

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT AND
AN APPEAL FROM A DECISION OF THE BRITISH COLUMBIA TURKEY
MARKETING BOARD TO DENY THE REQUEST FOR CUSTOM KILL DAYS

BETWEEN:

MARK ROBBINS d.b.a. K&M FARMS

APPELLANT

AND:

BRITISH COLUMBIA TURKEY MARKETING BOARD

RESPONDENT

AND:

SMALL-SCALE MEAT PRODUCERS ASSOCIATION

INTERVENER

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Al Sakalauskas, Vice-Chair
and Presiding Member

For the Appellant

Mark Robbins
Jill Azanza

For the Respondent
British Columbia Turkey Marketing Board

Robert Hrabinsky, Counsel

For the Intervener:
Small Scale Meat Producers Association

Julia Smith, Executive
Director

Date of Hearing

October 23-24, 2023, and
by written submission

Place of Hearing

Abbotsford, BC

Decision

March 5, 2024

A. INTRODUCTION

1. The Appellant, Mark Robbins dba K&M Farms (K&M), is a commercial turkey grower licensed by the British Columbia Turkey Marketing Board (Turkey Board) to produce 17,500 kg of turkey per year under quota.
2. Unlike conventional turkey growers who sell their turkeys grown under quota to processors who market the processed product, K&M has made a business decision to be a grower-vendor direct marketer. Its business model relies on obtaining custom processing services to slaughter, eviscerate and cool its whole turkeys and cut up some of its turkeys into parts, all for sale direct to customers.
3. On November 28, 2022, the Appellant wrote to the Turkey Board asking it to work with a specific processor, Sofina Foods, as well as the Canadian Food Inspection Agency, the Investment Agriculture Foundation, the Ministry of Agriculture and Food (Ministry) and the Small-Scale Meat Producers Association (SSMPA) to develop a policy establishing “turkey custom kill priority days” at the Sofina Foods processing plant in Abbotsford. K&M sought a direction securing a custom kill priority day 5 to 15 days before Thanksgiving and Christmas to provide the processing services required by direct market growers to meet the market demand for their niche turkey products. K&M maintained “time is of the essence as growers are now planning for the 2023 production year.”
4. In response to K&M’s request to develop a policy to support direct marketers, the Turkey Board established a Custom Processing Advisory Committee (CPAC) in January 2023 to develop recommendations for custom kill services. After receiving CPAC’s recommendations, on June 2, 2023, the Turkey Board denied K&M’s request for custom kill priority days concluding that suitable options existed to meet K&M’s custom processing needs and there was insufficient evidence to warrant regulatory intervention.
5. On June 16, 2023, K&M filed an appeal with the British Columbia Farm Industry Review Board (BCFIRB) arguing the Turkey Board’s decision denying its request for custom kill priority days was inconsistent with Ministry policy and BCFIRB directives and decisions.
6. On September 15, 2023, the SSMPA was granted full intervener status to appear at the hearing and call and cross-examine witnesses and provide written and oral submissions.
7. The appeal was heard on October 23-24, 2023, and closing arguments were by written submission. The Appellant testified. SSMPA called its Executive Director Julia Smith and two direct marketers, Raquel Kolof and

Ben Glassen. The Turkey Board called processor representative, Joe Falk of Fraser Valley Specialty Poultry (FVSP) and a panel comprised of its Executive Director, Natalie Veles and Board member, James Krahn.

8. In brief, the Appellant argues that BCFIRB has confirmed in a 2018 appeal decision¹ that the Turkey Board had a legislative and policy-based responsibility to work with the processors and direct marketers to enable direct marketers to supply their differentiated product to meet niche market demand. As a result, the Turkey Board's response to its request for a custom kill priority day policy was inadequate. K&M is critical of the composition of the advisory committee, CPAC, as it did not receive feedback from direct marketers struggling to find custom processing. CPAC's recommendations primarily dealt with on-farm processing for permit holders and reiterated the Turkey Board's 2018 position that direct marketers of turkey needed to work with processors to negotiate mutually beneficial arrangements. K&M asserts that the Turkey Board is primarily responsible to the interests of growers and consumers and not the business model of processors. As such, and as this is a profitable opportunity consistent with Sofina's core turkey processing business, the Appellant seeks an order that Sofina be directed to custom process K&M's birds.
9. The SSMPA supports K&M in its appeal and seeks a 5-year pilot project requiring Sofina to host custom processing days for direct marketers supported by an oversight body.
10. In response, the Respondent Turkey Board points to the previous three appeals² involving K&M and says its decision to deny the request for custom kill priority days is consistent with those rulings and sound marketing policy. Further, K&M has failed to discharge the onus of showing that extraordinary regulatory intervention is justified in this case and further, there is compelling evidence that negotiated arrangements are available to K&M if it chooses to pursue them. On this basis, the appeal should be dismissed.
11. The appeal was heard over two days on October 23 and 24, 2023. Closing arguments were made by written submission.

¹ Mark Robbins dba K&M Farms v British Columbia Turkey Marketing Board, December 31, 2018 (K&M 2018)

² K&M 2018, *Rosstown Farms & Natural Foods v. British Columbia Turkey Marketing Board*, February 3, 2020 and *Mark Robbins dba K&M Farms v. British Columbia Turkey Marketing Board*, November 6, 2020.

