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DELIVERED BY EMAIL

Dear Sirs:

Re: Island Vegetable Co-Operative Association (IVCA) v. BC Vegetable MarketingCommission

Introduction

On December 4, 2019 the British Columbia Farm Industry Review Board (BCFIRB) received an appeal from the Island Vegetable Co-operative Association (IVCA) from the November 18, 2019 decision (the Reconsideration decision) of the British Columbia Vegetable Marketing Commission (Commission) downgrading IVCA's Class I agency licence to a Class III agency licence with the following conditions:

a) IVCA's production growth is limited to its current delivery allocation (DA). Planted acreage is to yield production that is commensurate with the delivery allocation that the IVCA currently manages;

b) IVCA is not permitted to represent any additional or new producers of regulated vegetables;

c) an independent board member is to be appointed to the IVCA's board by the Commission and is to remain on the board until a Class I licence is re-instated; and

d) an audit is to be completed by the Commission on internal procedures, protocol and management practices within the Appellant as a licensed agency.

On December 18, 2019, BCFIRB received an application from IVCA, asking BCFIRB to stay the above order, pending appeal. On December 23, 2019 the Commission provided its response and IVCA's reply was received January 3, 2020. I have reviewed these submissions.

For the reasons that follow, IVCA's stay application is dismissed.

Legal Framework

Section 8.1(1) of the *Natural Products Marketing (BC) Act* gives BCFIRB the authority conferred under s. 25 of the *Administrative Tribunals Act* to stay an order, decision, or determination of a marketing board. Stays are only granted in exceptional circumstances.

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,
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> (ii) what harm to the applicant, that cannot be remedied, would occur if a stay is not granted, and
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> (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.

Background

There is an extensive history to this appeal which I do not intend to repeat here. For present purposes and to place this decision in context, on February 28, 2019, following an eight-day oral hearing, BCFIRB issued a decision in the Prokam Enterprises appeal. A finding in this appeal was that the Commission needed to reconsider whether any compliance or remedial action was necessary in relation to IVCA which resulted in the above orders that are the subject of this appeal.

Submissions of IVCA

On whether there is a serious issue to be tried, IVCA says the immediate nature of the order is in contrast to the carefully managed and planned industry within which the order is made.

IVCA's main argument relates to irreparable harm. It says the order causes harsh, significant and irremediable consequences on IVCA and its growers whose livelihoods are derived from the sale of regulated product. IVCA characterises the decision as being premised on the determination by the Commission that IVCA, as an agency of the Commission, failed to prevent Prokam from doing something which the Commission itself had no power to stop.

IVCA focuses on how this order impacts its growers. It says it imposes a cap on production and limits the ability of growers to plant in excess of their DA to mitigate risks related to poor yields due to extreme weather, pests or genetic characteristics of plants and their response to soil conditions. Growers must order seeds, immature plants, fertilizer and pesticides well in advance of the growing season to ensure they can produce the type and quality of desired product. The result of limiting DA has short, medium and long term impacts which result in several consequences to IVCA and its growers. It says all of these impacts constitute irreparable harm to its growers in circumstances where "the Order results was made on account of the appellant's activity as a designated agency of the Commission, and not as a result of any activities of its growers."

In the short term, IVCA's growers will be forced to discard marketable product presently in storage which has yet to be "produced" but has been grown in excess of DA. These vegetables were planned for and grown well before the Commission's and BCFIRB's decisions, without any contemplation of production caps. If this product is discarded, IVCA's growers will lose the opportunity to make productive use of this regulated product and recoup their production costs.

In the medium term, IVCA's growers would also suffer financial losses resulting from production and growth caps being imposed after financial commitments have been made for the upcoming growing season. These commitments include orders for seed, plugs, and fertilizer to produce product in excess of grower DA. Enforcing a cap will result in either wasted inputs or potentially wasted marketable produce.

In the longer term, a cap in production for any season results in a lower DA to growers in the future (as growers cannot earn more DA through gap filling) thus, handicapping IVCA's future growth. The order creates a marketing regime for IVCA and its growers which is different and more onerous than the scheme that applies to other vegetable agencies and growers. IVCA says different rules for growers, similarly situated, would likely have unintended and unforeseeable consequences which may also be irremediable.

IVCA does not specifically address this branch of the test although to some extent it is addressed under the heading of irreparable harm by its arguments that take issue with what it characterises as unequal treatment of growers (which is not in the public interest).

Submissions of the Commission

The Commission argues that there is no serious issue to be tried; IVCA's argument appears to be premised entirely on the erroneous assertion that the order under appeal arises from the minimum pricing orders which BCFIRB found to be ineffectual. The Commission argues that this issue does not give rise to a serious issue to be tried and is devoid of merit. The Prokam appeal decision and the Reconsideration decision set out the basis for the order (which the Commission reviews at length in its submission on pages 2-4 for BCFIRB appeal Panel and pages 4-9 for the Commission Panel).

