



National Farm Products
Council

Conseil national des
produits agricoles

Report of the Committee established to inquire into the complaint

By

Giannone Poultry Incorporated

Against

The Chicken Farmers of Canada

**Concerning the Chicken Farmers of Canada's Market Development
Assessment Decision Relating to Undermarketing for Periods A-54,
A-55 and A-56**

December 2004

Canada



November 30, 2004

TO: Members of the National Farm Products Council

Canada Building
344 Slater Street,
10th Floor
Ottawa, Ontario
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SUBJECT: Complaint Committee Report

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Attached is the Report of the Complaints Committee established to hear the complaint by Giannone Poultry Incorporated against the Chicken Farmers of Canada's market development assessment decision relating to undermarketing for periods A-54, A-55 and A-56.

The Committee sincerely hopes that the CFC and its Market Development licensees will find the contents of this report to be useful in improving the ongoing operation of the Market Development Policy. The approach we have taken is to offer advice and recommendations, as appropriate, to the parties involved. The Committee has outlined what it views as responsibilities of both the Agency and licensees and suggested steps that can be taken to enhance the functioning of the Policy. In particular, the Committee sees a need for improved communication between the Agency and its licensees, and a need to resolve inconsistencies between the Policy and the regulations that are used to implement it.

The Committee recognizes that the Market Development Policy provides an opportunity for producers and processors who wish to expand their operations and take part in international markets. However, the Committee must emphasize that the operations of this policy should in no way negatively impact those who participate in the domestic market.

This complaint hearing has provided a valuable opportunity for the Council to better understand the day-to-day operations of the Agency, and has increased Council's familiarity with the details of the Levies Order and Licensing Regulations. This will assist Council in its role of ensuring that the system for the national orderly marketing of farm products works in the balanced interests of all stakeholders, from producers to consumers.

Respectfully submitted,

Cynthia Currie
Chairperson of the Committee

Michel Veillette
Committee Member

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**REPORT OF THE COMMITTEE
ESTABLISHED TO INQUIRE INTO THE COMPLAINT BY
GIANNONE POULTRY INCORPORATED
AGAINST THE CHICKEN FARMERS OF CANADA'S MARKET
DEVELOPMENT ASSESSMENT DECISION RELATING TO
UNDERMARKETING FOR PERIODS A-54, A-55 AND A-56**

INTRODUCTION

A complaint was received by the National Farm Products Council on September 9, 2004 from Giannone Poultry Incorporated with regard to Chicken Farmers of Canada's market development assessment decision requiring Giannone Poultry Inc. to pay a levy of \$84,232.28 for failure to market in export trade, during periods A-54, A-55 and A-56, the full amount of the live weight equivalent of the chickens produced, as required by the *Canadian Chicken Licensing Regulations* and in contravention of its market development licence.

Section 7(1)(f) of the *Farm Products Agencies Act* (FPAA) requires that the National Farm Products Council (NFPC or Council) inquire into complaints from any person who is directly affected by the operations of an agency. The Council sent out a notice of hearing on September 20, 2004, announcing that the hearing would take place on November 1, 2004 in Ottawa. Giannone Poultry Inc. (Giannone) was asked to provide its written submission by October 1, 2004. Chicken Farmers of Canada (CFC) provided its response to the Giannone complaint on October 15, 2004. There were no interventions by other industry participants. All documentation was circulated to all of the parties in advance of the hearing. A pre-hearing teleconference call to discuss procedural matters was held on October 14, 2004.

A hearing was held in Ottawa on November 1, 2004, by a Complaints Committee (Committee) established by the Council. Pursuant to its *Guidelines for Complaints*, the Council established a Complaints Committee made up of Cynthia Currie, Committee Chairperson and Chairperson of the Council, and Michel Veillette, Council Member.

At the outset of the hearing, a letter dated October 25, 2004, signed by the Chairperson of the Complaints Committee, was read into the record (Annex I). The letter made the following observations and posed the following questions:

- Section 5 of the CFC Levies Order provides the conditions for which a levy of 44.0 cents per kilogram will be payable by a primary processor. Section 11 then provides that the levy is payable within 30 days after the primary processor receives CFC's determination that the levy is payable.

- Paragraph 8.09 of the CFC Market Development Policy (MDP) then indicates that the “determination” referred to in Section 11 of the Levies Order is to be forwarded to the primary processor in the form of a “notice of assessment”.
- Paragraph 8.10 of the CFC MDP then allows a market development license holder to appeal the CFC Notice of Assessment to the NFPC but provides no indication as to the grounds upon which the appeal may be based or what relief may be sought from the Council.

Given these various provisions:

- When does the 30 day payable period in Section 11 of the CFC Levies Order commence?
- If, as in this case, there is a failure to market during the related market development commitment period and the only determination for CFC to make under the Levies Order is to assess what the live weight equivalent is for the quantity of the regulated product which is not marketed, is an appeal based on a “*force majeure*” argument available to the market development license holder?
- Where the CFC has made its “determination” in accordance with Section 11 of the Levies Order, what authority does Council have to intervene in this process as an appellate body and what force and effect could any Council decision have?

