

July 9, 2021

File No: 3211.001

**BY EMAIL**

BC Farm Industry Review Board  
1<sup>st</sup> Floor, 780 Blanshard Street  
Victoria, BC V8W 2H1

**Attention: Wanda Gorsuch**

Dear Sirs/Mesdames:

**Re: Supervisory Review re. Allegations of bad faith and unlawful activity –  
Clarification from Pre-Hearing Conference**

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We write to clarify a factual matter that arose near the end of the pre-hearing conference on June 30, 2021, in connection with the parties' submissions on the Commission's quorum requirements, and specifically whether matters related to Prokam and CFP may be decided by a panel consisting of Debbie Etsell, Armand VanderMeulen, and Brent Royal.

The factual matter that arose is whether the reconsideration decision of the Commission dated November 18, 2019 (the "**Reconsideration Decision**")<sup>1</sup> was decided by a panel of four members (as Prokam and CFP submitted) or five members (as the Commission submitted).

The composition of the panel that made the Reconsideration Decision was first raised in the March 15, 2019 letter from Andre Solymosi to Prokam, CFP, and Thomas Fresh Inc. Mr. Solymosi wrote:

The primary purpose of this letter is to solicit the views of IVCA, Prokam and Thomas Fresh 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. We propose a panel comprised of the following members: John Newell, Eric Schlacht, Mike Reed, Brent Royal (newly elected Commissioner representing peppers). None of these persons ship to, or are shareholders, directors or officers of, BCfresh. Please let us have your comments with respect to the proposed panel no later than March 29th, 2019.

On March 22, 2019, we wrote back to Mr. Solymosi (copying Mr. Hrabinsky) and advised:

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<sup>1</sup> Available at [this link](#).



Our clients are agreeable to the proposed panel on the basis of your advice that none of the members of the panel ship to, or are shareholders, directors or officers of BCfresh.

On April 23, 2019, Mr. Solymosi wrote to confirm the originally proposed panel composition:


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.

In the Reconsideration Decision itself, the Panel confirmed that it was composed of Members Newell, Schlacht, Reed, and Royal, and summarized the process by which that composition was established:

14. 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.

15. By letter dated April 23, 2019, the Commission advised that it had reflected on comments made by IVCA, Thomas Fresh and Prokam regarding the composition of the panel, and that it had decided that the panel would consist of the originally proposed members, namely: John Newell, Eric Schlacht, Mike Reed and Brent Royal. As the decisions resulting from the reconsideration would 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.

The Panel also confirmed that it had been appointed by the Commission in order to address conflict-of-interest issues, and commented on the facilitating roles that Ms. Etsell and Mr. Solymosi played in assisting the Panel to come to its decision:



22. This Appointed Panel has been established by the Commission to reconsider the decisions made by the Commission on December 22, 2017. Participation on this Panel has been requested because the selected panel members:

1. Have less conscious or perceived levels of bias with this issue, and,
2. Are deemed to have less conflict-of-interest, based on their arms-length involvement with the storage crop sector.

23. The Appointed Panel has arrived at a consensus-based recommendation for the consideration of the BCVMC as a whole and has used a designed accountability process, with the intent to manage or limit the amount of bias or perceived bias present in the final recommendations presented to the BCVMC as a whole. Debbie Etsell, Chairperson of the BCVMC, and Andre Solymosi, General Manager of the BCVMC co-facilitated the process used by the Appointed Panel. Both the Chair and the General Manager worked together to prepare any advance reading required by this Appointed Panel, and, any responses to questions requiring further information or documentation.

In our view, the foregoing confirms that the Reconsideration Decision was made by a Panel of four members, purportedly exercising authority delegated to it by the full Commission. However, we understand that the Commission now disagrees.

Subsequent to the pre-hearing conference, we conferred with Mr. Hrabinsky regarding this issue and delivered to him a draft of this letter for his review and comment. He relayed to us his instructions that the Reconsideration Decision Panel consisted of five members – the four members indicated in the Decision and Ms. Etsell – and that Ms. Etsell participated in all of the Panel’s meetings and deliberations and voted together with Members Newell, Schlacht, Reed, and Royal. The Commission therefore maintains its position that the Reconsideration Decision was made by a quorum of five commissioners.

As we pointed out during the pre-hearing conference, the only restriction on the Commission’s authority to delegate is set out at para. 11(1)(p) of the *Natural Products Marketing (BC) Act*, which reads:

**Powers of marketing boards and commissions**

**11** (1)Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

...

(p) to delegate its powers to the extent and in the manner the marketing board or commission considers necessary or advisable for the proper operation of the scheme under which the marketing board or commission is constituted, but a power in paragraph (f), (g) (h) or (i) must not be exercised by any person other than the federal board, a marketing board or a commission;

The powers set out in paragraphs 11(1)(f)-(i) are:

(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;

Because the Reconsideration Decision cancelled Prokam's class 1 license for a purported violation of the General Order, it was a decision that could not be made by a panel of the Commission constituting less than a quorum of five members.<sup>2</sup>

However, any decision affecting Prokam or CFP that does not require the exercise of powers set out in paragraphs 11(1)(f)-(i) of the *Act* can be made by a panel comprised of less than five members exercising authority delegated by the Commission.

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<sup>2</sup> *Natural Products Marketing (BC) Act Regulations*, B.C. Reg. 328/75, para. 3(m).



It is on this basis that Prokam and CFP submitted at the pre-hearing conference that any decisions that affect Prokam and CFP pending completion of the supervisory review can and should be made by a panel consisting of Ms. Etsell, Mr. VanderMeulen, and Mr. Royal.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

CEH/RJA

Encl: 2019-03-15 Letter from Andre Solymosi to Prokam, IVCA, and Thomas Fresh;  
2019-03-22 Letter from Claire Hunter, Q.C. to Andre Solymosi;  
2019-04-23 Letter from Andre Solymosi to Prokam, IVCA, and Thomas Fresh.