BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

CLOSING ARGUMENT OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

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PART I - INTRODUCTION

1. The British Columbia Vegetable Marketing Commission (the "Commission") is neither a complainant nor a respondent with respect to the allegations of bad faith and unlawful activity that are the subject of this supervisory review. Nevertheless, the Commission has been profoundly impacted by these allegations.

2. The Commission adopts the submissions of hearing counsel and the respondent participants. This is addressed in more detail in Part II of this submission.

3. The Commission's supplementary submissions are set out in Part III of this submission. These include submissions regarding the impact of the unsubstantiated allegations and actions that ought to be taken by the BCFIRB as a consequence of this supervisory review.

PART II - SUBMISSIONS ADOPTED BY THE COMMISSION

General

4. The Commission adopts the following general submissions made by hearing counsel and by the respondent participants regarding the absence of any cogent evidence to support the very serious allegations made by the complainant participants:

(a) There is no cogent evidence to support any of the very serious allegations in the terms of reference. The evidence amounted in the main to no more than the speculation of the complainant participants, and insufficient evidence emerged to support the inferences that the Panel is asked to make, notwithstanding extensive cross-examination of multiple witnesses.

[Closing Argument of Hearing Counsel, par. 6]

(b) Allegations of misuse of public power must be advanced, scrutinized and resolved with caution and restraint. The reason is that the tort is intended to provide redress for egregious intentional misconduct and not for what may be, at worst, maladministration, official incompetence or bad judgment. An allegation that a public official abused his or her office for an ulterior motive is an extremely serious claim and proof commensurate with the seriousness of the alleged wrong is required. Misfeasance in public office is among the most egregious of tortious conduct and it carries with it the “stench of dishonesty”. As a result, the ambit of the tort is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged.

[Closing Argument of Hearing Counsel, par. 22 - 24]

[Written Submissions of the Commissioners, par. 2, 3, 74 - 75]

(c) The allegations made by Prokam and MPL can be properly characterized as allegations of corruption.

[Closing Argument of Hearing Counsel, par. 33]

(d) Mr. Solymosi is not a Commission member and does not have the authority to make decisions about issuing any orders. He can make recommendations to Commission members and Commission members are empowered to make decisions.

[Closing Argument of Hearing Counsel, par. 74]

Prokam Allegations

5. The Commission adopts the following submissions made by hearing counsel and by the respondent participants regarding the allegations made by Prokam:

(a) There is no proper basis to infer that Mr. Solymosi's conduct was corrupt.

[Closing Argument of Hearing Counsel, par. 111 - 112]

(b) In June 2017, Prokam was specifically warned that it was producing and shipping far in excess of its DA. Instead of responding to address the matter, the response letter written by IVCA and Prokam on July 10, 2017 took the position that they were doing nothing wrong and levelled serious but completely unsupported allegations against the Commission.

[Closing Argument of Hearing Counsel, par. 113]

[Written Submissions of Andre Solymosi, par. 13]

(c) In the circumstances, the reference by Mr. Solymosi to Prokam as a "rogue producer" in an email dated September 27 does not establish that

Mr. Solymosi was acting in a corrupt manner. Mr. Solymosi had a reasonable basis to make this characterization.

[Closing Argument of Hearing Counsel, par. 114 - 118]

[Written Submissions of Andre Solymosi, par. 9 - 21; 32 - 38]

[Submissions of BCfresh, par. 27 – 33]

(d) With regard to the fact that Mr. Solymosi only obtained information from IVCA in his investigation and did not contact Prokam, there may be a basis to argue that he conducted a flawed or incomplete investigation, but it is not a basis for arguing that the investigation constituted corruption.

[Closing Argument of Hearing Counsel, par. 119]

[Written Submissions of Andre Solymosi, par. 39 - 45]

(e) The then appointed Chair of the Commission, Mr. Krause, who was part of the investigation process in that he was at the October 3, 2017 meeting with Mr. Meyer and Mr. Michell, corroborated Mr. Solymosi's views about the intent being to bring orderly marketing back to the control of IVCA.

[Closing Argument of Hearing Counsel, par. 120]

(f) There is no evidence of malice towards Prokam or that Mr. Solymosi intentionally set out to hurt Prokam knowing that he had no proper basis to issue the C&D Order.

