMA has chosen to use historical market shares as a basis to make allocations when no such criteria are provided in section 23 of the Act and such criteria are inconsistent with section 21 of the Act. Also, CTMA has failed to employ the principle of comparative advantage of production in accordance with section 23(2) of the Act and as required by the FPA.

Saskatchewan is concerned that criteria listed in the FPA are not being followed and have been misused to sustain the delicate balance of provincial interests. The commercial allocation policy is inconsistent with both the interests of consumers and the intent of the Act. As well, the Act is mute on quota allocation principles that the CTMA has applied, specifically, status quo or proximity to local markets.

Both the Act and the FPA intend that quota allocation be based on a national approach to market responsiveness. The Act was designed to ensure that all provinces had fair access to market within Canada. The proposition that certain provinces be favoured by virtue of their proximity to the marketplace has no foundation in the Act.

Although Saskatchewan has no quarrel with the need to respond to verified processor needs, their concern is with the process used to determine which provinces are awarded the opportunity to meet identified contracts. Simply because certain producers are located closer to a processor, this is not justification to exclude others willing to supply at more competitive prices. The FPA is predicated on principles that share the Canadian marketplace amongst the most efficient producers.

The establishment of turkey marketing boards and the CTMA was to bring stability to the system, however, this is now in jeopardy given that self-sufficiency may have become a major factor in quota distribution. CTMA's allocation policy allows for little more than the pursuit of self-sufficiency since it is based on adjustments in accord with local market demand. CTMA's rationale for its quota allocations remains outside current authority.

Manitoba Turkey Producers and the Manitoba Farm Products Marketing Council

In response to BC's argument that CTMA's current commercial quota allocation is not market responsive enough, Manitoba maintains that what BC is arguing for is the recognition that the BC market is an entity unto itself and the rest of Canada should have little or no responsibility toward it. Manitoba views this as a position of self-sufficiency which Manitoba has consistently rejected.

Respecting BC's argument that CTMA's policies have failed to adequately address their market, Manitoba points out that members of the CTMA have over the years considered and adjusted its policies to deal with the needs of the Canadian market. Additionally, CTMA has put into place policies that address annually market shortages that may be utilized by any signatory to either fill a whole bird or further processing market shortfall.

BC argues that the CTMA has not completed a new FPA framework and has failed to meet the policy direction of Ministers and has therefore failed to exercise its mandate. Manitoba notes that, at the outset, the majority of members took the view that the current FPA had served the industry well and that unless there were mutual benefits for all participants, "let's not fix something that isn't broken". BC wished to rewrite the original provincial production from the original agreement as they believe that the original deal was not what BC was entitled to.

In citing a number of findings in the NFPC's May 10, 2004 report of the Saskatchewan Signatories complaint against the Canadian Egg Marketing Agency, Manitoba argues that the CTMA has provided a market responsive allocation process that complies with the provisions of the Proclamation.

Ontario Turkey Producers' Marketing Board

The Ontario Board supports the CTMA and the ongoing efforts to address the various allocation issues currently before the Agency and believes the BC complaint is of no merit.

The Ontario Board submits that the subject matter of the complaint does not lend itself to a review by the NFPC in the manner sought by the BC Signatories. The complaint relates to various policies of the Agency which raises a substantive issue respecting the entitlement of the BC Signatories to seek the relief specified. Section 7(1)(d) of the Act does not extend to authorizing the NFPC to engage in a comprehensive review of policies made by the Agency in furtherance of its objects. Also, subsections 7(1)(c) and (f) do not contemplate a review of the Agency's policies, but rather are concerned with operational aspects of the Agency, which operations are not an issue in this matter. Subsection 7(1)(l) is a catchall provision relating to the discharge of the NFPC's duties and do not constitute authority to engage in a substantive inquiry. A review of policies made by the Agency is properly confined to the Agency itself with full participation of all signatories to the FPA.

BC argues that the promulgation and reliance on policies by the Agency prevent it from substantively exercising the discretion reserved to it under subsection 4(1) of the Proclamation. The Ontario Board submits that the Agency, like any other statutory empowered body exercising discretion, has deemed it appropriate to design and implement policies to reflect how the duties of the Agency will be discharged.

The converse of "fettering" a discretion is the exercise of discretion in an arbitrary or capricious manner. The Board submits that policies are a necessary tool of the Agency, which afford all participants the ability to know in a predictable fashion, how the Agency will behave in respect to the discharge of its mandate. These policies do not fetter the Agency's discretion but rather provide a road map for the exercise of it. Provided the Agency reserves the right to amend and vary its policies, then it has not fettered its discretion.

The policies of the Agency do not bar it from carrying out its objects but rather ensure that it does. Reference is made to the Agency's initiatives with respect to the Market Responsiveness Pool and the Further Processing Pool noting these address regional market opportunities in a dynamic fashion, and both with reference to storage stock levels.

With respect to BC's reference to Brown and Evans, in *Judicial Review of Administrative Action in Canada*, the Board noted that the author expressed a caveat to the principle cited by the BC Signatories:

"There may also be some circumstances in which it is concluded (because, for example, of the unstructured nature of the statutory power or the underlying purpose of the legislative scheme) that a decision-maker may lawfully adopt a general rule without having to examine the facts of a particular case to see whether an exception was appropriate."

The assertion that aggressive and successful promotion campaigns coincide with unprecedented growth in BC's provincial retail purchases and hence BC should be rewarded with greater allocation is problematic for a number of reasons. First, no acknowledgment is made that a generic turkey marketing program has operated by the Agency funded by provincial boards and

processors since 1998. Second, if unprecedented growth is directly linked to BC's promotion campaigns, then abandonment of the campaigns should have resulted in a corresponding decline but no evidence was submitted to that effect. Demand is being maintained for other reasons including the continuation of the generic program. Finally, BC fails to acknowledge that turkey products continue to move freely among provinces and the fact that BC has experienced growth in consumer demand largely in the area of further processing.

Pursuant to section 6.01 of the FPA, the Agency has developed an export policy wherein provinces are able to develop their own market opportunities and any growth is not subject to quota sharing with other provinces. Each province benefits through the issuance of export credits to one province. BC is uniquely positioned to exploit export opportunities while its complaint is bereft of any reference to this issue.

Finally, the Ontario Board has participated diligently in efforts to renew the FPA. It is not the fault of the Agency that a new FPA has not been approved. Part of the reason for this is that the BC Turkey Marketing Board has viewed the renewal process as being synonymous with renegotiation and has sought to increase its provincial base. Such attitude toward achieving provincial self-sufficiency has largely contributed to the current state of disagreement regarding allocations.

