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File N1715, N1716, N1718, N1719

DELIVERED BY EMAIL

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Dear Sirs/Mesdames:

Re: Prokam and Thomas Fresh v. BCVMC.

On January 5, 2018, the British Columbia Farm Industry Review Board (BCFIRB) received appeals from vegetable producer, Prokam Enterprises Ltd. (Prokam) and packer/wholesaler, Thomas Fresh Inc. (Thomas Fresh) regarding a December 22, 2017 decision (December decision) of the British Columbia Vegetable Commission (Commission) to confirm cease and desist orders denying Prokam and Thomas Fresh the ability to market and sell potatoes below the authorized minimum price, revoking their class one licenses and replacing them with class 4 licenses and directing Prokam to BC Fresh Vegetables Inc. (BCfresh) as its designated agency. BCfresh has applied for and been granted intervener status in these appeals.

Subsequently, counsel for the appellants wrote to BCFIRB indicating Prokam's desire to bring a stay application but seeking directions on how to proceed given that the Commission's decision allowed for Prokam to apply to the Commission to vary its Agency Order (requiring Prokam to sign a grower marketing agreement (GMA) with BCfresh).

In a letter dated January 25, 2018, BCFIRB's Chair wrote to the parties stating in part:

Given that the Commission intends to make a decision on the Variation Application on Monday (January 29, 2018), it would make sense that any stay application be heard after that date. Given the tight timelines set out in the Commission's December 22, 2017 decision, BCFIRB is prepared to make itself available for one half hour to hear a stay application by telephone either January 30 or 31, 2017. I am in a hearing those two days

but could hear the application at either end of the hearing day or over the lunch break. The parties can file any materials in support of the application but I am prepared to make my decision based on oral submissions.

Following this letter, the Commission issued a decision extending the time for Prokam to sign a GMA with BCfresh to February 15, 2018 and then on January 30, 2018, the Commission denied Prokam's Variation Application giving written reasons.

Documents Received and Reviewed

On Friday, February 9, 2018, Prokam applied for a stay of the Commission's decision requiring it to enter into a GMA with BCfresh by February 15, 2018. The application was supported by the affidavits of Bob Dhillon, the principal of Prokam and Roy Hinchey the Chief Executive Officer of Thomas Fresh. BCFIRB determined that the stay application could be heard by telephone conference on Tuesday February 13, 2018, in order that a decision could be issued prior to February 15, 2018.

As Monday was a statutory holiday, BCFIRB received the Commission's written submission in response the morning of February 13, 2018. Counsel for BCfresh wrote to BCFIRB advising that due to the short notice he would not be on the call but indicated BCfresh's support for the Commission's position. He says that as BCfresh's marketing activities for the 2018 growing season are currently underway, there would be prejudice to BCfresh if there was a delay in executing the GMA with Prokam.

On February 13, 2018, the BCFIRB panel conducted a telephone hearing so that Prokam and the Commission could supplement their written submissions with oral argument. We appreciate the parties making themselves available on such short notice and acknowledge that the tight timelines may have limited the parties ability to prepare and respond to the arguments.

BACKGROUND

We note that the history here is somewhat complicated and that many of the facts, and the conclusions that can be drawn from those facts, are in dispute. What follows here is not intended to bind the panel on the appeal, but is set out only for the purposes of this stay decision.

In brief, Prokam produces vegetables in Abbotsford, BC. Since 2014, it has sold potatoes through the Island Vegetable Co-operative Association (IVCA) agency. In 2016, Prokam entered into a business arrangement through IVCA to sell potatoes to Thomas Fresh for the prairie market. Prior to this arrangement, Thomas Fresh supplied its markets with American imports and potatoes from eastern Canada.

In 2017, Prokam produced over 300 acres of potatoes for sale through IVCA largely to supply Thomas Fresh. Prokam describes its arrangement with Thomas Fresh as a legitimate "gap filler", filling a new market amounting to \$3 million/year.

In October 2017, the Commission issued cease and desist orders against Prokam, Thomas Fresh and IVCA and conducted a show cause hearing through written submissions. The Commission's December decision concluded that due to lack of oversight by the agency (IVCA), Prokam

planted far in excess of its District Allocation (DA) and sold potatoes “directly” to Thomas Fresh at less than the minimum Commission ordered price. “Directly” is in quotes as the Commission takes the position that the transactions were “papered” through IVCA as Prokam’s principal was a director and IVCA was largely unaware of these “backdoor activities”. Prokam disputes this characterization.

