

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA TURKEY
MARKETING BOARD REGARDING THE PRICE TO BE PAID FOR CUSTOM
PROCESSING SERVICES

BETWEEN

ROSSDOWN FARMS & NATURAL FOODS

APPELLANT

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

AND:

MARK ROBBINS dba K&M FARMS
FRASER VALLEY SPECIALTY POULTRY
PRIMARY POULTRY PROCESSORS ASSOCIATION of BRITISH COLUMBIA
BRITISH COLUMBIA CHICKEN MARKETING BOARD

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Daphne Stancil, Presiding Member
Al Sakalauskas, Vice Chair
Pawanjit Joshi, Member

For the Appellant:

Dion Wiebe and Christina Lingholt

For the Respondent:

Kevin Klippenstein, Chair
Shawn Heppell, Member and Vice Chair,
Michel Benoit, General Manager

For the Interveners:

Fraser Valley Specialty Poultry

Ken Falk

Primary Poultry Processors Association of
British Columbia

Morgan Camley and
Roark Lewis, Counsel

British Columbia Chicken Marketing Board

Rebecca Robb, Counsel

Date of Hearing

October 16 and 17, 2019 and written
submissions closing November 14, 2019

Place of Hearing

Abbotsford, BC

INTRODUCTION

1. The appellant, Rosstown Farms & Natural Foods (Rosstown), is a poultry processor which processes turkey and is licensed by the British Columbia Turkey Marketing Board (Turkey Board). Rosstown custom processed turkeys for grower-vendor K&M Farms (K&M) for several years up to 2018. Rosstown killed, eviscerated, bagged and chilled turkeys for K&M and provided primal cut services to supply K&M some cut-up product.
2. Rosstown refused to provide K&M primal cut services in 2018. K&M took the matter to the Turkey Board and the Turkey Board refused to direct Rosstown to provide K&M with these services. K&M subsequently appealed that decision to the British Columbia Farm Industry Review Board (BCFIRB) and, on December 31, 2018, a Panel of BCFIRB determined that the Turkey Board had the legislative authority to direct a processor to provide services, but that authority should only be exercised in specific circumstances.¹ In the *K&M* (2018) appeal decision, BCFIRB concluded in part, based on the circumstances that K&M faced at the time regarding access to custom processing services, “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” (para 104).
3. In 2019, K&M again required processing services and sought the assistance of the Turkey Board to secure those services to complete its annual grower program. After determining that there was no alternative arrangement, on April 26, 2019 the Turkey Board directed Rosstown to provide K&M custom processing services. Rosstown did not appeal the April 26, 2019 decision.
4. The Turkey Board began a process to determine a negotiated price for Rosstown’s services. In mid-May, 2019, the Turkey Board determined there was no likelihood that K&M and Rosstown would come to an agreement on the prices for custom processing services. The Turkey Board then turned to setting the price and requested pricing related submissions from K&M and Rosstown, which it considered in setting and ordering the prices on May 30, 2019 (May Pricing decision). Rosstown appealed that decision on June 20, 2019 and the matter was set for hearing at the first available time based on the availability of the parties (October 16 and 17, 2019).

BACKGROUND

5. The Turkey Board is established by the British Columbia Turkey Marketing Scheme (Scheme)², 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

¹ *K&M Farms v. British Columbia Turkey Marketing Board*, December 31, 2018 (*K&M* (2018)). Two of the three panel members on this appeal participated in the 2018 appeal.

² BC Reg 174/66 as amended to 2017.

production, transportation, processing, packing, storage and marketing of the regulated product³ 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.

6. BCFIRB concluded in *K&M* (2018) that, to avoid a market failure and where there is no alternative, the Turkey Board may direct a processor it licenses to provide services needed by a turkey grower to supply a market opportunity.

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.
7. The Turkey Board requires every grower to complete and file a grower program annually.⁴ The grower must indicate on the program form the processor that the grower will ship to and refer to the agreement that the grower and processor have reached.⁵ The Turkey Board directed Rosstown to supply custom processing services to K&M for the 2019 year in a decision made April 26, 2019; Rosstown did not appeal that decision.

³ Scheme: “**regulated product**” means any class of turkey raised for meat or egg production within the area to which the scheme relates.

⁴ General Order and Regulation of the British Columbia Turkey Marketing Board as amended to 28 April 2019, 3. Farm Practices Regulation 2019, section 9 states “GROWER’S PROGRAM: Every grower, regardless of class of license, shall prepare a written grower’s program to be counter signed by a processor or turkey broker and a hatchery or poulter broker, and filed with the Board by the date specified by the Board before the commencement of the quota year to which the program relates. In the case of new entry growers planning to direct market the regulated product, they are to have their Grower’s Program counter signed by the government-inspected plant that will be “custom killing” their turkeys.” The quota year is set by the General Order to begin and end with the last Saturday in the month of April for any given year; for 2019 the date was April 28, 2019.

⁵ General Order, *Ibid.*, 2. Agencies Regulation, section 15.

8. After concluding that Rosstown and K&M could not come to agreement regarding prices for services, the Turkey Board set the prices for services and certain equipment used through its May Pricing decision which states in part:

Pricing Process

As requested, the Board did receive submissions from both parties and they are included as Appendix A (K&M Farms) and Appendix B (Rosstown). Before making a final decision, the Board did take the opportunity to review the following BC FIRB decision with regards to pricing:

PPPABC & BCCGA v BCCMB Decision (PDF) May 16, 2019

Of particular interest, the Board gave careful consideration to the following paragraph.

112. As noted earlier there has been a long history of pricing disputes within the chicken industry. There are essentially three ways prices can be established – through negotiation amongst the parties (a method apparently relied on by some of the prairie provinces), through the application of an agreed-to formula based on contemporary data, and by a third party establishing the formula and /or the price.

Through their SAFETI analysis, the BCTMB had also come to the same conclusion as the panel prior to reading this decision. When determining the live price of turkey, the BCTMB has relied upon the use of the first two approaches listed above. That is through negotiations with stakeholders and through the use of a formula.

Up until now, self-marketers and turkey processors have mostly relied upon negotiations in determining custom process costs. This is the first occasion where the BCTMB has been called upon to make a determination and set the price for custom processing services for the BC turkey sector.

Given that negotiations between the parties were exhausted, the Board considered developing a formulaic approach based on processing costs but quickly realized that there were too many different types of arrangements and numerous processing processes involved in trying to determine a set of fixed prices for the custom processing sector. For example, some self-marketers have made long term arrangements or have made investments in the processing plant. Some self-marketers represent up to one million kilograms of production while others only process 17,500 kgs of production. Some processors can cry-o-vac or provide “crusting” services, others place the processed turkeys in totes. Trying to determine fair pricing given all these variances proved to be incredibly complicated and cumbersome. In order to do this, the Board believed that it would require processing costs from all processors who provided custom processing services. Even after receiving this information, the Board would still need to determine what the appropriate price is for each of these services.

The table below summarizes the custom processing prices charged by Rosstown Natural Foods for 2017 and 2018 as well as the two submissions presented to the Board for their consideration. The Board converted the two submissions to a per kilo charge for comparison purposes. In order to arrive on a per kilo cost, the Board assumed that there would be 700 turkeys per shipment and that 10 pallets would need to be used throughout the process:

Services	Rosstown 2017 Cost	Rosstown 2018 Cost	Rosstown 2019 Proposal	Rosstown per kg cost	K&M Farms Proposal	K&M Farms per kg cost

Kill and Chill	\$6.00	\$8.00	\$12.00	\$1.00	\$8.00	\$0.67
Bagging	\$1.50	\$1.75	\$2.75	\$0.23	\$1.75	\$0.15
Primal Cut	\$1.85	NA	\$14.00	\$1.17	\$2.00	\$0.17
Pallet Fee	\$11.00	\$14.00	\$20.00	\$0.02	\$14.00	\$0.02
Hauling Fee	\$250.00	\$375.00	\$450.00	\$0.05	\$375.00	\$0.04
Catching Fee/bird	\$0.40	\$0.45	\$0.68	\$0.06	\$0.45	\$0.04
Total per Kg				\$2.53		\$1.08

Most self-marketers have had a long history and relationship with their processor and up until now, price increases have been agreed to by both parties. Given the Board's responsibility to set the price in situations where a negotiated agreement cannot be reached the Board looked for other alternative pricing formulas that did not rely solely on production cost. After consideration, the Board has decided on the following:

That for the 2019/2020 Quota Year, custom processing prices should be set at the same price as the 2018/2019 Quota Year plus an inflation factor. The inflation factor chosen by the Board was 2.7% which coincides with the Consumer Price Index for BC as found in the following table:

<https://www2.gov.bc.ca/gov/content/data/statistics/economy/consumer-price-index>

The Board is willing to give consideration to higher increases if it receives quantifiable and verifiable information from the processor in question justifying higher increases. In this specific situation, this type of information was not provided.

Also, since there was no price set for primal cut services in 2018, the Board determined that a base price of \$2.25 per bird would be in line with other price increases that were implemented in 2018. As a result, the prices charged to K&M farms for the 2019/2018 Quota Year will be as follows:

2019 K&M Custom Processing Costs	
Kill and Chill	\$8.22
Bagging	\$1.80
Primal Cut	\$2.31
Pallet Fee	\$14.38
Hauling Fee	\$385.13
Catching Fee/bird	\$0.46

The Board will now accept the grower program submitted on December 28th, 2018 by K&M farm and expects both parties to carry out all the services required to fulfil this program to the best of their abilities. The Board is hopeful that this will conclude their involvement in this matter.

For the 2020/2021 Quota year and for subsequent Quota Years, the Board proposes that where an agreement between a processor and a self-marketer cannot be reached through

negotiation that the two parties hire an arbitrator to resolve the pricing dispute. The Board envisions these arbitration decisions should remain in effect for a minimum of two years and the Board would expect the arbitrator to use a final offer arbitration process and that the arbitrator give consideration to methodology utilized in this pricing decision when determining any future pricing matters.