Nova Scotia Turkey Producers Marketing Board

The Nova Scotia Board points out that sections 2 and 3 of Part 2 of the CTMA Proclamation provide for the initial establishment of the quota system and section 4 of Schedule B provides for a manner in which the Agency can permit the amount of turkey produced in Canada to exceed that set forth in section 3. Section 6(2) states that the "Commodity Board shall not market any quantity of the products made available to it in excess of the number of pounds of turkey meat referred to in sections 2 and 3 or as modified pursuant to section 4 of this Part, without prior consultation with the Agency".

It appears BC is interpreting sections 2 and 3 as it would apply to a province when in the Board's opinion, the quota system is in place for Canada and not province specific. Further, section 7 of the Proclamation is specific in that provincial Boards are agents for the CTMA. BC is a member province and as such has a responsibility to comply with CTMA's regulations. The Board does not believe that provincial self-sufficiency is a legitimate argument as there are other provinces where consumption exceeds production.

Ontario Farm Products Marketing Commission

Although the Commission does not request intervener status, it does support the efforts of the CTMA in addressing issues relating to the allocation of turkey across Canada.

In July 1998, Ministers of Agriculture indicated that "national poultry and egg marketing agencies continue to require FPAs to effectively operate the supply management system". At the

direction of Ministers, the National Association of Agri-Food Supervisory Agencies undertook to co-ordinate the redrafting of the agreements for eggs and poultry. In the case of turkey, the work is not complete. The Commission reiterates its ongoing commitment to work with the Agency and other signatories on the renewal of the FPA. To that end, the Commission strongly recommends that the NFPC direct the Agency to complete the work on the FPA in a timely fashion.

Further Poultry Processors of Canada (FPPAC)

The FPPAC views this hearing as essential to ensuring future allocation decisions are governed by the objects set out in section 21 of the Act and conform to the mandatory prescription set out in section 23(2) of the Act, section 4(1) of the Proclamation and section 5 of Schedule “C” of the FPA. An allocation system in harmony with the Act and Proclamation will not stand in the way of consolidation that needs to take place to build a strong competitive industry. So long as the Council continues to approve quota orders without compliance to the Act or the Proclamation, the CTMA will not be encouraged to bring their allocation policy in line with the enabling legislation.

FPPAC supports BC’s complaint that the CTMA allocations are made using a rigid formula and allocations have been made without considering the principle of comparative advantage of production and taking into account the Proclamation criteria. Likewise, FPPAC supports BC’s complaint that the CTMA has failed to put allocation proposals through the prism of section 21 of the Act (Agency objects).

The failure by CTMA to take account of the criteria, particularly comparative cost of production, has set aside the will of Parliament and has substituted unlimited discretion to act outside its enabling legislation. Agency directors have a responsibility to demand and consider analysis to demonstrate how the allocation policy advances legislative objects. Directors also have a responsibility to demand and consider evidence of comparative advantage of production for regions or provinces. Failure to do so is in violation of section 23(2) of the Act. There is a strong link between comparative advantage and an agency’s objects. To build a strong, competitive and efficient industry, comparative advantage of production cannot be ignored.

Further processors need a strong industry to ensure not only that allocations are set at the appropriate level, but also that turkey meat flows to the further processors that are driving growth. The CTMA’s export policy is one allocation policy that does meet the tests of sections 21 and 23(2) of the Act and FPPAC disagrees with BC that this policy can be used as an example of failing to meet the criteria. It is telling that no significant use of the export policy has been made by BC processors suggesting that comparative advantage in further processing turkey meat does not rest in BC although it has a growing market for further processed products. FPPAC suggests that the CTMA should sever the growth in the further processed market from the whole bird market and develop allocation policies for each separately.

FPPAC agrees that the Agency has the final responsibility to demonstrate its legislative mandates are met when making allocation decisions or policies. A province proposing a different approach to the allocation of growth must demonstrate that the comparative advantage of production lies with the province relative to others. To operationalize the principle of comparative advantage, FPPAC agrees that a good starting point is a comparison of provincial costs followed by other factors a province may wish to advance. The final test should be the application of transportation costs to the market where the growth is required. It may well turn out that the Agency may not be able to allocate the growth in production to the province where the growth in consumption is occurring without compromising the objects (section 23) of the Act.

FPPAC agrees with BC that the current pro rata allocation policy does not allocate future growth in a manner that takes into account the consumer interest. Only the historical processor interest is taken into account. The current consensus building process has become an exercise in doing whatever is necessary to achieve support of the majority of provinces without regard to the interest of consumers. Directors must work within the Proclamation and the Act, they cannot agree to ignore their statutory obligation. FPPAC noted that in past hearing reports, Council made it clear that consensus cannot override the Agency's statutory obligations.

FPPAC noted that in recent CTMA meetings, attempts were made to develop a new allocation approach and specifically one for further processing. If one could be developed in a meaningful way, it would be consistent with section 21 as well as the criteria. However, taking such a concept and adding it to the existing pro rata approach in such a way that makes only minute changes to the allocations received by provinces defeats the exercise. Such approaches do not take account of the Agency's statutory obligations in a meaningful way.

In concluding, the BC signatories are correct in suggesting that the industry would be made stronger if the Agency used, in a meaningful way, the criteria to develop its allocation policies and was able to demonstrate how the policy advanced its objects. FPPAC disagrees with BC that such an application will support the allocation of production growth based on population growth or growth in consumption by a particular province. The turkey market in Canada is a national market and this is why the application of comparative advantage is so important. Hence, FPPAC supports the relief sought by BC, especially with respect to future quota orders.

La Fédération des producteurs de volailles du Québec, Le Ministère de l'Agriculture des Pêcheries et de l'Alimentation du Québec and La Régie des marchés agricoles et alimentaires du Québec

The system currently used by the CTMA for allocating quotas to provinces has been applied since the signing of the FPA in 1974. Since that time, the criteria included in the formula for sharing allocations among provinces have been applied.

The NFPC prior-approved the regulatory framework governing the current quota system which was adopted by CTMA in 1990. As well, CTMA directors adopted the NCQAP in 1999. Over time, CTMA has adopted and/or revised specific allocation policies, namely, the Primary and Multiplier Breeder Policies, the Research Quota Credit Policy and the Export Policy. These various policies allow differentiated growth among provinces and enable response to characteristics in provincial production structures.

In describing the turkey industry in Canada, Quebec points to the stability brought by the allocation system which allowed for the development of a structured Canadian industry able to supply the national market efficiently. In each province, producers, processors and other downstream players developed strategies, business plans and organizations based on a known and foreseeable commercial allocation system.

There is no logic for provincial segmentation of the Canadian turkey market today. In applying the system of establishing and sharing allocations, consideration must be given to the fact that the turkey market is national. Provincial self-sufficiency is incompatible with this reality. The industry has structured itself to satisfy the requirements of both regional and national markets. Firms of a national scope compete against one another to meet the requirements of the Canadian market by offering consumers turkey products through a solid sales network across the country.

