

September 9, 2022

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By Email

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Our file 1041-001

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Wanda Gorsuch

Dear Sirs and Mesdames:

**Re: BCFIRB Allegations of Bad Faith and Unlawful Activity Review Decision of July 14, 2022
("Decision")**

I write this letter in response to the various submissions provided in response to my letter dated July 27, 2022. Thank you for the extension to provide this response.

In my letter dated July 27, 2022, I set out recommendations for steps to be taken arising from the Decision. Various parties responded to my recommendations. I summarize the responses below.

Commissioners

The Commissioners suggested that the concerns raised in the Decision may warrant the establishment of new Terms of Reference rather than being undertaken as an extension of the current supervisory process.

Prokam Enterprises Ltd. ("Prokam")

On August 12, 2022, Prokam responded by advising it had filed a petition for judicial review and as a result made no other substantive submission in response. Prokam was asked to do so and provided its substantive response by letter dated August 24, 2022.

Prokam's key points are as follows:

1. Prokam is entitled to unambiguous notice of precisely what is at stake and what is at issue.

2. The procedure proposed by Hearing Counsel for identifying whether an inference of bad faith or ulterior motives can or should be drawn is unsuitable.
3. Any inferences of bad faith or ulterior motives should be dismissed without the need for further investigation or argument.
4. 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.
5. If Phase 2 as suggested by Hearing Counsel 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 because there is no reason to expect a further investigation by Hearing Counsel would add anything. The non-complainant participants have had sufficient opportunity to provide their views.
6. Prokam's damages consist of lost revenue from 30 acres of potatoes left to rot in 2017 and lost revenue from subsequent growing seasons during which Prokam was forced to use BC Fresh as its agency and was denied a producer shipper license as an alternative.
7. BCFIRB is without jurisdiction to make an inquiry into whether to draw an inference of bad faith or ulterior motives.
8. BCFIRB is without jurisdiction to inquire into the motives behind the notice of civil claim and to impose punitive measures such as special costs, restrictions on industry participation, or any directions to the BC Vegetable Marketing Commission ("Commission") with respect to future regulatory decisions involving Prokam or CFP Marketing Corporation ("CFP").
9. BCFIRB cannot impose adverse regulatory consequences for Prokam having filed a notice of civil claim as Prokam has the right to access the superior courts.
10. There is no need for any investigation into the relationship between Mr. Dhillon/Prokam and CFP. Prokam set out the nature of the relationship in its submission.
11. It is not open to the Panel to use the findings from the Supervisory Review to inform the handling of CFP's application or any other future statutory decisions relating to Prokam.
12. It is impossible for the next phase of the process as suggested by Hearing Counsel to be procedurally fair.

MPL British Columbia Distributors Inc. ("MPL")

By letter dated August 12, 2022, MPL made the following points:

1. The suggestions made by Hearing Counsel would be an impermissible reopening of the Supervisory Review.
2. The process suggested by Hearing Counsel is beyond the scope of the Terms of Reference (“TOR”).
3. The Decision made by the Panel is a final decision. As a result, the Panel is *functus officio*, citing *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 SCR 848 (“*Chandler*”).
4. Were the Panel to make any ruling on MPL’s motivations behind MPL’s notice of civil claim, it would impair MPL’s right to access the courts and would be an attempt to usurp the court’s power and function.
5. Continuation of the process as suggested by Hearing Counsel would violate MPL’s reasonable expectations and right to procedural fairness because the TOR provide that the focus of the Supervisory Review was to investigate allegations made against the Commissioners and Mr. Solymosi, and not issues relating to MPL’s motivations and good faith basis for bringing its civil action.
6. MPL would suffer irreparable prejudice because if MPL had known at the commencement that its motivations and good faith were in issue, MPL would have conducted the proceedings differently. No procedural protections can now remedy this prejudice.
7. MPL summed up its position as follows:

In sum, it is MPL’s position that the Panel has completed and discharged its authority in this Supervisory Review and is now *functus officio*, and that taking steps to consider and make a determination on issues not previously before the Panel would amount to an impermissible reopening of the Supervisory Review. Such actions would further be beyond the scope of the TOR and BCFIRB’s authority, and would be a significant violation of MPL’s reasonable expectations and right to procedural fairness.

If, notwithstanding the above, BCFIRB chooses to take further steps, in this Supervisory Review, to purportedly investigate and make a determination on new issues related to MPL’s motivations and alleged bad faith in bringing its civil claim, MPL will not voluntarily consent to participate further in these proceedings.

Bajwa Farms

By letter dated August 12, 2022, Bajwa Farms submitted that there was no basis to engage in any consideration of whether Bajwa Farms acted in bad faith.

By letter dated August 24, 2022, in response to a request for submissions concerning the establishment of new terms of reference, Bajwa Farms made the following points:

1. BCFIRB lacks the jurisdiction to investigate the complainant participants' conduct regardless of whether new terms of reference are established or whether BCFIRB proceeds on the existing terms of reference.
2. The focus of the Supervisory Review was the conduct of the Commission and not that of the complainant participants. It would therefore be a breach of procedural fairness for BCFIRB, having invited the complainants to participate on that basis, to now investigate the conduct of the complainant participants.