Giannone commented briefly on the above questions. It was suggested that the 30 day period be increased to the length of a production cycle. Giannone believes that the Council should have the authority to revise and make final decisions.

CFC responded that the word “determination” in Section 11 must be interpreted as the final determination. As such, the 30 day period begins at such time as CFC makes its final determination that the levy is payable, and this would vary depending on whether there was an appeal of the assessment or not. Implicit in the MDP is the notion that if a primary processor submits a complaint to the Council, the requirement to remit the levy payment is stayed pending the outcome of the complaint.

CFC conceded that there is no statutory right of appeal. However, they submitted that CFC is not a quasi-judicial body, but a stakeholder organization that makes administrative decisions as well as regulations and orders. Where CFC interprets Section 11 of the Levies Order as applying to final determinations by CFC, that leaves CFC with the flexibility to consider issues raised by primary processors who receive a notice of assessment under the MDP. While there is no express provision for the use of a *force majeure* argument in appealing an assessment, the CFC

believes it is not restricted from applying its policy in a flexible manner, or from developing a particular practice in the context of its MDP. As such they believe that the right to appeal is a fair and practical approach.

CFC noted that the Levies Order does not reference the ability to argue a *force majeure* claim in an overmarketing situation either, but provincial boards can make a *force majeure* claim as set out in the Monitoring and Enforcement Policy. CFC has developed *Force Majeure* Guidelines to assist it with applying principles consistently. In the case of the MDP, there is no express provision for a processor to make a claim that an event constituted *force majeure*, but CFC in its discretion unanimously agreed to consider the claim. The important point is that the CFC made its market development assessment against Giannone in a manner consistent with CFC's authority under the Levies Order.

With regard to the questions of Council's jurisdiction, CFC pointed out that under Section 7 (1) (f) of the FPAA, Council is required to make inquiries in relation to any complaints received by it. As such, Council has the authority to undertake an inquiry such as the one brought by Giannone. However, CFC concluded that Council has limited remedial powers and cannot:

- quash the CFC determination that the events relied upon do not constitute *force majeure* and that the levy assessed is payable;
- substitute its decision for CFC's determination that the levy, as assessed, is payable;
- make a declaration that the events relied upon by Giannone constitute *force majeure*;
- grant Giannone the relief that it is not required to remit levies in respect of their failure to market in the appropriate periods that market development production is received; or
- order CFC to reconsider its decision.

Historically, Council has made recommendations, comments and observations to assist the parties to a complaint. While not binding on the parties, they have been helpful. In the past, Council had authority under the chicken Federal-Provincial Agreement (FPA) to resolve disputes. Under the new FPA, Council is not a signatory and therefore does not have the remedial power to grant the relief that Giannone is seeking.

In light of the responses to the above questions, the Complaints Committee concluded that it could not give either party the relief that was being sought. However, in light of Council's duty to review the operations of agencies, the Complaints Committee was prepared to proceed with the hearing and to prepare a report that could be helpful to the Agency. Both parties agreed to proceed with the hearing under these conditions.

POSITION OF GIANNONE POULTRY INC.

Giannone is a Quebec-based processor whose operations include exporting of fresh poultry products to the United States under a market development licence issued by the CFC.

Giannone maintains that CFC’s assessment of \$84,232.28 in respect of undermarketings in Periods A-54, A-55 and A-56 should be forgiven based on *force majeure* considerations. In order to satisfy CFC’s rules and regulations, Giannone proposed to export an amount of product equivalent to the assessed volume of undermarketing over six future periods.

Giannone’s submission consisted of a series of letters exchanged between CFC and Giannone. The following outlines the chronology of events to date:

- **May 31, 2004**

The CFC notified Giannone that they undermarketed a total of 191,437 kg (live weight equivalent) under the Market Development Policy (MDP), in periods A-54, A-55 and A-56, incurring a levy of \$84,232.28

Period	Total MDP Allocation kg	MDP Export kg	Difference kg	Levy @ \$0.44/kg live
A-54 Aug. 24 - Oct.18, 2003	528,814	477,710	51,104	\$22,485.76
A-55 Oct. 19 -Dec. 13, 2003	487,701	357,219	130,482	\$57,412.08
A-56 Dec. 14, 2003 - Feb. 7, 2004	372,663	362,812	9,851	\$4,334.44
Total	1,389,178	1,197,741	191,437	\$84,232.28

CFC informed Giannone that, according to paragraph 8.9 of the MDP, the levy must be forwarded to CFC by June 30, 2004.

- **June 28, 2004**

Giannone responded to CFC indicating its willingness to decrease its MDP volume over six periods, and to sell domestic chicken into the export market to compensate for the amount that was under exported in periods A-54 to A-56. Giannone stated that factors outside the company's control were to blame for not meeting its MDP commitments, particularly, a weak US dollar, delivery problems into the US and organizational restructuring with its main US customer. Giannone concluded that the situation with its US market was temporary and is now back to normal. Giannone requested an additional six production periods in which to make up the amount undermarketed.

