

January 9, 2020

File No: 3211.001

BY EMAIL

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

Re: *Vegetable Supervisory Review*

We write further to Mr. McDonell's letter of yesterday, further to his letter of January 3, 2020, substantively replying to our December 30, 2019 letter.

There appear to be a number of misapprehensions on the part of BCfresh reflected in Mr. McDonell's letter.

First, neither Prokam nor CFP have raised any allegations of bias at any time during the course of this supervisory review. Rather, they have raised the concern that the manner in which this supervisory review is being conducted has the potential to raise a reasonable apprehension of bias if the matters complained of are not properly addressed by the Panel in its decision-making process. The particulars of this concern to which Prokam and CFP have pointed include:

1. meetings between the Supervisory Panel and representatives of the Commission have taken place, *ex parte* to Prokam and CFP, which discussions have not been disclosed to Prokam or CFP;
2. the Supervisory Panel has yet to provide either Prokam or CFP with the same opportunity to be heard that has been provided to the Commission, in breach of the *audi alteram partem* rule;
3. without first seeking leave to do so, BCfresh has submitted – and the Supervisory Panel has received – submissions that have been redacted, preventing Prokam or CFP from being able to test or respond to these submissions or the evidence on which they are purportedly based.

These are not newly raised concerns; the first two of these three issues with the supervisory review procedure were canvassed at length in our letter of November 13, 2019.

Another misapprehension on BCfresh's part is reflected in its incorrect suggestion that Prokam and CFP are reserving the grounds of reasonable apprehension of bias and other procedural fairness deficiencies for a judicial review if the outcome on supervisory review turns out badly for them. As borne out in our letters of November 13 and December 30, 2019, Prokam and CFP raise the procedural deficiencies now for precisely the opposite purpose: to provide the Supervisory Panel with an opportunity to cure them, now, so that a judicial review on the basis of procedural fairness deficiencies might be avoided.


In *Eckervogt v. British Columbia* (cited in Mr. McDonell's letter), the appellants were content upon being apprised of the facts underlying the reasonable apprehension of bias concern for the Expropriation Compensation Board panel to continue to adjudicate their matter, but reserved the issue of bias for a possible appeal. The instant supervisory review is distinguishable in that Prokam and Thomas Fresh are not content to condone the *ex parte* meetings and redacted submissions unless and until there is an adverse decision on supervisory review. Rather, Prokam's and CFP's position is that these are breaches of their procedural fairness rights, and that the Supervisory Panel should take action to cure these now, while the supervisory process is extant.

Third, BCfresh's call for the Supervisory Panel to make a ruling on Prokam's and CFP's procedural fairness concerns appears to be based on the misapprehension that Prokam and CFP now seek to disqualify the Supervisory Panel for bias or a reasonable apprehension thereof. Because Prokam and CFP consider that it is possible for the Panel to cure the procedural unfairness of the receipt of *ex parte* evidence, no disqualification motion is being – or could properly be – brought at this juncture and any ruling on such a motion would accordingly be premature. In Prokam's and CFP's submission, the appropriate way forward is for the Supervisory Panel to address and cure the procedural fairness deficiencies CFP and Prokam have identified.

In Prokam's and CFP's submission, curing the procedural fairness deficiencies in question involves, at a minimum, disclosing to Prokam and CFP the discussions that took place during the *ex parte* meetings of October 28 and November 14, 2019 that relate to Prokam or CFP, disclosing the redacted BCfresh submissions, providing Prokam and CFP with an opportunity to make submissions on them,¹ as well as more generally providing Prokam and CFP with the same opportunity to be heard orally as has been provided to the Commission on any issues relating to Prokam or CFP before a decision is reached on those issues.

The obvious difficulty for Prokam and CFP in addressing the impact of the receipt of *ex parte* evidence and submissions from parties who have positioned themselves as adverse to our clients in this Supervisory Review is that it is generally not possible for our clients to assess, without the content of the *ex parte* communications being disclosed, whether or the

¹ As was done in *Sandirasegaram v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16662 (F.C.) at para. 41.



extent to which the *ex parte* evidence and submissions relates to our clients and the issues under review. It is possible that the discussions with the Commission at the October and November meetings did not relate to our clients or did not relate to the specific issue of Prokam's application for a producer-shipper license presently at issue: we simply do not know given the *ex parte* nature of the discussion. On the other hand, with respect to BCfresh's *ex parte* submission to the Panel, given that the context in which BCfresh provided its submission was in responding to a question about whether Prokam should be granted an interim producer-shipper license, it seems reasonable to infer that at least BCfresh considers whatever information they redacted to be relevant to the issue of whether Prokam should be granted an interim producer-shipper license.

The simple point of our letter of December 30, 2019 is that it is improper for the Supervisory Panel to consider information provided by an adverse party about our clients without giving our clients an opportunity to know and test the case they have to meet. It is not an issue that we raised lightly but we consider – precisely for the reasons alluded to in Mr. McDonell's correspondence – that the issue must be raised now if it is to be raised at all. We remain hopeful that the Panel will take immediate steps to cure this procedural unfairness prior to issuing its decision.

Very truly yours,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

cc: Robert Hrabinsky, counsel for the BC Vegetable Marketing Commission (by email)
Robert McDonell, counsel for BC Fresh Vegetables Inc. (by email)