

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

June 14, 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 raised in court filings alleging misfeasance of public office (“Misfeasance Claims”) by members and staff of the BC Vegetable Marketing Commission (“Commission”). The Notice of Supervisory Review invited potential participants to apply to participate in the Supervisory Review and to make submissions with respect to interim orders restricting the Commission’s activities.
2. This is my decision on the issues of participation and interim orders. I also address some procedural concerns raised by two participants, Prokam Enterprises Ltd. (“Prokam”) and Mastronardi Produce Ltd. (“MPL”), as well as the scheduling of the pre-hearing conference.

## Participation in the Supervisory Review

3. The Notice of Supervisory Review provided that the Commission, the named personal defendants in the two Misfeasance Claims, Prokam and MPL would all be allowed the opportunity to participate in the Supervisory Review as of right. All those groups have expressly indicated their intention to participate, with the possible exception of MPL. I confirm that the following groups will be participating in the Supervisory Review:
  - a. The Commission
  - b. Prokam
  - c. Andre Solymosi
  - d. John Newell, Mike Reed, Corey Gerrard, Blair Lodder and Peter Guichon (who are jointly represented)
4. For its part, MPL acknowledges BCFIRB’s right to undertake a supervisory process, but did not expressly state if it would participate. As set out below, I have invited the participants to provide further submissions with respect to the draft rules of procedure, and invite MPL to clarify its intention to participate in the course of its submission.
5. BCFIRB has also received requests for standing by BCFresh Vegetables Inc. (“BCFresh”) and CFP Marketing Corporation (“CFP”). I have considered their requests with a view to whether their rights and interests are likely to be affected by the Supervisory Review, or whether their participation will otherwise assist me in deciding the issues in the Supervisory Review.
6. BCFresh submits that it has a substantial interest in, and its rights will be affected by, the Supervisory Review. Its name appears in Prokam’s notice of civil claim, and MPL’s notice of civil claim makes numerous references to agencies and their conduct.

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7. I agree. Many of the allegations at issue in the Supervisory Review relate to the commissioners' alleged intention to benefit themselves and BCFresh, as well as BCFresh's dominant position and influence. Allowing BCFresh participation rights will also ensure that I have access to its evidence and documents, which will assist me in deciding the issues. BCFresh is therefore granted participant status.
8. CFP only seeks to participate to the extent the panel will make orders that affect it. It made submissions in respect of the interim orders the Commission requested. I have accepted and considered CFP's submission. CFP is welcome to apply again for further participation rights if it appears BCFIRB will make any such orders.
9. I also received three requests to participate that were subject to a request that the submissions and all further correspondence and evidence be received *in camera*. In considering those requests, I applied the test set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*"), where the Court held that a confidentiality order should only be granted when:
  - (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
  - (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
10. I understand that there are three important considerations when applying this test. First, the risk must be real, substantial and well grounded in the evidence, and pose a serious threat to the interest in question. Second, the interest in question cannot merely be specific to the party requesting the order; the interest must be expressed in terms of a public interest in confidentiality. In short, an important general principle must be at stake. Third, when considering reasonably alternative measures, a court or tribunal must restrict the order as much as is reasonably possible while preserving the interest in question.
11. Applying that test, I refused the applications to provide submissions and evidence *in camera*. Specifically, the applicants did not raise a serious risk to an important interest in the sense contemplated in *Sierra Club*, in that the risks the applicants identified were highly specific to them and not grounded in terms of a public interest in confidentiality. Additionally, the confidentiality interests raised were not outweighed by the negative effects that the order would have on the public interest in having an open and transparent Supervisory Review. This review concerns serious allegations of wrongdoing by members of the Commission, who are entitled to a very high degree of procedural fairness. If the applicants' evidence and submission were received *in camera*, those accused of wrongdoing would have no meaningful ability to test that evidence, which would pose a significant risk to the integrity of the review process.

12. However, several of these applicants raised issues that, if substantiated, might be relevant to the issues to be decided on the Supervisory Review. I invited those applicants to reconsider their participation and resubmit their application if they were willing to participate publically.

