

IN THE MATTER OF THE SYNDICAT DES PRODUCTEURS D'OEUFS
D'INCUBATION DU QUÉBEC COMPLAINT PURSUANT TO S. 7(1)(F) OF THE
FARM PRODUCTS AGENCIES ACT, R.S.C., 1985, C. F-4 AGAINST
CANADIAN HATCHING EGG PRODUCERS

RESPONSE OF CANADIAN HATCHING EGG PRODUCERS

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Overview

1. The September 12, 2015 complaint¹ by the Syndicat des producteurs d'œufs d'incubation du Québec (SPOIQ) seeks substantial changes to the manner in which broiler hatching egg quota allocations are established. As provided in Schedule "B" to the *Federal-Provincial Agreement*,² the fundamental principle for determining quota allocations has always been geared to chicken meat production in each province. SPOIQ's Complaint seeks to shift the emphasis to hatchery throughput including, in particular, the volume of chicks marketed in interprovincial trade.

2. Canadian Hatching Egg Producers (CHEP) recognizes the need to account for market realities in the broiler hatching egg industry, and the need for a degree of flexibility in the orderly marketing system. However, measures designed to address market realities and provide for flexibility must be supported by the industry as a whole and must be conducive to a strong, efficient and competitive broiler hatching egg industry in Canada. CHEP has a number of concerns with the position put forth in the SPOIQ Complaint, notably:

- a) The far-reaching changes sought in the SPOIQ Complaint would require the consent of all signatories to the *FPA*.
- b) SPOIQ seeks to base provincial allocations on unregulated interprovincial marketing of chicks between signatory provinces.
- c) The SPOIQ position fails to adequately reflect the three pillars of the supply management system, particularly the responsibility of provincial boards to abide by the quota allocations for each province.
- d) To modify the framework for quota allocations as suggested by SPOIQ would not promote stability, and would not be conducive to a strong, efficient and competitive industry for broiler hatching eggs in Canada.

¹ *Le Syndicat des producteurs d'œufs d'incubation du Québec c. Les Producteurs d'œufs d'incubation du Canada*, Plainte en vertu des articles 7(1)d) et 7(1)f) de la *Loi sur les offices des produits agricoles* (L.R.C. (1985), ch. F-4), signifiée le 12 septembre 2015 [Complaint].

² *Federal Provincial Agreement for Broiler Hatching Eggs* dated November 27, 1986 [FPA], as amended.

- e) A number of aspects of the relief sought by SPOIQ are beyond the jurisdiction of the Farm Products Council of Canada (FPCC or Council) and represent an unwarranted interference in CHEP's mandate.
- f) SPOIQ's Complaint is founded on unsubstantiated and unwarranted criticisms of CHEP.

3. The issues SPOIQ has raised will be resolved through SPOIQ working with CHEP and CHEP's partners, to arrive at a consensus – not through litigation before FPCC. From CHEP's perspective, a structured mediation process separate from this Complaint offers the best opportunity to forge a positive solution. In this regard, CHEP's perspective on the pending complaint by the Ontario Broiler Hatching Egg and Chick Commission (OBHECC) is similar.

Preliminary comments respecting the broiler hatching egg industry

4. In considering the SPOIQ Complaint, it is important to understand the unique characteristics of the broiler hatching egg industry as compared to other supply managed commodities.

5. Broiler hatching eggs are an intermediate product intended to service the requirements of broiler chicken producers. Thus, as discussed below, the fundamental principle for determining quota allocations has always been to derive such allocations by reference to chicken meat production in each province.

6. One of the key priorities behind the establishment of CHEP, back in the 1980s, was to better align the 18-month production cycle of broiler hatching egg producers with the much shorter cycle of chicken production. That priority, along with the control of imports, is key to CHEP's mandate under the *Farm Products Agencies Act*³ and the *FPA*. This can be seen in the opening paragraph of the *FPA*, which states:

WHEREAS the parties to this Agreement deem it expedient to establish a Comprehensive Broiler Hatching Egg Marketing Program for Canada in order to ensure a strong, efficient and competitive production and

³ R.S.C. 1985, C. F-4. [the Act].

marketing industry for broiler hatching eggs in Canada and a dependable supply of the product to the chicken industry...

7. Another unique characteristic of the industry is that broiler hatching eggs are sold to hatcheries and then in turn sold as day-old chicks to broiler chicken producers. Broiler hatching egg production and marketing is strictly regulated. Chicken production and marketing is also strictly controlled. In contrast, the hatchery sector is only subject to very limited regulation at the national level. To be more precise, CHEP's authority in relation to chicks is limited to licensing for information purposes⁴, and marketing from non-signatory provinces to signatory provinces.⁵

8. Interprovincial movement of chicks between signatory provinces – a matter which is central to SPOIQ's Complaint – is beyond the authority of CHEP, and by extension beyond the authority of FPCC. Hatcheries within the regulated area can sell chicks anywhere they find a market. Tariff Rate Quota (TRQ) utilisation is likewise beyond CHEP's authority. TRQ is initially allotted to hatcheries by the Department of Foreign Affairs, Trade and Development, and movement of TRQ paper within Canada is strictly a commercial matter as between hatcheries.