PRELIMINARY ISSUE

12. In the course of its case, the Appellant tendered a letter prepared by Dr. Nancy Olewiler, Professor at the School of Public Policy, Simon Fraser University, which supported K&M's request that the Turkey Board require processors to charge fair prices and not either refuse to process or do so at prices that inhibit the ability of small-scale farmers to stay in business. The Appellant indicated that he wanted to rely on Dr. Olewiler's letter as an expert report and tender it in evidence.
13. The Respondent objected to the admissibility of Dr. Olewiler's letter. It appears that other than receiving the report in the Appellant's book of documents, it was not properly served. The Respondent was not aware of the qualifications of Dr. Olewiler, she was not produced for cross examination, the connection between Dr. Olewiler and K&M was unclear, and the Respondent could not ascertain her independence in respect of the matters at issue.
14. The Panel ruled the letter was inadmissible for the following reasons. The letter does not comply with Rule 15 of the Rules of Practice and Procedure for Appeals as it does not adequately set out the expert's qualifications or present a summary of the expert's opinion including the facts and assumptions on which the opinion was based. The Respondent was not given proper notice of Dr. Olewiler's letter as expert opinion evidence and she was not produced for cross examination on her qualifications or her opinion. Finally, what is at issue here is the wisdom of a particular policy in the supply managed context. Such issues do not lend themselves to a black or white answer and one person's view on what is the right policy is treading on the ultimate issue that must be decided on this appeal and as such, usurps the Panel's role as decision maker.

B. ISSUE ON APPEAL

15. Did the Turkey Board err in its June 2, 2023 decision by denying the Appellant's request for the establishment of custom kill priority days (for direct marketers) with Sofina?

C. LEGAL FRAMEWORK

16. The Turkey Board is established by the British Columbia Turkey Marketing Scheme (Scheme), a regulation enacted under the *Natural Products Marketing (BC) Act (Act)*, the purpose of which is as follows:
 - 16 The purpose and intent of this scheme is to provide for the effective promotion, control and regulation, in any and all respects and to the extent of the authority of the Province, of the production, transportation, processing, packing, storage and marketing of the regulated product 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.

17. The Scheme grants the Turkey Board the following authorities relevant to processing:

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;

...

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

(f) to fix ... licence fees from any or all persons...processing...the regulated product, and to fix and collect from such persons fees for services rendered or to be rendered by the board, and to recover such licence and other fees by suit in any court of competent jurisdiction;

...

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

...

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

18. In addition to the legislative framework, there have been three appeals involving K&M and its processor where K&M sought regulatory intervention to access custom processing services. These decisions, while not determinative, provide valuable context.

First Appeal – *Mark Robbins dba K&M Farms v. British Columbia Turkey Marketing Board*, December 31, 2018, (K&M 2018))

19. In 2018, K&M appealed the Turkey Board's decision to not order its then processor Rosstown Farms & Natural Foods (Rosstown) to provide the custom processing services previously performed for K&M. In rejecting the Turkey Board's arguments about the limits to its statutory authority, BCFIRB concluded the Turkey Board had the authority to direct processors to provide custom processing services to producers when required to do so by sound marketing policy. Such a direction is grounded in orderly marketing. (paragraphs 70, 71)
20. In finding that the Turkey Board should have done more to assist K&M in the circumstances, BCFIRB concluded that an exercise of regulatory authority is only necessary where there is a strong likelihood of a market supply failure or barrier, or where a failure or barrier already exists. BCFIRB reiterated the need for parties to cooperate to find a negotiated resolution. However, where there was no other way to secure custom processing services in the short term, the Turkey Board could direct those services to allow sufficient time for K&M to implement its plans for 2018 and 2019. The Turkey Board was also ordered to undertake an industry assessment of grower-vendor direct marketing and establish a workplan. (paragraphs 104-108).

Second Appeal – *Rosstown Farms & Natural Foods v. British Columbia Turkey Marketing Board*, February 3, 2020 (Rosstown)

21. In 2019, and after receiving a request from K&M, the Turkey Board directed Rosstown to provide the custom processing services to complete its annual grower program and, as it found an agreement on prices for custom processing services was unlikely, it set the rates for services. Rosstown appealed.
22. In dismissing Rosstown's appeal, BCFIRB interpreted and applied K&M 2018 as follows:
 - a) The decision created a mechanism to develop interim solutions to K&M's immediate processing concerns and ordered the Turkey Board to undertake an industry assessment of grower-vendor direct marketing (paragraph 104)
 - b) All parties, including K&M, were expected to cooperate with the Turkey Board to find interim solutions to support K&M's marketing

plan. While interim decisions of the Turkey Board assisted K&M in the short-term, there was no expectation that the Turkey Board should be directing K&M's product for the long term. Interim pricing solutions allowed time for K&M to adjust its business model to avoid facing marketing failures. K&M was urged to participate with other grower-vendors in the development of a sustainable, effective business model as part of the Turkey Board's industry assessment directed by BCFIRB. (paragraphs 105-108)

- c) It was never the intention of BCFIRB to shift all the responsibility for K&M's future success to the Turkey Board. K&M should be actively engaged in finding and/or acquiring appropriate services to ensure its product reaches the market. (paragraph 129).
- d) Without the benefit of the Turkey Board's renewed strategic direction for the grower-vendor sector, K&M may have difficulty finalizing its grower program and again seek Turkey Board intervention. Industry convention is for grower processor relationships to be based on mutual benefit developed through negotiation. K&M was encouraged to find or develop its own processing solutions and adapt its business model to avoid the need for continued regulatory intervention. (paragraph 135)
- e) The Turkey Board has the authority and discretion to make orders necessary to ensure the orderly marketing of turkey by grower-vendors. The expectation is that the Turkey Board will exercise its authority and discretion to successfully support grower-vendors and processors to avoid the need for its extraordinary regulatory intervention. (paragraph 136)

