

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA TURKEY  
MARKETING BOARD REFUSING TO DIRECT FURTHER PROCESSING

**BETWEEN**

MARK ROBBINS dba K&M FARMS

**APPELLANT**

**AND:**

BRITISH COLUMBIA TURKEY MARKETING BOARD

**RESPONDENT**

**AND:**

ROSSDOWN FARMS & NATURAL FOODS  
FRASER VALLEY SPECIALTY POULTRY  
SMALL SCALE FOOD PROCESSOR ASSOCIATION  
VANCOUVER FARMERS MARKETS  
SMALL-SCALE MEAT PRODUCERS ASSOCIATION

**INTERVENERS**

## **DECISION**

**APPEARANCES:**

For the British Columbia Farm Industry  
Review Board

Daphne Stancil, Presiding Member  
Peter Donkers, Chair  
Al Sakalauskas, Vice Chair

For the Appellant:

Mark Robbins

Jill Azanza

For the Respondent:

Robert Hrabinsky, Counsel

For the Interveners:

Rosstown Farms & Natural Foods

Fraser Valley Specialty Poultry

Dion Wiebe and Tim Ludwig

Ken Falk

Date of Hearing

July 26, 2018 and closing submissions

Place of Hearing

Abbotsford, BC

## INTRODUCTION

1. The appellant, K&M Farms (K&M) raises turkeys and chickens on fenced pasture in Abbotsford, BC. K&M is a commercial grower<sup>1</sup> of turkey licensed by the British Columbia Turkey Marketing Board (Turkey Board). K&M sells both whole birds and parts directly to consumers who pay a premium for farm differentiated products.
2. Under K&M's business model, it pays for processing services to slaughter, eviscerate and cool the whole turkeys after kill ("kill and chill") and a processor or other entity to cut up some of its turkeys into parts ("primal cut").<sup>2</sup> Until 2018, K&M obtained both services from processor, Rosstown Farms & Natural Foods (Rosstown).
3. In 2018, Rosstown agreed to provide kill and chill services to K&M but not the primal cut service done in the past. K&M turned to the Turkey Board for assistance, and in particular requested that the Turkey Board direct Rosstown to provide K&M with primal cut service. The Turkey Board declined to do so.
4. The Turkey Board's decision of April 10, 2018 refusing to direct Rosstown to provide K&M primal cut service is the basis for this appeal. Rosstown and Fraser Valley Specialty Poultry (Fraser Valley), another processor providing custom processing services, participated fully in the appeal as interveners. Although the panel granted the Small Scale Food Processor Association full intervener status, it chose to provide a written submission as did the Primary Poultry Processors Association of BC (Poultry Processors). The Vancouver Farmers Markets and Small-Scale Meat Producers Association provided written submissions.
5. K&M also appealed a March 23, 2018 decision of the British Columbia Chicken Marketing Board (Chicken Board) to not direct Rosstown to continue to provide primal cut processing services for chicken. The panel considered hearing K&M's appeals of the Chicken Board and the Turkey Board together, but determined that it would be impractical. The panel heard K&M's appeal of the Chicken Board decisions on June 15 and 19, 2018. Following the hearing, K&M secured the services of one of the processors to further process its chicken. On July 6, 2018 K&M withdrew its appeal of the Chicken Board's March 23, 2018 decision, respecting direction to Rosstown to provide processing services.

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<sup>1</sup>General Orders, section 4: "**commercial grower**" means a grower who has been issued Commercial Quota by the Board in accordance with this order and the Quota Regulation, has been licensed by the Board as a commercial grower, markets regulated product to licensed processors and/or turkey brokers or self-markets regulated product and may also market regulated product direct to consumers at the farm gate or at a farmer's market.

<sup>2</sup>The turkey is cut up into several pieces: breast meat is removed from the underlying bones and halved, the appendages are removed from the carcass, and drumsticks and thighs are separated.

## BACKGROUND

6. The Turkey Board is established by the British Columbia Turkey Marketing Scheme (Scheme)<sup>3</sup>, a regulation enacted under the *Natural Products Marketing (BC) Act (Act)*, the purpose of which is as follows:

**16** The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product<sup>4</sup> within the Province, including the prohibition of such production, transportation, processing, packing, storage and marketing in whole or in part.

**17** The scheme shall apply to all persons who produce, transport, process, pack, store or market the regulated product and to all kinds and grades of the regulated product.

7. The Scheme grants the Turkey Board the following authority:

**28** The board shall have authority within the Province to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, processing, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, processing, packing, storing and marketing, or any of them, in whole or in part, and shall have all authority necessary or useful in the exercise of the authorities hereinbefore or hereinafter enumerated, and without the generality thereof shall have the following authority:<sup>5</sup> ...

8. In 2006, when Rosstown was planning to expand its business and processing plant to process turkey, BCFIRB undertook a supervisory review<sup>6</sup> of the Turkey Board's oversight decisions allocating the volume and weight of turkey available to each processor. BCFIRB observed at that time that the BC market for turkey was undersupplied and, through the review, set a base allocation for each processor. The Turkey Board established rules<sup>7</sup> (assurance of supply) to set the base amount allocated to each processor.<sup>8</sup> The Turkey Board repealed those rules in February 2013, in response to growers requesting greater flexibility in selection of processor. Also poultry production in BC had increased over 2006 production levels, possibly decreasing the intensity of competition amongst processors for turkey.

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<sup>3</sup> BC Reg 174/66 as amended to 2017.

<sup>4</sup> Scheme: “**regulated product**” as any class of turkey raised for meat or egg production within the area to which the scheme relates.

<sup>5</sup> Refer to Appendix A to this decision for the full text of section 28, paragraphs (a) to (t).

<sup>6</sup> [Turkey Marketing Board Allocations to Processors](#) (BCFIRB, January 26, 2006) and [Allocations to BC Turkey Processors \(supplementary decision\)](#) (BCFIRB, March 21, 2006)

<sup>7</sup> Agencies Regulation, April 25, 2010.

<sup>8</sup> “**processor**” means any person who changes the nature of the regulated product by mechanical means or otherwise, including slaughters of the regulated product and is certified as a government inspected slaughter house or abattoir.

9. The market for turkey in BC has changed over the last several years. The demand for seasonal whole birds is down, while the demand for cut-up and further processed products has increased. In its 2017 Annual Report, the Turkey Board noted (p. 7 and 8):

The industry continued to re-develop itself in 2017. The Sale of Whole Turkeys is decreasing as retailers continue to reduce the amount of featuring during festive season, but fortunately, Further Processing sales continue to increase. One of the strongest increases in consumption has occurred in the ground turkey sector. We now sell more ground turkey than deli products. As a result of these factors, the preliminary allocation for the 2018/2019 control year has been set at 87.3%.

10. The Turkey Board also reported on its marketing strategy aimed at consumers who do not normally eat turkey, encouraging them to try the product.
11. In 2002, K&M began producing 200 turkeys as a direct-vendor grower.<sup>9</sup> In 2006, it became a new entrant grower and on April 29, 2018, the Turkey Board converted K&M's new entrant quota to commercial quota to produce 17,500 kg of turkey per year.
12. K&M grows turkey according to specific farm practices and charges a premium to cover its extra cost. It packages turkey products to ensure farm source recognition and markets directly from its on-farm store and at farmers' markets. Between 2006 and 2017, K&M received custom processing services from Rosstown. In 2017, K&M also received custom processing services (kill and chill, primal cut and packaging) from Fraser Valley for chicken. Of the 1,750 turkeys that K&M produces, about half are directed to cut up for sale as parts and the other half are sold whole.
13. On November 30, 2017, Rosstown advised K&M that it could provide kill and chill services but not primal cut for 2018. K&M asked the Turkey Board to intervene on its behalf and direct Rosstown to provide custom processing services which the Turkey Board declined to do in its April 10, 2018 decision:

For background purposes, please note that there are 28 growers out of 67 in the Province that have some or all of their production processed under a custom processing arrangement. The volume of custom processed production in the Province represents 10% of all the production grown in BC. Also, we should point out that one of the largest turkey processing plants in the country located in Ontario provides custom processing arrangements with no additional regulations from the Marketing Board.