9. Ownership patterns in the broiler hatching egg industry are also relevant. Most broiler hatching egg producers throughout Canada are independently owned and operated. In

⁴ *Canadian Hatching Egg Producers Proclamation*, SOR/87-40 states:

And Know You Further that We are pleased to specify that Canadian Hatching Egg Producers shall not, in relation to chicks produced for chicken production, be authorized to exercise its powers pursuant to section 22 of the Farm Products Agencies Act, save and except to make such orders and regulations as it considers necessary

...

(b) to establish a system for the licensing, for information purposes, of persons engaged in the marketing of chicks produced for chicken production; ...

See also the *Canadian Broiler Hatching Egg and Chick Licensing Regulations*, SOR/87-516.

⁵ *Canadian Hatching Egg Producers Proclamation*, SOR/87-40 states:

And Know You Further that We are pleased to specify that Canadian Hatching Egg Producers shall not, in relation to chicks produced for chicken production, be authorized to exercise its powers pursuant to section 22 of the Farm Products Agencies Act, save and except to make such orders and regulations as it considers necessary

(a) to implement a quota system for persons engaged in the marketing of chicks produced in the Provinces of Nova Scotia, New Brunswick, Prince Edward Island or Newfoundland and Labrador or Yukon, the Northwest Territories or Nunavut for chicken production and marketed in the Provinces of Ontario, Quebec, Manitoba, British Columbia, Saskatchewan and Alberta....

See also the *Canadian Broiler Hatching Egg And Chick Orderly Marketing Regulations*, SOR/2000-283.

contrast, the substantial majority of broiler hatching egg operations in Quebec (in the order of 80%) are owned and controlled by hatcheries⁶. In Ontario, CHEP understands there is one major integrated hatchery/broiler hatching egg production operation that accounts for roughly 10% of production in that province.

Summary of Schedule “B” quota allocation methodology and provisions for adjustments

10. The methodology for broiler hatching eggs quota allocation is set out in Schedule “B” to the *FPA*, as last amended on March 20, 2012.⁷ Section 3.01 of Schedule “B” provides that CHEP:

- a) Estimate the total kilograms of Canadian chicken meat production, as recommended by CHEP’s industry advisory committee and, where appropriate, by taking into account other relevant information;
- b) Multiply (a) with the provincial chicken production market shares as compiled on a 52-week rolling basis, to determine provincial chicken meat production;
- c) Divide (b) by the meat-to-egg ratio to determine provincial requirements;
- d) Deduct 17.43% or less from (c) to account for imports and determine the net provincial requirements of broiler hatching eggs;
- e) Provide for a chick credit, converted to egg equivalents for chick shipments from the regulated area (signatory provinces) to the unregulated area (non-signatory provinces), not including chicks shipped under orderly marketing contracts approved by CHEP.

11. Pursuant to s. 14(5) of the *FPA*, CHEP is authorized to “adjust but not change the fundamental principles” of the quota allocation methodology with the unanimous approval of

⁶ CHEP has not been provided with precise information on the ownership of broiler hatching egg operations in Quebec, but CHEP understands that 80% or more of broiler hatching production in the province is hatchery owned and controlled.

⁷ Schedule “B” to the *Federal Provincial Agreement for Boiler Hatching Eggs* as approved on March 20, 2012.

CHEP Directors⁸. In other words, s. 14(5) allows for adjustments to the quota methodology provided they are unanimously supported by provincial boards and hatchery representatives, and provided they do not change the fundamental principles in Schedule “B”. More substantial changes require the consent of all *FPA* signatories, as provided in s. 7⁹.

12. The fundamental principles are set out in s. 2.00 of Schedule “B” as follows:

2.00 Fundamental Principles

2.01 The fundamental principle for determining national allocations is to derive such allocations by reference to the overall estimated kilograms of chicken meat production in Canada for the relevant year or period.

2.02 In addition to other factors which CHEP is required by law to consider¹⁰, the fundamental principle for determining quota allocations to the provinces is to derive such allocations by reference to the overall estimated kilograms of chicken meat production in each province for the relevant year or period.

2.03 The determination of quota allocations, where the adjustment for imports may be less than 17.43% of the total provincial broiler hatching egg requirements for provinces which are admitted or readmitted to CHEP, will not constitute a change to the fundamental principles. An adjustment for imports at less than 17.43% for a province that is to be admitted or readmitted to CHEP will require the unanimous consent of the members of CHEP.

13. Illustrating the flexibility provided by the orderly marketing system for broiler hatching eggs, Schedule “B” has undergone a number of changes over the years, notably:

⁸ S. 14(5) of the *FPA* provides:

It is agreed between the parties hereto that the methodology set out in Schedule “B” to this Agreement shall be followed for a period of two years after which time the Agency may adjust but not change the fundamental principles of the methodology with the unanimous approval of the members of the Agency.

⁹ Section 7 of the *FPA* provides :

7. Changes to the Federal Provincial Agreement

The parties agree that no changes shall be made to the Agreement and the Schedules hereto without the unanimous consent of all parties to this Agreement save and except that the methodology as set out in Schedule “B” annexed hereto may be amended in accordance with section 14(5) of this Agreement.

¹⁰ The reference in s. 2.02 to “other factors which CHEP is required by law to consider” is discussed below.

