

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

July 9, 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”). On June 14, 2021, I invited written submissions with respect to interim orders restricting the Commission’s activities, and draft Rules of Procedure. Oral submissions were also made at a prehearing conference on June 30, 2021. I have also reviewed an additional letter submitted by Prokam Enterprises Ltd. (Prokam) on July 9, 2021.
2. This decision addresses the interim orders.

Interim Orders

3. In my June 14, 2021 decision on participation and interim orders, I advised that I was considering issuing an interim order that would prevent commissioners named in the notices of civil claim filed by Prokam and MPL British Columbia Distributors Inc. (MPL) (the “Misfeasance Claims”) from undertaking any decisions with respect to MPL, Prokam and their principals or their affiliated companies pending conclusion of this Supervisory Review. I specifically proposed the following orders:
 - a. Andre Solymosi is prohibited from substantive participation in any deliberations or decision making with respect to any rights or interests of 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. 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 with respect to any rights or interests of Prokam, CFP, MPL, or any of their principals or affiliated companies, until the conclusion of the Supervisory Review.
4. The parties made submissions with respect to the scope of these restrictions, and with respect to whether it would be possible for the Commission to achieve quorum.

Scope of Restrictions

5. The Commission and Mr. Solymosi both take the position that the proposed orders, as framed, are too broad, as almost any action of the Commission could engage the rights or interests of Prokam, MPL, CFP Marketing Corporation (CFP) and related entities. The Commission and Mr. Solymosi suggest that any order should prohibit decision making “arising from applications or requests made, or to be made, by” Prokam, MPL and related companies. Prokam and CFP do not object, and any order will include that qualification.

Quorum Issues

6. If commissioners Newell, Gerrard and Lodder are prohibited from participating in decisions related to Prokam, CFP, MPL or any of their affiliates, questions were raised about the Commission’s ability to form quorum to make decisions related to Prokam, CFP and MPL and their affiliates.
7. Section 3(m) of the *Natural Products Marketing Regulations* sets out how Commission quorum is established:
 - (m) a majority of the members of any marketing board or commission shall constitute a quorum and all matters shall be decided by a majority vote of the members present provided that a resolution in writing signed by all members shall be as valid as if passed at a meeting regularly called and properly constituted.
8. Under the *British Columbia Vegetable Scheme*, the Commission consists of a chair appointed by cabinet and “up to” 8 members who are commercial producers, elected by those producers. The Commission currently consists of 7 elected producer members and a chair, resulting in a quorum requirement of 5. The 8th position (greenhouse representative) remains unfilled as of June 28, 2021, as no nominations were received as part of a special election process.
9. After reviewing all the written and oral submissions, I have considered two options that would allow for the decisions on the two agency applications and Prokam’s request for a Class 1 licence: (a) Commission delegation of the decisions to a smaller panel of the Commission; and (b) 5 member Commission panels.
 - (a) Commission delegation to a smaller panel**
10. Prokam, CFP and MPL suggest that a five-member Commission panel could delegate decision making to a smaller panel pursuant to s. 11(1)(p) of the *Natural Products Marketing (BC) Act (NPMA)*. The Commission argues this option is not viable as it does not have quorum to delegate, and nevertheless faces a resulting lack of “depth and expertise” without participation by Mr. Solymosi and knowledgeable Commission members.