It is clear that the Board is empowered to "... designate the agency through which, any regulated product shall be ... processed..., to determine the manner of distribution..., and to determine the charges that may be made for its services by any designated agency."

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<sup>9</sup> "direct-vendor grower" means a person who may place no more than 300 turkey poults in any one quota year and has been licensed by the Board as a direct-vendor grower. No direct-vendor grower shall market any regulated product, other than at the farm gate, at a farmer's market, through an independent butcher shop, or through an independent restaurant, to any person who is not the end consumer of the regulated product. Direct-vendor growers may not market to any other grower, wholesaler, broker, processor, turkey broker, retail grocery chain or commercial foodservice chain.

However, the scope of that authority must be understood in the context of the British Columbia Turkey Marketing Scheme as a whole. Though the Board is vested with broad powers, it is equally obvious that its primary function is to promote orderly marketing by managing supply through a quota system as defined in the scheme.

There is no doubt that commodity boards have exercised authority to direct regulated product to designated agencies on past occasions. However, your request does not seek such an order. In this case, you have asked that the board make an order directing a processor to provide custom processing services on terms that are unilaterally acceptable to yourself. In this regard, it is important to note that the K&M Farms competes in the same market space as the processor.

Furthermore, the terms of a custom processing arrangement are complex and dynamic in the sense that they will depend on the processing plant's capacity and current market conditions. To impose such an arrangement by order is not a simple matter of directing production. Price, volume, scheduling, and the nature of the services provided are all key elements.

A business plan that relies on the existence of a custom processing arrangement is a calculated risk. In particular, self-marketers take the risk that custom processing terms may become unfavourable, or even that a custom processing option will no longer be available.

Rosstown claims that it does not have sufficient capacity to accommodate the applicant's request for custom processing services. However, even if the processor had sufficient capacity, the Board does not think it would be either fair or transparent to impose commercial terms that favor only one party at the expense of the other. Doing so would not be strategic and would not serve to promote orderly marketing.

For all these reasons, the Board has declined to make an order requiring Rosstown to provide custom processing services to a competitor on terms that are unilaterally satisfactory only to the applicant. The Board encourages Mr. Robbins to explore new options. Commercial arrangements of the kind sought are by their very nature a two-way street and should be governed by good business decisions as opposed to regulations.

14. During a pre-hearing conference call on May 16, 2018, the Turkey Board clarified the use of the phrase “custom processing services” in its decision. Although both kill and chill and primal cut can be considered “custom processing”, in this context Rosstown is refusing to provide primal cut-up, therefore the Turkey Board’s order can only refer to that aspect of custom processing which Rosstown is no longer supplying. Accordingly, the Turkey Board suggested this appeal be limited to direction of primal cut services only. The presiding member agreed that “the appeal can only relate to ...the loss of custom or primal cut up”<sup>10</sup> and the appeal proceeded on this basis.
15. On July 4, 2018, following the conclusion of the hearing, Fraser Valley provided a link to a document on the Canadian Food Inspection Agency (CFIA) website titled: Meat Hygiene Manual of Procedures which augments federal regulations for the handling and labelling of defrosted frozen foods<sup>11</sup>. K&M asked for and was given an opportunity to provide an

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<sup>10</sup> Pre-hearing decision, June 1, 2018.

<sup>11</sup> [Article B.01.080](#), Food and Drug Regulations FOOD AND DRUGS ACT C.R.C., c. 870

informed response to this submission. K&M submitted an email from the Fraser Valley Health Authority (Health Authority). In response, the Turkey Board by email, questioned the Health Authority about the content of its email. The Health Authority provided its reply by email. The panel accepted the emails from the Health Authority and further written exchanges into evidence on July 24, 2018 following which the parties submitted their closing arguments.

16. The parties provided closing arguments in writing and the submission process concluded August 26, 2018.

## **ISSUE**

17. Did the BC Turkey Marketing Board err in its decision of April 10, 2018 refusing to direct Rosstown to continue to provide custom processing [primal cut-up]<sup>12</sup> services to K&M for 2018?

## **APPELLANT'S EVIDENCE AND SUBMISSIONS**

18. Mark Robbins represented K&M in these proceedings. K&M is in the process of implementing a succession plan transferring ownership to Jill Azanza, Mr. Robbins' daughter. Mr. Robbins called Ms Azanza and another turkey grower David Seibenga as witnesses.
19. Mr. Robbins referred to letters from two of K&M's customers – Dr. J. Hammersmark and Leah Fawcett. Both customers describe K&M turkey and turkey pieces as high quality products and explain that cut up turkey is convenient and allows them to consume turkey outside of the seasonal times for preparing “regular” meals. Both customers were willing to travel (from White Rock and Chilliwack) to Abbotsford to purchase poultry and wished to continue doing so.
20. K&M started growing turkey on pasture in 2002 and since 2006, Rosstown provided custom processing services (kill and chill and primal cut-up). In this time, K&M's volume of production has grown from 200 to 1,765 birds. K&M's growing practices are more costly than for “conventional” turkey and if paid the Turkey Board's price, K&M would not recover its costs for the turkeys graded as “utility”. For K&M, it “makes business sense” to direct market its product to secure premium prices. Unlike conventional turkey production that is grown then transported to the processor for slaughter and marketing, K&M retains ownership of its turkeys and markets them directly to the consumer.
21. K&M's business relationship with Rosstown changed in 2017. On May 16, 2017, Rosstown advised K&M by email that it “has changed its custom kill offerings” and would be able to process and pack turkeys whole for 2017, but not offer any cut-up. Mr. Robbins was initially able to get these cut-up services from Fraser Valley but

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<sup>12</sup>As noted above in paragraph AA, the custom processing referred to in the Turkey Board decision is limited to primal cut-up.

ultimately, K&M decided that Fraser Valley's product packaging did not meet its specifications.

22. K&M reported on a chain of emails with Rosstown. On December 1, 2017, Mr. Robbins contacted Mr. Wiebe regarding K&M turkey processing needs and timing. He requested that Rosstown process and package (cryovac) 800 to 850 whole turkeys and cut-up about 550 turkeys after initial processing. On December 12, 2017, Mr. Robbins again followed up with Mr. Wiebe by email who indicated that K&M should pursue an arrangement with another processor (Farm Fed) for turkeys. Mr. Robbins repeated his request to Rosstown's General Manager Stan Thiessen by email January 18, 2018. On February 24, 2018 Mr. Robbins emailed Rosstown and explained the steps he had taken to try to secure cut-up services elsewhere and how the loss of the cut-up services would affect K&M. He also advised that without a favourable response from Rosstown, Mr. Robbins would ask the Turkey Board to direct Rosstown to provide the cut-up services.
23. On March 6, 2018, Rosstown confirmed it would provide "kill and chill", but due to changes within the plant it had no flexibility to "handle and segregate" small lots to undertake cut-up. Rosstown suggested that K&M acquire services elsewhere for cut-up, once the turkeys had been killed and chilled.
24. On March 7, 2018, Mr. Robbins emailed the Turkey Board, requesting that it direct Rosstown to provide full service processing (kill and chill and cut-up services) at the levels provided to K&M in 2016. The Turkey Board ultimately decided not to make this direction resulting in K&M filing this appeal.
25. Mr. Robbins acknowledged during the hearing, that the relationship between K&M and Rosstown was contractual in nature but says that this relationship exists in a regulatory environment which provided an important legal context for his business decisions and to any contracts he made with a processor. When asked why K&M could not cut up whole processed turkeys after primary processing, Mr. Robbins evidence was that its store was the only facility it could use to do so. The kitchen in the store is inspected by the Health Authority and based on the maximum number of turkeys available at one time (400), the facility had insufficient space for the number of people required to do the cut-up within the food safe time window. In the past when staff trimmed the cut up parts for packaging, it took seven staff working three days.
26. While K&M "can legally" cut up turkeys in its store, physically the facility cannot handle 400 birds at one time. K&M has handled a "few dozen" at a time in the past; Ms Azanza estimated that it would take her 30 minutes to an hour using a knife, to cut up a turkey on a "cone" into breast meat, wings, legs and thighs.
27. When asked why K&M could not have the whole birds frozen and defrosted as needed for cut-up at a later time and at a slower pace that K&M might be able to handle, Mr. Robbins said this did not fit K&M's business model of supplying frozen cut-up turkey product to the farmers' markets and fresh cut-up turkey product from the farm store. Product that has been frozen and defrosted for sale has to be labelled "previously frozen". Mr. Robbins does

