

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

Submission of Hearing Counsel

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Submission of Hearing Counsel

1. In this Written Submission, I first provide a background summary of this matter. I then consider the law as it relates to the two questions set out in the Amended Final Terms of Reference (“AFTOR”) for Phase II of this Supervisory Review. I then present my recommendations in light of the answers to those questions.

Background Summary

2. In a Notice of Civil Claim dated March 25, 2021 (“Prokam NOCC”), Prokam made allegations of misfeasance in public office against a Commissioner of the BC Vegetable Marketing Commission (“Commission”), Mr. Guichon, as well as against the executive director of the Commission, Mr. Solymosi.
3. BCFIRB established a supervisory review (“Supervisory Review”) pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (“Act”), to look into allegations made by Prokam and others of bad faith and unlawful activity on the part of members and staff of the Commission.
4. At the outset, all participants were requested to summarize the allegations which were to be considered in the course of the Supervisory Review.
5. In its submission dated July 23, 2021, Prokam summarized the allegations which it considered to be the issues before the Supervisory Review, as against Mr. Guichon and Mr. Solymosi, (the “Allegations”) as follows:
 - (i) The state of the actual or constructive knowledge of Messrs. Guichon and Solymosi of the requirement that the Commission “gazette” and register orders in order to validly regulate interprovincial trade;
 - (ii) Evidence that Mr. Solymosi’s investigation of Prokam was motivated by and carried out with the improper purpose of creating an evidentiary record consistent with his predetermination that Prokam was a “rogue producer”;
 - (iii) Evidence that Mr. Guichon was motivated by personal self-interest or the interests of BC Fresh or its growers in participating in decisions adverse to Prokam; and
 - (iv) BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of a second lower mainland storage crop agency.
6. Prokam acknowledged that the first three of these allegations related to the Prokam NOCC while the fourth related to the terms of reference and perhaps the Mastronardi Claim, but not the Prokam NOCC.

7. The Supervisory Review involved extensive document production, interviews, and an oral hearing. At the completion of the Supervisory Review, BCFIRB issued a decision on July 14, 2022 (“Phase I Decision”).
8. The Phase I Decision addressed the Allegations along with allegations raised by MPL British Columbia Distributors Inc. (“MPL”) and others.
9. As the proceedings involving MPL have since concluded, in what follows below, I only detail the proceedings as they relate to Prokam and its principal, Mr. Dhillon.
10. In the Phase I Decision, the following were important findings made concerning Prokam:
 - a. **para. 71:** Mr. Dhillon is the principal of Prokam. There is no dispute that in 2017, Prokam increased its production to 380 acres without acquiring further Delivery Allocation (“DA”). Prokam planted, produced and shipped approximately 5,00 tons of potatoes, accounting for 9% of BC’s total potato production. Prokam shipped and sold roughly 4,000 pounds of Kennebec potatoes for which it had no DA.
 - b. **para. 73:** Mr. Dhillon was, at all material times, a director of the agency through which Prokam shipped its potatoes, namely, Island Vegetable Co-operative Association (“IVCA”).
 - c. **para. 78:** In the spring of 2017, as a result of various communications from the Commission, Mr. Dhillon understood that the Commission would be taking a strict approach to DA-related compliance.
 - d. **para. 80:** On June 14, 2017, the General Manager of the Commission, Mr. Solymosi, wrote to IVCA and Prokam explaining that the Commission had taken the view that Prokam and IVCA were in non-compliance with the Commission’s Consolidated General Orders (“General Orders”) for the 2016/17 crop year, as IVCA had not requested approval for marketing potatoes grown by Prokam in excess of Prokam’s DA.
 - e. **para. 81:** Prokam and IVCA responded by way of a letter dated July 10, 2017 (“July 10 Letter”), which letter was critical of the Commission and took the position that Prokam had done nothing wrong. Mr. Dhillon nevertheless agreed that Prokam had, in fact, grown potatoes significantly in excess of its DA.

- f. **para. 83**: There were significant issues with Mr. Dhillon’s credibility. Among other issues, Mr. Dhillon denied he had been involved at all in preparing the July 10 letter. Mr. Dhillon’s suggestion that he simply signed the letter without reading it closely was not credible. Mr. Dhillon had significant involvement in drafting the July 10 letter. Mr. Dhillon agreed with the content of the July 10 letter, which BCFIRB ultimately found to contain inflammatory and unfounded allegations.
 - g. **para. 84**: Mr. Dhillon repeatedly attempted to deflect responsibility for his conduct, claiming that he only “relied on his agency”. There is no question Mr. Dhillon had significant responsibility and authority within IVCA. His repeated self-serving suggestions that he was in effect an unsophisticated farmer acting at the direction of a third party agency were not credible.
 - h. **para. 85**: Mr. Dhillon’s evidence that he had no knowledge of any minimum pricing orders was not believable. Mr. Dhillon had many of the characteristics of an evasive and untruthful witness.
 - i. **para. 87**: Mr. Dhillon admitted that he understood that selling below the Commission’s minimum pricing orders was a serious matter.
 - j. **para. 89**: The manager of IVCA had difficulties controlling the agency because of Prokam’s influence.
 - k. **para. 110**: The effects of Prokam’s non-compliance with the Commission’s authority could be significant and delegitimized the entire regulated marketing industry.
 - l. **para. 135**: Prokam had been warned about its production and shipping in excess of DA, and Prokam responded it was doing nothing wrong. IVCA’s general manager then reported that Prokam was bringing IVCA into non-compliance by selling in excess of DA and below Commission-ordered minimum prices without keeping IVCA informed.
 - m. **para. 261**: There simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by Prokam. The allegations were based on no more than speculation, rumour and innuendo.
11. After finding there was no cogent evidence to support the Allegations, BCFIRB concluded that:

