

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

BETWEEN

MARK ROBBINS dba K&M FARMS

APPELLANT

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

AND:

PRIMARY POULTRY PROCESSORS ASSOCIATION of BRITISH COLUMBIA
BRITISH COLUMBIA CHICKEN MARKETING BOARD

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry
Review Board

Tamara Leigh, Presiding Member
David Zirnhelt, Member
Harveen Thauli, Member

For the Appellant:

Mark Robbins

For the Respondent:

Robert P. Hrabinsky, Counsel

For the Interveners:

Primary Poultry Processors Association of
British Columbia

Luke Zacharias, Counsel

British Columbia Chicken Marketing Board

Claire E. Hunter, Q. C., Counsel

Hearing Held by Written Submission

Written submissions closed July 28,
2020, Additional submissions closed
August 27, 2020.

INTRODUCTION

1. The appellant, K&M Farms (**K&M**) is a commercial turkey¹ grower licensed by the British Columbia Turkey Marketing Board (the **Turkey Board**). It has been producing heavy hens and toms (9-11kg) to direct market consumers since 2001. K&M sells both whole birds and parts directly to consumers who pay a premium for farm differentiated products.
2. Under K&M's business model, it relies on custom processing services to slaughter, eviscerate and cool the whole turkeys after kill ("kill and chill") and a processor to cut up some of its turkeys into parts ("primal cuts").²
3. There are only two processors in British Columbia that are able to process birds of the size produced by K&M – Sofina Foods (**Sofina**) and Rosstown Natural Foods (**Rosstown**) – and only Sofina is able to process toms. In any given year, commercial turkey growers are required to provide the Turkey Board with a grower program which includes the processor that the grower intends to use to process its birds. Both Sofina and Rosstown declined K&M Farms' request to process its birds for the 2020 production year.
4. K&M informed the Turkey Board that it did not have processing for its 2020 turkeys and requested that the Turkey Board direct its production for the next five years to either Sofina or Rosstown. On May 12, 2020, the Turkey Board declined the request in a decision (the **May 12 Decision**) as follows:

As you are aware, three poultry processing plants in British Columbia were closed at one time due to COVID-19 outbreaks this spring. This situation is occurring across North America. Up to date, three turkey farms were not able to ship their turkeys as scheduled as a result of the closures. If the problem persists, this number will increase.

Our Board is currently working on contingency plans to ensure all turkeys grown in BC are processed in a timely manner. Even without the plant closures, space in BC processing plants are at a premium due to high absenteeism, restrictions imposed by the CFIA and the Health authorities. As you can read in the letters from Sofina and Rosstown, this is causing some hardship for processors and in many cases, they are currently only performing the bare essentials [sic] tasks.

As a result, we will not be directing processors to custom slaughter or primal cut any of your turkeys in 2020. This decision does not preclude you from trying to make your own suitable arrangements if you wish. If you are unsuccessful in

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

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

finding suitable slaughtering arrangements, The Board can schedule your turkeys to be slaughtered and sold as commercial turkeys by a processor.

As you are aware, custom processing requires significantly more processing time when compared to regular production. The time to separate production, clear the chillers etc., is not feasible or possible for such a small amount of product in 2020.

As we have been recommending to all growers, as a result of the pandemic, we strongly recommend that you consider applying for AgriStability in 2020.

Information on this business risk program can be found here:

<https://www2.gov.bc.ca/gov/content/industry/agriculture-seafood/programs/agriculture-income-protection-agristability>

Your April 29th, 2020 correspondence also includes the following request: "That the direction be for a minimum of 5 years and include primal cut up of hens until a reliable alternative is available." We are unable at this time to consider this request. We will attempt to consider and respond to your request once we have a clear picture of the long-term impacts of COVID-19 on turkey production in BC.

This situation is out of the control or [sic] the regulated market. We are in a pandemic crisis management situation and we must work together during these difficult times.

5. On May 14, 2020, K&M filed the Notice of Appeal of the May 12, 2020 Decision with the British Columbia Farm Industry Review Board (**BCFIRB**).
6. On May 22, 2020, the Turkey Board issued a supplementary decision to its May 12 Decision cancelling the placement of poult that K&M had scheduled to place on May 26, 2020 pursuant to its grower agreement with Sofina (the **May 22 Decision**). The Turkey Board further directed K&M to submit a revised grower program showing suitable placement and slaughter dates before it would receive any future placements.

Proposed Placements

The Board has reviewed the year end reconciliation for the 2019/2020 Quota Year. As has been the case over the last number of years, K&M Farms grew more turkeys in 2019/2020 than what was allocated. In particular, K&M Farms is overproduced by 2,088 kgs, of which 1,373 kgs is above your sleeve (see the attached production summary which you would have received last fall).

In past years, K&M has been able to find suitable lease arrangements to correct your overproduction. However, the grower with whom you had made such arrangements is no longer a licenced grower. Board staff could assist you in finding other growers that could help you out. Please advise the Board office by June 1st if you wish to receive this assistance.

Growers who are overproduced are subject to overproduction penalties outlines in Section 34 of the Quota Regulations. I have included a link for your convenience.

<http://bcturkey.com/resources/documents/GOREGULATIONS2020.pdf>

The Board had also instructed Staff to review grower programs in light of the May 12th allocation decrease. For the 2020/2021 Quota Year, our projection (even assuming that you are able to make suitable lease arrangements) is that you will be overproduced again by more than 2,000 kgs.

More concerning for the Board is that your program calls for the placement of 100 toms and 1,500 hens that will be grown for over 100 days. Sofina Foods is the only processor in BC that is capable of handling turkeys above 11 kgs in weight. Using last year's average weights for your flocks, your upcoming placement would result in turkeys with an average weight over 11 kgs. This is the average weight and not the heaviest turkeys in the flock. The toms will likely weigh much more than 11 kgs.

Given that Sofina Foods has convincingly demonstrated to the Board that directing custom processing to them would be reckless, there is no processor in BC that can custom slaughter heavy turkeys in 2020.

As you are aware, there are processors who would be ready to custom slaughter your turkeys without direction from the Board if they were at a more suitable size. They could handle turkeys weighing up to 10 or 11 kgs (depending on the processor). In effect, your proposed placements are irreconcilable with the Board's May 12 decision.

As a result, the Board has decided to deny your scheduled upcoming placement. The hens you scheduled must be received at a later date (approved by the Board) that will ensure that they do not weigh more than acceptable weight of a willing custom processor. The scheduled toms must not be placed at all because: (a) no processor other than Sofina can handle tom production in BC; and (b) the Board has already decided that it will not direct Sofina to provide custom processing and cut-up services to you for such production.

A revised grower program showing suitable placements and slaughter dates must be submitted and approved prior to any future placements.

7. K&M filed the Notice of Appeal to the May 22 decision on May 25, 2020 with BCFIRB.
8. On May 26, 2020, BCFIRB received an application from K&M Farms, seeking a stay of the May 22 Decision of the Turkey Board, pending the outcome of the appeals before BCFIRB. On May 26 and 27, 2020, BCFIRB received the Turkey Board's response and K&M Farms' reply, respectively. The request to stay the May 22 Decision was dismissed.
9. On May 28, 2020, the parties attended a pre-hearing conference call at which time the parties agreed that the appeals would be combined and heard together. Due to restrictions related to the COVID-19 pandemic, the parties further agreed to conduct the hearing by written submission.

10. The BCFIRB hearing panel (the **Panel**) accepted the Primary Poultry Processors Association of BC (the **Poultry Processors**) and the BC Chicken Marketing Board (the **Chicken Board**) as “Intervenors”.
11. Final submissions from the parties were received on July 28, 2020.
12. On August 24, 2020, the Panel wrote to the parties, including the Intervenors, requesting further information. Final responses were received by August 27, 2020.

BACKGROUND

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

16 The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product⁴ 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.

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

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

15. Prior to this appeal, BCFIRB heard two previous appeals involving most of the same parties, and issued two major decisions, which provided direction to both K&M and the Turkey Board on matters directly related to this appeal.
16. In *K&M Farms v. BCTMB, 2018 (K&M (2018))*, BCFIRB affirmed the role of the Turkey Board in directing processing on behalf of growers in instances where market failure might otherwise be the result. In that case, K&M sought an order compelling Rosstown to continue to provide the processing services that it had

³ BC Reg 174/66 as amended to 2017.

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

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

provided K&M in the past. The panel in that case noted that the regulatory nature of the Scheme meant that the contractual relationships between a grower and a processor can be mitigated by the Turkey Board where the circumstances would otherwise result in a failure to provide a product for consumers that is otherwise in demand.

