Hunter Litigation Chambers
KAARDAL/SMART/STEPHENS/OULTON/HUNTER

January 18, 2022 File No: 3211.002

**BY EMAIL**

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BV B8W 2H1

**Attention: Wanda Gorsuch**

Dear Sirs/Mesdames:

**Re: Supervisory Review re. Allegations of bad faith and unlawful activity: Response to BCVMC Letter of January 18, 2022**

We write in reply to Mr. Hrabinsky's letter of today's date, in which he states that:

> Prokam appears to assert that the powers vested in Parliament and the provinces are "bifurcated" (as that term was used in *Pelland*), meaning that any regulation having an incidental extraprovincial element will require federal legislative authority, regardless of the dominant purpose of the regulation,

and suggests

> …[I]t would be sensible to address the issue of the state of the law when the export pricing orders were made, as a preliminary matter. ….The Commission respectfully submits that a preliminary resolution of this central question of law would contribute to the efficient resolution of the issues before the BCFIRB.

Prokam does not agree that this "bifurcation" issue the Commission raises should be addressed preliminarily. In fact, Prokam does not agree that the issue arises for determination in this Supervisory Review at all. It is difficult to understand how the Commission could have read either of Prokam's submissions delivered yesterday to suggest otherwise.

For clarity, Prokam's position in respect of the export minimum pricing orders (as set out in both of its submissions delivered yesterday) is that Mr. Solymosi used his office to promulgate the export minimum pricing orders, and Mr. Guichon used his office to issue the cease and desist orders based on purported violation of those export minimum pricing orders, knowing (or being reckless or wilfully blind to) the fact that the export minimum pricing orders were unlawful. As Prokam submitted yesterday, its position in this regard consists of three constituent allegations with respect to Messrs. Solymosi's and Guichon's knowledge,

Hunter Litigation Chambers Law Corporation
2100 – 1040 West Georgia Street, Vancouver, BC V6E 4H1
tel: 604 891 2400 fax: 604 647 4554
www.litigationchambers.com

Claire E. Hunter, Q.C.
direct: 604 891 2403
email: chunter@litigationchambers.com
PRACTICE CONDUCTED THROUGH A LAW CORPORATION

namely that at all material times each of them knew, or were reckless or wilfully blind to the facts:

(a) that the export minimum pricing orders required the exercise of federally delegated legislative authority;

(b) that the exercise of federally delegated legislative authority required adherence to the registration and gazetting requirements; and

(c) that the registration and gazetting requirements had not been complied with in respect of the export minimum pricing orders.

With respect to the allegation set out at paragraph (a) above, there can be no question that the export minimum pricing orders required the exercise of federally delegated legislative authority. BCFIRB already made that finding in the February 28, 2018 appeal:

> 35. Given the length and complexity of the submissions, we find it useful to set out our findings and orders first, with our supporting reasons set out below.
>
> **Finding** **The Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, or to issue any related cease and desist orders respecting such sales. We reach this conclusion because the Commission has not complied with the federal *Statutory Instruments Act*, a step that is required for the Commission to be able to avail itself of the interprovincial price setting authority that is provided by the federal *Agricultural Products Marketing Act* and the *British Columbia Vegetable Order*.**
>
> …
>
> 40. Section 4 of the Scheme makes clear that the Commission's power to regulate marketing is limited to activities "in the Province". Further, to the extent that section 4 of the Scheme includes all of the powers of section 11 of the *NPMA*, we note that it contains an express geographic limitation in relation to the establishment of minimum prices. Specifically section 11(1)(k) provides the power "to set …minimum prices at which a regulated product … may be bought or sold *in British Columbia*" (emphasis added). This is the only provision of section 11 that expressly contains such a limitation.
>
> 41. In our view, for the Commission to apply minimum pricing rules to the transactions at issue here would exceed the authority granted to the Commission by the Scheme, for the following reasons.
>
> 42. A plain reading of section 11 of the *NPMA* and section 4 of the Scheme make clear that the Legislature and the Lieutenant Governor in Council intended to allow minimum pricing rules only *in British Columbia*. Clearly this qualifying

term has to have a purpose – and it only makes sense to interpret this as meaning the Commission cannot set minimum prices at which BC regulated product can be bought or sold outside the province.

43. It is not necessary for us to engage in a complex exercise of finding the "locus" of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.

