

# Hunter Litigation Chambers

KAARDAL/SMART/STEPHENS/OULTON/OLTHUIS/HUNTER

May 27, 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 Ms. Gorsuch:

**Re: BCVMC ats. Prokam and BCVMC ats. MPL**

---

We write on behalf of Prokam Enterprises Ltd. (“**Prokam**”) and CFP Marketing Corporation (“**CFP**”) in response to the Commission’s letter of May 12, 2021 labelled “B”, and addressed to the Chair, concerning the implications of the notice of civil claim filed in *Prokam Enterprises Ltd. v. Guichon and Solymosi* (Vancouver Registry S-212980) (the “**Prokam Claim**”). We ask that you draw this correspondence to the Chair’s attention.

We prepared this letter prior to BCFIRB’s announcement yesterday of a new supervisory review to inquire into the allegations contained in the Prokam Claim and another claim filed by MPL British Columbia Distributors Inc., and intended to deliver it to the attention of Chair Donkers simultaneously with our correspondence addressing the Commission’s request to further adjourn Prokam’s appeal of the reconsideration decision. This letter does not constitute our submission to the supervisory panel that has been requested by June 4, 2021; we will deliver that submission under separate cover.

The Commission has asked BCFIRB to direct that it “[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”. For the reasons set out in this letter, BCFIRB should not make this extraordinary and unprecedented direction.

We begin by addressing the Commission’s contention that the Prokam Claim has been filed “to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of

the Commission”. There is no basis for these inflammatory allegations, which, regrettably, also appear to come quite close to accusing Prokam’s counsel of professional misconduct.<sup>1</sup>

In support of its baseless accusation that the Prokam Claim has been filed for an improper, ulterior purpose, the Commission suggests that the allegations made therein have never been raised by Prokam until now despite several appearances before BCFIRB. This contention – which also appears in BCFIRB’s announcement yesterday of the new supervisory review – is incorrect. The unlawful acts that form the basis for the Prokam Claim – the invalidity of the export minimum price orders and the procedural unfairness of the fall 2017 investigation – were both advanced by Prokam before BCFIRB in the original appeal before BCFIRB in 2018 (the “**Original Appeal**”). One was decided in Prokam’s favour,<sup>2</sup> and the other was not decided at all.

Similarly, the allegations that “Mr. Solymosi has an animus towards Prokam”<sup>3</sup>, and that he decided from the outset of his investigation that Prokam was “rogue producer” that needed to be punished, and that Mr. Guichon exercised his powers as a Commissioner for his own personal gain, are not new – Prokam expressly made all of these submissions in the Original Appeal.<sup>4</sup>

More recently, Prokam raised these issues expressly with the Supervisory Review panel. Prokam’s and CFP’s joint written submissions delivered in August, 2020 referenced (i) the allegation that the Commission knew it was not allowed to set export prices when it purported to enforce them against Prokam;<sup>5</sup> and (ii) the perception that the Commission “was operating on the basis of a personal animus against Prokam harboured by a person or persons with influence”.<sup>6</sup> While the questions posed by the Supervisory Review panel did not seek to inquire into the allegations of unlawful conduct and personal animus raised by Prokam in the Original Appeal, Prokam made specific reference in its written submissions to the Supervisory Review panel to:

1. Mr. Guichon’s admission during Prokam’s appeal to BCFIRB that his concerns as a competing grower motivated his involvement in the discussions leading up to, and the

---

<sup>1</sup> *Code of Professional Conduct for British Columbia*, Rule 5.1-2(a) “When acting as an advocate, a lawyer must not: (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party”.

<sup>2</sup> In the Original Appeal, BCFIRB held not only that the export minimum pricing orders were unlawful, but also that the Commission must have known this at the time: see Original Appeal Decision dated February 28, 2019 (available at [this link](#)) at para. 49.

<sup>3</sup> 2021-05-12b letter from R. Hrabinsky, p. 5.

<sup>4</sup> Excerpt from Submissions of Prokam and Thomas Fresh Inc. in Appeals N1715, N1716, N1718, N1719, attached as **Schedule 1**, with highlighting added.

<sup>5</sup> Written Submissions to BCFIRB Supervisory Panel available at [this link](#), p. 3.

