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File: N1905

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Claire Hunter
Hunter Litigation Chambers Law Corporation
2100-1040 West Georgia Street
Vancouver BC V6B 4H1

Robert Hrabinsky, Counsel
Affleck Hira Burgoyne LLP
1000 – 570 Granville Street
Vancouver, BC, V6C 3P1

Dear Sirs/Mesdames:

RE: CFP Marketing Corporation (Canada Fresh) v BC Vegetable Marketing Commission

On August 14, 2019, I wrote to the parties in my capacity as the presiding and sole member of the appeal panel to advise that I was giving consideration to whether it was appropriate in the circumstances to defer further consideration of this appeal in accordance with s. 8(8) of the *Natural Products Marketing (BC) Act (NPMA)*. I gave the parties the opportunity to provide their positions on BCFIRB addressing appeal-related matters in its supervisory capacity and have now received and reviewed their submissions.

The BC Vegetable Marketing Commission (Commission) submission states while it is not appropriate to refer the issues on this appeal which involve the application of a single stakeholder (CFP) for an agency licence for supervisory consideration, it is appropriate to defer the narrow question of CFP's application pending completion of the Commission's work on the Strategic Review and the Agency Review. The Commission says that the results of this on-going work will determine what changes are necessary to maintain an effective, rules-based regulatory system in the current and projected business environment. The Commission anticipates comprehensive amendments to its General Orders to clarify how delivery allocation is managed in a multi-agency/producer-shipper marketing model and that these fundamental regulatory issues need to be addressed before altering the status quo by establishing a new agency. The Commission believes that the outcome of these reviews could render the issues in CFP's appeal moot, or at the very least, bear on the issues in a significant way. It says, "there is no sense in putting the cart before the horse."

CFP argues that the Commission's General Orders set out a clear mandatory process for designation of new agencies (in Part XIV "Procedures for Designation of Agencies") which processes were not followed. As such, it says the Commission failed to follow the "rules of

British Columbia
Farm Industry Review Board

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
780 Blanshard Street, 1st Floor
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Web: www.gov.bc.ca/BCFarmIndustryReviewBoard

engagement” and the process was procedurally unfair and inconsistent with sound marketing policy; the real question on appeal is the matter of remedy. CFP acknowledges the requirement for BCFIRB to prior approve agency applications and that any meaningful remedy for CFP will require some measure of supervisory review as part of BCFIRB’s prior approval process. CFP agrees that if what is proposed is that BCFIRB effectively conduct the prior approval process by way of a focused supervisory review, it is appropriate to defer the appeal in favour of that process. CFP expresses concerns about the scope and timeline of any supervisory review as it has committed significant funds to its agency application and will be prejudiced by further delays in processing its application. CFP suggests BCFIRB follow a similar process to that of the 2012 deferral of two Vancouver Island vegetable marketing agency appeals related to agency designations which involved a 6-week review and a practical interim remedy which recognized the prejudice of delay on industry stakeholders.

CFP opposes any deferral of this appeal pending the current strategic planning initiative being undertaken by a consultant for the Commission. While it understands it is important that such a review be completed in a thorough and timely manner, a report is expected prior to November 2019 which would permit BCFIRB to have the benefit of the report even in a time-limited supervisory review process. While it is appropriate for BCFIRB to take into account any recommendations made, CFP says its application must be addressed in a procedurally fair manner and the Commission and BCFIRB should be applying the process set out in the General Orders at the time the application was made. The industry cannot be closed to new participants to accommodate a strategic planning process of indeterminate scope and length as that would not be appropriate or procedurally fair to CFP as it denies it proper and timely consideration of its application.

Decision

I have considered the positions of the parties. I agree with CFP that this appeal raises issues of proper process and appropriate remedy. The appeal also may involve a consideration of the reasonableness of the Commission’s decision to impose a moratorium and the appropriateness of a remittal of the application back to the Commission. However, I cannot separate this appeal from the context out of which it arises.

The Commission has identified a number of different initiatives (including the reconsideration of matters from the Prokam appeal, an agency review as well as a strategic review) which it says, on their own or collectively, impact the decision of the appropriateness of designating new agencies to the vegetable industry at this time. Based on the submissions before me, I can come to no conclusions about whether it is necessary that any or all of these initiatives be concluded before any new applications for agency can be considered, the mandatory nature of the application process, or the reasonableness of any moratorium including the nature of the time frames necessary to conclude the various initiatives (be they short, medium or long term in nature or a combination of all three).

While I agree with CFP that the industry should not be closed to new participants for an indeterminate period of time to allow for prolonged review, there needs to be some consideration of which, if any, of these initiatives should be resolved as a matter of sound marketing policy before a new agency application can be considered. In my view, that is the role for a supervisory panel of BCFIRB.

As such, I order that further consideration of CFP's appeal be deferred in accordance with s. 8(8) of the *NPMA* until the supervisory process has been completed. In making this order, I am not limiting the supervisory panel as to the issues it may consider, the process it will follow or the time frame to conclude its supervisory process.

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Per



Pawanjit Joshi
Presiding Member