BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY: INTERIM ORDERS ON BC VEGETABLE MARKETING COMMISSION PANELS

August 20, 2021

Introduction

1. On May 26, 2021, the BC Farm Industry Review Board (BCFIRB) issued a Notice of Supervisory Review into allegations of bad faith and unlawful activity by members and staff of the BC Vegetable Marketing Commission (Commission).

2. On July 9, 2021, I invited Prokam Enterprises Ltd. (Prokam), CFP Marketing Corporation (CFP), MPL British Columbia Distributors Inc. (MPL), the Commission, Commission member participants, and Mr. Solymosi to provide me with submissions with respect to proposed panels to consider matters related to Prokam, CFP and MPL in the period of this Supervisory Review.

Positions of the Parties

3. Prokam, CFP and MPL all stated they have no objection to the panels proposed at paragraph 27 of my July 9 decision. Specifically, MPL confirmed "…they have no objections to the members of this panel [comprised of Chair Etsell, and commissioners Reynolds, Husband, VanderMeulen and Royal] and have no objections to this panel considering MPL's agency application." For their part, Prokam and CFP stated they:

> … do not have any concerns with the proposed panel comprised of Chair Etsell and Commissioners, Newell, Royal, VanderMeulen, and Lodder, and Prokam and CFP accordingly confirm that they waive any and all reasonable apprehension of bias objections to that panel considering matters related to Prokam and CFP during the period of this Review.

4. However, the Commission, supported by Commission members Newell and Lodder, take the position that it is not enough for Prokam, CFP and MPL to waive reasonable apprehension of bias objections.

5. First, they note that Prokam and MPL assert actual bias by Commission members.

6. Second, they suggest that the existence of the civil claims could give rise to allegations of bias by other industry stakeholders who may be aggrieved by or dissatisfied with decisions made by the proposed panels on the basis that any favourable applications were improperly influenced by a fear of reprisal in the form of civil proceedings. The Commission suggests that BCFIRB could make it clear that it will not entertain bias objections by any person who subsequently claims.

7. Third, they say that allowing the proposed panels to proceed could be problematic if the allegations are substantiated, as it could result in decisions taken by those panels being overturned. They say that it is inconsistent for BCFIRB to defer hearing Prokam's appeal of the Commission's November 2019 reconsideration decision (Reconsideration Decision) pending the outcome of this Supervisory Review, but not defer further Commission decision making.to be aggrieved by or dissatisfied with decisions made by the proposed panels.

8. Finally, they take the position that waiver of reasonable apprehension of bias objections will not address panel members' concerns that they may be exposing themselves to personal liability. They demand releases for all Commission members serving on the panels, which must expressly acknowledge the members are serving as a matter of necessity to permit the establishment of quorum. In the absence of a release, they say that Commission members Husband, Royal, VanderMeulen and Lodder have advised they will resign as members of the Commission if directed to serve on the panels proposed by BCFIRB. It is unclear whether Mr. Newell also proposes to resign, as this was not addressed by his counsel.

Discussion

A. The proposed panels

9. As I understand the Commission's position, unless their members receive what they term a "full release", they will refuse to sit on the proposed panels and will resign from the Commission if forced to do so. For the reasons that follow, Commission members do not require any additional release beyond the waiver that is being provided by Prokam, CFP and MPL. Their threat to resign from the Commission is inconsistent with their obligations as statutory decision-makers. I am therefore issuing the order below directing them to serve on the panels.

10. First, I wish to make clear that this interim order is being made on the basis of necessity. As I explained in my July 9, 2021 decision, there are a very limited number of commissioners available to sit on each panel, and the panels necessarily involve some same-sector commissioners and commissioners who are facing allegations in civil claims. Without such commissioners sitting on the panels, quorum could not be reached and no decisions could be taken with respect to requests and applications made by Prokam, CFP and MPL. Similarly, it will be necessary for Mr. Solymosi to perform certain administrative duties to ensure the panels can properly function. Accordingly, I can confirm that, absent evidence of circumstances that are unknown to BCFIRB at this time, BCFIRB will not entertain arguments from any entity that the selected panels are or were incapable of acting due to a reasonable apprehension of bias on the part of the panel members or Mr. Solymosi.