- a) The 1986 allocation formula aggregated three factors: the base number of broiler hatching eggs, as set out in the Plan for each province; the provincial equalization; and the provincial market adjustment, which was tied to the forthcoming allocation in the broiler chicken industry¹¹;
- b) In 1990, a new allocation formula was agreed upon, which untied the estimation of future market requirements for broiler hatching eggs from the chicken meat provincial allocations and introduced a provincial adjustment for imports¹²;
- c) In 1995, the provincial adjustments for imports were updated to address certain import-related issues¹³;
- d) In 2000, new amendments affirmed CHEP's discretion in estimating chicken meat requirements, chicken meat production and net chick movement by reference to the latest data available on a 52-week rolling basis, rather than by reference to specific sets of data. The 2000 version of Schedule "B" also set up a credit system for chick shipments into unregulated areas, and new provincial adjustments for imports¹⁴;
- e) In 2012, amendments to Schedule "B" further affirmed CHEP's discretion in respect of the estimate of chicken meat production, as CHEP is expressly not bound by the recommendation of industry advisory committee and may take into account other relevant information. The credit for chicks shipped into the unregulated areas is explicitly included as a fifth step in the allocation calculation, rather than being a factor in the calculation of the meat-to-egg ratio.¹⁵

14. Additional flexibility is provided in the broiler hatching egg orderly marketing system in several ways.

¹¹ Schedule "B" to the *Federal Provincial Agreement for Boiler Hatching Eggs* as approved on November 27, 1986.

¹² *Federal Provincial Agreement for Boiler Hatching Eggs: Amendment for the purpose of repealing and replacing the existing Schedule B methodology* as approved in May 1990.

¹³ *Resolution with respect to Schedule "B" Methodology*, adopted on May 24, 1995.

¹⁴ Schedule "B" to the *Federal Provincial Agreement for Boiler Hatching Eggs* dated June 2000.

¹⁵ Schedule "B" to the *Federal Provincial Agreement for Boiler Hatching Eggs* as approved on March 20, 2012.

15. For one thing, CHEP's Liquidated Damages Assessment (LDA) Agreement¹⁶ and the LDA Resolution¹⁷ provide for a limited "sleeve" by which provinces can exceed their quota allocations without attracting LDA liability. For many years, this sleeve, which responds to the variations inherent in the production of a live product, has been set at 1% of the allocation for each province.

16. In addition, the framework of the *LDA Agreement* and *LDA Resolution* allows CHEP to make allowance for *force majeure* situations and other factors to relieve a province of LDA liability¹⁸.

17. For a number of years, CHEP has also had a mechanism for provinces to lease quota interprovincially. Under the *LDA Agreement* and *LDA Resolution*, the intent is that such exchanges be unanimously approved, so as to avoid economic harm to any one province. The status and significance of the 2012 Quota Lease Pool (QLP) Policy is further addressed below.

18. Last but not least, being geared to the demand of broiler chicken meat, the broiler hatching egg industry necessarily reflects the differential growth opportunities in the chicken industry. Differential growth in quota allocations for chicken producers is echoed in the quota allocation for broiler hatching eggs.

2014 proposal by SPOIQ, and response by CHEP and provincial boards

19. By letter of January 15, 2014,¹⁹ SPOIQ proposed various amendments to Schedule "B". The 2014 SPOIQ proposal was stated to be in response to concerns about the utilization of the national broiler hatching eggs quota, the use of TRQ, hatcheries' regular recourse to supplementary import permits, and chronic instability and imbalance in supply to Quebec's

¹⁶ *Liquidated Damages Assessment Agreement* dated 22 March 2000 [*LDA Agreement*].

¹⁷ *Office Consolidation of the Resolution (and Its Amendments of February 22 and November 20, 1993) Respecting the Determination of Liquidated Damages* [*LDA Resolution*].

¹⁸ To illustrate this point with a recent example, when Alberta rejoined CHEP as a signatory member in 2013, they had the ability to move from their 10% import volume as part of Schedule "B" to 17.43% over 10 years. Alberta made a request in the latter part of 2013 to change their import level to 17.43% effective for the 2013 calendar year. However, soon thereafter they recognized an error in their calculations. In order to recognize the unique circumstances surrounding Alberta's allocation in 2013, no liquidated damages were assessed against Alberta Hatching Egg Producers in relation to the 2013 allocation.

¹⁹ Letter from Gyslain Loyer, INCOBEC, dated January 15, 2014.

processing sector. SPOIQ argued that Schedule “B” has been changed many times in order to address changes within the industry, and asked that it be changed again to take into account the needs of hatcheries operating on each province’s territory. SPOIQ acknowledged that “this is a fundamental question and is political in nature,” and asked that its request be put on the agenda for CHEP directors’ telephone conference of January 23, 2014.

20. Suffice it to say that, despite repeated good faith efforts to listen, understand and discuss SPOIQ’s 2014 proposal, that proposal did not receive support from any other provinces outside of Quebec, and as a consequence could not be endorsed by CHEP.

