BRITISH COLUMBIA

BC Farm Industry Review Board

April 9, 2020 File: N1910

DELIVERED BY EMAIL

Claire E. Hunter Q.C.
2100-1040 West Georgia Street
Vancouver BC V6E 4H1

Christopher Harvey, Q.C.
MacKenzie Fujisawa, LLP
1600 – 1095 West Pender Street
Vancouver, BC V6E 2M6

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

Dear Sirs/Mesdames:

Island Vegetable Cooperative Association (IVCA) v BC Vegetable Marketing Commission

Introduction

This decision arises out of a March 24, 2020 letter from counsel for Prokam Enterprises Ltd. (Prokam), in which Prokam sought to have its appeal (File No. N1908) heard together with the above-captioned appeal by the Island Vegetable Cooperative Association (IVCA) (File No. N1910) which relates to the same decision. In the alternative, Prokam sought intervener status in IVCA's appeal.

On March 30, 2020, D. Stancil, Presiding Member in the supervisory review process initiated in September of 2019 (the Vegetable Review), issued a decision in which she ordered that the Prokam appeal would remain deferred until completion of the Vegetable Review. Accordingly, she held that the Prokam appeal would not be heard with this appeal.

My decision on Prokam's alternative application for intervener status now follows.

Background

By way of further background, both Prokam and IVCA appeals arise out of a November 18, 2019 reconsideration decision of the British Columbia Vegetable Marketing Commission (Commission) (the Reconsideration Decision), which addressed matters remitted to it by the BCFIRB panel in *Prokam et al. v. BCVMC* (February 28, 2019).

On November 20, 2019, Prokam filed an appeal from the Reconsideration Decision, which, in a decision dated November 29, 2019, I subsequently ordered the appeal be deferred pending the completion of the Vegetable Review by a BCFIRB supervisory panel.

On December 4, 2019, IVCA filed this appeal, and I dismissed IVCA's application for a stay on January 24, 2020.

On March 20, 2020, I determined that it was not necessary to defer the hearing of this appeal pending the completion of the Vegetable Review given my view that there is not a significant overlap between the issues on this appeal, which is largely focused on the reasonableness of the Commission's sanctions imposed on the IVCA in its Reconsideration Decision, and the more forward-looking issues in the Vegetable Review.

As above, Prokam's (alternative) application for intervener status in this appeal was received on February 24, 2020. Counsel for the IVCA provided responding submissions on March 27, 2020, and the Commission provided its submissions on March 31st. On April 1, 2020, counsel for Prokam provided her reply submissions.

Positions of the Parties

I will address the positions of the parties in more detail below, but they can be briefly summarized as follows.

Prokam says that because it is "adverse in interest" to IVCA in both its own appeal and this appeal, it can bring a perspective to the hearing of this appeal that IVCA cannot bring, and that the appeal panel would otherwise be left with "one side of the story", and an unbalanced appeal record on which to determine the issues in this appeal. It further argues that there will be no prejudice to IVCA or the Commission, as representatives of Prokam will need to give evidence at the hearing regardless of whether intervener status is granted. Prokam is seeking full participation rights, including the ability to tender evidence and cross-examine witnesses, along with the right to make final oral and written submissions.

In response, IVCA emphasizes that the only issue in this appeal is whether two sanctions imposed by the Commission are "proportionate and consistent with SAFETI principles". It therefore says Prokam has no "valuable contribution" or "perspective", such that the requirements of s. 33(1)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (*ATA*) are not met. Further, IVCA says it will be prejudiced pursuant to s. 33(1)(b) of the *ATA* because Prokam is effectively seeking to expand the scope of the appeal by adducing its own evidence and raising new issues.

The Commission takes a similar position to IVCA, noting in particular the extensive proceedings to date (including a now completed evidentiary phase), and the limited scope of this appeal as articulated by IVCA in its recent correspondence of March 17, 2020.

Both IVCA and Commission are of the view that this appeal should proceed by way of written submissions, supplemented only by affidavit evidence on the question of the remedial changes made by IVCA to address the concerns raised by the BCFIRB and Commission.

In reply, Prokam says that the notice of appeal is much broader than what IVCA says it now intends to address on appeal, and that the expressed "intention" on the part of IVCA does not mean that the scope of the appeal will necessarily be so limited, such that Prokam's interests may well be engaged. It makes a number of related submissions to the effect that it would be unfair for Prokam to be denied the right to participate in an appeal where its interests may be affected, including if findings might be made on the basis of evidence that Prokam adduced before the Commission.

Analysis and Decision:

This decision is being made pursuant to Section 33 of the *ATA*, and Rule 10 of the BCFIRB *Rules of Practice and Procedure for Appeals under the Natural Products Marketing (BC) Act, R.S.B.C. 1996, c. 330*.
Section 33(1) of the *ATA* reads:

> 33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that
>
> (a) the person can make a valuable contribution or bring a valuable perspective to the application, and
>
> (b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.

