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## BC Farm Industry Review Board

March 30, 2021

File: N1908, N2101

### DELIVERED BY EMAIL

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Dear Sir/Mesdame:

### RE: PROKAM ENTERPRISES LTD. V BC VEGETABLE MARKETING COMMISSION

#### Introduction

1. By letter dated December 29, 2020, Counsel for Prokam Enterprises Ltd. (**Prokam**) wrote to the British Columbia Farm Industry Review Board (**BCFIRB**) asking to reinstate Appeal #N1908, which was an appeal from a November 18, 2019 decision of the British Columbia Vegetable Marketing Commission (the **Commission**). A BCFIRB appeal panel deferred Appeal #N1908 to allow a supervisory panel to conclude its review.
2. On January 11, 2021, I established a submission schedule to give the parties an opportunity to identify what, if any, issues remained to be determined in Appeal #N1908.
3. On January 5, 2021, Counsel for Prokam filed Appeal #N2101 seeking to set aside what Prokam alleges was a Commission decision of November 17, 2020, and communicated in correspondence on December 7 and 14, 2020, that Prokam market through BCfresh under a renewed General Marketing Agreement (**GMA**) commencing June 1, 2021. By letter dated January 12, 2021, Counsel for the Commission seeks summary dismissal of Appeal #N2101.
4. The following is my decision on the question of whether there are any live issues left to be heard in Appeal #N1908, following the supervisory review, and the Commission's summary dismissal application in Appeal #N2101.

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## Background

### Deferral of Appeal #N1908

5. In the decision of *Prokam v. British Columbia Vegetable Marketing Commission*, February 28, 2019 (the **Appeal Decision**), the BCFIRB appeal panel issued orders directing the Commission to reconsider certain decisions it had made.
6. In September 2019, BCFIRB established a supervisory panel to undertake a supervisory review arising out of a series of appeals from Commission decisions (including the Appeal Decision) and related Commission management projects (the **Vegetable Review**).
7. On November 18, 2019, the Commission released its decision of those matters remitted to it in the Appeal Decision (the **Reconsideration Decision**) and made the following orders:

62. Prokam does not qualify to apply for a Producer-Shipper Licence

*[...] Once Prokam's Class III licence reverts back to a Class I licence it may submit an application to the Commission. As long as Prokam is an active producer growing regulated vegetables for the retail, wholesale, or food service markets, and remains compliant over the next three licence periods, this opportunity could be available to Prokam for the 2022/23 Crop Year.*

92. Prokam Enterprises Ltd. Licence Class

*Effective immediately, [t]he order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III Licence to this producer.*

*Prokam was not licenced to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licenced as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.*

94. BCfresh as the Agency Designated to Prokam Enterprises Ltd.

*With the enactment of this interim order, the panel offers Prokam with three options:*

- *Prokam can chose (sic) to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.*
- *If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018.*

- *If BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop agencies to represent the grower in consideration of the new Interim Order.*
8. The Reconsideration Decision also included an interim order to preserve the orderly marketing of storage crops (the **Interim Order**). The Commission found it was in the best interest of the industry to introduce the Interim Order adopting the definition “Packed For End Use” and mandating that product be marketed by an agency as “Packed For End Use” in all instances except where the express, prior, written approval of the Commission is sought and obtained.
  9. On November 20, 2019, Prokam filed Appeal #N1908 of the Reconsideration Decision alleging the Commission’s process was procedurally unfair and unreasonably delayed as well as that the Reconsideration Decision had substantive errors, was not supported by adequate reasons, and did not accord with sound marketing policy. Prokam sought reinstatement of its Class 1 licence retroactive to December 22, 2017; the setting aside of the Commission direction of Prokam to market through BCfresh pursuant to the terms of the February 15, 2018 GMA; the granting of a producer-shipper licence or direction to CFP Marketing Corporation if it obtains an agency licence; the freezing of Prokam's delivery allocation as at October 10, 2017; and the setting aside of the Interim Order. Prokam also applied for an interlocutory order for an interim producer-shipper licence pending the determination of its appeal.
  10. On November 29, 2019, the presiding member of the BCFIRB appeal panel issued a decision deferring the Appeal #N1908 until the Vegetable Review was completed (the **Deferral Decision**).
  11. On January 10, 2020, the supervisory panel issued an interim relief decision sought by Prokam (the **Interim Supervisory Decision**), which made the following decisions:
    - **Paragraph 25** – the panel did not consider Prokam’s request to have its Class 1 licence reinstated as Prokam had a valid licence and could produce and market vegetables.
    - **Paragraph 27** – the Commission took reasonable steps to address the administrative fairness issues identified in the Appeal Decision.
    - **Paragraph 29** – while the reconsideration process was lengthy, the panel was satisfied it was fair and inclusive.
    - **Paragraph 37** – the panel accepted that the Commission’s decision to direct Prokam to market through BCfresh for 2020/21 was consistent with sound marketing policy given BCfresh’s expressed willingness to work with Prokam, its experience and connections in potato marketing across Western Canada, the express support of other storage crop agencies for BCfresh to serve as Prokam’s agency, the findings in the Appeal Decision of Prokam’s non-compliance with the General Orders, BCfresh’s track record of compliance, and the opportunity for Prokam to demonstrate its willingness to operate within the regulated system so that it could