17. In *Rosstown Farms & Natural Foods v. BCTMB, 2020 (Rosstown (2020))* the Turkey Board applied the decision in *K&M(2018)* to effectively create a processing agreement between K&M and Rosstown for the 2019/2020 growing season. When the parties could not agree on a price for the services to be provided by Rosstown, the Turkey Board created its own pricing mechanism and that decision was appealed by Rosstown to BCFIRB. The panel in that case, dismissed Rosstown's appeal noting that the Turkey Board's decision accorded with the SAFETI principles for sound marketing policy. However, the panel was also clear that its decision and the previous decision in *K&M(2018)* were, for the most part, driven by the particular circumstances in those cases and that K&M should not need, and should not expect, to continue to seek regulatory intervention with respect to its processing needs.

18. 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. The panel in *K&M (2018)* stated:

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.

19. In *Rosstown (2020)*, BCFIRB reiterated the expectation that the Turkey Board set a strategic direction for the grower-vendor sector and encouraged K&M to continue adapting its business model to avoid the need for continued regulatory intervention by the Turkey Board. The panel in *Rosstown (2020)* stated:

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. Rosstown 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.

20. Following the *K&M* (2018) decision, the Turkey Board made the following determinations as set out at paragraph (8) of the *Rosstown* (2020) decision:
 1. A processor cannot cancel or terminate a “kill and chill” relationship with a self-marketer unless another viable option for the self-marketer exists.
 2. A processor must provide 2 full years notice to self-marketers if a “primal cut” service arrangement is to be terminated.
 3. Where the self-marketer and processor cannot reach agreement on pricing, the two parties are to hire an arbitrator to resolve the dispute. The arbitrator’s decision should remain in effect for a minimum of two years. In addition, the arbitrator should be empowered to make decisions on scheduling, packaging, transportation and other issues if the parties are unable to solve these issues.
21. This panel notes that the Turkey Board was the Respondent in both the *K&M*(2018) appeal and the *Rosstown*(2020) appeal. The Turkey Board’s initial decision not to compel processing services (*K&M*(2018)) was appealed by K&M and supported by Rosstown. The Turkey Board’s subsequent decision (*Rosstown*(2020)) to compel a processing agreement and in particular a pricing mechanism was appealed by Rosstown and supported by K&M. The current appeal sees the parties’ roles reversed again with the Turkey Board’s decision not to compel processing services as requested by K&M being appealed by K&M and supported by Rosstown. In short, this is not a case where the Turkey Board has demonstrated, nor is there any real allegation, of historical bias in the board’s decisions despite the fact that this is now the third appeal in three years between essentially the same parties.
22. In brief, K&M’s position in this appeal is that the Turkey Board has placed too much emphasis on direct market growers finding their own solution to processing. K&M argues that there is a power imbalance between growers and processors, which is a barrier to reaching effective long-term processing arrangements, and that while direct market growers are being asked to make every effort to cooperate and develop their business models, the Turkey Board is failing to require that processors give the same consideration to ensuring that grower-vendors have access to necessary services.

23. K&M takes the position that it made an adequate effort to find a processing solution for their 2020/21 production, and that, as a quota grower, it deserves the same assurances that other commercial growers receive for their long-term processing services. K&M further asserts that the Turkey Board failed to act when it was notified that Sofina had refused processing for K&M in January 2020, and the May 12 Decision refusing to direct custom processing for its Thanksgiving turkeys was not in the interest of sound marketing policy. In K&M's view, it effectively results in a market failure as it can no longer serve its market for heavy hens and specialty turkey parts.
24. In response, the Turkey Board submits that the May 12 Decision and May 22 Decision, are consistent with sound marketing policy and SAFETI principals. The Turkey Board argues that it would not have been in the best interest of the industry to direct Sofina to provide custom processing in the midst of the Covid-19 pandemic, particularly in light of the risk of a second wave arising in the fall. Further, the Turkey Board argues that K&M had other processing options available, but that it did not make any meaningful effort to negotiate before seeking regulatory intervention. Finally, the Turkey Board argues that the success of other grower-vendors in negotiating custom processing services indicates that regulatory intervention is unnecessary, but that this is the apparent business strategy being used by K&M Farms.
25. The Intervenors support the Turkey Board in this appeal.
26. The BC Chicken Marketing Board (**Chicken Board**) submits that it is generally inconsistent with sound marketing policy for a regulator to interpose itself in a commercial relationship between market participants over a long period of time. The Chicken Board supported the Turkey Board's cautious approach to directing processing in the context of the pressures caused by the COVID-19 pandemic on the poultry processing sector in British Columbia. The Chicken Board adds that while the objectives of promoting and supporting the development of niche markets is an important aspect of supply managed agriculture, the interests of an individual stakeholder must not be permitted to overwhelm what is sound marketing policy for the industry as a whole.
27. The Poultry Processors support the May 12 Decision and the May 20 Decision as "reasonable and consistent with sound marketing policy." They argue that increased regulations and shut-downs as a result of the COVID-19 pandemic have caused capacity constraints and increased costs for processors. Under these conditions, they agree with the Turkey Board that it would be reckless to direct custom processing at this time. The Poultry Processors further argue that K&M has had four years since Rosstown gave the notice required that it would no longer be able to provide processing services. In that time, K&M has failed to make changes or develop relationships with processors and has refused to meaningfully engage with processors or investigate alternative options.

ISSUES

28. Did the Turkey Board err in its May 12, 2020 decision not to direct a processor to provide custom slaughter and cut-up service to K&M Farms for the 2020-2021 quota year?
29. Did the Turkey Board err in its May 22, 2020 decision to deny K&M's scheduled poult placement and not make any further orders to direct a processor to provide custom services to K&M?
30. It is important to note prior to reviewing the evidence and submissions of the parties, that the scope of this appeal is narrow as defined by the issues set out above, and we echo the comments made by the panel in the *Rosstown(2020)* decision at paragraphs (128) and (129) to the effect that the overall circumstances in the turkey industry that have led in part to the current appeal will generally require the attention and efforts of the Turkey Board and the other industry participants as a whole to be resolved. We will have further comment below with respect to the obligations imposed on the Turkey Board in *K&M(2018)* to consult with stakeholders and create a work plan to address the long term issue of processing for owner-vendor producers. However, for the purposes of this appeal the panel has set its focus on the specific issues noted above in the specific circumstances in this case.

APPELLANT'S EVIDENCE AND SUBMISSIONS

31. K&M started growing turkeys in 2002. In an effort to produce a different product from what was already available in the market, K&M chose to focus on growing "heavy hens" (9 to 11Kg dressed) and to specialize in raising the birds outside (free range). In response to consumer demands, K&M started producing specialized turkey cuts, including roasts, breasts and ground turkey, as well as "turkey tenders", a product that can only be produced from heavy hens. K&M now sells 50% of its turkeys as parts.
32. K&M gave evidence that there is a growing demand for specialty turkey. It reported that the COVID-19 pandemic has resulted in a dramatic increase in sales, up 300% from March 2019 to March 2020. K&M sold out of its first fresh flock of chickens as well as turkey breasts, turkey tenders and turkey roasts by early May 2020.
33. K&M's submissions referred to a report prepared by Ron Bertrand and submitted to the Turkey Board (the "Bertrand Report"). The document is a response to the order made at paragraph (108) of the *K&M(2018)* decision to "undertake an industry assessment of grower-vendor direct marketing and establish a workplan."

34. As part of the industry assessment, the Turkey Board met with 18 direct marketers, six processors, six conventional producers and five retailers.

