



# BC Farm Industry Review Board

## NOTICE OF SUPERVISORY REVIEW

### Vegetable Marketing Commission

### Allegations of Bad Faith and Unlawful Activity

The BC Farm Industry Review Board (“BCFIRB”) has ordered a supervisory review process, pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (the “Act” or the “NPMA”), into allegations of bad faith and unlawful activity raised in court filings alleging misfeasance of public office by members and staff of the BC Vegetable Marketing Commission (“Commission”). The purpose of the supervisory review is for BCFIRB to determine whether these allegations can be substantiated and what resulting orders or directions may be required.

Given the gravity and potential implications of the allegations, the supervisory review will take the form of an oral hearing. BCFIRB recognizes the need to proceed with this matter expeditiously in order to ensure public confidence in the administration of the regulated vegetable industry in British Columbia.

This Notice lays out the background to the review, addresses its intended scope and focus, and sets out the next steps.

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## **I. BACKGROUND**

In 2017, the Commission undertook compliance and enforcement proceedings with respect to the interprovincial sale of potatoes against a commercial vegetable producer, Prokam Enterprises Ltd. (“Prokam”), its wholesaler Thomas Fresh Inc., and its agency, Island Vegetable Cooperative Association (“IVCA”). The Commission conducted a written show cause process and issued a written decision, which was followed in January 2018 by a variation decision. In the course of those proceedings, the Commission directed Prokam to BCFresh Vegetables Inc (“BCFresh”) as its designated agency.

Prokam and Thomas Fresh appealed those decisions to BCFIRB. In a decision dated February 28, 2019, BCFIRB remitted certain issues in the decision under appeal back to the Commission with directions to reconsider its cease and desist orders and enforcement actions in light of BCFIRB’s reasons.

In the appeal, the appellants asserted that the involvement of Peter Guichon, then a Commission member and vice-chair, gave rise to a reasonable apprehension of bias because of Mr. Guichon’s ties to the agency BCFresh, to which Prokam was referred. BCFIRB found that there was a limited record on the question and indicated the potential conflict of interest issues would be best addressed by the Commission in first instance. At that time no allegations of actual bias, abuse of public office, or corruption were raised against any members or staff of the Commission.

Prior to the Commission completing its reconsideration process, it received an application from CFP Marketing Corporation (“CFP”) for a Class I Agency license through which Prokam would ship its regulated product. Prokam’s principal, Mr. Dhillon, is a member of the Board of Directors of CFP.

On June 28, 2019, the Commission summarily dismissed CFP’s agency application, and established a moratorium on new agency and producer-shipper applications to allow it to complete significant projects underway related to strategic planning and an agency accountability framework.

In September 2019, BCFIRB began a supervisory review process examining aspects of Commission structure, agency accountability requirements and storage crop delivery allocation rules. These topics were finalized in May 2020 after consultation with the Commission and members of the regulated vegetable sector.

On November 18, 2019, the Commission issued its reconsideration decision of its cease and desist orders and enforcement actions remitted back to it by BCFIRB. Prokam appealed the reconsideration decision. This appeal was ultimately deferred to allow the supervisory process to complete.

In September 2020, Mastronardi Produce Ltd. (“MPL”), an Ontario greenhouse business seeking to market BC greenhouse vegetables, brought an application before the Commission for an agency license.

On October 21, 2020, the BCFIRB Supervisory Review Panel issued a decision that there was an adequate basis for the Commission to lift the moratorium and begin its review and consideration of new agency applications, including applications brought by CFP and MPL, and directed the Commission to move forward with identifying commissioners to consider current agency applications no later than October 30, 2020.

On December 22, 2020, BCFIRB issued its supervisory decision, which, *inter alia*, made recommendations related to managing the perception of bias and potential conflict of interest in Commission decision-making. No allegations of actual bias, bad faith, abuse of public office or corruption were raised during the course of the supervisory review, and were accordingly not considered by the panel. The Commission has not yet made decisions on CFP and MPL's applications for an agency license.

In December 2020, MPL commenced an appeal to BCFIRB of a Commission decision denying a request to extend the date for notice of producer transfers, arguing that the delay in considering its application without an extension constituted an effective denial of an agency license for the 2021 growing season. A BCFIRB panel dismissed that appeal summarily finding it had no chance of success. In that appeal, MPL raised an allegation of reasonable apprehension of bias, but not allegations of actual bias, bad faith, abuse of public office, or corruption. MPL has filed a petition for judicial review of the summary dismissal decision.