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11. Section 11(1)(p) of the *NPMA* allows delegation of some decisions to a smaller panel of the Commission. However, the following powers found in ss. 11(1)(f),(g), (h) and (i) of the *NPMA* cannot be delegated:
 - (f) to require persons engaged in the marketing of a regulated product to register with and obtain licences from the marketing board or commission;
 - (g) to set and collect yearly, half yearly, quarterly or monthly licence fees from persons engaged in the marketing of a regulated product;
 - (h) for the purposes of paragraph (g) and in respect of the persons affected by a regulation under that paragraph
 - (i) to classify those persons into groups and set the licence fees payable by the members of the different groups in different amounts,
 - (ii) to set and collect from those persons fees for services rendered or to be rendered by the marketing board or commission, and
 - (iii) to recover the licence and other fees by proceedings in a court of competent jurisdiction;
 - (i) to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;
12. These provisions together provide the Commission with the power to deal with licensing. Licensing is a core authority that enables regulated marketing boards and commissions to fulfill their legislative mandate of regulating vegetable marketing. Licensing determines who can and cannot participate in the regulated sector, including who can produce and market regulated product, and under what conditions.
13. My interpretation of *NPMA* s. 11(1)(f) is that it extends to also including the power to issue licenses by considering license applications. While there is some ambiguity in this provision, I note that all other aspects of licensing are captured by the powers in *NPMA* s. 11(1)(f)-(i). It is also consistent with the importance of deciding licensing applications to the vegetable industry as a whole that the decisions not be delegated. In my view, the legislature has expressed an intention for the Commission itself, with quorum, to make licensing decisions.
14. At the prehearing conference and in its July 9, 2021 letter, Prokam suggests that the Commission made a decision with respect to its license class using a four-member panel in the past. The Commission disputes this, and says that the decision was made with a five-member panel. In my view, this factual disagreement is not relevant to my interpretation of *NPMA* s. 11, and I will not resolve it here.

(b) Five member panels

15. The remaining option is for the Commission to establish panels composed of five commissioners to consider requests by Prokam and CFP and MPL's agency applications.
16. In the Commission's view, and in light of a vacancy on the Commission, only three commissioners are available to make decisions in response to agency applications by CFP and MPL: Chair Etsell, and commissioners Royal and VanderMeulen. As a result it argues it cannot make quorum. The Commission notes that regardless of any interim order, commissioners Newell and Gerrard have recused themselves from participating in decisions with respect to Prokam, MPL and CFP. Commissioners Husband and Reynolds have announced that they are also recusing themselves because they are shareholders in BCFresh (in relation to CFP's agency application and Prokam's Class 1 licence request) and are concerned about facing potential misfeasance claims. Prokam has in the past objected to participation by Lodder, but has now indicated they will consent to his involvement.
17. Quorum, recusal considerations and managing allegations of bias and potential conflict of interest in decision-making was thoroughly discussed in BCFIRB's December 22, 2020 Vegetable Review supervisory decision. It is not necessary review that decision in detail, but I emphasize that the panel made clear that "[t]he Commission cannot simply abdicate its responsibility to regulate the industry in response to perceived apprehension of bias or conflict of interest issues."
18. A decision to recuse oneself should not be taken lightly and should be exercised cautiously bearing in mind the applicable principles concerning reasonable apprehension of bias. Stepping down because of a fear of a bias allegation could be seen as essentially declining to perform an important aspect of a commissioner's mandate, and delay important and costly proceedings.
19. Thus, BCFIRB has emphasized to the Commission that recusals require a proper basis and foundation. In its August 29, 2017 letter to all BC regulated marketing boards and commissions, BCFIRB stated that "recusals should only be considered where a particular decision affects a particular board or commission member in a unique and significant way - where there is a 'truly disqualifying conflict' that the law would recognize as giving rise to a reasonable apprehension of bias."
20. When a commissioner is considering stepping aside due to a reasonable apprehension of bias, the proper approach is for the member to advise the participants of the circumstances, and invite submissions. This allows participants to waive any bias which might potentially exist, or convince the decision-maker that no potential bias exists, and thus allow the proceedings to continue. This is the approach the Commission took when making its November 2019 Reconsideration Decision.

