



BC Farm Industry Review Board

July 7, 2021

File: N1908

DELIVERED BY EMAIL

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Dear Sir/Mesdame:

RE: PROKAM ENTERPRISES LTD. V BC VEGETABLE MARKETING COMMISSION

Prokam Enterprises Ltd. (**Prokam**) filed Appeal N1908 on November 19, 2019, appealing the November 18, 2019 reconsideration decision (the **reconsideration decision**) of the British Columbia Vegetable Marketing Commission (the **Commission**). On November 29, 2019, the presiding member of the British Columbia Farm Industry Review Board (**BCFIRB**) appeal panel issued a decision deferring the Appeal #N1908, pending the conclusion of the 2019 vegetable supervisory review (the **2019 supervisory review**).

The decision of the 2019 supervisory review was released December 22, 2020, following which Prokam sought to reinstate Appeal N1908 on the basis that the 2019 supervisory review did not address certain issues. After receiving submissions from the parties identifying what, if any, issues remained extant in Appeal N1908, I found on March 30, 2021 that Prokam's appeal of the reconsideration decision on the issues of its licence class and the interim order to preserve the orderly marketing of storage crops (the **interim order**) remained live issues and directed that these two issues could proceed to a hearing.

In advance of the April 20, 2021 pre-hearing conference (**PHC**), I was made aware of a Notice of Civil Claim (**NOCC**) filed by Prokam alleging misfeasance in public office and bad faith against two persons: Commission member, Peter Guichon and General Manager, Andre Solymosi. Based on my review of the NOCC, it appears that the circumstances relied on to support the NOCC arise out of the 2017 compliance and enforcement proceedings which Prokam appealed (the **original appeal**).¹ The decision of the original appeal ultimately led to the reconsideration decision and is the basis of the

¹ The original appeal resulted in the decision of *Prokam v. British Columbia Vegetable Marketing Commission*, February 28, 2019. In this decision, the BCFIRB appeal panel issued orders directing the Commission to reconsider certain decisions it had made. After reconsidering its decisions, the Commission made orders in the reconsideration decision.

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two remaining issues in Appeal N1908. As such, I asked the parties to address the implications of the NOCC during the PHC. After hearing from the parties, on April 27, 2021, I granted the Commission's request for an adjournment to provide its position on the impact of the NOCC on the two issues remaining in Appeal N1908.

On May 12, 2021, the Commission applied for an adjournment of Appeal N1908, pending the final disposition of the allegations made against Mr. Solymosi in the NOCC. I gave Prokam until May 27, 2021 to respond to the Commission's request for an adjournment. However, on May 26, 2021, a day before the close of the submission process, I was advised that BCFIRB would be undertaking a supervisory review process, pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act (NPMA)*, in part to address the allegations of bad faith and unlawful activity against Messrs. Guichon and Solymosi raised by Prokam in its NOCC and other similar allegations raised by MPL British Columbia Distributors Inc. (**MPL**) in its NOCC (the **2021 supervisory review**). I note MPL's NOCC, in addition to Messrs. Guichon and Solymosi, makes allegations against three other Commission members (Messrs. Reed, Gerrard and Lodder).

In light of these developments, I asked for further submissions from the parties on deferring Appeal N1908 until the completion of the recently announced 2021 supervisory review, pursuant to s. 8(8) of the *NPMA*, and extended the time for Prokam to respond to the Commission's position on deferring Appeal N1908.

In addition to the positions of the parties on the PHC, which were confirmed in writing on April 20, 2021, I have reviewed the following submissions on adjourning and deferring Appeal N1908:

- a) Commission submissions on adjournment dated May 12, 2021;
- b) Prokam submissions on adjournment and deferral with attached Schedule 1 (containing excerpts from Prokam's submissions filed in the original appeal) dated May 27, 2021; and,
- c) Commission submissions on deferral and its reply to Prokam dated May 28, 2021.