11. Second, I turn to the statutory duty of the commissioners to sit on these panels and decide the matters assigned to them. As I have already signaled in previous decisions, decision-makers like the commissioners should not withdraw from a case without very careful consideration. In De Cotiis et al v. De Cotiis et al., the Court emphasized that judges have a duty to hear the cases assigned to them, lest parties be able to unilaterally pick their judges and thereby bring the administration of justice into disrepute:

> [10] There is, however, another aspect of these matters that must not be forgotten. It is the duty of a judge to hear cases that come before him or her, and a party should not be able to unilaterally choose not to have a matter heard by a particular judge simply because that party would prefer that another judge hear the case. If one party, without sound reason, is able to unilaterally determine that a particular judge will not hear a case, it also tends to bring the administration of justice into disrepute.
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> [11] I do not suggest that the Defendants are engaging in "judge shopping" in this case. Nonetheless, it is my duty to determine whether or not I ought to recuse myself, not by simply agreeing to refrain from hearing the matter because an objection is raised, but by reference to established legal principles.
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> [12] Mr. Sanderson mentions the case of *Locabail (UK) Ltd v Bayfield Properties Ltd*., [2000] QB 451, a case in which the English Court of Appeal considered, in the context of a variety of applications for leave to appeal, the question of when a judge should recuse him or herself from hearing a case. The point that it is the duty of the court to consider, rather than give effect to, every objection, is made starting at paragraph 21:
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> > If objection is … made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.
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> I believe that this principle is implicit, as well, in the judgment of Bastarache J. in *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851.[1]

12. The same is true for tribunal members. As noted in the leading text *Practice and Procedure before Administrative Tribunals*, "[s]tepping down out of an overly developed sense of bias may delay important and costly proceedings. And to step down merely to avoid controversy where the decision-maker does not believe that there is a reasonable apprehension of bias can come back to haunt the agency later…" (at 39.1).[2]

13. Importantly, the mere presence of allegations is not generally considered to be a basis for a tribunal member to refuse to carry out their duties. If their integrity is challenged, the tribunal members should consider whether they are biased, and if they conclude they are not, they should continue the hearing. The tribunal is not to be paralyzed simply because the allegation is made: *Bajwa v. British Columbia Veterinary Medical Association*, 2010 BCSC 848, para. 77. As the courts have confirmed, administrative decision makers are professionals with well-understood

[1] 2004 BCSC 117(quoted with approval in *R. v. Anderson*, 2017 BCCA 154). See also *Makowsky v. John Doe*, 2007 BCSC 1231 at para. 17 and *J.P. v. British Columbia (Director of Child, Family and Community Services)*, 2013 BCSC 515 at para. 35.
[2] Macaulay, Robert W. and Sprague, James L.H., *Practice and Procedure before Administrative Tribunals*, Toronto: Thomson Reuters (updated to April 2018) at 39.1

responsibilities, and the reasonable expectation should be that the work of the tribunal will go forward in the proper manner in the face of allegations of impropriety: *Ontario Provincial Police v. MacDonald*, 2009 CanLII 9751 (ON SCDC), para. 132, 134.

14. That can extend to situations where, as here, allegations are being raised in a civil claim. In *Grabowski v. Joint Chiropractic Professional Review Committee*[3], the Court specifically addressed the issue of whether bringing a claim in abuse of public office against a tribunal and its members prevented the named members from participating in a hearing into the plaintiff's activities. The Court held that since the panel members were not the initiators of the lawsuit, and were instead the recipients, their status as defendants in the lawsuit could not give rise to a reasonable apprehension of bias (para. 31). At that stage, there were just allegations in a claim, and without more, no reasonable apprehension of bias arose (paras. 38-39).[4]

15. While the presence of misfeasance allegations is not sufficient to disqualify a decision maker, as the Saskatchewan Court of Appeal noted in *Grabowski CA* having decision makers facing those allegations sit on panels determining the rights of those who accuse them "may not be the wisest course of conduct, or one to be recommended" (para. 4). I agree that such a scenario should be avoided if at all possible, particularly given the history of litigation between the Commission and the plaintiffs in the misfeasance claims. It is for that reason that I have crafted the order to preclude the commissioners named in the misfeasance claims participating in panels adjudicating the interests of those who accuse them, and restricted Mr. Solymosi from substantively participating in deliberations.

