

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
INTERIM RELIEF SOUGHT BY PROKAM ENTERPRISES INC.

January 10, 2020

INTRODUCTION

1. This matter results from an extensive series of decisions, appeals and requests related to vegetable producer, Prokam Enterprises Ltd. (Prokam), and the British Columbia Vegetable Marketing Commission (Vegetable Commission). The following is a brief summary of some of the key events leading to this decision.
2. On February 28, 2019, and following an eight-day oral hearing, the British Columbia Farm Industry Review Board (BCFIRB) issued a decision¹ arising from an appeal between Prokam, wholesaler Thomas Fresh Inc. (Thomas Fresh), and the Vegetable Commission (the Prokam appeal decision). BCFIRB found that the Vegetable Commission breached principles of administrative fairness by failing to adequately address reasonable apprehension of bias concerns related to the participation of BC Fresh Vegetables Inc. (BCfresh) Commissioners in compliance and enforcement proceedings.
3. The BCFIRB Prokam appeal decision directed the Vegetable Commission to reconsider several Commission Orders made with respect to compliance and enforcement, including directing Prokam to market through BCfresh.
4. On June 28, 2019, the Vegetable Commission issued a separate decision summarily dismissing a Class 1 Agency Application from CFP Marketing Corporation (CFP), and imposing a moratorium on all designated agency and producer-shipper licence applications. Prokam had requested that the Vegetable Commission consider directing Prokam to CFP in the event of CFP being granted a designated agency licence.
5. On July 3, 2019, CFP appealed this summary dismissal. In its Notice of Appeal, CFP stated that “BCVMC [Vegetable Commission] failed to follow its own processes (regarding designated agency approval) and conducted itself in a manner that was procedurally unfair and gives rise to a reasonable apprehension of bias”. CFP “...seeks an order setting aside BCVMC’s summary dismissal of its application for agency status and that BCFIRB direct the BCVMC to approve CFP as a designated agency or alternatively to forthwith process CFP’s application in a manner consistent with its General Orders.”
6. On September 10, 2019, a BCFIRB appeal panel, after hearing from the parties, deferred consideration of CFP’s appeal subject to completion of a supervisory process. Subsequently BCFIRB established a supervisory panel.
7. Prokam applied on September 20, 2019 to the remaining panel member of the Prokam appeal decision seeking direction that the Vegetable Commission provide Prokam with a producer-shipper licence, that its 2020/21 delivery allocation be

¹ 2019 February 28. BCFIRB. [In the Matter of the *Natural Products Marketing \(BC\) Act and Appeals from Compliance Orders of the British Columbia Vegetable Marketing Commission*](#).

calculated without regard for 2018/19 and 2019/20 growing seasons and for leave to apply for a producer-shipper licence for 2020/21. The BCFIRB panel member concluded they were *functus officio* (without power) and forwarded the application to the supervisory panel for consideration on October 7, 2019.

8. On November 18, 2019, the Vegetable Commission issued its reconsideration decision as directed by BCFIRB in the Prokam appeal decision (see footnote 1).
9. Prokam appealed the reconsideration decision to BCFIRB on November 20, 2019 taking issue with being directed to market through BCfresh and being granted a more costly Class III licence. It requested reinstatement of its Class I licence, a producer-shipper licence or direction to CFP (should it be granted an agency licence), freezing of its delivery allocation as of October 10, 2017 and that the Vegetable Commission's Interim Order related to agencies be set aside. After hearing from the parties, a BCFIRB appeal panel deferred the appeal pending completion of the supervisory review already underway (November 29, 2019).
10. In its November 20, 2019 notice of appeal, Prokam indicated it needed a timely decision in order to make business arrangements for the 2020/21 crop year.
11. Given the nature of the supervisory review, the supervisory panel determined it was appropriate to consider Prokam's requests for interim relief for the 2020/21 crop year and established a submission process to hear from the interested parties.
12. While Prokam seeks alternate marketing arrangements and production approvals, the panel encouraged Prokam (December 4, 2019) to plan to the extent it was able based on the delivery allocation the Commission approved while the supervisory panel considered whether any interim direction was necessary.