transition to a Class I licence and be in a position to apply for a producer-shipper licence for 2022/23.

- **Paragraph 45** – the panel was not satisfied that historical, regional or economic circumstances warranted granting Prokam a producer-shipper licence for 2020/21.
  - **Paragraph 47** – the panel concluded that the direction of Prokam to BCfresh gave it an avenue to market regulated crops for 2020/21 and therefore, the panel found it was unnecessary to consider that part of Appeal #N1908 on Prokam’s request for an agency designation to CFP.
  - **Paragraph 48** – the panel concluded Prokam needed to demonstrate its willingness to comply with the General Orders before a producer-shipper licence could be issued.
  - **Paragraph 52** – the panel directed the Commission to remove the 2018/2019 and 2019/2020 growing seasons from the calculation of Prokam’s delivery allocation for the 2020/2021 growing season.
12. On November 30, 2020<sup>1</sup>, the Commission issued a decision approving Prokam’s request for a delivery allocation freeze for the 2021/22 growing season (the **Delivery Allocation Freeze Decision**). This decision had the effect of freezing Prokam’s delivery allocation such that Prokam’s allotted future marketing volumes were not impacted by its non-production years.
  13. On December 22, 2020, the supervisory panel issued its directions and recommendations in the decision, In the Matter of the *Natural Products Marketing (BC) Act* and the 2019-20 Vegetable Review (the **Supervisory Review Decision**).
  14. On December 29, 2020, Prokam sought to reinstate Appeal #N1908 stating that the following issues were not addressed in the Supervisory Review Decision and remain live issues in Appeal #N1908:
    1. *Prokam’s licence class*: Prokam continues to seek the reinstatement of its Class 1 licence retroactive to December 22, 2017;
    2. *Prokam’s designated agency*: Prokam continues to seek an order setting aside the *direction* that Prokam market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018 (Order 94 of the Reconsideration Decision); and
    3. *Interim Order to Preserve the Orderly Marketing of Storage Crops*: Prokam seeks an order setting aside the Interim Order, made as part of the Reconsideration Decision, on the basis the Interim Order introduced a requirement that Prokam’s products be “packed for end use”.
  15. During the submission process, Prokam added fairness concerns arising out of the Commission’s reconsideration process and renewed its request for a producer-shipper licence.

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<sup>1</sup> This decision was made November 17, 2020 as reflected by Commission Minutes.

## Appeal #N2101

16. On January 5, 2021, Prokam filed Appeal #N2101. The alleged issue arises primarily from a letter dated December 7, 2020 from the Commission's General Manager to Prokam (the **December 7 letter**) in which the Commission confirmed the delivery allocation freeze and also stated:

*[I]f Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018, and a renewed GMA that commences June 1<sup>st</sup>, 2021. If BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become [Prokam's] designated Agency. [Emphasis added.]*

17. On December 11, 2020, Mr. Dhillon wrote to the Commission as follows:

*Andre:*

*Your e-mail of November 30 referred to a decision made regarding the delivery allocation freeze only. Your letter of December 7 referred again to the decision regarding the delivery allocation freeze but also made reference to a decision directing Prokam to sign a renewed GMA with BCfresh commencing June 1, 2021. My questions are:*