21. In responding to SPOIQ’s 2014 proposal, the Ontario Broiler Chicken Hatching Egg Producers Association (OBCHEPA)²⁰ referred to CHEP’s efforts to match the supply of broiler hatching eggs plus planned imports to the annual requirement for chicks. OBCHEPA emphasized participating in the chicken volume discovery process, determining allocations, working with DFAIT in respect of imports and responding to catastrophic situations such as bird flu outbreaks (Avian Influenza). OBCHEPA acknowledged that some Quebec hatcheries may wish to expand in Ontario, and noted various options already available to them within the regulated system. It further stated that market forces, including hatchery competition, must operate within the supply-managed system and respect its integrity. Producers would be harmed and the system destabilized if provincial allocations were based on the uncontrolled capacity of hatcheries that are not in a regulated system.

22. These views were endorsed by OBHECC,²¹ which also reaffirmed the “foundational principle” for broiler hatching egg allocations, namely, “to provide sufficient allocation to each province to meet the estimated market demand for chicken in that province, with an adjustment for imports from the United States.” OBHECC stressed the need to control the chick exports from Quebec into Ontario, and stated its position that the amendments proposed by SPOIQ represent a change in the fundamental principles of Schedule “B” allocation.

²⁰ Letter from John Kapteyn, OBCHEPA, dated February 25, 2014.

²¹ Letter from William H. Bearss, OBHECC, dated March 7, 2014.

23. Alberta Hatching Egg Producers (AHEP)²² noted the evolution in the hatchery industry. It also noted that the chicken allocation comprises an amount for New Market Development as subscribed by processors, but expressed concern that the “information being put forth in terms of allocation does not parallel the requests of our processors within our province.” AHEP favoured “more of a crystal ball approach into the future versus relying on the past.”

Related discussions involving SPOIQ and CHEP

24. In addition to the written submissions summarized above, CHEP has discussed the Quebec-Ontario IPM and related allocation issues on numerous occasions since at least 2012, when CHEP engaged retired Justice François Lemieux in an effort to identify the root cause and possible solutions for the issues faced by Ontario and Quebec. The issues were then canvassed at “directors only” meetings and teleconferences of March, May, July, October and November 2013. At the request of Ontario and Quebec directors, CHEP also organized meetings between SPOIQ and OBHECC. While those meetings continued in 2014, CHEP also continued to discuss the issue at the monthly “directors only” meetings and teleconferences of January to July 2014. CHEP then hired a consultant, Bob Burden, to provide an allocation analysis. SPOIQ, which had stated by letter of October 7, 2014 that it intended to bring a complaint to Council, agreed to postpone the complaint and acknowledged that steps were being taken to move the issue forward. Further discussions took place in January and March 2015. Then, in the spring of 2015, CHEP engaged the services of a facilitator, Warren Wilson. The issue continued to be dealt with through the spring and summer of 2015, and was linked to SPOIQ’s decision not to commence a complaint until September 2015.

25. In light of the extensive preoccupation of CHEP with SPOIQ’s concerns and requested modifications, SPOIQ’s suggestion that CHEP failed to seriously consider Schedule “B” adjustments is completely inaccurate.

26. To be fair, SPOIQ has been an active and constructive player in the confidential negotiations that have taken place. Other players have likewise approached these difficult issues in good faith. Moreover, despite appearances, from CHEP’s perspective considerable

²² Letter from Kevin Tiemstra, AHEP, dated March 10, 2014.

progress has been made. Thus, it is disappointing that SPOIQ has opted to litigate in respect of issues SPOIQ concedes are political in nature.²³

Relief sought in SPOIQ Complaint

27. There are four main parts to the relief sought by SPOIQ in its 2015 Complaint.

28. First, SPOIQ asks that FPCC order CHEP to change Schedule “B” to reflect what are described as the “realities and evolution of hatching egg and chick marketing”²⁴. In particular, SPOIQ seeks to amend s. 3.01(e) of Schedule “B” so that all chicks marketed from a signatory province in interprovincial trade would automatically be added to the province’s net requirements for allocation purposes²⁵.

29. Second, if CHEP fails to amend Schedule “B” within 90 days of the issuance of the Complaint Committee’s report, SPOIQ asks for the right to request that Council invoke its jurisdiction to introduce changes to the *CHEP Proclamation* to mandatorily and definitively resolve the concerns raised by SPOIQ²⁶.

30. Third, SPOIQ asks that FPCC order CHEP, until Schedule “B” is changed, to take into account various factors, which SPOIQ claims are “mandatory factors” set out in the legislation (“facteurs impératifs de la législation”)²⁷. SPOIQ further asks that FPCC refuse to prior-approve

²³ Letter from Gyslain Loyer, INCOBEC, dated January 15, 2014.

²⁴ SPOIQ Complaint, para. 66:

ORDONNER aux POIC que, suite au dépôt du rapport du comité établi pour entendre La présente plainte, des discussions soient menées au sein des POIC, s’il le faut sous La surveillance du CPAC, afin d’ajuster l’Annexe « B » de l’EFP de manière à mieux tenir compte de La réalité et de l’évolution de La mise en marché des oeufs d’incubation et des poussins...

²⁵ Currently, only chicks marketed in interprovincial trade from signatory to non-signatory provinces are credited in this manner, as set out at s. 3.01(e) of Schedule “B”.