The number one issue communicated during the consultation meetings was the processing of large (greater than 10kg), specialty turkeys, especially during the holiday seasons. All commercial processors, for a variety of reasons, do not want to process these birds. **However, according to many self-marketers and retailers there is a strong demand for these birds and the market could be grown.** Although some self-marketers have constructed or are considering constructing on-farm processing facilities, others must rely on custom processing and will have to cease operation if they can no longer access these services. Under a supply managed system it is important to provide consumers with the products that they want. (Bertrand Report, p. 12)
35. K&M argues that the Turkey Board's decision not to direct K&M's turkeys to a processor and to effectively block production of heavy hens will "deny long-established niche market consumers access to the product they prefer," and is a failure of the Turkey Board's responsibility to ensure adequate processing services for direct marketers to supply niche markets.
36. K&M maintains that this appeal is not a COVID-19 issue. K&M is also a commercial chicken grower and provided invoices from its custom chicken processing showing that the cost of processing at that processor had not changed during the COVID-19 pandemic. On the matter of new protocols and regulations affecting the turkey processing sector as a result of COVID-19, K&M submits that "This is a challenge but not new to the processors. CFIA and Work Safe are ever changing, and improving, their requirements for processing."
37. Rosstown Farms provided K&M custom processing services (beyond chill and kill) from 2007 to 2015. K&M informed the Turkey Board in early January 2020 that Rosstown had declined to process K&M's turkeys for the 2020/2021 quota season. Sofina formally declined the Turkey Board invitation to process K&M Farms turkeys on May 8.
38. K&M argues that Rosstown should be required to provide custom processing services because the 2019 determinations of the Turkey Board that a processor cannot cancel or terminate a "kill and chill" relationship with a self-marketer unless another viable option for the self-marketer exists.
39. K&M argues that processors are over-stating the extra cost and business disruption for custom kill services. As an example, it submitted the comparative costs of processing their outdoor pasture-raised and barn-based free-range chicken, which are processed as heavy roasters (3.8kg live weight). Farm Fed processes both groups of chickens. The outdoor pasture raised chickens are custom processed, and the barn-based free-range chickens are sold to Farm Fed and then bought back by K&M, then labelled and sold directly by K&M to meat markets and restaurants.

40. Based on 2020 pricing from Farm Fed, K&M calculates the extra work around custom kill for the chickens as reflected in the gross margin the processor needs from custom kill (\$5.99/bird) compared to purchase and sell (\$5.19/bird). The maximum cost of custom kill over simply flock separation is \$.80/bird or \$1,500 for the June 5, 2020 flock.
41. K&M argues that the Turkey Board’s insistence that K&M arrange processing on their own is unreasonable since, “a main pillar of regulated marketing, and the issue on which the Turkey Board spends most of its time, is to manage the market power of the processor over the grower.” This is done by setting a floor price the processors must pay growers.
42. Prior to the appeal, K&M reached out to Rosssdown on January 7, 2020 and Sofina on January 6, 2020. K&M offered the following changes to its business to accommodate the needs of the processors:
 - a. K&M would grow a smaller hen (9kg) to process in August
 - b. K&M would grow a heavy hen (11kg) for Thanksgiving
 - c. K&M would remove toms from its request for primal cut-up, which it believes would reduce pressure on processing plants. According to K&M, “Taking the toms out of the requirement for primal cut-up means the processing plants would only be doing what they do processing other turkeys.”
43. K&M addressed the claims of the Turkey Board that it was being uncooperative, saying that it did not receive a proposal from the Turkey Board or processor to engage in any discussion before the pre-hearing conference call on this appeal in May 2020.
44. Following the pre-hearing conference call, Rosssdown sent K&M an offer to process that did not include ‘primal cut’, limited the size of turkeys to under 11kg live weight, and included provisions for additional service charges based on delays or damage as a result of custom processing. Pricing for the proposal was higher than the proposed rate increases that were the focus of the Turkey Board’s 2019 May Pricing Decision, and FIRB’s *Rosssdown (2020)* decision.
45. The pricing suggested is compared below to previous years and Rosssdown’s proposed 2019 pricing:

Services	Rosssdown 2017 Actual	Rosssdown 2018 Actual	Turkey Board Direction 2019	Rosssdown 2019 Proposal	Rosssdown ** June 2020 proposal
Kill & Chill	\$6.00	\$8.00	\$8.22	\$12.00	\$13.00
Bagging	\$1.50	\$1.75	\$1.80	\$2.75	\$3.00
Primal Cut	\$1.85	NA	\$2.31	\$14.00	Na
Pallet Fee	\$11.00	\$14.00	\$14.38	\$20.00	\$20
Hauling Fee	\$250	\$375	\$385.13	\$450	\$450
Catching fee/bird	\$.40	\$.45	\$.46	\$.68	\$.68

46. K&M replied to Rosssdown on June 17, 2020 with a counteroffer for processing of birds in August at a weight of 10kg, and October at a target weight of 12.5kg. The suggested pricing as follows:
 - Kill & Chill: \$8.00/bird (\$9.00 for heavy hens)
 - Bagging: \$1.50/bird
 - Primal cut: \$2.50/bird
 - Pallet fee: \$15/pallet
 - Hauling fee: \$450
 - Catching fee: \$0.46/bird
47. K&M suggested that if Rosssdown could not provide cut-up services, that Rosssdown could provide three qualified staff for two days to provide cut-up services at K&M's facility.
48. Rosssdown declined K&M's June 17, 2020 proposal.
49. K&M reached out to Sofina on June 7, 2020. They responded on June 22, indicating that they had no interest in doing custom processing at this time.
50. Regarding 'primal cut', K&M says that there are no options for this service. Small butcher shops have discontinued the service of custom cutups for small permit growers.
51. K&M has expanded the cut up and packaging area in their farm store. It cuts and wraps its own chicken parts, but say that "finding staff with the physical strength and experience to cut up 20-24 lb turkeys for two days a time twice a year is not possible." K&M argues that "processing plants do primal cut as part of the normal processing process. It makes sense that they continue to do it."
52. In response to the panel's request for additional information, K&M provided the following information:
 - K&M did not find custom processing for its August turkeys that would accommodate heavy hens or provide primal cut-up. It sold their turkey to Superior and will not have turkey products available for their customers in 2020.
 - A trial run of 10 birds was completed in August 2020 with FVSP that did not produce satisfactory results.
 - K&M was not able to arrange processing for its Thanksgiving turkeys (the placement that was cancelled on May 26) as part of the Turkey Board's requirement for a new grower agreement before placement. As a result, no poults were placed for Thanksgiving market.

- K&M suggested that part of year could be salvaged if the Turkey Board helped arrange for K&M to buy 6-week-old turkeys from another grower and help arrange processing close to Christmas.
53. On the matter of pricing, K&M submits that processing is 40% cost of production. Rosstown's 2020 proposal was 65% higher than the 2019 Board rate. FVSP rate is almost 250% higher than 2019 Board rates.
 54. According to K&M's calculations, processing increases from Rosstown would result in 13% price increase to consumers, or 0.50/lb for whole turkey and 0.75/lb for parts.
 55. K&M aims to price its specialty turkey between mainstream and certified organic product. They compete with JD Farms and Skye Hi Farms. K&M claims that these operations have processing costs similar to the Turkey Board 2019 rates for custom processing that were the subject of the *Rosstown(2020)* decision.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

56. General Manager, Michel Benoit, provided a sworn affidavit on behalf of the Turkey Board, which formed the primary testimony of the respondent.
57. The Turkey Board provided into evidence a copy of the Bertrand Report to address BCFIRB's direction in *K&M(2018)* to "undertake an industry assessment of grower-vendor direct marketing and establish a workplan." The Bertrand Report concludes with the recommendation of an augmented role for the Turkey Board as follows:

[The Augmented Role] best accords with the responses received during the consultation process and the directives from BCFIRB. It recognizes that the expertise for market identification and development resides with individual self-marketers and processors. It also emphasizes the need for the TMB to ensure, to the extent possible, that contractual arrangements between producers and processors provide security to producers while at the same time allowing processors to evolve their businesses. It also recognizes that the availability of custom processing for specialty turkeys is on the decline and may become less and less available in the future. One of the options that all self-marketers must consider is non-conventional processing such as constructing on-site facilities, working with local butcher shops and mobile processing. Finally, the TMB needs to support current relationships between self-marketers and their processors and consider grandfathering those relationships for a period of time or until another viable option can be found.
58. Mr. Benoit says the Turkey Board was working on developing a workplan until those efforts were disrupted by the onset of the COVID-19 crisis.
59. Prior to May 12 Decision, Mr. Benoit states that the Turkey Board engaged K&M regarding their processing needs in a conference call in April, and through a series of emails after the call. The Turkey Board encouraged K&M "to continue looking at

other alternatives for [its] processing needs as we move through unknown territory with COVID-19.”

60. By a letter dated April 29, 2020, K&M demanded that the Turkey Board direct either Rosstown or Sofina to provide custom processing services for a minimum of 5 years.
61. The Turkey Board asked Rosstown to respond to K&M's demand. It replied to the Turkey Board as follows:

Rosstown and the poultry industry in general, are working in unprecedented times with COVID-19 and we recognize custom processing is necessary, but the well documented challenges we faced last year have not gone away and COVID-19 has only created additional pressure on our ability to provide custom kill services. Our plant and staff are under extreme pressure and stress to keep the poultry flowing through our processing facility and we have had to overcome many hurdles to stay operating, which has come at a significant increase in cost and also the uncertainty of whether or not we have our CFIA Inspectors there to keep our facility open and operational. There are ongoing industry discussions [sic] regarding mercy killing because of the processing demand and the decreased processing capacity.