- 1. Were these two decisions made separately or are they part of the same decision?*
- 2. What is the date or dates of the decision or decisions? [Emphasis added.]*

18. The Commission's letter dated December 14, 2020 (the **December 14 letter**) responded as follows to Prokam's questions:

*The Commission made one decision to grant the freeze of your 2020/2021 delivery allocation. This decision was made by the Commission on November 17, 2020. This decision was communicated by e-mail November 30 and by letter dated December 7, 2020.*

*The Commission did not make any further decision to direct Prokam to market through BCfresh. Rather, the decision recognizes that BCfresh is presently Prokam's designated agency. Thus, if BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become your designated Agency. Further, this does not preclude the possibility of future applications or orders regarding the manner in which Prokam's regulated product may be marketed.*

19. In Appeal #N2101, Prokam seeks an order that the alleged direction that Prokam market through BCfresh under the terms of a renewed GMA commencing June 1, 2021 be set aside. The Commission, however, is seeking summary dismissal of this appeal arguing that it is clearly deficient because it fails to identify any order, decision or determination, which could be the subject matter of an appeal under s. 8 of the *Natural Products Marketing (BC) Act*.

20. In my view, Appeal #N2101 raises issues, which overlap with the issues raised in Appeal #N1908. As such, I will address Appeal #N1908 first.

## **Decision**

### **Appeal #N1908**

21. Prokam and the Commission have an extensive history of appeals, appeal-related litigation proceedings and a supervisory process, which culminated in the Supervisory Review Decision. I will not set out that history in this decision but it is aptly summarized at paragraphs 32 to 51 of the Supervisory Review Decision.
22. After reviewing the submissions of the parties, Prokam and the Commission agree that Prokam's licence class and the Interim Order remain extant on Appeal #N1908, so I am directing that these matters be set down for hearing. Despite their agreement on what remains "live" issues in this appeal, the parties disagree on the overall results of the Interim Supervisory Decision.
23. The Commission's position is that the Interim Supervisory Decision conclusively addressed the following issues:
- (a) the Commission's direction that Prokam market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018 (Order 94 of the Reconsideration Decision)
  - (b) Prokam's application for a producer-shipper licence, and
  - (c) the Commission's "process".
24. Prokam strenuously disagrees and refers to Mr. Justice Mayer's reasons for judgment dated December 2, 2020<sup>2</sup> (the **Court Judgment**), which upheld the applications of BCFIRB and the Commission to strike aspects of the judicial review petition commenced by Prokam. Prokam states that the Commission's position is inconsistent with Mr. Justice Mayer's characterization of the Interim Supervisory Decision where he stated:
- [123] I am satisfied that the [Interim] Supervisory Decision was only made, and therefore the reasons supporting this decision only apply, in respect of Prokam's application for an interim producer-shipper licence for [the 2020/21 crop year]. For this reason, I agree with the submission of BCFIRB that this decision is now moot and there is therefore no reason for it to be judicially reviewed.*
25. Prokam argues that the characterization of the Interim Supervisory Decision as being applicable only to the 2020/21 crop year, which was argued by BCFIRB and accepted by the Court, suggests that the issue of Prokam's designated agency beyond the 2020/21 crop year is unresolved.

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<sup>2</sup> *Prokam Enterprises Ltd. v. British Columbia Farm Industry Review Board*, 2020 BCSC 2138.

26. Prokam further argues that the Commission and BCFIRB both took the position in the judicial review petition that the issue of the Commission's direction of Prokam to market through BCfresh should not be heard by the Court and should be addressed by BCFIRB, as the "adequate alternative remedy" (discussed further below). Prokam submits that for the Commission to argue now that this issue should not be addressed by BCFIRB in Appeal #N1908 amounts to an inconsistent pleading and constitutes an abuse of process.
27. Prokam also argues that the Commission's Order 94 of the Reconsideration Decision may be interpreted as either that BCfresh remains Prokam's designated agency until its GMA expires, following which Prokam will be without a designated agency, or that BCfresh is Prokam's designated agency in perpetuity, unless BCfresh releases Prokam or the Commission orders otherwise. Prokam believes the Commission takes the latter, broader view of Order 94, that is, Prokam was directed to BCfresh indefinitely and not merely until the expiry of the three-year GMA. Prokam argues that the latter interpretation appears to align with the Commission's theory of why its purported direction of Prokam to enter into a renewed GMA with BCfresh beginning in June 2021 was not a decision (which argument is addressed below). Prokam submits its appeal seeks to set aside Order 94 of the Reconsideration Decision in its entirety and since neither interpretation has yet been determined, the appeal should proceed.
28. For completeness, I asked the Commission to respond to Prokam's interpretation of the Court Judgment and to address the implications, if any, of Part VI of the General Orders on the issues under appeal.
29. Part VI provides:

#### PART VI TRANSFER OF PRODUCERS BETWEEN AGENCIES

1. If a Producer and the Agencies involved agree, a Producer in good standing with the Commission may transfer from one Agency to another Agency. The parties must notify the Commission of the transfer before it takes effect.
  2. If a producer wishes to transfer from one Agency to another Agency, or if an Agency wishes to discontinue receiving Regulated Product from a producer but one or more of the involved parties does not agree the Commission may make a determination binding upon the Producer and the Agency or Agencies.
  3. No transfer registered with the Commission and no determinations made by the Commission pursuant to this Part shall be intended to negate, terminate or diminish established, agreed commercial arrangements or contracts between an Agency and a Producer.
30. In its brief reply of February 10, 2021, the Commission agrees that the Interim Supervisory Decision was only made on Prokam's request for an interim producer shipper licence for the 2020/2021 crop year. The Commission submits that if

Prokam wishes to reapply for a producer-shipper licence, it may do so by reapplying to the Commission and presumably, by pointing to new considerations or changed circumstances. The Commission argues that it is an abuse of process for Prokam to use this appeal process as a vehicle to apply directly to BCFIRB for a producer-shipper licence and circumvent the Commission entirely.

31. The Commission further argues that Prokam either misunderstands the ruling in the Court Judgment on the nature of the “adequate alternative remedy” or is mischaracterizing that ruling in its submissions to BCFIRB. The Commission states the Court found that it was an abuse of process for Prokam to bring on judicial review proceedings when there is a statutory right of appeal of Commission decisions to BCFIRB. The “adequate alternative remedy” analysis focussed on the appropriate forum and did not in any way suggest that there is merit in any of the positions taken by Prokam in this appeal. The Commission submits that the live issues in Appeal #N1908 are properly before the BCFIRB, and the ruling in the Court Judgment does not oblige BCFIRB to rule in Prokam’s favour, either on interlocutory procedural issues or final substantive issues.
32. In response to the application of Part VI of the General Orders, the Commission argues that it does not, and cannot, operate to preclude the Commission from making an order changing Prokam’s designated agency; granting a producer-shipper licence; or making any other order that conflicts with a GMA between Prokam and BCfresh. Part VI also does not preclude Prokam from reapplying to the Commission for a producer-shipper licence.
33. In its reply of February 12, 2021, Prokam agrees that the reinstatement of Prokam’s licence class and the setting aside of the Interim Order are live issues in Appeal #N1908, but then adds that three other issues remain to be determined in this appeal, namely: the setting aside of the direction of Prokam to market through BCfresh; the granting of a producer-shipper licence or a direction to CFP (if it obtains an agency licence); and the fairness of the Commission’s reconsideration process.
34. Prokam submits that it is not necessary for BCFIRB to consider the Commission’s submissions that Prokam is required to apply to the Commission for a producer-shipper licence, or that it is abusive for Prokam to seek that relief in this appeal. Prokam further submits that the Commission’s arguments are beyond the scope of this submission process, which Prokam understood to be aimed at identifying those aspects of Appeal #N1908 that remain to be determined by BCFIRB.
35. Prokam argues that the Commission is no longer maintaining its position that the question of whether BCFIRB could or should grant Prokam a producer-shipper licence has already been determined, and is instead asking BCFIRB to determine this issue, based on a new substantive argument, that such an order must first be sought from the Commission. Prokam states that if this is a “live” issue, the time and place for arguments about it is within Appeal #N1908.