ISSUE

13. In light of the ongoing supervisory process and the deferral of Prokam's appeal of the Vegetable Commission's reconsideration decision, does Prokam require an interim order from the supervisory panel to grow and market regulated product for 2020/21?

LEGAL AUTHORITIES

14. In British Columbia, the production and marketing of vegetables is regulated under the *Natural Products Marketing (BC) Act (NPMA)* and the British Columbia Vegetable Scheme (Scheme).
15. Under the Scheme, the Vegetable Commission may regulate all vegetables grown in the province. At this time storage, greenhouse and processing crops, as defined in the Vegetable Commission General Orders, are regulated "south of the 53rd parallel

north, including Vancouver Island and the Gulf Islands and excluding the Queen Charlotte Islands”.

16. Among other extensive powers, the Scheme grants the Vegetable Commission the authority to require persons marketing regulated product to obtain condition-based licences. The legislation and Scheme do not contemplate a “right” to hold a licence.
17. The legal authority granted to the Vegetable Commission, as first instance regulator of the BC vegetable industry, imposes a corresponding responsibility to ensure that this authority is exercised in accordance with fundamental principles of good governance and sound marketing policy in the public interest.
18. The Vegetable Commission’s General Orders set out the rules it uses when undertaking promotion, control, and regulation of the production, transportation, packing, storing, and marketing of regulated vegetables in BC.
19. BCFIRB is responsible for the general supervision of all marketing boards and commissions under the *NPMA*, including the Vegetable Commission. BCFIRB has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact, law and discretion arising or required to be determined by BCFIRB.

PROCESS

20. On December 4, 2019, the supervisory panel requested written submissions from Prokam, BCfresh and the Vegetable Commission. In setting the questions, the panel took in to consideration the extensive information produced to date through the Prokam appeal decision process and the Vegetable Commission’s reconsideration process. The questions provided to the parties were as follows:
 - a) Production
 - i. What is Prokam’s delivery allocation as set by the Commission for 2020/21, and what was included in the calculation (years and volumes)?
 - ii. What acreage is Prokam planning on planting to produce the delivery allocation?
 - iii. Is there a sound marketing policy reason for this amount of delivery allocation to be modified for 2020/21? Please explain why or why not.
 - b) Marketing
 - i. Is the current Grower Marketing Agreement (GMA) between Prokam and BCfresh directed by the Commission to continue for 2020/21 viable? (Is this a viable marketing option?) Why or why not?

- ii. Apart from BCfresh, is any other agency a viable option for use by Prokam? Why or why not?
 - iii. What are the risks and benefits to orderly marketing of issuing Prokam a producer-shipper licence?
21. Parties made their final submissions to BCFIRB on or before December 16, 2019. BCFIRB posted all submissions to its web site, redacting confidential business information.
22. On December 30, 2019 the panel received a letter from Prokam raising procedural concerns with the supervisory review process, "...particularly in respect of decisions that impact Prokam's right to a licence that would permit its product to be marketed". The concerns related to supervisory panel meetings with the Vegetable Commission (October 28, 2019 and November 14, 2019) and the redacting of information from BCfresh's submission received in this supervisory process (paragraph 20 above). BCfresh requested that the panel resolve these issues to avoid further legal proceedings (January 3, 2020 and January 8, 2020). The panel received a further replay from Prokam on January 9, 2020.
23. In its January 9, 2020 response to the concerns raised by Prokam, the supervisory panel ruled as follows:

The panel has determined it is in a position to address Prokam's objections without further submissions from the parties or any further process and has considered all necessary and relevant information.

...