As to irreparable harm, IVCA has pointed to harm that it says would be suffered by its growers, rather than by IVCA itself. The Commission argues that this is not a sufficient basis to establish irreparable harm to IVCA. Further, any harm to IVCA's growers is purely speculative. The purpose of the order is to assert greater control over an agency that has engaged in efforts to deliberately circumvent the authority of the Commission and growers that are dissatisfied with this agency may apply to market through another agency.

The Commission argues on the third branch (balance of convenience), harm to the public is to be presumed and that it is incumbent on the applicant to establish how granting a stay would promote the public interest, see *RJR* supra:.

> 73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. <u>In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority</u>

> does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought….
>
> 76. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly 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. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
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> 77. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights….

The Commission says IVCA has failed entirely to rebut this presumption and says that on the contrary, the order sought would clearly disrupt the public interest as it would permit IVCA to operate without the degree of control and oversight that is so obviously required in the circumstances.

Reply of IVCA

IVCA says that the Commission is inviting a level of scrutiny into the merits of the appeal which is inappropriate on a stay application. Further, the Commission's submission need to be read in light of the fact that management of the industry is under close scrutiny by BCFIRB in its supervisory jurisdiction and the Commission fails to address the other grounds of appeal advanced by IVCA that do not turn on the Commission findings.

In response to the Commission's arguments that IVCA has relied on harm to its growers, it needs to be made clear that IVCA is a cooperative association made up of those growers who are suffering harm.

Finally and relying on *British Columbia (A-G) v. Wale* (1987), 9 B.C.L.R. (2d) 333(C.A.), IVCA argues that irreparable harm is not a box to be checked but is one factor in the assessment of the balance of convenience.

Analysis and Decision:

Serious issue(s) to be Tried: The Commission's position is that there is no serious issue to be tried. IVCA argues that the Commission's decision is patently unreasonable as it fails to take into account previous determinations by BCFIRB in the appeal brought by Prokam Enterprises. It further says that the decision is procedurally unfair to IVCA and fails to accord with the SAFETI principles.

In *Dialadex Communications Inc. v. Crammond* (1987), 1987 CanLII 4419 (ON SC), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

I am 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, I must consider whether IVCA has satisfied the burden of proving that it would suffer "irreparable harm" if the Commission's decision is not stayed pending appeal.

IVCA's argument is that the order will cause irreparable harm to its growers when the order results from IVCA's activity as a designated agency of the Commission and not grower activities. Further, the order creates a different and more onerous marketing regime for IVCA and its growers which will likely have unintended and unforeseeable consequences. I note that IVCA makes these allegations generally. It has not provided any affidavit or other supporting evidence from its Directors or its growers to particularize these vague assertions to explain how the Commission's decision will impact them and why the status quo should be maintained until a final determination is made on appeal.

As a delegate of the Commission, IVCA's role and responsibility is to promote orderly marketing, was at the heart of the Commission's considerations leading to this appeal. IVCA, as a designated agency, was acting under authority delegated to it by the Commission and remains answerable to the Commission for its actions. The fact that its growers might be impacted by the Commission's decision is not sufficient in my view to demonstrate irreparable harm. It is IVCA's conduct that has led the Commission to take the regulatory steps that have resulted in this appeal. I agree with the Commission that if growers are concerned that sanctions against IVCA may limit their product or ability to earn DA, they have meaningful remedies available to them. As the Commission points out, growers can apply to move agencies to mitigate any such impact.

On an interim basis and until the final determination is made on IVCA's appeal, IVCA might end up paying a larger licence fee but this does not establish irreparable harm. If IVCA's appeal is allowed then this licence fee can be reimbursed or adjusted. I have not received any submissions that IVCA will be unable to pay the licence fee or that its payment will cause undue hardship. Similarly, on the conditions imposed, IVCA has failed to demonstrate actual irreparable harm would be caused by requiring it to meet its the obligations under the General Orders and any additional oversight the Commission deemed necessary in its order pending appeal.

Balance of Convenience:

I am not persuaded by IVCA's arguments that the parties' interests in this stay being granted or not being granted are evenly balanced. IVCA as an agency does not have existing "rights" which the order under appeal is impacting. IVCA is an agency subject to the regulatory authority of the

Commission. Given the serious nature of the allegations levelled by the Commission that IVCA has acted outside the regulations and the Commission's responsibility to manage orderly marketing and to implement the regulations in the public interest, I am satisfied it would cause serious harm to the public interest to stay the Commission's decision pending appeal.

Accordingly, the application for a stay is dismissed.

ORDER

The **Island Vegetable Co-Operative Association's** application for stay is dismissed.

Dated at Victoria, British Columbia this 24th day of January 2020.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

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Pawan Joshi, Presiding Member