

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT AND
ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY

SUBMISSIONS OF BC FRESH VEGETABLES INC.

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A. INTRODUCTION

1. On March 25, 2021, Prokam Enterprises Ltd. (“Prokam”) commenced a lawsuit in British Columbia Supreme Court against Mr. Solymosi and Mr. Guichon alleging they are liable in damages for the tort of abuse of public office for alleged misconduct in their respective capacities as General Manager and member of the Commission.
2. On April 23, 2021, MPL British Columbia Distributors Inc. (“MPL”) commenced an action alleging the same tort against several members of the Commission and Mr. Solymosi.
3. Given the ongoing regulatory matters underway at the time the lawsuits were commenced, the irresistible inference was that these lawsuits were commenced for strategic or ulterior purposes and not for the purpose of recovering damages alleged to have been suffered as a result of the conduct of the named defendants. Prokam has adopted a somewhat defensive posture in regard to the commencement of the lawsuit, repeatedly referring to the lawsuit as having been commenced to avoid the expiry of limitation periods (Prokam, Written Submission, para. 9).
4. The inference that the Prokam lawsuit was commenced for strategic or ulterior purposes becomes all the more irresistible when one considers the evidence in this hearing, which fails to support the making of the allegations and the claims for damages in the lawsuit. Even if the minimum export prices should not have been

set (which is not admitted), nothing the Commission did prevented Prokam from shipping potatoes. Prokam's potatoes continued to be shipped after the minimum export prices were set. The Cease and Desist orders did not prohibit Prokam from shipping potatoes, other than for varieties for which Prokam had no delivery allocation (and even there the Commission left the door open for Prokam to apply to ship Kennebecs). Approximately 92% of Prokam's crop had been shipped as of the date of the Cease and Desist orders.

5. Prokam alleges that it left potatoes in the field, without harvesting, after the Cease and Desist orders were issued. This was a matter either of Prokam's choice or a consequence of Prokam having taken the risk of planting in excess of its delivery allocation without storage capacity. The evidence doesn't show that, if not sold to Thomas Fresh, Prokam's potatoes could not have been sold by IVCA. Moreover, any Prokam potatoes sold, other than to Thomas Fresh under the fixed priced contracts, after the dates the minimum prices were set or the Cease and Desist orders were issued, would have been sold at higher prices, increasing returns to Prokam. Deciding not to produce potatoes for the ensuing three years was also a matter of choice by Prokam and not the result of any step taken by the Commission.

6. Most, if not all, of the series of interminable regulatory proceedings at the Commission and the BCFIRB over the last few years relate to events occurring during 2017. During that year, Prokam, IVCA and Thomas Fresh were in non-compliance with the General Orders in the marketing and sale of Prokam's potatoes, over which IVCA had lost control. Prokam was in substantial violation of

the delivery allocation system that is critical to the implementation of orderly marketing (BCFIRB Appeal, 2018). During 2017, the Commission took steps to address these problems. Since then, too much time and effort, that should have been directed to growing and marketing BC produce, has been wasted.

7. It is frustrating that so much time has been spent on the issue of the Commission's authority to issue minimum prices for export when, considered in the context of loss of management control at IVCA and gross over-production by Prokam, the export pricing issue is largely irrelevant and not in any way causally connected to any harm or damages allegedly suffered by Prokam.
8. A review of the Commission's June 14, 2017 letter (Common Book "CB", p. 847), and the concerns and warnings as to possible enforcement proceedings expressed therein, is helpful in showing that, given the path Prokam had chosen for itself, enforcement proceedings against Prokam during the 2017 crop year were inevitable.
9. The commencement of this Supervisory Review, on May, 26, 2021, was welcome news for industry stakeholders concerned that Prokam had commenced litigation making serious allegations of bad faith and self dealing by Commission members and the General Manager.
10. This Supervisory Review can serve an important purpose. It is respectfully submitted, the Review Panel can and should exercise its statutory powers to the extent the Panel finds warranted in the circumstances and make determinations, on the evidence, as to Prokam's allegations that the Commission members and

the General Manager exercised powers of the Commission designed to serve self-interests and acted out of personal animosity.

