

June 25, 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 -  
Submissions on proposed interim order**

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We write on behalf of CFP Marketing Corporation (“**CFP**”) and Prokam Enterprises Ltd. (“**Prokam**”) in response to the invitation of the Chair to make submissions on the proposed interim order at paragraph 27 of his June 14, 2021 decision on participation and interim orders (the “**Participation Decision**”).

**Paragraph 27(b) of the Participation Decision**

Prokam and CFP are each content with the portion of the proposed interim order reflected in paragraph 27(b).

We are in receipt of correspondence of yesterday’s date from Mr. Hira, Q.C., delivered on behalf of Mr. Solymosi. Our clients do not take issue with the changes to the wording of interim order set out at paragraph 27(b) that Mr. Hira proposes, namely, that the restrictions on Mr. Solymosi’s involvement relate to decision-making “arising from applications or requests made, or to be made, by them”. A similar revision has now been proposed by the Commission, and, again, our clients do not take issue with that proposal.

However, Prokam does take issue with Mr. Hira’s characterization of Prokam as attempting to “[fabricate] grounds for disqualification or recusal through [its] own actions (i.e. by filing [a] civil [claim] against the Commission and Commission members)”. Prokam has never sought to have Mr. Solymosi disqualified or recused from carrying out his administrative duties pending resolution of its misfeasance in public office claim. Rather, Prokam has continued to correspond directly with Mr. Solymosi in his capacity as General Manager with respect to administrative matters.<sup>1</sup>

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<sup>1</sup> Schedule A to Prokam’s June 4, 2021 submission in this supervisory review available at [this link](#).

It was in fact the Commission – not Prokam – that sought to effectively disqualify its entire membership and its own General Manager, arguing that “it would not be fair or appropriate to require the Commission to process [Prokam’s, CFP’s, and MPL’s] applications while the integrity of its General Manger and five Commission members has been so profoundly impugned and this pall of suspicion is permitted to linger”.<sup>2</sup> Prokam, for its part, argued against this attempt, calling it “completely unprecedented” and asserting it would “result in chaos and absurdity”.<sup>3</sup> To the extent Mr. Solymosi now argues that his complete recusal would compromise “the effective functioning of the BC regulated vegetable industry”, it would appear that he agrees with Prokam’s position on this issue and disagrees with the Commission’s position.

The Commission’s suggestion that it cannot make decisions properly without the provision of information by Mr. Solymosi ought not to be given much weight. For one thing, it is not clear to us what information the Commission requires in order to consider either of the specific decisions presently before it. As regards CFP’s agency license application, the information to be considered is that which is in the application, and that which is obtained through consultation with industry stakeholders contemplated by Amending Order 54. Indeed, it is not clear to us that it would be procedurally fair for Mr. Solymosi to be supplying additional information without CFP and Prokam having a chance to respond, quite apart from whatever issues arise from the misfeasance allegations.

### **Paragraph 27(a) of the Participation Decision**

For the reasons previously expressed, Prokam and CFP do not agree that the mere existence of the misfeasance claims necessitates the removal of any commissioner from ongoing decision-making. Given that the Chair appears to have preliminarily come to a contrary view, these submissions make two further and different points.

First, Prokam has not made any allegations against any current commissioners (including Messrs. Newell, Gerrard, and Lodder). Paragraph 16 of the Participation Decision appears to imply that there are allegations that commissioners who might be involved in any ongoing decision-making have previously acted with an intent to harm Prokam. That is not the case. Prokam has not made allegations against any current commissioners; MPL’s allegations against current commissioners do not include allegations of an intent to harm Prokam. It is important that the Chair not treat Prokam’s and MPL’s misfeasance claims as a single undifferentiated whole. The MPL claim names defendants not named in the Prokam claim, and the allegations made in each claim are different.

In the absence of any allegation that any current commissioner acted with intent to harm Prokam, the logic of paragraph 18 of the Participation Decision is controlling: There is no

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<sup>2</sup> Letter dated May 12, 2021 from R. Hrabinsky to Chair Donkers at p. 5.

<sup>3</sup> Letter dated May 27, 2021 from Claire Hunter, Q.C. to Wanda Gorsuch at pp. 3-4.

reason why *any* commissioner not alleged to have deliberately harmed *Prokam* cannot continue to make determinations with respect to *Prokam*, and, given that all current commissioners meet that description, it should be presumed that *all* of them will act in good faith to carry out their statutory duties. That presumption should also hold for determinations related to CFP, which has not made any misfeasance allegations all, let alone any allegations against any current commissioner or Commission officer or employee.

Second, the practical problems presented by the quorum issue that the Chair identified weigh against the proposed interim order reflected in paragraph 27(a). In what follows, we set out the quorum difficulties that the proposed interim order would create, and why the preferable solution is to permit commissioners to continue making decisions in relation to *Prokam* in accordance with existing panel assignments (which pre-existing panels include Mr. Newell and Mr. Lodder, as detailed below).

