

April 23, 2019

DELIVERED BY ELECTRONIC MAIL

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Cc: Robert P. Hrabinsky, Affleck Hrabinsky Burgoyne LLP
Claire E. Hunter, Hunter Litigation Chambers

Dear Sirs:

RE: Panel Decision on Procedure to Address the BCFIRB Orders

BCFIRB DIRECTIONS

In its decision dated February 28, 2019, the BCFIRB made the following orders:

ORDER 1: Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

48.3 - The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.

48.5 - The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.

ORDER 2: The Commission is directed to reconsider its decision to issue order 48.1.

48.1 - Effective February 1, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.

ORDER 3: Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.

ORDER 4: The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.

ORDER 5: The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.

SUBMISSIONS REGARDING PANEL COMPOSITION AND PROCESS

By letter dated March 15, 2019, the Commission wrote to Thomas Fresh, Prokam and IVCA to solicit their views concerning the composition of a Commission panel to be struck for the purpose of reconsidering the matters described in the BCFIRB's orders 1, 2 and 4. In particular, the Commission proposed a panel comprised of the following members: John Newell, Eric Schlacht, Mike Reed, Brent Royal (newly elected Commissioner representing peppers). None of those persons ship to, or are shareholders, directors or officers of, BCfresh. The Commission asked that any comments concerning the proposed panel be submitted to the Commission no later than March 29, 2019.

By letter dated March 22, 2019, counsel for Thomas Fresh and Prokam advised that they "are agreeable to the proposed panel on the basis of [the Commission's] advice that none of the members of the panel ship to, or are shareholders, directors or officers of BCfresh." In that same letter, counsel for Thomas Fresh and Prokam requested a meeting with the Commission panel in order to "make submissions with respect to the process for the consideration of matters with respect to Prokam currently under review."

By email dated March 27, 2019, IVCA stated: "IVCA suggest an independent person be put into the mix or someone from the Egg Board or Milk Board. What about Bob Sifford from VIFP?"

By email dated April 8, 2019, the Commission responded to the letter dated March 22, 2019 from counsel for Thomas Fresh and Prokam as follows:

...the Commission is of the view that it should adhere to a more formal, written consultative process.

... any preliminary submissions that your client might wish to make regarding "the process for the consideration of matters with respect to Prokam currently under review" should be made in writing.

Counsel for Thomas Fresh and Prokam responded by letter dated April 10, 2019, as follows:

As we have previously discussed, in my view the findings of BCFIRB require the Commission to vacate the order against Thomas Fresh, reinstate its class 1 license and refund fees paid in excess of the class 1 license fees by Thomas Fresh pursuant to the Commission's decision that was the subject of the appeal. We trust that upon review of this matter, the Commission's Panel will reach this conclusion. If written submissions are required on behalf of Thomas Fresh, please advise of the schedule and we will deliver them promptly.

On behalf of Prokam, we have requested a meeting or call with the Commission Panel to discuss the process for reconsideration. We are concerned that it has now been over a month since BCFIRB's decision and the Commission has been unwilling to meet with or speak to our client and appears to have taken no steps to date to implement the BCFIRB decision beyond striking a panel. While the issue of Prokam's license class is similarly straightforward, the issue on which we had hoped to address the Commission Panel is on the appropriate process for reconsideration of the decision to require Prokam to sign a GMA with BCfresh.

First, there are a number of issues before the Commission presently, including Prokam's requests for a producer-shipper license and that its Delivery Allocation be frozen so as not to include the periods between the Commission's decision to require Prokam to sign the GMA with

BCfresh and the completion of the reconsideration ordered by BCFIRB, which in our view should properly be considered and determined together with the reconsideration.

Second, since the Commission's initial decision, there have been developments relevant to the question of the Agency through which Prokam should produce, including a breakdown in its relationship with IVCA. Accordingly, Prokam may wish to lead further evidence relevant to the decision to direct Prokam to a new Agency and requests that the submission schedule account for and permit the submission of new evidence.

Finally, we understand that there may be an application to approve the establishment of a new lower mainland Agency to which Prokam would, if approved, seek to be directed as an alternative to BCfresh or IVCA. Prokam's position is that the timeline for submissions should include a date by which any application for a new Agency to which Prokam would request to be directed be made so that any such application may be considered together with the other alternatives for Prokam.