11. BC Fresh submits the evidence before the Panel does not show that the Commission's powers have been exercised to serve the self interests of the respective Commission members or its General Manager. It has also not been shown that the Commission members or the General Manager have exercised powers due to a personal animosity toward Prokam.
12. Unless otherwise indicated herein, BC Fresh agrees with the submissions of Hearing Counsel.
13. Also, unless otherwise indicated herein, BC Fresh, as a storage crop agency of the Commission, will be addressing its submissions only to the storage crop sector.

B. THE FINAL TERMS OF REFERENCE

14. The Final Terms of Reference ("FTOR") issued on June 18, 2021 under the heading "Scope and Focus" identify that this Review is directed by two objectives: (1) ensuring effective self governance of the Commission and (2) ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector.
15. The FTOR provide that this Review will consider allegations that the Commission's exercise of powers to direct producers to agencies and the issuance of new agency licences have been exercised in a manner designed to further self interests.
16. Further particulars of the allegations for review here include conduct designed to further self interests as described in the FTOR at sub-paragraphs (a) – (c) of

paragraph 1. Paragraph 2 of the FTOR directs inquiry into whether Commission members and staff exercised the Commission's powers in bad faith, for improper purposes and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

17. It is common ground that the BCFIRB does not have jurisdiction to make findings as to whether Prokam has, as a matter of law, a cause of action in tort as alleged in the pleadings in the BC Supreme Court actions. That is an exclusive jurisdiction belonging to the BC Supreme Court. Prokam argues, at paragraph 28 of its Written Submission, that the purpose of this Review, therefore, is to ascertain whether or not there is evidence that the allegations might be made out at a trial in the BC Supreme Court. It is submitted this is incorrect. Just as this Review Panel has no jurisdiction to make a finding as to whether or not the alleged tort was committed, this Panel, with respect, does not have jurisdiction to determine whether on the evidence the BC Supreme Court may or could make a finding that a tort was committed. That, again, is within the exclusive jurisdiction of the BC Supreme Court. There is no jurisdiction to consider whether the tort is made out in full, nor is any purpose served by speculating whether a Court may find that there is some evidence of conduct actionable in civil proceedings for the tort of abuse of public office.

18. The purpose of this Review is not to determine what a Court might or might not find in some future proceeding. It is submitted the FTOR directs the Panel to serve the important public purpose in deciding, on the evidence, whether the Commission or its members have committed the misconduct described as in

paragraphs 1 and 2 of FTOR. This mandate is well within the broad supervisory powers of the BCFIRB enabled by the Natural Products Marketing Act.

19. A determination that the Commission, its members or staff published or enforced minimum pricing orders that they ought to have known were contrary to law does not, without more, respond to the FTOR. The issue, for the purposes of this Review, as prescribed by the FTOR, is whether the powers of the Commission were exercised for the purpose of serving self interests or due to personal animosity.
20. As stated above, it is BC Fresh's submission that the conduct described in the FTOR is not shown on the evidence.
21. The Commission, its members and General Manager are each represented by counsel in this Review who will respond to the various allegations on behalf of those parties. The Panel also has the benefit of the submissions of Hearing Counsel.
22. In these submissions, BC Fresh wishes to stress certain portions of the evidence to assist in placing the facts in issue into proper context. The conduct of the Commission, its members and staff, at the material times, must be considered in the context in which they operated and the substantial and successful interests they are required to protect and advance in the BC storage crop sector.
23. The conduct of Prokam must also be considered in the context of the obligations of a producer to comply with the General Orders in the production and shipping of

regulated product. Consideration of the evidence showing that Prokam had stepped into IVCA's role in marketing and sale of potatoes is an important part in considering the context in which the Cease and Desist orders were issued to address the state of affairs at IVCA.