Third Appeal - *Mark Robbins dba K&M Farms v. British Columbia Turkey Marketing Board*, November 6, 2020, (K&M 2020))

- 23. As directed in *Rosstown*, the Turkey Board completed its industry assessment of grower-vendor direct marketing and commissioned a report from consultant, Ron Bertrand (the Bertrand Report). In April 2020, the Turkey Board again engaged with K&M regarding its processing needs following which K&M requested that the Turkey Board direct either Rosstown or Sofina to provide custom processing services for a minimum of five years. The Turkey Board denied the request.
- 24. In dismissing K&M's appeal, BCFIRB held as follows:
 - a) The panel's expectation was that all options be explored before K&M brought its appeal which was not the case. The history of appeals by K&M from Turkey and Chicken Board decisions demonstrates K&M's unwillingness to effectively co-operate with other industry stakeholders. The Bertrand Report noted that K&M's concerns were

not consistent with the experiences of other grower-vendors, and the Turkey Board's position was being distorted.

- b) K&M did not engage in meaningful correspondence with the Turkey Board or processors until June/July 2020 even though it was apparent to K&M in January 2020 that it would have issues obtaining processing services. K&M's pattern of behaviour does not support the finding that it is making sincere efforts to find a negotiated solution. It is using BCFIRB appeals to force a solution rather than use legitimate efforts to seek processor agreement. (paragraph 130)
 - c) The evidence supports the Turkey Board and processors' claims that there are custom processing options for K&M. The issue is not whether processing capacity is available, but rather how K&M's business model – in terms of pricing and product – can be compatible with the custom processing services available. (paragraph 131)
 - d) Unlike in *K&M 2018*, the Turkey Board was responsive and engaged with K&M. It sought resolutions even after the appeal was filed. It directed a processing agreement and pricing mechanism on Rosstown that required an appeal to enforce. The Turkey Board engaged with K&M repeatedly and in good faith to resolve its processing issues, short of mandating contractual terms onto processors who were able to work with other producers. The Turkey Board followed the directions in *K&M 2018* but COVID-19 and the unwillingness of K&M to work effectively towards a resolution resulted in K&M again asking BCFIRB to intervene to impose terms on a processor. (paragraphs 132-133)
 - e) K&M's expectation that BCFIRB impose a five-year agreement was a far greater intervention than directed in either *K&M 2018* or *Rosstown 2020*. Decisions made by BCFIRB to intervene in contractual relationships between producers and processors are inherently interim in nature, and the ultimate resolution needs to be developed by the Turkey Board, in consultation with the turkey industry through its work plan. (paragraph 135)
 - f) To grant the level of intervention sought, K&M would need to demonstrate it worked effectively and co-operatively with the Turkey Board and processors to find a mutually beneficial resolution and no other circumstances advised against such a significant intervention. The evidence did not support that finding. (paragraph 136)
25. The Panel now turns to a summary of the key facts upon which this decision is based. The facts were not in dispute in this appeal and much of the Appellant's case was presented as argument supporting his position that once a direct marketer demonstrates the existence of a consumer demand, the Respondent is required to direct custom kill processing services. For

him, the issue is not whether to implement such a policy; rather the issue was how to implement such a policy.

D. Key Findings of Facts in this Appeal

26. On November 28, 2022, K&M made its initial request to the Turkey Board that it establish custom kill priority days before Thanksgiving and Christmas at Sofina Food's processing plant so that direct marketers of turkey had guaranteed access to the custom processing to meet their market demand.
27. On November 29, 2022, the Turkey Board emailed K&M inquiring whether it had contacted Sofina to discuss custom kill priority days. Mr. Robbins confirmed he had not and asserted that it was incumbent on the Turkey Board "to move forward on this issue" and not push K&M's request back on the growers.
28. On November 30, 2022, the Turkey Board emailed K&M asking if it had spoken with the other processors, Farm Fed or FVSP, about its custom kill priority days proposal. Mr. Robbins confirmed he had not talked to Farm Fed and had last talked to FVSP in 2021. He further asserted that "a grower cannot negotiate effectively with a processor" and that "the suggestions... that the grower should negotiate an arrangement with the processor is disingenuous."
29. The Turkey Board discussed K&M's request at its December 7, 2022 meeting and decided to establish a committee (CPAC) to provide advice and recommendations concerning a custom kill priority day policy.
30. On December 14, 2022, the Turkey Board wrote to K&M advising it would be establishing the CPAC, representing a broad range of stakeholders, to provide advice and recommendations on the issue of custom kill processing services for turkeys. The intention was to provide a forum for growers, processors, and federal and provincial government representatives to develop relationships and discuss measures to support the long-term success of the BC turkey industry.
31. The Turkey Board invited Mr. Robbins to sit on the CPAC. He indicated his willingness to do so provided the terms of reference confirmed CPAC's purpose was to advise on the best approach to establishing custom kill priority days and limited processors' input to how best to implement such a policy and not allow debate on its desirability.
32. In January 2023, the Turkey Board established terms of reference and settled on CPAC's composition including two direct market turkey growers³,

³ One of these growers also sits on the Turkey Board's New Entrant, Specialty Markets Advisory Committee.

two processors (FVSP and the Executive Director of the Primary Poultry Processors Association of BC (PPPABC)) and a Ministry representative. The Turkey Board determined as Mr. Robbins initiated the request for a change in policy, it would not be appropriate for him to sit on the CPAC, but he could appear before the Committee in support of his position.

