August 24, 2022 File No: 3211.002

BY EMAIL

BC Farm Industry Review Board
1st Floor, 2975 Jutland Road
Victoria, BC V8T 5J9

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

Re: Allegations Supervisory Review

We write further to the Review Panel Chair's letter of August 17, 2022 requiring Prokam to make, by today's date, substantive submissions on Hearing Counsel's July 27, 2022 recommendations for next steps in this Supervisory Review following the release of the July 14 decision (the "**Allegations Review Decision**"), and to address the proposal made by Mr. McEwan, on behalf of the Commissioners, with respect to the establishment of new Terms of Reference. In these submissions, we will refer to the process that resulted in the Panel's decision of July 14 as "**Phase I**", and the proposed further process as "**Phase II**". These submissions are made without prejudice to Prokam's ability to argue that the Panel should not be embarking on Phase II, now or ever, and to make that argument directly to the Court in due course.

1. Whether Phase II proceeds on the basis of new terms of reference is immaterial

As a matter of procedural fairness, Prokam is entitled to unambiguous notice of precisely what is at stake (*i.e.* what "consequences" are on the table), and precisely what is at issue (*i.e.* on what basis those consequences would be imposed), and it is entitled to scrupulous adherence to those parameters once they are determined. Whether those parameters are communicated by way of new Terms of Reference or by some other means is a matter of form, not substance. And it will not cure any of the jurisdictional or procedural fairness problems with Phase II identified in the submissions that follow.

Whether framed as one process or two, the intent is clearly to make orders and determinations in Phase II based on the outcome of Phase I. The fact that the Panel has already deemed the Allegations Review Decision to be a "final decision" within the meaning of s. 57 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, amenable to judicial review within 60 days (giving notice of that determination in the final paragraph of the Allegations Review Decision itself) is demarcation enough for any purpose we can think of.

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PRACTICE CONDUCTED THROUGH A LAW CORPORATION

2. The Panel ought not to adopt Hearing Counsel's proposals

The submissions that follow under this heading address why (i) the procedure proposed by Hearing Counsel for identifying whether an inference of bad faith or ulterior motives can or should be drawn is unsuitable; and (ii) any such inferences should be dismissed now, preliminarily, without the need for further investigation or argument.

In making the latter point, we do not mean to diminish the Panel's concerns. But it must be borne in mind that those concerns arose from submissions that were largely unanswered, in light of the focus of Phase I and the constraints of reply. For the reasons set out below, such inferences are so plainly unwarranted as to be unworthy of further investigation.

We add this. In his ruling on Mr. Hira's email to Hearing Counsel during the cross-examination of Mr. Dhillon, the Chair placed his faith in counsel's appreciation of their professional obligations.[1]

As we noted at the outset of this proceeding,[2] the accusation that the notice of civil claim was filed "to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission"[3] – which has now been repeated by several participants, in several variations – comes regrettably close to an allegation of professional misconduct.[4] It is a more severe attack on the integrity of counsel than anything counsel for Prokam has said at any point during the Phase I, including when arguing that the email episode was worthy of investigation.

More to the point, when deciding whether the bad faith and ulterior motive questions are worthy of further investigation, the Panel should pay similar heed to counsels' appreciation of their professional obligations. Accordingly, in the absence of a compelling case for bad faith or ulterior motives – which does not exist – the issue should be put to rest.

Proposed investigation into whether Prokam had additional evidence to support its allegations (Investigation Phase, Item One)

This aspect of the proposed investigation will involve needless time and expense – potentially a great deal of it, given how closely it can be expected to skirt the line of solicitor-client privilege, and the challenges that will present. We say needless because it is difficult to understand why Hearing Counsel would think that Prokam had additional evidence at the time

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[1] Ruling dated February 4, 2021 Regarding Email sent to Hearing Counsel.
[2] Letter from Ms. Hunter to the BCFIRB dated May 27, 2021.
[3] Letter from Mr. Hrabinsky to the BCFIRB dated May 12, 2021; Letter from Mr. Mitha to the BCFIRB dated July 27, 2022, p. 4.
[4] *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 brougth solely for the purpose of injuring the other party".

that it made the impugned allegations (*i.e.* when it filed the Notice of Civil Claim) that it held back, such that anything relevant could realistically be expected to come of this investigation.

Presumably, Hearing Counsel envisions inviting the Panel to draw an inference of bad faith and ulterior motives from the *absence* of evidence over and above what was tendered at the hearing (if that is what the proposed investigation reveals), since it will be impossible to peer directly into Prokam's motives for filing the Notice of Civil Claim without violating solicitor-client privilege.