With so many unknown factors under our new COVID-19 environment we cannot commit to any custom processing for the 2020/2021 quota year at this time.

Conditionally if we find that we can provide these services for the requested slaughter dates the following terms apply:

1. We have to charge based on the custom kill fees proposed in 2019 plus a 15% increase to recover a portion of our extra costs due to working in this COVID-19 era. Payment will be required in full prior to slaughter.
2. We will require payment in full for the outstanding Accounts Receivable for the last year's services rendered prior to slaughter. These additional charges arose from K&M shipping very large birds which created breakdowns and down time. We have been very clear in our past correspondence that we cannot receive birds larger than 11 kg live weight. And the last custom processing the average weight shipped was 12 kg which means we had birds ranging from 13-15 kg.
3. We will not process any birds larger than 11 kgs and if the flock arrives at the plant with weights above 11 kgs it will be returned to the grower without penalty.
4. We will not be providing any cutup or deboning services for K&M Poultry. We gave them the regulated 2 years notice that we would be discontinuing these services in 2018.

62. The Turkey Board asked Sofina to respond to K&M's demand that custom processing services be directed for a minimum of 5 years. It responded by letter on May 8, 2020 as follows:

Thank you for the opportunity to provide input into custom processing requests. As you can imagine, COVID 19 has taken all our resources and capacity at this time. There is no additional room for current processing needs let alone additional custom processing requests.

CFIA and labour restriction have made it all but impossible to have additional requests at this time and for some time in the future. Processors are working hard to meet current demand as well as the challenges from processor plant shut downs.

As you are also aware, these challenges have reduced capacity and I would stress strongly that custom processing requests are extremely difficult. This is more difficult with the smaller quantities of birds as segregation given that we have to jump through the same QA & regulatory hoops for 300 birds as we do for 10,000. The difficulty is further amplified if we have to do anything more than kill and chill. Finally, in circumstances such as COVID when we cannot get employees to stay long enough on OT to get our own work, this is even more onerous than it appears to those people and agencies that do not actually operate a food processing plant.

Not to be missed, I don't think there was enough acknowledgement of exactly how difficult the ask is for a plant. This ask is coming at a time and with no understanding that they have absolutely no risk or responsibility in the food safe processing of turkeys.

At this time, there is no possibility capacity and labour wise that would allow for this to occur. Additionally, the risk is not acceptable to ask employees to work OT for custom processing when we need them to be healthy and safe for the work that is already in place.

63. On May 12, 2020 the Turkey Board wrote to K&M with the decision to deny its request for an order directing custom processing services for a minimum of 5 years (reproduced at paragraph (4) above). The Turkey Board noted that "The decision was made having regard to the significant impact of the COVID-19 crisis on the processing sector, as well as the fact that K&M was not precluded from trying to make its own suitable arrangements with a processor." Their decision included the following caveat:

"We are unable at this time to consider this request. We will attempt to consider and respond to your request once we have a clear picture of the long-term impacts of COVID-19 on turkey production in BC."

64. On May 22, 2020 the Turkey Board wrote to K&M with supplementary decisions to those made on May 12, 2020 (reproduced at paragraph (6) above). The supplementary decisions were driven by the Turkey Board's realization that K&M was significantly over-produced, and that their proposed grower program was "fundamentally irreconcilable with the decision of May 12, 2020 insofar as it would result in turkeys that could only be processed by Sofina."
65. The Turkey Board argues that when K&M made the demand for custom processing to be directed for a minimum of 5 years, that they had "not fully explored options for custom processing or engaged in any meaningful attempt to negotiate a mutually acceptable solution."
66. On May 31, 2020, the Turkey Board wrote to K&M to offer assistance with respect to K&M's overproduction issues and to encourage it to pursue processing opportunities without Board intervention. In the letter the Turkey Board:
 - a. Offered to assist in finding suitable leases to cover K&M's overproduction;

- b. Reminded K&M that a new grower program with suitable poult placement, processor and slaughter dates are required before any new poult placements will be authorized;
 - c. Suggested that K&M explore processing options with Fraser Valley Specialty Poultry (FVSP), Rosstown and Farm Fed.
67. The Turkey Board asserts that Rosstown's offer and pricing proposal to K&M for custom processing constitutes a willingness to provide service. In an email dated June 10, 2020, the Turkey Board reiterated their position regarding Rosstown and inquired about K&M's efforts to engage with Farm Fed and FVSP.
68. K&M responded by email on June 10, 2020 indicating that Rosstown's offer was unacceptable, and that it was unwilling to work with FVSP because K&M had a negative experience with FVSP processing its chickens in 2016.
69. The Turkey Board produced an extensive record of email correspondence with K&M through the months of June regarding different processor options, culminating in an email to K&M on June 29, 2020 that states:
- "We have been engaged and we believe that we have met the threshold of your expectations outlined above. Self-Marketers enjoy the benefits of being a Self-Marketers. They also have to assume the risks of being a Self-Marketer. We believe that a fair offer has been made by Rosstown and other options such as FVSP remain unexplored. Also, your representation of our involvement with commercial growers is inaccurate. Their relationship is primarily with the processors. We set live price and approve their grower program and very little else is required from the Board. We do not set catching cost or scheduling of shipment or poult scheduling or bird sizes... All that is negotiated among the parties."
70. The Turkey Board refutes the claims in Appellants submissions in response to additional questions from the panel:
- It's true that custom processing was not available on the same terms as it was in the past, but K&M had offers from Rosstown and FVSP.
 - The Turkey Board also identified a new abattoir in Langley that could have slaughtered K&M's turkey for \$12/bird.
 - FVSP was willing to process heavy hens.
71. With regards to the FVSP trial run that was conducted in August 2020, the Turkey Board notes that K&M did not talk to the General Manager of FVSP about the quality issues that K&M claims to have occurred during the trial run at FVSP.
72. In an email to the Turkey Board, Ken Falk of FVSP describes in detail the process and equipment temperatures during the trial run. He admitted that the plant had had some issues with their sealing machine, and that was partly why they wanted

to do the trial. His letter closes with the following:

“We would have appreciated feedback from Mr. Robbins on this directly so we could work with him on this to improve for the future.

Unfortunately I feel that Mr. Robbins is just using as a pawn to win his battle at any cost. Even though we do currently have the capacity with the new equipment we will be less inclined to deal with Mr. Robbins in the future based on how we have been treated.”

73. In the context of the Turkey Board’s industry assessment of grower-vendor direct marketing conducted in 2019, the Turkey Board spoke with other self-marketers who described how they had invested their own time, effort and capital in order to develop their business. It reports that “one grower processed his turkeys on his farm last year when he found out that his processor could not process his heavy hens. Another arranged a crew and rented an abattoir in order to slaughter their turkeys for themselves. Yet another grower has shipping crates transported to Vancouver Island where he loads his turkeys for transport to the Fraser Valley for processing so that they can be brought back to Vancouver Island for sale.”
74. The Turkey Board argues that, instead of investing time, effort and capital into developing its business like other self-marketers, K&M has focused on trying to secure regulatory intervention.
75. The Turkey Board refutes K&M’s claim that “The other counter intuitive aspect of selling commercially is that the commercial market is shrinking, and the niche markets are under supplied.” The Turkey Board reports instead that niche production capacity is routinely used to produce commercial turkeys in order to keep the specialty market in balance.
76. In response to the panel’s question as to whether the Turkey Board had proposed third-party mediation, the Board replied: “The Turkey Board did not propose third party mediation in its submissions on this appeal. The concept was merely explored in the Turkey Board’s consultation process. In that context, the Turkey Board contacted the BC International Commercial Arbitration Centre (BC ICAC) and discovered that there was very little support for mediation in this context. Furthermore, mediation is only effective when there are two parties willing to negotiate in good faith.”