44. It not necessary for us to rule on whether the General Orders (or any legislation) would fall outside the constitutional competence of the province under section 92 of the *Constitution Act*, 1867 and indeed the appellants have not asked for any such relief. (As such, the *Constitutional Questions Act* has no application.)

45. We do not accept the Commission's argument that "it relies on the plenary powers of section 4 of the Vegetable Scheme and paragraph 11(1)(q) of the Act to establish the minimum price that may be charged by an agency as a means of regulating the returns to producers within the province…" In our view, section 4 of the Scheme includes a clear limitation related to regulation "in the Province". And we do not accept that section 11(1)(q) of the *NPMA* gets the respondent around the clear language in section 11(k) limiting minimum price setting to "in British Columbia". In our view, the power in section 11(1)(q) to make rules and orders necessary or advisable to promote, control and regulate effectively the marketing of a regulated product must be read in concert with section 11(1)(k), which is more specific – and more limiting – in terms of the geographic scope of minimum price setting. If we were to adopt the respondent's arguments in this regard, it would render section 11(1)(k) – and other sections, such as the power to set and collect levies under 11(1)(o) – superfluous.

46. We do not accept the Commission's assertions that the words "within the province" and "in British Columbia" as used in the Scheme and the NPMA should be understood to referentially incorporate expansions that may have occurred *in constitutional law cases*. This is particularly true where, as outlined in the written submissions of the appellants, there is a long series of cases going back many decades which have dealt specifically with the complex interrelationship between federal and provincial aspects of regulated marketing, eventually resulting in an elegant constitutional equilibrium involving integrated federal and provincial legislation. In this regard, we note the following words of the Supreme Court of Canada in a 2005 case dealing specifically with regulated marketing:

> 38. With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards

> and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. .. (*Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292)

47. There is no compelling reason to stretch the interpretation of the provincial regime to find for the Commission authority to regulate minimum prices for product sold outside BC on the basis that such authority would be an integral part of an overall effective regime for management *within* BC. This is because the Commission already has the power to regulate minimum price setting for interprovincial transactions under the federal *Agricultural Products Marketing Act* and the supporting *British Columbia Vegetable Order*.

48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the Statutory Instruments Act. This is accepted by the Commission, which stated in its submission, "in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted". There is no dispute that Commission has not yet done so in respect of any orders related to minimum pricing.

49. These are not minor issues or legal technicalities. Nor are they matters that the Commission can be excused for being unaware of. As the appellants note, the application of, and compliance by the Commission with, the *Statutory Instruments Act* was the subject of considerable discussions before the Standing Joint Committee for Scrutiny of Regulations in late 2007 and early 2008. We pause here to note that the respondent objected to the admissibility of the transcripts of proceedings before this parliamentary committee on the basis of parliamentary privilege. The panel ruled that it was not appropriate to put the documents to the Commission witness and left the broader issues of parliamentary privilege, relevance and weight for closing argument. However, the parties did not raise the issue further in written argument. In the circumstances, the panel has decided that evidence of these proceedings is admissible for the limited purpose of noting that the issue of the requirements of the Statutory Instruments Act has been known to the Commission at least since 2008 when similar provisions were subject to considerable attention in the parliamentary committee.

[Underline emphasis added; bold and italic emphasis in original.]

Thus, BCFIRB has already ruled that:

(a) the export minimum pricing orders required the exercise of federally delegated legislative authority;

(b) the exercise of federally delegated legislative authority required adherence to the registration and gazetting requirements; and

(c) the registration and gazetting requirements had not been complied with in respect of the export minimum pricing orders.

There is accordingly no purpose served by reopening the statements of fact and law set out at paragraphs (a) through (c) above for re-determination (and, with respect, the Commission's attempt to do so in this Supervisory Review is a collateral attack on BCFIRB's February 28, 2019 decision and an abuse of process). The question that arises for determination on this Supervisory Review is whether at all material times Messrs. Guichon and Solymosi knew, or were reckless or willfully blind to, the facts set out at paragraphs (a) through (c) above.

It is Prokam's submission for the foregoing reasons that the Review Panel should decline the Commission's request to have the "bifurcation" issue determined preliminarily, or at all, in this Supervisory Review.

Yours truly,

Hunter Litigation Chambers

Per: 

Claire E. Hunter, Q.C.

CEH/RJA