- **July 12, 2004**

In response, CFC indicated that Giannone or a designated representative could present its case to the CFC's Board of Directors' meeting on July 22, 2004 in Calgary, Alberta. The CFC also provided Giannone with a copy of its Overmarketing Assessment Procedures and directed Giannone to paragraph 17, which states: "In the case of a licencing action, the CFC Directors representing the Canadian Poultry and Egg Processors Council (CPEPC) or licence holder representatives may present their claim for *force majeure* consideration."

- **July 15, 2004**

Giannone designated Robin Horel of the CPEPC to speak on its behalf at the CFC's Board of Directors meeting in Calgary, Alberta. In its September 30, 2004 submission to Council, Giannone described the CFC's invitation to the Calgary meeting as unprofessional due to the distance company official(s) would have been required to travel (Montreal - Calgary) and the short notice given. Hence the decision to have the CPEPC present Giannone's case.

- **July 26, 2004**

CFC informed Giannone that the Board of Directors at their July 22, 2004 meeting refused the company's proposal and requested payment by August 27, 2004.

- **August 12, 2004**

Giannone responded that they were not satisfied with the CFC's decision and asked for a re-evaluation of their file, reiterating that the situation with their US customer was out of their control and therefore was a *force majeure*. Giannone also asked CFC to take into account that all of their exports are fresh whole birds, unlike other processors who are

exporting either frozen product or legs. Giannone attached a letter dated August 13, 2004 from their major US customer, Phoenix Poultry Corporation, which purchases 50% of Giannone's fresh product. The company outlined the problems they faced during the last six months of 2003 and their subsequent restructuring.

- **August 27, 2004**

CFC informed Giannone that it was not in a position to re-evaluate the complaint and that the necessary time had elapsed as indicated in Section 2 of the CFC Overmarketing Assessment Procedures. CFC also referred to Section 3 of the same procedures and quoted "no new claims can be made by the affected board or license holder outside this 30 day limit". CFC reiterated that payment was due August 27, 2004. CFC reminded Giannone that assessments relating to levy payments are subject to appeal to the NFPC, as set out in Section 7(1)(f) of the FPAA, Council's Guidelines for Complaints, and Section 8.10 of CFC's Monitoring and Enforcement Policy.

- **September 3, 2004**

Giannone responded to CFC's August 27, 2004 letter stating that it finds it unacceptable that CFC will not re-examine its case and reiterates that its decreased exports should qualify as a *force majeure* due to restructuring of its major customer. Giannone further questioned CFC's position that Giannone was presenting "new claims" outside of the 30 day limit when it introduced the August 13 letter from its customer. Giannone also asked that its case be re-examined at CFC's mid-September meeting. Giannone stated that if CFC again denied its request it would appeal CFC's decision to the NFPC.

RESPONSE BY THE CHICKEN FARMERS OF CANADA

OVERVIEW

The complaint concerns the market development assessment made by the CFC requiring Giannone to pay a levy of \$84,232.28 for undermarketing of 191,437 kg (live weight equivalent), in periods A-54, A-55 and A-56, pursuant to the *Canadian Chicken Licensing Regulations*, the *Canadian Chicken Marketing Levies Order* and CFC's Market Development Policy.

The CFC submission notes that Giannone does not dispute that it undermarketed and was in contravention of its market development licence, nor does it dispute the amount of levy payment owed. Giannone submits that because of *force majeure* it should not be required to pay the levy payment. Giannone made a proposal to CFC indicating how it was prepared to address the undermarketings. CFC considered both Giannone's claim of *force majeure* and its proposal

during the CFC Board meeting held on July 22, 2004, rejected the claim, and requested that the levy payment be submitted. Giannone asked that CFC re-evaluate the claim of *force majeure*. CFC did not re-evaluate the claim. Giannone then submitted a complaint to Council.

The Agency submits that the complaint brought forward by Giannone should be dismissed. Giannone, through a designated representative, had the opportunity to present its case to the CFC Board at its July 22, 2004 meeting, where all available information (from CFC and Giannone) was considered. CFC indicated that it is not required to re-evaluate its market development assessment when a licensee later submits additional information in support of a claim of *force majeure*, particularly where the additional information could have, with due diligence, been submitted prior to the CFC's consideration of the matter. CFC noted that even if additional information had been submitted, the CFC's decision would have remained the same. The circumstances cited and relied upon by Giannone do not, in the view of the CFC, constitute *force majeure*.

FACTUAL BACKGROUND

For periods A-54, A-55, and A-56, Giannone agreed to market chicken in accordance with the market development commitment forms which it completed. The CFC sets out the volume of undermarketings and the amount of levy assessment for each of the three periods. The Agency describes the chronology of the events beginning with the Notice of Assessment dated May 31, 2004 and ending with Giannone's filing of a complaint with the Council on September 9, 2004. This time line is consistent with that presented by Giannone in its submission (above).