SUBMISSIONS OF THE INTERVENERS

BC CHICKEN MARKETING BOARD

77. The Chicken Board was granted intervener status on this appeal as it was on the Rosstown(2020) appeal.

78. In summary, the position of the Chicken Board on this appeal is as follows:
- a. The approach taken by the Turkey Board in declining K&M's request for long-term direction to a processor at a price that appears to be significantly below market price is consistent with sound marketing policy
 - b. Particular consideration should be given to the current state of emergency arising from the global COVID-19 pandemic.
 - c. It is generally inconsistent with sound marketing policy for a regulator to interpose itself in a commercial relationship between market participants over a long period of time.
79. By way of background, the Chicken Board provided information on two earlier appeals by K&M on similar matters.
80. In March 2018, K&M filed two appeals from decisions of the Chicken Board, one to the March 5, 2018 decision not to permit K&M to annualize its pasture-raised bird production from May until October (the "Chicken Annualization Appeal"), and the other appealing the March 23, 2018 decision of the Chicken Board not to direct Rosstown to continue processing service to K&M (the "Chicken Processing Appeal"). Both appeals were heard in June 2018.
81. The Chicken Processing Appeal was withdrawn before a decision was rendered by BCFIRB because K&M had successfully negotiated its own solution for custom processing. The Chicken Board sought costs from K&M for the hearing on the basis that the negotiated solution was one of several options for processing that K&M had failed to explore prior to filing the appeals. The appeal was denied. In a letter from BCFIRB on July 9, 2018 re: Appeal 1803 Mark Robbins DBA K&M Farms v BC Chicken Marketing Board – Dismissal Order, the panel noted several options that K&M could have pursued prior to the appeal, concluding that:
- "The evidence was that none of these options had been explored by K&M and each or a combination of these options might have provided cut up services without the need for the direction of the Chicken Board or the appeal from the decision not to accede to its request."
82. The Chicken Board suggests that materials filed by K&M in this case suggest that the current situation with respect to the processing of K&M's turkeys is not one in which there are no processing services available to them but rather one in which K&M is not prepared to agree to the terms on which the processors would be prepared to provide those services, including with respect to the issue of price.
83. The Chicken Board observes that, "while K&M's position in the prior appeals seems to have been that the niche it served was for pasture-raised poultry including pieces, their position on this appeal is that their niche is "larger birds (9 to 11kg dressed) and to specialize in raising the birds outside." They note that there is no evidence that the market for turkey parts is necessarily connected to the size

of the turkey, and that it is unclear how the niche market for parts would be impacted if K&M could not grow larger birds.

84. With regards to the role of marketing boards to support niche producers, the Chicken Board states: "...it is important to consider the specific niche served and any intervention necessary should be tailored to supporting the grower in meeting the specific requirements of that niche, rather than the grower's preference for their business model more generally." It further affirmed its position that "All industry participants, including those producers who serve a niche market, have the responsibility to develop their own viable business plans and to conduct their operations in a manner that does not require the constant intervention and attention of the marketing boards as first instance regulators."
85. The Chicken board further submits that it is also appropriate for marketing boards to consider the particular stresses that the COVID-19 pandemic and emergency response is placing on processors in terms of risk to their employees, increased absenteeism and difficulty keeping staffing levels and slowdowns on the lines to accommodate social distancing and appropriate protective equipment for employees.
86. The Chicken Board cited recent experiences with chicken processor closures following outbreaks of COVID-19 and supported the Turkey Board's consideration of the impact of COVID-19 on the availability of processing facilities and the potential impact of closures as well operational impact of the emergency response before directing product to a processor.
87. Overall, the Chicken Board recommends a "cautious approach" to intervening in long-term commercial relationships between industry stakeholders and characterized K&M's request for an order that would last 5 years as a long-term intervention.
88. The Chicken Board submits that inclusivity (the I in SAFETI) is an important consideration in this decision, as sound marketing policy requires the boards and commission to be inclusive in considering the impact of all potentially affected stakeholders, including the public, when rendering a decision.

PRIMARY POULTRY PROCESSORS OF BRITISH COLUMBIA

89. The position of the Poultry Processors is that the May 12 Decision and the May 22 Decision of the Turkey Board were reasonable and consistent with sound marketing policy. Specifically, the Poultry Processors raise two issues stated in their submissions as follows:
 - (a) K&M Farms has misinterpreted the *K&M 2018* decision and relied on the extraordinary regulatory powers of the Turkey Board and the BCFIRB to

negate any meaningful engagement in negotiating mutually beneficial custom processing terms with the processors; and

- (b) Due to the COVID-19 pandemic, and increased regulations and outbreak shut-downs, the processors are experiencing capacity constraints and increased costs. Under such conditions, we agree with the Turkey Board that it would be reckless to direct custom processing at this time.

- 90. The Poultry Processors note that the turkey industry has been well served by a longstanding history of building good working and mutually beneficial relationships between growers and processors. K&M has had four (4) years since first being informed by Rosstown that it would no longer be able to provide processing services to make changes or develop new, mutually beneficial, partnerships. Despite increased revenue to its business, the Poultry Processors submit that K&M has refused to meaningfully engage with processors or investigate alternative options.
- 91. The Poultry Processors summarize K&M's efforts to locate a processor for the 2020/2021 quota year as "sending a few emails" and then relying on the Turkey Board and ultimately BCFIRB to compel processing. The Poultry Processors further submit that K&M has in fact made negligible efforts to help themselves since the issue first arose in 2016 and that it would be unfair to force Rosstown to continue to provide services that were terminated by notice in 2016, and at rates that would cause Rosstown to operate at a loss.
- 92. The Poultry Processors state that, since *K&M(2018)*, K&M has deliberately frustrated negotiations with processors and used the Turkey Board and BCFIRB as tools for its contractual negotiations. They say that K&M has "adopted increasingly strident views" and that the approach of BCFIRB and the Turkey Board to assist K&M has "led to a reliance on these extraordinary regulatory powers to resolve issues which, to date, have always managed to be negotiated by others in the industry."
- 93. The Poultry Processors' submission cites the Bertrand Report, in which 36 producers from 23 different organizations, largely consisting of growers and producers in the turkey industry were interviewed. His conclusion was that K&M's position was not shared by other producers and processors:
 - "... It was stressed during a number of the sessions that the issue was a disagreement between a small self-marketer and a processor and that there has never, heretofore, been a situation where a producer and a processor have not been able to work out disagreements between themselves. The disagreement between K&M and Rosstown should not have resulted in the historic role of the TMB being changed in any significant way. To sum up the views of a number of those consulted with, there was no point in making a 'mountain out of a molehill'".

94. The Poultry Processors note that K&M is enjoying increased revenue and profitability from products, particularly with the shift to more cut and processed products. However, instead of working with processors to negotiate price, K&M are insisting on assistance from the Turkey Board and BCFIRB to improve its competitive advantage.
95. The Poultry Processors argue that the fear in the industry is that, if the Turkey Board and BCFIRB continue to step in and direct processors to extend contracts, after providing the requisite two years' notice, processors will either stop entering into custom kill contracts for fear of being compelled to extend the contract, or significantly increase the new entrant fees to ameliorate this risk. They note that based on the pricing from FVSP and Rosstown, this has already started to occur as a result of the *K&M(2018)* decision.
96. The Poultry Processors further note that since *K&M(2018)*, some processors are already reluctant to enter into custom kill contracts out of fear that such contracts will be extended indefinitely by regulatory order. They suggest that this fear will be exacerbated should the BCFIRB assist K&M for a third time in as many years.
97. The Poultry Processors are also concerned about the larger implications of the Turkey Board and the BCFIRB routinely stepping in to regulate matters and direct processing. They argue that the precedent created may lead to a new business model whereby other poultry growers fail to comply with the General Orders and Regulations and refuse to cooperate with other members of the poultry industry in an effort to force regulatory intervention.
98. The Poultry Processors argue that the assistance to K&M has proven ineffective in resolving the issue to date and would therefore fail the "E" (Effective) requirement of the SAFETI principles for sound marketing.
99. With regards to K&M's relationship with Rosstown, the Poultry Processors offer the following context:
 - Rosstown informed K&M in 2016 that it would not be able to continue primal cut services in the future.
 - K&M took its chicken production to another processor in 2017
 - Rosstown has installed new equipment that is best able to process birds of uniform flock size with a maximum weight of 11kg.
 - Rosstown's decision to cancel custom-kill services was not specific to K&M. In April 2019, Rosstown cancelled another large custom kill contract for heavy tom turkey with another customer they had been working with since 2007.
 - Rosstown has decreased their custom kills services from 25% in the beginning to 0.5% today in order to focus on their own branded business