not believe that frozen product which was defrosted and refrozen would meet the quality standards for a premium product which is the basis for K&M's business model.

28. Mr. Robbins submitted a letter from Mandeep Dial, Environmental Health Officer with the Health Authority who inspected K&M's facilities on July 9, 2018. Mr. Dial advised that K&M's premises would not enable K&M to meet the conditions required by s. 14 of the Food Premises Regulation<sup>13</sup>, to freeze, thaw, cut-up, package, then refreeze product for sale, for the quantity of turkeys that K&M had to handle.
29. Mr. Robbins argues that he has no option for primal cut-up services other than Rosstown. K&M's customers want its "signature" bird (about 10 kg) if preparing a whole turkey. Mr. Robbins identified four medium sized poultry processors that were provincially licensed at the time he was seeking custom processing services in the Fraser Valley. Of those, the size of bird he produced was too large for Farm Fed and Fraser Valley to process because the equipment in those plants is ordinarily set up to process smaller poultry. The third custom processor dealt only with specialty poultry, leaving Rosstown as the only logical supplier. When asked if he had considered other options such as butchers for the cut-up to follow the primary processing, Mr. Robbins stated he had contacted two butcher shops. The first could no longer take on this type of business because the returns did not offset the effort. The second smaller butcher did not have cooler space to deal with the number of turkeys K&M needed to have cut-up.
30. Mr. Robbins agreed he had not offered to purchase equipment to provide the butcher further storage space and while further investment in K&M facilities to support cut-up was a possibility, this option could not be fully researched in the tight 2018 time frame for turkey production and processing. He had not contacted a financial lender or an "agricultural source" lender of funds to support the option of facility development.
31. Ms Azanza testified about her efforts to retain cut-up services. She contacted a butcher in Langley, who had a considerable backlog of product and indicated it could not take on K&M's cutting needs. Another butcher in Abbotsford and a small custom slaughter service for poultry did not cut up turkeys. Ms Azanza advised that she contacted two other farms in Abbotsford that cut up chickens for sale from their farm stores but they did not cut up turkey. Another farm with a similar business model as K&M advised they might be able to take on more turkey cut-up, but it would have to be outside the peak "turkey times" when they focused on their own production. Ms Azanza did not contact anyone in Chilliwack and did not look into retaining additional cooling storage using a truck with a cooler. She contacted known meat cutters for large grocery stores but they were not interested in taking on extra work outside of their employment. Although K&M advertised for skilled butchers to cut up turkeys, none responded.
32. Mr. Robbins indicated that he understood the nature of deal-making with processors, and the practice of offering something beneficial beyond the fee for service (a "carrot"), to achieve the deal. His firm belief is that producers are at a disadvantage negotiating with processors. To get a beneficial arrangement with a processor, Mr. Robbins indicated he

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<sup>13</sup> B.C. Reg 210/99

would “entertain” making an investment in the processor. He also advised that he had paid the fee that Rosstown had established during the past several years for the services of primary processing and cut-up and had offered to pay more for 2018. Mr. Robbins also adjusted K&M’s catching schedule to align with Rosstown’s availability.

33. K&M also called turkey grower, Mr. Siebenga, as a witness. Mr. Siebenga reviewed his income and expense sheet based on growing 1,765 turkeys in a barn, with a non-conventional feed ration, to a target weight of 8.5 kg per turkey for sale to Fraser Valley. He confirmed he expected to receive \$7,490 based on the budget which took into account costs for poults, feed, and operation of the barn, but no deductions for labour costs or capital cost allowances. Mr. Siebenga confirmed the expected payment from Fraser Valley was based on a premium price for the turkey because of the specialty feed. He also indicated that he had a five-year lease on a barn for this production.

### **RESPONDENT’S EVIDENCE AND SUBMISSIONS**

34. Michel Benoit, General Manager and Kevin Klippenstein, Chair appeared together as a panel for the Turkey Board. Mr. Benoit described K&M’s history as a registered turkey grower, beginning as a direct-vendor grower in 2002 and becoming a new entrant grower in 2006 with an issuance of 2,956 kg quota. In 2007, 2008 and 2010, the Turkey Board provided K&M “top ups” of 2,601 kg, 4,443 kg and 5,000 kg respectively and finally in 2018, issued a further 2,500 kg. With total quota holdings to produce 17,500 kg annually, the Turkey Board now classifies K&M as a commercial grower.
35. Mr. Benoit explained the annual “sign up” process through which a grower enters into an agreement with a processor to place or start a specified number of poults and the specified number of turkeys that will be shipped for primary processing (kill and chill). He says the details regarding further processing, after kill and chill, are typically worked out between the grower and processor closer to the time of shipping and the Turkey Board does not play a role in these further processing agreements.
36. Mr. Benoit described the email exchanges with K&M. On November 17, 2017, K&M advised that Fraser Valley could not provide the full processing services it requested and K&M planned to ask Rosstown again about these services. In response, the Turkey Board reminded K&M of the pending deadline to sign up with a processor on the Turkey Board contract form. K&M’s email of December 14, 2017 stated that the Turkey Board’s response did not address K&M’s concerns regarding lack of processing services and noted that “(t)he federal and provincial legislation that gives the Marketing Boards their authority, and social responsibility, to regulate marketing of poultry products includes the regulation of processing.” K&M went on to ask “is (the Turkey Board) prepared to encourage Rosstown to continue processing K&M Farm turkeys – they have my production schedule for 2018”.