If required, an arbitrator can also make determinations with regards to scheduling, packaging, product pick-up transportation, etc., if the parties are unable to solve these aspects of the custom processing contract. In summary the Board has made the following determinations for the 2019/2020 Quota year. They are as follows:

- 1- Given the directives and guidance provided in the December 31st, 2018 FIRB decision, the Board has elected to expand the protection provided to growers with regards to processing assurances to self-marketers. In other words, a licensed processor cannot unilaterally cancel or terminate a “kill and chill” relationship with a self-marketer unless another viable option for the self-marketer exists. Under extraordinary circumstance, the processor would need to seek permission from the Board prior to severing any “kill and chill” services provided to self-marketers.**
- 2- Furthermore, licensed processors must provide 2 full year’s notice to self-marketers if a “primal cut” service arrangement is to be terminated. The Board believes that this period of time should be adequate to find alternate arrangements.**
- 3- That for the 2019/2020 Quota Year that custom processing prices should be set at the same price as the 2018/2019 Quota Year plus an inflation factor. The inflation factor chosen by the Board was the Consumer Price Index for BC as found in the following table:**

<https://www2.gov.bc.ca/gov/content/data/statistics/economy/consumer-price-index>

For the period of April 2018 to April 2019, the CPI index for BC has increased by 2.7%.

The Board is willing to give consideration to higher increases if it receives quantifiable and verifiable information from the processor in question justifying higher increases.

For subsequent Quota years, the Board is encouraging self-marketers and processors to continue negotiating contracts and where disputes occur that the following process be followed:

- 4- The Board proposes that where an agreement between a processor and a self-marketer cannot be reached through negotiation that the two parties hire an arbitrator to resolve the pricing dispute. The Board envisions these arbitration decisions should remain in effect for a minimum of two years and the Board would expect the arbitrator to use a final offer arbitration process and that the arbitrator give consideration to methodology utilized in this pricing decision when determining any future pricing matters.**
- 5- The arbitrator can also make determinations with regards to scheduling, packaging, pick-up transportation, etc. if the parties are unable to solve these aspects of the custom processing contract.**

Next Steps:

This decision document will form the basis of a consultation process to be carried out throughout the remainder of 2019. This consultation will also be carried out in conjunction with an industry assessment of turkey self-marketer needs in British Columbia. A permanent decision with respect to the revocation of custom processing services to self-marketers and pricing of custom processing services will be made prior to December 31st, 2019.

9. As noted above, Rosstown appealed the May Pricing decision on June 20, 2019.
10. K&M participated as a full intervener in the hearing in support of the Turkey Board's position. Fraser Valley Specialty Poultry (Fraser Valley), another processor which provides custom processing services to the industry, and the Primary Poultry Processors Association of British Columbia (Association), whose members include major poultry processors and smaller processor K&R Poultry Ltd., participated fully in the appeal as interveners. The British Columbia Chicken Marketing Board (Chicken Board) sought limited intervener status to provide a written submission which it addressed in the hearing.
11. The Panel heard the appeal on October 16 and 17, 2019 and it concluded on November 14, 2019 after receipt of the appellant's final reply.

ISSUE

12. Rosstown raised a concern in the first pre-hearing conference (PHC) of August 12, 2019 that the issue for appeal should be broadened as the decision could have implications for others. The presiding member agreed that others should be made aware of the appeal and each could determine the applicability of an appeal outcome to their circumstances and make application for intervener status on that basis. As noted above, K&M, Fraser Valley, the Association and the Chicken Board all applied for and were granted the intervener status each requested.
13. As to the scope of the appeal, the Turkey Board submitted that it should be limited to the May Pricing decision regarding price for specific processing services. Rosstown indicated that the scope could be broader. As set out in the PHC report, the presiding member concluded that "the scope of this appeal is specific to the unique relationship between Rosstown and K&M for the provision of custom processing services for the 2019/20 production year. More simply stated, this is a narrow scope of appeal."

14. On that basis, the issue on appeal is as follows:

Did the Turkey Board err in its May Pricing decision in setting the prices for K&M to pay Rosstown for custom processing services, including “kill and chill” and “primal cut” of turkeys, for the 2019/2020 quota year?

SUMMARY OF EVIDENCE

15. The Panel has reviewed and considered all the evidence provided in the hearing from the testimony of the following witnesses:

- For the appellant Rosstown – Thomas Cherian, Director of Technical Services for Rosstown and Dion Wiebe, President of the Rosstown group of closely-held companies;
- For the Turkey Board respondent - a panel composed of the Chair, Kevin Klippenstein who has a background in the hospitality, restaurant and cidery business, and General Manager, Michel Benoit;
- For the intervener K&M – Mark Robbins, a principal of K&M and turkey grower;
- For the intervener Fraser Valley - Ken Falk, a principal of the specialty processing plant;
- For the intervener Association – Kenneth Huttema, a principal of K&R Poultry Ltd. which owns a processing plant, Farm Fed, which is a member of the Association.

16. There are two streams of evidence: the first regarding custom processing itself and the second regarding pricing for the development and finalization of K&M’s producer program including the custom processing contract.

Custom Processing

17. Mr. Cherian and Mr. Wiebe testified that the custom primary processing of small flocks of poultry and the providing of primal cut services requires a commitment of time and resources greater than the time and resources required for the processing of conventionally-raised flocks which are typically much larger in size than a flock raised for niche production. As to the primal cut services, they confirm that Rosstown must cut up turkeys manually as opposed to relying on automation.

18. Rosstown must plan and adopt a sequence of processing to accommodate different flocks of turkeys, or other poultry, moving through the plant. The plant relies on cleaning and disinfection procedures to eliminate cross-contamination from one flock to another. Rosstown may be required to slow the line speed after the evisceration process to avoid cross-contamination of turkeys within a flock, once processing begins. Further it may be necessary to raise the temperature of the scald to prevent the transmission of micro-organisms from one turkey to the next. These steps are essential to food safety and Mr. Cherian emphasized the importance of meeting food safety standards to ensure CFIA did not “de-list” Rosstown as a federal plant and disable its ability to export to the US; de-

listing would be a serious issue requiring time and effort to remedy which Rosstown operated to avoid.

19. K&M observed high operational standards are expected of a processor such as Rosstown to meet food safety requirements and that there is nothing unusual in the need to make operational adjustments as necessary to avoid contamination to meet food safety standards.
20. Rosstown provided evidence that it implemented a slower line speed for K&M's turkeys compared to another farm because of a concern for cross-contamination during processing; it also raised the scalding temperature to deal with cross-contamination.
21. Mr. Cherian and Mr. Wiebe described the challenges dealing with processing larger sized turkeys (over 12 kgs), which often results in the need for line adjustments such as the need for extra personnel to hang birds and lowering the line speed to avoid equipment breakage. Processing larger turkeys occasionally results in line stoppages to repair broken equipment and personnel working the line must wait on standby at full pay until the equipment is running again. Mr. Wiebe submitted as evidence a copy of an "invoice" from Rosstown, dated October 10, 2019, to K&M demanding compensation for slowing the line speed to deal with cross-contamination (loss of 44 min) and for a line stoppage (54 min) to repair a line break when processing K&M's turkeys.
22. Mr. Wiebe testified that Rosstown refused to process tom turkeys (larger in size than hens) from other producers in 2019 due to changes in plant automation which would require the slowing of the line speed to accommodate the weight of the turkeys. He advised that Island Farmhouse Poultry (affiliated with Rosstown) limited its custom processing to turkeys of 10 kg.
23. Mr. Falk indicated that at Fraser Valley, they avoid processing turkeys over 10 kg because of the inevitable equipment breakage and because the plant depends on manual labour as it is not fully automated. Heavy birds are difficult for personnel to handle.
24. Mr. Huttema testified that K&R has over 20 years of experience processing turkeys and custom processes turkeys for two growers: one a direct grower-vendor and one who markets through a small specialty venue. K&R refuses to process K&M's turkeys because they are too large.
25. Mr. Robbins submitted that K&M targets the production of a nine to 11 kg hen (its "signature" turkey), but that K&M's flocks include toms and hens of variable weights – some over 11kgs, some under- with an average weight of about 12 kg. Mr. Robbins estimated that 1.5% of K&M's turkeys in 2019 exceeded 12 kg (dressed weight). Rosstown did not provide evidence that it requested a change in K&M's production to set a maximum size per turkey for the 2019 production year.
26. K&M shipped turkeys for processing both in August and October 2019. K&M indicated this was to have the turkeys processed at non-peak processing times for turkey. Rosstown

testified that it had acquired more mainstream poultry production and now always operated at peak production.

27. K&M submitted it has been using the same production practices for many years. Mr. Wiebe testified that he expected the range in size of the turkeys that K&M shipped in 2019. He indicated that on the basis of equipment updates to the plant, the line speed would have to be lowered for K&M turkey because of weight-related challenges and he took this factor into account for his pricing submission.

Pricing

28. K&M began communicating with Rosstown about its processing needs in December, 2018, which culminated in an email from Rosstown on February 15, 2019 indicating that Rosstown would not provide services to K&M for the 2019 production year. Rosstown advised the Turkey Board in writing on March 18, 2019 that it could no longer provide custom services due to changes at the plant related to taking on more mainstream producers (primarily chicken) and specifically, that Rosstown could not provide services to K&M for turkey processing. K&M, concerned about the timing of ordering poults, contacted the Turkey Board on March 10, 2019 asking about the status of processing services.
29. In April 2019, Rosstown provided some information to the Turkey Board about its custom processing costs by submitting its 2017 price list and indicating that prices had increased significantly since then. Both Mr. Cherian and Mr. Wiebe gave evidence that plant improvements and updates had been made to the Rosstown plant and these were costly, contributing to price increases.
30. After meeting with Rosstown and K&M on April 11, 2019, and considering the inter-party communication to that date, the Turkey Board made an order on April 26, 2019 directing K&M's turkeys to Rosstown for processing.
31. Rosstown and K&M could not execute a contract at that time because the fees for services remained unresolved. The Turkey Board advised "both parties to try to come up with mutually acceptable pricing for this arrangement and if an understanding cannot be reached, the BCTMB will set the price for these services." The Turkey Board gave Rosstown and K&M until May 20, 2019 to come to an agreement. The parties did not reach an agreement and the Turkey Board directed each to submit a proposal for prices by May 24, 2019.