33. By email dated January 29, 2023, Mr. Robbins expressed displeasure with CPAC's composition and was critical of the selection of JD Farms and Skye Hi Farms as they are large direct market specialty turkey producers who paid substantial sums to Farm Fed to guarantee access to processing at peak times. They had no business interest in making custom processing available to competitors in the direct market segment.
34. The CPAC held meetings on February 2, 27, March 14, 30, and April 20, 2023. Minutes were taken and Executive Director Ms. Veles testified that the meeting minutes accurately recorded CPAC's discussions.
35. At the February 27, 2023 CPAC meeting, the SSMPA made a presentation recorded in the minutes as follows:

Small Scale Meat Producers Presentation – Julia Smith

- SSMPA has been working on information gathering and exploring processing solutions since 2018.
 - A survey was developed and administered to gather more information related to small scale meat production. 708 participants; 619 current and 89 that have closed their facilities. 94% of respondents supplement their income with non-meat commodities.
 - There are breakdowns by region, access to slaughter, cut up, affordability, etc. Background slide deck to be shared with Committee.
 - SSMPA sees an opportunity to increase turkey processing and consumption through small scale producers. One example could be aligning Direct Vendor allowances with Farmgate Plus Licenses.
 - Small scale production offers an opportunity to move production and processing outside the Lower Mainland. Volume is required to encourage investments in facilities.
 - Questions and discussion on availability and access to quota for smaller growers. There may be an opportunity for smaller growers to acquire quota if they knew it was available.
 - It was noted that large commercial processors are not set up for custom slaughter. Costs could be considerable, overtime for workers, mandatory segregation of product etc.
36. Following the March 14, 2023 meeting and at CPAC's request, the Turkey Board solicited feedback from registered growers, licensed processors, past applicants to the New Entrant Program, and past licensed processors, and recommended contacts from SSMPA. The questions asked for input on unmet needs for getting turkeys custom processed in BC supported by

examples, potential options to increase access to custom processing for registered turkey growers and the benefits and drawbacks of requiring processors to fill custom orders before Thanksgiving and Christmas.

37. Mr. Robbins responded to the Turkey Board's questions reiterating his position that it is the Turkey Board's responsibility to work with the growers and processors to ensure appropriate custom processing services are available for direct marketers to service their niche markets. It is totally impractical for K&M to build a processing facility with capacity to process 1200 turkeys over two days for use once a year. If processing is not available, direct market growers will stop growing and investing in the industry. The question is not if there is an unmet demand for direct market turkeys but rather what barriers exist to processors providing the custom processing services needed to meet market demand. Inconvenience is not a barrier.
38. In their response to the Turkey Board's questions, the processing sector identified their concerns. Sofina's view was that as sales to consumers are local, a provincially inspected, smaller slaughterhouse is better suited to processing small volumes at the busiest times of the year. Forcing a processor to enter a commercial transaction against its will is troubling and problematic as requests come at the busiest times of year when the plant is short of labour and processing time and would have to be done 100% on overtime. There are issues related to scheduling of catching and trucking of less than a full loads of birds. Custom slaughters must be segregated and tracked to create gaps in the custom work to avoid mix ups. If cutting or bagging is needed, tracking and "gapping" is required in more areas of the plant. It is unreasonable for anyone to place turkeys without having a slaughter arrangement sorted out.
39. Similar views were shared by processor and direct vendor Andrea Gunner who agreed it is difficult for processors to accommodate mandatory custom orders before busy holiday seasons as processors would need to deprioritize customers, lose efficiency and work around varying batches and requirements for growers during a high-volume period.
40. In terms of unmet demands in the past year, FVSP observed it had had no requests for custom processing and limited experience custom processing K&M's quota birds in 2019 when it thought Mr. Robbins was more interested in a battle with BCFIRB than establishing and growing a business relationship with FVSP. It had two non-quota custom processing requests in the past year. In its view, there is not a lack of custom processing capacity in the Fraser Valley for growers who accept the fee/cost structure for small lot processing. FVSP made recommendations on how to increase capacity and increase allotments in the New Entrant Programs and reiterated concerns with directing custom processing during prime weeks. It identified

potential issues with segregation, equipment automation, staffing and inspection limitations. Processors have a significant demand for fresh product during busy weeks and forcing them to provide custom services could potentially disrupt their supply chain, causing birds to grow oversized and limiting the fresh market product for their customers. FVSP runs into overtime and adding custom processing in busy weeks exacerbates health and safety risks for staff and jeopardizes existing business volumes and sales.

41. FVSP commented on the unique nature of the business relationship between a processor offering custom processing services and a direct marketer in contrast to the conventional relationship where a producer ships to a processor who markets that product. If the Turkey Board were to direct custom processing services, it could harm business relationships. Issues would arise if correct specifications were not properly communicated, resulting in oversized birds and excess utility grades, more trimming or salvaging, all of which requires more time, and risks wrong packaging or sizing at the plant. FVSP predicted that directing custom processing will not end well as there are many unforeseen and unintended consequences for all parties involved.
42. The CPAC discussed all the feedback received at its March 14, 2023 meeting. Mr. Robbins appeared by video to elaborate on his position. CPAC discussed possible recommendations which were shared with CPAC members on March 24, 2023.
43. CPAC held its fourth meeting on March 30, 2023, to consider the draft recommendations, following which they were circulated to registered growers and licensed processors for comment on March 31, 2023.
44. Mr. Robbins' feedback on the draft recommendations dated April 11, 2023, stated in part:

Comments on the draft recommendations

The 2018 FIRB decision directed the Board to change their relationship with the processors. FIRB made it clear the Boards are responsible to work with the producers and processors to find a processing solution that results in the niche markets being served. The outcome of the 2018 FIRB decision is that the processing sector collectively no longer has a choice as to **whether** they provide custom processing for producers serving niche markets. The question has shifted to **how** the sector is going to provide custom kill processing services to enable the niche marketers to meet the unmet demand.