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21. Reasonable apprehension of bias objections can be waived. Waiver may occur if a party knew of a disqualification and failed to take objection at the earliest practicable opportunity, provided, of course, that the full extent of the decision maker's interest has been disclosed (see *Eckervogt v. British Columbia*, 2004 BCCA 398 at para. 49). A reasonable apprehension of bias objection may also be expressly waived provided there is no lack of informed consent, no pressure to waive rights, and there is no evidence of bias so overwhelming courts cannot permit the decision of the tribunal to stand (*Henderson v. Zachariadis*, 1979 CanLII 265 (BCSC) at paras. 17-21). The effect of a waiver is that that the reasonable apprehension of bias claims can no longer be advanced in an appeal or judicial review.
22. Prokam and CFP suggest the following panel could determine applications by Prokam and CFP: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), Lodder (storage crop sector).
23. Prokam and CFP take the position that since they do not make allegations against commissioners Newell, Gerrard and Lodder in Prokam's Misfeasance Claim, it should be presumed that they would act in good faith toward Prokam and their affiliated companies, and they should not be restricted from participating in decision making with respect to their requests and applications. They say they specifically do not object to commissioners Newell and Lodder sitting on a panel that would decide CFP's agency application, and would prefer that Lodder sit on a panel than await the election or appointment of a new commissioner to fill the current vacancy.
24. Prokam and CFP have made their submissions with full knowledge of the allegations raised in the Misfeasance Claims, and of Prokam's earlier objection to Lodder based on the fact he ships unregulated product to BCfresh. I take from their submissions that Prokam and CFP are therefore willing to waive any reasonable apprehension of bias objections to those members participating on a panel that would determine their requests and applications.
25. MPL did not make any submissions with respect to what panel would be acceptable to it, and instead simply stated the disqualification of the three Commission members named in its Misfeasance Claim should not lead to any quorum issues.
26. If all the persons named in MPL's Misfeasance Claim are restricted from deciding MPL's agency application, the following members will be available to decide MPL's agency application: Chair Etsell, and commissioners Reynolds and Husband (all non-greenhouse sector commissioners) and commissioners VanderMeulen and Royal (greenhouse sector members). For the Commission to constitute quorum, MPL would have to waive any reasonable apprehension of bias objections flowing from the participation of greenhouse sector members on its panel. I note that

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neither commissioners VanderMeulen nor Royal have recused themselves from decision-making in respect of MPL at this stage.

27. In light of my conclusions, and before finalizing any interim orders:
- a. Prokam, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to Prokam during the period of this Review: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), Lodder (storage crop sector). Prokam is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on the panel. If this panel is not appropriate for any reason, the participants are invited to propose a panel that would be acceptable to them.
 - b. CFP, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to CFP during the period of this Review: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), Lodder (storage crop sector). CFP is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on the panel. If this panel is not appropriate for any reason, the participants are invited to propose a panel that would be acceptable to them.
 - c. MPL, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to MPL during the period of this Review: Chair Etsell, and commissioners Reynolds and Husband (all non-greenhouse sector) and VanderMeulen and Royal (greenhouse sector). MPL is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on its panel. If this panel is not appropriate for any reason, the participants are invited to propose a panel that would be acceptable to them.
28. Finally, I note that in their written submissions, Prokam, CFP and MPL suggest BCFIRB could step into the shoes of the Commission and consider their applications in the first instance. The Commission submits this would not be

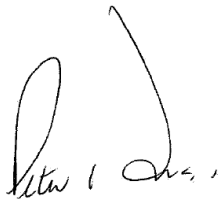
feasible without the involvement of Mr. Solymosi to advise BCFIRB. I stated in my June 14, 2021 decision that this option should only be used as a last resort. BCFIRB members are not intimately familiar with the needs and circumstances of the vegetable industry in the same way as commissioners. If BCFIRB were to assume decision-making authority, it is likely that will occasion further delay, while undermining the statutory scheme, which is to no-one's benefit.

29. With particular reference to CFP and MPL's agency applications, CFP argues that their application materials provide all the necessary information for decision-making. I do not necessarily agree. The question of how agencies should be structured within a particular industry given their marketing plans and activities, and who those agencies should be, are key marketing policy questions for regulators. Strategic and accountable decision-making requires a thorough understanding of the regulated sector and business and are most appropriately made by the Commission in the first instance given its knowledge and expertise in the sector.

Conclusion

30. I am making the following directions or orders:
- a. Counsel for the Commission, Commission members, Mr. Solymosi, Prokam, CFP and MPL should provide me with submissions as outlined at paragraph 27 above **no later than July 16, 2021**.

Dated at Victoria, British Columbia, this 9th day of July 2021.



Peter Donkers
Chair