²⁶ SPOIQ Complaint, para. 66 :

RESERVER au Syndicat, en cas d’échec des discussions au sein des POIC dans les 90 jours du dépôt du rapport du comité, le droit de se réadresser à votre Conseil en vue de présenter une requête invoquant notamment la compétence du Conseil en vertu de l’article 6 (1) a) de façon à ce que La Proclamation soit éventuellement modifiée en vertu de l’article 17 (2) c) afin que toutes les problématiques soulevées par La présente plainte soient résolues de façon impérative et définitive...

²⁷ SPOIQ Complaint, para 66:

ORDONNER aux POIC et ce tant que l’Annexe « B » de l’EFP n’aura pas été ajustée de prendre en compte les autres facteurs impératifs de la législation en considérant notamment :

- o Les besoins des transformateurs;
- o L’évolution du marché interprovincial des poussins;

any amendment to the Quota Regulations that does not adequately take into account these so-called “mandatory factors”. In addition, SPOIQ asks FPCC to find that CHEP failed to correctly apply Schedule “B” since 2012 by failing to take into account these factors.

31. Fourth, SPOIQ asks that FPCC require CHEP to adhere to the QLP policy until Schedule “B” is modified in the manner proposed by SPOIQ.

CHEP’s response to the relief sought by SPOIQ

Changes sought by SPOIQ would require signatory approval

32. SPOIQ’s Complaint seeks to substantially alter the framework for deriving quota allocations that has been in place pursuant to the *FPA* since CHEP came into existence in 1986. SPOIQ also seeks a declaration that those alterations do not constitute a fundamental change to the Schedule “B” methodology²⁸.

33. With the greatest of respect, SPOIQ cannot have it both ways. SPOIQ cannot insist on far-reaching changes and in the same breath downplay them as mere adjustments not requiring approval by all signatories. Section 7 of the *FPA* makes it clear that, with the exception of adjustments (not changes to the fundamental principles) in Schedule “B”, no changes to the *FPA* and its Schedules can be made “without the unanimous consent of all parties to this Agreement”.

SPOIQ seeks to base allocations on unregulated interprovincial marketing of chicks

34. As SPOIQ concedes²⁹, CHEP has no authority over interprovincial marketing of chicks from hatcheries between signatory provinces. The volume of chicks that move interprovincially from hatcheries between signatory provinces is unregulated. Moreover, the volume of chicks shipped interprovincially is completely outside the control of independently owned broiler

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- o La capacité d'une province de produire son allocation d'œufs d'incubation;
 - o Les besoins des producteurs et notamment La proximité de ceux-ci des couvoirs, leur approvisionnement en poussins et La facilité de communication de ceux-ci;
 - o Tout autre facteur pertinent...

²⁸ SPOIQ Complaint, para 66:

DÉCLARER qu'un tel ajustement ne constitue pas « un changement fondamental à La méthodologie » de l'annexe «B »...

²⁹ SPOIQ Complaint, paras. 14 and 20-23.

hatching egg producers. Likewise, CHEP has no control over TRQ utilization by hatcheries and movement of TRQ paper between hatcheries within Canada.

35. Calculating regulated provincial market shares for broiler hatching eggs directly based on unregulated interprovincial shipments by competitive hatchery operations is unsound from a policy perspective, as further explained below.

SPOIQ's approach fails to adequately reflect the pillars of supply management and is not conducive to a strong, efficient and competitive industry in Canada

36. Adherence to marketing and production limits is one of the three basic pillars of supply management. The other pillars are effective import controls and regulated pricing to enable producers to achieve their cost of production.

37. SPOIQ's Complaint has failed to mention, let alone adequately address, the substantial and growing overproduction in Quebec, which has occurred since 2011. While CHEP acknowledges that various provinces, including Ontario, have underproduced their allocation, any long-lasting solution must reaffirm the provincial commitments to limit production.

38. Furthermore, SPOIQ has failed to explain how its favoured approach of basing provincial quota allocations for broiler hatching eggs on hatchery throughput in each province can be reconciled with the pillars of supply management. SPOIQ has failed to show how its proposed methodology can be conducive to a strong, competitive and efficient broiler hatching egg industry in Canada taking into account the interests of broiler hatching egg producers and consumers.

39. To put SPOIQ's proposal in context, the chart below shows trends in interprovincial movement of chicks between signatory provinces dating back to 2006, as measured in egg equivalents³⁰.

³⁰ Note that the figures in this table are for marketing, not calendar years.