37. Mr. Benoit responded on December 20, 2017<sup>14</sup> that the Turkey Board had not directed product for processing since 2014 when the “assurance of supply” rules in the General Order were repealed. He provided the names of four processors (other than Rosstown) in the Fraser Valley that the Turkey Board understood provided custom processing services, and encouraged K&M to make a mutually beneficial agreement for the services it required. He also advised that the Turkey Board expected a grower to show that it had made a “serious attempt” to secure slaughtering capacity “before being asked to intercede” and that “it is premature to answer your questions until this process has been completed.”
38. Mr. Benoit noted that K&M stated in its March 7, 2018 email that it “conducted an extensive search of alternatives and made every effort to work out an arrangement with Rosstown...nothing has worked out.” K&M did not confirm that it had worked through the list of actions that the Turkey Board had outlined or provide any details of efforts taken to find an alternate processor to Rosstown. In particular, Mr. Benoit said he had expected K&M to consider the option of spreading its production over the year, relying on freezing, defrosting and refreezing to eliminate the requirement that 400 turkeys be cut up at one time. He testified that refrigerated trucks have been used to expand cooling capacity in other situations and K&M had not considered this option to extend the “food safe window” or expand on farm cut-up facilities. Mr. Benoit pointed to other growers that have created flexibility in marketing by cutting up turkeys on farm after kill and chill in a processing plant through small facility expansions (by using kitchen space in a restaurant).
39. Mr. Klippenstein briefly commented on his experience in fruit and vegetable production and self-marketing. He explained that in his situation, there was a market to fill and he adjusted his business from growing and selling to include processing to become more profitable and responsive to market demands. He worked with the local health authority to develop facilities that met specifications and relied on his staff to provide the necessary labour to process product. He agreed that there were no regulations limiting production volume in his case.
40. Mr. Benoit stated he was reluctant to encourage the Turkey Board to make the direction K&M requested because 28 of 67 registered turkey growers (about 10% of production) are self marketers requiring custom processing services. In his view, making the direction sought could set an unusual precedent and interfere with the business of processors which is not something the Turkey Board “knows”. The role of the Turkey Board is to facilitate the relationship between growers and processors and to manage the programs established by regulation. He acknowledged that the current provincial turkey allocation (BC’s share of the national annual target for production) is smaller than in 2006 due to a reduction in the consumption of whole turkey nationally. As a consequence, the Turkey Board is supporting a new marketing strategy aimed at potential consumers of specific ethnicities, since many new Canadians do not consume turkey seasonally or at other times of year. Additionally, major processors are providing fresh and/or frozen cut-up turkey products as

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<sup>14</sup> Refer to Appendix A, for the full list of clarifications provided by the Turkey Board to K&M on December 20, 2017.

well as ground turkey throughout the year to expand the consumption of turkey beyond the seasonal meals.

## **SUBMISSIONS OF THE INTERVENERS**

### ***ROSSDOWN***

41. Mr. Wiebe testified on behalf of Rosssdown, a family operated processing plant that supports the development and marketing of niche chicken and turkey products. In early 2000, his family farm was faced with entering the processing business because of the need to process poultry to meet its marketing objectives. The Rosssdown plant in Abbotsford is now federally inspected and runs at maximum capacity year round. In these circumstances, there is no benefit to Rosssdown to take on the processing and cut-up of K&M's turkeys and there is no added incentive to do so. Rosssdown can set fees for service, but this alone is not enough for Rosssdown to adjust its management plan to fit in the cut-up services that K&M is requesting.
42. Rosssdown argues that as K&M maintains ownership of its turkeys for direct marketing, it assumes a risk because it has no direct control over who will provide processing services and the nature of those services. The grower-direct marketer assumes a risk that growers who sell to processors do not. As a consequence, Rosssdown submits that K&M should be looking for a mutually beneficial arrangement with a processor to achieve the services that it requires rather than demanding the services of a processor through an order of the Turkey Board. By way of example, Rosssdown says a small grower can give a processor access to some of its niche product in order to gain the market benefit of advertising the attributes of that product on its processed product. Rosssdown suggested that another processor who benefits from processing K&M's other poultry products (chicken) could provide the cut-up services that K&M seeks as it has acquired a market opportunity from its business relationship with K&M.
43. Rosssdown says that since K&M bears the risk of finding appropriate processing services to meet its market needs, it must also bear the burden of finding those services. It says that there were other "routes that could have been taken to mitigate the loss of access to the cutting and packaging facilities of Rosssdown" and suggests K&M should have sought the assistance of the grower association, other industry associations and the Turkey Board to understand its range of options. K&M apparently did not do so. As far as options go, Rosssdown suggests K&M consider freezing whole birds, to thaw and cut up in smaller batches at a later date (by itself or using the services of a third party such as a butcher) and disconnect the primal cut from the volume of the kill size. Rosssdown itself relies on this option. K&M could also consider expanding its capacity to do cut-up on farm once the turkeys have been killed at a processing plant.

### ***FRASER VALLEY***

44. Mr. Falk on behalf of Fraser Valley testified he supported K&M's market responsiveness. He described the challenges facing a processing plant if it was ordered by the Turkey

Board to provide primal cut-up services. For Fraser Valley, the plant time scheduled for one of its primary streams of processing (ducks) might be displaced. Changing the lines for species and product is time consuming, labour intensive and must meet food safety regulations. Such an order would displace other customers' business and interfere with timeliness placing its business at risk. Further when a plant is operating at over capacity, issues regarding employees' overtime and overwork arise. Managing employees is Fraser Valley's responsibility and it does not want employee-employer relations to be put in jeopardy by a third party. Food safety rules requiring changing lines and creating appropriate working conditions are factors that add to the overall cost of doing specific custom work and raise costs to K&M. Given that so many aspects of plant operations would be impacted by responding to a Turkey Board order for additional custom work, Fraser Valley questions whether unplanned and directed primal cut-up work could be economically feasible.

45. Fraser Valley did, however, acknowledge a need for more small scale processing, especially for services that "fall outside the norm".

## **OTHER INTERVENERS**

46. A number of other interveners provided written submission to be considered in this appeal and K&M's appeal to the Chicken Board referred to earlier.
47. In its submission, the Small-Scale Meat Producers Association<sup>15</sup>, discussed the difficulties for small-scale poultry producers "booking kill dates (with processors) over the past few years" and that most small-scale producers known to the organization are experiencing challenges with having their poultry processed. It acknowledges that K&M is a quota producer (occupying a "space" between a permit holder and a large-commercial grower) and not of the same scale as its members, but notes that K&M is experiencing the same challenges finding the processing services it requires. This Association acknowledges the demand for niche products and encourages the Turkey Board to work with producers to ensure the sustainability of smaller scale production of turkeys.
48. The Poultry Processors' submission focuses on the authority of the Turkey Board to make the order K&M seeks. It acknowledges that the *Act* provides the Turkey Board with broad powers to direct processors to provide services but these powers have been used to "support orderly marketing" through the exercise of "normal business practices". While the Turkey Board has the authority to direct product and set processing fees, the direction of primal cut-up is beyond the intent of the *Act* as interpreted by the Turkey Board in the context of what the industry has required. Custom processing services have been and should remain a matter of negotiation between grower and processor without intervention by the Turkey Board. Self-marketers are growers who have accepted a business risk and can only obtain the services that a custom processor is able and willing to provide. Here K&M and Rosstown were not able to make a successful agreement for these services in

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<sup>15</sup> Of the interveners listed under "Other Intervenors", only the Small-Scale Meat Producers Association was not an intervener in the Chicken Board appeal regarding further processing services.

2018. The custom processor must consider a number of factors including scheduling capacity, plant capacity, plant suitability, costs and regulatory requirements in order to determine whether to supply the services sought by a self-marketer. The Turkey Board should respect that the grower and processor must negotiate a commercially viable arrangement. For the Turkey Board to enter into such negotiations would “not be sound from a business perspective”, nor would it support orderly marketing.

49. The Small Scale Food Processor Association posed 16 questions to the Turkey Board, some of which apply to the issue under appeal:
  - a. Is there processing infrastructure to support the growth of the small scale quota holders?
  - b. Would growth be limited to those turkey producers who have developed a vertically integrated operation?
  - c. What responsibility does the Board have to ensure orderly marketing in all segments of the turkey market?
  - d. Is the BCTMB responsible for ensuring the regulated product provides adequate return to the producer?
50. In its submission, the Vancouver Farmers Markets explained how its organization creates marketing channels for small growers through year-round farm-direct markets that provide local product to a growing consumer group in the Vancouver area. It predicts a large increase in the sale of poultry products, provided that producers have access to “adequate” processing. Despite the potential for growth, it is actually experiencing a significant decline in the attendance of small-scale poultry producers because of the lack of small-scale processing capacity available to producers. It describes K&M as the “proverbial canary in the coal mine” because it expects K&M will not be able to attend the market to sell turkey products due to a lack of custom processing services. K&M is the sole supplier of turkey to the Vancouver Farmers Markets and its absence will remove the option of turkey purchase for those consumers who only buy from this market, potentially resulting in longer term consequences for the sector.