The CPAC recommendations do not reflect this shift....

The recommendations reflect the same arguments used by the Board in the FIRB hearing leading to the December 2018 decision. FIRB has already rejected these arguments.

45. CPAC held its fifth meeting on April 20, 2023 to review final comments on the draft recommendations.
46. On April 21, 2023, after being told by Ms. Smith (of SSMPA) that Mr. Falk (of FVSP) had indicated at the CPAC meeting that FVSP was looking to process more turkeys, Mr. Robbins emailed Mr. Falk with his expectations for custom processing:

To service their niche market consumers, K & M Farms needs what Rosstown had provided until 2016. They are:

- Processing for 1100 heavy hens and 100 heavy toms between 5 and 12 days before the Thanksgiving holiday. (Rosstown typically kills them the Monday before the Thanksgiving weekend)
- Cryovac approximately half of the birds. In our trial run a couple of years ago the turkeys came back from FVSP vacuum packaged – not cryovaced.
- Primal cut up of approximately half of the birds.
- Catching services for a fee.

The cost of these services needs to be reasonably similar to what other specialty producers pay. (this was part of the 2018 FIRB decision)

Joe. Can you do this and can you continue to do this in the future?

47. In his response to Mr. Robbins, Mr. Falk indicated that he had not specifically committed to the CPAC that FVSP could custom process K&M's turkeys, but he was looking for custom processing and was prepared to explore whether K&M was a good fit. Following a telephone conversation on April 24, 2023, Mr. Falk summarized the following points in his email:

FVSP is not interested in being used for the purposes of battling issues with the Board or Firb regarding custom process services. We are interested in doing business and growing business relationships. (But not interested in being forced or under a pricing duress)

In regards to KM Farms stated needs here were my comments:

FVSP cannot guarantee custom processing for years and years into the future indefinitely.

FVSP cannot guarantee processing during key holiday weeks or during stat weeks. (if we were to plan during a stat week we would need to consider it at an OT rate) • FVSP cannot guarantee to do 1200 turkeys over two days and also guarantee to do primary cut on 600 of those turkeys. It is important to FVSP in our business relationships to have some give and take. Some things might have to be adjusted by the grower to accommodate. IE. We

could only do 200 – 300 turkey in a day and cut up the UT's to a maximum of 20 – 25% as examples. As discussed I don't see there is a fit here.

48. Mr. Robbins's evidence is that he did not see FVSP as a good fit based on a trial run in 2019 where the packaging and cut ups did not meet his (or his customers') satisfaction. He had no reason to believe anything had changed with FVSP's equipment or capacity but in any event, it was unreasonable to expect him to move 1100 turkeys over four days given the need to separate his flock, withdraw feed and water and incur additional hauling fees. He denied being rigid in his request but said these were the "parameters" within which he would negotiate. Further, these parameters are what his customers need and not what he wants. His customers are, in fact, "Turkey Board customers" who are entitled to an orderly supply of quota production. He specifically denied asking for a commitment for "years and years" but did concede he needed a commitment of greater than a year.
49. Mr. Robbins' evidence is he has no desire to build a turkey processing facility as it does not make business sense to spend hundreds of thousand dollars for a facility to process 2000 birds over a few days. While he has facilities to do cut up on his chicken production, his employees are not physically capable of processing heavy birds over three days.
50. On May 16, 2023, CPAC made its final recommendations to the Turkey Board.

Recommendation #1: Align the Board's licensing of turkey processors with the updated BC Government Meat Regulations (October 2021). This may include:

- a) Exploring a two-tier licensing process that allows for different levels of reporting requirements etc. based on processor type and size. Details are TBD.
- b) Conducting an outreach and education campaign to help inform processors of the Board's role in the turkey industry, requirements for licensing, and awareness of the potential need for custom processing services in certain areas.
- c) Working with the BC Ministry of Agriculture and Food to ensure applicants for processor licenses are aware of the Board's licensing requirements.

Recommendation #2: Encourage growers to work collaboratively with processors to develop and maintain mutually beneficial, long-term relationships.

Recommendation #3: Encourage growers to work collaboratively with each other to identify and pursue viable small lot processing options as needed. This may include:

- a) Extending their season for marketing turkey outside peak holiday times to help ensure more regular and steady business.
- b) Identifying licensed processors and cut & wrap facilities that have the capabilities and interest in providing the services they require. The Board may want to help consolidate this information and make it available to interested parties.
- c) Evaluating the business case for on-farm processing and cut-up services with consideration for the options under the new Meat Regulations. Use of business planning and training supports offered by government is encouraged.

Recommendation #4: Pursue a full review of the Direct Vendor and New Entrant Programs for turkey production in BC, understanding that sourcing custom processing is an obstacle for New Entrants and Direct Vendors

51. On May 4, 2023, the SSMPA wrote to the Turkey Board advising of its concerns with the Recommendations and taking issue with the supply management system in general:

Overall, these recommendations do not go far enough to create a path to growth and address processing issues for small-lot producers. They shift responsibility for the problem of custom processing back on to the producer who, under supply managed regulation, has very little control over the situation. We would like to see the Marketing Board take a more active role in finding a solution to this problem. It isn't reasonable to regulate without taking responsibility. Alternatively, make all Direct Vendors exempt from regulation and we will take care of our own processing needs.