The industry in Quebec includes 4 hatcheries, 138 producers and 4 federally-inspected slaughterhouses. These four slaughterhouses process approximately 24% of all turkeys grown in Canada. One of these companies is heavily involved in further processing of turkey products, serving national accounts and investing annually large sums of money in new product research. The industry employs hundreds of workers, vast sums of money are invested every year and capitalization of assets at various levels of the industry is considerable.

Quebec is self-sufficient in grain production which allows efficient production of turkey across the province. This production contributes to regional development and employment. The price of live turkey in Quebec has been amongst the lowest in Canada, except for toms weighing more than 9 Kg. whose price is slightly higher than in Ontario.

In cooperation with processors, Quebec producers developed a three year promotion campaign costing \$3 million. This promotion plan complements the national marketing program developed by CTMA. The above, as well as other initiatives, demonstrate the resolve of Quebec producers to develop this market and to revitalize growth of turkey production in Canada.

After 30 years of use, the CTMA allocation system has produced positive results by supporting industry growth, responding to Canadian market requirements and achieving a high level of competitiveness. Quota has increased by 37% and, to various degrees, all provinces have taken advantage of this growth. In fact, BC benefited from a 68% increase in allocation, one of the highest in Canada.

The request by BC could have negative effects on the industry as a whole by hampering competitiveness, impairing development and compromising the existence of certain regional elements causing severe impacts on producers, processors and both upstream and downstream players. It is important to avoid replacing the current allocation process with a system that would systematically exclude one or more provinces from sharing growth.

The approach proposed by BC redirects the development of the industry toward provincial self-sufficiency thereby foregoing the development of an efficient market-responsive industry. By contrast, CTMA's formula-based allocation methodology along with the adoption and/or revision of allocation policies have allowed provinces to develop a modern, efficient and competitive industry. It is important to allow this situation to continue. In Quebec, the production and processing industries have reached a level of development national in scope. It is essential that the allocation system be based on a formula supporting stability in Quebec and maintaining Quebec's share of Canadian domestic production.

Alberta Turkey Producers

The Alberta Turkey Producers (ATP) believe the BC complaint raises significant issues that impact all CTMA members.

The ATP contends that instead of applying the required criteria in the Proclamation, the Agency has adopted formulas to allocate increases in allocation based on past market shares. Alberta supports changes on a go-forward basis that ensure future increases are allocated using the criteria in the Proclamation and in a manner that recognizes market growth and market responsiveness as important factors in allocating increases. It does not support any attempt to reopen past Agency decisions and allocations. Alberta believes the Committee can provide important guidance on the role of the criteria in the Proclamation.

The ATP recognizes the role of the CTMA in ensuring an effective and prosperous turkey industry and the efforts of the Executive and staff in developing proposals for changes to the allocation policies. Alberta supports the continuation of this process but asks the Committee to emphasize the review process cannot continue indefinitely and that necessary changes must be in place for the 2005/2006 control period.

The ATP believes there also has been a significant negative impact on the Alberta industry as a result of CTMA's policy. While Alberta agrees with the concerns raised by BC regarding the failure of the existing policies to take into consideration the criteria in the Proclamation and sees the need for significant changes, it acknowledges that Alberta was part of the process that developed these policies. Alberta does not support the suggestion that past allocations should be reopened and a particular province should receive increased allocations in the future based on adjustments to past allocations. Doing so would cause disruption and uncertainty in the industry for producers and processors. Precedent is also cited as a concern by the ATP, in that it might be

used by other provinces who were unhappy with how they perceived some other criteria was or was not applied in the past.

Alberta believes that the BC complaint raises valid concerns regarding the use of allocation policies for increases in quota that do not make use of the criteria in the Proclamation and rely upon fixed formulas to allocate future increases.

It is a fundamental principle of administrative law that an administrative body is required to act in accordance with the terms of the statute and any subordinate legislation under which it is created. The CTMA must conduct itself in a manner consistent with its objects as set out in Section 21 of the Act and it is also required to consider the Proclamation criteria before taking any decision to increase a provincial allocation. If the criteria are not considered, then the requirements of the Proclamation are breached.

The role of the criteria in setting quota allocations is not new to the CTMA or other agencies. Past decisions have generally recognized that an agency is given broad discretion in how to apply the criteria. The ATP refer to a number of the conclusions reached as a result of a legal opinion by Mr. Henry Molot of the federal Department of Justice respecting issues arising out of the Proclamation. The following conclusions were identified:

- 1) The Agency has a very broad discretion as to whether to apply any criterion or not and as to the weighting and method of weighting to be used.
- 2) Generally National Farm Products Marketing Council ought not to find an Agency decision on quota allocation illegal or without authority unless there is evidence that the Agency ignored or did not even consider one or more criteria.
- 3) The Agency has flexibility in applying any criterion and is not, in law, bound to use one method for all quota allocated under any criterion.
- 4) In allocating quota the Agency must, in fact, consider each of the criteria and make a conscious decision on whether to apply it, the weight to be given it and the method of calculating. To avoid controversy, the Agency ought to show in its records and submit to the NFPC the records showing that these steps were carried out.

The NFPC has also recognized the broad discretion afforded an agency in taking into account the criteria. In this respect, the ATP refer to a number of paragraphs in the May 10, 2004 Council Committee Report concerning the Canadian Egg Marketing Agency Plan.

Unfortunately, the allocation policies established by the Agency fail to meet the basic requirements set out in the Molot Opinion and in the NFPC Committee Report. Both Molot and

the NFPC report recognize the criteria must be consciously considered and strongly recommend that the Agency provide an analysis showing how they were applied.

The allocation policies of the Agency also violate a fundamental principle of administrative law, known as the "rule against fettering" which provides that an administrative agency cannot refuse to exercise its discretion by creating policies that apply automatically without considering other applicable factors.

When the Agency's allocation policies are examined the problem of "fettering" becomes obvious. The NCQAP sets a starting point of 132 Mkg eviscerated for national commercial turkey allocation and then provides in section 3(b) as follows:

“Global increases or decreases to the starting point of 132 Mkg will be allocated to the provinces based on their percentage shares at 132 Mkg.”

The policy then sets out a table with the percentage share for each province based on 132 Mkg. Under this Policy, any future increase in allocation will be allocated based on a fixed percentage and the five criteria will be ignored. Alberta describes the policy as an inflexible rule that will apply in all circumstances, and takes the place of any consideration the criteria must be given under the Proclamation when allocating increases. This is a clear example of fettering discretion.

