

# Hunter Litigation Chambers

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File No: 3031.001

## BY EMAIL

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

**Attention: Wanda Gorsuch, Manager,  
Issues and Planning**

Dear Ms. Gorsuch:

### **Re: Submissions in response to May 26, 2021 notice of supervisory review**

Further to the notice of supervisory review issued on May 26, 2021, and our letter of May 27, 2021, we write to deliver the written submissions of Prokam Enterprises Ltd. (“**Prokam**”) confirming Prokam’s intention to participate in the Supervisory review, and concerning possible interim orders Chair Donkers might make in the supervisory review.

Prokam will be exercising its right to participate in this supervisory review. Prokam submits it should be entitled to the fullest participatory rights that are afforded to any participant, including the right to cross-examine witnesses and make oral and written submissions.

Before we turn to the matter of interim orders, we wish to address two aspects of the notice of supervisory review.

The first concerns the relationship between the current supervisory review and the court process in Prokam’s misfeasance of public office claim (Vancouver Registry No. S-212980) (the “**Prokam Claim**”). We welcome the BCFIRB taking seriously the allegations that have been made in the pleadings. As set out in our May 27, 2021 letter, Prokam has long been trying to draw the BCFIRB’s attention to the issues that form the basis for the Prokam Claim.<sup>1</sup> It is a positive development that this conduct is now to be a focus of BCFIRB’s attention. Indeed, the supervisory review provides the opportunity for BCFIRB to consider other questionable conduct of the Commission not pleaded in the Prokam Claim, such as the

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<sup>1</sup> See our letter to Chair Donkers dated May 27, 2021, and Schedule 1 thereto. With the greatest of respect, it is difficult to reconcile the BCFIRB’s apparent perception that the issues that are to be the focus of the current supervisory review were not raised in the previous supervisory review with the discussion at pages 2 to 4 of Prokam and CFP’s joint written submissions to the Supervisory Review available on [this page of the BCFIRB’s website](#)

conduct that led to the Commission's adoption of Amending Order 43 and the ensuing appeal to BCFIRB. .

However, we wish to confirm that this supervisory review will not compromise the integrity of the process of the Court, the jurisdiction of which was invoked prior to the announcement of the supervisory review. It is for the Court to decide whether the facts alleged in the Prokam Claim are true, and whether they establish the tort of misfeasance in public office. In conjunction with that, Prokam is entitled to exercise its discovery rights.

It is trite to observe that BCFIRB has no jurisdiction to adjudicate tort claims such as the misfeasance in public office pleaded in the Prokam Claim. However, we are concerned that the terms of reference for the supervisory review appear designed to make determinations of the very same issues the Court has been asked to determine in the Prokam Claim. We foresee the risk that the defendants in the Prokam Claim may attempt to rely on findings BCFIRB may make in this supervisory review as ostensibly barring certain lines of argument or foreclosing certain determinations by the Court, whether on the propounded basis of issue estoppel, cause of action estoppel, collateral attack, abuse of process, or otherwise. Such arguments if they are eventually made, will be ill-founded. But the potential need to debate them will unduly complicate matters. We would expect the possibility that this supervisory review might encroach upon the Court's exclusive jurisdiction to hear and determine the Prokam Claim to be of equal concern to both plaintiffs and defendants.

We assume that it is not the BCFIRB's intention to pre-empt the court process through this supervisory review. In order to avoid the prospect that the supervisory review will generate new and unnecessary *res judicata* and collateral attack debates down the road, we ask the BCFIRB to consider these concerns as the terms of reference are being finalized.

We respectfully submit that the BCFIRB should explicitly specify, either in the terms of reference or in an interim order, that any findings of fact that are made by the supervisory panel:

1. are made for the narrow purpose of deciding whether those facts necessitate any changes to the manner in which the vegetable industry is regulated, and
2. are in no way intended to be binding upon the parties to the Prokam Claim or the Court.

The second aspect of the notice of supervisory review we wish to address is the recitation of the background beginning at page 2, and its potential implications for the interim orders being contemplated. In light of our May 27 letter disproving the Commission's assertion that the factual allegations underlying the Prokam Claim were only recently made, we trust the BCFIRB will now appreciate the need to proceed with caution before unquestioningly accepting the Commission's assertions, either with respect to the history of proceedings or

otherwise, as the basis for any decisions or orders without first soliciting comment from Prokam and other affected parties.

It is important to recognize that the submissions that Prokam made in the appeal and the supervisory review were tailored to the issues defined in those proceedings, and to BCFIRB's statutory jurisdiction. While the conduct of Messrs. Solymosi and Guichon that underlies the pleading of misfeasance in public office in the Prokam Claim was certainly the subject of submissions in the 2018 appeal and the 2019-2020 supervisory review, it would not have been open to Prokam to allege in those BCFIRB proceedings that the impugned conduct constituted misfeasance in public office, or to ask for an adjudication from BCFIRB of a claim of misfeasance that BCFIRB has no jurisdiction to determine. Prokam's omission to do so accordingly cannot rationally form the basis in full or in part for any interim order that may be sought in this supervisory review.