36. Prokam further argues that it is not necessary for BCFIRB to decide on the issue of the Commission's "inconsistent pleading", which arose from the Commission taking the position that the direction of Prokam to BCfresh had already been determined in the Interim Supervisory Decision, because Prokam submits the Commission is no longer taking this position. Prokam then argues that it is not necessary for BCFIRB to decide on whether treating the direction of Prokam to BCfresh as a "live" issue would be inconsistent with the Court's ruling on the adequate alternative remedy because the only argument for how it could be said to be anything but "live" – the contention that it was resolved in the Interim Supervisory Decision – has fallen away in the face of the Court's ruling on that point.
37. As for the implications, if any, of Part VI of the General Orders, Prokam argues the effect of Order 94 of the Reconsideration Decision must mean that Prokam's designated agency is BCfresh unless BCfresh agrees to release it (consistent with s. 1 of Part VI) or the Commission grants a transfer application (s. 2 of Part VI). Prokam states this is consistent with its position in these submissions that Prokam's challenge of the Commission's direction of Prokam to BCfresh was not determined by the Interim Supervisory Decision and will not be rendered moot by the expiry of the 2018-2021 GMA.
38. I have already found that the issues related to Prokam's licence class and the Interim Order remain "live" and will be set down for hearing. I will now consider what, if any, other issues remain to be determined.

### **Direction of Prokam to Market through BCfresh**

39. Significantly, Order 94 of the Reconsideration Decision was a direction that Prokam market any regulated products through BCfresh for the 2020/21 growing season, under the terms of the three-year GMA entered into on February 15, 2018, nothing more. Order 94 was subsequently replaced with the Interim Supervisory Decision, also for the 2020/21 growing season.
40. Before issuing the Interim Supervisory Decision, the supervisory panel had conducted a submission process to consider Prokam's request for immediate relief from certain aspects of the Reconsideration Decision, including the direction directed to market through BCfresh. Prokam also raised procedural concerns with the Commission's reconsideration process.
41. The supervisory panel accepted that the Commission's decision to direct Prokam to market through BCfresh for the 2020/21 growing season was consistent with sound marketing policy and gave supporting policy rationale (paragraph 37 of Interim Supervisory Decision).
42. The panel also upheld the Commission's process, concluding that the Commission took reasonable steps to address the administrative fairness issues identified in the Appeal Decision. While the reconsideration process was lengthy, the panel was satisfied it was fair and inclusive (see paragraphs 27 and 29 of Interim Supervisory

Decision). As presiding member of this appeal, I do not sit in review of supervisory panel decisions.

43. I have considered the impact of the ruling in the Court Judgment on the findings of mootness and adequate alternative remedy. Given that the supervisory panel decision was limited to the 2020/2021 growing season, and consistent with the transcript of BCFIRB's counsel from the notice to strike application relied on by Prokam in its submissions, it is understandable why the Court found Prokam's challenge to BCfresh as its agency for the 2020/21 growing season moot. The growing season was, for all intents and purposes, over at the time of the application hearing.<sup>3</sup>
44. I have also considered the impact of the Court's ruling on the "adequate alternate remedy". In my view, this ruling needs to be understood in the context of Prokam's judicial review petition, which sought sweeping constitutional relief, not initially sought before BCFIRB, and also attempted to circumvent the Deferral Decision and supervisory process to obtain a different result from the Court. I understand the Court's conclusions as affirming BCFIRB's supervisory and appeal processes as adequate alternative remedies to Prokam's court challenges to decisions made by the Commission.
45. I agree with the Commission that the Court Judgment focussed on the adequacy of the forum provided by BCFIRB as "an expert tribunal with a statutory grant of exclusive jurisdiction to deal with the issues in dispute", "whose decisions are protected by a strong privative clause."<sup>4</sup> The Court's reasons do not dictate any particular result. BCFIRB is free to consider the issue of what remains a live issue, in the usual course.
46. To the extent that Prokam is trying to use this appeal to seek a ruling from BCFIRB on its agency for the 2021/22 growing season, an issue that was not considered by the Commission in its Reconsideration Decision or the supervisory panel in its Interim Supervisory Decision, it is misguided. In my view, the Court's findings on Prokam's judicial review petition that such a tactic is an abuse of process is equally applicable here.
47. As such, I conclude that the direction of Prokam to BCfresh for the 2020/21 growing season is not a "live" issue in Appeal #N1908.