24. The Commission's "2021 Report Statistical Review" dated April 12, 2022 (Exhibit 40) provides important statistics regarding historical volumes, prices and varieties for BC potatoes.
25. Certain key market information in the report assists in understanding the context in which the Commission and storage crop stakeholders operate, including:
 - (a) The total FOB dollar value for vegetables regulated by the Commission for 2021 was \$390 million. It is an industry of substance, involving significant capital investment, employing thousands of people;
 - (b) The average price at which potatoes sold in 2021 was \$837.00 per ton. This is a 65% increase from 2012 when the price per ton was \$547.00;
 - (c) The average price at which potatoes sold in 2017 was \$781.00 per ton. This equates to an average of approximately .39 cents per pound which is a helpful price to keep in mind when considering Prokam's sales at .22 per pound;
 - (d) In 2012, BC produced approximately 35,000 tons of potatoes and produced approximately 40,000 tons in 2017;
 - (e) In 2021, it is projected that BC produced approximately 65,000 tons of potatoes, a 54% increase from 2012. Annually, the Western US states produces upwards of 12,950,000 tons of potatoes.

**Certain Whole Potatoes, Expiry Review, No. RR-2020-002,
Canadian International Trade Tribunal, para. 58**

Exhibit 40

26. Some of the vulnerabilities of and challenges to the BC potato market were described by Mr. Driediger in his evidence on March 28, 2022 (22/03/28, page 81, lines 2-25). The marketing scheme in place, to advance the interests of orderly marketing, is essential for the survival of the industry as presently constituted and, to its credit, continually growing.

C. PROKAM'S CONDUCT

27. On the evidence, the only parties shown to have misconducted themselves are Prokam, Thomas Fresh and IVCA. As Prokam is the person making the allegations that it was the victim of self-serving conduct and a personal animosity, it is fair and reasonable to consider the conduct of Prokam.

28. The evidence establishes that Prokam's attitude toward the Commission and the General Orders is an attitude of contempt.

29. BC Fresh relies on the following evidence as establishing Prokam's contempt:

(a) Mr. Dhillon, as an officer and director of IVCA, responding to the Commission's requirement that IVCA provide reports on delivery allocation by stating "F**K them" (CB, p. 3416);

(b) Mr. Dhillon asking Brian Meyer of the IVCA to conceal from the Commission Prokam's potato acreage in 2017, knowing that IVCA had been requested by the Commission to provide this information and that IVCA had a duty to respond truthfully (CB, p. 3389);

- (c) Producing and shipping far in excess of its delivery allocation for potatoes in 2016;
 - (d) Producing and shipping approximately 5000 tons of potatoes, again far in excess of its delivery allocation in 2017 of approximately 400 tons (04/02/2022, p. 55, line 6 – p. 56, line 34);
 - (e) Aggressively and disproportionately responding to the Commission's June 14, 2017 (CB, p. 847) letter by way of letter dated July 10, 2017 (CB, p. 891), making unfair and unwarranted accusations and, further, with intent to obfuscate and mislead the Commission, in disregard for the Commission's rights to make enquiries of IVCA and receive truthful responses. Virtually all of the requests of the Commission to IVCA and Prokam in the letter were ignored. Virtually all of the consequences that the Commission advised could result from non-compliance came to pass (CB, pp. 850-851); and
 - (f) Causing IVCA to enter into fixed price agreements with Thomas Fresh for potato shipments from July to November 2017 ("the 60 day forward contracts") in violation of the General Orders, at .22 cents per pound.
30. It is correct that a person can plant a regulated product in excess of their delivery allocation without violating the General Orders. In a growing market, it is commonly and rightfully done, both to grow one's own delivery allocation and, in turn, grow the industry and BC market share. The risk of doing so is, and should remain, with the producer. Regrettably, the consequences of Prokam's excessive planting in 2017 and its disregard for the orderly marketing scheme are being borne by the industry broadly, including multiple proceedings and the cloud of warrantless personal allegations.