...the panel has determined that the redacted paragraph of the BCfresh submission, which provides specific details of BCfresh's markets and contracts, is not material to the interim decision it is presently making. At issue is whether Prokam has a legitimate opportunity to market regulated vegetables for 2020/21. The panel finds that it can proceed to make its decision without reference to the redacted information provided by BCfresh.

....

Prokam also objects to the panel's meetings with the Commission on October 28, 2019 and November 14, 2019. We find this objection to be without merit.

...

As all of the parties are well aware, BCFIRB is conducting a supervisory process relating to high level issues within the industry. Importantly, the panel and the Commission met on both occasions prior to the Commission making its reconsideration decision... Also, the meetings occurred before the panel established

the process to address Prokam's requests for interim relief...specific to the 2020/21 production year ...(which) are narrow and specific compared with those issues which the panel expects to deal with through its supervisory review which will be different in scope than the specific appeals and have industry-wide application.

...

The panel finds that it can decide on these interim matters without reference to the broader industry and project background information sought from the October and November 2019 meetings with the Commission.

ANALYSIS

24. The Vegetable Commission made the following decisions regarding Prokam as part of its reconsideration decision:

92. Prokam Enterprises Ltd. Licence Class

Effective immediately, [t]he order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III License to this producer.

Prokam was not licensed to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licensed as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

62. Prokam does not qualify to apply for a Producer-Shipper Licence

Once Prokam's Class III licence reverts back to a Class I licence it may submit an application to the Commission. As long as Prokam is an active producer growing regulated vegetables for the retail, wholesale, or food service markets, and remains compliant over the next three licence periods, this opportunity could be available to Prokam for the 2022/23 Crop Year.

94. BCfresh as the Agency Designated to Prokam Enterprises Ltd.

With the enactment of this interim order, the panel offers Prokam with three options:

- Prokam can chose (sic) to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.
- If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018.

- If BCfresh releases Prokam from the GMA, Prokam can consult with other licensed storage crop agencies to represent the grower in consideration of the new interim order.
25. In this decision, the panel is not considering Prokam's appeal request to have its Class I licence reinstated. Prokam has a valid licence and as such can produce and market vegetables. The issue of what is the appropriate class of licence for Prokam cannot be resolved in this process.
 26. In considering whether to amend or vary a decision of the first instance regulator on an interim basis, this panel would only do so if it found the process followed by the Vegetable Commission was substantially flawed (as in the case of the finding in the Prokam appeal decision where the BCFIRB panel found failure to address reasonable apprehension of bias concerns required a remittal back to the decision maker for reconsideration) and/or the Vegetable Commission made a substantive sound marketing policy error in its directions.

Vegetable Commission's Process

27. In the panel's view, the Vegetable Commission has taken reasonable steps to address the administrative fairness issues identified in the Prokam appeal decision. Specifically, it fulfilled the appeal direction to canvas interested persons' views on the reconsideration panel composition. In establishing the reconsideration panel, the Vegetable Commission consulted with Thomas Fresh, Prokam and Island Vegetable Cooperative Association (IVCA). The final panel was composed of Vegetable Commission members who do not ship to, and are not shareholders, directors, or officers of BCfresh. All storage crop members recused themselves from the Vegetable Commission's final decision discussion and vote.
28. The panel observes that Prokam, in its November 20, 2019 Notice of Appeal, did not dispute the Vegetable Commission's steps to address the potential conflict of interest concerns in decision-making.
29. While the reconsideration process was lengthy, the panel is satisfied it was fair and inclusive. The Vegetable Commission shared the written submissions with all parties and provided opportunity for reply. Following the first process, the Commission panel requested input from BC potato producers and agencies on the direction of Prokam to BCfresh. The Commission subsequently provided a submission extension. The Vegetable Commission shared the submissions with IVCA, Thomas Fresh and Prokam, who did not make reply submissions to the Vegetable Commission.