APPLICATION OF CFC REGULATIONS AND POLICIES

Canadian Chicken Licensing Regulations

Giannone holds a market development licence issued under the *Canadian Chicken Licensing Regulations* and is required to comply with all conditions attached thereto. Specifically, the Agency refers to subsection 5(3)(d) and (h) of the *Canadian Chicken Licensing Regulations* which state that:

(d) the licensee must market the total live weight equivalent of the number of kilograms of chicken indicated in section 1 of the market development commitment form - as calculated with the coefficients set out in column 2 of section 1 of Schedule 2 - during the market development commitment period to the buyers, and for the end-uses, referred to in section 3 of that schedule;

(h) the licensee must remit any levies imposed on the licensee under subsection 5(1) of the *Canadian Chicken Marketing Levies Order*...

The CFC notes that Giannone does not dispute that it is in contravention of 5(3)(d) of the

Canadian Chicken Licensing Regulations.

Canadian Chicken Marketing Levies Order

The CFC imposed the levy assessment in accordance with subparagraph 5(1)(a)(ii) of the *Canadian Chicken Marketing Levies Order* and Articles 8.6 and 8.8 of its Market Development Policy.

Subparagraph 5(1)(a)(ii) of the *Levies Order* states that:

5(1) Every primary processor who holds a market development licence issued under the *Canadian Chicken Licensing Regulations* and who markets chicken produced under a federal market development quota must pay a levy of 44.0 cents per kilogram on the live weight equivalent of any of that chicken

(a) that is

(ii) not marketed during the market development commitment period,.....

CFC's Market Development Policy

CFC assessed levies against Giannone in accordance with CFC's MDP. One of the Agency's responsibilities under the MDP (Article 4.1(a)) is to ensure the monitoring and auditing of all production under the Policy, the licensing regulations, the quota regulations and the provincial market development programs.

Article 5 of CFC's MDP sets out the responsibilities of market development licensees including the requirement to hold a valid market development licence and to abide by the provisions contained in the Agency's licensing and quota regulations or equivalent provincial regulations. The CFC notes that its MDP incorporates several elements of flexibility to assist primary processors who market under the Policy.

To obtain market development production, primary processors make a request using the Market Development Commitment Form stating total live weight equivalent they plan to market using the product coefficients in Article 6.5 of the MDP. CFC states that Article 6.4(d) allows a processor to reduce its commitment prior to the start of the targeted production period. CFC notes that it is not aware that Giannone requested to reduce its market development commitment for any or all of periods A-54, A-55 or A-56.

Article 6.4(f) of the MDP provides additional flexibility for processors allowing them to market in the targeted period or in either of the periods immediately preceding or following. Primary processors, therefore, are not restricted to market in the same period that the product is produced.

Article 8.6, 8.7, and 8.8 of the MDP sets out the implications for a processor for failure to fully utilize the live weight equivalent requested in the Market Development Commitment Form. In particular, failure to market will result in an assessment of a levy by the CFC or provincial board, as applicable, in the amount of 44 cents per kg based on the live weight equivalent for the market development production that has been marketed other than in accordance with the Policy and the applicable regulations.

CFC notes that the MDP does not expressly make provision for a market development licensee to challenge a CFC notice of assessment by claiming *force majeure*. The CFC states that Article 8.13 of the Policy addresses what a non-compliant licensee must establish to avoid a decision by CFC to suspend, revoke or refuse to issue or renew a market development licence. Specifically, the licensee must establish to the satisfaction of the CFC that the failure to comply was due to an event that:

- (a) rendered it impossible for the licensee to market the chicken as per the market development policy;
- (b) was not reasonably foreseeable; and
- (c) was beyond the control of the licensee and the party that was to purchase the chicken from the licensee.

CFC Consideration of Giannone's Claim of *Force Majeure*

Although CFC made no decision in respect of the market development licence of Giannone, in light of Giannone's claim of *force majeure*, the Board considered the merits of the claim. The Board looked to the following policies and guidelines for guidance regarding the principles of *force majeure*: Article 8.13 of the MDP, Section 7.08 of the CFC Monitoring and Enforcement Policy, the CFC *Force Majeure* Guidelines, and the CFC Overmarketing Assessment Procedures.

Under Section 7.08 of the CFC Monitoring and Enforcement Policy, a *force majeure* event must satisfy three preconditions:

- (a) the event must render performance of the obligation or commitment impossible, not just difficult;
- (b) the event must not be reasonably foreseeable; and
- (c) the event must be beyond the person's control.

It is not sufficient that the event be beyond the person's control. All three preconditions must be satisfied for the event relied upon to constitute *force majeure*.