### **Interim Orders**

13. I have received requests for interim orders from the Commission and Prokam.

#### *Commission's Proposed Order*

14. The Commission has requested that BCFIRB direct the Commission to defer any decisions in relation to existing or future applications made by or in relation to Prokam, CFP, MPL or their affiliates and related companies, until there is a final disposition of the allegations made against the named defendants in the Misfeasance Claims. The Commission suggests this is appropriate because the allegations, if substantiated, suggest bias on the part of the Commission, and because it believes the Misfeasance Claims may have been brought for tactical or strategic purposes.
15. Prokam, CFP and MPL all object to the issuance of those orders on the basis that it would amount to an abdication of the Commission's duties, and would punish them for bringing wrongful conduct to the attention of the courts and BCFIRB, none of which is consistent with sound marketing policy. CFP additionally stresses that it is independent of Prokam, and points to the fact that it agreed to withdraw an appeal to BCFIRB on the agreement that its agency application would be adjudicated by the Commission.
16. The question of what, if any, interim orders should be issued to restrict the Commission is a difficult one. On the one hand, the allegations that have been raised against the commissioners and Mr. Solymosi are serious, and include that those individuals acted with an intention to harm Prokam and MPL. In the event these allegations are substantiated, it would be inappropriate for the commissioners and Mr. Solymosi to continue participating in decision-making during the Supervisory Review.
17. On the other hand, the allegations are at this stage unproven, and there has not been any finding that these Misfeasance Claims were brought solely for strategic purposes, and the suspicion of counsel for the Commission is not sufficient to ground the need for the broad order the Commission seeks.
18. The Commission's proposed order raises two other concerns. First, the Commission's proposed order would have the effect of casting the net of allegations of wrongdoing over the entire Commission. In my view, that cannot be the case. There is no reason why commissioners who have not been named in the Misfeasance Claims cannot continue to make determinations with respect to

Prokam, MPL and their principals and affiliated organizations, and it should be assumed they will act in good faith to carry out their statutory duties.

19. Second, as I understand it, the Commission is seeking an order that would remain in place until the conclusion of the Misfeasance Claims. It is my view that a more appropriate timeframe would be until the Supervisory Review has concluded. It is the Supervisory Review that will determine whether the commissioners' and Mr. Solymosi's actions are in accordance with the orderly marketing of vegetables in the province.
20. I am therefore considering issuing a more limited interim order that would allow Commission decision-making to continue, but prevent the commissioners named in the Misfeasance Claims from undertaking any decisions with respect to MPL, Prokam, their principals or their affiliated companies pending conclusion of this Supervisory Review. Mr. Solymosi could continue to process applications and act in an administrative capacity so long as he is not included in any deliberations and does not make any recommendations with respect to the issues to be decided by the other commissioners.
21. However, issues around achieving quorum have been raised by both the Commission and Prokam. The Commission has sought direction with respect to how to proceed. Prokam has suggested that the Commission could act with a four-member panel, or that BCFIRB assume jurisdiction.
22. Quorum requires a majority of commissioners for a legally valid decision. The Commission is currently composed of a Chair and 7 elected producer commissioners. As such, the Commission requires 5 commissioners for quorum.
23. First, it is my preliminary view that it is not possible to proceed with a quorum of four, and that having BCFIRB assume jurisdiction should be a step of last resort. Second, there is a vacancy on the Commission, and a special election is underway for which nominations close on June 28. However, if that special election results in a new commissioner (or a new commissioner is instead appointed), it appears that would still not be sufficient to address quorum without having same sector commissioners participate on panels. Accordingly, the interim order would likely need a provision to allow same sector participation on the panels.
24. In the circumstances, I am therefore requesting further submissions from all participants, and in particular CFP, Prokam, MPL and the Commission, with respect to this proposed order.

#### *Prokam's Proposed Order*

25. Prokam has requested an order that the Commission not direct Prokam to any existing agency pending further direction from BCFIRB. As I see it, that order is unnecessary if I make the order I propose. My proposed order would give Prokam

protection from any of the impugned commissioners issuing directions, while also ensuring that those commissioners who are not subject to any allegations can continue to fulfill their statutory duties in respect of Prokam.

26. The proposed order would also address an additional concern raised by Prokam that the Commission have some residual power to determine how Prokam's potatoes will be marketed in this growing season. That decision can be made by a panel that does not include any of the impugned commissioners.