## **ANALYSIS AND DISCUSSION**

51. The appellant argues that the Turkey Board erred by refusing to direct Rosstown to continue to provide primal cut-up services to K&M. K&M submits that the Turkey Board has the legislative authority to direct Rosstown to provide custom processing services and that to do so is consistent with sound marketing policy. In response the Turkey Board argues that it lacks the authority to make such an order and that such an order is not consistent with sound marketing policy.
52. The panel first considers whether the Scheme gives the Turkey Board the legislative authority to make the order sought.

### **Legislative Authority**

53. The Turkey Board agrees that the Scheme vests it with broad powers and that a literal interpretation of these powers would appear to support the order the appellant seeks to

direct a processor to supply certain custom processing services. Section 16 of the Scheme provides:

The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product within the province.....[emphasis added]

54. The Turkey Board is empowered by the Scheme to manage the supply of turkey through the establishment and management of a quota system. Section 3 of the Scheme provides:

The board shall, on the coming into force of this Part, establish by order or regulation a quota system in order to assign quotas to all members of classes of producers in the Province in such manner that the number of pounds of turkey meat produced in the Province and authorized to be marketed in intraprovincial 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 interprovincial and export trade in the same year, pursuant to quotas assigned by the agency 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 board, will equal the number of pounds of turkey meat set out in section 4 of this Part.

55. The Turkey Board argues against a literal interpretation divorced from the purpose of the Scheme and says the powers of the Scheme must be interpreted in light of the purpose of managing turkey supply through a quota system. The Turkey Board argues that the appellant's request, which may have superficial appeal, is unconnected with "orderly marketing". Unless a purposive approach is applied to the power to "regulate and control in any and all respects", there could be "untenable" results. For example, the Turkey Board might use this power to "fix the minimum wage payable to farm workers" or undertake to license all further processors and butchers handling turkey products.

56. The Turkey Board argues that there is nothing in the *Act* or the Scheme to suggest an intention to license further processors (including butchers) to compel them to provide custom cut-up services to growers against their will or to permit a grower to control a private further processing business in which the grower has no equity interest. Neither the *Act* nor Scheme disclose an intention to eradicate the ability of growers and further processors to enter into commercial arrangements, to position the Turkey Board as the administrator of a dynamic business relationship requiring it to set fees for various services, volumes, weights, scheduling, term, and termination rights or to supplant the civil courts' role in enforcing commercial agreements.

57. In response, K&M submits that section 28 of the Scheme provides broad authority, sufficient to allow the Turkey Board to make the order it seeks:

The board shall have authority...to promote, regulate and control in any and all respects,...the production, transportation, processing, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, processing, packing, storing and marketing, or any of them, in whole or in part,

58. K&M argues that the Turkey Board has the authority to regulate all aspects of the turkey industry including processors and all aspects of processing. It has a role to ensure sound marketing policy exists in the processor-grower relationship given the power imbalance of processors over the grower. K&M says this authority is derived from the words of the Act which remains in force, even if the Turkey Board has not exercised the power in a particular way. The Turkey Board has the authority to direct product to specific processors for processing and to make the order K&M seeks and as an example of a similar exercise of power, K&M points to the Turkey Board's enactment of the Agencies Regulation (2010) resulting in the direction of product from growers to processors through the grower's program.
59. K&M says that any order made could be specific to the relationship between K&M and Rosstown in order to avoid any concern about the order extending to other situations and affecting other growers licensed by the Turkey Board. The order need not extend to entities that the Turkey Board does not currently licence such as butchers, since the further processing sought here is an extension of kill and chill services already provided by the processor.
60. The panel agrees with the Turkey Board that statutory interpretation is based on more than just a review of the statutory text. Interpretation must take into account the language, purpose and context of the section and of the statute as a whole. In this case, we find that the language, purpose and context of the legislation all clearly support the view that the Turkey Board is authorized to direct an agency to receive product from a producer.
61. BCFIRB has long accepted, and this panel reaffirms, that marketing boards are instruments of public policy; see *Pan-O-Ramic Farms (1990) Ltd. v. British Columbia Milk Marketing Board*, October 22, 2004 at paragraph 44, *Lilydale Co-operative Ltd. and Seven Growers v. British Columbia Chicken Marketing Board*, February 21, 2005 (*Lilydale and 7 Growers*) at paragraphs 9, 73 and 74). They exist to carry out the purposes of regulated marketing for a very specialised economic sector. The overriding public policy is found at section 2(1) of the *Act*:
- 2(1) The purpose and intent of this Act is to provide for the promotion, control and regulation of the marketing of natural products....
62. In furtherance of this statutory policy, the Legislature has granted the Lieutenant Governor in Council the power to establish schemes "for the promotion, control and regulation in British Columbia of the production, transportation, packing, storage and marketing of natural products", see s. 2(2)(a) of the *Act*. A scheme "may relate to all or part of British Columbia and may relate to one or more natural products or to a grade or class of product": see 2(3) of the *Act*. One such scheme creates the Turkey Board.
63. The purpose of the Scheme "is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product (see s. 16). The Scheme applies to "all persons who produce, transport, process,

pack, store or market the regulated product and to all kinds and grades of the regulated product” (see s. 17).

64. The Scheme grants the Turkey Board the power “to promote, regulate and control in any and all respects, to the extent of the powers of the Province, the production, transportation, processing, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, processing, packing, storing and marketing, or any of them, in whole or in part” including specific enumerated authorities: see s. 28(a) through(t). Of those enumerated authorities, the following apply to processing:
- (a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be produced, processed, packed, stored or marketed; to determine the manner of distribution, the quality, grade, or class of the regulated product that shall be transported, produced, processed, packed, stored or marketed by any person at any time; to prohibit the production, transportation, processing, packing, storage or marketing of any grade, quality or class of any regulated product; and to determine the charges that may be made for its services by any designated agency;
  - (e) to require any or all persons engaged in the production, transportation, processing, packing, storing or marketing of the regulated product to register with and obtain licences from the board;
  - (f) to fix ... licence fees from any or all persons...processing...the regulated product, and to fix and collect from such persons fees for services rendered or to be rendered by the board, and to recover such licence and other fees by suit in any court of competent jurisdiction;
  - (i) to fix the price or prices at which the regulated product or any grade or class thereof may be bought or sold by or to any person;
  - (n) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, processing, packing, storage or marketing of the regulated product and to amend or revoke the same;
65. In *Money’s Mushrooms Ltd. v. British Columbia (Marketing Board)*, 2001 BCCA 453, the British Columbia Court of Appeal described the authority granted through schemes enacted pursuant to the *Act* as follows:
- The Legislature conferred powers of essentially unlimited scope on the Lieutenant Governor in Council which in turn has conferred those same powers ... on the Marketing Board. That the Lieutenant Governor in Council, in s. 4.01 of the Scheme, enumerated specific powers does not take away from the breadth of the opening words of that section”: *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd.*, 2003 BCCA 356, the court cited the same language in upholding a Chicken Board order directing that Sunrise and other named chicken processors purchase and take delivery from Rosstown.
66. Further, and as the appellant points out, the decision of Mr. Justice Tysoe in *British Columbia (Chicken Marketing Board) v. Sunrise Poultry Processors Ltd*, BCSC October 23, 2002 acknowledged: “The common law right to trade freely has been taken away by clear language in the Scheme.”

