

December 30, 2019

File No: 3031.001

BY EMAIL

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

Re: *Vegetable Supervisory Review and Prokam Enterprises Ltd.*

We write further to your December 4 letter and December 23 email and to the submissions exchanged on the subject of Prokam's application for an interim producer shipper license to express our objection to the Supervisory Panel considering any evidence or submissions from the BC Vegetable Marketing Commission (the "Commission") or BCfresh – both parties who have adopted a position adverse to Prokam in these proceedings – that Prokam has not had the opportunity to hear and test.

In particular, we understand that members of the BC Vegetable Marketing Commission have met privately with the Supervisory Panel on at least two occasions¹, and has received submissions from BCfresh (dated December 16, 2019) that were provided to Prokam (including to Prokam's counsel) and posted to BCFIRB's website² only in redacted form. Moreover, the December 16, 2019 submissions of both BCfresh and the Commission, which were to be comments on the positions of the other parties participating in the process, purport to include statements of fact that do not appear to be supported by evidence and which Prokam has no ability to test, given the nature of the process and schedule.

As set out in our letter of November 13, 2019, Prokam is entitled to a high degree of procedural fairness in the supervisory review process, particularly in respect of decisions that impact Prokam's right to a license that would permit its product to be marketed.

¹ The November 27, 2019 "Thank you" letter records meetings on October 28, 2019 and November 14, 2019.

² https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/supervisory-reviews/current-supervisory-reviews/vegetable-supervisory-review/2019_dec_16_bcfresh.pdf

It is well established that the receipt of *ex parte* communications from an adverse party by a decision-maker about a party whose rights are at issue gives rise to a reasonable apprehension of bias. The BC Court of Appeal recently described the issue as follows:

[86] It is well-accepted in the context of judicial proceedings that a judge ought not to discuss any part of an ongoing case with only one party to the dispute, or a witness. If a judge were to discuss a case with only one party, even in good faith, this could be sufficient to create a reasonable apprehension of bias.

[87] As explained by Dickson J. in *Kane v. University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105 at 1113–1114:

It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses ... or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must... “. . . know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. . . . Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other.”...

[Emphasis added; citations omitted.]³


The Court cited with approval a decision of an Ontario court summarizing the law as follows:

To my understanding the prohibition against a judge speaking to one counsel about any case in the absence of other counsel is virtually absolute, permitting very few exceptions. In order to maintain public confidence in the administration of justice the prohibition must be strictly enforced.⁴

It is worth noting that prior to the hearing of the appeal in this matter, BCfresh sought an order that it be permitted to adduce evidence at the hearing *in camera* on a “counsel’s eyes only” basis. We opposed such an order on the basis set out in our March 26, 2018 letter, a copy of which is enclosed with this letter. Ultimately, BCfresh did not seek to adduce any evidence *in camera* at the hearing of the appeals. Whatever information has been redacted from the submission they have provided to us –a letter from their counsel-- was apparently not in evidence at the hearing and it is unclear whether the submission is supported by any evidence otherwise adduced.

³ *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 at para. 86-7

⁴ *Ibid.*, at para. 90




In the circumstances, we thought it appropriate to alert the Supervisory Panel to our position on the receipt of *ex parte* evidence and submissions as we anticipate we would be instructed to raise the matter should an application for judicial review of any adverse decision be required.

Very truly yours,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

cc: Robert Hrabinsky, counsel for the BC Vegetable Marketing Commission (by email)
Robert McDonell, counsel for BC Fresh Vegetables Inc. (by email)