31. The General Orders prohibit production and shipping of regulated product in excess of delivery allocation (Part IX, s. 13). Accordingly, the violation occurs when a producer or an agency, without Commission approval, ship produce to market in excess of the producer's delivery allocation. The regulation of the scheme by the Commission reasonably requires the cooperation of agencies and growers, including disclosure of plans for the crop year, including planting intentions. Unfortunately, Prokam has decided that it will grow regulated product but it will not engage in the cooperation legally required by the regulator.
32. The General Orders regulate potatoes by dividing the crop year into four periods (General Orders, Schedule VI). Prokam shipped approximately 5000 tons during Periods A and B and nothing during periods C and D. Certain records of shipments were either destroyed or accidentally erased from the computer operated by Mr. Gill, the IVCA employee hired to sell Prokam's potatoes, with, inexplicably, Prokam paying a portion of Mr. Gill's salary. This 5,000 tons represents a substantial fraction of the BC potato volumes then being marketed. If Prokam's volume is calculated based on 50% of the year where total industry shipments for the full crop year were approximately 40,000 tons, Prokam's 5,000 tons would represent approximately 25% of the market at the time when Prokam was selling "out of the field". Even if Prokam's volume is compared to the BC volume for the full 2017 crop year of approximately 40,000 tonnes, (which would not accurately reflect the relative volumes then at market), Prokam's volume would represent approximately 12.4% of total BC production.

33. A further market factor arises from this substantial volume of potatoes being sold at a (mistakenly) low price early in the crop year, in August and September. These sales impact ongoing marketing efforts and pricing for the remainder of the year, making it all the more challenging and, in turn, reducing returns to producers throughout the crop year, all as a result of Prokam not abiding by the General Orders.
34. There is no evidence that setting the minimum export price in August was designed to further self interests or was an act of personal animosity. Prokam's first line of defence in regard to the minimum export prices was that they were confidential as between the Commission and agencies and, in the result, as a producer, Prokam wasn't aware of the minimum export prices and kept shipping at lower prices.
35. In September and October, 2017, the management of IVCA was asking for help and the marketing and sale of a significant portion of the BC potato crop presently in the market did not appear to be in the control of the agency. It is patently obvious, on the evidence, that there was a problem afoot at IVCA relating to Prokam's potatoes. It was in this context that the Commission moved forward with enforcement of the General Orders by way of the Cease and Desist orders. On the evidence, that was a reasonable thing for the Commission to do. It is suggested by Prokam that Mr. Solymosi recommended the Cease and Desist orders to support his view that Prokam was a non-compliant producer. The evidence confirms, as did the findings of the BCFIRB in the 2018 appeal, Mr. Solymosi's opinion in this regard. It is suggested Mr. Guichon acted out of self interest in considering the state of 'potatoes in the shed.' Thinking like a producer is what

Mr. Guichon is supposed to do as a Commission member. It is why he held the position as Commission member.

36. Prokam was not entitled to cause IVCA to enter into the 60 day forward contract with Thomas Fresh. As stated by in a letter from IVCA's lawyer to the Commission on December 6, 2017 (CB, p. 1354-5), IVCA did not learn Mr. Gill had entered into the fixed price contracts for the sale of Prokam potatoes to Thomas Fresh until late in the fall of 2017. Prokam is responsible for consequences resulting from this contract and concealing the contract from the Commission and IVCA. If the contract had been disclosed and approval sought as required, the Commission would not (in consultation with Brian Meyer, IVCA's general manager) have set a minimum price for export sales in August, 2017. BC Fresh would have been the sole agency selling at market in Alberta at that time, making it unnecessary to set a minimum price in the interest of orderly competition between agencies. Once again, Prokam, by its deception, is the author of these problems.
37. In regard to the Cease and Desist orders, as reflected in the language of the orders, the main purpose was to get the business of IVCA securely back into the hands of management.
38. Prokam's suggestions that BC Fresh treated it unfairly in discussions in the spring of 2018, or during the three years when the Grower's Marketing Agreement was in place, are completely contradicted by the evidence of Mr. Driediger and confirmed by the letters sent to Prokam by BC Fresh in 2018 and 2020 (Exhibit 26).