IPM Chick Movement (within regulated area only³¹)

Equals: [IPM Chicks Shipped] - [IPM Chicks Received]

Converted into In Egg Equivalents (1 chick = 1.27 eggs)

	2006	2007	2008	2009	2010
British Columbia	715,564	95,876	128,777	-253,059	404,919
Alberta	2,186,206	92,925	109,182	148,358	-295,739
Saskatchewan	-3,187,714	-585,761	-530,758	-416,008	1,143,042
Manitoba	100,247	262,696	215,427	379,766	-1,034,773
Ontario	-8,934,343	-8,981,965	-7,333,793	-7,363,629	-7,715,400
Quebec	9,120,040	9,116,229	7,411,165	7,504,572	7,932,849
Atlantic	-	-	-	-	-

	2011	2012	2013	2014	2015
British Columbia	-326,376	-20,815	17,424	-13,146	-46,417
Alberta	206,808	80,559	2,730	-76,625	123,769
Saskatchewan	-1,401,358	-1,663,698	-1,705,684	-1,209,396	-301,556
Manitoba	1,426,798	1,603,182	1,696,095	1,309,913	234,926
Ontario	-8,339,579	-8,433,393	-8,907,692	-9,133,340	-9,870,031
Quebec	8,433,707	8,434,165	8,897,127	9,122,594	9,859,309
Atlantic	-	-	-	-	-

40. Certain observations can be made from these numbers, including the following:
- Quebec hatcheries have consistently accounted for the lion's share of interprovincial chick movements within the regulated area, accounting for approximately 7.5 million egg equivalents in 2006, which has increased to 9.9 million egg equivalents in 2015.
 - Ontario broiler producers have consistently been the largest recipient of chicks, reflecting the interprovincial movement of chicks from Quebec hatcheries.
 - Manitoba hatcheries have also accounted for a significant volume of interprovincial chick movement into Saskatchewan in the period in question, although the figures have varied somewhat more than as between Ontario and Quebec.
 - For different reasons, there is considerable variability in interprovincial chick shipments between certain regulated provinces. For example, Alberta and British Columbia have been net shippers and net recipients in different years.

³¹ Note that Saskatchewan and Alberta were not formally part of the regulated area for this entire period, but had signed service contracts for part of the period in question.

41. It is not entirely clear how SPOIQ's proposed chick credit model would work in practice. The intent appears to be that Quebec, in particular, would receive a credit on the volume of chicks shipped in interprovincial trade (9.9 million in 2015, in egg equivalents). It is less obvious from SPOIQ's Complaint how the corresponding reduction would be distributed (i.e., whether the burden of the 9.9 million egg equivalent credit would be borne entirely by Ontario as the recipient province, or spread amongst provinces proportionately, or in some other manner). However, the effect of SPOIQ's approach would clearly be to directly award higher broiler hatching egg production to any province that gains competitive hatchery market share from one or more other provinces.

42. It is also important to consider how the hatchery throughput model would alter the industry landscape going forward, given the following:

- a) Hatcheries compete with one another for market share within their respective provinces and in other provinces.
- b) There are limits to how far it is technically and economically feasible to ship chicks, but these limits are less significant than might be assumed. If there is enough money to be made, travelling distances do not appear to be a significant impediment to chick shipments across Canada. More specifically, CHEP understands that chick shipments from U.S. hatcheries into Canada can come from as far away as 38 hours of trucking time, with the average being about 25.5 hours. Chick movements tend to cover shorter distances within Canada, but CHEP understands that chick movements of up to 24 hours of trucking time do occur in some situations.
- c) The competitive impact will differ substantially depending on the ownership model of the broiler hatching egg and hatchery operations. A hatchery operation that owns broiler hatching egg production stands to benefit to a much greater degree from a hatchery throughput quota allocation model as compared to an independent hatchery operation. The integrated hatchery/broiler hatching egg producer stands to benefit at two levels from the SPOIQ model: first by gaining market share

through interprovincial chick shipments and second by gaining market share as a broiler hatching egg operation. Recall that Quebec is alone in having a broiler hatching egg industry that is predominantly owned and controlled by hatcheries.

- d) The willingness of hatcheries to buy broiler hatching eggs from other provinces is another consideration. A hatchery that owns broiler hatching egg production will naturally have an incentive to prefer its own production operation and may decline to buy broiler hatching eggs from other producers, especially broiler hatching egg producers in another province. This is an issue that has been raised on a number of occasions by Ontario³².

43. The recent experience relating to interprovincial movement of chicken between Ontario and Quebec further illustrates the need for caution in basing provincial quota allocation for broiler hatching eggs on unfettered activities in downstream sectors. Fueled by premiums paid by processors to chicken farmers, interprovincial movement between Ontario and Quebec spiked to the point of causing serious market disruption in that industry. The growth in chicken production in Eastern Ontario, alluded to in the SPOIQ Complaint, was a by-product of this process. Provincial chicken boards in Ontario and Quebec, together with processor organizations in those two provinces, found it necessary to come up with a moratorium and other arrangements to regulate interprovincial movement to restore stability and minimize market distortions³³.

44. To sum up, CHEP is deeply concerned that the unregulated hatchery throughput model would introduce substantial distortions in the regulated broiler hatching egg market as well as in the competitive hatchery market. This would be the very antithesis of promoting a strong, efficient and competitive production and marketing industry for broiler hatching eggs in Canada.

³² See the discussion of this issue in Letter from John Kapteyn, OBCHEPA, dated July 30, 2015 in respect of OBHECC's complaint.

³³ For a discussion of related issues see *Bos v. CFO*, 2011 ONAFRAAT 12 (CanLII) and *Association des abattoirs avicoles du Québec inc. c. Nadeau Poultry Farm Ltd.*, 2013 QCCA 2025 (CanLII).

45. CHEP is not alone in sharing these concerns, as the negative response from other provinces to SPOIQ's January 2014 proposal illustrates.