16. However, it should be emphasized that the allegations against those specific commissioners do not taint the entire Commission, and particularly those commissioners whose conduct is not at issue in this supervisory review or the misfeasance claims. In that regard, I note that in *Mugesera v. Canada (Minister of Citizenship and Immigration)*[5], the Court held that the mere presence of one member of the Supreme Court who had to recuse herself did not automatically disqualify the other members of the Court or give rise to the conclusion that all of the members of the court are biased:

> …. If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a

[3] 1999 SKQB 9, aff'd 2000 SKCA 61 ("*Grabowski – CA*")
[4] See also: *Commandant v. Wahta Mohawks First Nation*, 2007 FC 692, para. 27; *R. v. J.L.A.,* 2009 ABCA 344, para. 30; *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, para. 72
[5] 2005 SCC 39, para. 15

> judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.

17. In any event, there is no basis for a recusal or resignation by any of the Commission members where Prokam, CFP or MPL have expressly agreed to waive any allegations of reasonable apprehension of bias. As an aspect of fairness, bias can generally be knowingly waived by the parties, either expressly or by failing to raise an objection at the earliest opportunity: *Re Energy Workers' Union and A.E.C. Ltd.,* 1985 CanLII 3134 (FCA), paras. 13-14. Indeed, challenging a decision in which one has fully participated without objection, and which one indeed requested be resolved by that decision maker, may well be found to be an abuse of process: *The Piazza Family Trust v. Veillette*, 2011 ONSC 2820. The effect of the waiver is to preclude the objection being raised on judicial review or appeal: *Zündel v. Canada (Human Rights Commission)*, 2000 CanLII 16575 (FCA), para. 8.

18. Thus, the decisions by Prokam, CFP and MPL constitute a waiver of bias flowing from all the matters of which they presently have knowledge. Here, the parties used clear and unequivocal language and have full knowledge of the situation, and have accordingly made an informed decision about waiving their rights.[6]

19. I do not agree with the suggestion by the Commission that the allegations of "actual bias" made in the notices of civil claim change the situation. First, Prokam, CFP and MPL are fully informed of those very serious allegations having been made, and have chosen to proceed notwithstanding. It would not be appropriate to then raise actual bias after the fact, absent some new previously unknown facts that the commissioners were corrupt and acting with malice on these panels. In turn, it does not lie with the commissioners to suggest that such facts might later come to light. I also note that it is not clear that "actual bias" can be waived in any event.[7]

20. I noted at the outset that this interim order is being issued on the principle of necessity, and thus there is no proper basis for any other industry stakeholders to raise issues of bias with respect to the decision-making of these panels (including the administrative participation of Mr. Solymosi). I further do not see any inconsistency in the panel hearing the appeal of the Reconsideration Decision deferring its decision, and the supervisory panel not deferring further decision-making by the Commission in respect of Prokam, MPL and CFP. BCFIRB has a specific statutory power in s. 8(8) of the NMPA to defer decision-making if a

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[6] See *Park v. the Queen*, 1981 CanLII 56 (SCC), [1981] 2 S.C.R. 64, and *Korponay v. Canada (Attorney General)*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41 at p. 49,

[7] See: *Scivitarro v. Ministry General of British Columbia*, [1982] 4 W.W.R.6 32 1982 CanLII 265 (BC SC), paras. 27-29. *Zeliony v. Red River College*, 2007 MBQB 308, para. 125; *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61; *Re Energy Workers' Union and A.E.C. Ltd.,* 1985 CanLII 3134 (FCA) para. 8; *Moore v. NB Real Estate Ass.*, 2007 NBQB 5, rev'd on other grounds 2007 NBCA 64, para. 31; *L.N. v. S.M.*, 2007 ABCA 258, paras. 25-33.

supervisory process is likely to resolve some of the issues under appeal. There is no similar power for the Commission.