Also in December 2020, Prokam sought to reinstate its appeal of the Commission's November 18, 2019 decision. Following a submission process, on March 30, 2021, BCFIRB directed that the appeal related to Prokam's licence class and the interim order could proceed to hearing.

In April 2021, BCFIRB learned that Prokam filed a Notice of Civil Claim in the BC Supreme Court, naming as defendants Mr. Guichon and Andre Solymosi, the General Manager of the Commission. The claim makes the following allegations against Mr. Guichon and Mr. Solymosi:

- a) Mr. Guichon enforced orders against Prokam in bad faith and for improper purposes—to protect and advance his own economic interests as a BCFresh grower and shareholder.
- b) Mr. Guichon knowingly participated in the show cause and variation decisions when he was disqualified because of his personal interests in BCFresh
- c) Mr. Solymosi investigated Prokam in bad faith with a view to punishing a "rogue producer"
- d) Mr. Solymosi intentionally and unlawfully did not provide Prokam with an opportunity to respond to the evidence against it.

- e) Mr. Solymosi set minimum pricing standards targeting Prokam directly, and Mr. Guichon and Mr. Solymosi enforced them against Prokam, with the knowledge they were not in force because they were not gazetted.

BCFIRB subsequently learned of another civil claim filed by MPL, which named Commission members John Newell, Mike Reed, Corey Gerrard, Blair Lodder, Mr. Guichon and Mr. Solymosi. The claim includes the following allegations:

- a) The defendants arbitrarily, separately or in concert, have acted to prevent MPL from entering the BC market for the improper purpose of maintaining their market position in BC for their own financial benefit.
- b) Mr. Solymosi and Mr. Reed have prevented the granting of additional production allocation to growers thought to be aligned with MPL, for their own economic benefit.
- c) The defendants have failed to recuse themselves from the decision-making process in respect of MPL's application for a 2021 agency application, and apply the criteria for evaluating agency applications.
- d) Mr. Newell and Mr. Reed have entered into an agreement with Mr. Gerrard, Mr. Lodder and Mr. Guichon to improperly circumvent the conflict of interest policy, whereby the latter defendants will vote as requested by Mr. Newell and Mr. Reed on matters related to greenhouse crops in exchange for votes on storage crop matters.

On May 12, 2021, counsel for the Commission wrote to BCFIRB in its supervisory capacity and asked it to issue directions requiring the Commission to defer any decisions in relation to existing or future applications made by or in relation to Prokam, CFP, MPL and/or their affiliates or related companies, until such time as there is final disposition of the allegations made in the notices of civil claim.

## II. REGULATION OF THE INDUSTRY

The British Columbia Vegetable Marketing Scheme (Vegetable Scheme), a regulation under the *NPMA*, establishes the Commission and its associated powers as the first instance regulator of vegetables in the province. These powers include "...to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product" (Vegetable Scheme, s. 4) and "...to designate the agency through which a regulated product must be marketed" (*NPMA* s. 11(1)(a)). The Commission's General Orders address specific management of the regulated system, including designation, review, and revocation of agencies.

The *NPMA* and its Regulations establish BCFIRB's authority and role in relation to the Commission. In its supervisory role (*NPMA* s. 7.1), BCFIRB "may exercise its powers ... at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances". BCFIRB has the broad power to amend, vary or cancel orders by the Commission at any time, before or after 1974 (*NPMA*, s. 11(2)), and has broad jurisdiction to grant whatever other orders it considers necessary to supervise the operations of the Commission (*Regulation*, s. 4). It is

specifically empowered to investigate where it has reason to believe the Commission or one of its actors is not adhering to or enforcing the provisions of its scheme (*Regulation*, s. 4.1).

### III. SUPERVISORY REVIEW

#### SCOPE AND FOCUS

Serious allegations of wrongdoing have been raised in the claims filed by Prokam and MPL that BCFIRB, as the body with overall responsibility for natural products marketing in the province, has a statutory obligation to investigate in order to protect the public interest and ensure public confidence in the orderly marketing of regulated vegetables. While these allegations were not raised in the recent review of the vegetable industry concluded in December 2020, it would be an abdication of BCFIRB's statutory responsibilities to now ignore them.

BCFIRB's supervisory review is directed by two objectives:

- ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and
- ensuring public confidence in that fairness and integrity of the administration of the BC regulated vegetable sector.