32. By correspondence dated May 21, 2019, K&M submitted the following:

Service	2017 price	2018 price	%change	Suggested price 2019 and 2020
Custom turkey processing	\$6.00 ea	\$8.00 ea	+33%	\$ 8.00 ea
Bagging fee	\$1.50 ea	\$1.75 ea	+17%	\$ 1.75 ea
Primal Cut up	\$1.85 ea	NA		\$ 2.00 ea
Pallet fee	\$11 ea	\$14 ea	+27%	\$ 14 ea
Hauling Fee	\$250	\$375	+50%	\$ 375
Catching fee	.40 ea	.45 ea	+13%	\$.45 ea
Total per Kg				\$1.08⁶

33. Rosstown made the following pricing submission to the Turkey Board on May 23, 2019:

Service	Rosstown Proposal	2019 Proposed Price (per kg)
Kill and Chill	\$12.00 (per bird)	\$1.00
Bagging	\$2.75 (per bird)	\$0.23
Primal Cut	\$14.00 (per bird)	\$1.17
Pallet Fee	\$20.00 (per processing day)	\$0.02
Hauling Fee	\$450.00 (per haul trip of 700 birds)	\$0.05
Catching Fee/bird	\$0.68	\$0.06
Total per Kg		\$2.53

34. The Turkey Board, after considering the submissions, indicated it would determine prices by May 30, 2019. In an attempt to better understand the basis for the submissions, the Turkey Board requested further information which Rosstown declined to provide because the Turkey Board determined it could not guarantee protection of the confidentiality of the information. As a result, K&M also declined to provide further information.

35. The Turkey Board issued its May Pricing decision, the subject of this appeal, setting the following prices between Rosstown and K&M for 2019:

2019 K&M Custom Processing Costs	
Kill and Chill	\$8.22
Bagging	\$1.80
Primal Cut	\$2.31
Pallet Fee	\$14.38
Hauling Fee	\$385.13
Catching Fee/bird	\$0.46

⁶ This line is extracted from the May Pricing decision

36. In setting the prices for services, the Turkey Board researched and adopted a model of evaluation using Canada's annual consumer price index (CPI), a mechanism used by the Residential Tenancy Office (RTO). It reasoned that, like a contract between renter and landlord, an agreement between grower-vendor and custom processor was unique and based on the needs of the self-marketer and the services provided. The Turkey Board concedes it was not an expert in processing and, rather than evaluate each element of custom processing, it required a tool to fairly adjust each cost by the same amount.
37. Using the approach of the RTO, the Turkey Board established a 2.7% increase over the 2018 fees, agreed to between Rosstown and K&M, for 2019 processing. For the primal cut, the Turkey Board used the cost for 2017, adjusted for 2018 followed by a further 2.7% increase on that amount. Based on the same factors that the Turkey Board used to calculate the cost per kg for processing from the submissions of Rosstown and K&M taken from the May Pricing decision (700 turkeys per shipment and that 10 pallets would need to be used throughout the process) and two shipments, the Turkey Board calculated the cost per kg at about \$1.11.
38. K&M shipped 600 turkeys to Rosstown for processing on August 22, 2019. Of these, Rosstown bagged 200 as whole birds and cut up 400. K&M shipped the balance of the turkeys (800 to 850) in early October. (K&M planned to ship them on October 7, 2019.) K&M did not require cut up of any of the turkeys shipped in October. For 2019, K&M listed its fresh whole pasture-raised turkey for sale to consumers at \$9.35/kg and its frozen whole pasture-raised turkey at \$8.70/kg. Mr. Huttema noted that one of K&R's processing customers sold their turkeys retail for the Thanksgiving market for a little less than K&M's prices, and the other specialty producer's turkeys retailed fresh for the Thanksgiving market at a higher cost (\$11/kg). He observed that K&M could probably pay more for processing but would have to absorb those costs as it could probably not pass those costs on to the consumer.
39. Mr. Wiebe explained that Rosstown had recently purchased a farm in the Similkameen which grows turkeys. In 2019, Rosstown shipped these turkeys to its Abbotsford processing facility for processing and supplied the turkeys to "local" small shop retailers to be sold as free range, raised without the use of antibiotics (RWA) turkey grown in the Similkameen. Rosstown does not sell directly to consumers. Rosstown shared in the profits from the sales of these turkeys from retailers after assigning costs for processing at "similar rates" as Rosstown proposed to the Turkey Board for K&M's processing in May 2019.
40. The price list Mr. Wiebe supplied for custom primary processing (without cut up) of turkeys for 2019 at the Island Farmhouse Poultry plant is \$12 per bird, with a limit of 10 kgs on size. That plant suggests on its fee list that growers should choose the slaughter date to ensure that turkeys do not exceed this weight. Mr. Wiebe did not provide details of costs in addition to the primary processing fee. Fraser Valley lists its custom primary processing fee for 50 birds and over at \$18 per turkey.

41. Based on this evidence, the processing fees for primal cut up of a 12 kg turkey could range from about \$13 (\$1.08 x 12) to just over \$30 (\$2.53 x 12). The Turkey Board's order results in a price of about \$13.30 (\$1.11 x 12) for processing services based on a 12 kg turkey. Due to a number of variables, the panel recognizes that these prices have a high degree of uncertainty, but represent the only evidence available for comparative purposes regarding the fee proposals and outcome of the order. Several witnesses testified regarding elements of costs of processing and elements of retail prices (as well as new accounting methods) for specialty turkey. After reviewing and considering all the information provided, the panel discovered gaps in information making it impossible to develop a comprehensive and reliable data set from which to draw definitive conclusions regarding the magnitude of losses that Rosstown claims to have suffered, if any, as a result of processing K&M's turkeys at the Turkey Board's set rates. Similarly the panel was unable to assign a dollar value to any profits that K&M may have realized from the retail sale of the processed products at these rates.
42. Despite the evidence the panel heard, from a purely numerical perspective, the Panel concluded it was in no different position than the Turkey Board in dealing with the three fee proposals. This did not hamper the panel in its analysis of the issue on appeal regarding the May Pricing decision, but if the panel had been provided better information it may have been able to deal more directly with specific submissions regarding losses.
43. Before making any findings, the Panel next outlines the closing submissions.

CLOSING SUBMISSIONS AND ARGUMENT

APPELLANT – ROSSDOWN

44. Rosstown argues that it appealed the May Pricing decision because in its view, the Turkey Board did not exercise due diligence prior to making its decision. The Turkey Board failed to request further information from Rosstown following its May 23, 2019 submission to explain the prices Rosstown sought and this failure resulted in procedural unfairness. As noted above (para 33), Rosstown's pricing submission to the Turkey Board was for a custom processing price of \$2.53 per kg which includes overhead costs and some revenue.
45. Rosstown claims that its processing plant overhead has increased due to:
 - a) changes to plant layout and purchase of new equipment to provide greater capacity and lot segregation (mandatory to ensure food safety and flock traceability from farm to retailer),
 - b) increases to the cost of sampling to test for pathogens and other contaminants within the plant (and increased documentation), and
 - c) increases in labour costs at the plant as a result of a new collective agreement with its workers. The increased labour cost is exacerbated by line failures or malfunctions,

manual duties and overtime. Staff must be paid for their down time waiting for the line to be fixed. The risk of line malfunctions increases when heavy turkeys (over 12 kgs) are processed. Labour costs also increase when primal cut up of turkeys is required. Overtime labour costs are expensive and impossible to avoid at busy times of year.

46. After an internal review, Mr. Wiebe concluded Rosstown's historic accounting practices did not accurately reflect the true cost of custom processing work and for 2019 it more accurately calculates the overhead cost per kg of product for its processing. Rosstown's recently adopted accounting practices integrate these overhead costs which Rosstown, as of 2019, passes onto growers in its fees for custom processing services. The Turkey Board did not engage with Rosstown after it received Rosstown's submission to obtain any of this rationale for price increases and, as noted previously, Rosstown did not provide specifics of its costs or revenues because the Turkey Board could not guarantee the confidentiality of the information.
47. Rosstown submits that at the prices the Turkey Board has set, Rosstown is losing money when processing K&M's turkey. On this point, the Panel observes here that after considering the specific evidence that Rosstown provided, it was unable to make firm conclusions about Rosstown's actual losses, if any. On the evidence provided, it is difficult to reconcile Rosstown's 2019 processing costs, attributed to its new accounting system, with its historical costs for providing these services.
48. Rosstown submits that since K&M did not provide the Turkey Board information regarding its business margin as requested, the Turkey Board could not properly inform itself regarding K&M's production costs in its decision. By not requiring K&M to substantiate its submission, the Turkey Board perpetuated K&M's reliance on the board for solutions without taking direct responsibility.
49. Rosstown also argues that the Turkey Board is not capable of setting price for processing services because the Turkey Board is not familiar with the complexities of processing and the arrangements between grower and processor. For example, the Turkey Board did not place a size limit on the turkey that K&M produced to enable successful processing of all birds. The Turkey Board should have been aware of this requirement as of April 2019 after Rosstown declined to process large tom turkeys from another grower. Uniformity in size of turkey is another factor that the Turkey Board failed to consider.
50. Rosstown asserts that the Turkey Board failed to meet the objectives established *in K&M* (2018) (para 105), which it argues infers that the any fees that the Turkey Board may have to set should not render a solution it directs inoperable. It says the May Pricing decision is an "inoperable solution" for Rosstown because it results in a business loss. It also results in a competitive disadvantage for Rosstown as Rosstown now offers its own specialty turkey to retail and does so based on a cost structure assimilating new processing costs. If K&M does not have to pay the same fees for processing, the retail cost of K&M's product

will be less than Rosstown's specialty turkey at retail giving K&M an advantage. Further, Rosstown argues that the Turkey Board did not properly consider whether or not there would be a market failure if it did not intervene to set the prices for custom processing of K&M's production.