CFC draws a parallel between the three preconditions required to establish a claim of *force majeure* as accepted by Council in the Report, dated May 1986, in "National Farm Products Council Inquiry Into A Complaint by the New Brunswick Chicken Marketing Board Against

Liquidated Damages Assessed by the Canadian Chicken Marketing Agency” and the six guidelines to be used in assessing a *force majeure* claim, as included in CFC’s *Force Majeure Guidelines*:

Council’s report accepted the Agency’s three preconditions of unavailability, unforeseeability and externality as principles of *force majeure*. The factors were defined as follows:

- (a) Unavailability: events alleged must render performance of obligation impossible, not just difficult;
- (b) Unforeseeability: events must be not be reasonably foreseeable because steps must be taken to prevent such action if at all possible;
- (c) Externality: events must proceed from an external cause.

In the report, Council rejects the *force majeure* argument put forward by the New Brunswick Chicken Marketing Board, stating that the New Brunswick Board failed to meet any of the three preconditions necessary to invoke a *force majeure* situation.

CFC’s *Force Majeure Guidelines* state:

- (a) the event must be of such a magnitude as to radically change the circumstances of the contract;
- (b) the event could not have been anticipated or addressed through proper planning and diligence;
- (c) the event must make performance of the obligation or commitment impossible, not simply difficult;
- (d) there is greater difficulty in demonstrating that the event could not be reasonably foreseen if similar events occurred in the recent past and could be addressed through proper contingency planning;
- (e) a person cannot claim *force majeure* if the person contributed to the event either through its actions or inactions;
- (f) an extenuating circumstance must be the cause of the marketing situation to qualify as *force majeure*.

No Event Constituting *Force Majeure*

Having considered the guidelines applied in other circumstances to claims of *force majeure*, and the circumstances of the undermarketing by Giannone, the Agency rejected the claim of *force majeure* by Giannone for the following reasons:

- (a) the documentation provided by Giannone in its letter of June 28, 2004 was not sufficient to establish *force majeure*.
- (b) the CFC Board, in its consideration of the claim at its July 22, 2004 meeting in Calgary Alberta, posed a number of questions to Robin Horel, President and CEO of the

CPEPC and designated representative of Giannone. CFC noted that Mr. Horel advised the Board that Giannone's customers were finding other opportunities or cancelling orders or not requiring what they would normally require. CFC submits that the failure of Phoenix Poultry to take delivery of product which it had sourced from Giannone was a contractual matter between the two parties. Furthermore, CFC maintains that internal problems at Phoenix Poultry were not business problems amounting to *force majeure*. Mr. Horel stated that the event that constituted the *force majeure* was simply a change in the buying habits of Giannone's day to day, week to week customers in the US market. CFC submits that these factors do not support a conclusion that the event relied upon by Giannone was unforeseen.

(c) Mr. Horel indicated that for processors who supply fresh poultry, they must deal with fluctuations in the orders for fresh product and the possibility that US customers will find a better source of supply in the US for a period of time. The Agency noted that Giannone was not the only processor to market fresh product in the US market. Nine other processors export fresh product to the US, and were able to meet their commitments for periods A-54, A-55 and A-56, while dealing with the same currency fluctuations cited by Giannone. While some exported less product in A-55, others showed strong increases. There was no evidence of a consistent down-trend across processors.

(d) CFC submits that the largest contributing factor to Giannone's undermarketing in periods A-54, A-55 and A-56 was not the reduction in marketings in the US, but rather was the increase in market development production requested and received for periods A-50 through A-55, as compared to the level in A-49. The Agency contends that the increases were not sustainable in light of the actual exports in those periods. As Giannone continued to request large volumes of market development product each period, the actual exports of product began to fall more and more into the period following the period in which they were produced. The flexibility of allowing the following period's exports to account for production not yet marketed was built into the MDP to allow primary processors to deal with difficulties in the marketplace. Giannone had already used up much of this flexibility when US clients started cancelling their orders.

(e) when Giannone realized that Phoenix Poultry was having difficulties, it could have requested a reduction in its market development commitment for some future period. It made no such request.

Proposal by Giannone to Address Undermarketing in A-54, A-55 and A-56

In its letter to CFC dated June 28, 2004, Giannone proposed to address its undermarketing of market development product in periods A-54, A-55 and A-56 by, over six periods, marketing in export trade, product that was intended for the domestic market.

The proposal was similar to the terms of a settlement agreed to by Giannone and CFC approximately four years ago. Giannone was one of several processors assessed a penalty for undermarketing for periods A-23 to A-29. The CFC audit, among other things, revealed a number of instances of double-counting, where two processors were claiming export credit for the same product. CFC decided, under the circumstances, to enter into settlement agreements with all of the processors.

As a direct result of the concerns raised by the above audit, the CFC Board adopted a number of amendments to its Market Development Policy in January 2001. In particular, the amendments to clauses 5.1 (c), 6.2, 6.4 (g) and 6.4 (h) were made in order to ensure that there would be no double-counting. Also, clause 6.4 (d) was added stating that a processor may reduce its export commitment by providing a revised Market Development Commitment Form to the provincial board prior to the start of the targeted production period.

For purposes of the recent undermarketing by Giannone, the CFC MDP, implemented in January 2002, is in effect, includes provisions to address the undermarketing, and was properly applied by the CFC Board.

