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**FEDERAL COURT**

B E T W E E N:

**SIMPLE PATH FARMS AND POULTRY LTD.**

Applicant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

**NOTICE OF APPLICATION**

**TO THE RESPONDENT:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the Applicant. The relief claimed by the Applicant appears below.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The Applicant requests that this application be heard at 90 Sparks Street, Ottawa, Ontario, K1A 0H9.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

April 16, 2024

Issued by: \_\_\_\_\_

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## APPLICATION

This is an application for judicial review in respect of the November 2, 2023 decision of the Chicken Farmers of Canada (“**CFC**”), made pursuant to sections 5(1) and 11.2(1) of *the Canadian Chicken Marketing Levies Order*, SOR/2002-35 (“**Levies Order**”), assessing the Applicant, Simple Path Farms and Poultry Ltd. (“**SPF**”) a levy of \$241,485.00 (“**Final Assessment**”).

The Applicant makes application for:

1. A Declaration that section 5(1) of the Levies Order is *ultra vires* CFC’s authority to impose levies or charges under section 12 of the *Chicken Farmers of Canada Proclamation* SOR/79-158 (“**Proclamation**”);
2. A Declaration that the Final Assessment, which was made pursuant to section 5(1) of the Levies Order, was therefore *ultra vires*;
3. An Order striking section 5(1) of the Levies Order as *ultra vires*;
4. An Order setting aside the Final Assessment;
5. An Order granting the Applicant its costs; and
6. Any other relief counsel may advise and/or other relief this Honourable Court deems just.

THE GROUNDS FOR THIS APPLICATION ARE:

### A. The Parties

1. The CFC is a body corporate and “marketing agency” within the meaning of section 2 of the *Farm Products Agencies Act*, RSC 1985, c F-4 (“**FPA**”).

2. Pursuant to its authorities under the *FPAA* and the Proclamation, CFC has made the Levies Order, the *Canadian Chicken Licensing Regulations*, SOR/2002-22 (“**Licensing Regulations**”) the *Canadian Chicken Marketing Quota Regulations*, SOR/2002-36 (“**Quota Regulations**”).
3. Using those powers, CFC, *inter alia*, administers a market development program that permits licensees to commit to market a specified amount of chicken in interprovincial or export trade during prescribed periods (“**Market Development Program**”).
4. The Applicant is an Ontario corporation based in Welland, ON. It is a “primary processor” of chicken within the meaning of the Levies Order and holds a market development license issued by CFC pursuant to section 4(1) of the Licensing Regulations.

## **B. The Statutory Framework, in brief**

### **(i) The *FPAA***

5. Section 16(1) of the *FPAA* empowers the Governor-in-Council (“GIC”) to establish, by proclamation, agencies with powers relating to certain farm products, including eggs and poultry.
6. Section 17(1) *FPAA* provides that a proclamation establishing an agency shall, *inter alia*, “set out the terms of any marketing plan that the agency is empowered to implement.”
7. Section 2 of the *FPAA* defines “marketing plan” as a “plan relating to the promotion, regulation, and control of the marketing of any regulated product in interprovincial or export trade that includes any or all of”, *inter alia*, “the imposition and collection by the appropriate agency of levies or charges from persons engaged in the growing or production of the regulated products or the marketing thereof and for such purposes classifying those persons into groups and specifying the levies or charges, if any, payable by the members of each group.”
8. The *FPAA* does not define “levies” or “charges.”

9. Section 21 of the *FPAA* provides for the objects of an agency as follows:

21 The objects of an agency are

(a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and

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

10. Section 22(1) (f) of the *FPAA* provides, *inter alia*, that where an agency is empowered to implement a marketing plan, an agency may “make such orders and regulations as it considers necessary in connection therewith” and prescribes a process by which such orders and regulations must be approved by the Farm Products Council of Canada (“**FPCC**”), a body established under section 3(1) of the *FPAA*.

11. Section 37(c) of the *FPAA* makes it a summary conviction offence to contravene “any order or regulation made by an agency under paragraph 22(1)(f)” that has been approved by the FPCC.

**(ii) The Proclamation**

12. The GIC established CFC through the *Proclamation* in 1979.

13. Part II of the Proclamation empowers CFC to implement a marketing plan, including the establishment of a quota system.

14. Consistent with section 17(1) of the *FPAA*, section 12(1) of the *Proclamation* empowers CFC to “impose levies or charges” on persons engaging in the production or marketing of chicken as follows:

12 (1) CFC may, with respect to the signatory provinces, by order or regulation, impose levies or charges on persons engaged in the production or marketing of chicken and any such order or regulation may classify such persons into groups and specify the levies or charges payable by members of each such group and provide for the manner of their collection.