Interprovincial barriers to movement of broiler hatching eggs

46. SPOIQ quite appropriately makes reference³⁴ to the principle in the *FPA* designed to avoid restrictions on the movement of broiler hatching eggs in a manner inconsistent with the *FPA* and any applicable legislation³⁵. However, SPOIQ fails to address the implications of its proposed approach in terms of interprovincial movement of broiler hatching eggs between signatory provinces.

47. This issue takes on added significance given that most Quebec broiler hatching egg operations are owned by Quebec hatcheries. Ontario producers have expressed concern about the apparent unwillingness of Quebec hatcheries to source hatching eggs from Ontario producers and to instead lease hatching egg quota from Ontario for the use of Quebec producers.³⁶ This unresolved issue points to the potential for the SPOIQ proposal to result in barriers to interprovincial movement of broiler hatching eggs.

48. CHEP supports the principle that interprovincial movement of chicks should not be restricted in any manner contrary to the *FPA* and any applicable legislation. The same principle must be recognized and given effect in connection with interprovincial movement of broiler hatching eggs.

Relief sought by SPOIQ beyond FPCC jurisdiction

49. The primary relief sought by SPOIQ is beyond FPCC's authority to grant. More specifically:

³⁴ SPOIQ Complaint, para 16.

³⁵ S. 10 of the *FPA* provides:

10. Interprovincial and Intraprovincial Marketing

The parties to this Agreement agree that intraprovincial and interprovincial marketing of broiler hatching eggs and chicks shall not be restricted in any manner which is inconsistent with the provisions of the Comprehensive Broiler Hatching Egg Marketing Program and any applicable legislation.

³⁶ See the discussion of this issue in Letter from John Kapteyn, OBCHEPA, dated July 30, 2015 in respect of OBHECC's complaint.

- a) FPCC cannot force changes to the quota allocation system that require approval by all *FPA* signatories.
- b) As FPCC has previously held, FPCC cannot direct CHEP to alter Schedule “B”. To quote from the 1999 Report relied on by SPOIQ in this Complaint, “no authority to make such a directive exists”³⁷.
- c) As for amending the Proclamation, that is the purview of the Governor in Council. The Governor in Council has broad amending powers, but CHEP questions whether that authority extends to overriding commitments made to *FPA* signatories. The *CHEP Proclamation* forms Schedule “A” to the *FPA*. As previously noted, s. 7 of the *FPA* is very clear in stating that “no changes shall be made to the Agreement and the Schedules without the unanimous consent of all parties” (apart from the adjustments to Schedule “B” permitted by s. 14(5) of the *FPA*).
- d) The QLP Policy is a policy adopted by the CHEP Board of Directors. That policy does not have the status of binding legislation or regulations, as implied by SPOIQ.

Status of the Quota Lease Pool (QLP)

50. SPOIQ’s position on the QLP is somewhat difficult to follow. On the one hand, SPOIQ seems to criticise the QLP as an “artificial flexibility mechanism”. On the other hand, SPOIQ insists that the QLP is valid and in force.

³⁷ In National Farm Products Council, Report of the committee established to inquire into the complaint by OBHECC against CBHEMA re adjustment for imports in its quota allocation methodology dated July 9, 1999 [the 1999 Report], the FPCC Complaint Committee ruled as follows:

OBHECC has requested that Council direct the Agency to adjust imports under Schedule B so they reflect the import permit allocation made by EICB.

For all the reasons expressed earlier, the Committee is of the view that no authority to make such a directive exists.

The complainant cites that a directive be made pursuant to section 6(1)(c) of the Act, which section provides that Council works with agencies in promoting more effective marketing of farm products in interprovincial and export trade.

The Committee agrees with the Agency that this section "neither expressly nor by necessary implication constitutes either a general directing power of Council vis-à-vis agencies or, specifically, a directing power to CBHEMA to adopt an adjustment for imports different from the adjustment stipulated in Schedule B".

51. CHEP's position in respect of the QLP has been addressed in responding to the OBHECC complaint. Briefly,

- a) The QLP was first introduced in the early 1990s with the intention of introducing flexibility into the quota system, ensuring efficient use of the national allocation, and minimizing reliance on supplementary import permits to service the domestic market.
- b) CHEP sought legal advice respecting the QLP in 2014, in response to the August request from OBHECC. The resulting opinion raised concerns about the legal compatibility of the QLP with orderly marketing commitments in the *FPA*³⁸. CHEP Directors took the immediate step of deciding to follow the QLP in 2014 only, while pursuing amendments to the QLP on a parallel track³⁹. Various options were considered thereafter, including a modified proposed version of the QLP put forward by OBHECC⁴⁰. However, none of the options to modify the QLP for 2015 attracted a consensus.
- c) As indicated by the Chair of CHEP at the July 2015 meeting of Directors, having not reached agreement on a modified QLP for 2015, the QLP is no longer in force.

52. It should be added that, in seeking a replacement for the QLP Policy, it is not CHEP's intention to disregard the need for flexibility in the orderly marketing system for broiler hatching eggs. However, any new arrangements that are implemented must be designed to be compatible with, and not take precedence over, provincial board commitments under the *FPA* to avoid overmarketing and to respect allocation limits. It is wholly inappropriate to simply disregard the legal problems identified with respect to the QLP, and to treat that Policy as somehow binding on CHEP, as SPOIQ seems to propose. The inconsistencies of the QLP Policy with the *FPA* must be addressed for the industry to move forward, and for CHEP to fulfill its mandate and objects.