Based on the MDP, there was no valid reason to accept the proposal made by Giannone.

Re-evaluation by CFC

In developing and adopting the MDP, it was the intention of the CFC Board of Directors that once a decision was made concerning undermarketing by a market development licensee, the Board would not re-evaluate or re-consider the decision made. CFC quotes Section 8.10 of the MDP, which directs licence holders that they may appeal an assessment or licensing action to the NFPC.

In the circumstances, the Board was not required to re-evaluate its decision based on Giannone's August 12, 2004 letter to CFC. In addition, the information contained in that letter could have, with due diligence, been obtained by Giannone for presentation to the CFC Board at the July 22 meeting.

CFC points out that even if the additional information had been considered by the Board, it would not have altered their decision. They refer to Phoenix Poultry's letter which stated "the last six months of 2003 was a difficult time for us...We had a contract with Giannone for the production of a certain volume of product but we were unable to take delivery of some of it...in any business, problems like this sometimes arise and must be addressed".

Problems that Giannone asked CFC to accept as a *force majeure* were characterized and accepted by Phoenix Poultry as a reality of doing business, not as something unforeseen.

CFC points out that Phoenix Poultry in its letter stated that Giannone was aware that the last six months of 2003 was a difficult time for them. Period A-54 began on August 24, 2003. If Giannone was aware in July 2003 that Phoenix was experiencing problems, they could have reduced their market development requests for periods A-54, A-55 and A-56. CFC stated that they were not aware of Giannone making any requests to reduce their market development commitments.

RELIEF SOUGHT

CFC requested that Council:

(a) reject the claim of *force majeure* made by Giannone in respect of undermarketing of market development product during periods A-54, A-55 and A-56;

(b) dismiss the Complaint; and

(c) in accordance with Article 8.12 of the Market Development Policy, require Giannone to pay to CFC the levy payment of \$84,232.38 within thirty (30) days of the date of the Report of the Complaints Committee as adopted by Council.

COMMITTEE FINDINGS

At the outset of the hearing, the Complaints Committee concluded that it could not give either party the relief that was being sought (see Introduction). However, in light of Council's duty to review the operations of agencies, the Complaints Committee agreed to proceed with the hearing under these conditions, with the concurrence of both parties.

In view of the issues raised during the course of the hearing respecting the application of the Market Development Policy, *Canadian Chicken Marketing Levies Order* and *Canadian Chicken Licensing Regulations*, the Committee will take this opportunity to provide its observations and recommendations on the operation of the MDP and the role and responsibilities of market development licensees, the Agency and provincial marketing boards in its operation.

It should be emphasized that the complaint was in relation to an assessment action by CFC, not a licensing action, as these matters are addressed differently in the Agency's policies and regulations.

Observations

Giannone Poultry Inc., in its verbal presentation, stressed the following points:

- Giannone at no time disputed the amount of kilograms undermarketed.
- Giannone acknowledged that the amount of undermarketed production pursuant to the MDP was sold on the domestic market.
- Giannone felt that CFC did not provide sufficient notice for them to present their case to the CFC Board of Directors meeting in Calgary. While Robin Horel (CPEPC) did his best to present Giannone's case in Calgary, Giannone feels that they could have provided a better justification of their appeal, based on their operations and marketing strategies.
- Giannone feels that they should have been provided with a written record of what transpired at the CFC Board of Directors meeting in Calgary on July 22, as well as a written decision, including the reasons for rejecting the *force majeure* claim, from the Board of Directors.
- Giannone stressed that it produces a high-end specialty product and cannot compete on price in the US market. As such there are a limited number of US buyers that would be interested in their product. Giannone prides itself on its client-based approach to its business. When Phoenix Poultry experienced problems, Giannone chose to work with Phoenix to resolve them.
- Giannone concluded that they are trying to promote Canadian product in export markets. They agreed that the rules must be followed, but wanted to reach a "settlement" with CFC and move on.

On questioning by the Committee, it was apparent that while Giannone was aware to a certain extent of the contents and provisions of the "export policy" as provided to it by its provincial board, it was not clear whether Giannone had been in receipt of the full details of the Agency's Market Development Policy, nor was Giannone aware of the legal instruments (Licensing Regulations and Levies Order) used to implement the policy. Giannone did not appear to be fully aware of the legal implications of the situation. Based on Giannone's previous experiences with undermarketings under the MDP, it appears that Giannone did not expect to have to pay a monetary levy.

The Agency highlighted the following information in addition to its written submission:

- CFC's goal is to maintain the integrity of the MDP, including equitable treatment for all processors.
- CFC noted that the purpose of the MDP is to increase the production and processing of chicken in Canada, thereby creating more flexibility for the Canadian chicken industry. A

key element of the policy is to ensure that the domestic market is not disrupted.

