



BC Farm Industry Review Board

March 30, 2020

File: 44200-60\VEG

DELIVERED BY EMAIL

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Dear Sirs/Mesdames:

**RE: Vegetable Industry Supervisory Review, Prokam v. BCVMC (File No. N1908, and
Island Vegetable Co-operative Association v. BCVMC (File No. N1910)**

On March 24, 2020, Ms Hunter, counsel for Prokam Enterprises Ltd. (Prokam) wrote to the Case Manager of the British Columbia Farm Industry Review Board (BCFIRB) seeking to have Prokam's above captioned appeal (File No. 1908) heard together with an appeal by Island Vegetable Cooperative Association (IVCA) (File No. N1910). If BCFIRB denies the application, and as an alternative, Prokam requests BCFIRB grant it intervener status in the IVCA appeal. Both appeals (File Nos. 1908 and 1910) arise from, and relate to, a November 18, 2019 British Columbia Vegetable Marketing Commission (Commission) decision (the Reconsideration Decision).

Mr. Harvey, Counsel for IVCA, wrote to BCFIRB on March 27, 2020 objecting to both of Prokam's applications to join or intervene in the IVCA appeal. In light of my decision it is not necessary for me to consider Mr. Harvey's submission.

In a November 29, 2019 decision, a BCFIRB appeal panel deferred hearing the Prokam appeal pending completion of a supervisory process. The same appeal panel, in a decision dated March 20, 2020, decided not to defer the IVCA appeal pending completion of a supervisory process. The IVCA appeal is proceeding to hearing on a yet-to-be determined date.

**British Columbia
Farm Industry Review Board**

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I must consider Prokam's request to join its deferred appeal with IVCA's appeal from the perspective of Chair of the supervisory review panel.

This letter provides BCFIRB's decision to Prokam's application to have its appeal heard before the supervisory review is completed. Accordingly, it is directed to counsel for Prokam, counsel for IVCA, and counsel for the Commission, Mr. Hrabinsky.

Background

Before making my decision, I reviewed the relevant procedural history.

Following initiation of the current supervisory review process (the Vegetable Review) in September 2019, the supervisory panel held a series of meetings with the Commission in fall 2019. The goal was to establish a common understanding of the Commission's projects, appeals and other related matters.

On November 18, 2019, the Commission issued its Reconsideration Decision addressing matters remitted back to it by the BCFIRB panel in *Prokam et. al. v. BCVMC*, February 28, 2019.

On November 21, 2019, Prokam filed its appeal of the Reconsideration Decision. As part of this appeal, Prokam sought interim directions that the Commission issue it a producer-shipper licence for the 2020/2021 growing season, and that the Commission calculate its delivery allocation without regard to the 2018/2019 and 2019/2020 growing seasons.

On November 27, 2019, the supervisory panel issued a letter recognizing, among other matters, the fact of Prokam's November 21 appeal and set out the steps it would take to finalize the Vegetable Review scope.

Also on November 27, 2019, the presiding member of the Prokam appeal (Pawanjit Joshi) canvassed the parties on their positions with respect to deferring the appeal to a supervisory process. Prokam supported the deferral of its appeal to BCFIRB's supervisory jurisdiction, stating:

Prokam agrees that it makes sense to have issues raised by the above-captioned appeal addressed by the same supervisory panel to which the appeal brought by CFP Marketing Corporation dba Canada Fresh ("CFP") was deferred. However, the prospect of deferral of the appeal to supervisory review without any established timeframe or process for the supervisory review raises the following concerns for Prokam.

Prokam raised the issue of its participatory rights in the supervisory review and concerns about additional delay that may result from deferral of its appeal to supervisory review. Prokam was concerned that delay could result in potential prejudice. It stated:

If these concerns can be accommodated in the supervisory process, Prokam is agreeable to deferral to supervisory review provided that the review can be completed efficiently and without undue delay. Prokam is opposed to deferring this appeal to a supervisory review that is open-ended in terms of timing and procedural structure.

In a November 29, 2019 decision, Mr. Joshi deferred the Prokam appeal pending the completion of the Vegetable Review. Mr. Joshi stated:

I cannot limit the supervisory Panel as to the issues it may consider, the process it will follow or the time frame to conclude its supervisory process. Having made the decision that I have sufficient information before me based on the submissions of the parties to make my decision and as I conclude it is appropriate in these circumstances to defer the appeal, it is now up to the supervisory Panel to determine how it will incorporate the issues raised in this appeal in its supervisory process. Any road map for the supervisory review process must be developed by the supervisory Panel.

The supervisory panel recognized that Prokam had raised issues in its appeal that were time-sensitive. Prokam required decisions regarding its delivery allocation and marketing avenue before the start of the 2020/2021 growing season in order to make business arrangements. On December 4, 2019, the supervisory panel established a written submission process to address Prokam's time-sensitive issues.

In a January 9, 2020 response to process concerns raised by Prokam in a December 30, 2019 letter, the supervisory panel described its submission process as follows:

The supervisory review panel determined it was appropriate to put the broader supervisory process on hold in order to consider and address Prokam's immediate business concerns. The supervisory review panel established a condensed submission process on December 4, 2019, in response to Prokam's stated need for timely relief. This interim process included all parties the panel determined it needed to hear from (Prokam, the Commission, BCfresh) and closed on December 16, 2019. The panel concluded that in addition to the direct submissions it received it could rely as well on the extensive information already at hand through the previous appeals and requests, which parties incorporated by reference into their submissions.