However, an investigation by Hearing Counsel would not appreciably advance the Panel's consideration of that inference. Suppose that the proposed investigation reveals that the only evidence Prokam had when it filed the Notice of Civil Claim was the evidence that emerged in the 2018 appeal. An inference of bad faith or ulterior motives still would not follow.

Prokam did not file its notice of civil claim without evidence; it filed with evidence that the Panel did not agree substantiated Prokam's allegations. Whether the evidence in question actually establishes the allegations is a different issue from whether bad faith can be inferred from Prokam's reliance upon it. Focusing only on pre-Allegations Review evidence, two examples – which is all that space allows – illustrate.

Take, first, Mr. Guichon's statements in the 2018 appeal as to the role his concerns as a grower with potatoes in storage played in the issuance of the CDOs, his unhappiness upon learning that Prokam had been selling at 22 cents a pound, and his awareness of the implications of Prokam's activities for BCfresh sales into Alberta.[5] The Panel dismissed that as nothing more than the sort of perspective growers are meant to bring to their deliberations.[6] The Court, on adjudication of Prokam's civil claim, may take a different view. But the Panel can surely appreciate, as Supervisory Review Panel did in 2020, that the line between a grower's perspective and improper self-interest is a matter of some nuance.[7] It was not unreasonable – let alone indicative of bad faith – for Prokam to have viewed these admissions as evidence that Mr. Guichon had crossed the line, recklessly if not knowingly, and that it would have the opportunity to obtain additional evidence through the civil discovery process before it was called to account for the allegations that it made.

As to the scope of the BCVMC's power to regulate interprovincial transactions, it was hardly a foregone conclusion that reliance on Mr. Hrabinsky's theory of the matter would prove as compelling an answer to charges of recklessness and wilful blindness as the Review Panel appears to consider it to have been.[8] This is particularly so, given the BCFIRB Appeal Panel's

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[5] Closing argument of Prokam, at paras. 119-123; Exhibit 1, p. 2251:11, 17 [Transcript Extract Book of Prokam, Tab 4]; Exhibit 1, p. 2291:30 - 2291:14 [Transcript Extract Book of Prokam, Tab 84].
[6] Allegations Review Decision, para. 158.
[7] See 2019-20 Supervisory Review Decision, at paras. 77-80, suggesting that a relevant inquiry is whether the interest in question is "no different than the interests of other producers".
[8] Allegations Review Decision, paras. 121, 124

previous treatment of that argument;[9] and how little traction the *Pelland*-based theory appeared to have gotten with the Parliamentary Standing Committee.[10] This Review Panel was not convinced. But it was, again, not unreasonable – let alone indicative of bad faith – for Prokam to have taken a different view.

The simple point is this: Phase II should not proceed on the fictional premise that Prokam filed the notice of civil claim in the *absence* of evidence or based "principally on speculation". At most, what we have here is a legitimate disagreement as to the significance of the evidence that emerged from the 2018 appeal. Such a disagreement is not capable of giving rise to an inference of bad faith or ulterior motives.

Procedurally, two things follow. First, if Phase II were to proceed at all, the issue could and should be dealt with through argument, without any need for an investigation and presentation of findings by Hearing Counsel.

Second, the current exchange also serves as an opportunity to reject, preliminarily, any suggestion that an inference of bad faith or ulterior motives arises from the particular combination of evidence and evidentiary gaps Prokam faced in March of 2021. There is no reason to expect that a further investigation by Hearing Counsel would add anything. The non-complainant participants have had a sufficient opportunity in the circumstances to provide their views. A reply from Hearing Counsel is forthcoming. With that, the Panel can, and should, take this issue off the table.

However, if the Panel is determined to move forward with Phase II, it should simply set a schedule for the exchange of submissions on whether, in the circumstances, filing a notice of civil claim with only the evidence derived from the 2018 appeal gives rise to an inference of bad faith or ulterior motives, and what consequences, if any, should follow.