As a result of these conclusions, the Commission maintained its cease and desist orders denying the appellants and IVCA the ability to market and sell potatoes at below the authorized minimum price, revoked the appellants’ class one licenses replacing them with more expensive class 4 licenses and directed Prokam to BCfresh as its designated agency “as it is better equipped to manage the producer and ensure pricing rules are followed”.

While the agency IVCA’s position appears to have changed over time, in its most recent correspondence (January 31, 2018) it has indicated it is not prepared to act as designated agency for Prokam going forward. The Commission also put forward letters from other agencies (Vancouver Island Farm Products Inc. and Okanagan Grown Produce Ltd.) indicating their unwillingness to act as designated agency for Prokam.

While it does not appear to be in dispute that the volume of potatoes sold is in excess of Prokam’s DA, it appears that the question whether or not this is off side the Commission’s regulatory authority will be an issue on this appeal. There is also a dispute about the applicability of the Commission’s authorized minimum price to sales outside the province and whether Prokam or Thomas Fresh had knowledge of the Commission’s minimum price. As noted above, Prokam also disputes the characterization that it had a direct relationship with Thomas Fresh and says that IVCA acted as its agency and made the arrangements to supply product to Thomas Fresh. These issues along with whether the Commission’s failure to disclose its “purported regulation of minimum price for potatoes sold in Alberta and Saskatchewan” was sound marketing policy or procedurally fair are issues to be addressed on the hearing of the appeal.

DECISION

Before considering whether a stay is appropriate in these circumstances, we observe that there is significant dispute between the parties as to how the regulatory framework operates in the vegetable industry and the appropriate interpretation and conclusions which can be drawn from that framework when applied to the particular facts of this case, many of which are also in dispute.

The Commission characterizes the facts leading up to its December 2017 decision as a significant disruption to orderly marketing and says markets that would otherwise be lawfully serviced by agencies were displaced by Prokam undercutting the minimum price. In contrast, Prokam says it developed a profitable potato operation (gap filler) with IVCA and Thomas Fresh which has expanded the market for BC potatoes. It says the Commission is acting beyond its jurisdiction and beyond the scope of its minimum pricing authority in its December 2017 decision.

In these circumstances, it is very difficult to make any preliminary decisions in the absence of a full hearing. Further, many of the arguments and issues raised in this application go to the merits of the appeal. Given the summary nature of this application and the short notice, it is not

appropriate to deal with such arguments in this context. These issues will no doubt be canvassed fully at the hearing of this appeal on its merits.

Section 8.1(1) of the *Natural Products Marketing (BC) Act*, c. 330 gives BCFIRB the authority conferred under s. 25 of the *Administrative Tribunals Act* to stay an order, decision, or determination of a marketing board.

In determining whether a stay is appropriate in the circumstances, BCFIRB relies on the three part test set out in *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1S.C.R. 311 and its predecessor, *Attorney General of Manitoba v. Metropolitan Stores*, [1987] 1 S.C.R. 110, now reflected in Rule 6 of BCFIRB's Rules of Practice and Procedure for Appeals:

- (i) whether the appeal raises a serious issue(s) to be considered,
- (ii) what harm to the applicant, that cannot be remedied, would occur if a stay is not granted, and
- (iii) why the harm to the applicant outweighs the harm that would occur to others, or to the public interest, if BCFIRB grants the stay.

Serious Issue to be Tried: The Commission argues that there is no serious issue to be tried. Prokam's appeal is entirely premised on the erroneous notion that producers may market directly to retailers and wholesalers rather than through an agency obligated to market in accordance with the minimum prices set by the Commission. On this point the Commission relies on section 7 of the Consolidated General Orders which expressly prohibits persons from selling, offering to sell, supplying or delivering regulated product to any person other than an agency or such other person as the Commission may expressly direct or authorize. Further all other agencies have either expressed support for the Commission's decision to move Prokam to BCfresh or expressed disinterest in working with Prokam.

Prokam argues that this appeal raises serious issues as to whether the Commission's December decision constitutes sound marketing policy and observed principles of natural justice. It says in many respects the December decision is devoid of reason and does not comply with SAFETI and appears inconsistent with factual findings. It also raises issues as to whether the Commission acted within its authority.