[Closing Argument of Hearing Counsel, par. 121]

[Written Submissions of Andre Solymosi, par. 72 – 74; 76]

(g) The suggestion that Mr. Solymosi promised to protect IVCA's license in exchange for information concerning Prokam is speculation. Mr. Solymosi explained the email in question by focusing on the fact that he was concerned about the agency, and his focus was on getting the agency to comply. He was not improperly protecting the agency as a favour because he wanted to obtain information to punish Prokam.

[Closing Argument of Hearing Counsel, par. 122]

[Written Submissions of Andre Solymosi, par. 46 - 48]

(h) The content of the final C&D Order issued against Prokam is consistent with Mr. Solymosi's evidence that his goal was to give control back to IVCA. Hearing counsel took Mr. Dhillon through the C&D Order, and established that the terms of the Order were how the sales should function in any event, with the agency having control over the sales function.

[Closing Argument of Hearing Counsel, par. 123]

[Written Submissions of Andre Solymosi, par. 25 - 31]

[Submissions of BCfresh, par. 37]

(i) Prokam alleges that Mr. Solymosi engineered the November 10, 2017 letter written by the agency managers and that he failed to provide that letter to Prokam before the show cause hearing. It is alleged that this is evidence of corruption. However, the evidence shows that Mr. Driediger prepared the content of the letter, circulated it to other Agency managers who signed it and the signed letter was provided to Mr. Solymosi. Mr. Solymosi had no involvement in any way in asking for the letter or preparing the content of the letter. Further, there is no basis to claim the failure to provide one piece of evidence to Prokam constitutes corruption. While Mr. Solymosi likely should have provided the letter to Prokam before

the show cause hearing, his failure to do so does is, at best, an error. This error was brought to the attention of BCFIRB at the appeal hearing and Prokam had the opportunity to complain of this error and to seek a remedy.

[Closing Argument of Hearing Counsel, par. 130 - 134]

(j) There is no evidentiary basis upon which this Panel could draw any inference or conclusion that Mr. Solymosi improperly influenced VIFP's decision not to represent Prokam as an agency.

[Closing Argument of Hearing Counsel, par. 135 - 138]

(k) A key allegation made against Mr. Solymosi is that he knew that the Export Minimum Price the Commission set on August 8, 2017 was invalid because it required registration and Gazetting before the Commission could set the minimum price. The difficulty with Prokam's allegation is that there was no determination on this point until BCFIRB's decision of February, 2019. As much as Prokam tried to establish that there was a settled belief or view that from 2008 onwards the Commission knew that it did not have authority to set interprovincial levies or prices without registration and Gazetting, the fact is that the issue was never determined and there was no such general knowledge among Commissioners. Moreover, and importantly, Mr. Solymosi testified that he genuinely and honestly believed that at all times the Commission had the jurisdiction to set prices for British Columbia storage crop even if that crop was being exported. Mr. Solymosi repeated this perspective throughout rigorous and extended cross-examination. His evidence was sincere and strongly held.

[Closing Argument of Hearing Counsel, par. 139 - 161]

[Written Submissions of the Commissioners, par. 93 – 111]

[Written Submissions of Andre Solymosi, par. 22 - 24]

(l) Other than speculation, there is no basis for a claim that Mr. Guichon's conduct in consenting to the C&D Orders constituted corruption. There is no evidence that he acted with malice towards Prokam.

[Closing Argument of Hearing Counsel, par. 162 - 168]

[Written Submissions of Commissioners, par. 81 – 82]

(m) Whether Mr. Guichon was correct or incorrect as a matter of law about whether he should have recused himself from any participation in discussions about Prokam is not relevant. The issue is whether Mr. Guichon intentionally participated in discussions knowing that he was acting inappropriately and he did so for the purpose of harming Prokam. In that regard, the evidence is clear. Mr. Guichon participated in some discussions at the Commission decision-making level concerning Prokam. But, he did so on the advice of the then Chair of the Commission, and genuinely believing that as long as he absented himself from deliberations and decisions, he was acting appropriately and not contrary to any conflict of interest policy. There is no evidence whatsoever that Mr. Guichon participated in discussions concerning Prokam knowing that he was acting unlawfully or because he intentionally intended to cause harm to Prokam. Stated more simply, there is no evidence that Mr. Guichon's participation in discussions about Prokam constituted corruption.

[Closing Argument of Hearing Counsel, par. 169 - 177]

[Written Submissions of Commissioners, par. 82 – 84, 112 - 115]

(n) There was no evidence that Mr. Guichon was aware or thought that the Commission could not set prices for exports without compliance with the federal *Statutory Instruments Act*.