100. The Poultry Processors submit that processing turkeys greater than 11kg (Oversized Turkeys) leads to increased processing time and breakage of the processing equipment. To illustrate their point, they note that, following the *K&M* (2018) decision, Rosstown was directed to process K&M's Oversized Turkeys. The result was that the line speed needed to be slowed down by 44 minutes to deal with increased contamination and stopped altogether for another 54 minutes to repair a line break caused by the size and weight of the Oversized Turkeys.
101. At that time, Rosstown invoiced K&M Farms \$4,764.27 to try and recoup some of its losses. At the time of the Poultry Processors submission, K&M had refused to pay for the excess time and equipment damage caused by processing its Oversized Turkeys in 2019.
102. The Poultry Processors say the capacity for poultry processing is strained by the impacts of COVID-19, including increased facility shutdowns because of outbreaks, absenteeism, slower line speeds, new physical distancing, employee screening protocols, and restrictions and requirements from WorkSafe, health authorities and the Canadian Food Inspection Agency. They submit that the additional direct costs as result of the COVID-19 pandemic include: increased PPE, plexi-glass separators for workstations, temperature monitoring, compliance labour, additional employee welfare space (lunchrooms, locker rooms) as well as increased sanitation costs during operating shifts.
103. The Poultry Processors note that the additional costs related to COVID-19 protocols cannot be passed on to commercial producers because the price for live turkeys is set by the Turkey Board. Processors either recover increased costs in the selling price for their turkeys or they are absorbed by processor. However, in custom processing situations processors cannot recover their increased costs in the marketplace so the self-marketer is required to cover those costs. These costs are expected to continue for the foreseeable future.
104. At the time of the Poultry Processors' submission, three poultry processing plants in British Columbia closed at one time due to COVID-19 outbreaks. These closures required Sofina to process turkeys usually managed by other plants and contributed to Sofina's reduced capacity for custom processing and increased labour and operating costs.
105. Hallmark Poultry Processors (Hallmark) was one of the poultry processors that experienced shutdowns due to COVID-19. It contacted Sofina to provide custom kill services for their turkeys. Sofina advised that it could slaughter the turkeys but could not freeze or store them. Sofina and Hallmark developed a plan for Hallmark to pick up the slaughtered turkeys and transport them to a third party for freezing and storage. Additional flocks were killed by Sofina and then shipped back to Hallmark for cut up and processing services. All of this occurred without regulatory intervention.

106. The Poultry Processors state that efforts like the ones between Hallmark, Sofina and the other processors, represent typical relationships between stakeholders in the value chain, where the parties work together to ensure there are no market failures. They maintain that K&M has not exhibited any such efforts to secure processing.
107. The Poultry Processors agree with the Turkey Board that the added difficulties and cost implications imposed by COVID-19 make an order compelling Rosstown to process Oversized Turkeys, at the peril of its equipment and employees, reckless and inconsistent with sound marketing policies. They ask that the appeal be dismissed.
108. Regarding the processing of August turkeys, the Poultry Processors take the position that K&M had options available, including Rosstown and FVSP, but that K&M is looking for Turkey Board to direct services at “prices that are not sustainable for processors.”
109. On the matter of product pricing the Poultry Processors provided the following summary:

It appears that K&M Farms is looking for preferential processing arrangements that allows them to undercut the marketplace. A review of on-line pricing comparing K&M Farms pricing with JD Farms and others shows K&M to be \$0.25 - \$0.64 per pound cheaper than JD Farms. As well, a distributor for K&M Farms is marketing their fresh whole bird turkeys for \$6.14 per pound compared to \$4.75 per pound on K&M's price list. K&M Farms roast products are also priced anywhere between \$4.05 - \$5.04 per pound cheaper than JD Farms. In fact, K&M Farms turkey roasts are priced at \$7.95 per pound while fresh “supermarket turkey” roasts are priced at \$8.20 per pound. K&M Farms is not capturing the value they say they are creating for their customers, is simply selling on price and expects the processors to subsidize them for competitive advantage.

ANALYSIS AND DISCUSSION

110. K&M argues that the Turkey Board erred by refusing to direct custom processing and primal cut-up for its heavy hens and toms for the 2020/2021 quota year. K&M submits that, regardless of the COVID-19 pandemic, the Turkey Board has the legislative authority and responsibility to direct processing to protect against market failure.
111. In response, the Turkey Board argues that the COVID-19 pandemic put significant pressure on processors such that directing custom processing would create unnecessary risks when other processing solutions were available to K&M. The Turkey Board further submits that K&M has had options and opportunities to engage with processors for the 2020/2021 quota year and that the failure to secure processing is as a result of the decisions made by K&M.

112. BCFIRB's role in this appeal is to determine whether the May 12 Decision and the May 22 Decision accord with sound marketing taking into consideration all of the circumstances that are particular to this appeal.

The May 12, 2020 Decision and the May 22, 2020 Decision

113. The May 12 Decision arose as result of the request made by K&M that the Turkey Board compel a processor to provide processing services to K&M for five years at prices based on the mechanism previously used by the Turkey Board for the 2019/2020 quota year. The Turkey Board provided that request to Sofina and Rosssdown and neither processor was willing to enter into a processing agreement with K&M on that basis.
114. The May 22 Decision to deny K&M's scheduled placement of poults was supplemental to the May 12 Decision and arose as a result of the Turkey Board realizing that K&M's proposed grower program could not be reconciled with the May 12 Decision.
115. The initial circumstances of this appeal are very similar to those in the *K&M(2018)*. In that case the panel ultimately decided that in instances where market failure might otherwise arise, the Turkey Board could and should intervene to compel arrangements between producers and processors to avoid such failure.
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.
116. Regulatory interventions were not expected to become the norm for the industry but were rather conditioned on unique circumstances. In their analysis, the *K&M(2018)* panel specifies "that all parties including K&M will cooperate with the Turkey Board in this process"(paragraph 107) to alleviate need for regulatory intervention in the future.
117. Given the initial factual similarities between this appeal and the *K&M(2018)* appeal, the panel in this case has to consider whether circumstances exist in 2020 that did not exist in 2018 and that would result in a different assessment of the May 12 Decision in terms of sound marketing than might otherwise be the case. If it were the case that circumstances had not changed in any meaningful way between 2018 and 2020 then there would not be much to inform the panel in terms of deviating from the decision made in *K&M(2018)*.

118. Clearly, circumstances have changed. In the first instance, the panel cannot avoid the fact that the COVID-19 pandemic has affected the turkey industry. Secondly, the panel notes that three growing years have passed since the first impasse arose between K&M and Rosstown and in that time a significant amount of time and energy has been expended by the parties arguing the regulatory effects of the *K&M(2018)* decision, however the parties may in fact be further apart than when the process began. Finally, the request made by K&M in this case is significantly more expansive than was the case in the *K&M(2018)* appeal.
119. With respect to the COVID-19 pandemic, K&M disputes that COVID-19 is the real reason that the Turkey Board refused to order processing. K&M maintains that the processing sector is faced with continually evolving health and safety requirements and regulations, and that the additional costs to the processors in terms of dealing with the pandemic are simply part of doing business for processors.
120. Further, K&M maintains that their pre and post COVID-19 processing costs for chicken processing, and their costs to buy back their chickens from processors, have not changed. However, the panel was not provided with any evidence with respect to the interrelationship between the costs for custom processing chicken and the costs for custom processing turkey so the comparison made by K&M is of limited value in determining the net impact of COVID-19 on turkey processors.
121. The submissions of the Turkey Board and the intervenors provide a broader context for the impact of ordering custom processing to a major turkey processor at a time when outbreaks of COVID-19 are putting pressure on labour resources and resulting in plant closures in the province.
122. The panel accepts the evidence of the Turkey Board and intervenors. Particularly compelling was the evidence of Hallmark's emergency processing arrangement with Sofina following an outbreak in the spring that shut down other processors, as an example of why it is prudent to maintain capacity in the system to be able to manage these kinds of emergencies. The pandemic is a global crisis and inevitably affects all aspects of industry and society. The panel does not accept K&M's characterization of the COVID-19 pandemic as mere matter of updating health and safety protocols along the lines of the changes that otherwise regularly occur in the industry. The pandemic is a unique and overriding circumstance that cannot be avoided in assessing the reasonableness of the Decisions.
123. The Turkey Board and Poultry Processors provided evidence that processing heavy turkeys strains processing equipment and increases the likelihood of damage at a time when plant capacity may be critical to the overall supply of turkey in the province.
124. The panel sought clarification from the Poultry Processors regarding specific costs related to dealing with COVID-19 and received lists of cost items which the panel finds are reasonable in the circumstances. We further accept that many of the

COVID-19 related costs will remain in order to protect employees and keep plants open but expect that further analysis and accounting will shed more light on the magnitude of these costs going forward which can factor into discussions and negotiations between growers, processors and marketers. However, at the time that the Turkey Board made the May 12 Decision, it was in the early days of the pandemic and at that time it needed to rely on the best information that it could obtain from processors and its general perception of the manner in which events could unfold over time for the industry.