Proposed exploration of "what damages Prokam says it suffered as a result of the CDOs and the process after the CDOs" (Phase One, Item 4)

There is no mystery as to what damages Prokam says it suffered. They are stated clearly in the draft Notice of Civil Claim: lost revenue from the 30 acres of potatoes left to rot in the field in 2017,[11] and lost revenue from subsequent growing seasons during which Prokam was forced to have BCfresh as its agency and was denied producer-shipper licences as an alternative.[12]

The fact that Prokam did not earn revenue from potato sales for the balance of the 2017 season and thereafter is not controversial. All there is to "explore" is the legal merit of an argument

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[9] 2018 Appeal, at paras. 47-49.
[10] See, in this regard, Prokam's submissions January 17, 2022 regarding the admissibility of the Standing Committee Transcript dated, excerpting the key portions.
[11] Notice of Civil Claim, paragraph 44.
[12] Notice of Civil Claim, paragraphs 45-49.

that the lost revenue is not compensable in damages, on the theory that Prokam was free to market those potatoes in accordance with the General Order[13] – for example, by attempting to sell through BCfresh from 2018-2020.

Again, that is not an argument about the *absence of evidence* of harm or damages. It is an argument about the legal significance of (i) the fact of Prokam's non-sale of potatoes since the issuance of the CDOs, and (ii) the observation that Prokam was not entirely without options during that time.

Whether failure to pursue those options precludes or reduces an award of damages will turn on the application of principles of mitigation, which operate to reduce an award by the amount of any loss that the plaintiff, acting reasonably, could have avoided (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at pp. 579-580). The assessment of what steps would have been reasonable, and how much of the loss would have been avoided, must be undertaken with reference to all of the circumstances (*Gilbert v. Bottle*, 2011 BCSC 202, at para. 202).

Accordingly, this aspect of Phase II can and should be eliminated as well. The only thing that probing the issue in Phase II can possibly accomplish is to reveal a difference of views as to the proper application of mitigation principles in the circumstances. That difference of views:

> (i) *is beyond the Panel's jurisdiction to resolve*. Whatever might be said about BCFIRB's jurisdiction to inquire into the substance of allegations against members of the Commission and its general manager pertaining to their exercise of statutory powers, inquiring into what steps Prokam ought reasonably to have taken, for the purpose of assessing the merits of its claim to damages, is surely beyond the limits of the supervisory power;
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> (ii) *if the Panel did attempt to resolve it, would necessitate a wide-ranging factual inquiry*. Such an inquiry is ill-suited to a procedure in which Prokam's evidence is packaged by Hearing Counsel; and
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> (ii) *will in any event tell the Panel nothing about the motives behind the filing of the Notice of Civil Claim*. Just as the issue of *whether* Prokam had evidence is properly viewed as a difference of opinion over the significance of the evidence Prokam did have, the "absence of evidence of damages" is properly viewed as a difference of opinion over the application of mitigation principles in the circumstances.

Proposed investigation into the relationship between Mr. Dhillon/Prokam and CFP (Phase One, Item 3)

The proposed investigation into the relationship between Mr. Dhillon/Prokam and CFP is similarly pointless. If the Panel intends to consider whether Mr. Dhillon's or Prokam's

[13] Allegations Review Decision, para. 266.

involvement should disqualify CFP (which is the only place this investigation can be expected to go), it is difficult to see that the proposed investigation by Hearing Counsel will add any value.

The existence of an association between Prokam and CFP is public knowledge. More particularly, a public registry search of CFP Marketing Corporation indicates that Mr. Gill and Mr. Dhillon each serve on the six-person board of directors, alongside two independent directors experienced in the area of regulated marketing: Robin Smith (immediate past chair of the BC Chicken Marketing Board) and Alistair Johnston (past chair of the Canadian Dairy Commission and Vice Chair of the B.C. Chicken Marketing Board). Mr. Gill is the president.

It is doubtful that anything would turn on greater specificity, even if any could be expected given that CFP has been denied an agency license and accordingly has yet to actually begin operations in regulated marketing. If the Panel is determined to consider this issue, then it might as well proceed to the exchange of submissions on the above basis.

In any event, the CFP question should also be eliminated as an area of inquiry. It is not open to the Panel to use the results of Phase I to inform the handling of CFP's application, or any other future statutory decisions relating to Prokam, for the reasons set out below.

3. Phase II should not happen

Beyond the fact that any further decisions predicated on the Allegations Review Decision will be invalid because the Allegations Review Decision is invalid (which is a matter for the Court), there are several reasons to abandon the proposal for Phase II.

Jurisdictional issues

Even assuming for the sake of argument that Phase I was a legitimate exercise of the BCFIRB's supervisory power, nothing that can conceivably come out of Phase II will be, at least insofar as it potentially affects Prokam.[14] The jurisdictional problems pertain both to the subject matter of Phase II (whether to draw an inference of bad faith or ulterior motives), and the sorts of orders that might follow.