- While CFC has no stated *force majeure* policy for MDP assessments, it has heard four cases based on this argument in addition to the current one. Two of those were accepted and two rejected.
- With regard to Giannone's suggestion to make up its undermarketings over six periods, CFC submitted that this is a totally different situation from A-29, when such a solution was permitted. Subsequent to A-29, the MDP was changed. The solution proposed by Giannone is not the preferred solution to undermarketings.
- CFC noted that it did not refuse to hear Giannone's *force majeure* argument, believe that fair notice was given, and stated that it must work within the schedule of the pre-set Board meetings.
- CFC recognizes that it could have shared more information regarding the appeals process with Giannone.
- CFC acknowledges that international markets are less flexible than the domestic market, and submits that processors collectively understand that there is increased risk in international markets. For this reason, CFC made the MDP as flexible as possible, while ensuring that the domestic market would not be disrupted. The policy allows processors to reduce their commitments prior to the start of the period and provides three periods to market the product.

On questioning by the Committee, it was not entirely clear whether ongoing MDP licensees are provided with copies of the MDP and amendments on a regular basis. Subsequent to the hearing, CFC provided copies of correspondence sent to MDP licensees relating to changes in the policy (Annex II). It was not apparent that licensees are informed of the avenues available to them in appealing an assessment. It was noted that according to Section 8.13 of the MDP, for an assessment appeal situation to be considered *force majeure*, all three criteria must be met. Conversely, in Section 8.3 of the Licensing Regulations, it states that only one of the three criteria must be met when considering a licensing action. It appears that CFC did not provide Giannone with a copy of the *Force Majeure* Guidelines prior to the CFC Board of Directors' consideration of its *force majeure* claim at the meeting in Alberta on July 12, 2004.

Recommendations

As the body responsible for the approval of CFC's Levies Order and Licensing Regulations, Council has the responsibility to ensure that the Agency carries out its operations in accordance

with its objects as set out in Section 21 of the FPA. It is on this basis that the Committee presents the following recommendations to market development licensees and the CFC.

Recommendations for Market Development Licensees

1. Market development licensees have a responsibility to ensure that they have a full understanding of both the Market Development Policy and the related regulations (Levies Orders and Licensing Regulations). There may be a role for CPEPC in informing their members about the various policies and regulations that the Agencies have in place.
2. Licensees should be pro-active in communicating with the provincial board and CFC in the event of any concerns regarding the policy, and should take advantage of the option to reduce their commitments prior to the start of a period, should the need arise.
3. Licensees should understand the consequences of not meeting the commitments as specified in the policy and understand that this is a legal matter, as well as a policy matter.
4. Licensees should recognize that one of CFC's key goals in the administration of the MDP is to ensure that the domestic market is not disrupted to the detriment of all stakeholders. As much as possible, licensees should develop contingency plans in order to avoid disruption of the domestic market.

Recommendations for CFC

1. There is a need to ensure open, transparent and consistent operation of the policy as it applies to all licensees. CFC has a responsibility to ensure that MDP licensees are fully informed about the policy, related regulations and amendments thereto. The Committee sees a need for broader stakeholder consultation, beyond provincial commodity boards and including all processor licensees, and an ongoing review of the MDP and related regulations. CFC may wish to involve CPEPC in developing some form of structured communication in relation to the policy – possibly periodic information sessions or discussions of best practices and recommendations for improvement.
2. The Committee noted that under the provisions of the current Levies Order, Section 5 (1), there is no discretion for CFC to waive an assessment levy, nor any grounds for a licensee to appeal an assessment. However, the Market Development Policy allows for both. If review or appeal rights for licensees are considered desirable, such rights should be referenced in the regulations through either the inclusion of express provisions or the incorporation, by reference, of the CFC policy. There is a need to ensure that the licensing regulations, levies orders and policy are consistent.

3. CFC should clarify in its policy and regulations the grounds upon which an MDP assessment appeal can be made. CFC may wish to consider posting information on an appeal process on its web site. CFC should ensure that licensees who are appealing an assessment are fully aware of the options available to them and the process to be followed. In advance of any Board of Directors review process, licensees should be informed of all assessment criteria and standards against which their case will be judged, in order to allow them to present their appeal effectively.
4. The Committee was made aware of a number of inconsistencies in the treatment of Overmarketing Assessments, affecting provincial boards, and MDP Assessments, affecting individual processors. Procedures for both policies should be more clearly defined and standardized in order to ensure equitable treatment of individual processors and provincial boards.
5. If the concept of *force majeure* is to be made available as a ground for appeal of any assessment, CFC should clarify the definition of *force majeure* and in which circumstances it may be applied. The definition of *force majeure* should be sufficiently broad to allow it to be applied consistently in all appeal situations. CFC also needs to address whether the standards for a *force majeure* policy should be the same for an appeal of a licence suspension or revocation as they are for a levy assessment, and the effect of an agency policy that requires a more stringent test than that found in the regulations.
6. The Committee expressed concerns about the appropriateness of MDP levy assessments as a deterrent to disrupting the domestic market, and noted that their effectiveness could be compromised in some market situations. There also appears to be a considerable delay between the time when the infraction occurs and the imposition of the penalty. CFC may wish to consider whether there are any other means of disciplining offenders against the policy that would be more effective and timely, and minimize disruption to the domestic market at the time it occurs.
7. The Committee questioned the effectiveness of including the right to appeal to the NFPC in the CFC's policies and regulations. As discussed at the beginning of the hearing, in view of Council's limited remedial authority (see Introduction), the Agency should consider the costs, inconveniences and delays relating to, and the purpose of, an appeal process. The CFC may wish to consider whether including an appeal process in an Agency policy, which relies on Council's responsibilities to review the operations of agencies and inquire into complaints, creates improper and inappropriate expectations for licensees in these circumstances.