Review of Submissions of Parties

Adjournment

Prokam's position at the PHC was that its appeal should be allowed to proceed and there is no need for an adjournment because the parties to the proceedings are different, the NOCC and Appeal N1908 deal with a different subject matter, and the relief sought is different and non-overlapping. Prokam argues it would be unfair and prejudicial to defer Appeal N1908 again, pending completion of the court action as this could take years to resolve. Further, Appeal N1908 was already deferred for a year due to the 2019 supervisory review, which delay forced Prokam to file its NOCC while Appeal N1908 was extant. Prokam submits that even if Appeal N1908 and its NOCC deal with the same subject matter, there is no general prohibition against simultaneously proceeding in both administrative and judicial forums, unless the judicial proceeding is a collateral attack, which in Prokam's view, is not the case and cites *Greengen Holdings Ltd. v. British*

Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2018 BCCA 214.

For its part, the Commission argues Appeal N1908 should be adjourned generally. The Commission does not dispute Prokam's assertions that Appeal N1908 and the NOCC involve different parties, subject matter, and relief sought, and further agrees that there is no general prohibition against proceeding simultaneously in both administrative and judicial forums. However, the Commission argues that Prokam's NOCC is "*entirely without merit*", and was filed for the purposes of harassment, intimidation and to cast a pall over the conduct of the Commission. The NOCC alleges the General Manager had an animus towards, and sought to punish, Prokam and that he acted intentionally, recklessly or wilfully blind to the unlawfulness of his conduct. The Commission points out that Mr. Solymosi has acted in the capacity of General Manager throughout the entirety of the events that are the basis of the two remaining issues in Appeal N1908. If the allegations of animus are proven, this impacts all of his dealings with Prokam, including the 2017 compliance and enforcement matters. The Commission submits that it is not possible for BCFIRB to close its eyes to "*the lingering existence of these allegations in the appeal proceedings*", and as a result, it would not be fair or appropriate to proceed with Appeal N1908 when Mr. Solymosi's integrity has been so profoundly impugned. Fairness requires determination of these allegations before Appeal N1908 is heard. Permitting the appeal to proceed allows Prokam to benefit from the "*true, strategic purpose*" of its NOCC. The Commission further argues that if the suspicions of improper motives behind the NOCC are proven, this could be material to BCFIRB's *de novo* disposition of the two remaining issues in Appeal N1908.

In its reply submissions, Prokam argues that since the Commission is *ad idem* on the above four criteria, this is sufficient to dispense with its request for an adjournment.

On the balance of the issues raised by the Commission, Prokam makes several arguments. Prokam first argues that there is no factual basis for the allegation that its NOCC was filed "*to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission*". Prokam disputes the Commission's assertion that these "*sudden and explosive allegations of bad faith and misfeasance*" were never advanced before BCFIRB. Prokam submits that the only allegations about Mr. Solymosi's conduct raised in the NOCC, not advanced in the original appeal, relate to his state of knowledge about the unlawfulness of his conduct, and that proof of such knowledge was not germane to any of the issues in the original appeal. Prokam further submits that issues on the unlawfulness of the minimum price orders, procedural unfairness of the investigation, and a preconceived view of Prokam as a "rogue producer" were all advanced in the original appeal. Prokam points to excerpts from its submissions in the original appeal to support its position. Prokam also states that animus was also raised during the 2019 supervisory review (attributed to unnamed "persons of influence" within the Commission), as was the allegation that the Commission purported to enforce export minimum price orders, which were knowingly made without jurisdiction, and that Mr. Guichon exercised his power for personal gain.

Prokam also submits it has a right to a timely appeal and should not be deprived of that right based on hypotheticals of what might be proven in another proceeding. Prokam states the Commission's arguments are without merit and it questions the significance of proving animus of the General Manager when his animus cannot establish bias on the part of the Commission. Prokam further submits the suggestion that the true aim of the NOCC is to harass and intimidate the Commission is unsubstantiated speculation, devoid of factual foundation and cannot support an adjournment decision prejudicial to Prokam. Finally, Prokam argues that the Commission has not explained how its suspicions about improper motives behind filing the NOCC "*could conceivably be material to BCFIRB's de novo jurisdiction to hear the appeal*", and "*it is inconceivable*" that the NOCC could be material to BCFIRB's determination of the remaining two issues in Appeal N1908 on the correctness and fairness of the Commission's decision.

Deferral

Prokam argues that because Appeal N1908 has already been deferred once, it is not open to BCFIRB to defer it a second time in light of ss. 8(8.4) of the *NPMA*, which Prokam claims places a mandatory obligation on BCFIRB to "*proceed with and decide*" this appeal.

Section 8(8) and 8(8.4) provide:

(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.