[Closing Argument of Hearing Counsel, par. 169 - 177]

[Written Submissions of Commissioners, par. 85 – 92]

MPL Allegations

6. The Commission adopts the following submissions made by hearing counsel and by the respondent participants regarding the allegations made by MPL:

(a) Concerning the allegations made against Mr. Solymosi, initially Mr. Mastronardi suggested that Mr. Solymosi acted improperly by delaying the Commission's consideration of MPL's application and/or contributing to delaying the lifting of the moratorium. However, in cross-examination, Mr. Mastronardi acknowledged that Mr. Solymosi was not a decision maker and had no control over the Commission panel making decisions. Further, Mr. Mastronardi acknowledged that Mr. Solymosi had no control over when the panel made decisions unless Mr. Solymosi delayed getting information to the panel, but he had no evidence that Mr. Solymosi had done so. Finally, Mr. Mastronardi acknowledged that Mr. Solymosi was not responsible for any delay between September 18, 2020 and March 5, 2021, and the only thing Mr. Solymosi did wrong was his tone on the phone. In sum, MPL has no evidence that Mr. Solymosi did anything wrong. The suggestion that his tone of voice on the phone constitutes misfeasance is frivolous. There is no evidence from which this Panel could draw a conclusion or even an inference that Mr. Solymosi's conduct was corrupt.

[Closing Argument of Hearing Counsel, par. 187 - 191]

[Written Submissions of Andre Solymosi, par. 49 – 55; 72 - 74]

(b) The allegation that the MPL Defendants imposed a moratorium on Agency applications in June 2019 because they knew that MPL would eventually

want to make an Agency application in British Columbia is entirely without merit. As a starting point, Messiers Guichon and Gerard did not even participate in the decision to impose the moratorium. Further, the reason for the imposition of the moratorium is set out clearly in the Commission's June 28, 2019 decision. The reasons were that the Commission felt it was important to complete a strategic review and agency review. Finally, in June 2019, there was no agency application from MPL. In fact, MPL made its agency application in September 2020, more than a year after the moratorium was imposed. The suggestion that the Commission knew that MPL might be interested in making an agency application at some point in time, and therefore as a prophylactic the Commission diabolically made up a reason to impose a moratorium in June 2019, is entirely frivolous.

[Closing Argument of Hearing Counsel, par. 193 - 196]

[Written Submissions of Commissioners, par. 119 – 121]

(c) There is no evidence whatsoever that the failure to lift the moratorium had anything to do with MPL. On October 21, 2020, approximately a month after MPL first made its Agency application, the Commission considered lifting the moratorium because it had received a letter from BCFIRB stating that the moratorium should be lifted. The minutes of the October 21, 2020 meeting reflect the reasons why the moratorium was not lifted at that time, namely the Commission felt it was still important for it to complete the agency review and strategic review in order for it to implement amendments for the process for any agency application. All of the MPL Defendants were at that meeting and testified that there was no substantive discussion whatsoever about MPL's Agency application or any suggestion that the moratorium should not be lifted in order to delay consideration of MPL's application. MPL only speculates that the MPL Defendants intentionally chose not to lift the moratorium in order to delay consideration of MPL's agency application. It is just that: speculation. The

actual evidence is to the contrary. In cross-examination, it was put to Mr. Guichon that one of the concerns that existed at the time MPL was seeking to lift the moratorium to have the Commission consider its application, was that if the Commission reviewed the MPL application before promulgating the final agency application rules, the Commission might well be accused of tailoring those rules in response to the particular application. Mr. Guichon agreed with that proposition. It is also noteworthy that MPL appealed the Commission's decision not to lift the moratorium to BCFIRB and was unsuccessful. Finally, on March 15, 2021, after completion of its reviews, the Commission created Amending Order 54 amending Agency application requirements. On May 27, 2021, the Commission received MPL's amended application, which was amended to comply with Amending Order 55. Then, on December 21, 2021, the Commission issued a decision approving MPL's application and requesting BCFIRB's prior approval. The evidence and the chronology confirm the Commission's reasons to complete its strategic and agency review before considering any agency applications. It had nothing to do with intentionally trying to delay MPL's agency application as alleged.