Commission's Decision to Direct Prokam to Market through BCfresh

30. Prokam seeks to have the Vegetable Commission direction to market through BCfresh overturned and be granted a producer-shipper licence.

31. The government of BC established regulation for the vegetable industry in the interest of vegetable producers and the public. Vegetable producers to whom the Scheme applies (see paragraphs 14 to 17 above) are required to operate within the regulated system, including abiding by the terms of a condition-based licence.
32. The Vegetable Commission General Orders operate as a whole to facilitate the orderly production and marketing of regulated storage crops for the benefit of all storage crop producers. Disruptions through over or under-supply, or marketing, negatively impacts all regulated storage crop producers.
33. Under the General Orders, regulated storage crop producers are required to market through a designated agency, unless they are granted a Producer-Shipper licence or an exception. Agencies manage delivery allocation so that all producers have an equal opportunity to market their product and share in maximizing returns. Agencies are delegated legislative authorities by the Vegetable Commission and BCFIRB. The agencies are accountable to the Vegetable Commission, and ultimately BCFIRB, for these delegated authorities.
34. In reaching its reconsideration decision, the Vegetable Commission considered Prokam's previous non-compliance with the General Orders regarding delivery allocation² and planning for new or additional regulated product (acknowledged and summarized by BCFIRB in the Prokam appeal decision), the position of other storage crop agencies on marketing Prokam's regulated product, and agency accountability.
35. In light of Island Vegetable Cooperative Association's³ "dysfunctional nature" the Vegetable Commission upgraded Prokam's Class IV licence to a Class III licence to recognize Prokam's demonstrated non-compliance with the General Orders regarding delivery allocation and planning for new or additional production.
36. The Vegetable Commission found in its reconsideration decision that BCfresh meets the objectives and obligations of an agency under Part V (Agencies) and Part VII (Agency Responsibilities) of the Commission General Orders. It also found that BCfresh has the resources and experience to support Prokam's growth ambitions within the current regulatory framework. The Vegetable Commission noted that while other designated agencies have the ability to market Prokam's regulated crops, these agencies expressed support for BCfresh as the preferred choice.
37. The panel accepts that the Vegetable Commission determination to direct Prokam to market through BCfresh for 2020/21 if Prokam chooses to grow regulated product or

² How much regulated product a producer can deliver to an agency or market within a specified time period.

³ At the time of the Prokam appeal, Prokam was marketing through the Island Vegetable Cooperative Association.

if BCfresh will not release Prokam from the current Grower Marketing Agreement is consistent with sound marketing policy for the following reasons:

- a) BCfresh has expressed willingness to work with Prokam and committed to selling Prokam regulated product;
- b) BCfresh has experience and connections in potato marketing across Western Canada and should have the capacity to successfully market Prokam's regulated product;
- c) As reported in the reconsideration decision, other storage crop agencies which also have the capacity to market Prokam's regulated product expressed support for BCfresh serving as Prokam's agency;
- d) The Prokam appeal decision found that Prokam was not in compliance with the Vegetable Commission's General Orders regarding delivery allocation and planning of new or additional production;
- e) The reported BCfresh track record of compliance with the General Orders can support Prokam's compliance efforts;
- f) Prokam has the opportunity to demonstrate its ability and willingness to operate within the regulated system by working with BCfresh; and,
- g) Once Prokam demonstrates its ability and willingness to operate within the regulated system it has the opportunity to transition to a Class I licence and be in a position to apply for a Producer-Shipper licence for 2022/23.