52. The Turkey Board met on May 23, 2023 to discuss K&M's request in light of the Recommendations. The minutes of the meeting provide:

The Board did not find sufficient evidence during the consultation process to pursue K&M Farms' recommendations for priority kill days at a Class A processing facility. There were not any other registered growers who voiced support for the idea. Further, FVSP offers the services K&M requires. The Board discussed the importance of like-size growers and processors conducting business together. Staff to draft a response to Mr. Robbins based on Board comments to the CPAC recommendations...

53. On June 2, 2023, the Turkey Board issued its decision which is the subject of this appeal, which concluded:

With respect to your request that the Board "work with industry and government agencies to establish 'custom kill priority days' at a Class A licensed processing plant", the Board determined that there are already suitable options available to meet your slaughter and custom processing needs. They did not see sufficient evidence that would warrant the regulatory intervention of "custom kill priority days" that you have proposed.

Consequently, the Board has decided to deny your request for the establishment of “custom kill priority days”.

The Board would like to remind you of BCFIRB’s findings in the November 6, 2020 Appeal Decision (K&M v. BCTMB). In this decision, BCFIRB noted that “regulatory interventions were not expected to become the norm for the industry but were rather conditioned on unique circumstances”. It also found that the “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”.

The Board encourages you to work with processors who are able and willing to provide the kind of services K&M needs. The Board notes that processors of like-size to K&M would be a preferable option, as they are more able to accommodate small custom orders. It is important that K&M engages in good faith negotiations and is willing to adapt its business model to arrive at a mutually beneficial, long-term relationship with a processor.

E. ANALYSIS AND DECISION

54. As pointed out above, the facts are largely not in dispute. The Appellant K&M asked the Respondent Turkey Board to implement a policy to benefit direct marketers of turkey. The relief sought was not limited to personal circumstances, rather the Appellant sought a new policy guaranteeing direct marketers access to custom processing services before Thanksgiving and Christmas. When the Respondent refused to implement the Appellant’s preferred policy, the Appellant appealed arguing that the Respondent’s failure to implement the policy was inconsistent with prior BCFIRB decisions and sound marketing policy.
55. This appeal is unusual. In the ordinary course, an appellant challenges a commodity board’s interpretation or implementation of existing orders or policies, arguing the board’s interpretation is in error, not consistent with sound marketing policy or that there ought to be an exercise of discretion due to special circumstances. Here, the Appellant, supported by the SSMPA, seeks extraordinary intervention into direct marketers’ business relationships with processors through enactment of a new policy guaranteeing them access to custom processing for five years.
56. The Appellant argues that what is at issue is not whether to implement such a policy; rather once a direct marketer demonstrates the existence of a consumer demand, the Respondent is obligated to direct custom kill processing services to meet the demand of what the Appellant characterized as the “Turkey Board’s customers”. In his view, the only issue is how such a policy should be implemented.
57. The Panel has already pointed to the limited nature of the evidence called by the Appellant which, as observed above, was more in the nature of argument to support what the Turkey Board described as his “philosophical”

view that processors have no choice but to provide custom processing to direct marketers. Similarly, the witnesses called by the SSMPA offered their broad views related to the unmet consumer demand for their product, the impact of supply management restricting small scale growers' ability to achieve the economies of scale necessary to take care of their own processing, and the resulting challenges accessing processing services or developing on-farm processing.

58. In contrast, the evidence from Turkey Board Executive Director, Ms. Veles, and Board member, Mr. Krahn, confirmed that the Respondent took the Appellant's request seriously and established CPAC to provide advice. The composition of CPAC represented a range of views including two direct market growers⁴, two processor representatives, the Ministry livestock industry specialist and the SSMPA. While the Appellant was critical that the two large direct market growers on CPAC lacked interest in supporting competitor direct marketers given their paid access to custom processing, he acknowledged both growers started out as new entrants and have successfully grown their direct marketing businesses without regulatory intervention. As such, the Panel finds their presence brought valuable expertise and experience to CPAC. Further, the SSMPA's participation was intended to bring forward the views of small-scale direct vendors and a review of the CPAC minutes confirms it did so. Despite not being chosen to sit on CPAC, the Appellant was afforded opportunities to put forward his views, respond to questions and appear before CPAC to provide feedback. The Respondent confirmed that it considered the feedback and the Recommendations and then made its decision not to enact a custom kill priority day policy.
59. In the Panel's view, the Respondent followed a transparent and inclusive process to consider the Appellant's request. The CPAC provided opportunities for a broad range of stakeholder engagement. In the absence of other registered growers' support and given the evidence of available custom processing capacity at FVSP, the Respondent declined to enact the policy sought. The decision not to enact a new policy is well supported and consistent with previous BCFIRB decisions and sound marketing policy.
60. Further, in the Panel's view it is an overreach for the Appellant to ask this Panel to create or impose a new policy for direct marketers in the turkey industry, especially based on the limited evidence presented on this appeal. The Turkey Board is not obligated by law to enact policies at the direction of a registered grower. Rather, it remains a judgement call whether the Turkey Board believes such a policy accords with sound marketing policy and is in the best interests of the entire industry (and not just direct marketers of turkey). Judgement calls on policy are not black and white and rarely have just one right answer as they involve a balancing of a broad range of

⁴ One of the growers is also on the New Entrant and Specialty Advisory Committee.

interests. The Appellant is incorrect when he says the Respondent should only be concerned with the needs of growers and consumers, and processors have no choice but to provide custom processing for producers serving niche markets. Further, SSMPA is misguided when it uses its role as an intervener to challenge supply management and seek exemptions for its growers. The Turkey Board must regulate with due consideration for the interests of the entire industry including processors and the Panel finds that it did so when it declined to enact the custom priority day policy.