*Conclusion on Interim Orders*

27. I am considering issuing the following order:
- a. 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.
  - b. 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 Prokam, CFP, MPL, and any of their principals or affiliated companies in an administrative capacity.
28. However, I am mindful that this order was not proposed by any of the participants, and there are potential issues around achieving quorum as discussed above. **I therefore invite the participants to the Supervisory Review to provide me with written submissions with respect to my proposed interim order no later than June 23, 2021.** Given that my proposed order would affect CFP's rights and interests, CFP may also make submissions in respect of it. I will invite the participants to speak to those written submissions at the prehearing conference, the date of which is addressed below.

**Procedural Concerns Raised by Prokam and MPL**

29. Both Prokam and MPL have raised a concern that the Supervisory Review not compromise their rights in their Misfeasance Claims, focusing in particular on a lack of discovery rights in the Supervisory Review. Prokam asks the Review Panel to issue terms of reference or an order confirming that any fact finding in the Supervisory Review will be for the narrow purpose of the Supervisory Review and the participants will not be bound by it in the civil action. MPL raises a concern that the Supervisory Review not prejudice its civil claim in light of the Review

Panel's inability to award damages, a lack of discovery rights, and its inability to compel evidence in the Supervisory Review. It has requested a prehearing conference to determine how to best protect its rights and interests.

30. It is not controversial that I do not have the jurisdiction in this process to determine the claims of misfeasance in public office. Those claims will be decided by the courts, and is not the purpose of this Supervisory Review. However, in my view, the concerns raised by Prokam and MPL that the Supervisory Review not compromise or prejudice them in their misfeasance claims are likewise matters for the courts, not this panel. The courts have the ability to prevent actions from proceeding where it would be an abuse of the court's process, or where the issues have already been decided in other proceedings, including administrative proceedings. As I understand it, those decisions are at the court's discretion, and are applied to protect the integrity of the court's own processes. It would be inappropriate for me to attempt to limit or influence whether and how the courts exercise their discretion in that regard.
31. Concerns about a lack of discovery rights and the inability of the participants to compel evidence, however, are matters with which I am properly concerned. Indeed, I am mindful of the importance of crafting a fair process that is properly designed to get to the truth of the allegations of wrongdoing by commissioners and staff. To address the concerns raised by MPL and Prokam, and to ensure the fairest possible process, it is appropriate for the rules of procedure to be designed with input from all participants.
32. The Notice of Supervisory Review provided that the Review Panel would finalize the terms of reference and issue final rules of practice and procedure on June 18, 2021. I have decided it is appropriate to depart from that plan to allow the participants to comment on the rules of procedure before they are finalized. **Accordingly, on June 18, I will provide the participants with draft rules of procedure along with the final terms of reference. I invite the participants to provide written submissions on those rules of procedure on or before June 23, 2021.** The participants will also be provided with an opportunity to speak to those written submissions at the prehearing conference.

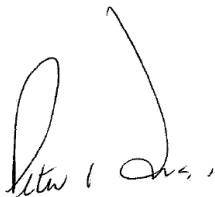
### **Prehearing Conference**

33. The Notice of Supervisory Review provided for a pre-hearing conference to be held on June 24, 2021. I have since been informed that counsel for Ms. Solymosi is not available that day, but can be available on June 25, 2021. That letter was copied to all counsel, none of whom have indicated they are unable to attend on June 25, 2021.
34. I have therefore decided that the pre-hearing conference will be **re-scheduled to June 25, 2021, at 9:30 a.m.** I am anticipating that the hearing will take at least the balance of the morning.

## Conclusion and Summary

35. I am making the following directions or orders.
36. The following participants are granted standing in the Supervisory Review:
  - a. The Commission
  - b. Prokam
  - c. Andre Solymosi
  - d. John Newell, Mike Reed, Corey Gerrard, Blair Lodder and Peter Guichon (who are jointly represented)
  - e. BC Fresh.
37. The participants may make submissions with respect to the draft rules of procedure (to be issued on June 18) on or before June 23, 2021. MPL is invited to clarify whether it intends to participate in the Supervisory Review in its submissions.
38. The participants in the Supervisory Review, as well as MPL and CFP, may provide me with submissions with respect to my proposed interim order no later than June 23, 2021.
39. The participants and CFP may speak to their written submissions at the pre-hearing conference, which will be held on June 25, 2021, commencing at 9:30 a.m.

Dated at Victoria, British Columbia, this 14<sup>th</sup> day of June 2021.



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Peter Donkers  
**Chair**