Prokam Request for a Producer-Shipper Licence

38. The Panel now turns to evaluate Prokam's request to be granted a Producer-Shipper licence instead of being directed to BCfresh.
39. Storage crop Producer-Shipper licences are not common. Part VIIA of the General Orders states that "A Producer-Shipper licence is an extraordinary licence issued under exceptional circumstances. The circumstances are inclusive of, but not limited to, the history, geography and economics associated with the applicant." Currently, there is one storage crop producer, operating on Vancouver Island, holding a Producer-Shipper licence granted under specific circumstances⁴. The Vegetable Commission observed that in order to consider such an application, the producer would need to be in good standing with the Commission's General Orders. The Commission has outlined how Prokam can be eligible to apply for a Producer-Shipper

⁴ 2017 January 31. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and the Future of Regulated Vegetable Production on Vancouver Island – Agency Designation.](#)

licence in two years (2022/23 – see paragraph 24), and the panel accepts this evaluation.

40. Prokam’s justification for this request is based in large part on its stated view that it cannot work with BCfresh, citing past acrimony between Prokam and BCfresh management staff. This leads Prokam to a concern that BCfresh will also not explore or pursue market opportunities that Prokam suggests, and those opportunities will be lost. Conversely, BCfresh expressed a willingness to work with Prokam and notes that it will assist Prokam in maximizing its opportunities to market its potatoes at a potentially better price than it would receive as a Producer-Shipper.
41. The panel understands BCfresh and Prokam have made very limited efforts to develop a working relationship. Prokam references some initial spring 2018 discussions with BCfresh, where Prokam disagreed with terms put forward by BCfresh. Following this exchange, discussions appear to have ended. Prokam states, among other matters, that BCfresh would not accede to Prokam’s wish to expand into extra-provincial markets, that BCfresh would limit Prokam’s plantings, and that Prokam would need to construct storage.
42. With respect to this latter point, the panel observes that as a designated agency, BCfresh is responsible for ensuring all producers shipping through its agency have shared access to the opportunity to market their vegetables by managing delivery allocation assigned by the Vegetable Commission. Producer plantings typically are based on and reflect delivery allocation adjusted for normal production losses and some market adjustments (or “gap filling”). The role of the agency necessarily extends to monitoring acreage under production and ensuring producers have storage for their crops. Crop storage is not only a common practice for regulated BC potato producers, but is a necessity, as agencies do not typically have the capacity to provide storage for their producers.
43. The Vegetable Commission General Orders establish a clear process by which new or expanded markets can be met. The panel does not agree that the solution to meeting potential new or expanded market demands, if such exist, is to grant Prokam a Producer-Shipper licence. Even if Prokam is granted a Producer-Shipper licence it has obligations under the General Orders and is still bound by its delivery allocation should supply exceed demand.
44. Shipping over delivery allocation requires Commission authorization whether Prokam ships through an agency or direct markets as a Producer-Shipper. The panel recognizes that Prokam wishes to demonstrate ways it can offer additional product at times other producers are not able to do so or offer product to meet specific niches others do not meet. Prokam did not provide the panel any substantive information that would lead it to find that BCfresh is unable or unwilling to consider these types of proposals by Prokam as long as they can be achieved through compliance with the General Orders.

45. The marketing framework provided by the Commission's General Orders has been developed to serve all registered growers of regulated product. It is the panel's position that it is incumbent on Prokam to now demonstrate its willingness to work within the regulated system and to re-establish its good standing before seeking concessions. The panel is not satisfied that Prokam has demonstrated there are historical, regional or economic circumstances that warrant granting it a Producer-Shipper licence for 2020/21.
46. As noted in paragraph 44 Prokam's avenue to expand production to fill new or additional markets is not closed. Should Prokam, in cooperation with BCfresh, identify opportunities for marketing new or additional regulated product in 2020/21, application can then be made to the Vegetable Commission under Part XV of its General Orders (Marketing of "New" or Additional Regulated Product by Existing Agencies and Producer-Shippers).
47. The panel finds Prokam, in being directed to BCfresh, has an avenue to market its regulated crops for 2020/21 and an opportunity for growth should the market allow. In making this finding for the 2020/21 crop year, it is unnecessary for this panel to consider that part of Prokam's November 20, 2019 appeal relating to an agency designation for CFP.
48. In closing, while Prokam commits to abiding by the General Orders going forward, the panel would need to see Prokam demonstrating its willingness to comply with the General Orders before issuing it a Producer-Shipper licence.