61. That decision having been made, the Panel turns to consider the narrower question of whether the Appellant has established sufficient grounds to warrant BCFIRB intervening on his behalf with a regulatory solution.

62. The Panel has approached its analysis by asking the following questions:

- a) When should the Turkey Board intervene in the business relationship between a direct marketing turkey grower and a processor?
- b) Should the Turkey Board intervene in K&M's business relationship in the circumstances of this appeal?

a) When should the Turkey Board intervene in the business relationship between a direct marketing turkey grower and a processor?

63. The Appellant argues that Ministry and BCFIRB policy documents⁵ support the need for new entrant grower programs and differentiated production that meets niche market demand. These policies, coupled with the *K&M* 2018 decision, establish the threshold for a regulatory response by the Turkey Board:

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 the Turkey Board must make an order to achieve a result which works for this niche market. The panel concluded that the exercise of 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 exists. [emphasis added]

64. In response, the Respondent argues its obligations to K&M are not analogous to its responsibility as a regulator to “find a home” for all regulated product produced under quota. Turkey growers are obliged by regulation to produce their quota and the Turkey Board is obliged to “find a home” for quota production and can direct product to a processor, if necessary (see s. 11(1)(a), *NPMA*). This obligation to “find a home” for regulated product produced under quota does not provide a philosophical justification to intervene in an individual's private business dealings. Further,

⁵ Ministry of Agriculture and Food (Regulated Marketing Economic Policy, 2004, Specialty Market and New Entrant Submissions – Policy, Analysis, Principles and Directives, 2005

the notion that the Turkey Board is obliged to ensure K&M's business aspirations are realized is absurd. The Appellant testified that he "doesn't want to be in the processing business" when in reality he is in the processing business by choice. He seeks the rewards of direct sales of value-added turkey and it is incumbent on the Appellant, not the Turkey Board or BCFIRB, to add the value either by processing his regulated product or managing business relationships to secure custom processing services. The Appellant's assertions that the Turkey Board as the regulator should negotiate on his behalf to secure favourable commercial terms is fundamentally at odds with the Turkey Board's role as an impartial regulator.

65. The Turkey Board further argues that, consistent with previous appeals, it should only intervene in the private business dealings of a direct marketer in extraordinary circumstances, and on an interim basis. Industry convention is for stakeholders to negotiate mutually agreeable contracts for processing services, and regulatory intervention could disrupt this. Further, the prospect of regulatory intervention should be assessed against the ongoing obligation on stakeholders to adapt their business models such that they don't need regulatory intervention.
66. The Panel finds the decisions in *K&M 2018*, *Rosstown* and *K&M 2020* instructive. To the extent there is any ambiguity or confusion, the Panel finds that the Turkey Board has the legislative authority to direct a processor to provide custom processing services. However, the decision to exercise that authority requires sound justification and the Turkey Board should not regulate for the sake of regulating. It is the industry norm for direct marketers to negotiate mutually agreeable contracts for processing services to ensure long-term success of the business relationship. Business relationships evolve over time, and it is reasonable to expect a direct marketer will continue to adapt its business model to avoid the need for regulatory intervention.
67. The legislative authority to direct a processor to provide services is an extraordinary measure and should only be used where there is the existence of, or a strong likelihood of, a market supply failure or barrier. *K&M 2018* was an example of such a market failure as K&M's long-term processor indicated it would not be providing the processing services K&M relied upon for its direct market. The Turkey Board declined to assist K&M, maintaining it lacked authority to do so. In the unique circumstances of that case and where there was no other way to secure custom processing services, BCFIRB disagreed with the Turkey Board that it did not have the authority and ordered the Turkey Board to direct those services to allow sufficient time for K&M to implement its plans in the short term (2018 and 2019) with the express expectation that K&M consider adjustments to its business model, as necessary, to avoid future market failures.

68. The Panel disagrees that *K&M 2018* established a precedent whereby processors no longer have a choice whether to provide customer processing.
- b) Should the Turkey Board intervene in K&M's business relationship in the circumstances of this appeal?**
69. The question of whether the Appellant requires regulatory intervention requires a consideration of the evidence of a market failure (or a strong likelihood that one will arise), the efforts to negotiate a mutually beneficial arrangement with a processor, and efforts to adapt or adjust the business model.
70. The Appellant's position is that he has experienced a market failure or barrier to obtaining custom processing to supply its niche market demand. He argues Sofina is the only licensed processing plant in the lower mainland of BC that can provide the specific services he needs, and it refuses to engage in discussions. Other licensed processing facilities simply cannot provide the services the Appellant or his customers require. Mr. Robbins' emails directed to the Turkey Board, CPAC and Mr. Falk and his testimony in this appeal all confirm the starting point for negotiation is his strongly held belief that it is the Turkey Board's job to satisfy his niche market. The Appellant describes his customers as "the Turkey Board's customers" and suggests it is the Turkey Board's obligation to meet the customer demand for pasture raised turkey, produced under quota, by directing custom processing on the Appellant's preferred terms.
71. The Appellant acknowledged not engaging in any discussions with Sofina prior to asking the Turkey Board to enact a five-year custom processing policy. He has spoken annually with Sofina's hatchery representative but says these discussions have gone nowhere. He also acknowledged limited discussions with FVSP in 2021 but says that "a grower cannot negotiate effectively with a processor" and that "suggestions... that the grower should negotiate an arrangement with the processor is disingenuous." Further, and at the suggestion of Ms. Smith of SSMPA, the Appellant discussed his required terms for a custom processing arrangement with FVSP in April 2023.
72. The evidence of the Appellant's efforts to adapt or adjust his business model were limited. The Appellant believes he is entitled to the same services Rosstown provided in 2016 and only Sofina has the capacity to process the volume of birds and provide his customers' preferred services. It does not make business sense to build on-farm turkey processing facilities to accommodate a few days of processing each year and the Appellant's current employees are not physically able to do the heavy work required. Similarly, it does not make sense to haul birds to FVSP over four