Rule 10(1) provides:

> (1) Any person wishing to participate in an appeal as an intervener (ATA, s. 33) must apply in writing to BCFIRB (copied to the parties to the appeal) describing:
>
> (a) the proposed intervener's identity;
>
> (b) how the proposed intervener can make a valuable contribution or provide a valuable perspective to the appeal that an existing party cannot provide;
>
> (c) how the potential benefits of the intervention outweigh any prejudice or inconvenience to a party;
>
> (d) the extent of participation that is sought (for example to provide a submission or to give evidence and/or cross examine witnesses); and
>
> (e) the date the intervener became aware of the appeal and the reason for any significant delay between that date and the date of the application.

There was some debate in the submissions as to whether there is a difference in approach on interventions between the BC Court of Appeal and the BCFIRB. From my review of the jurisprudence, including the decisions of BCFIRB cited by Prokam in its reply submissions, there is not a material difference in approach.

In both contexts (and leaving aside the distinct issue of public interest standing), the first question is whether the proposed intervener can demonstrate that its legal rights or interests might be affected by the outcome of the appeal. It is only by demonstrating that its interests are potentially affected by an appeal that a potential intervener will be able to establish under section 33(1)(a) of the *ATA* that it can make a valuable contribution or provide a valuable perspective. Otherwise, there is a risk that mere "busy-bodies", without a genuine interest in an appeal, will be granted intervener status, which will in turn hinder the efficient resolution of appeals before the BCFIRB. After it has been determined that an intervener can make a valuable contribution or bring a valuable perspective, the analysis then shifts to the balancing of the benefits and prejudice that may be caused by a particular intervention under section 33(1)(b) of the *ATA*.

Prokam correctly points out that intervention applications have been routinely granted by the BCFIRB in supply management appeals. However, in my view, that follows from the fact that the issues raised in these kinds of appeals generally have implications beyond the immediate parties to the appeal. Indeed, in this case, I agree with Prokam that the IVCA's notice of appeal raises issues which on their face certainly could affect Prokam's interests.

However, I understand IVCA to have expressly agreed to limit the scope of its appeal. Counsel for IVCA said this in his March 27th letter:

> As I said in my email of March 17, 2020, IVCA intends to limit its appeal to two narrow issues.
>
> The orders are conveniently set out at para. 84 of the Commission's decision of November 18, 2019. They are that IVCA's Class I license is revoked and replaced with a Class III licence containing four conditions: production growth limited to current DA; no new producers; the appointment to the IVCA board of an independent board member until IVCA's Class I licence is reinstated; the completion of an audit on IVCA's internal procedures by the Commission.
>
> I confirm that IVCA has now determined that it will not challenge the reclassification of licence and that it will limit its appeal to two of the four conditions; namely, production growth limited to current DA and no new producers.
>
> The essence of the argument will be that the imposition of those two conditions is disproportionate to the findings of misconduct upon which it is based. The punishment does not fit the crime. The argument looks solely to IVCA's conduct and circumstances. Every attempt will be made by the IVCA to keep the appeal to this narrow focus so as not to encroach on issues more properly left to the supervisory review.

Later, he added this:

> The only issue in the appeal is whether the two sanctions imposed by the Commission are proportionate and consistent with SAFETI principles.

In its reply submission, Prokam expresses the concern that the IVCA is merely stating an "intention" to limit the scope of its appeal, and that if that intention changes, the IVCA would be entitled to rely on its notice of appeal to argue a broader range of issues. That in turn could lead to Prokam's interests being engaged, and thus it would be prejudiced if not participating in the appeal as an intervener.

In my view, that concern can be addressed by a ruling from this panel on the scope of the appeal. The precise terms of the grounds of appeal should not be determined until after I have had a chance to hear from, in particular, IVCA at a pre-hearing conference. However, I can direct now that the scope of the appeal will be limited to IVCA's challenge to the two sanctions imposed by the Commission; namely, that production growth is limited to current DA, and no new producers.

I further direct that this appeal will proceed in the manner agreed to by the parties, by way of written submissions, and additional affidavit evidence will be limited to the issue of remedial changes made by IVCA to address the concerns expressed by the BCFIRB and the Commission in their previous decisions.

With those directions in place, the balance of the concerns raised by Prokam in its April 1st reply submission fall away. Simply put, if the scope of the appeal is limited as I have set out above, Prokam's interests will not be affected by the outcome of this appeal, and they will accordingly not suffer any prejudice in the circumstances.

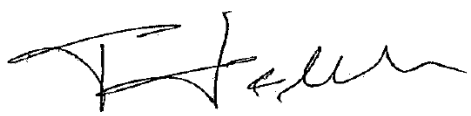
Accordingly, I find that Prokam's application for intervener status should be dismissed.

The Case Manager will contact IVCA and the Commission shortly to arrange a pre-hearing conference.

ORDER

Prokam Enterprises Ltd.'s application for intervener status is dismissed

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:



Pawan Joshi, Presiding Member