<sup>6</sup> Written Submissions to BCFIRB Supervisory Panel, p. 3.

decision to issue, the cease and desist orders against Prokam (discussions and decisions from which he did not recuse himself);<sup>7</sup> and

2. Excerpts from the transcripts of evidence of Mr. Guichon and Mr. Solymosi at the Original Appeal.

That these allegations have previously been made to BCFIRB is ultimately neither here nor there – BCFIRB is not the proper forum in which to advance a misfeasance in public office claim, including because it lacks the jurisdiction to order damages for resulting losses. But it is important to recognize and understand that the Commission’s reliance on its inaccurate suggestion that the allegations in the Prokam Claim are new and have only come late in the day is misplaced.

Prokam would like to get back to the business of growing potatoes. And, at least until the Commission’s May 12, 2021 letter and yesterday’s announcement from BCFIRB, there appeared to be some hope of that happening. The judicial review petition has been put to rest with a determination that, despite its dismissal, Prokam acted in good faith in bringing it.<sup>8</sup> The issue of Prokam having been directed to BCfresh has, for practical purposes, fallen away in light of Presiding Member Thauli’s holding in appeal N1908 that that relationship will cease at the end of this month.<sup>9</sup>

Just a few days before the Commission’s May 12 letter, Prokam submitted a request that the Commission consider granting it a Class 1 license. This was something Ms. Etsell had indicated to Mr. Dhillon that the Commission would be willing to consider, and Prokam submitted the letter at her invitation. The tenor of that exchange seemed positive, and Prokam noted that it could help reduce the scope of appeal N1908 and lay the groundwork for a fresh start.<sup>10</sup>

However, the Commission’s position appears to have changed, and it now appears unwilling to consider the request for a Class 1 license that Ms. Etsell invited Prokam to make. In fact, the Commission now seeks to be excused from performing any of its statutory duties as first-instance regulator with respect to Prokam and CFP while Prokam’s misfeasance in public office claim is extant. The proposition that a first-instance regulator can seek to abdicate its statutory duties any time the conduct of one of more of its public officers is called into question by way of a lawsuit is completely unprecedented, and the Commission cites no authority in support of it.

By way of analogy, it would mean that anytime a taxpayer sues officers of the Canada Revenue Agency, the Agency could refuse to deal with the taxpayer until the lawsuit is

---

<sup>7</sup> Written Submissions to BCFIRB Supervisory Panel, p. 2.

<sup>8</sup> *Prokam Enterprises Ltd. v. BCFIRB*, [2021 BCSC 246](#), at para. 11.

<sup>9</sup> Reinstatement Decision in Appeal N1908 dated March 30, 2021, at paras. 39-47, attached as **Schedule 2**.

<sup>10</sup> Letter from Prokam to Ms. Etsell dated May 8, 2021, attached as **Schedule 3**.

concluded. Police agencies could refuse to carry out their statutory duty to protect a plaintiff from crime while a lawsuit against officers for false imprisonment, wrongful arrest, or breaches of *Charter* rights is outstanding. Health authorities could refuse to provide medical services to plaintiffs while lawsuits against doctors for sexual assault or other breaches of duty remained unresolved.

Permitting public regulators like the Commission to refuse to regulate plaintiffs who sue their officers until the lawsuit is completed would result in chaos and absurdity. Most disturbingly, it would have a chilling effect on the ability of individuals and corporations to access the courts in order to seek redress and hold public officers to account for abuses of their statutory authority without fear of reprisals from the public bodies who regulate them.

Because Prokam's status as of May 31, 2021 is that it is without an agency or other avenue through which it can participate in the regulated vegetable industry, the direction the Commission seeks would effectively continue Prokam's inability to participate in the industry until its lawsuit is completed. This would effectively punish Prokam and its principals for bringing a legitimate dispute to the courts for adjudication, and would amount to a violation of the *Canadian Charter of Rights and Freedoms*.

Moreover, CFP – a hopeful new entrant in the regulated vegetable industry – is not a party to any lawsuit against officers of the Commission. It would be especially unfair and inappropriate to continue to exclude a potential new entrant by reason of its association with Prokam. CFP is an entity distinct from Prokam with a mission distinct from Prokam's. CFP is governed by a board of directors that includes senior members from the agricultural sector with considerable governance and regulatory experience.

CFP agreed on November 17, 2020 to withdraw its appeal from the summary dismissal of its original agency application and abandon its petition for judicial review of BCFIRB's deferral of that appeal in reliance on the Commission's representations that if CFP did that, the Commission would proceed to consider CFP's agency application. It would be manifestly unfair to permit the Commission to go back on its word and refuse to consider CFP's agency application after CFP so significantly changed its position in reliance on the Commission's representations. If there is to be any direction from BCFIRB arising from this exchange of correspondence, it should be a direction that the Commission comply with BCFIRB's October 2020 direction and consider CFP's agency application promptly.