[Closing Argument of Hearing Counsel, par. 197 - 205]

[Written Submissions of Commissioners, par. 122 – 125]

[Written Submissions of Andre Solymosi, par. 56 – 58; 78]

(d) MPL's allegation that the MPL Defendants refused to recuse themselves from the consideration of MPL's agency application is without any evidentiary foundation. All of the MPL Defendants confirmed that: they were not on any panel which was struck to consider MPL's application (except for Mr. Guichon who initially was on the panel but later was removed because his term as a Commissioner ended); they never saw the MPL Agency application; they did not discuss MPL's application with any

other Commissioners; no other Commissioners asked for their opinion on the MPL Agency application; and they did not have any decision-making role in MPL's Agency application.

[Closing Argument of Hearing Counsel, par. 207 - 208]

[Written Submissions of Commissioners, par. 126]

(e) There is no factual foundation for MPL's "vote swapping" allegation. Mr. Mastronardi could not identify a single decision made by the Commissioners where there was this alleged vote swapping arrangement. He testified that many of the allegations raised in MPL's NOCC were based on information received by him from Mr. Ravi Cheema. However, Mr. Cheema did not provide any particulars of the allegations. Instead, the allegations were of a general nature, and were based on his feelings and rumours. In contrast, each of the MPL Defendants: (a) denied there was any vote swapping arrangement in the strongest terms; (b) denied they had ever been asked to vote in any particular way by other of the MPL Defendants; and (c) denied that they ever even exchanged views on MPL's application with the other MPL Defendants.

[Closing Argument of Hearing Counsel, par. 209 - 222]

[Written Submissions of Commissioners, par. 130 – 132]

(f) There is no proper basis for the allegation that Mr. Reed interfered with an application by Mr. Cheema (by his company Fresh4U) to the Commission as a way of also interfering with MPL because Mr. Reed was aware that Mr. Cheema was a supporter of MPL.

[Closing Argument of Hearing Counsel, par. 223 - 227]

[Written Submissions of Commissioners, par. 127 – 129]

(g) Whether Mr. Newell was opposed to MPL at any time is largely irrelevant because there is uncontradicted evidence that at no time did Mr. Newell have any discussions, decision-making involvement or in any other way consider MPL's Agency application. Nor did he discuss MPL's Agency application with any other Commissioners. Therefore, even if Mr. Newell was opposed to MPL coming into British Columbia (which he denies), he did not act on that sentiment. Even if MPL could establish that Mr. Newell has always been concerned about MPL's entry into British Columbia, it is clear he did not act on that perspective as a Commissioner. As a result, the email chains in Exhibit 38 cannot form the basis of a claim of corruption against Mr. Newell.

[Closing Argument of Hearing Counsel, par. 228 - 233]

Bajwa Farms Allegations

7. The Commission adopts the following submissions made by hearing counsel and by the respondent participants regarding the allegations made by Bajwa Farms:

(a) There is no evidence to claim that Mr. Solymosi or the Commission acted improperly vis-à-vis Bajwa Farms. The Commission did not favour Mr. Bajwa over Ms. Bajwa. The Commission accepted the facts as were communicated to it, and the Commission made the proper decision to state that Mr. Bajwa could not use the DA of Bajwa Farms to sell his cabbage. Far from being improper, this was the correct decision.

[Closing Argument of Hearing Counsel, par. 235 - 263]

[Written Submissions of Commissioners, par. 133 – 137]

[Written Submissions of Andre Solymosi, par. 59 – 64; 72 – 74; 77]

PART III - SUPPLEMENTARY SUBMISSIONS OF THE COMMISSION

The "Gazetting" Issue

8. Hearing counsel correctly notes that the difficulty with Prokam's allegation is that there was no determination regarding the requirement to "Gazette" extra-provincial pricing orders until BCFIRB's decision of February, 2019. Thus, there is no basis to assert that the Defendants should be retroactively vested with knowledge of that ruling before it was made.

9. Moreover, the Commission's position prior to the BCFIRB's decision of February, 2019 was neither frivolous nor artificial [See also: Written Submissions of the Commissioners, par. 93 – 111]:

   (a) At all material times, the Commission expressly acknowledged that orders requiring federal legislative authority must be "Gazetted". In particular, the Commission made extensive submissions with respect to this requirement in its Written Submissions dated August 13, 2018 filed in the matter of *Prokam et. al. v. BCVMC* (Files: N1715, N1716, N1718, N1719). (See: **EXHIBIT 1 at pages 4060 - 4062**).

