



BC Farm Industry Review Board

March 11, 2020

Files : N1910

DELIVERED BY EMAIL

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

Robert P. Hrabinsky
Affleck Hrabinsky Burgoyne LLP
1000 – 570 Granville Street
Vancouver BC V6C 3P1

Dear Sirs and Mesdames:

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

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 conditions related to growth, management of delivery allocation (DA) governance, and audits. On December 18, 2019, BCFIRB received an application from IVCA, asking BCFIRB to stay the above order, pending the hearing of its appeal. As presiding member, I dismissed this application with written reasons on January 24, 2020. On February 3, 2020, BCFIRB wrote to the parties asking for their positions on whether this appeal should be deferred pursuant to s. 8(8) of the *Natural Products Marketing (BC) Act (NPMA)* pending the completion of the supervisory process currently underway in the vegetable industry.

Positions of Parties

The appellant opposes this appeal being deferred arguing that a full and proper supervisory review of the industry would involve considerably more evidence, parties and time than an appeal, and the appellant cannot be expected to continue to suffer harm for the duration of that process.

The Commission argues that the recursive nature of the process to date demands that this latest appeal be deferred until the existing supervisory process has been completed. To do otherwise would result in unnecessary re-litigation of many issues that were raised in the eight-day *Prokam and Thomas Fresh v. BCVMC* hearing before BCFIRB in April, May and June 2018. The Commission argues that if this appeal proceeds in isolation from the ongoing supervisory review, there is a risk of significant overlap and inconsistent or contradictory outcomes. As to the appellant's argument that it will suffer "irreparable harm" if it is required to comply with the Commission's order under appeal pending the supervisory review, this submission was rejected

by the presiding member in its decision of January 24, 2020. This is not a basis on which to oppose deferral of the appeal.

Decision

I have considered the positions of the parties. My decision of whether it is appropriate to defer the hearing of this appeal pending the completion of the supervisory process necessarily involves a consideration of what the supervisory process is intended to address and whether there is a likelihood that that process will touch on matters raised in this appeal.

As the Commission rightly points out, there is an extensive history here. However, the subject of this appeal is grounded in the past actions of IVCA and whether those past actions are sufficient to warrant the Commission's compliance and enforcement sanctions. Very briefly, in October 2017, the Commission commenced compliance and enforcement proceedings against producer Prokam Enterprises Ltd., wholesaler Thomas Fresh Inc. and IVCA. After a written show cause process, the Commission issued its December 22, 2018 decision.; IVCA was not sanctioned but Thomas Fresh and Prokam had their Class 1 licences revoked and replaced with Class 4 licences, and; Prokam was directed to a different agency. Prokam, Thomas Fresh and IVCA appealed the Commission's decision (IVCA subsequently withdrew its appeal).

The eight-day hearing concluded in June 2018 and BCFIRB's appeal decision was issued February 28, 2019. The decision concluded that the Commission placed too much weight on IVCA's cooperation in the investigation process and not enough weight on its regulatory responsibility as an agency. As a result, the Commission was ordered to reconsider whether any compliance action was necessary in light of "fundamental failings on the part of the designated agency" (IVCA). The Commission issued its Reconsideration Decision on November 18, 2019.

This appeal raises issues regarding the reasonableness of the Commission's sanctions in its Reconsideration Decision given BCFIRB's findings in the *Prokam* appeal related to IVCA's conduct in the 2017-2018 growing season and the procedural fairness of the Commission's decision-making process.

In contrast, the supervisory review will be forward looking. Although the terms of reference for the review have yet to be finalized, the supervisory panel's process letter of November 27, 2019 indicated:

...in the panel's view it is not sound marketing policy to restrict agency applications for an unknown and potentially extended time period. It will take this view into consideration as it develops the supervisory review scope and process. The panel will also take in to consideration three themes arising from a recent series of vegetable sector agency-related supervisory review decisions: new agency decisions must be made within the context of a vision and direction for the regulated vegetable sector; the vision needs to be integrated with a proactive approach that seeks to identify and resolve emerging industry issues and challenges; and, agencies need to be accountable for the legislated authorities they are delegated.

I see IVCA's appeal, which really relates to the question of whether the Commission "got it right" in terms of assessing remedial sanctions for past conduct, as quite dissimilar to the CFP Marketing Corporation's appeal, which I deferred in September 2019. That appeal, in part, challenged the Commission's decision to place a moratorium on new agency licenses while the Commission completed its strategic review relating to agencies. I was satisfied that there would

be significant overlap in the subject matter of the supervisory review and the CFP appeal, and concluded it was appropriate to defer the appeal pending the conclusion of the supervisory process. However, I do not see the same degree of overlap with this appeal, as the supervisory panel is unlikely to involve itself in considerations of whether IVCA is deserving of sanctions for past conduct and/or what those sanctions should be. The supervisory panel may touch on agency governance matters but any such recommendations or directions would likely be forward looking in nature.

In light of the foregoing, I am satisfied that it is not necessary to defer the hearing of this appeal pending the completion of the supervisory review. A pre-hearing conference call will be scheduled, and this matter will proceed to an appeal hearing.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read 'P. Joshi', written over a horizontal line.

Pawan Joshi, Presiding Member