51. In the alternative, Rosstown submits that the Turkey Board should not have set prices for processing services because those services for custom processing should be negotiated and agreed to by the turkey grower and the processor. The industry operates in this manner and any change to this practice is disruptive to the industry and causes business uncertainty to Rosstown and other processors. The Turkey Board should not create policies that impede the adoption of innovative practices by the processing sector or interfere with the expansion of processors. Direct negotiation would enable the processor to seek recovery for plant investments from its customers.
52. Rosstown requests that the May Pricing decision be set aside with no further direction from the Panel so that "Rosstown be entitled to set our custom kill rates." Rosstown suggests "this means that K&M be required to negotiate commercial rates for their custom processing in the same way that all other custom kill processors are required to."

RESPONDENT – TURKEY BOARD

53. The Turkey Board is seeking an outcome from this appeal in time for the 2020-21 production year. It says this appeal is unique because it arises from BCFIRB's appeal decision *K&M* (2018) which sets out specific directions to ensure a particular market niche is satisfied with turkey product. The Turkey Board says it took care to follow the directions of *K&M* (2018) (particularly paras 102, 104 and 105). These include the Turkey Board's responsibility to engage in problem-solving and to take appropriate action as the first instance regulator accountable to the members of the turkey industry (para 102), to not regulate for the sake of regulating but be prepared to do so if circumstances require (para 104) and to not be constrained by the order sought by K&M as fees could be established through negotiation as long as the pricing set does not render the solution (including an order) inoperable.
54. Despite the Turkey Board's attempts to encourage a voluntary and negotiated solution to this challenge, none emerged and the Turkey Board put in place a regulatory solution to achieve the outcome it had been directed to achieve.⁷ This required a significant commitment of board time.

⁷ The Turkey Board summarized these efforts when it released its decision on April 26, 2019 to direct K&M's product to Rosstown:

On February 15th, 2019, the Board office was copied on an email between Rosstown Natural Foods and K&M Farms whereby Rosstown indicated that they "will not be able to provide the services you have requested for 2019". The services in question included the "kill and chill" as well as the "primal cut" of turkeys to be processed within the 2019/2020 Quota year.

55. The Turkey Board began discussions with Rosstown and K&M in mid-February, then undertook a process to identify any other processor able to provide K&M custom services, and then, having identified Rosstown as the only processor (April 26, 2019), turned to the price for services. The Turkey Board encouraged Rosstown and K&M to reach an agreement on pricing and, without one, set the fees by order.
56. The Turkey Board demonstrated its awareness of K&M's needs for primal cut services and encouraged K&M to become self-reliant in this regard. The time pressure to establish an agreement prior to the e growing cycle was present throughout the Turkey Board's decision-making process.
57. The Turkey Board submits it applied SAFETI principles in coming to its decision and recognized that this was the first time it "had been called on" to set prices for custom services:
Given the directives and guidance provided in the December 31st 2018 FIRB decision, the Board has elected to expand the protection provided to growers with regards to processing assurances to self-marketers. In other words, a licensed processor cannot unilaterally cancel or terminate a "kill and chill" relationship with a self-marketer unless another viable option for the self-marketer exists. Under extraordinary circumstance, the processor would need to seek permission from the Board prior to severing any "kill and chill" services provided to self-marketers.
58. The May Pricing decision also imposed a requirement on processors to provide two full year's notice to self-marketers if a "primal cut" service arrangement is to be terminated to allow time to find alternate arrangements and a mechanism to calculate price for the 2020/2021 year and beyond, relying on a third-party arbitrator if necessary to resolve disputes. These aspects of the decision are not under appeal.
59. The Turkey Board indicated that, as part of BCFIRB's directions flowing out of *K&M* (2018), it was to undertake an assessment of processing services available to grower-vendors. BCFIRB has granted an extension for the deadline for completion of a work plan

Upon receiving this notice and after enquiring about the reasons for the notice, the Board started seeking alternative options for K&M Farms. This process included many conversations, emails and meetings with various processors and K&M Farms.

During this period, Mr. Robbins of K&M Farms indicated that he would prefer to continue having his turkeys "kill and chilled" as well as being "primal cut" at Rosstown Farms for the 2019/2020 Quota year. Mr. Robbins indicated that he would like the Board to make a long term decision with respect to his custom processing needs as the uncertainty has been very challenging for his operation.

As a result of Rosstown's refusal to provide the services requested, the Board sought and received written submissions from all licensed Lower Mainland Processors with regards to custom processing services.

The Board also met separately with the Processors and Mr. Robbins on April 11th to discuss the issue and to see if a solution could be found.

to respond to this assessment to April 30, 2020.⁸ The Turkey Board also seeks direction from this Panel for the 2020 production year as the broader industry assessment and recommendations will not be available for the upcoming production year.

60. The Turkey Board characterizes this appeal as the “second instalment” of K&M’s appeal that resulted in *K&M* (2018). The Turkey Board submits that it followed the directions BCFIRB set out in *K&M* (2018) and used SAFETI principles in making its May Pricing decision. The strategic context for this decision is grounded in *K&M* (2018) and will be developed more fully after the Turkey Board completes its assessment of the needs of the grower-vendor sector and the current availability of custom processors, in accordance with that decision. In the meantime, the Turkey Board submits that it followed the expectations established by *K&M* (2018) and the specific directions in a manner in accordance with the SAFETI principles for decision-making. In this regard, the Turkey Board relies on *K&M* (2018):
- ...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. (para 104; Turkey Board’s emphasis)
61. The Turkey Board interprets the *K&M* (2018) decision as “instruct(ing) it to look favorably towards those involved in self-marketing” and if it had to establish pricing between grower and processor, that arrangement had to be a unique pricing determination due to the specific arrangements between the parties and would not be generally applicable to other grower-processor arrangements. It applied *K&M* (2018) by encouraging Rosstown and K&M to reach a mutually acceptable agreement before it stepped in and directed Rosstown to custom process for K&M due to the advancing production season.
62. The Turkey Board says it evaluated the increases in pricing sought by Rosstown in its submission for a 50% increase in fees for kill and chill and an over 600% increase in primal cut and concluded these increases were unreasonable and could result in making its April 26, 2019 direction of product order inoperative. Faced with this outcome, it adopted a tool, the CPI, to adjust 2018 processing fees. The Turkey Board argues that adopting the same tool the RTO uses enables it to address a potential power imbalance between grower and processor. Significantly, both the Turkey Farmers of Canada and the Turkey Board in Ontario use the CPI to calculate a cost of living adjustment factor in their live pricing models for the conventional side of the turkey business.
63. In applying *K&M* (2018), the Turkey Board took into account the practical timelines that growing turkeys on pasture require, from ordering and setting poults, to harvesting turkeys, in order to ensure that K&M could meet its marketing opportunities and satisfy customers.

⁸ 2019 October 15 TMB needs assessment deadline extension.

64. The Turkey Board submits that its May Pricing decision, directed only at K&M and Rosstown, met the expectations that were established by *K&M* (2018) and should not be set aside. It also points out the practical reality that K&M had, or would have at the time of the close of submissions in this appeal (November 14, 2019), sold much if not all its turkey products. In other words, if the May Pricing decision is overturned and prices payable to Rosstown for the turkeys processed in 2019 are increased, K&M has no opportunity to pass on any increase in its costs to its customers.
65. The Turkey Board suggests that for the next production year (2020/2021) it favours the use of an arbitrator, possibly in conjunction with use of the CPI to set a base price for use by the arbitrator, to resolve disputes on pricing where there is no agreement. A benefit to this approach would be that the arbitrator could protect the confidentiality of any information shared with her or him in the course of resolving a dispute on price.

SUBMISSIONS OF THE INTERVENERS

K&M FARMS (K&M)

66. K&M's submission speaks to the technical aspects of processing and the steps involved in pricing. With respect to processing, K&M submits that, because Rosstown had processed its turkeys for so many years, it was fully aware of the average dressed weight of the turkeys K&M raised and should have been prepared to adjust the processing line as necessary to accommodate them as in previous years. As to the loss of time for line disruption from heavy turkeys, K&M says that there is nothing specific that points to any particular turkey causing line breakage and these breaks can occur randomly and are part of the business of processing.
67. K&M acknowledges that turkeys raised outside have higher levels of fecal coliform contamination compared with turkeys raised in a barn and states that the costs paid for custom processing are intended to compensate for the need to run the line more slowly to avoid any spread of contaminants. As to costs associated with segregation, K&M does not deny that they exist, but suggests that Rosstown probably manages segregation well and efficiently and that segregation for custom processing of specialty product requires no more effort than for the other categories of production that Rosstown handles. K&M suggests costs associated with segregation should be fairly constant over time and that Rosstown provided no evidence to indicate otherwise. K&M agrees that segregation and line speed add to costs, but says there is no evidence to support repeated increases of 33% or more each year. K&M acknowledges that Rosstown's costs for labour have likely gone up since the plant workers organized.
68. K&M considers Rosstown's argument that a new accounting approach of trying to allocate a margin of cost to each processing element should not, in and of itself, cause total costs to go up. Often businesses assign costs to reflect the operational complexities or difficulties associated with a function. K&M understood that is what Rosstown had done in the past as opposed to applying a generalized margin cost representing all the processing done at the

plant. In other words, K&M understood that Rosstown had already adjusted its prices to reflect the actual cost of processing K&M turkey as opposed to applying a cost calculated for all processing done at the plant. K&M argues that Rosstown's proposal on pricing was not reasonable especially since Rosstown had increased certain cost elements for the 2018 production year significantly.