In the same letter, the supervisory panel considered and described the issues it was considering as follows:

Finally, as noted above, the issue currently before the panel dealing with Prokam's applications as interim matters, is whether Prokam has a legitimate opportunity to market regulated vegetables in 2020/21. 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.

Given the time constraints related to planning for the 2020/21 crop season, the panel is doing its best to release its decision on Prokam's request for interim relief in the very near future as communicated on December 23, 2019. Once its decision is released, the panel will be moving forward with the broader supervisory review.

On January 10, 2020, the supervisory panel issued its interim relief decision affirming the Commission's decision to direct Prokam to market regulated product through the agency BC Fresh Vegetables Inc. (BCfresh), dismissing the request to issue a producer-shipper licence to Prokam for the 2020/21 crop year and directing the Commission to meet with BCfresh and Prokam to talk about potential market needs. The supervisory panel also issued directions to the Commission on how to calculate Prokam's delivery allocation for the 2020/21 crop year. The supervisory panel received a further submission from Prokam regarding calculation of its delivery allocation. After receiving a response from the Commission, the supervisory panel issued

a decision on February 11, 2020 approving the Commission's January 17, 2020 calculation of Prokam's delivery allocation for the 2020/2021 crop year. The panel's approval was based on the condition that the Commission review a recording error noted by Prokam, and make any necessary adjustments.

As should be clear from the above summary, the supervisory panel put the Vegetable Review on hold to address the substantive and interim relief sought by Prokam in its appeal to provide certainty and clarity to Prokam for the 2020/21 production year. Other issues raised in the appeal remain to be addressed in the Vegetable Review following BCFIRB's decision of November 29, 2019 deferring the appeal. The supervisory panel has recently returned to establishing a terms of reference for engaging with the vegetable industry as part of the Vegetable Review.

Mr. Joshi is also the presiding member in the IVCA appeal and in his March 20, 2020 decision, he declined to defer IVCA's appeal pending completion of the supervisory review. He stated:

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 licences 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.

Decision

Section 8(8.4) of the *Natural Products Marketing (BC) Act* (Act) contemplates that an appeal has been deferred and **where the supervisory process has been completed**, an appellant may give notice that it intends to proceed with its appeal (emphasis added).

Here the supervisory review is underway and not yet completed. As set out above, the supervisory panel suspended its supervisory process in order to address the immediate concerns of Prokam. The supervisory panel made the decisions Prokam required prior to the 2020/21 production year and by doing so has considered several of the Prokam-related directions in the Commission's Reconsideration Decision -- at least on an interim basis. Some of the Reconsideration Decision orders, which are under appeal by Prokam, are replaced by the findings of the supervisory panel in its January interim relief decision. The delay in the supervisory review is regrettable, but in the supervisory panel's view, delay was necessary to provide Prokam the clarity it sought for 2020/2021.

As noted previously, the supervisory panel is now in the process of finalizing its terms of reference for the Vegetable Review. The panel has held further preliminary conversations with Commission representatives, and a meeting is set with the Commission's working group for March 30, 2020. Following this meeting, the supervisory panel will consult with industry members, including Prokam, on the review areas of focus identified in the draft terms of reference

(currently scheduled for April 2020). Once the areas of focus are finalized, a process and timeline will be established for the remainder of the review.

The panel recognizes that business must continue throughout the Vegetable Review. It will be working with the Commission to ensure business does so. The panel also recognizes that because of the COVID-19 outbreak, the regulated vegetable industry is facing new and unprecedented challenges. While the supervisory panel is unable to predict everything the industry will face during the 2020/21 production year, the panel is fully aware that the Vegetable Review process must be responsive to the practicalities related to industry impacts and public health issues raised by the pandemic.

In summary, Prokam supported the deferral of its November 21, 2019 appeal, and availed itself of BCFIRB's supervisory jurisdiction to deal with matters of urgency on an interim basis for the 2020/21 production year. As provided by the Act (s. 8 (8.4)), Prokam can seek to continue its appeal of any issues that remain following the conclusion of the review. The supervisory panel's decisions, while interim, are of a substantive nature and respond to many of the issues Prokam is appealing. Because the supervisory panel has made decisions on substantive issues Prokam raised in its November appeal, and the Act provides a mechanism to have any unresolved issues dealt with on appeal, in my view the appropriate course of action at this time is for the supervisory panel to conclude its work. Once concluded, it will then be open to Prokam to give notice that it intends to proceed with its appeal (File No. N1908) and the appeal panel will then determine whether any live issues remain for appeal that the supervisory process did not address.

Prokam's appeal remains deferred until the completion of the supervisory review.

Having concluded that Prokam's appeal remains deferred, the appeal cannot be heard with IVCA's appeal.

I note that Prokam's request to intervene in IVCA's appeal remains outstanding. Prokam should contact Gloria Chojnacki Gloria.Chojnacki@gov.bc.ca or (778) 974-5789 to advise if it wishes to continue this application. If so, it will be for the IVCA appeal panel to consider Prokam's application and determine if they require anything further from the parties to make a determination.

I will provide a copy of this letter to the appeal panel.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per



Daphne Stancil
Presiding Member