Solymosi

By letter dated July 29, 2022, Mr. Solymosi submitted that Hearing Counsel should also consider whether Bajwa Farms acted in bad faith. Further, provided that the investigation proposed by Hearing Counsel does not result in a reopening of the Supervisory Review, Mr. Solymosi agrees with the proposed next steps set out by Hearing Counsel.

BC Vegetable Marketing Commission ("Commission")

The Commission had no submissions in response to Hearing Counsel's recommendations.

BC Fresh Vegetables Inc. ("BC Fresh")

BC Fresh also had no submissions in response to Hearing Counsel's recommendations.

Summary of Key Issues Raised in Response to Hearing Counsel's Recommendations

In summary, the following are the key issues raised regarding Hearing Counsel's recommendations:

1. To ensure procedural fairness, new terms of reference should be established for the continuation phase of the Supervisory Review as suggested by Hearing Counsel.
2. BCFIRB does not have jurisdiction under the TOR or under its legislation to conduct the continuation of the Supervisory Review as suggested by Hearing Counsel, including any inquiry into the conduct of the complainant participants.
3. BCFIRB cannot impose adverse regulatory consequences on the complainant participants for having filed notices of civil claims, as they have a right to access the superior courts, and BCFIRB's attempt to inquire into the motives for the filing of the notices of civil claims would be an attempt to usurp the court's power and function.

4. It is an irremedial breach of procedural fairness to consider whether the complainant participants acted in bad faith or with ulterior motives in filing their notices of civil claims.
5. BCFIRB has reached a final decision and is therefore *functus officio*.
6. If Phase 2 as suggested by Hearing Counsel 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 because there is no reason to expect a further investigation by Hearing Counsel would add anything. The non-complainant participants have had sufficient opportunity to provide their views.

Hearing Counsel's Response to Concerns Raised

As a starting point, as Hearing Counsel, I make no submissions concerning the petition filed by Prokam.

Concerning the issues raised by the various submissions, below I provide an outline of my response and then provide a more detailed discussion of the points raised:

1. There is no doubt that all participants are entitled to procedural fairness at all times. The real issue is what constitutes procedural fairness in the circumstances. Here, in order to ensure procedural fairness, there should be a clarification of what is being considered going forward, and the possible consequences for the complainant participants, and an opportunity for all participants to provide submissions. Whether such clarification is done through amended terms of reference or otherwise makes little difference.
2. I do not agree that BCFIRB is without jurisdiction to proceed under the existing TOR (albeit with some clarification). I am also of the view that BCFIRB has the statutory jurisdiction to proceed as I previously suggested and has the power and jurisdiction to provide directions to the Commission on any matter involving orderly marketing.
3. Concerning access to the courts and BCFIRB making findings about the complainant parties, Prokam's and MPL's arguments are, with respect, misguided. As discussed below, the focus for BCFIRB is and has always been supporting orderly marketing. This is well within the jurisdiction (and mandate) of BCFIRB.
4. BCFIRB is not *functus officio*.

Procedural Fairness

It is trite that the participants are entitled to procedural fairness. Exactly what the content of procedural fairness is depends on the circumstances and the nature of the proceedings. One feature of Prokam's and MPL's arguments is that they were both denied procedural fairness during the course of the Supervisory Review. This is not a question that can be addressed by the Panel in any process going

forward. The Panel made its rulings on the allegations of procedural fairness raised by both MPL and Prokam during the course of the hearing.

The other theme running through the submissions of Prokam and MPL is that procedural fairness entitles them to notice of what may be considered going forward. In this regard, I agree with them. As I stated in my letter of July 27, 2022, I am mindful of the requirements of procedural fairness and the need for an efficient process to address the concerns raised by the Decision. All parties must know exactly what is at issue and what is being considered. As will be discussed below, appropriate notice can be provided through a clarification of the terms of reference.

Jurisdiction

In *Verdonk v. British Columbia Farm Industry Review Board*, 2010 BCSC 601, the BC Supreme Court recognized that the *Natural Products Marketing (BC) Act* bestows very broad powers on BCFIRB including general supervisory authority, where it deems it appropriate, to give policy directions to commissions in order to ensure that they take action that BCFIRB considers necessary and in the public interest. The court specifically stated that: “The BCFIRB does not act simply as an appeals commission. It has the “overall responsibility for natural products marketing in the province” (at paras 31-33).

Accordingly, BCFIRB has the jurisdiction to ensure orderly marketing by making original decisions concerning individual matters or providing directions to the Commission on policy and/or individual matters.

The overarching purpose of the Commission is to regulate and enforce orderly marketing in the regulated vegetable industry. Orderly marketing has been described in many ways. In the context of this Supervisory Review, all the participants acknowledge that orderly marketing requires trust and integrity among the main players in the industry, being the Commission, agencies and producers.