21. Accordingly, the Commission and its members must perform their statutory duties by deciding the requests and applications brought by Prokam, CFP and MPL, using the panels I set out below. To act otherwise would paralyze the Commission, with significant repercussions for the industry.

B. Additional issues raised by Prokam

22. In its submission on interim orders, Prokam reiterates its request that I resolve a factual dispute with respect to who participated on the Commission panel that issued the Reconsideration Decision on a preliminary basis. Prokam suggests that doing so will determine whether the Reconsideration Decision was made without the requisite legal authority, and is consequently void, and thus have an impact on its application for a Class 1 license.

23. This factual issue does not relate to the matters before me in this supervisory review. It has no bearing on the interim orders I am issuing, nor does it have any relationship to the terms of reference of the Supervisory Review.

24. This is an issue that could be raised as a ground for appeal of the Reconsideration Decision. Prokam suggests that the impact of the decision to defer the appeal of the Reconsideration Decision is that the panel must have considered some issues raised in the appeal to be more appropriately dealt with in the Supervisory Review. While that is the case, it does not mean that all issues in the appeal will be determined in this supervisory review. I therefore decline to decide this matter as requested by Prokam.

25. On August 18, 2021, Prokam wrote to the panel to advise that it anticipated that it would be ready to harvest potatoes in late September or early October, and reminded the panel of its position that Prokam is without an agency or a producer-shipper license. On August 19, 2019, counsel for BC Fresh Vegetables Inc. stated it is prepared to act as Prokam's agency on an interim basis.

26. The question of how Prokam may market regulated vegetables in 2021/22 was dealt with at paras. 62-63 of a BCFIRB March 30, 2021 interim appeal decision. To the extent any decisions are needed, they ought to be made by the Commission at first instance using the panel provided for in my order below, depending on what business decision Prokam makes.

27. I will add more generally that all issues to do with Prokam's current ability to market potatoes in compliance with the Commission's General Orders, including its agency and license class, are outside the scope of this Supervisory Review and must be dealt with through the Commission and, where applicable, BCFIRB's general appeal process.

Orders

28. I am issuing the following orders to remain in place until the conclusion of this supervisory review or further order:

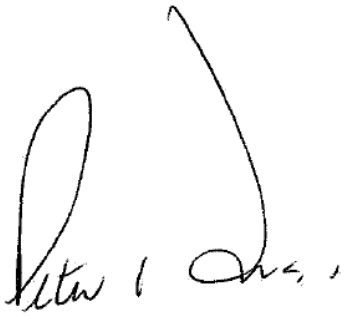
    a. Andre Solymosi is prohibited from substantive participation in any deliberations or decision making arising from applications or requests made, or to be made, by, Prokam, CFP, MPL, or any of their principals or affiliated companies, including but not limited to the making of recommendations to any commissioners or Commission panels, until the conclusion of the Supervisory Review or further order of the supervisory panel. However, Mr. Solymosi may continue to deal with Prokam, CFP, MPL, and any of their principals or affiliated companies in an administrative capacity.

    b. Commission members John Newell, Corey Gerrard and Blair Lodder (Mike Reed and Peter Guichon are now former members) are prohibited from participating in any deliberations or decision making arising from applications or requests made, or to be made, by MPL, or any of their principals or affiliated companies, until the conclusion of the Supervisory Review or further order of the supervisory panel.

    c. The following panel shall hear and decide applications or requests made, or to be made, by Prokam and CFP: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), and Lodder (storage crop sector).

    d. The following panel shall hear and decide applications or requests made, or to be made, by MPL: Chair Etsell, and commissioners Reynolds and Husband (all non-greenhouse sector) and VanderMeulen and Royal (greenhouse sector).

Dated at Victoria, British Columbia, this 20th day of August 2021.



Peter Donkers
Chair