(8.4) If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial board must proceed with and decide the appeal. [emphasis added by Prokam]

Prokam argues that once it gave notice under ss. 8(8.4), BCFIRB cannot defer Appeal N1908 a second time in favour of the 2021 supervisory review. If BCFIRB considered that certain issues raised in Appeal N1908 would have been better dealt with by a supervisory process, it could and should have incorporated those terms of reference (**TOR**) into the 2019 supervisory review as the allegations in the NOCC were the subject of submissions made to BCFIRB in both the original appeal and the 2019 supervisory review. Prokam then states that BCFIRB could have crafted the TOR for the 2019 supervisory review as broadly or as narrowly as necessary to capture as many or as few issues raised in Appeal N1908 into the supervisory process. BCFIRB instead took the opportunity to defer Appeal N1908 and that opportunity is now spent. Finally, Prokam argues that there is no prospect that the two remaining issues in Appeal N1908 will be determined in the 2021 supervisory review based on its review of the TOR recently announced.

The Commission disagrees with Prokam and argues that there is no rational basis to conclude that BCFIRB's mandatory obligation "*to proceed with and decide the appeal*" is not itself subject to BCFIRB's authority to "*defer further consideration of the appeal*" as provided under ss. 8(8), where circumstances so warrant. As to Prokam's assertion that

it is entitled to a timely disposition of its appeal, timeliness must be assessed in the circumstances. Here, the Commission states that Appeal N1908 should be deferred pending completion of 2021 supervisory review into the allegations of bad faith and unlawful conduct.

DECISION

The Commission's application for adjournment has been overtaken by my consideration of whether Appeal N1908 should be deferred pending the conclusion of the newly announced 2021 supervisory review into allegations of bad faith and unlawful conduct made against Commission members and staff.

Jurisdiction to Consider Further Deferral

First, I agree with the Commission that it is open to me to consider whether to defer the remaining issues in Appeal N1908 until the completion of the 2021 supervisory review, even in the face of the deferral decision of November 29, 2019. In my view, ss. 8(8.4) should not be read as creating a mandatory direction to BCFIRB that on receiving an appellant's notice of intention to proceed with an appeal, it can only proceed with hearing the appeal. Subsection 8(8) creates an ongoing obligation on an appeal panel to consider whether an appeal is more properly dealt with in a supervisory process. Circumstances often change and as presiding member, I must always be concerned about running a fair and effective appeal. Where there is the potential for a supervisory process to impact issues in an appeal before BCFIRB, the need to consider deferral arises. I am satisfied that the circumstances are such that it is appropriate for me to consider whether a deferral pending the completion of a supervisory process is appropriate.

I find little merit in Prokam's suggestion that BCFIRB should have drafted its TOR for the 2019 supervisory review in sufficiently broad terms to capture its current allegations. Prokam was consulted on the TOR, and had it wished to raise the allegations of actual bias and intentional harm that are now advanced in the NOCC, it could have done so. Furthermore, it is reasonable to conclude that the supervisory panel would have amended the TOR accordingly given its focus on matters relating to Commission governance.

Deferral Decision

For reasons that follow, I find that the allegations of misfeasance (intent to harm) raised by Prokam and MPL in their NOCCs against certain Commissioner members and staff are new circumstances, which were not before BCFIRB in the original appeal or the 2019 supervisory review.

I have carefully reviewed Prokam's submissions filed in the original appeal. I observe that while Prokam raised the issue of Mr. Solymosi's animus in the original appeal, it did so as part of its broader submissions on findings of credibility of certain witnesses, including Mr. Solymosi, and what adverse inferences should be drawn. While the submission acknowledges at paragraph 367 that "*a breach (of) the duty of procedural fairness will therefore be established where the circumstances of the decision give rise*

either to actual bias or a reasonable apprehension of bias”, Prokam specifically chose to make submissions on how the facts supported a finding of reasonable apprehension of bias on the part of “*Mr. Guichon and the other BCfresh commissioners*” in the 2017 compliance and enforcement proceedings. These allegations fall far short of, and are properly distinguished from, the allegation of actual bias now being made in Prokam’s NOCC, based on what Prokam acknowledges are the same (or overlapping) facts.