39. In his evidence, Mr. Dhillon stated that BC Fresh was only prepared to work to increase Prokam's delivery allocation for russets. The March 5, 2020 letter shows that evidence is false as the letter reflects a more than reasonable plan for developing and growing Prokam's delivery allocation for coloured potatoes as well as russets and Kennebecs.
40. Mr. Dhillon, at an early stage, in 2018, stated Prokam would never ship to BC Fresh. Why was Mr. Dhillon then engaging in discussions with BC Fresh in 2018? (CB, p. 1498). In any event, the communications between BC Fresh and Prokam in 2018 and subsequently are not within the scope of the FTOR.
41. There is no evidence that, in directing Prokam to BC Fresh, the Commission members who made that decision were serving their own interests or that it was an act driven by a personal animosity. It is not clear whether Prokam's strategy is to attempt to show that others were trying to curtail Prokam's production of potatoes or were trying to obtain Prokam's production for their own benefit. Both are false and unsupported by the evidence.
42. The only personal animosity revealed in the evidence is on the part of Prokam toward BC Fresh. This is explained by Mr. Dhillon's apparent dissatisfaction with BC Fresh having applied the delivery allocation rules in selling cabbage grown by Mr. Dhillon's father in years past. Mr. Dhillon's evidence in the BCFIRB 2018 appeal was that BC Fresh would sell Prokam's early product (ie. before other product became available) and then, as other producers started shipping, BC

Fresh “would start following delivery allocations and - - and that just doesn’t - - it wouldn’t work for us.” (04/02/2022, p. 69, lines 5-18).

43. In 2018, BCFIRB found that the Commission, in considering and addressing the state of affairs in 2017 had placed too much weight on IVCA’s cooperation with the Commission thus reducing IVCA’s share of responsibility for the misconduct afoot as between IVCA and Prokam in 2017. In this Review, Prokam has focused on the misconduct of IVCA. However, highlighting IVCA’s misconduct, in circumstances where Prokam usurped IVCA’s management responsibilities, does not establish that the Commission, its members or staff were acting for the purpose for furthering their own self interests or acting out of personal animosity against Prokam

D. BAJWA FARMS LTD

44. The evidence from Mr. Driediger, as confirmed by the emails in evidence from Bajwa Farms Ltd. to BC Fresh, establishes that at all times, BC Fresh and Mr. Driediger and the other BC Fresh employees acted with courtesy and respect for all members of the Bajwa family and Bajwa Farms Ltd., including during a difficult time for the Bajwa family (Transcript 03/28/2022, p. 69, lines 1-41).
45. Mr. Driediger’s email to Mr. Solymosi, reporting the information he received from Mr. Bajwa, makes it clear that the situation was complicated, for a variety of reasons, and that it was a problem for the Commission to resolve (CB, p. 4455). Clearly, following Mr. Driediger’s phone call with Mr. Bajwa, additional important

information came to light, specifically, the cabbage in issue belonged to van Eekelen Farms.

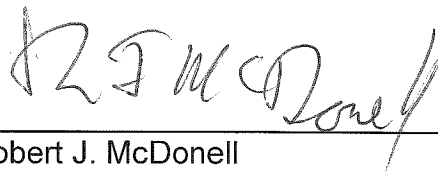
46. What is missing in the Bajwa Farms Ltd. submission is the lack of evidence that Bajwa Farms Ltd. or Ms. Bajwa owned the cabbage that Bajwa Farms says is at the heart of the controversy.
47. The fact that the subject cabbage was owned by van Eekelen appears, as between Bajwa Farms, Mr. Bajwa and van Eekelen, to resolve the controversy over this particular cabbage (CB, p. 4590).

E. CONCLUSION

48. As stated above, BC Fresh looks forward to this Review enabling the industry to move forward from the events of 2017 regarding Prokam.
49. BC Fresh wishes to reserve its position on costs until such time as the Panel makes its determinations on this Review.

June 13, 2022

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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