Similar problems occur in the CTMA Export Policy. Under section 1.1(a) of the Export Policy "any province which has exported young turkey grown within quota" will be eligible to apply for a conditional allocation which will be incorporated into the amount set in the Canadian Turkey Marketing Quota Regulations for the control period. The conditional allocation allows a province to increase its quota allocation beyond the base amount simply by producing surplus production for export and this increase occurs simply based upon a formula without any regard to the criteria established in the Plan.

Similarly, CTMA's other policies can increase provincial allocations without regard to the criteria. Although the CTMA is not restricted to only the criteria specified in subsection 4(1), they still must be taken into account. It remains unclear as to whether this has occurred. In order to avoid fettering its discretion, CTMA must actually demonstrate that it has considered the criteria in each instance where an allocation is to be increased.

The Agency cannot establish a policy that allocates increases based on a fixed percentage and still apply the Proclamation criteria. This creates a static system of "entitlement" for each province to a particular percentage of an increase and as a result, is in direct conflict with the intent of the Proclamation. It prevents the development of allocation policies that respond to industry needs and to market growth in particular provinces.

Alberta is concerned that the past export policy and its use of export regrow credits has created a system that has a negative and distorting impact on domestic production by placing undue

emphasis on this single factor. A large percentage of all growth has been allocated through this policy rather than using the criteria. The present export policy does not address these problems. Alberta is supportive, however, of the CTMA's engagement of a consultant to review the policy and to measure its impact on the domestic allocation system.

The ATP request that the NFPC:

- a. Acknowledge:
 - (i) the failure of the Agency's existing allocation policies to conform with the Agency's express obligation to take into account the criteria set out in subsection 4(1) of the Proclamation and (ii) the urgent need for the Agency to ensure that its allocation policies conform to the Act and the Proclamation, both in form and in substance.
- b. Recommend to the Agency that it take immediate steps to ensure that its allocation policies conform to the Act and the Proclamation, both in form and in substance.
- c. Encourage the Agency, the BC Signatories and the other members of the CTMA to continue and accelerate the process of developing new allocation policies that incorporate the criteria listed in the Proclamation and that are responsive to market growth in particular provinces and to the needs of the industry as a whole.
- d. Recommend to the Agency that it ensure that the necessary changes are in place prior to the commencement of the 2005/2006 Control Period.
- e. Advise the Agency that a comprehensive justification will be required respecting the use of the listed criteria in support of any request for the NFPC's prior approval of any future quota order and that the NFPC will expect that changes to address the concerns noted in this hearing are in place before the Agency requests prior approval of a quota order for the 2005/2006 Control Period.

COMMITTEE FINDINGS

For consideration by Council, the Committee presents below commentary with respect to its review of the relevant legal instruments, summary comments by parties respecting the use of the Proclamation criteria and finally, its conclusions and recommendations.

Review of Legal Instruments

The power of “prior approval of agency orders and regulations” is conferred on the National Farm Products Council by para. (d) of s. 7(1) of the Farm Products Agencies Act, R.S.C. 1985, c. F-4 as amended by S.C. 1993, c. 3, as follows:

“7.(1) In order to fulfill 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 turkey marketing scheme enacted by subsection 7(1)(d) of the Act has as its purpose that “where it is satisfied” the orders and regulations “are necessary for the implementation of the marketing plan”, the Council “shall approve the orders or regulations”. Of particular note in this case is the statutory requirement for the Council to satisfy itself that an agency order or regulation is necessary for the implementation of the agency’s marketing plan.

In their submissions, the BC Signatories emphasized that, as an administrative body created by a duly enacted Proclamation pursuant to the Act, the CTMA is obliged to function within the limits of its statutory authority. The Committee therefore concluded that it is essential to review the applicable provisions of the Act and Proclamation in order to examine the degree of flexibility afforded to CTMA for making overbase quota allocations.

Section 23 of the 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) In allocating additional quotas for anticipated growth of market demand, an agency shall consider the principle of comparative advantage of production.”

In the Committee's view, each of the subsections in Section 23 comprises a separate prescriptive text with the result that they may be susceptible to different interpretations as to whether or when subsection 23(2) must be applied. Such interpretations were thoroughly discussed in Council's "Report of the Committee established to inquire into the complaint by the Saskatchewan Signatories to the FPA 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", issued in May 2004. The Committee reiterates the conclusions reached in that Report notably, that section 23 "was only intended to prescribe 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". It follows, therefore, that the terms set out in the CTMA marketing plan must be examined.

In particular, Part II of the CTMA marketing plan provides as follows:

"Quota System"

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

2. (2) *The Agency, in establishing a quota system, shall assign quotas in such manner that the number of pounds of turkey meat 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 pounds of turkey meat 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 pounds of turkey meat 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 pounds of turkey meat 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 pounds of turkey meat set out in this section for a province or for the unregulated area is the number of pounds set out in Column II of an item of the following table in respect of the province or the unregulated area set out in Column I of that item.*

TABLE

<i>Item</i>	<i>Column I Province or Area</i>	<i>Column II lb.</i>
1	<i>British Columbia</i>	<i>20,500,000</i>
2	<i>Alberta</i>	<i>18,250,000</i>
3	<i>Saskatchewan</i>	<i>8,000,000</i>
4	<i>Manitoba</i>	<i>17,250,000</i>
5	<i>Ontario</i>	<i>92,000,000</i>
6	<i>Quebec</i>	<i>54,000,000</i>
7	<i>New Brunswick</i>	<i>1,440,000</i>
8	<i>Nova Scotia</i>	<i>2,500,000</i>
9	<i>Unregulated Area</i>	<i>60,000</i>

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

- (a) *the number of pounds of turkey meat 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 pounds of turkey meat 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 pounds of turkey meat 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 turkeys;*
- (e) *any failures by turkey producers in any province or provinces to market the number of pounds of turkey meat authorized to be marketed;*
- (f) *the feasibility of increased production in each province available to be marketed;*
- (g) *the existing production and storage facilities in each province; and*

(h) *the comparative transportation costs to market areas from alternative sources of production.*

4. (2) *No order or regulation shall be made pursuant to subsection (1) unless the Agency is satisfied that the size of the market for turkeys has changed significantly.*

Except for the year 1973, the CTMA marketing plan does not contain terms which actually allocate quota. The plan does require, however, that the CTMA must establish a quota system subject to and in accordance with the rules set out in the plan. Paragraphs 2 and 3 of the plan provide the foundation on which CTMA is to operate in making allocations for the 1973 production year while the table in paragraph 3 establishes what are often referred to as the base quota numbers. Paragraph 4(1) of the plan subsequently specifies that if an annual allocation to any province is to exceed the volume in the table for the province, then the Agency must have “taken into account” the six criteria listed in the same paragraph (one of which is comparative advantage of production).