Prokam and Thomas Fresh look forward to receipt of the Commission Panel's proposed submission schedule promptly as time is of the essence, particularly to ensure that a third season is not lost to Prokam due to further delay in carrying out the reconsideration ordered by BCFIRB.

DETERMINATIONS REGARDING PANEL COMPOSITION AND PROCESS

The Commission has reflected on these comments made by IVCA, Thomas Fresh and Prokam regarding the composition of the panel, and it has decided that the panel will consist of the originally proposed members, namely: John Newell, Eric Schlacht, Mike Reed and Brent Royal. As the decisions resulting from this reconsideration are to be decisions of the Commission, the Commission did not think that it would be useful to include persons on the panel who are independent from the Commission itself, as suggested by IVCA.

With respect to process, the Commission hereby invites each of IVCA, Thomas Fresh and Prokam to make written submissions to the Commission regarding the matters to be reconsidered, namely:

1. Should the Class 1 Producer Licence previously issued to Prokam be revoked and replaced with a licence of another class?
2. Should the Class 1 Wholesaler Licence previously issued to Thomas Fresh be revoked and replaced with a licence of another class?
3. Should BCfresh be the designated Agency for Prokam, and should Prokam sign a GMA with BCfresh under the Agency's standard terms?
4. Should any compliance or remedial action be taken in relation to IVCA?

These written submissions must be delivered to the Commission and to any other party entitled to make a written submission, on or before **May 10, 2019**. Each of IVCA, Thomas Fresh and Prokam will then have an opportunity to file a brief reply submission in order to address any matter raised in any other party's original written submission. Any such reply submission must be delivered to the Commission and to the other parties entitled to make submission on or before **May 24, 2019**.

Specific directions regarding process are as follows:

1. **In relation to each of the issues to be reconsidered**, the parties are expected to specifically address, among other things, the following findings made by the BCFIRB:

22. The Commission was aware of Prokam’s decision to plant potatoes in excess of its DA and in late January 2017, initiated a review process to coordinate agency production planning. Despite numerous requests to IVCA to submit a production plan, confirm planting intentions and agency growth expectations, IVCA remained silent on its planned market for Prokam’s potatoes and its business relationship with Thomas Fresh, preferring to rely on an earlier submission in the Vancouver Island Agency Review.

23. The Commission made it clear that this earlier application for agency license was not a marketing plan for IVCA’s regulated product and issued a warning notice, but IVCA remained non-compliant with Part XV of the General Orders requiring Commission approval where an agency intended to market new product (product not covered by DA). Mr. Dhillon in his role as vice-president of IVCA and Mr. Gill as an IVCA employee participated in these decisions to thwart Commission authority.

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27. Mr. Dhillon, either in his role as the principal of Prokam or as a director of IVCA, did not seek approval from the Commission before producing or shipping regulated product not covered by or in excess of Prokam’s DA as required by the General Orders.

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33. Having heard all the evidence, we find Mr. Dhillon’s role to be a bit more nuanced than found by the Commission. Mr. Dhillon, in his role as IVCA vice-president and director, was a force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of the potato production in BC. This production significantly increased IVCA’s capacity. Mr. Dhillon acknowledged that IVCA needed Prokam as a grower, both financially and for growth. Mr. Dhillon was not beneath threatening to fire staff or pulling his money from the agency in order to get his way. With respect to Mr. Gill, Mr. Dhillon was instrumental in bringing him into IVCA and supported his employment handling IVCA’s “mainland sales” which in fact were the sales of Prokam potatoes to Thomas Fresh. While Mr. Dhillon denied paying part of Mr. Gill’s salary, we accept Mr. Gill’s evidence that Mr. Dhillon negotiated half his salary to be paid through Mr. Dhillon’s father’s company, Sam Enterprises.

34. However, it is also clear that IVCA through its previous general manager and its current president actively solicited the Thomas Fresh account over several years. While Mr. Gill may have signed the contracts, he did so in full knowledge that IVCA wanted a long term agreement with Thomas Fresh to access the tonnage fees to address agency cash flow problems. While the current general manager may have been late to a realization that the contracts were signed and the implications of those contracts, the inescapable conclusion is that the management of IVCA (not just Mr. Dhillon) actively participated in obtaining these contracts. All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.