We trust that the BCFIRB will be prepared to revisit and refine its characterization of what has taken place in past proceedings, and the import of that characterization, with the benefit of submissions from all participants over the course of the new supervisory review.

### **Interim Orders**

In anticipation of these concerns being accommodated, Prokam's submissions with respect to possible interim orders are as follows.

#### ***The Commission's proposed interim order***

One potential interim order has already been put forward: the Commission's proposed direction that it be permitted to "[d]efer any decisions in relation to existing or future applications made by or in relation to Prokam, CFP Marketing Corporation, or their affiliates and related companies, until such time as there is a final disposition of the allegations made against Mr. Solymosi in the Prokam Claim".

The BCFIRB has Prokam's submissions of May 27 on why that order ought not to be made. We add the following in respect of the Commission's position in relation the potential further deferral of Appeal N1908.

In that context, the Commission has invoked the fact of its having devoted 22 pages of its written submissions in Prokam's 2018-19 appeal to the issue of its provincial authority to issue the export minimum pricing orders. It will be for the Court to decide what inference, if any, can be drawn from that fact about the state of the Defendants' knowledge a year earlier when they caused the export minimum pricing orders to be issued. The Commission's position taken in Prokam's 2018 appeal is simply that: a position it took on an appeal. It is not evidence of the state of the defendants' knowledge at the time the export minimum pricing orders were issued, and it will especially be no answer to knowledge being imputed to them on the basis of recklessness or wilful blindness.

***Prokam's proposed interim order with respect to Prokam's designated agency***

Prokam seeks an interim order that the Commission shall not direct Prokam to any existing agency pending further directions from BCFIRB.

This narrow interim order preserves the *status quo*, which is that, at present, Prokam has no designated agency.<sup>2</sup> Prokam's objective in seeking this order is to preserve the current state of affairs until CFP's agency license application has been processed. It would be a shame, and deeply unfair, if after all this time Prokam were to be directed to enter into a GMA with another agency, just when CFP's status is on the cusp of finally being determined and Prokam has finally been liberated from its compelled three-year agency relationship with BCfresh.

There is no need for an agency direction to be made in the immediate term. However, Prokam is understandably apprehensive that such a direction could be made at any time without notice or an opportunity to make submissions, because of the history of these proceedings, namely:


- Prokam was originally directed to BCfresh without being told that the Commission would be considering that issue at the December 2017 show-cause hearing, and without being provided with an opportunity to make submissions in advance on that issue.
- Last December, the Commission made a confusing reference to Prokam's renewal of its GMA with BCfresh as though it was a *fait accompli*, precipitating a further BCFIRB appeal.<sup>3</sup>
- As set out at p. 3 of our May 27, 2021 letter, Prokam has requested that the Commission consider granting it a Class 1 license, despite the language of the November 2019 reconsideration decision.<sup>4</sup> The email exchange that followed is attached as Schedule A to this letter. In brief: Mr. Solymosi advised that the Commission had struck a panel to consider Prokam's license class and marketing intentions. Prokam expressed concern that the Commission might purport to decide anything other than the license class issue it had sought to raise. In answer, Mr. Solymosi advised that he would relay Prokam's desire that the panel address only the license class issue, but declined to confirm that the Commission panel would so confine itself, noting that Prokam's "marketing intentions for 2021 are also expressed in the letter". The "marketing intentions" to which Mr. Solymosi averted was a discussion about the possibility that Prokam might later apply for a producer-shipper

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<sup>2</sup> As discussed at p. 3 of Prokam's May 27 letter.

<sup>3</sup> This exchange is described in paras. 16 to 19 of the Reinstatement Decision in Appeal N1908, attached as Schedule 2 to our May 27, 2021 letter.

<sup>4</sup> Letter from Prokam to Ms. Etsell dated May 8, 2021, attached as Schedule 3 to our May 27, 2021 letter.



license in the event that CFP is not licensed as an agency, which Prokam expressly asked the Commission to leave for another day. The exchange speaks to the legitimacy of Prokam's concern that the Commission might make a unilateral decision about how Prokam's potatoes will be marketed before considering CFP's agency application, and without providing Prokam an opportunity to make submissions on that issue, and it is disheartening that the Commission took an overture towards resolution as a potential pretext for doing so.