It is important to recognize that there is no additional guidance or indication in the plan as to how the “overbase” criteria in the plan are to be defined or quantified nor is there any direction as to the appropriate weight each criterion should be given in the application of the criteria. The Committee is of the view, though, that the requirement to “take into account” the criteria is a mandatory undertaking by the CTMA when making quota decisions involving “overbase” quota allocations to any province. In other words, the six listed criteria must play an important role in the allocation deliberations of the Agency. As to how the Agency defines and applies each of the criteria, the Committee is of the opinion that such determinations must be in accord with the objects of an agency as prescribed under section 21 of the Act.

Past Council decisions have afforded a wide discretion to an agency in applying criteria contained in a marketing plan (or indeed any other criteria), albeit this discretion cannot be said to be unlimited. Given that the context in which the obligation to take into account the six listed criteria involves the making of a quota order, the CTMA is required to give careful and meaningful consideration when determining how and the extent to which each criterion should be applied. The Committee submits that to blindly ignore this statutory requirement is not an option available to an agency in the exercise of its decision-making authority.

The Committee re-emphasizes the findings contained in Council’s May 2004 Report 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”. The Committee also reiterates the Council’s conclusion that although provincial allocations can change disproportionately, it would not be reasonable to implement radically different allocations for each quota period if only for the sake of preserving stability in the industry.

To put the final 2004/05 quota order, presently before Council for its consideration for prior-approval, into proper context, the total quota allocations to member provinces amount to 315,272,131 pounds of turkey. The base numbers as set out in the Proclamation to these provinces total 213,940,000 pounds. Accordingly, there are 101,332,131 pounds of overbase quota subject to the requirements of section 4(1) of Part II of the Proclamation, i.e. that the Agency must take into account the six listed criteria when allocating any or all of the overbase portion to any of the member provinces.

Comments by Parties Respecting the Use of the Proclamation Criteria

The British Columbia Signatories

BC alleges that the Agency has adopted and applied rigid formulaic allocation policies. In the case of commercial allocations, which is the main focus of their complaint, allocations are determined according to a rigid formula that takes into account only historical allocations. BC maintains that this approach is inconsistent with the Agency's express obligation to take into account the criteria set out in subsection 4 (1) of the Proclamation. The adoption of these rigid policies reflects an improper abdication of the Agency's statutory obligation to take into account those criteria. BC states that it is incumbent upon the Agency to take the criteria into account, on every occasion that it makes a quota allocation; it is insufficient for the Agency to assert that the criteria were taken into account when the original formula was developed and adopted. The assertion that the criteria were taken into account when the original formula was adopted is tantamount to an expression that the criteria are not truly taken into account on the occasions when quota allocations were actually made. Finally, the manner in which these allocations have been made is inconsistent with the Agency's express objects to promote a strong, efficient and competitive production and marketing industry for the regulated product and to have due regard for the interests of producers and consumers.

BC believes that it has been negatively impacted by CTMA's use of an allocation formula, and lack of regard to the criteria listed in the Proclamation. In September 2003, CTMA established the global commercial allocation at 128 million kilograms (Mkg). Had the provincial allocation been made with due regard to the criteria set out in subsection 4(1) of the Proclamation, the difference in allocation to BC is estimated to be as high as 7 Mkg. The gap between BC's market and its allocation has consistently widened since BC's entry into the national plan. The rigid allocation formulas used by the CTMA do not promote a strong, efficient and competitive industry and are suffocating what would otherwise be a vibrant industry.

BC delineated CTMA's express statutory obligations as follows: the CTMA is obliged to conduct itself in a manner consistent with the objects of an agency prescribed in section 21 of the Act and is obliged to take into account the criteria set out in subsection 4(1) of the Proclamation before taking a decision to increase a provincial allocation.

BC points out that section 3(b) of CTMA's NCQAP specifically provides that "global increases or decreases to the starting point of 132 Mkg will be allocated to the provinces based on their percentage shares at 132 Mkg".

By adopting a rigid approach to quota allocation, the CTMA has effectively abdicated its legislative responsibility to exercise a discretion, "which is framed in terms of criteria, not rules". The adoption of rigid formulas precludes an exercise of the very discretion conferred on the Agency under the Proclamation. How can the CTMA "take into account" the criteria set out in subsection 4(1) of the Proclamation if the decision to increase a provincial allocation is effectively predetermined by the rigid, formulaic policy adopted by the CTMA? The CTMA *is* vested with broad discretion under the Proclamation, but it is not so broad as to permit it to decline from exercising that discretion, relying instead upon the automatic application of "policies".

The criteria that the CTMA is required to consider cannot be reduced to the rigid formula employed in the NCQAP, or to the eligibility requirements employed in the Export, Breeder and Research Policies. These policies operate as a means to increase provincial allocations without regard to the criteria listed in the Proclamation. Although the CTMA is not restricted to consideration of the listed criteria, it is obliged to take those criteria always into account.

BC concluded that the onus is on the CTMA to provide a detailed analysis outlining how it is taking into account the criteria listed in the marketing plan in establishing each and every quota order.

In BC's Rebuttal of the CTMA Response it was noted that the CTMA admitted that if it mechanically applied its policy, if that were the starting point and the end point, then there would be a fettering problem. BC then contended that "the fact of the matter is that the CTMA has adopted a policy that requires commercial allocations to be made only on a historical pro rata basis, and ... the CTMA has in fact applied that policy. It is the starting point and the end point".

Regarding the CTMA's reference to a submission made by BC regarding the use of the criteria at a CTMA Board meeting, BC stated: "BC was then, as it is now, merely arguing that the CTMA should have regard to the criteria rather than slavishly following a pro rata formula".

BC stated that, in their opinion, BC, Alberta, Saskatchewan and FPPAC all agree in principle that the CTMA ought not to slavishly follow a pro rata formula, but rather should make individual allocation decisions, having regard to the criteria and in a manner that is consistent with their objects. It is entirely reasonable to expect that those parties would have very differing views on what the outcome of a quota allocation decision that has regard to the criteria should look like. While BC might take issue with the substance of the position advanced by FPPAC, for example, FPPAC's argument is precisely the kind of argument that ought to be given voice at the CTMA table, and it is not, nor are the arguments of others. The fact is, those arguments have no place at the CTMA table, because commercial allocation decisions are made according to a rigid formula based on historical allocations.

BC argued that while it is difficult to find consensus and agreement on the criteria, it is only when the national agency provides scope for the Signatories to put these meaningful issues on the table to discuss that the industry can develop in the manner it should.

BC contends that “with the passage of the present commercial quota allocation policy in 1999, the Agency has wholly rejected any element of market-responsiveness choosing instead to base allocations on historical allocations, and it is for that reason that BC opposed the 1999 Commercial Allocation Policy.”