Concluding Remarks

The Complaints Committee was concerned with the roles played by both Giannone and the CFC in this matter. The Committee notes that MDP licensees have a responsibility to ensure that they

understand the program. The Committee was made aware of gaps and inconsistencies in the Agency's policies and regulations and suggests that CFC conduct a thorough review, with stakeholder participation, and make such adjustments as are needed to ensure that the regulations mirror the policy. Council will use the information gathered during this complaint in its ongoing review of CFC's policies and regulations, with a view to improving the functioning of the system. The Committee sees some merit in the Council meeting with the Agency to discuss the findings of this hearing.

ANNEX I

Our file: 1205-7

October 25, 2004

Mr. David Fuller
Chairman
Chicken Farmers of Canada
350 Sparks Street, Suite 1007
Delta Office Towers
Ottawa, Ontario K1R 7S8

Mr. Bruno Giannone
President
Giannone Poultry Inc.
2320 rue Principale
St. Cuthbert, Quebec J0K 2C0

Sirs:

In the matter of a complaint to the National Farm Products Council by Giannone Poultry Inc, the Complaint Panel would greatly appreciate receiving comments from the parties at the commencement of the hearing on November 1st in respect to the following issues:

Section 5 of the CFC levies order provides the conditions for which a levy of 44.0 cents per kilogram will be payable by a primary processor. Section 11 then provides that the levy is payable within 30 days after the primary processor receives CFC's determination that the levy is payable.

Paragraph 8.09 of the CFC Market Development Policy then indicates that the "determination" referred to in Section 11 of the Levies Order is to be forwarded to the primary processor in the form of a "notice of assessment".

Paragraph 8.10 of the CFC Market Development Policy then allows a market development license holder to appeal the CFC Notice of Assessment to the National Farm Products Council but provides no indication as to the grounds upon which the appeal may be based or what relief may be sought from the Council.

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Given these various provisions:

- a) when does the 30 day payable period in Section 11 of the CFC Levy Order commence?*
- b) if, as in this case, there is a failure to market during the related market development commitment period and the only determination for CFC to make under the Levy Order is to assess what the live weight equivalent is for the quantity of the regulated product which is not marketed, is an appeal based on a “force majeure” argument available to the market development license holder?*
- c) where the CFC has made its “determination” in accordance with Section 11 of the Levy Order what authority does Council have to intervene in this process as an appellate body and what force and effect could any Council decision have?*

Should you have any questions or require further information on this request, please contact Carola McWade, Deputy Executive Director and Registrar at (613) 995-9697.

Yours sincerely,

Cynthia Currie
Chairperson

MEMORANDUM

TO: Export Licence Holders

FROM: Yvon Séguin
Manager of Finance

DATE: April 30, 2001

RE: Amended Export Policy

For your information, please find herewith Chicken Farmers of Canada's amended Export Policy effective period A-39 (May 6th, 2001).

Pursuant to paragraph 5.1.c of the policy, an export licence holder may claim export product that has been **purchased** from another federally-inspected primary processor located in the same province. To monitor such transactions, CFC developed a 4 part declaration form (25 copies attached) which the slaughtering processor must within 7 days of the purchase date, complete, sign and submit copy 1 to CFC, copy 2 to its Provincial Commodity Board, copy 3 to the processor claiming the product, and retain copy 4 for its records.

Should you have any questions regarding this amended policy or its application, please do not hesitate to contact me.

Sincerely,

Encl.



MEMORANDUM

To: Market Development License Holders

From: Chicken Farmers of Canada Staff

Re: Market Development License

Date: December 18, 2001

As you may or may not be aware, the CFC Export Policy has been replaced with the CFC Market Development Policy. The new Policy will operate in a similar fashion to the Export Policy with a few exceptions.

Under the new Policy, there is increased flexibility through the expansion of the approved end uses to include domestic sales to approved Canadian manufacturers of products that are not on the Import Control List (Non-ICL). Please refer to the Market Development Policy for the specifics of the Policy.

Please be advised that the co-efficients detailed in Article 6.5 of the Policy are scheduled to be reviewed during 2001. As a result, there may be a revision of these co-efficients. All license holders will be notified in the event there are revisions.

If you have any questions regarding the Market Development Policy and its implications, please contact the following CFC staff for assistance:

Yvon Seguin, Manager of Finance
Michael Laliberte, Monitoring and Enforcement Officer
Yves Ruel, Manager of Trade & Policy