   (b) The Commission's position was further articulated as follows (See: **EXHIBIT 1 at page 4064**):

> 82. …if the minimum price orders are made in relation to "property and civil rights in the province", they are valid. Conversely, if the minimum price orders are made in relation to "the regulation of trade and commerce", they are invalid.

   (c) Twenty-two pages were devoted to the Commission's analysis of its authority in its Written Submissions dated August 13, 2018 filed in the matter of *Prokam et. al. v. BCVMC* (Files: N1715, N1716, N1718, N1719).

(See: **EXHIBIT 1 at pages 4059 - 4081**). With respect to its minimum export pricing orders, it was the Commission‘s position that:

(i) The scope of the *Natural Products Marketing (BC) Act* (the “NPMA”) and the *Agricultural Products Marketing Act* (the “APMA”) must be understood within the context of the *Constitution Act, 1867*. The terms of the NPMA and the APMA cannot alter the division of powers conferred on Parliament and the Provinces under the *Constitution Act, 1867*. Thus, the constitutional context arising under sections 91 and 92 of the *Constitution Act, 1867* is the first order of any valid interpretational analysis.

(ii) The minimum export pricing orders, which are applicable only to British Columbia Agencies, were made for the purpose of preventing unwanted inter-Agency competition that would impede the maximization of returns for British Columbia Producers. Consequently, the minimum export pricing orders were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely, the regulation of property and civil rights within the Province within the meaning of subsection 92(13) of the *Constitution Act, 1867*.

(iii) Application of the "pith and substance doctrine" means that the mere fact that the Commission's minimum export pricing orders apply to "interprovincial transactions" is dispositive of nothing. It is the dominant purpose of the regulation that matters - not its incidental affect.

(iv) Parliament is not competent to enact laws in furtherance of the regulation of property and civil rights in the Province. Consequently, the APMA could not provide authority to promulgate minimum export pricing orders imposed exclusively on British Columbia

Agencies for the purpose of preventing unwanted inter-Agency competition that would impede the maximization of returns for British Columbia Producers.

(v) The Commission had the power and authority pursuant to the *Natural Products Marketing (BC) Act* and *Scheme* to promulgate the minimum export pricing orders in furtherance of the purpose as described above, and in particular:

A. It was the intention of the Legislature to make available to commodity boards the full scope of regulatory powers within the constitutional competence of the Province as are necessary to provide for the effective promotion, control and regulation of the marketing of natural products;

B. The words “Without limiting other provisions of this Act“, as they appear in subsection 11(1) of the NPMA, should not be interpreted to mean “limiting other provisions of this Act”; and

C. Federal legislative authority under the APMA was not required to support the minimum export pricing orders as described above. More specifically, the minimum export pricing orders imposed by the Commission against British Columbia Agencies were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely, to prevent unwanted competition among British Columbia Agencies that would impede the maximization of returns for British Columbia Producers. Consequently, these orders did not require federal legislative authority under the APMA, and therefore did not need to be “Gazetted” under APMA.

10. Finally, it is respectfully submitted that it would go too far to suggest that the Commission should have anticipated the BCFIRB's February, 2019 decision regarding the requirement to "Gazette" the extra-provincial pricing orders [See also: Written Submissions of the Commissioners, par. 93 – 111]:

(a) The BCFIRB's February, 2019 decision appears to deviate substantially from well-established constitutional jurisprudence emphasizing the necessity to engage in a "pith and substance" analysis as an essential starting point. See: *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292; *R. v. Comeau*, [2018] S.C.J. No. 15.

(b) The BCFIRB's February, 2019 decision appears to reflect a reversal from positions previously expressed by it regarding the extent to which orders made pursuant to Provincial authority may incidentally bear on extra-provincial transactions. See: Letter from BCFIRB to Joint Standing Committee dated March 11, 2008 (**EXHIBIT 5 at page 131 – BCVMC-A-06259 and at page 132 – BCVMC-A-06260**); See also: Email from Wanda Gorsuch to Andre Solymosi dated October 18, 2017 (**EXHIBIT 5 at page 1207**).

(c) The BCFIRB's February, 2019 decision appears to reflect a territorially "bifurcated" view of Provincial and Federal legislative authority (i.e., that a regulation affecting intra-provincial transactions is a matter within provincial jurisdiction, regardless of the dominant purpose of the regulation; and that a regulation affecting inter-provincial or export transactions is a matter within federal jurisdiction, regardless of the dominant purpose of the regulation). This approach was expressly rejected by the Supreme Court of Canada in *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292.