The supervisory panel in the 2019 supervisory review made interim orders in January and February 2020 at Prokam’s request. The supervisory panel established draft TOR, confirming it would be examining Commission governance. Prokam was given an opportunity to comment on the TOR and how it wanted to participate: see letter from Prokam and CFP Marketing Corporation to BCFIRB dated April 30, 2020. While the letter raised limited concerns on the conflict of interest with Mr. Guichon’s participation in the 2019 supervisory review given his dual role as a director of BCFresh, Prokam did not seek to revise the TOR to include allegations of actual bias or intent to harm by the Commission and/or its staff.

Turning to the recently announced 2021 supervisory review, its stated purpose is to determine whether the allegations of bad faith and unlawful activity raised in the Prokam and MPL NOCCs, alleging misfeasance of public office by Commission members and staff, can be substantiated and what resulting orders or directions by BCFIRB may be required: Notice of Supervisory Review (May 26, 2021). Draft interim orders have been circulated which contemplate impugned Commission members and staff being prohibited from participating in Commission deliberations or decision making on any rights or interests of Prokam, CFP and MPL until the conclusion of the 2021 supervisory review. Following the supervisory hearing, if the allegations are found to be substantiated, it will be open to the supervisory panel to make orders, which could include revisiting, reversing or varying any or all of the Commission decisions made in support of the 2017 compliance and enforcement proceedings, including those that are the basis of the two remaining issues in Appeal N1908.

In contrast to the supervisory review process, my role is constrained by the specific matters on appeal. The appeal panel in the original appeal rendered a decision following eight days of hearing. The appeal panel made certain findings of fact on compliance and enforcement and remitted certain issues back to the Commission for determination based on the findings of the appeal panel. The Commission revisited its enforcement decisions based on the appeal panel’s findings and the reconsideration decision then followed. Just as it was not open to the Commission to dispute the panel’s findings in the original appeal, I too must accept those findings. The first issue in Appeal N1908 is whether, given the appeal panel’s findings, the penalty of a Class 3 licence imposed on Prokam, is appropriate or proportional to the finding of non-compliance. The second issue involves considering whether the interim order is consistent with sound marketing policy.

Contrary to Prokam’s position that “*it is inconceivable*” the allegations of bad faith and unlawful conduct in its NOCC are material to my determination of the remaining two issues in Appeal N1908, and there is no prospect that they will be determined in the 2021 supervisory review, I find that to proceed would - at best - result in a duplication of BCFIRB resources allocated to the same or similar issues, and would - at worst - create

a risk of inconsistent and contradictory findings between the supervisory review and appeal processes.

If the allegations of bad faith and unlawful conduct of the Commission members and staff are proven in the 2021 supervisory process, multiple Commission decisions made in the compliance and enforcement proceedings could possibly be rescinded or varied. In short, if the Commission and its General Manager are found to have unlawfully targeted Prokam, the supervisory panel could set aside or vary any decisions, including the issuance of a Class 3 licence and/or the enactment of the interim order.

As mentioned above, the narrow focus of my appeal is whether the Commission's sanctions were appropriate given the findings of the appeal panel in the original appeal. I may uphold or vary Prokam's Class 3 licence and determine whether the interim order was consistent with sound marketing policy. The remedy for any process concerns is less clear but I note that process issues (especially those involving the motivation behind certain steps taken) will form part of the 2021 supervisory review. I see a significant risk that my findings in Appeal N1908 may overlap or conflict with the findings of the supervisory panel.

Thus, pursuant to ss. 8(8) of the *NPMA*, I conclude that at least part of the subject matter of Appeal N1908 is more appropriately dealt with in the 2021 supervisory process. Once we have the benefit of the supervisory panel's findings, it will then be more appropriate to determine what issues, if any, remain to be determined in Appeal N1908.

On Prokam's concerns about delay, it is my view that this additional delay could have been avoided if Prokam had properly brought forward its concerns earlier. As I set out above, I do not accept that Prokam had previously raised the allegations of bias and intent to harm that are now advanced in its NOCC, despite having had multiple opportunities to do so, including in the 2019 supervisory review. Prokam made the decision to raise these allegations at a later date and in a different forum, and the consequence of that is another supervisory process and the corresponding need to defer Appeal N1908. Having said that, the supervisory review is proceeding on a relatively expedited basis, and I am satisfied that any additional delay will not be inordinate in any event.

Yours truly,



Harveen Thauli
Presiding Member
BC Farm Industry Review Board