69. With respect to disclosure, K&M submits that since Rosstown refused to provide the Turkey Board information regarding its margins, K&M had no obligation to do so.
70. In closing, K&M relies heavily on *K&M (2018)* and concludes the decision confirms "that supplying a niche market is sound marketing practice and the regulated marketing system is responsible to ensure orderly supply to the niche market consumers." It notes that processors play a role in either ensuring or eliminating choice of product to consumers. K&M suggests that Rosstown is narrowing consumer choice of specialty product by attempting to restrict the size of turkey that it processes (less than 11 kg live weight which dresses out at about 8.8 kg or just over 19 lbs). Some of K&M's customers prefer a specialty turkey which is 11 to 14 kgs live weight or over 22 lbs. K&M does not accept that the equipment in the Rosstown plant cannot handle turkeys of this weight. K&M submits that consumers should be driving what is available to them in the market not processors who can control supply of product and drive prices.

FRASER VALLEY SPECIALTY POULTRY (Fraser Valley)

71. Fraser Valley's submission emphasizes the need for the Turkey Board to take a broad view of what is needed for the grower-vendor turkey sector. Fraser Valley is a provincially licensed plant which processes many specialty birds, some supply managed and some not. Mr. Falk pointed out that the history of many plants is to start off small, offering custom processing services. Then as the business matures and grows, it may attract more supply managed product and shift its business toward purchasing product from the farm, processing it and selling it. As this increases, the focus and business of the plant may shift entirely to the mainstream style of processing, which puts fewer demands on the plant in terms of segregation and customer instructions.
72. Fraser Valley's primary concern arises from a commodity board exercising its authority to direct product for processing without giving due consideration to the resulting disruption this could cause to a processing business such as Fraser Valley. Further board regulation should not "force processors" to provide services at a financial loss. Turkey Board policies regarding small production growers should ensure that producers secure processing arrangements so they can effectively self-market if that is their chosen business model. In this regard, Fraser Valley had a lot of good advice for new turkey growers who were considering the self-marketing business model and will likely be of interest to the Turkey Board in determining the future direction for the grower-vendor sector.

PRIMARY POULTRY PROCESSORS ASSOCIATION OF BRITISH COLUMBIA
(Association)

73. The Association makes submissions regarding processing and pricing as well. With respect to processing, Mr. Huttema indicated that no processor wants to take a loss from its processing business. A processor must take several factors into account in setting its price for service including: the volume of the lot being processed; the number of times the plant must segregate lots to manage gaps in processing or line down-time; customers' unique needs; business risks introduced by food safety requirements; collections; and constancy of supply. Each custom processing customer has different requirements and needs which underlie the importance of processor and producer negotiating a specific contract.
74. Farm Fed began business providing mainly custom processing but found it could not survive on custom processing alone and pursued and attracted processing of conventional product "to survive." The typical model is that a plant processing conventionally raised and marketed product must slot in any custom work it undertakes so that the conventional processing supports the custom processing. Farm Fed does not want any more custom processing. Mr. Huttema does not believe there is adequate production volume to build and support another processing plant in the lower mainland.
75. Some grower-vendors have been successful in marketing their own product, but the cost and importance of processing to this model is always underestimated. Farm Fed could not take on custom cut up for turkey because they do not employ the skilled labour to provide the function and do not have space in the processing plant to accommodate it. Farm Fed did not submit a proposal to the Turkey Board for processing for 2019.
76. In reviewing K&M's cost submission to the Turkey Board, Mr. Huttema commented that K&M could probably pay more for processing services but may not be able to pass that increase along to the consumer and may have to absorb those costs.
77. Mr. Huttema acknowledged that the consumer demand for turkey overall is stagnant. Retailers, however, are seeking market differentiated product such as turkey raised to meet specific standards such as organic or raised without antibiotics. He estimated that at this time of the total market for turkey, the demand for specialty turkey is about 10%.
78. In responding to questions, Mr. Huttema noted that Farm Fed did provide processing services for K&M's pasture-raised chicken after negotiations with K&M. He indicated that processors should be able to decline custom work, but acknowledged that this leads to a dilemma when all processors decline to provide processing services for self-marketers (grower-vendors). Mr. Huttema also indicated that a processing plant has to plan for and secure product to be operational for a full year. The challenge that seasonal specialty product raises is the need for it to fit in around other processing jobs. At this time, Farm Fed does not have "room" for custom processing any more turkey.
79. The Association's submission next deals with pricing asserting that the Turkey Board should not have made a ruling regarding pricing for custom processing services since

taking this step goes beyond the intention of or misinterprets *K&M* (2018). Because of this error, the May Pricing decision should be set aside with the direction that Rosstown and *K&M* negotiate an outcome.

80. The Association provides many arguments to suggest the May Pricing decision is contrary to sound marketing policy. The prices the Turkey Board sets result in preferential treatment for *K&M*, providing it an advantage over its competitors. The Turkey Board failed to obtain information from *K&M* as to whether or not price increases could be passed on to *K&M*'s customers. Because Rosstown's price proposal was not accepted by the Turkey Board, it did not form the basis of the prices that the Turkey Board ordered and, as a consequence, *K&M* realized a competitive price advantage over for its customers as compared to Rosstown's customers for a specialty product where the retail price was based on the cost structure for processing in Rosstown's May proposal.
81. In addition, the May Pricing decision does not provide a rationale for the decision in the absence of the kind of data it should have collected and used. It had no basis for the prices it imposed on Rosstown. The Association submits that the unique situation of *K&M* should not be used to set marketing policy for the entire poultry sector. The negative consequences of interfering in *K&M*'s pursuit of custom processing arrangements have caused negative implications to the turkey industry as a whole.
82. With respect to the May Pricing decision itself, the Association argues that it was not formulated according to SAFETI principles and does not support sound marketing:
 - The decision is an intervention for an "outlier", who did not negotiate its own arrangements, and placates the self-interest of that outlier. Establishing policy for an outlier results in a narrow policy unsuited to broad industry interests and, potentially, negative consequences to the industry as a whole.
 - The Turkey Board recognizes it does not fully understand the processing business and should not be making decisions that affect custom processing, a complex component of the industry.
 - The price established may distort the market if other grower-vendors cannot negotiate similar prices, have to pay more for processing and therefore charge more for their product. *K&M* could benefit from this market distortion by charging lower prices than other grower-vendors for its product. Alternatively, the price established by the Turkey Board (2.7% increase) could artificially depress the prices that other custom processors charge.
 - The "invitation" by BCFIRB for the Turkey Board to step into price setting will cause more grower-vendors to seek this assistance and create a new dimension of pricing disputes. This could have the further negative effect of reducing the number of custom processing providers.
 - Board price setting eliminates the risks that grower-vendors should expect, experience and assume, by selling product into the market.

83. In addition, the Association asserts that the method that the Turkey Board chose to set price for the custom processing services reflects unsound marketing policy. Relying on the CPI was a poor choice because it was overly simplistic, unreasonable and not reflective of the specific business of custom processing. Mr. Huttema testified that the CPI was not a good tool because it did not take into account certain factors important to processing costs, such as the cost of power. The documented CPI methodology itself indicates there may be other indices more suitable to tracking price changes for various kinds of services. The Association recognizes the use of the CPI for establishing price changes for residential rents, but indicates that the same tool should not be applied for custom processing services. Grower-vendors cannot be compared to tenants because, unlike tenants, grower-vendors can raise prices for product or increase income to respond to increases in processing services.
84. The Association argues that K&M has not satisfied the burden of proof necessary to establish the need for the Turkey Board to intervene in contract negotiations, the Turkey Board applied different evidentiary standards for K&M (lower) and Rosstown (higher) before determining it needed to regulate an outcome on pricing, and it did not pursue a determination from K&M as to why the pricing proposed by Rosstown would make that outcome “inoperative.”
85. Finally, on a procedural point and with respect to this Panel’s assessment of whether or not the Turkey Board’s pricing decision was consistent with sound marketing policy, the Association argued that this Panel should not “close its mind” to what should be considered sound marketing policy. The Association raises this concern in light of a procedural step of the Panel “cutting off” a line of questioning by the Association with respect to K&M’s processing alternatives to Rosstown. It argues that the rules of natural justice require that a Panel not make its mind up in advance of hearing the full submissions of the parties. The Panel’s decision to not hear evidence regarding alternatives suggests that it may be closed to recalibrating its policy as established by *K&M* (2018).

BRITISH COLUMBIA CHICKEN MARKETING BOARD (Chicken Board)

86. The Chicken Board asks that the Panel set the May Pricing decision aside, essentially making four arguments:
- The Turkey Board misinterpreted the directions in *K&M* (2018), which did not direct the Turkey Board to set fair market value for processing services. Such an order would be ad hoc and arbitrary. *K&M* (2018) does not disclose that BCFIRB intended the Turkey Board to set fees for processing services. The direction was that the parties negotiate an outcome.
 - Despite its broad regulatory authority, the May Pricing decision should be set aside because the Turkey Board failed to consider all relevant industry interests and public interests and failed to properly balance those interests when making its decision. This failure would have become apparent to the Turkey Board if it had undertaken a SAFETI analysis. Although the Turkey Board claims it made a SAFETI analysis before making its decision, there is no evidence that it did.