(d) The BCFIRB's February, 2019 decision appears to "read down" the scope of the *Natural Products Marketing (BC) Act* in a way that would deprive

commodity boards of the authority to make extra-provincial pricing orders in furtherance of the regulation of property and civil rights. This is arguably inconsistent with the cooperative federalism "blueprint" that has been in place since 1978, as established by the Supreme Court of Canada in *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198. That decision establishes that the full scope of provincial and federal authority must be vested in a commodity board if the market is to be regulated effectively. As the Commission argued in its written submissions, "a more restrictive interpretation would be antithetical to the principle of cooperative federalism, which requires that commodity boards be able to exercise the full scope of legislative authority available to both the Province and Parliament."

(e) The BCFIRB's February, 2019 decision held that the APMA would provide legislative authority for the minimum export pricing orders, regardless of their "dominant purpose", and notwithstanding that Parliament does not have the constitutional competence to make extra-provincial pricing orders in furtherance of the regulation of property and civil rights:

> 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. (emphasis added)

Bajwa Farms Allegations

11. At paragraph 4 of its written submissions, Bajwa Farms asserts that the Commission "ignored the interests of Nupinder and Bajwa Farms and facilitated the marketing of cabbage despite being aware of Nupinder's concerns that Harjeet grew the cabbage in breach of his fiduciary obligations."

12. At paragraph 16 of its written submissions, Bajwa Farms asserts that the Commission should have "directed" Harjeet to negotiate terms with Nupinder on which the cabbage could be marketed using Bajwa Farms' delivery allocation.

13. At paragraphs 132 and 136 of its written submissions, Bajwa Farms again asserts that the Commission "chose not to intervene on Bajwa Farms' behalf" and thereby "acted in bad faith, without procedural fairness, and based on personal animosity."

14. In essence, Bajwa Farms' complaint against the Commission is that it did not act as an advocate for Nupinder and Bajwa Farms in relation to the civil dispute with Harjeet. However, it is not the role of the Commission to act as an advocate for or against parties engaged in a civil dispute. Indeed, Nupinder and Bajwa Farms were at all material times represented by legal counsel. Any responsibility to "intervene of Bajwa Farm's behalf", or to "negotiate [the] terms… on which the cabbage could be marketed using Bajwa Farms' delivery allocation" resides with legal counsel for Nupinder and Bajwa Farms – not with the Commission.

15. Furthermore, the mere existence of a civil dispute cannot provide a basis to preclude Harjeet or Van Eekelen from growing cabbage without delivery allocation. If Nupinder or Bajwa farms had some kind of enforceable interest in

the fruits of Harjeet's or Van Eekelen's labour, then it would be open to them to seek enforcement of that interest (presumably with the assistance of their own legal counsel) in an appropriate forum. The Commission is not the appropriate forum for the resolution of such civil claims, and it is not responsible for any failure to so "intervene on Bajwa Farm's behalf". Again, that responsibility resides with legal counsel for Nupinder and Bajwa Farms – not with the Commission.

16. Finally, it is to be noted that if Nupinder or Bajwa Farms were aggrieved by any decisions taken by the Commission in relation to Harjeet or Van Eekelen, they had an opportunity to appeal such decisions. Nevertheless, they elected not to pursue any such appeal within the prescribed limitation period.

The Allegations and their Impact

General

17. If there was evidence commensurate with the serious nature of the allegations, it would be a simple matter for the complainant participants to present that evidence to the panel. They have not done so.

[See also: Written Submissions of the Commissioners, par. 4]

18. In what can only be regarded as a tacit admission of its failure to substantiate its allegations, MPL is now apparently attempting to recast its allegations in even more nebulous terms. It says that the Commission "is broken" and that there are rumours of "a loss of trust and confidence in the Commission" and "corruption at the top" (MPL submissions, par. 1 and 2). That these specious insinuations are made only serves to underscore the absence of any cogent evidence commensurate with the seriousness of the alleged wrongs.

19. Prokam, on the other hand, attempts to deflect from its inability to present evidence by claiming that it was impeded from doing so by the supervisory process itself.

20. Hearing counsel correctly and accurately asserts at paragraph 6 of his written submission that “there is no cogent evidence to support any of the very serious allegations in the terms of reference. The evidence amounted in the main to no more than the speculation of the complainant participants, and insufficient evidence emerged to support the inferences that the Panel is asked to make, notwithstanding extensive cross-examination of multiple witnesses.”