Canadian Turkey Marketing Agency

In respect of the use of the Proclamation criteria, the Agency in its written submission references the Molot opinion wherein broad discretion is afforded it when allocating quota, that broad discretion being framed as criteria as opposed to rigid rules, thus providing the CTMA with flexibility in carrying out its mandate. The CTMA notes that it has the discretion to assign no weight to the Proclamation criteria and has the discretion to consider additional criteria provided that it is done to further its statutory objects.

The CTMA contends that all of its policies, including the NCQAP, were developed in a manner which addressed the Proclamation criteria. The Agency also submits that the policy used to produce the 2004/05 Quota Regulation addressed the criteria. CTMA members believed that they had developed policies that incorporated those Proclamation criteria. As an example, in the development of the breeder policies, the Agency chose not to give any weight to the criteria as it would have been illogical to do so. Rather, members developed other more logical criteria and in so doing furthered the Agency’s statutory objects.

The Agency then noted that with the development of policies such as the NCQAP, it has not (Committee emphasis) reviewed the Proclamation criteria each time that it has made quota orders or regulations, believing that those criteria were appropriately addressed in the policies.

In the CTMA’s oral response to the BC submission, Mr. John O’Kane, CTMA’s solicitor, declared that “there is a reality that the directors of the CTMA, being both a mix of producers and processors, are all acutely aware of the criteria of the Proclamation even if there is not what I would describe as rote recitation of those Proclamation criteria in all of the CTMA minutes when overbase quotas are addressed”. He went on to indicate that directors are all active investing participants in the turkey industry and that they routinely consider the criteria. It was also noted that the Agency’s publication “Turkey Facts” which includes data relating to the criteria is before the directors at every meeting.

Mr. O’Kane then submits “with respect to these criteria, without that rote recitation that I alluded to earlier, unless that is a requirement for the CTMA to follow, and it is my submission that it is not, without a poll of each director of the CTMA it is nearly impossible, in my submission, to assess whether those directors individually, as they are obliged to do, have taken into account the Proclamation criteria, but it can’t be said that they are not before the CTMA for consideration

each time it is making an allocation decision, which is what was submitted on behalf of BC today relying on an earlier decision of Council. I now turn to another reality about the Proclamation criteria for this committee's consideration, and that is there is no fixed nor lasting concurrence among CTMA members about what the criteria mean and how to measure them". As an example, it was noted that the BC submission focussed very clearly on the provincial market as the primary factor to be considered while the Saskatchewan intervention identified comparative advantage of production, hence, there is no fixed or lasting concurrence about what the criteria mean. Although the criteria continue to evolve, it cannot be said that due consideration is not given to the criteria each time quota allocation is before the directors.

In response to a question from Council's legal counsel respecting the accuracy of the statement that there was no fixed or lasting concurrence among directors as to the meaning of the criteria and how they are applied, Mr. O'Kane confirmed that was the case. In response to a further question that if there is no consensus among members on the meaning and application of the criteria, how does the Agency take into account the criteria in the allocation process, Mr. O'Kane stated that consensus is achieved albeit not always unanimity. Finally, when asked to identify the specific consensus reached by members with respect to the meaning of the criteria and how they were applied respecting a given quota order for a particular year, Mr. O'Kane replied that he could not point to any set of minutes with that level of detail.

Intervenors

Alberta Turkey Producers

With regard to the CTMA's use of the criteria, Alberta's intervention included the following comments:

"Alberta agrees that the Complainants raise a valid concern regarding the importance of the criteria set out in the Proclamation when the CTMA is considering any increase in allocations of turkey. Instead of applying the required criteria, the Agency has adopted formulas to allocate increases in allocation".

"Alberta supports changes to the allocation policies on a go-forward basis to ensure that future increases are allocated with regard to the criteria in the Proclamation and in a manner that recognizes market growth and market responsiveness as important factors in allocating increases".

"...Alberta believes that the NFPC Committee in the present hearing can provide important guidance on the role of the criteria set out in the Proclamation and on the importance of developing allocation policies for future increases that are based on market responsiveness and not formulas based on past market shares".

"Alberta believes that the BC Signatories' complaint does raise a valid concern regarding the use of allocation policies for increases in quota that do not make use of the criteria set out in the

Proclamation and that rely upon fixed formulas to allocate future increases.” They make the point that “it is a fundamental principle of administrative law that an administrative body is required to act in accordance with the terms of the statute and any subordinate legislation under which it is created”. They then proceed to delineate the objects of an Agency as set out in Section 21 of the FPAA. They further note that the CTMA is also required to consider the criteria set out in subsection 4 (1) of the Proclamation before taking any decision to increase a provincial allocation, and quote the related subsection. Alberta observes that “subsection 4 (1) of the Proclamation makes clear that the criteria listed must be considered every time the Agency makes a decision to increase the amount of turkey to be allocated. If the Agency does not consider these criteria, it breaches the requirements of the Proclamation”.

After reviewing the Molot Opinion and Council’s May 2004 Complaint Committee report, Alberta observes: “unfortunately, the allocation policies established by the Agency fail to meet the basic requirements set out in the Molot Opinion and in the NFPC Committee Report”. Alberta goes on to describe how the NCQAP works. They note: “thus under this NCQAP, any future increase in allocation will be allocated based on a fixed percentage. The five criteria will be ignored and a rigid formula will be applied to determine how much of the increase is allocated to each province. In the Commercial Quota Allocation Policy, the Agency has clearly adopted an inflexible rule that will apply in all circumstances. This rule takes the place of any consideration of the criteria under the Proclamation”.

With regard to the Export Policy, Alberta states “the conditional allocation allows a province to increase its quota allocation beyond the base amount simply by producing surplus production for export and this increase occurs simply based upon a formula without any regard to the criteria established in the Plan. The fixed formulas employed in the NCQAP and the eligibility requirements employed in the Export Policy, the Breeder Policy (primary and multiplier) and Research Policy provide a means to increase provincial allocations without regard to the criteria specified in subsection 4 (1) of the Proclamation. While the Alberta Turkey Producers does not suggest that the CTMA is restricted to the consideration only of the criteria mentioned in subsection 4 (1), the CTMA is always obliged to take these criteria into account. It is not clear that this has been done in respect of any of the policies”.

Alberta further points out that “in certain materials provided by the CTMA, the Agency’s executive has suggested that it is sufficient to recite that the criteria were considered. ...the Agency must do more than simply reference the criteria in its preamble. It must actually demonstrate that it has considered the criteria in each instance where a quota allocation is to be increased”.