67. In furtherance of effective marketing regulation, marketing boards have been given comprehensive regulatory powers and numerous tools by which to exercise these powers. The common law freedom of regulated actors to trade with one another is subject to the Turkey Board's express power to determine that regulation is necessary and advisable to promote, regulate or control the production, transportation, storage or marketing of the regulated product. The panel finds that the plain words of the Scheme not only create a quota system but also confer a jurisdiction to regulate a chain of activities that extend beyond the farm gate at least to the relationship between producers and processors.
68. The panel does not accept the Turkey Board's argument that the "contractual" nature of custom processing arrangements between growers and processors takes this matter outside the regulatory authority of the Scheme. While it may or may not be wise or desirable to regulate beyond the farm gate depending on the circumstances, that is an entirely different question from whether the Turkey Board has legal authority to do so in connection with relationship between producers and agencies.
69. To accept the Turkey Board's position in this case would have significant implications for other commodity boards. It also suggests an inconsistency with the Turkey Board's own implicit legal view as reflected in its "Agencies Regulation 2018" - part of its general orders - which states that "Every contract of purchase and sale is at all times *subject to the authority of the Board*, any agreement to waive any of the requirements of any order made by the Board is of no effect." Quite correctly, this regulation does not suggest that parties can contract out of the regulatory scheme. This is consistent with the express authority found in s. 28(a) of the Scheme "to regulate the time and place ... the regulated product is processed...and determine ... the class of regulated product and the charges made for services ... of a designated agency".
70. This language, consistent with the purpose of the *Act*, provides the Turkey Board broad power to regulate the processing of turkey and in particular, to designate processors as agencies, to establish fees for the services processors provide, to set the price of turkey and to make orders and regulations as necessary to meet these purposes.
71. In the panel's view, the Turkey Board's legal authority to direct processors to provide custom processing services to producers when required by sound marketing policy is clear. The panel finds such a direction, made to promote access to a niche product in the market place, is grounded in orderly marketing as opposed to regulating the minutiae of the services relationship between grower and processor. Whether or how that authority should be exercised is a different question, to which the panel now turns.

### **Current Regulatory Regime**

72. In approaching the question of sound marketing policy, it is important to begin by understanding how the Turkey Board currently regulates the business relationship between K&M and its processor(s).
73. The Turkey Board actively regulates the business relationship between grower and processor which turns a live turkey into a fresh or frozen carcass, or fresh or frozen turkey

parts for consumption. The Agencies Regulation 2018, referred to above, requires that a processor and grower execute a contract of purchase and sale before the processor can receive turkeys from a grower. The grower must complete a grower program, which must be provided to the Turkey Board with an executed contract, on an annual basis and before each “quota year” begins. The Farm Practices Regulation 2018 requires every grower to have the grower program “counter signed” by the processor that the grower has agreed to ship to. The grower program must also be submitted when there are custom killing arrangements. The grower program and 2018 contract between K&M and Rosstown were exhibits in this appeal.

74. Each grower prepares a program for the Turkey Board by inserting necessary information into a “form”. The grower fills the form in by supplying details relevant to its location, production and processor. The Turkey Board approves the grower program and the contract which specifies the type of relief the parties are entitled to in the case of non-performance of the contract between the grower and the processor.
75. The agreement or contract that the grower program refers to specifies the names of the grower, poult supplier (hatchery) and processor; the time frame for the agreement; the placement and shipment dates for the turkeys; the sex of the turkeys placed; the numbers of turkeys to be shipped on each date; and, the projected weights for the turkeys. The agreement is signed and dated by the grower, poult supplier and processor, and the grower program is incorporated into the agreement by reference. The agreement ordinarily incorporates by reference the Turkey Board’s pricing orders to establish terms of payment by the processor to the grower. Based on the preceding analysis, the panel finds that the Turkey Board currently regulates much of the bilateral relationship between grower and processor.
76. The panel understands that processor business comes from a variety of sources, including some products that, as in the case of Fraser Valley, are not regulated. Much of Rosstown’s expanding business however, comes from the regulated system. While Rosstown has developed its business in a manner consistent with its internal business planning and objectives, much of what and when Rosstown processes is governed by the demands and regulations of the supply managed poultry sectors. The panel notes that a processor can manage the business provided by the supply managed sectors, but a processor cannot always control it.
77. The primal cut services have been characterized as unwanted, inconvenient, burdensome and costly, but they are an extension of services requested from a processor actively engaged in processing regulated products. The requested services are finite and of relatively short duration. While the custom relationship may not be the norm in the industry, the further processing of turkey beyond kill and chill by processors is not unusual. Primal cut is fully integrated into processing when undertaken following kill and chill by a processor as defined and licensed under the General Orders. While the type of products produced by further processing may change with time, further processing of

turkey following kill and chill has been the practical reality for most poultry processors licensed by the Turkey Board since at least 2006.<sup>16</sup>

78. K&M and Rosstown had an agreement or contract for custom processing services from 2007 to 2016. These agreements include written terms (and adopt the grower program) and other terms (for example, fees for custom services including kill and chill and cut up services) negotiated orally and confirmed through exchanges of email. The panel agrees with K&M that the contractual relationship between grower and processor has regulatory underpinnings. The form of agreement provided by the Turkey Board allows for terms of custom processing to be added; to date K&M has not specifically incorporated the terms of the custom processing into the agreement.
79. The panel concludes that the Turkey Board currently regulates much of the commerce between growers and processors – quantity, quality, delivery dates, and price – when the commerce culminates in purchase and sale between two parties. In the case of custom kill arrangements which are not purchase and sale arrangements– many of the elements of commerce between grower and processor are also regulated, with the exception of fee for service.

### **Sound Marketing Policy**

80. Having established the extent of regulation that currently exists between K&M and its processor, the panel now considers whether as a matter of sound marketing policy, there is a proper and legitimate reason for the Turkey Board to extend its regulatory authority to ensure growers like K&M operating within the quota system can access processing services to make turkey products available to serve niche markets or whether the Turkey Board should stay out of this aspect of the grower-processor relationship.
81. K&M argues that the long term nature of its relationship with Rosstown, founded on the regulated system, justifies the Turkey Board exercising its authority to order a continuation of the relationship until K&M can find replacement processing services. K&M submits that Rosstown should not discontinue the relationship just because its plant is working at full capacity with other business. K&M advances the proposition that this discontinuance of services demonstrates the power imbalance in the business relationship between grower and processor. Based on these submissions, K&M concludes that the Turkey Board should intervene and exercise its authority to provide oversight of the grower-processor relationship and direct Rosstown to provide the cut-up service.
82. K&M submits that the Turkey Board in exercising its legislated responsibilities should be guided by policy established by the Ministry of Agriculture<sup>17</sup> for regulated marketing and

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<sup>16</sup>See *Sunrise Poultry Processors Ltd. v. British Columbia Turkey Marketing Board*, September 21, 2007 at paragraph 19 which recognised that “in 2005...national allocation for turkey did not reflect how turkey was processed. In 2006, the CTMA and CPEPC recognized that there were two basic types of turkey processing - whole bagged birds and further processed such as boned turkey parts and canner pack turkeys...”

<sup>17</sup> The Regulated Marketing Economic Policy (2004)

by the directions of BCFIRB in 2005<sup>18</sup>, and as confirmed in 2018<sup>19</sup>, which collectively encourage, support and facilitate farm level production of differentiated product in response to consumer demands. The Turkey Board must understand the market and its segmentation to ensure the niche products are available to consumers who wish to purchase them. K&M submits that it is the role of the Turkey Board to provide balance to the processor-grower relationship and support growers who require custom cut-up services so that consumers can buy the products they want.