- Even if *K&M* (2018) did not prevent the Turkey Board from setting processing fees, the Turkey Board should not have done so because commodity boards do not regulate specific commercial results. Ordering fees for services is an interference with the normal conventions of the industry whereby producers and processors negotiate the costs of custom processing services as a basis for their annual contracts. BCFIRB ruled *K&M* (2018) that any fees the Turkey Board established should not render an order directing product to a processor inoperative by causing the processor to lose money. Rosstown testified that the fees the Turkey Board established resulted in financial loss on the 2019 processing done for K&M.
- Sound marketing policy objectives dictate that the Turkey Board should not make an order setting fees for processing services even in the particular situation that gives rise to this appeal, a contract between K&M and Rosstown, because of the potential for broader implications to the entire value chain and the concerns of the processing sector. The Turkey Board is responsible to the sector as a whole.

87. The Chicken Board acknowledges that the first two parts of the *K&M* (2018) order pertain to K&M's immediate needs of getting niche product processed for the market it supplies and the third directs the Turkey Board to undertake a broader review of the producer-vendor segment of the industry and its processing needs.

COMMENT ON ROLE OF INTERVENERS

88. The Panel has summarized and set out the submissions of the interveners above. However, as the Panel proceeded with its deliberations, we found that much of the evidence and arguments of the interveners (with the exception of K&M) extended to matters beyond the scope of this narrow appeal which as we discuss below relates to issues arising out of the implementation of the *K&M* (2018) appeal decision. Arguments relating to the broader implications of the Turkey Board regulating in the area of custom processing services are, at this time, better made before the Turkey Board as part of its broader work related to its industry assessment of grower-vendor direct marketing, as it develops and implements its work plan. It would be premature for this Panel to offer its views on these issues prior to the Turkey Board completing its work.

ANALYSIS AND DISCUSSION

89. Given the nature of the submissions received and arguments heard, the Panel finds it useful to set out our findings first, followed by our supporting reasons.

Finding: The *K&M* (2018) decision confirmed the Turkey Board's legal authority to direct Rosstown to provide cut-up services if no other alternative could be found and to set fees for custom processing service where necessary to do so.

90. This appeal arises out of the Turkey Board's implementation of the *K&M* (2018) appeal decision which resulted from K&M not being able to secure primal cut custom processing services in 2018 necessary to supply its customers with pasture-raised turkey in the form they wished. K&M had been raising and direct marketing pasture-raised turkeys for about

17 years with its production increasing over time to meet demand. Rosstown supplied the processing services for most of that period. Rosstown's business evolved; the plant is now federally registered denoting the achievement of specific operational standards and up to date plant equipment. Its throughput has increased significantly over that time. From Rosstown's perspective K&M's processing needs had become burdensome and in 2018, Rosstown expressed an interest in severing their business relationship. Given the tight timeframes due to production and harvesting schedules, and business plans of potential suppliers, K&M had found no alternative processor for its turkeys. Without a processor to provide K&M services, a market failure would have resulted as K&M's product would not get into the market place and its customers would not have been able to purchase the turkey products they desired. The Turkey Board declined to direct K&M's product to Rosstown and, as a result, K&M appealed.

91. In making a determination that the Turkey Board had broad legislative authority to regulate the relationship between grower and processor⁹, the K&M Panel looked at how the Turkey Board historically regulated the business relationship between K&M and its processor, at that time Rosstown:

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

⁹ *K&M (2018)*, para 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.

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.

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. [emphasis added]

92. The K&M Panel next considered the question of sound marketing policy:

90. When considering sound marketing policy and the question of whether or not to regulate, the panel in *Lilydale and 7 Growers*¹⁰...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. ...

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

¹⁰ *Lilydale Co-operative Ltd. and Seven Growers v. British Columbia Marketing Board (Lilydale and 7 Growers)*, February 21, 2005.

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 business objectives are consistent with BCFIRB's objectives regarding niche production and reflect sound marketing policy. [emphasis added]
93. The K&M Panel determined that the failure of K&M to supply its customers with pasture-raised turkey products would amount to a market failure of K&M's demonstrated market and observed:
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. [emphasis added]
94. The K&M Panel, in considering what steps the Turkey Board would have to take to ensure market demands were met and what circumstances would have to exist before exercising regulatory authority, opined:
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. [emphasis added]

95. The K&M Panel then considered how to ensure the processing of K&M's pasture raised turkey product for market:

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. As far as the panel is aware, the Turkey Board's obligations under the first part of this order have been met (sic) and the provision is spent; K&M's primal cut needs for the year 2018 were met.

96. At paragraph 108, the K&M Panel made the following 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 cutup 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.
97. Subparagraph 106(a) is relevant to subparagraph 108(a); subparagraph 106(b) is relevant to subparagraph 108(b) of the order and so on through to the third component - (c) - of the order. Each refers to specific time frames - the 2018 production year (108(a)), the 2019 production year (108(b)) and the following years (108(c)). The first two parts of the order are specific with respect to production year, those orders expire as each year is completed. As a practical matter, in the May Pricing decision the Turkey Board has included how it plans to deal with this production year (2020-2021).
98. The first two parts of the order (subparagraphs 108(a) and 108(b)) are interim in nature and contemplate having effect for one production year, two in total, to bridge to a time when more stable solutions can be developed for the grower-vendor sector generally and for K&M specifically. The effect of describing the nature of these orders as interim and transient is that any orders the Turkey Board makes in response will also be interim and transient. The Turkey Board orders are also implementation orders. The Turkey Board advises that it is undertaking an assessment of processing services available to grower-vendors in response to the third part of the order. The Panel notes that any orders arising from the third part of the 2018 order may provide longer term direction for the grower-vendor sector. The Chicken Board's submission (see para 87 above) regarding the orders is consistent with the Panel's characterization of the May Pricing decision.
99. The K&M Panel recognized that regulatory solutions, when imposed, create unusual dynamics. In the case of Rosstown and K&M, they replaced the industry convention of negotiating a mutually agreeable contract for the securing and payment of processing services.
100. In this Panel's view, and as reflected in our finding above, the *K&M* (2018) decision is clear, that regulation should only be used when necessary, if circumstances require it, to replace a negotiated agreement for custom processing services (para 104). The Panel disagrees with the positions advanced by the Chicken Board and the Association (interveners) that the K&M Panel never intended the Turkey Board to extend into regulating the fees for service for custom processing because its rules currently do not extend into this field and this constrained the Turkey Board to rely on negotiation to set fees for processing services (see para 79).
101. This Panel finds that the focus of *K&M* (2018) was to underscore the Turkey Board's regulatory authority to direct product and, where necessary, set processing fees. While the decision encouraged negotiated solutions, it recognized the responsibility of the Turkey Board, having acknowledged the importance of the grower-vendor through licensing and quota allotments, to be responsive to support the orderly marketing of this niche market and avoid a market failure.

102. As a result of the *K&M* (2018) appeal, certain requirements were imposed on the Turkey Board to provide interim solutions between these two parties if negotiations were unsuccessful. The Panel appreciates the cautionary remarks from Mr. Huttema and Mr. Falk about the downside of regulatory intervention and the disruption of the mutuality that arises between parties through negotiation and agreement, and has taken these into account in coming to a decision on how the Turkey Board’s regulatory authority should be used in this case.
103. However, the Panel finds that by April 2019 the relationship between Rosstown and K&M was not one of “mutuality” based on a business relationship, rather it was a purely regulatory arrangement based on the direction in *K&M* (2018) that the Turkey Board assist K&M with completing its grower program. In the absence of an agreement between K&M and Rosstown, *K&M* (2018) required the Turkey Board to direct product. In this sense that decision was ad hoc. However, a board-ordered direction of product without certainty of pricing does little to prevent a market failure, caused by the absence of pasture raised turkey and turkey products, or a product price so high that it would deflect consumers from purchasing the niche product. The Panel accepts that the Turkey Board determined in mid-May 2019 that, to avoid a market failure, and comply with the direction at subparagraph 108(b), it was necessary to set fees for processing services to ensure product availability; this was not an arbitrary decision. This was a logical application of the direction in *K&M* (2018).
104. The *K&M* (2018) decision essentially created a mechanism to develop interim solutions to K&M’s immediate processing concerns and then ordered the Turkey Board to undertake an industry assessment of grower-vendor direct marketing. As such, the types of concerns raised by the Chicken Board and Association about the broader implications of setting prices for processing services do not fit well within this appeal. The Panel does not find these arguments of assistance in deciding this appeal. In the Panel’s view, and as stated above, such issues are more usefully raised in the Turkey Board’s process with respect to longer term solutions for the grower-vendor sector as opposed to expanding the scope of these proceedings beyond what is consistent with *K&M* (2018) and necessary to resolve the issue on this appeal.
105. The K&M Panel expected “that all parties including K&M will cooperate with the Turkey Board in this process” to find interim solutions to support K&M’s marketing plan (para 107). Prior to the May 2019 pricing decision K&M provided some assistance to the Turkey Board in so far as it advised the Turkey Board that it could not find the necessary services and provided some information to the board as requested. The interim decisions of the Turkey Board have assisted K&M in the short-term. However, this Panel does not expect the Turkey Board to be continually involved in finding processor-related solutions for K&M by directing product to Rosstown for the long term. The Panel expects that having been provided with an interim pricing solution which has created some time for K&M, K&M will consider adjustments to its business model, as necessary to avoid facing marketing failures. This Panel urges K&M to participate with other grower-vendors in the development and adoption of a sustainable, effective business model as the Turkey Board moves to the third phase of implementation of *K&M* (2018) (subpara 108 (c)).

106. Finally and in response to the position taken by the Association regarding certain procedural steps taken by the Panel, the narrow scope of this appeal informed how the Panel managed its hearing process. While the Interveners were given considerable latitude, where questioning strayed into areas of limited relevance to the issues on appeal regarding processing fees (such as other processing alternatives available to K&M), the Panel imposed restrictions on those questions.