Delivery Allocation

49. According to Part XVI of the Vegetable Commission's General Orders, delivery allocation management is intended to support orderly marketing, including preserving market access for producers who have served the market over time; allowing for new entrants, and providing opportunity for industry growth. The Orders also reflect that delivery allocation is a privilege and is issued by the Commission at its discretion based on producers meeting certain conditions.
50. Prokam has made several requests to the Vegetable Commission, and again as part of this supervisory process, for its zero-potato production in 2018/19 and 2019/20 not to be included in the calculation of the five-year rolling average delivery allocation calculation by the Vegetable Commission for 2020/21. The Vegetable Commission has not responded to date, nor did BCFIRB direct the Vegetable Commission to reconsider Prokam's delivery allocation in the Prokam appeal decision. As such, the panel has undertaken to address Prokam's delivery allocation calculation for 2020/21 under this process as part of its supervisory jurisdiction.
51. The panel agrees with Prokam that including the two non-production years (2018/19 and 2019/20) has a significant impact on Prokam's total delivery allocation. It also

recognizes that BCFIRB found in the Prokam appeal decision that the Commission's decision-making process regarding a number of operational matters was significantly flawed. It took the Commission several months to establish and conduct its reconsideration of those matters and issue its decisions. In the meantime, Prokam has filed a number of appeals, adding cumulative time and uncertainty to achieving a consistent business environment for Prokam's operations.

52. For the purposes of this decision, the panel finds that the two years of business uncertainty were in part created by the flawed Vegetable Commission process which necessitated the initial appeal and then the reconsideration. In the panel's view, the delay to resolve the process concerns amounts to special circumstances and those years should be excluded from calculation of delivery allocation.
53. Nonetheless, parties should be aware that the Commission's General Orders provide (Part XVII paragraph 10): "Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation."
54. In this decision, the panel determined it necessary to deal with two of Prokam's requests, as set out above, related to marketing arrangements and calculation of delivery allocation for 2020/21, as interim matters critical to business uncertainty for Prokam. The panel expects Prokam to make its business decisions regarding planting regulated product in light of this decision and the Vegetable Commission General Orders.

DECISION

55. There are insufficient process grounds for the panel to set aside or amend the Vegetable Commission's November 18, 2019 decision to direct Prokam to market regulated product through the agency BCfresh.
56. The panel finds that the Vegetable Commission's November 18, 2019 decision to direct Prokam to BCfresh accords with sound marketing policy.
57. Prokam has not satisfied the panel that conditions exist as a basis for the Commission to decide to issue a Producer-Shipper licence to Prokam. Without any of these conditions being met, there are insufficient sound marketing policy grounds on which to grant Prokam a Producer-Shipper licence for the 2020/21 crop year.
58. The Vegetable Commission (as represented by appropriate members and staff) is directed to meet with BCfresh and Prokam to assess if or when an application seeking new or additional product beyond the delivery allocation approved by the Commission, under Part XV of the General Orders may be justified, and to discuss the Commission's application requirements.

British Columbia Farm Industry Review Board
Interim Relief Sought by Prokam Enterprises Inc.
January 10, 2020

59. In calculating Prokam's delivery allocation for 2020/21, the Vegetable Commission is directed to:

- a) Exclude 2018/19 and 2019/20 crop years from calculating Prokam's 2020/21 delivery allocation;
- b) Abide by the Prokam appeal decision finding that Prokam's 2017-18 crop year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation; and,
- c) Submit Prokam's 2020/21 delivery allocation to the panel for prior approval.

Dated at Victoria, British Columbia, this 10th day of January 2020.

D. G. Stancil

Daphne Stancil
Member

D. Lapierre

Dennis Lapierre
Member

T. Leigh

Tamara Leigh
Member