15. Section 12(2) of the Proclamation further provides that levies or charges imposed under section 12(1) “shall be established” to produce a prescribed return, namely, enough to defray CFC’s estimated annual administrative and marketing expenses and costs:

(2) Levies imposed by any order or regulation referred to in subsection (1) shall be established at such levels as to produce in each year a return to CFC that is an amount sufficient to defray its administrative and marketing expenses and costs, as estimated by it, for the year.

16. Section 12(3) provides what CFC may consider when estimating its administrative and marketing expenses and costs:

(3) CFC, in estimating its administrative and marketing expenses and costs for a year, may allow for the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of chicken, as CFC considers appropriate, and any other expenses and costs deemed essential by CFC for the realization of its objects.

17. Section 12(3) provides what CFC may consider when estimating its administrative and marketing expenses and costs:

(3) CFC, in estimating its administrative and marketing expenses and costs for a year, may allow for the creation of reserves, the payment of expenses and losses resulting from the sale or disposal of chicken, as CFC considers appropriate, and any other expenses and costs deemed essential by CFC for the realization of its objects.

18. Nothing else in the Proclamation empowers CFC to impose “levies” or “charges.”

### **(iii) The Levies Order and the Policy**

19. In 2001, pursuant to section 12 of the Proclamation, section 22(1)(f) of the *FPAA*, and with the approval of the FPCC, CFC made the Levies Order in 2001.

20. Sections 5(1)(a) and (b) of the Levies Order impose a two-tiered levy on any primary processor marketing chicken produced under a federal market development quota, as defined in the *Licensing Regulations*, within the periods defined in the *Quota Regulations* as follows:

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 the following:

(a) in the case of chicken that is not marketed during the market development commitment period, a levy of \$1.00 per kilogram on the live weight equivalent of that chicken;

(b) in the case of chicken that is not marketed before the end of the period referred to in the schedule to the Canadian Chicken Marketing Quota Regulations that immediately follows the market development commitment period, an additional levy of \$0.60 per kilogram on the live weight equivalent of that chicken

21. Section 11 of the *Levies Order* provides that CFC shall issue a notice of assessment to every primary processor who must pay a levy under section 5(1).
22. Section 11.1 provides a process by which a processor can dispute the notice of assessment on the basis that its failure to market was due to events meeting the *force majeure* conditions prescribed by section 11.1(2).
23. Pursuant to section 11.2(1), CFC shall cancel or revise the notice of assessment if it finds the *force majeure* conditions were met in whole or in part, and issue a final assessment determination.
24. CFC has also made CFC Market Development Policy ("**Policy**") providing guidance on the imposition of levies issued under section 5(1) of the Levies Order.
25. The Policy states, *inter alia*, that the net proceeds of any levies collected under the Policy "are to be used to develop new markets for Canadian Chicken, to promote increased consumption for Canadian chicken, or develop new uses for Canadian chicken.

### **C. The Original Assessment**

26. On April 26, 2023, CFC issued the Applicant a Market Development Levy Notice of Assessment advising that SPF had not met its market development commitment under the Policy for the marketing periods A-174 and A-175, and therefore, assessing the Applicant levies totalling \$241,485.00 (“**Original Assessment**”).

27. On May 26, 2023, and pursuant to section 11.1 of the *FPAA*, the Applicant provided CFC with notice of its intention to challenge the Original Assessment.

### **C. The Applicant’s Challenge to the Original Assessment**

28. In written submissions and subsequent oral submissions before the CFC Board of Directors on October 11, 2023, the Applicant SPF challenged the Original Assessment on two bases.

29. First, the Applicant argued that the events leading to its failure to meet its market development commitments met the *force majeure* conditions provided in section 11.1(2) of the Levies Order, such that CFC should cancel the Original Assessment.

30. Second, the Applicant challenged the Original Assessment on administrative law grounds, namely, that the levies imposed under section 5(1) were unreasonable because they were *ultra vires* and failed to reflect a proportionate balancing of *Charter* values with its regulatory objectives.

### **D. The Final Assessment**

31. The CFC Board of Directors issued its Final Assessment on November 2, 2023, denying the Applicant’s challenge and confirming the Original Assessment.

32. The Final Assessment rejected the Applicant’s *force majeure* argument, finding that the events at issue were “best described as market challenges or commercial risks that accompany participating in the market development program.”

33. The Final Assessment further declined to address the Applicant's administrative law arguments for various reasons, including that the CFC's Board was not legally trained to adjudicate questions of law of the nature posed by the Applicant's challenge, and that allowing the Applicant's challenge would be inconsistent with the process for the making of regulations and orders under the *FPAA*.

#### **E. SPF's Complaint to the Farm Products Council of Canada**

34. To protect its rights to further challenge the Final Assessment, on December 4, 2023, SPF filed a complaint with FPCC pursuant to section 7(1)(f) of the *FPAA* ("**Complaint**").