The aim of this proposed interim order is clarity and certainty. It would provide Prokam comfort that it will not end up in another involuntary relationship with any agency while there remains a possibility of CFP being licensed. In Prokam's submission, addressing the outstanding regulatory issues one at a time – which is what was envisioned in Prokam's May 8, 2021 letter seeking a Class 1 license and Mr. Dhillon's email to Mr. Solymosi asking that the Commission confine itself to that issue – is conducive to resolution. Having constantly to guard against the possibility of unilateral action by the Commission is not.

***Possible interim orders with respect to Prokam's license class***

The current status of Prokam's license class is this:

- Order 92 of the reconsideration decision issued in November 18, 2019 (the "Reconsideration Decision") provided that Prokam would be entitled to a Class 1 license at the end of a second year of growing regulated vegetables.
- Order 92 of the Reconsideration Decision is the subject of appeal N1908. The parties are awaiting a decision from Presiding Member Thauli on whether that appeal will be deferred in light of the current supervisory review.
- Only one growing season (2020-21) has passed, during which Prokam did not grow regulated vegetables. Prokam has notified the Commission that it has planted potatoes (within the volume of its delivery allocation confirmed by BCFIRB) for the current growing season (2021-22), for which it requires a producer license. Those potatoes will be harvested in fall 2021, by which point it will be necessary to know how they can be marketed in compliance with the General Order.
- Prokam raised with the Chair of the Commission, Ms. Etsell, the possibility of applying for a Class 1 license despite the language of Order 92. Ms. Etsell indicated that Prokam could submit a letter for consideration by the Commission panel that made the Reconsideration Decision.
- Prokam submitted that letter on May 8, 2021, suggesting that the rationale for issuing a Class 1 license despite the terms of Order 92 not having been met was that Prokam had been punished enough, and that it would be a positive step towards bringing an

end to the regulatory proceedings that have bogged down both Prokam and the Commission for nearly four years.

- Instead of a substantive response to its May 8, 2021 letter, on May 12, 2021, Prokam received correspondence from the Commission's counsel to Chair Donkers expressing the Commission's desire for a direction that it be relieved from making any decisions with respect to Prokam. The deadline for renewal of producer licenses was May 15, 2021; in order to ensure that it would be licensed in some fashion, Prokam submitted the paperwork for renewal of its Class 3 license. According to Mr. Dhillon's email exchange with Mr. Solymosi, the Class 3 license renewal will be processed either way. The only question is whether there is an opportunity for that license to be upgraded to a Class 1 license. The reason that matters is because Prokam's license class may become a factor in downstream decisions that will determine how the potatoes Prokam has planted will be marketed, when it comes time for those decisions to be made.
- Instead of reconstituting the remaining members of the panel that made the Reconsideration Decision to decide whether the requirements of Order 92 should be waived, the Commission purported to strike a new panel, and sought Prokam's comments on its composition.
- The conclusion of that exchange was Mr. Solymosi's determination that the Commission could not constitute a panel because there were only four members who were not subject to Prokam's objections relating to affiliation with BCfresh.

Given that Ms. Etsell's original proposal was for the matter of Prokam's license class to be referred to the panel that made the Reconsideration Decision (a panel of four), it is unclear why it would be problematic for a panel of the same size to revisit the issue. Nevertheless, we understand the Commission's need for guidance on this point in light of what we understand to be the vacancy left by Commissioner Reed, leaving the Commission with only 9 members. In light of Mr. Solymosi's advice about the impossibility of constituting a quorum, our understanding is that that leaves only 4 Commission members who are unaffiliated with BCfresh (in the sense of not shipping to, or being shareholders, directors, or officers of BCfresh).

In the circumstances, Prokam would be supportive of a direction that a panel of the four Commissioners identified in Mr. Solymosi's email of May 31, 2021, decide the issue or alternatively that BCFIRB determine the issue itself if the Commission is unable to act.

***Possible interim orders with respect to how Prokam's potatoes will be marketed***

Prokam has planted potatoes, which will be harvested in the fall. As noted in Prokam's letter of May 8, 2021, and Mr. Solymosi's email of May 28, 2021 (within the chain attached as

Schedule A), within a matter of months there will need to be a decision about how the potatoes that Prokam has planted – and for which it holds delivery allocation – may be marketed in accordance with the General Order. It is not necessary for that decision to be made now, and Prokam is not seeking any orders in that regard.

However, we raise this issue because, if the Commission is to be granted the interim order it seeks – that is, that it be excused from exercising its responsibility to consider any applications relation to Prokam – Prokam will be left with no means of obtaining a decision that would permit those potatoes to be marketed.

In the event that the Commission is granted the direction it seeks, we would ask that provision be made in the terms of reference for a process within the supervisory review by which Prokam can seek an interim producer-shipper license pending determination of CFP's agency license application, or through which CFP's application for an agency license can be determined.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

CEH/APC

Encl: Schedule A: E-mail Exchange