### **Producer-shipper Licence**

48. It appears, based on Prokam's February 12, 2021 submission, that Prokam also maintains that the issue of its application for a producer-shipper licence remains to be determined in Appeal #N1908. I have reviewed the Interim Supervisory Decision, specifically paragraphs 39 to 48, which provide the supervisory panel's

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<sup>3</sup> Paragraph 123, *Prokam, supra*

<sup>4</sup> Paragraph 91, *Prokam, supra*

comprehensive reasons for why it did not think it was appropriate to grant Prokam a producer-shipper licence. Specifically, paragraph 45 states:

45 *The marketing framework provided by the Commission's General Orders has been developed to serve all registered growers of regulated product. It is the panel's position that it is incumbent on Prokam to now demonstrate its willingness to work within the regulated system and to re-establish its good standing before seeking concessions. The panel is not satisfied that Prokam has demonstrated there are historical, regional or economic circumstances that warrant granting it a Producer-Shipper licence for 2020/21. [Emphasis added.]*

49. To the extent that the supervisory panel dismissed Prokam's request for a producer-shipper licence, I conclude this is not a live issue before me on this appeal. I do not sit in review of decisions of a BCFIRB supervisory panel.
50. Should Prokam be successful on its challenge to its Class 3 Licence and receive a Class 1 licence as part of its remedy in Appeal #N1908, the General Orders contemplate a process by which a producer in good standing (i.e. one with a Class 1 licence) can apply for a producer-shipper licence from the Commission. It would be premature for BCFIRB to weigh in on this issue before Prokam makes an application to the Commission for a 2021/22 producer-shipper licence, and the Commission, as the first instance regulator, has an opportunity to make its decision.

### **Process Issues**

51. Prokam argues that its process issues have not been addressed and these remain live issues. On this point, I note that the Interim Supervisory Decision made the following findings:
27. *In the panel's view, the Vegetable Commission has taken reasonable steps to address the administrative fairness issues identified in the Prokam Appeal Decision. Specifically, it fulfilled the appeal direction to canvas interested persons' views on the reconsideration panel composition. In establishing the reconsideration panel, the Vegetable Commission consulted with Thomas Fresh, Prokam and Island Vegetable Cooperative Association (IVCA). The final panel was composed of Vegetable Commission members who do not ship to, and are not shareholders, directors, or officers of BCfresh. All storage crop members recused themselves from the Vegetable Commission's final decision discussion and vote.*
28. *The panel observes that Prokam, in its November 20, 2019 Notice of Appeal, did not dispute the Vegetable Commission's steps to address the potential conflict of interest concerns in decision-making.*
29. *While the reconsideration process was lengthy, the panel is satisfied it was fair and inclusive. The Vegetable Commission shared the written submissions with all parties and provided opportunity for reply. Following the first process, the Commission panel requested input from BC potato producers and agencies on the direction of Prokam to*

*BCfresh. The Commission subsequently provided a submission extension. The Vegetable Commission shared the submissions with IVCA, Thomas Fresh and Prokam, who did not make reply submissions to the Vegetable Commission.*

52. Further, the Supervisory Review Decision made extensive directions on the Commission's governance and structure to address Commission decision-making and manage conflicts of interest and any reasonable apprehension of bias (Supervisory Review Decision, paragraphs 99 to 121). The directions include both short-term directions (i.e. use of non-sector panels and advisory committees and revision of election rules to make agency directors ineligible to sit as Commissioners) and long-term recommendations to government (i.e. regulatory amendments to add further independent Commission directors).
53. In light of the above and the *de novo* nature of BCFIRB appeals, it is difficult to see what live process issues remain to be determined. I do not find Prokam's submissions of assistance on this point. To the extent there are any process issues that need to be determined, they can only be for the two remaining live issues related to Prokam's licence class and the Interim Order.