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51. In our view, orders 48.3 and 48.5 of the Commission's December decision relied, to some degree, on the Commission's belief that it had the authority to apply its minimum pricing rules to the transactions at issue. In the circumstances, one option for the panel would be to simply reverse those orders on the basis that the Commission's position on the validity and applicability of its minimum pricing rules to the facts at issue has been rejected by the panel.
52. However, we also note that this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes and some remaining findings against Prokam in respect of DA issues (discussed below). We further note that a full review of the materials presented to us makes clear the conduct of Prokam and/or its officers was not beyond reproach.
53. In all the circumstances, we believe the question of whether the appellants' conduct warrants any further action by the Commission (irrespective of the minimum pricing rules in relation to interprovincial sales) is one that must still be answered, and it is one more appropriately considered in the first instance by the Commission – not the panel.

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71. In this case, IVCA and Prokam made a calculated decision not to provide a business plan satisfactory to the Commission for the new production and did not meet with the Commission to explain their intentions. Instead, they argue that IVCA's agency licence application submitted in November 2016 should have been adequate for the Commission's purposes. However, the Commission clearly and repeatedly articulated that the agency application was not sufficient for its purposes and asked for further information which was never provided.

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74. Prokam appears to be arguing that had it applied, the authorization would have been given as these were legitimate gap fillers. But that is not Prokam's decision to make. Furthermore, we are not prepared to accept that Prokam's marketing of huge volumes (348 tons) of potatoes falls within the concept of legitimate gap fillers as described by the Commission's witnesses. As a result, we agree with the Commission's decision not to include this production in Prokam's five year rolling average to calculate earned DA.

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82. The panel concludes that the Commission placed too much weight on IVCA's cooperation with the Commission's investigation and not enough weight on the regulatory responsibility of IVCA as an agency. The very reason that this compliance issue arose rests with IVCA and its aggressive growth aspirations. It was IVCA that pursued Mr. Dhillon and his early land. It was IVCA that pursued the re-packer/wholesaler business of Thomas Fresh. It was IVCA that failed to meet its obligations under the General Orders as an agency to disclose its business plans to the Commission and actively pushed off the Commission's efforts to plan growth and ensure

orderly marketing. These fundamental failings on the part of the designated agency are not in any way rectified or mitigated by the cooperation of IVCA staff in the subsequent compliance investigation.

83. While we observe that the appellants were critical of how the Commission dealt with IVCA, the December decision did not make any orders in relation to IVCA. However, the panel finds that there are many unanswered questions about IVCA's role in the events leading up to these appeals. We have significant concerns about whether IVCA has demonstrated the ability to perform the requisite front line role to ensure that marketing is conducted in an orderly fashion according to the General Orders and provide fair market access to all registered growers. As such, and as a matter of both our appellate and supervisory jurisdiction, we believe this is a matter that requires reconsideration by the Commission.

2. **In relation to issue "3" ("Should BCfresh be the designated Agency for Prokam, and should Prokam sign a GMA with BCfresh under the Agency's standard terms?"):**

- (a) the parties are expected to specifically address, among other things, the Commission's analysis as set out in its written decision and reasons therefor dated December 22, 2017, and as set out its written decision dated January 30, 2018;
- (b) the parties may also make submissions concerning the possibility of granting a producer-shipper license to Prokam;
- (c) the parties may also make submissions concerning whether it is appropriate to freeze Prokam's Delivery Allocation so that it does not include the periods between the Commission's decision to require Prokam to sign the GMA with BCfresh and the completion of the reconsideration ordered by BCFIRB; and
- (d) the Commission will not entertain submissions from any party concerning the possibility of directing Prokam to an agency that has not yet been approved or designated by the Commission. Any request that might be made by Prokam to transfer to another agency may only be made in relation to agencies that are approved and designated by the Commission.

3. **In relation to each of the issues to be reconsidered**, the parties are expected to specifically support their position with a S.A.F.E.T.I. analysis.

Yours truly,



Andre Solymosi
General Manager