As stated by MPL in its closing submissions in the Supervisory Review:

The industry operates on mutual trust among the Commission, the agencies and the growers.
The whole system breaks down if the industry loses that trust.

As the supervisory body, BCFIRB can step into the shoes of the Commission and has a statutory obligation to protect the public interest and ensure public confidence in the orderly marketing of regulated vegetables.

In the Decision, BCFIRB recognized that its supervisory review was guided by two objectives:

- ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and
- ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector.

At paragraph 66 of the Decision, the Panel described in some detail the regulatory scheme for the regulated vegetable industry. At paragraphs 67 and 68 of the Decision, the Panel discussed the concept of orderly marketing.

It is within the above context that BCFIRB can and should address the concerns arising from the Supervisory Review as set out in the Decision and summarized in my letter of July 27, 2022. In other words, any decisions made about the conduct of MPL and/or Prokam are to be considered within the context of whether the conduct affects public confidence in the integrity of the regulation of the BC regulated vegetable sector, and if so, what steps need to be taken to restore that confidence.

Considered in that context, BCFIRB undoubtedly has the jurisdiction, and indeed the mandate to consider the conduct of MPL and Prokam in relation to the regulated vegetable industry. The jurisprudence and sections 7.1 and 9 of the *Natural Products Marketing (BC) Act* make clear that BCFIRB has broad powers to regulate orderly marketing in the regulated vegetable sector.

Concerning the argument that consideration of MPL's and Prokam's conduct would usurp the court's power and function, this argument relies on the notion that any findings made by the Panel would be binding on a court in the actions filed by MPL and Prokam. Findings made by the Panel in relation to orderly marketing would not bind a court in its consideration of the tort claim.

At paragraph 21 of my closing argument, I stated that: "It is not for the Panel to determine whether the tort of misfeasance in public office has been established; rather its task is to determine whether there is evidence to support the specific allegations in the FTOR."

In paragraph 62 of its Decision, the Panel expressly acknowledged that it would not adjudicate whether the tort of misfeasance was made out. As a result, any decision reached by the Panel would not be a decision that interferes with or usurps the court's jurisdiction.

MPL and Prokam will still have access to the court. Any decisions made by BCFIRB would not directly affect a court's power and jurisdiction to determine whether there has been misfeasance and whether there should be a remedy in damages. Stated simply, MPL and Prokam will continue to have access to the court for the adjudication of their misfeasance claims regardless of any future decision of BCFIRB.

Finally, BCFIRB is not *functus officio*. In *Chandler*, the Court specifically found that the concept of *functus officio* should be applied flexibly to administrative tribunals. Additionally, where the enabling statute permits a tribunal to discharge its function, it should be permitted to do so. The court stated, *inter alia*:

21... For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law.

22 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, supra.

23 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.

In the case at hand the Panel made clear in its Decision that it intended to complete its process but required submissions on what next steps should be taken. This is not a case where the Panel is violating the principle of finality by changing its mind about a decision reached. Rather, it is a case where the Panel expressly noted that it intended to fulfil its statutory obligation to complete the Supervisory Review after receiving additional submissions from impacted parties. The concept of *functus officio* has no applicability in this case.

In summary, my recommendations are as follows:

1. The Panel should continue the Supervisory Review with a focus on its mandate to ensure orderly marketing in the industry.
2. The Panel should give specific notice to MPL and Prokam that their conduct in filing the notices of civil claims will be considered.
3. The Panel should also provide MPL and Prokam notice of the range of possible consequences that may flow from any findings about their conduct in furtherance of ensuring orderly marketing.
4. In light of Prokam's submission that the issue of the conduct of the complainant parties could and should be dealt with through argument, without any need for an investigation and presentation of findings by Hearing Counsel, the Panel should proceed without the need for Hearing Counsel to conduct any further investigations. However, the Panel should leave it open for Prokam and/or MPL to produce any further evidence they may wish to provide.
5. In terms of a process going forward, my suggestions are as follows:
 - a. The Panel should leave open that that MPL and Prokam can provide any further evidence if they wish to do so. The expectation is that Prokam will not provide further evidence, while MPL's position on this issue is not known;
 - b. The Panel should then require Hearing Counsel to provide submissions on how to address the concerns summarized in paragraphs a – g of Hearing Counsel's letter of July 27, 2022. Hearing Counsel should be specifically asked to make submissions on any conclusions or inferences to be drawn and the consequences that should flow from those inferences or conclusions.
 - c. The Panel should then provide the other participants the opportunity to make submissions in response to Hearing Counsel's submissions, with the complainant participants proceeding last.

- d. Hearing Counsel can then provide a final reply.
- e. The Panel can then make its final decision on the inferences and conclusions, and on any possible consequences.

The above process will have as its overarching guide ensuring orderly marketing in the industry and public confidence in the integrity of the regulation of the BC regulated vegetable sector.

Yours very truly,
Mitha Law Group

Per:

A handwritten signature in blue ink, appearing to be 'N. Mitha', with a long horizontal flourish underneath.

Nazeer T. Mitha, QC *
* Law Corporation

NTM/kk