125. At the time of writing of this decision, processing plants in BC are still being affected by COVID-19 outbreaks and the number of cases is increasing rapidly daily. Ordering custom processing in the uncertainty of COVID-19 would pose a risk to orderly marketing, with potential impacts on all poultry processors.
126. The Turkey Board has a responsibility to all quota holders to ensure orderly marketing and access to the supply chain. Given the plant closures during Spring 2020, and predictions of a second wave of infection in the Fall, the panel finds that the Turkey Board acted responsibly in its May 12 Decision and did not err in its decision to refuse to order custom processing for K&M's turkeys in the overriding circumstances of the COVID-19 pandemic. Given that finding, it follows that the May 22 Decision which was supplemental to the May 12 Decision was also reasonable as until such time as a processor was in place that could handle the turkey to be produced by K&M, the placement of further poultts did not make sense until a processor was in a position to handle the turkeys produced by K&M..
127. Both parties to this appeal provided extensive email correspondence in their submissions documenting their efforts to find a solution to the issues surrounding the May 12 and May 22 Decisions. In both cases, the bulk of the submissions in fact covered the period of time following the filing of the appeals. As noted above, beyond the unanticipated change in circumstances associated with COVID-19, the other significant change in circumstances from the *K&M(2018)* and the current appeal is that the parties have had approximately three years to work towards a reasonable solution with the guidance provided by BCFIRB.

128. In the *Rosstown(2020)* at paragraph (105) the panel stated:

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)). (emphasis added)

129. It is the expectation of this Panel and BCFIRB that all possible options for resolution will be explored before these matters are brought to appeal. This has not been the case in the matter before us. Furthermore, this Panel is concerned that this history of appeals by K&M from decisions made by both the Turkey Board and the Chicken Board demonstrates an unwillingness to effectively co-operate with other industry stakeholders. We note the comments in the Bertrand Report to the effect that other producers in similar circumstances were clear that K&M's concerns were not consistent with other producer's experiences, that the position of the Turkey Board was being distorted and that the whole process had created a 'mountain out of a mole hill'.
130. This Panel finds that K&M did not engage in ongoing meaningful correspondence with the Turkey Board and other processors until June and July 2020 when it was apparent in January 2020 that there were going to be issues in obtaining processing services. K&M's general pattern of behaviour does not support its claim that it is making a sincere effort to find and negotiate a solution on their own. Instead, it that appears to the panel that K&M is using the FIRB appeal system to try to force a processing solution in place of legitimate efforts to seek agreement with a processor.
131. The evidence supports the claims by the Turkey Board and the Poultry Processors that there were options for custom processing for K&M. The matter is not one of whether or not processing capacity is available, but how K&M's business model – both in terms of pricing and product – can be made compatible with the services available for custom processing.
132. The Panel is satisfied that the Turkey Board was responsive and engaged in the process of coming to the May 12, 2020 and May 22 Decisions and continued to attempt to seek resolutions after the appeals were filed of those decisions. The evidence before the Panel included extensive correspondence showing that the Turkey Board actively offered direction and assistance to K&M in the months following the filing of the appeals.
133. The circumstances in this case thereby differ from the circumstances in *K&M*(2018) wherein the Turkey Board's refusal to impose a processing arrangement on Rosstown was not arrived at after a lengthy engagement with K&M. In this instance, the evidence shows that the Turkey Board has engaged with K&M to the point of enforcing a processing agreement and a pricing mechanism on Rosstown in 2019 that required an appeal to BFIRB to enforce. The Turkey Board has further engaged with K&M repeatedly and in good faith to try to resolve its processing issues without resorting to mandating contractual terms onto processors that are otherwise able to work with other similar producers. In terms of its direct relationship with K&M, the evidence shows that Turkey Board has followed the *K&M*(2018) decision, but that the intervention of COVID-19 and

the unwillingness of K&M to work effectively towards a resolution have resulted in the current situation where K&M is seemingly content to wait for BCFIRB to intervene again on its behalf to impose terms on a processor.

134. The final significant change in circumstances from the *K&M(2018)* decision, may arise from this expectation of intervention. K&M's initial request, and its Notice of Appeal in this matter, set out its expectation that a processor agreement should be imposed for five years, based on the pricing mechanism described in the *Rosstown(2020)* decision. This is a far greater intervention than was previously imposed by BCFIRB in either the *K&M(2018)* decision or the *Rosstown(2020)* decision.
135. As noted in *Rosstown(2020)* at paragraphs (104) and (105), the decisions made by BCFIRB to intervene in the contractual relationships between producers and processors are inherently interim in nature and the ultimate resolution of these issues will need to be developed by the Turkey Board in consultation with the turkey industry as a whole to develop a work plan as required by the panel in the *K&M(2018)* decision (more on that issue below).
136. For an intervention of the nature that K&M is seeking to be warranted in the circumstances, K&M would need to demonstrate that it had worked effectively and co-operatively with the Turkey Board and processors to find a mutually beneficial resolution to its processing needs and that no other significant circumstances existed to advise against such a significant intervention. In fact, as noted above, the evidence demonstrates that the opposite is in fact the case.
137. Furthermore, this Panel is concerned that the net effect on the turkey industry as a whole of the *K&M(2018)* decision, in light of COVID-19 and the economic uncertainty inherent in a pandemic, without further clarity, may lead to some of the negative effects described by the intervenors in terms of the unwillingness of processors to engage in custom services at all, and the potential disregard in the industry for the general orders and decisions of the marketing boards going forward.
138. As such, K&M's request for the Turkey Board to impose a five-year regulatory settlement on a processor (*Rosstown* or *Sofina*) was unreasonable in the circumstances generally, and in particular in light of the COVID-19 pandemic.
139. Based on the findings above this Panel has reviewed the May 12 Decision and the May 22 Decision in terms of the SAFETI principles for sound marketing and finds as follows:⁶

⁶ The SAFETI acronym refers to "Strategic" (identify key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities), "Accountable" (maintain legitimacy and integrity through understanding and discharging responsibilities and reporting performance), "Fair" (ensure fair process and decision-making), "Effective" (a clearly defined outcome with appropriate processes and measures), "Transparent" (ensure that processes, practices, procedures & reporting on exercise of mandate are open, accessible

Strategic – The Turkey Board noted that it took into consideration BCFIRB’s 2018 and 2020 decisions and found that regulatory intervention was not justified under these circumstances. The May 12 decision weighed the risks of business failure for one grower against the potential risk of system failure of a major turkey processor during COVID-19 and impacts on the entire turkey sector.

Accountable – The Turkey Board engaged with and took their interests of all parties into account in making its decision.

Fair – The Turkey Board followed a clear process in coming to its decision and sought input from all affected parties. It invested considerable time and effort in identifying custom processing opportunities and ensuring that K&M knew what was required in order to have poults placed.

Effective – The Turkey Board decision is effective in maintaining sound marketing policy by ensuring no market failure to the broader turkey industry as a result of increased pressures to the processing sector while it seeks to manage through the challenges of the COVID-19 pandemic.

Transparent – The Turkey Board provided clear and open communication with K&M, and kept other stakeholders updated throughout the process.

Inclusive – The Turkey Board weighed the interests of K&M and the processors involved and reflected those against the broader grower-vendor sector in British Columbia. It has consulted with industry and sought input into the level of regulatory involvement that stakeholders want from the Turkey Board.

140. It is important to note, that it is inherent to the SAFETI review set out above that there will often be countervailing priorities that need to be addressed and that the particular circumstances of any decision will mean that more or less weight should be given to the principles set out above respectively. In this case, the Panel finds that the May 12 Decision and the May 22 Decision accord with the SAFETI principles for sound marketing policy.
141. The findings of the panel in support of the May 12 Decision and the May 22 Decision do not detract from the directions and orders of previous panels in 2018 and 2020. In particular, the Turkey Board was to establish a long-term strategy for specialty turkey production, particularly relating to securing custom processing as set out a paragraphs (106) and (108) of the *K&M(2018)* decision. Had the Turkey Board completed the work as it had previously committed to by December 31, 2019, it is likely that this appeal could have been avoided.

and fully informed), and “Inclusive” (ensure that appropriate interests, including the public interest, are considered). See *Island Vegetable Co-operative Association v. BC Vegetable Marketing Commission*, (December 16, 2015) at para. 31. See also *Skye Hi Farms Inc. et al v. British Columbia Broiler Hatching Egg Commission* (March 29, 2016) at para. 119 (“Skye Hi”).