They go on to point out that “there is no way that the Agency can establish an ongoing policy that allocates increases based on a fixed percentage to each province that does not vary and still apply the criteria in the Proclamation to each potential increase in allocation....Such a system... is in direct conflict with the clear intent of the Proclamation that the listed criteria be considered in each proposed increase”.

Saskatchewan Signatories

Saskatchewan began by stating that in their view the national marketing agencies need to comply with the provisions of the Act, the FPA's and the Proclamation. Saskatchewan also believes that it is imperative to maintain a national approach when applying quota allocation criteria for the purpose of distributing industry growth. In the view of the Saskatchewan signatories, CTMA's actions perpetuate an allocation policy that prevents access to quota in a manner that is consistent with statutory requirements.

The grounds for this complaint are that the allocation methodology employed in support of CTMA's NCQAP involve considerations which are irrelevant and improper in that CTMA has:

- 1) chosen to use historical market shares as a basis to make allocations when no such criteria have been provided in section 23 of the Act and such criteria are inconsistent with section 21 of the Act; and
- 2) the CTMA has failed to employ the principle of comparative advantage of production in accordance with section 23(2) of the Act and as required by the current FPA.

It is of particular concern to Saskatchewan that criteria listed in the FPA are not being followed and in fact, have been misused for no other reason than to sustain the delicate balance of provincial interests. Fundamentally, the CTMA's NCQAP is inconsistent with the interests of the consumer and inconsistent with the intent of the Act. In Saskatchewan's view, the principle of comparative advantage of production was given prominence within this Act yet its application is conspicuous by its absence in CTMA's quota allocation process. At the same time, the Act is mute on quota allocation principles that the CTMA has chosen to apply, specifically: status quo, or proximity to local markets.

Clearly, CTMA's rationale for its quota allocations remains outside current authority. The NFPC put it best in an appeal decision dated June 8, 2000, in the matter of: *Complaints from the Manitoba and Saskatchewan Egg Signatories against the Canadian Egg Marketing Agency*. Council clearly articulated that:

"Self-sufficiency is not, nor has it ever been, an objective which an agency is authorized to pursue. In fact, moving in this direction may very well impede the promotion of a strong, efficient and competitive industry. Furthermore, in terms of supplying the domestic processing market, the use of such ratios may well prevent the attainment of cost efficiencies given the locational characteristics of this sector".

Saskatchewan is of the view that the law is the law and it must be followed until it is changed or agreed to in a new FPA. "The CTMA has based its quota allocation factors on what it was not entitled to consider, factors associated with other than those that are in the Act and Proclamation. In other words, the only factors that CTMA is entitled to take into account when allocating overbase quota are the ones listed in the Act and the Proclamation". Saskatchewan believes that

the CTMA's actions are invalid because they are based on an allocation formula that was derived through a process independent of the amendment provisions in the FPA and the basic underpinnings of the Act. Until these changes are made, the CTMA is not empowered to make any changes it sees fit to the principles that govern how production rights are to be distributed amongst the provinces. This is the purview of the broader group of signatories and this is the process that needs to unfold.

With regard to comparative advantage, Saskatchewan recognizes that while there are a number of ways of operationalizing and interpreting what comparative advantage is, the point is what is required under the Act and what is required under the current FPA and Proclamation is what Saskatchewan is committed to advancing. Saskatchewan stated its commitment to an open discussion on the merits of improving the balance of factors that need to be addressed in the allocation policy. Saskatchewan agrees with BC that the five criteria must be followed when allocating quota, but the criteria must be applied at the national rather than provincial level.

The Saskatchewan Signatories requested that the NFPC:

(i) direct the CTMA to undertake a review of its proposed quota allocation policy in the interests of introducing factors responsive to the principle of Comparative Advantage of Production as required by Section 23 of the FPAA, and

(ii) ensure that no changes are made to the Proclamation or to the FPA that fail to properly and fully address the requirement of section 23(2) of the Act to respect the principle of comparative advantage of production in allocation of new quota.

Manitoba Turkey Producers and the Manitoba Farm Products Marketing Council

In citing a number of findings in the NFPC's May 10, 2004 report of the Saskatchewan Signatories complaint against the Canadian Egg Marketing Agency, Manitoba argues that the CTMA has provided a market responsive allocation process that complies with the provisions of the Proclamation.

Ontario Turkey Producers' Marketing Board

The Ontario Board strongly supports the actions of the CTMA and supports the ongoing efforts of the Agency to address the various allocation issues currently before it. Accordingly, the Ontario Board strongly disagrees with the complaint filed by the BC signatories.

BC argues that the promulgation and reliance on policies by the Agency prevent it from substantively exercising the discretion reserved to it under subsection 4(1) of the Proclamation. The Ontario Board submits that the Agency, like any other statutory empowered body exercising discretion, has deemed it appropriate to design and implement policies to reflect how the duties of the Agency will be discharged. These policies do not fetter the Agency's discretion but rather

provide a road map for the exercise of it. Provided the Agency reserves the right to amend and vary its policies, then it has not fettered its discretion.

The policies of the Agency do not bar it from carrying out its objects but rather ensure that it does. Reference is made to the Agency's initiatives with respect to the Market Responsiveness Pool and the Further Processing Pool, noting these address regional market opportunities in a dynamic fashion, and both with reference to storage stock levels.

The Ontario Board views the BC complaint as being reflective of BC's attitude and approach experienced during the FPA renewal process.

Ontario Farm Products Marketing Commission

Although the Commission did not request intervener status, it does support the efforts of the CTMA in addressing issues relating to the allocation of turkey across Canada

La Fédération des producteurs de volailles du Québec, Le Ministère de l'Agriculture des Pêcheries et de l'Alimentation du Québec and La Régie des marchés agricoles et alimentaires du Québec

The Quebec signatories began by enumerating the benefits of the national supply management system, followed by comments on BC's demand for major changes to the allocation system.

Quebec notes that the system currently used by the CTMA for allocating quotas to provinces has been applied since the signing of the FPA in 1974. Since that time, the criteria included in the formula for sharing allocations among provinces have been applied.

The approach proposed by BC redirects the development of the industry toward provincial self-sufficiency, thereby foregoing the development of an efficient market-responsive industry. By contrast, CTMA's formula-based allocation methodology along with the adoption and/or revision of allocation policies have allowed provinces to develop a modern, efficient and competitive industry. It is important to allow this situation to continue. In Quebec, the production and processing industries have reached a level of development national in scope. It is essential that the allocation system be based on a formula supporting stability in Quebec and maintaining Quebec's share of Canadian domestic production.

Nova Scotia Turkey Producers Marketing Board

Nova Scotia strongly disagrees with BC's opinion that the CTMA is not operating in compliance with section 4 of the Proclamation.