Finding: The Turkey Board acted in a procedurally fair manner in its process used to arrive at the May Pricing decision.

107. Rosstown argues that the Turkey Board did not exercise due diligence in making the May Pricing decision as it failed to request further supporting information from Rosstown following its initial pricing submission. Rosstown argues this failure resulted in procedural unfairness.

108. In considering the procedural fairness argument, the Panel has considered the process followed by the Turkey Board. The Turkey Board's rules¹¹ require that a contract be in place between grower and processor before the grower-vendor submits its grower program to the Turkey Board. The Turkey Board must accept the grower's program before the grower can purchase poults. One element of the program is the identification of the processor being shipped to and another is an agreement between the grower and processor. In this case, K&M was not able to submit its grower program before the 2019 "quota year" began, as it did not have a contract for processing services (identifying who is processing, what the specific services will be, and at what cost).

109. The evidence shows that, early in 2019, K&M contacted the Turkey Board indicating it could not complete its grower program because it could not secure a processor. By February 2019, the Turkey Board started a process to determine which processors could supply K&M's processing needs. Near the end of April 2019, the Turkey Board's discussions and influence had failed to secure a viable offer from any processor and, consistent with the *K&M* (2018) decision, the Turkey Board directed Rosstown to supply the services and urged the parties to negotiate. Rosstown did not appeal the Turkey Board decision (April 26, 2019) directing K&M's production to Rosstown.

110. When it became evident that K&M and Rosstown would not reach an agreement on fees, the Turkey Board requested specific information regarding production and processing margins. Rosstown refused to provide specific cost and revenue information because the Turkey Board could not guarantee the privacy of its data, arguing this could interfere with its competitive position in the processing business. Given the position taken by Rosstown, K&M also declined to provide any information. The Turkey Board continued to encourage the parties to reach an agreement but by the May 20, 2019 deadline no agreement had been reached. As a result, the Turkey Board sought proposals for fees for processing services from both K&M and Rosstown.

¹¹ General Orders of the British Columbia Turkey Marketing Board as amended to 28 April 2019.

111. After reviewing the proposals, the Turkey Board found a significant spread in the proposed fees for certain critical elements of processing. K&M submitted a proposal based on 2018 fees, arguing that the prices between 2017 and 2018 had been raised significantly so there should be little or no increase for 2019. Rosstown's submission sought a 50% increase for primary processing over 2018 costs, and a more than 600% increase from an adjusted 2018 price for primal cut.
112. The Turkey Board could not see closing this gap through negotiation with both parties in the time available before young turkeys needed to be placed on pasture. Faced with this time constraint and two parties that would not negotiate or cooperate, the Turkey Board opted not to go back to the parties for further information and instead adopted a methodology to set fees for services without their participation.
113. Addressing Rosstown's argument that the Turkey Board's failure to seek clarification on its proposed fees was procedurally unfair, the Panel concludes it was not. The Turkey Board gave Rosstown an opportunity to set out its proposed fee structure and provide support for its position. Given that Rosstown's proposed fee structure was significantly increased over the previous two years, it would have been reasonable for Rosstown to anticipate that the Turkey Board would require some form of evidentiary support. Rosstown could also have followed up with the Turkey Board if there were parts of its proposal it felt required explanation. It did not.
114. The Panel does not accept Rosstown's position that the Turkey Board's inability to "guarantee" private business information would remain confidential is justification for failing to provide supporting documents. The Turkey Board is a public body subject to the *Freedom of Information and Privacy Act (FOIPPA)*. Section 21 of *FOIPPA* imposes an obligation on the head of a public body to refuse to disclose information that reveals commercial or financial information of a third party, supplied, implicitly or explicitly, in confidence, and where the disclosure would significantly harm the competitive or negotiating position of a third party. While we understand that the ultimate decision maker in a dispute about whether certain financial or business information is disclosable would be the Information and Privacy Commissioner, courts are deferential to a public body's assessment of what is confidential information especially where it establishes formal processes to receive documents in confidence. It is regrettable that Rosstown raised the question about protection of confidential information in absolute terms. While it is true that one can never be absolutely certain in advance of a ruling by the Privacy Commissioner as to outcome, *FOIPPA* imposes an obligation on the head of a public body (Chair, Turkey Board) to protect confidential business information. There would have to be a compelling public interest rationale for the Commissioner to do otherwise.
115. The Panel also observes that appeals to BCFIRB are subject to s. 41 of the *Administrative Tribunals Act (ATA)* which gives BCFIRB the discretion to receive evidence in confidence. Further, s. 61(c) of the *ATA* provides that *FOIPPA* does not apply to any information received by the tribunal in a hearing or part of a hearing where the public, a party or intervener was excluded. Rosstown did not seek to introduce confidential information in these proceedings to support its calculations for the significant increases it sought (50% for

primary processing; over 600% for primal cut resulting in a total cost of \$2.53 per kg) which on their face appear excessive based on past fee structures. In the absence of an evidentiary foundation and as stated above, the Panel places little or no weight on Rosstown's submissions for primary processing and primal cut, and could not test whether these prices are necessary to recover costs as revealed through new accounting practices, as Rosstown claimed.

116. In the Panel's view and based on the events set out above, we conclude that as a matter of procedural fairness, it was not incumbent on the Turkey Board to go back to Rosstown and seek further clarification of the numbers it provided.

Finding: In the absence of proper disclosure from the parties, the methodology for setting processing fees chosen by the Turkey Board was reasonable in the circumstances.

117. In light of the conduct of the parties set out above, the Turkey Board says it considered three possible options to resolve this dispute: making further attempts to negotiate a solution with the parties, seeking further information from the parties or developing a solution utilizing an outside source. It chose the third – a mechanism that did not involve K&M or Rosstown, which would allow it to address a potential power imbalance between grower and processor and have a decision in place by the end of May 2019.
118. The Turkey Board looked at the practices of other regulatory agencies regarding price setting and found that the RTO relies on the Consumer Price Index (CPI) in evaluating and determining rents and that other turkey regulators (Turkey Farmers of Canada and the Turkey Board in Ontario) also relied on this tool in some aspect of their price setting for purchase and sale agreements between producers and processors. The Turkey Board submitted that the CPI tracks and adjusts for changes in consumers' cost of living which would be a useful tool in this case to generate a factor that could be applied equally to all the fee components.
119. Rosstown is critical of this position and says that the Turkey Board does not have the knowledge to set fees for the processing business which is highly complex and in which every custom processing relationship is unique. The Turkey Board's reliance on the CPI has set processing fees that result in financial loss to Rosstown which in Rosstown's view renders the order inoperable. The Turkey Board should have considered all of Rosstown's extra costs identified through its new accounting practices, including costs associated with segregation of lot, slowing line speed, adjusting equipment (scalder), line stoppage and the associated repair of broken equipment, labour costs in general and overtime costs - and the Turkey Board did not. Furthermore, Rosstown submits that once the Turkey Board received its proposal, the Turkey Board clearly had questions and should have asked for an explanation. The Association argues that the CPI is an inappropriate index for use by the Turkey Board as it does not assess the costs pertinent to processing and there may have been better indices to use (like those dealing with manufacturing). Rosstown says the order should be set aside so that Rosstown and K&M can negotiate the fees.

120. Although the circumstances giving rise to the appeals are quite different, the Panel finds itself in a similar position to the Panel in *PPPABC et al. v. British Columbia Chicken Marketing Board*, May 16, 2019 where BCFIRB also analysed the actions of a commodity board in setting prices. The Panel in the pricing appeal observed at paras 93-94:

93.(the Chicken Board) requested more information from the Processors in respect of their competitiveness and, in the absence of receiving fact-based and transparent data, the Chicken Board relied on the available data which included wholesale, retail and gross margin data, EMI market research data all of which indicated that BC processors were doing well.

94. While we accept the Processors' arguments that there may be limits to the usefulness of such data, in the absence of the Processors providing more meaningful comparative data, the Chicken Board must rely on information that is readily available. Further, if the Processors want better data, it is open to them to provide gross margin data to CPEPC or contribute data to the weekly EMI Canadian wholesale price data set, or develop another mechanism to disclose this data.

121. Similarly here, we recognize that Rosstown is critical of the Turkey Board adjusting its fees using the CPI. However, in the absence of Rosstown advancing a principled and evidence supported position before the Turkey Board, we find the Turkey Board's approach reasonable. In light of the need to finalize the producer program, the broken relationship between the parties necessitating a regulatory solution in the first place, and the inadequate responses to requests for further information, the Turkey Board had little choice but to find a timely resolution. The Turkey Board made reasonable efforts to set fees that balanced the interests of processor, grower and consumer. The use of the CPI resulted in cost increases to fees consistent with other cost increases that consumers would experience. As noted above (paras 41 and 42), the Panel was unable to translate the increases in costs associated with plant operations and equipment that Rosstown and the Association submit contributed to price increases for services, to monetary amounts for purposes of evaluating the claimed increases. The Panel could not determine the impact on Rosstown's costs and the Panel observes, in any event, that the information provided in this appeal was not available to the Turkey Board before making its May Pricing order. While we acknowledge Rosstown's request that it be allowed to negotiate processing fees now, the time for negotiation was in early May 2019.

Finding: In the circumstances of this appeal, it was consistent with sound marketing policy for the Turkey Board to set the price for Rosstown's custom processing services for 2019.

122. The Turkey Board argues that its May Pricing decision is grounded in sound marketing policy because it follows the directions and orders of *K&M (2018)*. *K&M* say *K&M (2018)* addresses sound marketing policy in the context of the Turkey Board's authority to regulate the grower-processor relationship and that the decision confirms "that supplying a niche market is sound marketing practice and the regulated marketing system is responsible to ensure orderly supply to the niche market consumers."