35. The Complaint challenged both the Final Assessment's rejection of the *force majeure* argument and CFC's declination to consider the Applicant's administrative law arguments.

36. The Complaint requested that Council exercise its authority under section 7(1)(f) of the *FPAA* to strike section 5(1) of the Levies Order as unreasonable or *ultra vires* and set aside the Final Assessment.

37. The Complaint further requested, in the alternative, that FPCC conclude that that the *force majeure* conditions of section 11.2(1) of the Levies Order were met and therefore set aside the Final Assessment.

38. On March 28, 2024, the Applicant subsequently amended the Complaint to remove the administrative law grounds, such that the Applicant was only requesting that FPCC conclude that the *force majeure* conditions were met and that FPCC set aside the Final Assessment on that basis ("**Amended Complaint**").

39. The FPCC's hearing of the Amended Complaint is scheduled for April 17, 2024.

#### **F. Section 5(1) of the Levies Order is *ultra vires*.**

**(i) CFC's stated purpose for the levies issued under section 5(1) of the Levies Order**

40. CFC has repeatedly stated that the purpose of the levies are to deter processor's non-compliance with the CFC's regulations and the Policy made thereunder.

41. The current two-tiered levy was established in 2011. CFC Staff's April 28, 2011 memorandum to the CFC Board recommending the change makes it clear that the purpose of the change is to prove an effective deterrent to non-compliance:

**CONSIDERATIONS**

Based on the trend that started in 2009 and became consistent throughout 2010, there was a clear direction supporting an increase to the levy rate. With a price spread average of 1.50 dollars per kilogram in 2010, the current levy was no longer perceived as an effective deterrent.

Although many comments did not suggest a specific value, Committee members felt the suggestion of a two-tiered levy would strongly encourage a user of the MDP to meet its commitments. The concept of a two-tiered levy is to offer one additional period in order to meet the commitment at the base levy. Then, if the commitment is still not met, a higher levy would be assessed.

42. Similarly, in responding to the Applicant's *Charter* argument below CFC, stated, *inter alia*:

- "the purpose of the levy is to disincentivize non-compliance with the Policy";
- "the purpose of the levy is to make sure it is more expensive not to comply with the Policy than it is to comply"; and
- 'As noted in *Guindon*, "In some cases, sizeable penalties are necessary so the penalty is not simply considered a cost of doing business." That is precisely the purpose of the levies at issue in this complaint.'

**(ii) The purpose of CFC's authority to impose "levies or charges" under section 12 of the Proclamation is to defray CFC's administrative and marketing costs.**

43. Nothing in the text or context of section 12 of the Proclamation empowers CFC to impose “levies” or “charges” to disincentive producer’s non-compliance. Nor do the broader statutory objects or regulatory context suggest that this is the case.
44. Rather, the text of section 12(2) makes it clear that any such amounts “shall be established at such levels” to produce a return sufficient for CFC to “defray” its estimated annual administrative and marketing expenses. None of the relevant considerations CFC may consider when estimating those expenses include imposing fines for non-compliance.
45. The GIC has provided CFC with other mechanisms to deter non-compliance with its regulations, including, the discretion to suspend a producer’s license for non-compliance under section 8(1) of the *Licensing Regulations*:

8 (1) Subject to subsection (3), CFC may suspend a licence if the licensee

- (a) fails to comply with a condition of the licence;
- (b) is not in good standing with the Commodity Board or the Board;
- (c) fails to pay levies in accordance with the Canadian Chicken Marketing Levies Order;
- (d) is not in compliance with a quota allotted under the Canadian Chicken Marketing Quota Regulations; or
- (e) is not in compliance with the requirements set out in subsections 5(1) to (3) and (7).

46. Consistent with the Proclamation’s text, the *FPAA*’s other uses of “levy” and “charge” (sections 2, 22(1)(g), and 36 of the *FPAA*) do not suggest any penal or punitive intention. Rather, they are consistent with “levies and “charges” being imposed for the purposes of funding the operation and administration of *FPAA* agencies, not to disincentivize or penalize producers who fail to comply with regulations.
47. Moreover, and as noted above, the *FPAA* provides a further mechanism to deter non-compliance with regulations, namely, section 37.

48. CFC's objects, as provided in section 21 of the *FPAA* are not punitive in nature; rather, they include "to have due regard to the interests of producers and consumers of the regulated product or products."

49. Consistent with all of the above, the *FPAA* is not listed in the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c 40, s 3. as one of the defined "agri-food Acts" for which Parliament has created an administrative monetary penalty regime.

**THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

1. The Affidavit of A. Pinho, to be sworn or affirmed; and
2. Any additional evidence of which Counsel may advise and the Court will accept;

**RULE 317 REQUEST**

The Applicant will serve CFC with a Rule 317 request separately and in due course.

April 16, 2024



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