Further Poultry Processors of Canada (FPPAC)

FPPAC views this hearing as essential to ensuring future allocation decisions are governed by the objects set out in section 21 of the Act and conform to the mandatory prescription set out in section 23(2) of the Act, section 4(1) of the Proclamation and section 5 of Schedule “C” of the FPA. An allocation system in harmony with the Act and Proclamation will ensure that needed turkey meat will flow to those further processors that are promoting growth in turkey meat demand. FPPAC states that the Agency has an obligation to take into account relevant factors set out in the legislation and avoid relying on irrelevant factors which are not set out in the legislation such as pro rata market share when making overbase allocations. FPPAC believes that the current allocation policies prevent the criteria from being considered.

FPPAC supports BC’s complaint that the CTMA allocations are made using a rigid formula and allocations have been made without considering the principle of comparative advantage of production and taking into account the Proclamation criteria. Likewise, FPPAC supports BC’s complaint that the CTMA has failed to put allocation proposals through the prism of section 21 of the Act.

The failure by CTMA to take account of the criteria, particularly comparative cost of production, has set aside the will of Parliament and has substituted unlimited discretion to act outside its enabling legislation. Agency directors have a responsibility to demand and consider analysis to demonstrate how the allocation policy advances objects set out in section 21 of the FPAA. Directors also have a responsibility to demand and consider evidence of comparative advantage of production for regions or provinces. Failure to do so is in violation of section 23(2) of the Act. There is a strong link between comparative advantage and an agency’s objects. To build a strong, competitive and efficient industry, comparative advantage of production cannot be ignored.

The CTMA’s export policy is one allocation policy that does meet the tests of sections 21 and 23(2) of the Act and FPPAC disagrees with BC that this policy can be used as an example of failing to meet the criteria. It is telling that no significant use of the export policy has been made by BC processors suggesting that comparative advantage in further processing turkey meat does not rest in BC although it has a growing market for further processed products.

FPPAC believes that the Agency has the final responsibility to demonstrate its legislative mandates are met when making allocation decisions or policies. “The Agency has a responsibility to live within its obligations but most of all to be transparent about that. That is probably the biggest missing factor”.

FPPAC agrees with BC that the current pro rata allocation policy does not allocate future growth in a manner that takes into account the consumer interest. Only the historical processor interest is taken into account. When put to the test of Section 21, the pro rata allocation approach will fail. The current consensus-building process around allocation decisions has become an exercise in doing whatever is necessary to achieve support of the majority of provinces without regard to the interest of consumers. Directors must work within the Proclamation and the Act, they cannot

agree to ignore or set aside their statutory obligation. FPPAC noted that in past hearing reports, Council has made it clear that consensus cannot override the Agency's statutory obligations.

FPPAC stated that acting within the jurisdiction conferred by statute means that future allocation decisions should be accompanied with a detailed rationale on how the criteria and other relevant factors were considered and implemented. In addition, further rationale must set out how the objects of the Agency, section 21 of the Act, were enhanced, which is broad enough in terms of mandate to bring into play many of the business factors which need to be considered in bringing new products to market.

FPPAC noted that in recent CTMA meetings, attempts were made to develop a new allocation approach and specifically one for further processing. If one could be developed in a meaningful way, it would be consistent with section 21 as well as the criteria. However, taking such a concept and adding it to the existing pro rata approach in such a way that makes only minute changes to the allocations received by provinces defeats the exercise. Such approaches do not take account of the Agency's statutory obligations in a meaningful way.

FPPAC's objective in taking part in the complaint hearing was to have the criteria discussed and made transparent at the Agency proceedings.

Conclusions and Recommendations

As noted in the section of this report entitled "Review of Legal Instruments", the Committee is of the view that the Agency must give serious consideration to the Proclamation criteria each time it makes an "overbase" allocation to any province. This is a legal requirement which is not to be taken lightly.

The Agency noted on a number of occasions that consensus was reached among directors in terms of the meaning and application of the criteria. The Committee must question the accuracy of this statement for a number of reasons. First, at least four submissions from Agency members (British Columbia, Alberta, Saskatchewan and Further Poultry Processors Association of Canada) indicated there had been no meaningful consideration of the criteria during Agency meetings leading to the establishment of the 2004/05 quota order. Furthermore, each of these four submissions would seem to be placing emphasis on different factors contained in the criteria set as a whole. The Committee, therefore must comment that if there is indeed consensus among members, that consensus was not made evident to the Committee during the course of the presentations by all parties to the hearing.

The Agency also indicated that in the absence of a poll of its directors, it is impossible to assess whether those directors individually have taken into account the criteria. In going further, the Agency indicated that "there is no fixed nor lasting concurrence among CTMA members about what the criteria mean and how to measure them". The Committee observes that whether or not individual members of the Agency considered the criteria is a moot point. The Proclamation requires the "Agency" as a corporate body to take account of the criteria. To openly admit that

there is no agreement among members as to the meaning and application of the criteria is tantamount to an admission that, in fact, the Agency did not take into account the criteria in any real or meaningful way as is required by the Proclamation. This conclusion is supported by the fact that the Agency could not point to any set of meeting minutes that identified any consensus respecting the meaning and application of the criteria. The question remains: if Agency members cannot agree on the meaning of the criteria, and are unable to provide written confirmation of a duly arrived at consensus on this issue through the minutes of the Agency's meetings where the proposed quota allocation numbers are established, how can the Agency possibly demonstrate that it took into account these same criteria?

The Committee would also like to comment briefly on the methodology employed by the Agency in making the 2004/05 quota order, and in particular the commercial quota allocation portion of the order. It would seem that the Agency, in moving from 126 Mkg. (which had been allocated on a pro rata basis) in the 2003/04 quota year, to 128 Mkg. in the 2004/05 year, simply allotted the incremental addition of 2 Mkg. 85% based on pro rata and 15% on the difference between retail sales and provincial allocation. In other words, not only was the Agency unable to demonstrate it took into account the Proclamation criteria in its deliberations leading to the 2004/05 quota order, but it used pro rata market shares as the most significant factor in allotting increases over the 2003/04 provincial allocation levels. It should be noted that the previous year's allocations do not constitute a new base (the same can be said about the 132 Mkg. level in the NCQAP) and until such time as a renewed FPA is completed, the terms and conditions of the existing Proclamation must be respected.

As a result of the foregoing, the Committee recommends to Council that:

- (1) the Council decline to prior-approve the CTMA's 2004/05 quota order given that the Agency has not clearly demonstrated that it took into account the criteria in subsection 4(1) of the Proclamation for that portion of the allocations which exceeded the base numbers for each province, and
- (2) each time the CTMA presents a quota order for prior-approval purposes to Council which includes above-base allocations that 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. Additionally, 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.