The following points form the initial terms of reference for this supervisory review:

1. The Commission's exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self-interest of members of the Commission, including:
  - a. Self-interested prevention of new agencies from entering the British Columbia agency market to further the Commission members' economic interests, by both failing to adjudicate agency licence applications, and preventing the granting of additional production allocation to growers thought to be aligned with applicants;
  - b. Collusion by members to "vote swap" on agency applications and thus circumvent the conflict of interest policy;
  - c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest;
2. Prosecuting enforcement proceedings in bad faith and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

These terms of reference may be amended if other industry stakeholders raise similar allegations related to Commission decisions and activities that BCFIRB determines ought to be included within the supervisory review.

## **FORMAT OF THE SUPERVISORY PROCESS**

The Act affords BCFIRB significant latitude in how it exercises its supervisory jurisdiction. BCFIRB acknowledges that allegations of bad faith and wrongdoing by public officials warrant a high degree of procedural fairness and an oral hearing. In light of the COVID-19 pandemic and public health orders, it is likely that the oral hearing will proceed by way of video conference.

Accordingly, BCFIRB will engage outside counsel to question witnesses and present documentary evidence during the hearing. Separate outside counsel will be retained to assist the panel during the hearing and their deliberations. The supervisory panel will consist of BCFIRB Chair Peter Donkers. The panel will issue directions or rules of procedure pursuant to s. 7.1(7) of the *NPMA* to govern the conduct of the hearing in due course.

## **PARTICIPATION RIGHTS**

BCFIRB recognizes that all those whose rights will be affected by the supervisory process should be afforded a right to participate. This includes, at a minimum, the Commission, the named personal defendants in the two civil claims, and Prokam and MPL. These parties shall be afforded the opportunity to participate, as of right, upon writing to the panel to indicate their intention to participate. Those submissions should be received no later than close of business on June 4, 2021.

BCFIRB has an obligation to ensure that these allegations of misfeasance are thoroughly investigated. It may be the case that other parties wish to raise similar allegations to those raised by Prokam and MPL. Those parties may apply to participate by written submission. Submissions should be directed to the core points identified above under *Scope and Focus*, or raise allegations similar to those identified in that section. In the latter case, the panel will consider other information a party feels is necessary to be brought forward in the supervisory review. Those submissions should likewise be received no later than close of business on June 4, 2021.

## **INTERIM ORDERS**

In its May 12, 2021 letter, the Commission has requested that BCFIRB issue directions to prevent the Commission from considering applications for licences brought by Prokam, CFP, MPL and related bodies until the allegations in the civil claim have been resolved. Over and above the Commission's specific request for an interim order, given the serious nature of the allegations, BCFIRB is prepared to consider whether additional, and more restrictive interim orders may be required in the public interest to ensure the fair and accountable administration of the Vegetable Scheme pending the outcome of the supervisory review process. Broader orders could include restricting the Commission from dealing with all agency applications, or directing regulated producers to specific agencies.

Accordingly, BCFIRB is asking for written submissions from the participants in the supervisory process as of right, and any stakeholders who would be affected by

BCFIRB making such interim orders. Those submissions should be received no later than close of business on June 4, 2021.

### **NEXT STEPS**

Once the parties to the supervisory review have been finalized, the initial step in this review will be a pre-hearing conference. The panel anticipates that the initial steps of the supervisory review will proceed in accordance with the following expedited schedule:

May 26, 2021	Distribution of Notice
June 4, 2021	Deadline for written submissions on participation and interim orders
June 14, 2021	BCFIRB to issue decision on participation and interim orders
June 18, 2021	BCFIRB to finalize terms of reference and issue rules of practice and procedure, including a procedure for the production of documents
June 24, 2021	Prehearing conference

It is the Panel's intention to hold the oral hearing in mid to late summer 2021.

All written submissions with respect to the issues raised in this Notice should be marked "Attention: Wanda Gorsuch, Manager, Issues and Planning" and sent via email to the following address: [Wanda.Gorsuch@gov.bc.ca](mailto:Wanda.Gorsuch@gov.bc.ca) (cc: [firb@gov.bc.ca](mailto:firb@gov.bc.ca))

**Please be advised that all written submissions will be posted to the BCFIRB website, unless there is a request for submissions to be made *in camera*.**

If you have any questions regarding this supervisory review, please contact Wanda Gorsuch via email at [Wanda.Gorsuch@gov.bc.ca](mailto:Wanda.Gorsuch@gov.bc.ca).