123. Rosssdown and the Association argue that the Turkey Board interfered in the competitive position of Rosssdown by setting the service fees as it did. Rosssdown now processes and sells turkey into the specialty turkey market based on the very fee structure that it proposed. Because the fees as set by the Turkey Board do not even reflect Rosssdown's actual costs, K&M's costs for processing were lower than Rosssdown's for 2019 and K&M could pass the benefit of these lower fees on to its customers. Rosssdown claims that it did not realize the full costs of processing until it adopted its new accounting tool. As a result the proposal for costs submitted resulted in extremely large increases in price to two components of the fee structure (primary processing and primal cut) which contribute significantly to the overall cost of processing and would ordinarily raise the price to consumers.
124. K&M finds this argument non-sensical as Rosssdown is a highly experienced processor and to accept this argument would mean that Rosssdown has been experiencing losses for its custom turkey processing for some time, which raises the question of why these costs and losses would only show up now. The Turkey Board shares this view.
125. The Panel can accept that if Rosssdown is experiencing cost increases, it should be able to pass those on to recipients of its custom services. however, the Panel finds that the level of increases sought (50% for primary processing; over 600% for primal cut resulting in a total cost of \$2.53 per kg), without proper evidentiary support, are excessive. We place little weight on the submission that these prices are necessary to recover costs only just revealed to Rosssdown by its new accounting practices. Further, we observe that it is not open to K&M to recover additional processing costs from its customers for 2019 as the turkey has been sold. We also observe that these levels of increases are well above those consumers are experiencing for other food items, based on the CPI of 2.7%.
126. As Rosssdown, the Association and the Chicken Board point out, it was never the intention of *K&M* (2018) to direct the Turkey Board to make orders that would result in either the grower or the processor suffering financial loss. The intent of the Turkey Board was to set fees in its May Pricing decision, appropriately balancing the interests of the grower and processor, while attempting to avoid business loss by each, based on the information available when making its decision. The Turkey Board did not have the benefit of all the information Rosssdown provided in this appeal about its actual costs. However, the fact remains that the Turkey Board had a time sensitive decision to make on the information available to it in order to ensure that a niche market was properly served. On this basis, the Panel accepts the Turkey Board's decision reflects sound marketing policy.
127. As to the broader implications for the industry, the K&M Panel recognized that operational decisions regarding aspects of turkey production and marketing are thoughtfully made in the context of broad and sound policy analysis regarding the objectives for the entire sector. Given the length of time that has passed since the Turkey Board established the grower-vendor sector and as the marketplace has evolved, that Panel determined it was

necessary for the Turkey Board to develop a work plan to assess this sector and its quota holders.

128. The events of 2018 and 2019 which resulted in these appeals underscore the need to approach the longer term in a problem-solving manner that will result in Turkey Board orders that support the entire sector, both growers and processors, and avoid the need for specific case-by-case interim directions. The Turkey Board indicated in its evidence that it is close to disclosing its work plan to respond to identified needs. When complete, any recommendations in conjunction with any other strategic level documents pertinent in this regard, such as a strategic plan, will establish the strategic objectives or context for the board's decision-making and regulation. The need for consultation by the Turkey Board to respond to the range of accountabilities as it undertakes this work is essential, and the Turkey Board has made the Panel aware of some of the consultation the Turkey Board has completed or intended to undertake. Mr. Huttema and Mr. Falk each commented in this appeal on whether or not there is a need for more processing capability in the Fraser Valley and the Panel encourages each to make their views known to the Turkey Board in the context of the needs assessment, if they have not already done so. Mr. Wiebe, Mr. Huttema and Mr. Falk all commented on the inherent difficulties with processing large turkeys (over 10 kg), and business decisions they have taken to avoid the need to process heavy turkeys. This matter is not one that the Panel deals with in this decision as in our view it is better considered by the Turkey Board in the first instance in assessing the needs of the grower-vendor sector.
129. As the Panel notes above (para 105) the interim orders and resulting actions of the Turkey Board are intended to provide a bridge to longer term solutions that the Turkey Board recommends for the processing needs of the grower-vendor sector. It was never, however, the intention of BCFIRB to shift all of the responsibility for K&M's future success to the Turkey Board. K&M should also be actively engaged in finding and/or acquiring appropriate services to ensure its product reaches the market. Despite the comments of Mr. Huttema that from his perspective, there is no demand for more processing capacity in the FraserValley, the evidence and argument this Panel has heard from Rosstown suggest that the Rosstown plant has evolved and may no longer be a good fit as a processor for K&M. This is a critical point which the Turkey Board must address with assistance from K&M. It is not the Turkey Board's responsibility alone.

Finding: The Turkey Board's decision reflects an appropriate SAFETI analysis considering the narrow circumstances of this appeal.

130. Both the Association and the Chicken Board have questioned whether or not the Turkey Board conducted a SAFETI analysis as reported in the May Pricing decision. The Association submits that the Turkey Board did not apply the SAFETI principles and the Chicken Board submits that the Turkey Board failed to consider all relevant industry

interests and public interests and failed to properly balance those interests when making its decision. This failure would have been diagnosed if the Turkey Board had conducted a SAFETI analysis and there is no evidence that it did.

131. Before determining whether or not the Turkey Board did conduct a SAFETI analysis, the Panel considered what type of SAFETI analysis it would expect from the Turkey Board to support its May Pricing decision. In our view, the analysis should take into account the circumstances relevant to the decision and the nature of the contemplated order. As stated earlier, the Panel determined “that the May Pricing decision was responding to the direction of *K&M* (2018) specifically for the production year 2019. The Turkey Board’s order is an implementation order interim in nature and of narrow application within the industry. It is specific to *K&M* and *Rosstown*...” This is not a broad industry order rather it is an order applicable to two parties for a limited time.

132. With these circumstances in mind the Panel summarizes its SAFETI expectations.

- Strategic – the Turkey Board noted that it is working on the strategic direction for the grower-vendor sector in response to the *K&M* Panel’s order, subparagraph 108 (c); the Panel notes that the relevant strategic direction for the implementation order is that it support sound marketing policy. The Turkey Board drew this conclusion in the rationale for its decision. The Turkey Board understood that the May Pricing decision was not a strategic level decision, but rather one necessary to comply with *K&M* (2018) until it developed its longer term plans for the sector.
- Accountable – the May Pricing decision sets applicable fees between one grower-vendor and one processor based on the specific details of the processing requirements. The Turkey Board engaged with and took their interests into account in making its decision.
- Fair – having determined that there were two parties with an interest in the outcome of its decision, the Turkey Board offered the same opportunities to each party to support their requested fee structure; since the parties did not take full advantage of these opportunities, the Turkey Board determined it should rely on a third party objective source for information for assistance with setting the fees.
- Effective – the Panel has discussed previously in this decision the objectives of the order as being effective to achieving sound marketing policy by ensuring no market failure in the market served by *K&M*.
- Transparent – the Turkey Board made the parties (*K&M* and *Rosstown*) aware of the steps it would take and the timelines. It did not consult with the parties on the use of the CPI, but given that the parties were not open to providing the information that the Turkey Board required, it took reasonable steps to continue with its obligations in the time that it had to make a decision.
- Inclusive – the Turkey Board included the necessary parties in its decision-making process.

133. A SAFETI analysis can be tailored to fit the circumstances of the decision-making as required by the type of decision that a board is to make. While the Turkey Board offered no documentation in support of the analysis it undertook, the directive nature of *K&M* (2018) coupled with the evidence of the Turkey Board, supports a finding that the Turkey Board members considered the points listed in the above analysis. The lack of discussion with the parties before relying on the CPI is a deficiency, but since the Panel has concluded above that this was a reasonable step for the Turkey Board to take in light of the lack of cooperation of the parties, and the time line the Turkey Board faced, the Panel finds that the deficiency is not enough to undermine the May Pricing decision.

CONCLUSION

134. The Panel has reaffirmed the Turkey Board's authority to direct a processor to provide services and to set the fees for those services (Finding 1). In the circumstances of this appeal, the Panel concludes based on the findings as discussed above that the Turkey Board was procedurally fair and applied a reasonable methodology in making the May Pricing decision (Findings 2 and 3). Also, the Panel concludes based on its findings (Findings 4 and 5) that the May Pricing decision reflected sound marketing policy and demonstrated that the Turkey Board applied the SAFETI principles. The Panel concludes there is no basis to set aside the May Pricing decision.
135. Given that it is February 2020, K&M is likely working on its grower program. The Turkey Board is expected to release its workplan soon. Through implementation of the workplan, the Turkey Board will set the strategic direction for the grower-vendor sector. Without the benefit of the Turkey Board's renewed strategic direction, and if the past two or three years are any indicator, the Panel anticipates that once again K&M may have difficulty finalizing its grower program and again, if necessary, seek Turkey Board intervention. Rossdawn and several interveners have pointed out, a relationship based on regulatory intervention is not the convention for the industry. Relationships based on mutual benefits developed through negotiation are genuine relationships with potential for achieving long term success. These are preferable to regulatory ones. The Panel encourages K&M to find or develop its own processing solutions. In 2019, K&M demonstrated some willingness to adapt its business model through harvesting of its turkey flocks earlier in the year than in the past. The Panel encourages K&M to continue to adapt its business model to avoid the need for continued regulatory intervention by the Turkey Board.
136. The Panel has concluded that the Turkey Board has the authority and discretion to make orders necessary to ensure the orderly marketing of turkey by grower-vendors. The Panel anticipates that the Turkey Board will exercise its authority and discretion to successfully support grower-vendors and processors to avoid the need for its extraordinary regulatory intervention.

ORDER

137. The Panel makes no order arising from this appeal and makes no order as to costs.

Dated at Victoria, British Columbia this 13th day of February 2020

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Daphne Stancil, Presiding Member



Al Sakalauskas, Vice Chair



Pawan Joshi, Member