The Context in which the Allegations were Made

21. It is essential to note that these unsubstantiated allegations were made by Prokam, Bajwa Farms and MPL in a context where both Prokam and MPL have been seeking relief from the Commission, either directly or, in the case of Prokam, through a related company, CFP.

22. The Commission respectfully submits that there is only one inference that can be drawn in the circumstances. These unsubstantiated allegations of bad faith and misfeasance were made for strategic purposes, namely, to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission. See also: Written Submissions of Andre Solymosi, par. 79 and Submissions of BCfresh, par. 3 and 4.

Summary

23. In summary, the Commission submits that the conduct of the complainant participants in making these unsubstantiated, serious allegations is a low point in the history of regulated marketing in the Province. Here, the complainant participants have advanced the most serious allegations that can be made against public officials. The supervisory review has revealed that the complainant

participants have been unable to present any cogent evidence commensurate with the seriousness of the alleged wrongs, despite having been given every opportunity to do so. It is concerning that this has occurred in a context where both Prokam and MPL have been seeking relief from the Commission, either directly or, in the case of Prokam, through a related company, CFP. The unfortunate inference to be drawn is that these unsubstantiated allegations of bad faith and misfeasance were made for strategic purposes, namely, to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission. See also: Written Submissions of Andre Solymosi, par. 79 and Submissions of BCfresh, par. 3 and 4.

Impact

24. The impact of these allegations cannot be overstated:

(a) The expense to the Commission has been significant.

(b) The time spent in relation to these unsubstantiated allegations has significantly detracted from the Commission's ability to address real and substantive regulatory issues.

(c) For more than a year, the Commission has been deprived of access to knowledgeable Commission members and to its General Manager, in relation to issues advanced by Prokam, CFP, MPL, and any of their principals or affiliated companies. Though all commodity boards rely extensively on their senior executives to facilitate decision-making, Mr. Solymosi's role has been reduced to that of a secretarial function in relation to the complainants.

(d) The reputation of the Commission and the named respondent participants has been unjustifiably sullied.

(e) The unsubstantiated allegations made by the complainant participants have had a chilling effect on the willingness of industry stakeholders to contribute by providing service as a Commission member. There have been legitimate concerns that, by doing so, they may expose themselves to other unsubstantiated claims. It is to be recalled that Commission members Kevin Husband, Brent Royal, Armand VanderMeulen and Blair Lodder had each advised that they would rather resign as members of the Commission than to serve on the panels proposed by the BCFIRB.

Proposed Actions

General

25. There must be consequences arising from these unsubstantiated allegations. The impact to the Commission has been significant, and no commodity board should have to endure a "repeat" of what has here transpired.

26. The Commission respectfully submits that the BCFIRB should consider two actions as a result of this supervisory review. First, the Commission respectfully submits that the BCFIRB should advocate for legislative change to improve upon the scope of statutory immunity available to elected members and commodity board staff. Second, the Commission submits that the BCFIRB should make an order in the nature of an order for costs. Each of these will be addressed in turn.

Statutory Immunity

27. Section 19 of the *Natural Products Marketing (BC) Act* specifies the circumstances in which there may be statutory immunity from civil prosecutions. That section was substantially amended on December 3, 2004, and with that amendment, the protection afforded to elected commodity board members was all but eliminated, while the protection afforded to members and staff of the BCFIRB was substantially enlarged.

28. Prior to December 3, 2004, section 19 provided as follows:

> **Protection of members of boards from actions**
>
> 19. No action may be brought against a person who at any time has acted or purported to act or who is acting or purports to act, as a member of a Provincial board, marketing board, commission or agency appointed under the federal Act or under this Act for anything done by the person in good faith in the performance or intended performance of the person's duties.

29. In that form, the section effectively insulated commodity board members from any liability arising from anything done in good faith.

30. After the amendment made on December 3, 2004, the section provides as follows:

> **Immunity protection for Provincial board, its members and others**
>
> 19 (1) In this section, "decision maker" includes the Provincial board, a member of the Provincial board or a staff officer of the Provincial board who participates in a dispute resolution process.
>
> (2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, a marketing board, a commission or an agency or their members appointed under the federal Act or under this Act, because of anything done or omitted
>
> (a) in the performance or intended performance of any duty under this Act, or
>
> (b) in the exercise or intended exercise of any power under this Act.
>
> (3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

31. Under the present version of section 19, substantial protection is given to the BCFIRB, its members and staff. Unfortunately, any protection that was previously available to elected commodity board members has since been eliminated.