#### *CFP*

According to Mr. Solymosi's email of March 16, 2021, the panel appointed by the Commission to consider CFP's agency license application, consisted of John Newell, Mike Reed (now former commissioner), Brent Royal, Blair Lodder (a storage crop commissioner), and Debbie Etsell. CFP had no objection at that time to Messrs. Newell and Lodder sitting on the panel, and has no objection to it now. As set out above, neither *Prokam* nor CFP has made any allegations against any current commissioner.

Even accounting for the new appointee, without Mr. Newell there will not be enough for a quorum without one of the remaining BCfresh-associated commissioners (Hugh Reynolds and Kevin Husband) being appointed to the panel.

In CFP's submission, it is both more sensible and desirable, as a matter of sound marketing policy, to permit Mr. Newell to consider its agency license application than either of Messrs. Reynolds or Husband.

The Participation Decision also averts to the possibility of an order with respect to same-sector panel members. CFP has never understood there to be a bar on same-sector commissioners sitting on appointed panels to consider agency license applications, such that an order of the Chair would be required to allow for it. Indeed, CFP did not object when Mr. Solymosi originally indicated that Mr. Lodder had been appointed to the panel that was to consider its application.

Because time is of the essence, CFP would prefer to have Mr. Lodder sit on the panel rather than await the election or appointment of a commissioner to the vacancy left by Mr. Reed, simply for the sake of having a different sector represented. CFP therefore requests that the panel originally appointed by the Commission proceed to consider its agency license application, with Armand VanderMeulen replacing Mike Reed.

### *Prokam*

The only decision currently before the Commission involving Prokam is Prokam's request for reinstatement of its Class 1 license. The circumstances of the Commission having deemed itself unable to constitute a quorum to consider that request are set out on pages 5 and 6 of Prokam's June 4, 2021 submission, and the relevant email exchange is appended to that letter.

However, it now appears to us that Prokam's request for reinstatement of a Class 1 license in place of a Class 3 license is not necessary. We observe that paragraph 3(m) of the *Natural Products Marketing (BC) Act Regulations* does indeed provide that a quorum is a majority of all commissioners, which is five commissioners both now and after the current vacancy is filled.

Quorum was also five Commissioners on November 18, 2019, the date of the Commission's Reconsideration Decision revoking Prokam's Class 1 license and replacing it with a Class 3 license. Since that decision was made by a panel comprised of only four commissioners, the implication of paragraph 22 of the Participation Decision (with which we agree) is that the Reconsideration Decision is not legally valid, and there is accordingly no extant decision revoking Prokam's Class 1 license and replacing it with a license of any lower class.

We will be writing under cover of separate correspondence to the Presiding Member in Appeal N1908 to seek the summary resolution of that appeal in Prokam's favour on the forgoing basis. For present purposes, we simply request that the Supervisory Panel exercise BCFIRB's supervisory jurisdiction to direct the Commission to immediately issue Prokam a Class 1 license for the 2021-2022 growing season on the basis that there is no valid extant decision revoking that class of license.

In the event that the Commission must make other regulatory decisions with respect to Prokam while this supervisory review is extant, Prokam submits (noting that the Chair does not favour assumption of first-instance jurisdiction by the BCFIRB except as a last resort) that a panel consisting of John Newell, Brent Royal, Armand VanderMeulen, Blair Lodder, and Debbie Etsell would be acceptable for that purpose.

### **Implications of Recusal by Messrs. Newell and Lodder**

The foregoing submissions on panel composition were prepared without the benefit of the Commission's advice that Messrs. Newell and Lodder have recused themselves from decision-making involving Prokam and CFP. In light of that development, Prokam and CFP's submissions are as follows.

First, it may be that this development prompts the BCFIRB to reconsider whether this is one of those "last resort" scenarios where BCFIRB engages in direct decision-making. If this is not the "last resort" scenario, it is very difficult to imagine what is.

The Commission suggests that Prokam and CFP are precluded from making that suggestion by reason of counsel's letter of April 30, 2020. That letter was directed at the specific conditions of that Supervisory Review, at that time. For the Commission to treat this letter as indicating that Prokam and CFP took the position that BCFIRB could not directly make a decision affecting them, ever, takes a fragment of a sentence *wildly* out of context. The proposition was that the process the supervisory review had followed to that point raised procedural fairness concerns. We note that neither Prokam nor CFP has concerns thus far with the procedural fairness of this supervisory review that would impact BCFIRB's ability to directly make decisions with respect to their outstanding applications.

The Commission suggests that BCFIRB would be unable to effectively make decisions without the Commission being in a position to provide it with information. We do not agree. As noted above, the requisite information is contained within the four corners of CFP's application, and can be obtained through consultation with industry stakeholders contemplated by Amending Order 54 – carried out by BCFIRB, rather than the Commission. If BCFIRB decides it needs more information, steps can be taken to obtain that information in a transparent, procedurally fair manner.

Despite the Chair signalling his preference that the Commission find a way to continue making decisions, the Commission apparently remains steadfastly resolved in its determination not to do so, and has expanded its position to say that BCFIRB should not do so either. As set out in our previous letters, the BCFIRB has now repeatedly said that decision-making cannot be put on hold indefinitely. If the Commission is unwilling or unable to make decisions involving Prokam or CFP, BCFIRB should do so.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

CEH/RJA/APC