All that the Commission is being asked to decide is whether licensing CFP as an agency is in the interests of the industry, according to the criteria and process set out in s. 2 of Amending Order #54. It is in nobody's interest for that determination to be further delayed.

If licensing CFP as an agency is ultimately deemed to be in the interests of the industry, further delay in the Commission's consideration of that application will have deprived the industry of the benefit of CFP's presence in the interim. On the other hand, if licensing CFP

as an agency is deemed *not* to be in the interests of industry, it makes no difference to the industry whether that determination occurs now or later – although it makes a great deal of difference to CFP. In other words: the industry as a whole stands to possibly gain from a prompt decision, and *nobody* stands to gain from delay.

As the chronology appended to this letter as Appendix A demonstrates, we are now nearing two years since the Commission summarily dismissed CFP's original agency application in June 2019, and one year since BCFIRB first expressed concern about the prospect of the industry being closed to new participants for an indeterminate period of time.<sup>11</sup> The delay has accrued incrementally from myriad decisions, each with its own stated rationale based on the circumstances at the time. Respectfully, it is astonishing that the Commission continues to go to such extraordinary lengths to avoid even having to consider admitting CFP into the regulated vegetable industry or permitting Prokam to market potatoes other than through BCfresh.

We hope that BCFIRB will now agree that, viewed cumulatively and with the benefit of hindsight, the global delay is now inordinate and no further avoidable delay should be tolerated.

Events cannot continue in this fashion. A great deal of time and energy has been devoted to CFP's agency license application – both to crafting and re-crafting it, and to trying to get the Commission to consider it. Prokam's effective exclusion from the regulated vegetable industry now dates back more than three-and-a-half years. There is no basis in fact or law for the Prokam Claim to excuse the Commission from continuing to carry out its statutory responsibilities, including in relation to Prokam and CFP.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.


CEH/RJA/APC

---

<sup>11</sup> Letter from Presiding Member Joshi dated September 10, 2019 transferring CFP's appeal from summary dismissal of its agency license application to supervisory review, available at [this link](#).

## **APPENDIX A: CHRONOLOGY OF EVENTS RELATED TO CFP AGENCY APPLICATION**

- May 10, 2019. CFP submits application for agency license.
- June 28, 2019. The Commission summarily dismisses CFP's agency license application on the basis of the involvement of former BCFIRB chair Mr. John Les, and issues moratorium on applications for new agency licenses.
- July 3, 2019. CFP files notice of appeal from summary dismissal of CFP's agency license application.
- August 2, 2019. The Commission asks BCFIRB to decline to hear CFP's appeal due to bias the Commission alleges on the part of BCFIRB.
- September 3, 2019. CFP requests that the Commission reconsider its summary dismissal of CFP's agency license application in light of the replacement of Mr. Les with Mr. Alistair Johnston.
- September 10, 2019. BCFIRB defers CFP's appeal to the Supervisory Review, while agreeing with CFP that "the industry should not be closed to new participants for an indefinite period of time".
- September 12, 2019. The Commission refuses to consider CFP's request for reconsideration of its summary dismissal of CFP's license application.
- November 27, 2019. The Supervisory Review panel delivers an update to the Commission in which it conveys its view that "Regarding CFP's agency application, in the panel's view it is not sound marketing policy to restrict agency applications for an unknown and potentially extended time period".
- April 30, 2020. Counsel for CFP writes to the Supervisory Panel asking that arrangements be made for the processing of CFP's application.
- May 22, 2020. The Supervisory Panel declines to consider CFP's request for arrangements to be made for processing of its application, and indicates that if CFP is dissatisfied, it has "other legal remedies available".
- June 15, 2020. CFP files a petition for judicial review, which originally included pleas for relief aimed at having CFP's application processed in the fall of 2020.
- September 9, 2020. Having been unable to obtain a date for hearing of the judicial review petition prior to the fall of 2020, CFP abandons its pleas for relief aimed at




having CFP's application processed in the fall of 2020. The hearing of BCFIRB's and the Commission's applications to strike the balance of the petition is set for October 22 and 23, 2020.