days and incur extra hauling fees and the additional complications associated with withdrawing feed and water from his flock over multiple days.

73. In response, the Respondent disputes that K&M is experiencing “market failure” as there are no extraordinary circumstances nor is the issue short-term in nature. The Appellant’s position has become increasingly strident and inflexible, and the Appellant is now advancing positions diametrically opposed to the principles previously expressed by BCFIRB. The evidence shows that the Appellant has refrained from engaging with processors in any meaningful way to avoid a negotiated solution that would undermine the Appellant’s campaign for long-term regulatory intervention as a “first order” response instead of engaging in reasonable business dealings.
74. Further, the Respondent says that despite the Appellant’s unwillingness to negotiate, the evidence shows options are available. Specifically, FVSP was prepared to provide custom processing services to the Appellant if he were to act in a business-like manner and negotiate in earnest. Similarly, the Turkey Board argues that K&M is reluctant to modify its business model pointing to the testimony that the Appellant does not want to be in the processing business and has questioned why he should be. The Turkey Board argues that the Appellant is in the processing business by choice as he engages in direct sales of value-added production. The Respondent states it is incumbent on the Appellant as opposed to the Turkey Board or BCFIRB to “add value” either by processing his own regulated product or managing his business relationships to secure custom processing services.
75. The Panel observes that the facts of this appeal are quite similar to those in *K&M (2020)* where K&M sought long term regulatory intervention from the Turkey Board. In that appeal, BCFIRB distinguished the circumstances from those in *K&M 2018* and stated:
 135. 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.
 136. 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).

137. 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.
76. Looking at the evidence in this appeal, the Panel agrees with the Respondent that the Appellant's views about the regulatory responsibility of the Turkey Board have become more strident and his demands more interventionist. Where once he sought special accommodation for his own business, he now seeks industry-wide policies to advance the interests of direct marketers over the interests of processors. Further, he has demonstrated an unwillingness to negotiate in good faith and explore available options or adapt his business model as necessary. The Panel finds that it is not surprising that negotiations have proved unsuccessful when his starting position has been premised on giving him and his customers preferential terms on volumes, time, place and price, failing which he threatens regulatory intervention to impose the terms necessary to support his niche market.
77. The Panel finds the Appellant dismissive of the processors' concerns related to challenges with being forced to accommodate custom processing orders during busy holiday seasons and the additional complications of deprioritizing customers and losing efficiency due to segregation, staffing and over-time concerns. The Panel does not agree with the Appellant's assertion that his direct market business model preferences outweigh the business model preferences of processors, and that processors must adapt.
78. With respect to the Appellant's assertion about processor business decisions and preferences, the Panel finds Mr. Falk's evidence compelling. Mr. Falk testified about how FVSP has grown its business over the past ten years, adapting by processing more or less of a particular kind of bird in response to the market, and responding as various opportunities became available. FVSP has also experienced situations where a processor refused to process its birds requiring alternate arrangements on short notice. When FVSP lost its hauling company, it entered that business, not because it wanted to but because it needed a reliable delivery service. As barriers or challenges have arisen, FVSP has adapted and taken responsibility for its supply chain. The Panel finds these are reasonable expectations for any business owner.
79. Mr. Falk disagreed with the suggestion that growers cannot negotiate with processors; he testified that he has negotiated many joint ventures and long-term business development relationships where parties continue to work together to resolve their issues. FVSP sees opportunities to increase

custom turkey processing and add automation to grow its business. Mr. Falk cautioned against regulatory intervention saying it would be disruptive to negotiated relationships and could result in the unintended consequence of processors choosing to walk away from custom processing relationships to avoid the risk of being locked in for an indefinite period.

80. Based on the totality of the evidence, the Panel concludes that the Appellant's current challenges in accessing custom processing have more to do with his strongly held belief that the Turkey Board must act to ensure his preferred business model rather than a market failure. Instead of trying to work with a processor, starting small and growing a business relationship over time, the Appellant sought guaranteed preferential terms from the outset. When he did not get his preferred terms, he characterizes the issue as a market failure requiring regulatory intervention.
81. The Panel finds that, similar to the finding in *K&M 2020*, the Appellant has failed to demonstrate sufficient efforts to work effectively or cooperatively with the Turkey Board or processors to find a mutually beneficial resolution to his processing needs, choosing instead to pursue and demand regulatory intervention through policies that specifically benefit his niche market business model. In the absence of evidence supporting legitimate efforts to negotiate in good faith and participate in the give and take of a business relationship for him (and his customers), the Panel finds the regulatory intervention sought unwarranted.

F. ORDER

82. The appeal is dismissed.
83. There is no order as to costs.

Dated at Victoria, BC, this 5th day of March, 2024.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read 'A Sakalauskas', with a long horizontal line extending to the right.

Al Sakalauskas, Presiding Member