³⁸ Memo re Quota Lease Pool and Overmarketings Sleeve from David Wilson and Carmen Baru to Giuseppe Caminiti, dated October 3, 2014.

³⁹ Excerpt from CHEP Minutes of the Directors Only Meeting, dated November 17, 2014.

⁴⁰ Letter from Bob Guy, OBHECC, dated February 9, 2015.

SPOIQ misconstrues the 2012 amendments to Schedule “B”

53. SPOIQ misconstrues Schedule “B” when it claims that the references in the 2012 version to “other factors required by law” are a “major” modification and a new requirement to consider comparative advantage of production as set out at section 23 of the *Act*.

54. Indeed, if the changes to Schedule “B” in 2012 were as “major” as SPOIQ claims, CHEP would question how those changes could be introduced without approval of all *FPA* signatories.

55. As SPOIQ acknowledges, prior to 2012 CHEP was implicitly required to consider any “factors required by law”, including section 23 of the *Act*. Moreover, neither Quebec nor any other province previously expressed concerns that, in the absence of the 2012 amendments, CHEP’s allocation formula was unlawful. The changes were added in 2012 simply to provide greater clarity.

56. SPOIQ’s argument that CHEP has misapplied the Schedule “B” methodology is also misplaced. For one thing, SPOIQ voted for all the quota allocations in question. Furthermore, FPCC’s Interim Complaint Guidelines contemplate that complaints are to be filed within 21 days of the Agency decision at issue. To put it mildly, it is too late for SPOIQ to complain about what CHEP decided, with SPOIQ’s endorsement, in respect of past allocation decisions.

57. SPOIQ refers to section 23 of the *Act* in its Complaint but makes no explicit mention of the principle of comparative advantage of production, as embodied in s. 23(2). In any event, comparative advantage of broiler hatching egg production is not even indirectly addressed in SPOIQ’s Complaint. The factors cited by SPOIQ, such as hatcheries’ needs, established sales networks of hatcheries and ease of communication of chicken producers, cannot be understood as indicators of the principle of comparative advantage of production of broiler hatching eggs. Moreover, if the suggestion is that the focus should be on competitive advantage (which CHEP is not in favour of), it is noteworthy that the cost of production of broiler hatching eggs is higher in Quebec than certain other provinces, notably Ontario.

58. Finally, even if one postulates, for the sake of argument, that CHEP had an obligation to consider the factors cited by SPOIQ, the argument by SPOIQ still fails. As acknowledged by

SPOIQ, the request for an amendment of Schedule “B” was repeatedly and extensively considered by CHEP. The proposal advanced by SPOIQ was rejected as being inconsistent with the pillars of supply management and as purporting to modify the fundamental principles of Schedule “B”. But SPOIQ’s suggestions and ideas were given careful and good faith consideration by CHEP, its provincial partners and its industry partners. Moreover, as further discussed below, CHEP remains open to consensus-based solutions to address the concerns identified by SPOIQ and respond to market realities.

The 1999 Report of Council is of limited assistance

59. The 1999 Report, cited at length by SPOIQ, provides valuable guidance, but cannot be transposed directly to the current Complaint.

60. The 1999 Report focused on imports, and on CHEP’s import adjustment calculations under Schedule “B”. The focus of the current Complaint, by contrast, is on hatchery throughput and serving the needs of hatcheries. The discretion advocated by SPOIQ in relation to hatchery needs is a vastly different exercise from the calculations associated with imports, as discussed in the 1999 Report.

61. CHEP agrees, however, that certain statements made in the 1999 Report remain relevant, namely with respect to:

- a) Council’s lack of jurisdiction to change CHEP’s Schedule “B” allocation formula;
- b) CHEP’s lack of jurisdiction to unilaterally amend its allocation formula;
- c) The need for more information about hatcheries;
- d) The concern that certain practices (such as the quota lease) allow provincial boards to change provincial allocations and thereby usurp a function of CHEP.

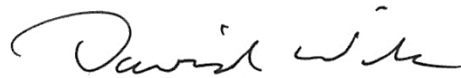
Concluding comments

62. For the reasons explained in these submissions, the SPOIQ Complaint has not been substantiated and, in CHEP’s respectful submission, must be dismissed.

63. But that is not the end of the story.

64. Notwithstanding the fundamental concerns CHEP has with the position advanced in SPOIQ's Complaint, CHEP recognizes that there is work to be done to devise practical, consensus-based solutions to address the challenges facing the broiler hatching egg industry, including the challenges identified by SPOIQ. CHEP also recognizes that SPOIQ has been an active and constructive player in related discussions and has put forth some useful suggestions. The hatchery sector, represented by CHEP Directors appointed by the CHF, has also made a positive contribution. From CHEP's perspective, the best prospect lies in facilitated negotiations, outside the complaint process. Considerable progress has already been made in clarifying and narrowing the issues. Solutions will be forged by negotiating, not litigating.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 9th day of October, 2015.



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