### **Appeal #N2101**

54. In its submission of January 14, 2021, Prokam argues that the Commission made a "decision requiring Prokam to sign a renewed GMA with BCfresh commencing June 1, 2021" in both its December 7 and December 14 letter (the **December letters**). For ease of reference, I include the relevant passages from the December letters here:

*[I]f Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018, and a renewed GMA that commences June 1<sup>st</sup>, 2021.*

*The Commission did not make any further decision to direct Prokam to market through BCfresh. Rather, the decision recognizes that BCfresh is presently Prokam's designated agency. Thus, if BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become your designated Agency.*

55. Although the Commission did not say so in its December letters (or with any great clarity in its submissions), I take the above passage as a reference to Part VI of the General Orders:

#### **PART VI TRANSFER OF PRODUCERS BETWEEN AGENCIES**

1. If a Producer and the Agencies involved agree, a Producer in good standing with the Commission may transfer from one Agency to another Agency. The parties must notify the Commission of the transfer before it takes effect.
2. If a producer wishes to transfer from one Agency to another Agency, or if an Agency wishes to discontinue receiving Regulated Product from a

producer but one or more of the involved parties does not agree the Commission may make a determination binding upon the Producer and the Agency or Agencies.

3. No transfer registered with the Commission and no determinations made by the Commission pursuant to this Part shall be intended to negate, terminate or diminish established, agreed commercial arrangements or contracts between an Agency and a Producer.
56. In my view, Part VI of the General Orders speaks to the ongoing nature of the producer-agency relationship in the orderly marketing of vegetables. The regulatory framework for vegetables in BC, in the usual course, contemplates an ongoing marketing relationship between a producer and an agency. In a functioning producer/agency relationship, the agency and producer enter into a GMA, which would be renewed from time to time, on terms agreed to between the parties.
57. Part VI established the process for producers to change agencies should either the producer or the agency determines the marketing relationship is no longer meeting their respective business needs. The Commission requires notification when a producer changes their agency to ensure orderly marketing. Part VI also establishes that the Commission may issue directions, as needed to ensure orderly marketing should a producer and agency disagree about terminating a GMA.
58. I note that there is no requirement for, or a reference to, GMAs being automatically renewed between producers and agencies in Part VI or elsewhere in the General Orders. Furthermore, the GMA executed between Prokam and BCfresh in February 2018 is for a three-year term and will expire on May 31, 2021. The GMA does not contain any “automatic renewal” clause. Finally, I note the position of the Commission in its December 14 letter wherein it states that the Commission did not make any further decision to direct Prokam to market through BCfresh.
59. Based on the operation of basic contract law, and in the absence of any further decision of the Commission directing Prokam to market through BCfresh for the 2021/22 growing season, and having not been referred to any provision of the General Orders to the contrary, Prokam’s GMA with BCfresh expires on May 31, 2021.
60. On a plain language interpretation of the December letters, I find that they do not contain an order, decision or determination. The only decision made by the Commission was the Delivery Allocation Freeze Decision, which decision Prokam is not challenging. While the passages that Prokam does take exception to are less than clear, especially given the mention of “renewal”, I am satisfied that the December letters do not generate a right of appeal.

61. BCFIRB has previously held that an appellant cannot, simply by writing a letter to a commodity board objecting to a given order or seeking an interpretation or clarification of that order, generate a right of appeal: see *Saputo v. British Columbia Milk Marketing Board*, (May 29, 2008), *Klaas Korthuis dba Try Poultry Farms. v British Columbia Chicken Marketing Board*, October 18, 1999.
62. Here, and as discussed above, by virtue of the Interim Supervisory Decision, there is an existing relationship between Prokam and BCfresh as evidenced by their GMA. This relationship expires on May 31, 2021, full stop. If Prokam chooses to market regulated vegetables in the 2021/22 growing season, Prokam has a business decision to make. If it wants to enter into a GMA with an agency and should it result in a transfer from BCfresh, Prokam must notify the Commission under Part VI.
63. To my knowledge, Prokam has not taken any steps to date. Given that I do not accept that the December letters are an “order, decision or determination” of the Commission, it follows that there is no associated right of appeal. As such, I summarily dismiss Appeal #N2101.

If you have any questions, do not hesitate to contact Case Manager, Gloria Chojnacki directly at 778-974-5789.

Yours truly,



Harveen Thauli  
Presiding Member  
BC Farm Industry Review Board