With respect to the subject matter of Phase II, Prokam agrees with MPL that any inquiry into the motives behind the notices of civil claim falls outside of the BCFIRB's supervisory jurisdiction, and punitive measures – whether in the form of special costs or any directions to the Commission with respect to future regulatory decisions involving Prokam or CFP – all the more so.

[14] Whatever the Commission wishes to discuss about legislative reform is of no concern to Prokam, provided it is not made retrospective – and if the objective is to avoid chilling participation by growers in regulation, there is no reason it would need to be.

We add this: an issue may arise as to the absence of a Notice of Constitutional Question in respect of the right of access to the superior courts recognized in *Trial Lawyers Association of British Columbia v. British Columbia*, 2014 SCC 59; imposing adverse regulatory consequences for having filed a notice of civil claim that an administrative tribunal deems to be unfounded is a contravention of that right. The Panel should handle the issue, should it arise, in the same manner as it was dealt with in Prokam's 2018 appeal: notice is not required so long as the Panel is being asked to interpret the scope of its supervisory authority in conformity with s. 96 of the *Constitution Act, 1867*.[15]

Leaving aside the lack of jurisdiction even to conduct an inquiry into motives, the Panel lacks the jurisdiction to do anything with those findings.

First, the supervisory power does not enable the BCFIRB to order the exclusion of Prokam from the industry; that does not fit within the meaning of the "supervision over a marketing …commission" within the meaning of s. 7.1(1)(a) of the *NPMA*, nor would it be in keeping with the purpose for which supervisory review powers were granted.

Nor does the supervisory power allow the BCFIRB to dictate future BCVMC decision-making so as to achieve that result (*e.g.* by refusing to licence Prokam), or otherwise pre-empt BCVMC decision-making – or, for that matter, the BCFIRB's own decision-making – with respect to Prokam or CFP. That sort of interference with other statutory decision-making processes is not allowed.

Purporting to do so amounts to an attempt to fetter the BCVMC's discretion, which would require statutory authority not found in s. 7.1 of the *NPMA*. The attempt itself is susceptible to a finding of invalidity (*Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.), at paras. 11-15; *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, at paras. 63- 65).

Procedural Fairness

It is impossible for Phase II to be procedurally fair. Short of revisiting the determinations made in Phase I, which the Panel will presumably not be doing, it does not matter how much procedural fairness Prokam is accorded in Phase II. If the Panel wished to leave open the possibility of its Phase I determinations forming the basis for a finding misconduct or bad faith against Prokam, then it was incumbent on the Panel to ensure that Prokam was accorded a degree of procedural fairness commensurate with that outcome. Instead, repeated denial of Prokam's procedural fairness requests on the basis that it was not the one accused of misconduct gave rise to a legitimate expectation that the process would not be allowed to morph into one in which the results became a platform for findings of misconduct – and associated consequences – against Prokam.

[15] See, in this regard, the 2018 Appeal, at paras. 36-37.

It would be a mistake to think that this problem could be solved by narrowing the inquiry to the evidence Prokam had at the time the Notice of Civil Claim was filed (such that Prokam's complaints about the subsequent process might theoretically be said to fall away). The Panel's views of that evidence will necessarily, and inevitably, be coloured by what transpired during Phase I. It is difficult to see how anyone could purge that process from their minds so as to look at the evidence with fresh eyes, with a view to making inferences about Prokam's motivations. In any event, the Panel has already deemed that evidence to be of no significance – a finding that is inseparable from the larger evidentiary context created by the Panel's procedural rulings.

The Panel may be tempted here to avert to previous instances in which it dismissed Prokam's procedural fairness concerns on grounds of a failure to establish what the Panel considered to be a sufficient evidentiary foundation for them. That, too, would be an error. Prokam having found itself in that situation is *itself* a function of the impugned process (*e.g.* being told that cross-examination would make up for any shortcomings in the investigation,[16] only to later have cross-examination truncated, without due regard for to curative role envisioned at the time of the January adjournment ruling). It would be impermissibly circular to cite the absence of evidence emerging during the impugned process to dismiss procedural concerns about the results of the impugned process being recycled in new and prejudicial ways.

Yours truly,

Hunter Litigation Chambers

Per: 

Claire E. Hunter, Q.C.

CEH/APC/jkn

[16] Chair's January 26, 2020 Ruling on adjournment and preliminary matters, at pp. 2-3.