83. K&M suggests that the Turkey Board recognized the importance of providing farm differentiated product directly to consumers when it established the “grower-vendor” licence to allow direct farm to consumer responsiveness. K&M began producing turkey under this category of licence before it expanded to become a commercial grower. Despite its growth, its purpose as a grower remains the same, to fulfill the demands of its customers for farm-differentiated niche products through direct marketing and sales. The Turkey Board should be consistent in its support of direct marketing by ensuring the availability of the custom processing services that growers need to provide their niche products. K&M submits that the Turkey Board has failed in its responsibility to consumers by refusing to direct Rosstown to provide the processing services needed to ensure consumer access to farm-differentiated products.
84. The Small Scale Food Processor Association supports the need for the Turkey Board to be market responsive in determining a course of action. The Vancouver Farmers Markets supports K&M’s approach to on farm practices, products and marketing and notes that turkey products will not be available directly to consumers through its market system if K&M cannot obtain further processing services. Vancouver Farmers Markets suggests that the absence of products to its marketing system may have longer term market implications. The Small-Scale Meat Producers Association predicts negative implications to the small scale poultry producers in general without the necessary processor services required to meet consumer demands.
85. In response, the Turkey Board does not take issue with the quality of K&M’s products, the loyalty of its customers, the desirability of a diverse industry that includes self-marketers or the financial benefits that accrue to K&M specifically (as opposed to the industry in general) if Rosstown could be compelled to provide custom cut-up services “against its will by force of regulation”. The Turkey Board submits that it is not consistent with orderly marketing for the Turkey Board to direct Rosstown to supply custom processing services. In its view, such services should be based on mutually beneficial commercial arrangements and to date, the setting of the fee for custom services has been negotiated by the grower and processor outside of the currently regulated domain.
86. The Turkey Board suggests that if part of the rationale is “grandfathering” growers who currently rely on processors for custom cut-up, making the order K&M seeks could “kill” the self-marketing sector. No further processor would take on this work voluntarily if it knew it could be forced at some other time to do so. The Turkey Board also predicts that

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<sup>18</sup> The Specialty Market Review (2005)

<sup>19</sup> 2018 Quota Assessment Tools Supervisory Review

there could be a surge of growers wanting to become self-marketers and thereby take over the processing sector by force of regulation, without investing in capital or bearing any of the business risk.

87. If custom services can be procured through force of regulation, the Turkey Board maintains there would be no need for the grower to develop and sustain good business relationships with industry stakeholders. It points to Rosstown's letter of March 22, 2018, in which it describes its relationship with K&M as one with no mutual benefit, but of convenience to K&M alone. Rosstown suggests K&M uses other processors when it suits K&M, and when it doesn't, it uses Rosstown. Rosstown points to K&M's recent decision to take its RWA (raised without antibiotics) chicken to another processor. Based on this, Rosstown says it would be more supportive of K&M if K&M was committed to its relationship with Rosstown as a priority. Rosstown notes that K&M cherry picked components of its production and offered those components to other processors to benefit K&M, but access to those components could have benefitted Rosstown. Rosstown concludes that it is not sound marketing policy to make orders insulating the appellant from its own inability or unwillingness to foster mutually beneficial commercial arrangements for custom services. Such an order, Rosstown suggests, results in excessive interference in the business dealings between growers and processors.
88. The Turkey Board argues that it would not be "sound marketing policy" to achieve by force of regulation that which can be achieved through innovation. Some self-marketers have developed their own slaughter facilities and if custom services can simply be procured through force of regulation, this kind of innovation would be stifled. It argues that it is disingenuous for K&M to suggest it only seeks the "continuation of a long standing processing relationship that included primal cut-up service". The dramatic shift in regulatory policy sought by the appellant, whereby the Turkey Board should license further processors (including butchers, presumably), to compel custom cut-up services to growers against their will by force of regulation, is a complete rejection of the "mutuality" that is the essence of any commercial relationship.
89. Rosstown, Fraser Valley and the Poultry Processors agree with the Turkey Board, that directing a processor to provide custom services supplants normal business dealings between growers and processors and these should not be interfered with.
90. When considering sound marketing policy and the question of whether or not to regulate, the panel in *Lilydale and 7 Growers, supra* (at paras. 81 and 82) stated as follows:

Arriving at a policy judgment regarding this contentious issue has required a considerable amount of risk prediction about the consequences of one policy approach versus another, and a weighing of competing benefits against risks in the BC context. We have undertaken that process to the best of our ability, recognising that despite the broad legal power to regulate, the decision to exercise regulatory power in any particular case requires sound justification. Whatever their legal powers, marketing boards should not regulate for the sake of regulating. ...

..... Beyond the superficial appeal of certain rhetoric, very few policy questions in this area have a black or white answer. It is more common to have to make policy choices between difficult options, recognising that policies are never final judgments; they change with the circumstances and with experience.

91. The panel notes that these passages apply directly to the circumstances of this appeal. In considering the approach that best serves sound marketing policy in this case, the panel begins with a recognition of the current market for turkey in BC. In 2006, processors were seeking more product as the demand for turkey was rising. This led BCFIRB to set base allocations for each processor. In recognition of rising consumption of turkey in 2006, BC received a large increase of quota that year (about 1.82 million kgs live weight)<sup>20</sup>. More recently in BC, the trend is towards declining annual consumption of turkey. The Turkey Board acknowledges that BC's allocation has dropped and is currently at 2006 levels.
92. The Turkey Board is addressing the drop in consumption by supporting a marketing program to create awareness in non-traditional consumers of the nutritional benefits of turkey and its desirability as a protein source. Part of the existing industry strategy to increase turkey consumption is to make more diverse products such as fresh turkey cuts and ground product available for non-seasonal use. The large processors have responded and consumers can now find turkey cuts in most retail poultry cases. Similarly, the evidence of K&M's customers is that they appreciate being able to use turkey more regularly and look for turkey parts from K&M. The Turkey Board appears to recognize the benefits of this niche market given its grower-vendor licensing policies and its submissions on this appeal. The panel considers responsiveness to market demands an essential component of sound marketing which is highlighted by current market conditions.
93. The panel concludes that if turkey grower-vendors are to be successful, they must be able to access the processing services they require to be market responsive. Based on the current number of grower-vendors, the limitations on processor services could become systemic and not limited to just one grower. The panel is of the view that the Turkey Board, having acknowledged the importance of the grower-vendor through licensing and quota allotments, must understand and respond as necessary to this niche market segment to support orderly marketing. The panel does not consider such a response solely a "social responsibility", but a legislative and policy-based market responsibility of the first instance regulator, the Turkey Board. Further, the fact that a grower lacks an equity interest in a processor is insufficient reason for the Turkey Board to decline to exercise its authority to promote orderly marketing in these circumstances.
94. In coming to this conclusion, the panel confirms that market responsiveness is part of sound marketing policy and that a grower who is supplying farm differentiated product to consumers through a modified value chain in which the farm or farmer's market is the retail centre for consumers, is responding to the market. The grower is also providing a window, no matter how small, through which customers can directly view agriculture. Many consumers might not otherwise have this opportunity. The panel finds that K&M's

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<sup>20</sup> *Sunrise*, *supra* para 16.

business objectives are consistent with BCFIRB's objectives regarding niche production and reflect sound marketing policy.