We are satisfied that the appeal raises serious issues to be tried and the decision of whether or not to issue a stay does not turn on this branch of the test.

Irreparable Harm: In considering this second branch of the test, the panel must consider whether Prokam has satisfied the burden of proving that it would suffer "irreparable harm" if the Commission's December decision is not stayed pending appeal. Having reviewed the parties' submissions and having had the benefit of oral argument, we are not satisfied that Prokam has satisfied this second branch of the test.

Prokam argues based on the affidavit evidence of Mr. Dhillon and Mr. Hinchey that Prokam will suffer serious and irreparable harm if it is required to sign a GMA with BCfresh. Their evidence is that Thomas Fresh will not contract with BCfresh for potatoes (even if the potatoes are grown by Prokam). BCfresh is a competitor and has unfairly and inaccurately criticized Thomas Fresh to its customers and used derogatory language to describe its business model and practices.

Thomas Fresh is only prepared to contract with Prokam directly or with another agency other than BCfresh. Otherwise it will source potatoes from eastern Canada or the United States.

This argument assumes that if Thomas Fresh does not buy Prokam's potatoes due to the involvement of BCfresh, Prokam will be irreparably financially harmed. However, BCfresh is prepared to accept Prokam's production. Even if one assumes that Thomas Fresh is the only wholesale marketer for Prokam's potatoes on the prairies (or elsewhere), that Thomas Fresh is set against purchasing potatoes from BCfresh, and that that market will be lost to Prokam (and BC), that does not establish irreparable harm to Prokam. BCfresh is a large agency with market access both nationally and internationally. As an agency, its regulatory role is to find and fill markets on behalf of all of its producers in good faith within the rules of the orderly marketing system as set out in the Consolidated General Orders. Prokam has not shown that BCfresh will be unable or unwilling to move its regulated product as permitted by the Consolidated Orders. While Prokam may have had a poor relationship with BCfresh in the past, that is insufficient in our view to demonstrate that Prokam will suffer irreparable harm if it is required to ship through BCfresh going forward, particularly where the evidence is that BCfresh is willing to sell its product. The producer/agency relationship continues. In our view, the argument that the loss of Thomas Fresh as a wholesale customer will cause financial losses to Prokam is speculative at best.

Prokam also says that because any GMA with BCfresh does not take effect until June 1, 2018 there is no reason why it must be signed by February 15, 2018. That decision could await the hearing of the appeal in April 2018. Further it takes issue with the fact that the BCfresh GMA is for a 3 year term magnifying the potential negative impact and disruption on Prokam's business. We note here that BCfresh has indicated that a delay in Prokam signing the GMA will prejudice its 2018 marketing activities.

In our view, these objections do not speak to irreparable harm. They speak to whether the deadline was necessary, or the order itself, was necessary. These are issues for the appeal on the merits. They speak more to the issue of possible remedy should Prokam and Thomas Fresh prevail at the April hearing, in whole or in part. As part of the regulated system, producers, the Commission and agencies are all subject to the appellate jurisdiction of BCFIRB. Whether or not a stay is granted today, BCFIRB has the remedial authority to address the issues raised on this appeal if the appeal is allowed.

As the appellants have not demonstrated irreparable harm, it is unnecessary to go further and consider the balance of convenience; however we do so in order to give the parties the benefit of complete reasons.

Balance of Convenience: In this case, we are satisfied that the balance of convenience rests with the Commission as it has first instance authority to regulate its stakeholders and make decisions in the public interest. In *Metropolitan Stores, supra*, at p. 129, it states that in the usual course, the test of irreparable harm to the public interest will "almost always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility." In our view, that test is met here.

The Commission conducted a review process, allowed the affected parties to show cause and delivered considered reasons with respect to the issues under appeal. This process should not be lightly interfered with on an interlocutory basis.

In our view, even if we were satisfied that Prokam had established that the loss of Thomas Fresh's business will cause irreparable harm, given the serious nature of the allegations levelled by the Commission that Prokam has acted outside regulation, it would cause serious harm to the public interest to reverse the Commission's considered decision pending appeal.

Accordingly, the application for a stay is dismissed.

Yours truly,



John Les, Chair and
Presiding Member



Al Sakalauskas
Member