- October 21, 2020. The Supervisory Panel advises the Commission that it is “satisfied that the Commission is now in a position to effectively manage current and pending agency and/or producer-shipper applications” ; that “there is an adequate basis for the Commission to begin its review and consideration of new agency applications”; and that “[t]he panel expects the Commission will move forward with identifying Commissioners to be assigned to panels to consider current applications no later than October 30, 2020”.
- November 5, 2020. In the wake of BCFIRB's lifting of the moratorium on agency applications, counsel for the Commission advises counsel for CFP that “if CFP abandoned its extant appeal before the BCFIRB, as well as any proceedings before the BC Supreme Court regarding that application for designated agency status, there would be no impediment to the Commission reconsidering the application”.
- November 10, 2020. Counsel for the Commission advises counsel for CFP that “new rules or criteria are expected to be formulated within about four weeks. If necessary or appropriate, applicants will then be given an opportunity to supplement or revise their applications in light of any new rules or criteria formulated by the Commission. The Commission expects to be able to process applications in a timely manner.” Four weeks from November 10, 2020 would have been December 8, 2020.
- November 13, 2020. The Commission's counsel provides further information to counsel for CFP about the Commission's anticipated process for consideration of agency applications.
- November 17, 2020. CFP delivers to BCFIRB notice of withdrawal of its appeal from the Commission's summary dismissal of its agency license application.
- November 17, 2020. CFP delivers a letter advising the Court of its withdrawal of its appeal to BCFIRB and of CFP's intent to seek to discontinue the aspects of the judicial review petition related to its agency license application.
- November 27, 2020. A case planning conference is held before Mr. Justice Mayer during which all counsel (including counsel for BCFIRB) agree that it was not necessary to consider the relief sought in respect of CFP agency license application.
- December 2, 2020. Mr. Justice Mayer delivers reasons for judgment striking certain portions of the Petition for judicial review and adjourning the applications to strike the relief sought in respect of CFP's agency license application.



- December 11, 2020. The Supervisory Review panel directs that the Commission “not make any orders as individual orders or as amendments to the Consolidated General Order until it has the benefit of the panel’s directions and recommendations”.
- December 15, 2020. In response to CFP counsel’s request for an update on the anticipated timing of any new rules or criteria for consideration of agency applications, the Commission’s counsel advises that the Commission was deliberating on it, but had been directed not to make any orders until it had the benefit of the panel’s supervisory directions and recommendations.
- December 22, 2020. The Supervisory Review panel releases its final decision.
- December 29, 2020. CFP’s counsel writes to the Commission’s counsel asking for an update on the anticipated timing of any new rules or criteria for consideration of agency applications, and advises that in the event no new rules or criteria are released by January 4, 2021, CFP intends to update and resubmit its application for designated agency status so that it may be considered in a timely manner.
- February 3, 2021. CFP’s counsel delivers to the Commission’s counsel an updated version of CFP’s agency license application, under a cover letter asking that it be delivered to the panel assigned to consider CFP’s application in accordance the Supervisory Panel’s direction of October 21.
- February 4, 2021. CFP Chair Mr. Smith delivers a copy of CFP’s updated agency license application, together with a cover letter from CFP’s counsel, to Commission Chair Ms. Etsell.
- March 15, 2021. The Commission issues Amending Order #54 establishing the process and criteria for applications for designated agency status.
- March 16, 2021. Commission General Manager Mr. Solymosi delivers Amending Order #54 to Mr. Gill, President of CFP, invites CFP to update its application, and advises that the application already submitted will not be put before the panel unless CFP advises that it does not intend to make revisions.
- March 25, 2021. The Prokam Claim is filed, but not served.
- April 19, 2021. BCFIRB advises the parties to Appeal N1908 that the Prokam Claim has been brought to BCFIRB’s attention, and asks the parties to be prepared to address its implications at the pre-hearing conference for appeal N1908.
- April 20, 2021. The pre-hearing conference is held in Appeal N1908, following which Prokam’s counsel delivers a letter explaining (i) that the applicable limitation





period required that the Prokam Claim be filed in March of this year; (ii) the relationship between the Prokam Claim and past and current BCFIRB proceedings; and (iii) that, according to the applicable jurisprudence, the two matters should both be permitted to proceed.

- April 27, 2021. Appeal N1908 is adjourned generally to permit the Commission to formulate its position on the impact of the Prokam Claim on the two remaining issues in Appeal N1908.
- May 12, 2021. the Commission's counsel delivers two letters: one seeking adjournment of appeal N1908, and one seeking the direction that is the subject of this exchange.