142. Furthermore, in 2019 the Turkey Board established an arbitration process for managing conflict between grower-vendors and processors. However, the party that is needed at the table to negotiate a solution with K&M in the first instance, is not the Turkey Board but a processor. Both K&M and the Turkey Board agree on this. If negotiation fails, as it has in the past, then the parties can initiate third party assistance to make a business deal based on this arbitration process. In this case this avenue for dispute resolution was not explored as K&M simply sought an order from the Turkey Board compelling processing, and when the Turkey Board refused this appeal was triggered by K&M.
143. The evidence in this appeal strongly points to deteriorated relationships between all the parties involved in this appeal which has resulted in a business environment wherein it will continue to be difficult to negotiate a solution in the short term. However, employing third-party conflict resolution tools like mediation, arbitration and enhanced engagement will be essential to developing and implementing a long-term strategy for vendor marketers. No regulatory order by the Turkey Board or BCFIRB for a processor to process K&M's product will contribute to a lasting solution. As has been pointed out in submissions, mutually beneficial arrangements will contribute to a lasting solution.
144. The Bertrand Report has provided a good first step with respect to the industry consultation envisioned by the panel in *K&M(2018)*. The report provides direction to the Turkey Board on an augmented role of the board that would satisfy the needs and expectations stated by industry, including growers and processors, in their consultations:

The second option outlined above best accords with the responses received during the consultation process and the directives from BCFIRB. It recognizes that the expertise for market identification and development resides with individual self- marketers and processors. It also emphasizes the need for the TMB to ensure, to the extent possible, that contractual arrangements between producers and processors provide security to producers while at the same time allowing processors to evolve their businesses. It also recognizes that the availability of custom processing for specialty turkeys is on the decline and may become less and less available in the future. One of the options that all self-marketers must consider is non-conventional processing such as constructing on-site facilities, working with local butcher shops and mobile processing. Finally, the TMB needs to support current relationships between self-marketers and their processors and consider grandfathering those relationships for a period of time or until another viable option can be found.

145. While the Panel recognizes the challenges that COVID-19 has posed to the turkey industry generally and with respect to the implementation of the work plan contemplated in *K&M(2018)* in particular, it is a significant concern of the panel that the consequence of delays in the implementation of this strategy have had and will continue to have profound effects on the broader industry. These concerns are

conveniently summarized in the Turkey Board's May 22, 2020 letter to K&M Farms, which states:

In our view, the BCFIRB contemplated regulatory intervention as an interim measure that would promote orderly marketing and provide you with the opportunity to develop mutually acceptable arrangements with a processor. It is the Board's view that the BCFIRB did not contemplate repeated or permanent directions by the Board that would effectively relieve K&M of any responsibility to conduct itself in a manner that promotes orderly marketing. Unfortunately, the effect of the Board's past order directing Rosstown to provide custom services to K&M, coupled with K&M's steadfast unwillingness to work with processors on a cooperative basis, has created an atmosphere of entitlement, mistrust, fear and friction for all the growers and processors who are involved in self-marketing and custom processing. It has proven to be complicated, burdensome and confusing. It has negatively affected relationships for all stakeholders in the sector. In short, it is the Board's view that regulatory intervention, when coupled with K&M's unwillingness to work cooperatively with processors, has proven to be antithetical to orderly marketing.

146. The Turkey Board has gone part way towards undertaking the industry assessment and developing a work plan as set out in the *K&M(2018)* decision. Furthermore, the Turkey Board now has the benefit of recommendations from the Bertrand Report. It is absolutely essential for the Turkey Board to complete and implement its strategy and carry forward with a work plan that we expect will ensure that measures are in place to allow producers and processors some measure of certainty going forward and will not require ongoing appeals to BCFIRB to impose interim processing terms on the parties.

ORDER

147. The appeal of the BC Turkey Marketing Board's May 12, 2020 decision is dismissed.
148. The appeal of the BC Turkey Marketing Board's May 22, 2020 decision is dismissed.
149. The panel orders that the Turkey Board complete and implement the workplan as ordered in *K&M(2018)*, paragraph 106(c), no later than January 31, 2021.

150. There is no order as to costs.

Dated at: Victoria, British Columbia this 6th day of November 2020

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Tamara Leigh, Presiding Member



David Zirnhelt, Member



Harveen Thauli, Member

APPENDIX A

[Turkey Scheme](#) s. 28(a-t)

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

(a) to regulate the time and place at which, and to designate the agency through which, any regulated product shall be produced, processed, packed, stored or marketed; to determine the manner of distribution, the quality, grade, or class of the regulated product that shall be transported, produced, processed, packed, stored or marketed by any person at any time; to prohibit the production, transportation, processing, packing, storage or marketing of any grade, quality or class of any regulated product; and to determine the charges that may be made for its services by any designated agency;

(b) to issue quotas to growers as is deemed necessary; such quotas shall at all times remain the property of the board and shall have no monetary value;

(c) to revoke in whole or in part unused quotas or portions of quotas and to reissue such quotas in whole or in part, equitably, to other growers;

(d) to exempt from any determination or order any person or class of persons engaged in the production, transportation, production, processing, packing, storing or marketing of the regulated product or any class, variety or grade thereof;

(e) to require any or all persons engaged in the production, transportation, processing, packing, storing or marketing of the regulated product to register with and obtain licences from the board;

(f) to fix and collect yearly, half-yearly, quarterly or monthly licence fees from any or all persons producing, transporting, processing, packing, storing or marketing the regulated product, and for this purpose to classify such persons into groups and fix licence fees payable by the members of the different groups in different amounts, to fix and collect from such persons fees for services rendered or to be rendered by the board, and to recover such licence and other fees by suit in any court of competent jurisdiction;

(g) to cancel any licence for violation of any provision of the scheme or of any order of the board or of the regulations;

(h) to require full information relating to the production, transportation, processing, packing, storing and marketing of the regulated product from all persons engaged therein, and to require periodic returns to be made by such persons, and to inspect the books and premises of such persons;

(i) to fix the price or prices at which the regulated product or any grade or class thereof may be bought or sold by or to any person;

(j) to authorize any marketing agency appointed by the board under the scheme to conduct a pool or pools for the distribution of all proceeds received from the sale of the regulated product, and requiring any such marketing agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, in such manner that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of the regulated product delivered by him, and to make payments in respect thereof until the total net proceeds are distributed;

(k) to require the person in charge of any vehicle in which the regulated product could be transported to permit any member or employee of the board to search the vehicle;

(l) to seize and dispose of any of the regulated product kept, transported, processed, packed, stored or marketed in violation of any order of the board;

(m) to use any moneys received by the board in carrying out the purposes of the scheme, and in paying the expenses of the board, and in paying to the British Columbia Turkey Association any portion or all of the expenses incurred by the said association with the authority of the board in carrying out the purposes of the scheme;

(n) to make such orders, rules and regulations as are deemed by the board necessary or advisable to promote, control and regulate effectively the production, transportation, processing, packing, storage or marketing of the regulated product and to amend or revoke the same;

(o) to refuse to issue any licence to any person who previously held a licence which was cancelled by the board, and to any person who was associated with any person who previously held a licence which was cancelled by the board, and to any person who has, within 6 months of the date of his or her application for a licence, committed any act which would be an act of bankruptcy under the *Bankruptcy and Insolvency Act* (Canada), and to any person who fails to satisfy the board that he or she has the production, transportation, processing, packing, storing and marketing facilities deemed by the board necessary to properly protect the interests of the growers;

(p) to promote the turkey industry by advertising in such manner as may seem advisable, and by compiling, publishing, distributing and furnishing information with respect thereto;

(q) to delegate its power to such extent and in such manner as the board may from time to time deem necessary or advisable for the proper operation of the scheme; provided that this paragraph shall not permit the delegation by the board of the authorities contained in paragraphs (e), (f), (g) and (o) of this section;

(r) to exercise any authority or function conferred upon it under the *Agricultural Products Marketing Act* (Canada) or under the *Farm Products Agencies Act* (Canada) or by the Canadian Turkey Marketing Agency established pursuant to the *Farm Products Agencies Act* (Canada);

(s) to cooperate with the Canadian Turkey Marketing Agency to bring about parallel coordination of this scheme and the Federal Marketing Plan established by the Canadian Turkey Marketing Agency;

(t) the powers set out in section 11 (1) (o) (i), (ii), (iv) and (v) and (v) of the [*Natural Products Marketing \(BC\) Act*](#).