32. While statutory immunity should not extend to anything done or omitted by a person in bad faith, this supervisory review nevertheless provides cause to revisit the scope of statutory immunity that should be extended to elected commodity board members and staff.

33. It is respectfully submitted that statutory immunity should properly extend to elected commodity board members and staff, excluding anything done or omitted by a person in bad faith. While such a formulation would have made no material difference in the present circumstances (given that the allegations involve alleged bad faith), extending statutory immunity to elected members and staff would help to ameliorate the "chilling effect" on the willingness of persons to serve. While it is true that elected members and staff are not "appointed" by government, these persons perform the same functions as appointed persons, and they should have the same access to statutory immunity. A proposed version of section 19 might take the following form:

> **Immunity protection**
>
> 19 (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a person who at any time has acted or purported to act, or who is acting or purports to act, as an elected or appointed member, or staff officer, of a Provincial board, marketing board, commission or agency appointed under the federal Act or under this Act, because of anything done or omitted
>
> (a) in the performance or intended performance of any duty under this Act, or
>
> (b) in the exercise or intended exercise of any power under this Act.

> (2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Costs

34. Pursuant to paragraph 8.1(1)(b) of the *Natural Products Marketing (BC) Act* and section 47 of the *Administrative Tribunals Act*, the BCFIRB may, for the purposes of an appeal under section 8 of the Act, make orders for payment requiring a party to pay all or part of the costs of another party or an intervener in connection with the appeal, or requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the appeal. Further, if the BCFIRB considers that the conduct of a party has been improper, vexatious, frivolous or abusive, the BCFIRB may require the party to pay all or part of the actual costs and expenses of the BCFIRB in connection with the appeal.

35. Of course, the within proceeding is not an "appeal under section 8 of the Act". Nevertheless, it is submitted that the BCFIRB is empowered to make a costs order in the context of a supervisory review pursuant to the power vested in it under subsection 7.1(2) of the Act, which provides that "the [BCFIRB] may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances."

36. It is the Commission's respectful submission that the BCFIRB must take steps to discourage persons from making unsubstantiated, serious allegations of the kind made by the complainant participants. The impact to the Commission and to the respondent participants has been severe. In the absence of such an order, there will be nothing to discourage stakeholders (including the complainant participants) from making further serious and unsubstantiated allegations in the future.

37. Consequently, the Commission submits that the BCFIRB should order that the complainant participants jointly and severally pay the actual costs of the

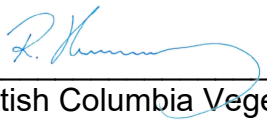
respondent participants, the Commission, BCfresh, and the BCFIRB, of and incidental to this supervisory review. Further, payment of such costs should be a condition of any licence or regulatory privilege held by the complainant participants, their principals, or related companies.

38. Perhaps in anticipation of a potential costs order, Prokam states at paragraph 15 of its written submissions that "[t]his most unusual proceeding was initiated by essentially making out of Prokam's and MPL's claims a supervisory review in which neither Prokam nor MPL wished, but in which they were effectively compelled, to participate." The fact that Prokam and MPL did not "wish" for, or initiate, this supervisory review is immaterial. This review is the natural and inevitable consequence of making such serious allegations.

39. Though it is submitted that the BCFIRB has jurisdiction to award costs in the context of a supervisory review pursuant to subsection 7.1(2) of the Act, an alternative approach is available to the BCFIRB should it conclude that such jurisdiction is lacking.

40. Pursuant to section 4 of the *British Columbia Vegetable Scheme* and paragraph 11(1)(o) of the Act, the Commission is empowered to set and collect charges from persons engaged in the marketing of a regulated product, and to use those charges to pay the expenses of the Commission. Thus, should the BCFIRB determine that it lacks the jurisdiction to order the payment of costs in the context of a supervisory review, the Commission respectfully submits that the BCFIRB should direct the Commission to impose a charge against the complainant participants, jointly and severally, to recover the actual expenses of the Commission of and incidental to this supervisory review. Again, payment of such a charge should be a condition of any licence or regulatory privilege held by the complainant participants, their principals, or related companies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 17th DAY OF JUNE, 2022



Counsel for the British Columbia Vegetable Marketing Commission

PART IV - TABLE OF AUTHORITIES

1. *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292

2. *R. v. Comeau*, [2018] S.C.J. No. 15

3. *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198