95. The Turkey Board, at least at one point before its decision of April, 2018, appears to have recognised that it had a role to play in assisting K&M in securing adequate custom processing. Mr. Benoit gave K&M the names of potential processors in the Fraser Valley that offer custom processing and encouraged it to make a mutually beneficial agreement. The Turkey Board expected K&M to make a serious attempt to secure processing capacity and thought it was premature to take any steps until it did so.
96. Both Mr. Robbins and Ms Azanza gave evidence of their efforts to secure alternate arrangements for primal cut-up services prior to commencing this appeal. Rosstown says that K&M failed to explore all the available options and it must bear the burden of finding those services. It says that K&M should have asked for help from the Turkey Board, the grower association and other industry associations to find replacement services. Rosstown also suggests that if K&M directed its primary processor to freeze whole turkeys after kill, K&M could defrost and cut-up product over a longer time frame or at a different location to avoid pressure on service providers during peak seasonal times. Rosstown suggests that K&M develop its own capacity to further process (cut-up) turkeys killed and chilled by a processor.
97. Fraser Valley argues that there is no regulatory impediment to defrosting product for further processing. The Health Authority advised that K&M's current set up would not enable freezing, thawing, cutting-up, packaging, then refreezing for sale parts of 400 turkeys to satisfy the requirements of section 14(4) of the *Food Premises Regulation*. If K&M expanded its facilities, that expansion would be subject to Health Authority inspection and approval.
98. The Turkey Board indicated there may be a way to provide K&M further capacity through the utilization of mobile facilities (cooler trucks) in which to do its own primal cut. Although the Turkey Board appears to have been prepared to assist K&M, it concluded in April 2018 that K&M had not done enough to find a solution and decided not to intervene which resulted in this appeal.
99. The panel acknowledges there are successful grower-vendors who have developed and/or acquired the facilities necessary to process the turkeys they produce to their specifications with the appropriate regulatory approvals. The panel cannot comment on the feasibility of K&M pursuing this objective, but notes that K&M indicated it "does not want to get into the processing business". Further, the panel observes that expansion of facilities is a longer term solution that would not likely have been a feasible solution to K&M's processing needs for its birds in 2018.
100. The panel is of the view that the Turkey Board, after setting out options for K&M to pursue, should have determined what steps K&M had taken, and if K&M required further assistance, to secure a solution to its processing needs before making its decision. The Turkey Board did neither. Further, after receiving K&M's request for regulatory

intervention, the Turkey Board did not carefully consider the difficulties K&M was experiencing with securing cut-up services.

101. Based on the evidence of Mr. Robbins and Ms Azanza in this hearing, the panel is satisfied that at the time K&M filed its appeal, it had met its obligations to try and secure alternate custom processing services. Further, the panel agrees with Rosstown that a combination of advice and assistance from the Turkey Board, growers association and industry associations would have helped K&M find a workable solution. The Turkey Board's failure to intervene to ensure product, for which there is a demand, got into the market place created an imbalance in the processor and grower relationship. Had the Turkey Board been willing to adopt a problem solving approach to this situation and work cooperatively with others, including K&M, to develop a solution, which solution may not have been the specific order sought by K&M, this appeal would have been unnecessary.
102. It continues to be the Turkey Board's responsibility to engage in a problem-solving process and take appropriate action as the first instance regulator of the turkey industry accountable to the members of the industry. Depending on the outcome of that process, the panel acknowledges that there will be implications to others, especially the smaller processors including Rosstown, for any action taken. The challenge for the Turkey Board is to ensure that the market demands of consumers are met to support orderly marketing with the least disruption to all concerned.
103. The panel does not accept that there would be a surge of grower-vendors seeking similar relief. K&M advises, and the panel agrees, that the time and effort required to develop and adopt farming practises to attract specific consumer interest and loyalty is considerable. The panel is of the view that this would moderate any unusual grower response. However, if a grower-vendor finds itself in a similar position to K&M, it would not in the panel's view be unreasonable for the grower-vendor to expect assistance from the Turkey Board in getting its product processed for the market.
104. As noted previously, the Turkey Board does not need to regulate for the sake of regulating. In fact, it may not need to regulate at all; it simply needs to be prepared to do so if circumstances require. If, after consulting with interested parties, the Turkey Board concludes that no voluntary solution can be found to secure the custom processing services K&M requires, then it is the responsibility of the Turkey Board to make an order to achieve a result which works for this niche market, which in the panel's view should be supported. The panel concludes that the exercise of this regulatory authority would only be necessary where there is a strong likelihood of a market supply failure or barrier, or where a failure or barrier already exist.
105. The Turkey Board is not constrained by the particular form of order that K&M seeks in this appeal and the panel is not persuaded that the Turkey Board must set a fair market value on services. Fees could be established –as in the past- through negotiation- provided that the resulting fee does not render any solution, including an order, inoperative.

106. In summary, the panel determines that the Turkey Board has three tasks.
- a. First it must deal with K&M's current needs to custom process any remaining birds for 2018. Given the time that has passed since the panel heard this appeal, the panel does not know what steps K&M has taken to mitigate its situation and what more, if anything must be done in this production year. Because of this, the panel can not be more specific with its direction. A solution that preserves the processors' objective of avoiding further regulation of the custom processing sector is desirable but this may or may not be possible depending on the willingness of interested parties to contribute to a solution and, of course, industry limitations and practicalities as raised in evidence. All parties need to work together to explore the range of available options to find a satisfactory resolution to the short term custom processing issue. If the Turkey Board determines an order is necessary, any order should be specific to services for K&M and would require K&M's full cooperation. The Turkey Board may seek prior approval from BCFIRB for such an order.
  - b. Second, the Turkey Board must determine what if any assistance K&M requires to complete its grower program for 2019 to avoid the same situation that arose in 2018 from occurring in 2019. The goal should be long-term stability that encourages and supports K&M in developing the primal cut capacity it requires within a reasonable time frame. The panel expects that for 2020, K&M with the assistance of the Turkey Board as needed, will have developed a means of obtaining the processing services it requires.
  - c. Third, given the number of turkey growers relying on custom processing services for direct marketing of product, and the potential for growth of this sector, the Turkey Board must establish a process to assess the broader needs of the grower-vendor sector for custom processing services and develop a work plan as necessary to address any outstanding needs. If the Turkey Board has already planned or is currently undertaking work that could satisfy the requirements for assessment of and work planning for the broader needs of the sector, the Turkey Board may seek approval to achieve them through implementing a pre-existing plan.
107. In summary, the panel concludes the Turkey Board has the legislative capacity and authority to direct licensed processors to undertake primal cut services. The panel does not need to decide if this authority extends to further processing not ordinarily undertaken in combination with kill and chill and by third parties not currently licensed by the Turkey Board. Further the panel concludes that supporting K&M's business model and the products it has developed and sells is consistent with sound marketing policy. It follows that the Turkey Board's facilitation of identifying and securing processing services (custom primal cut) required to support this type of marketing plan is consistent with sound marketing policy. The panel expects that all parties including K&M will cooperate with the Turkey Board in this process. While a negotiated resolution is in everyone's interest, if there is no other way to secure custom processing services for K&M, the Turkey Board may need to direct processors to supply them, as necessary, to allow K&M sufficient time to implement its new primal cut plans. Any such order could be subject to prior approval of BCFIRB.

**ORDER**

108. The panel orders that the Turkey Board:

- a. in cooperation with K&M, licensed processors and others it determines necessary, make its best effort to address any unresolved short term issues regarding primal cut-up of K&M's 2018 turkey production as outlined above in paragraph 106(a), and if necessary, seek the prior approval of BCFIRB of any order;
- b. in consultation with any parties it determines necessary, assist K&M in preparation of its grower program for 2019, as outlined above in paragraph 106(b) and in accordance with the General Orders and Regulations; and
- c. undertake an industry assessment of grower-vendor direct marketing and establish a workplan as outlined above in paragraph 106(c), no later than December 31, 2019.

109. There is no order as to costs.

Dated at Victoria, British Columbia this 31<sup>st</sup> day of December, 2018

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



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Daphne Stancil, Presiding Member



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Peter Donkers, Chair



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Al Sakalauskas, Vice Chair