- a. Serious concerns were raised about the significant impact the allegations had, especially as the allegations were made without any proper factual foundation, including:
- i. **para. 262**: In addition to the time and expense of responding to the allegations, the Commission had been deprived of access to its general Manager in relation to issues advanced by Prokam and its principal, and there had been a chilling effect on the willingness of producers to serve as elected Commission members.
 - ii. **para. 263**: A number of participants raised the serious concern that the allegations were made without a proper factual foundation.
 - iii. **para. 264**: BCFresh suggested that the misfeasance claims were commenced for strategic or ulterior purposes.
 - iv. **para. 265**: The Commission submitted that an inference ought to be drawn that the unsubstantiated allegations were made for strategic purposes, specifically to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission.
 - v. **para. 266**: It was argued that Prokam did not suffer any damages because Prokam was able to continue participating in the market and to continue selling its potatoes outside the province to Thomas Fresh.
 - vi. **para. 267**: BCFIRB agreed with the non-complainant participants that significant concerns arose out of the fact that no evidentiary foundation for these various serious allegations was established in the Supervisory Review. Over the course of the hearing, it began to appear that Prokam had advanced these serious allegations principally on speculation, which reduced the Supervisory Review to largely being an unsuccessful fishing expedition by Prokam, at extraordinary expense.
 - vii. **para. 268**: The allegations and the necessity of the Supervisory Review had destabilized and caused a lack of confidence in the regulated vegetable industry. The advancement of the allegations effectively paralyzed aspects of the Commission's operations.

12. At paragraph 269, BCFIRB concluded that regardless of these concerns, the specific question of whether the Allegations were advanced in bad faith, or for the improper purpose of exerting influence over the Commission, was never put squarely in issue in Phase I, and was not put to Prokam's witnesses. Moreover, the determination of whether there had been bad faith potentially gave rise to larger issues regarding the suitability of Prokam's participation in the regulated vegetable industry.
13. At paragraph 270, BCFIRB indicated that as these concerns had not been directly addressed to date and had the potential to impact other proceedings. Hearing Counsel and the participants were directed to provide submissions on next steps and consequences.
14. Hearing counsel and the participants provided submissions in response to the Phase I Decision. I submitted there should be a second phase (Phase II) where the concerns raised in Phase I could be put directly to Prokam.
15. In its submissions, Prokam acknowledged it did not have any further evidence about the Allegations. Further, Prokam raised three key concerns about proceeding with a second phase of the Supervisory Review: first, that having a second phase would constitute procedural unfairness; second, BCFIRB did not have jurisdiction to proceed under the existing terms of reference, and BCFIRB's attempt to continue with the second phase would usurp the court's jurisdiction; and third, BCFIRB was *functus officio*.
16. On October 21, 2022 (and in a corrigendum issued on November 2, 2022), BCFIRB issued a decision on Phase II of the Supervisory Review, concluding that it was not *functus officio*, its inquiry would not impede access to the courts, and it had the jurisdiction to proceed, and it could properly address any procedural unfairness issues by amending the terms of reference. Consequently, BCFIRB made orders as follows:
 - a. The terms of reference for the Supervisory Review will be amended (the "AFTOR") as set out in Appendix "A" to include consideration of the following:
 - i. Whether Prokam advanced allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi for bad faith, strategic or ulterior purposes; and

- ii. What orders or directions BCFIRB had the authority to make, and which may be required to restore orderly marketing, trust, and confidence in the BC regulated vegetable industry, including, but not limited to:
 - (1) Orders of costs against Prokam;
 - (2) Advocacy by BCFIRB for legislative reform;
 - (3) Restrictions on the participation of Prokam or its principal in the BC regulated vegetable industry;
 - (4) Directions or recommendations to the Commission on how to address future applications by Prokam or its principal; and
 - (5) Directions or recommendations to other BCFIRB panels on how to address appeals or other processes involving Prokam.
 - b. Prokam will be provided an opportunity to provide additional evidence; and
 - c. The participants will provide written submissions on the following issues:
 - i. What conclusions or inferences should be drawn from the findings in the Phase I Decision, together with any additional evidence filed by Prokam, with respect to Prokam's motivations for advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi; and
 - ii. In light of any findings that might be made concerning Prokam's motivations, what if any orders or directions does the Panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.
17. Subsequently, the participants agreed to a stay of Phase II of the Supervisory Review, pending the outcome of judicial reviews filed by Prokam and MPL of the Phase I Decision.
18. On January 25, 2023, after MPL discontinued its judicial review application and made certain commitments to the Commission and BCFIRB, BCFIRB issued a decision discontinuing Phase II as against MPL.
19. On February 13, 2023, the BC Supreme Court dismissed Prokam's judicial review application.

20. On April 26, 2023, and in continuance of Phase II of the Supervisory Review, I wrote to BCFIRB and the parties, recommending further investigation about Prokam's current business or market relationship with Okanagan Grown Produce Ltd ("OGP"). I proposed that I speak with Prokam, OGP, and other members of the storage crop industry as necessary.
21. Submissions were made on my proposal. After considering all submissions, on June 12, 2023, BCFIRB made the following orders:
 - a. Hearing Counsel will investigate through interviews with OGP, Prokam, and such other members of the storage crop industry as he considers necessary how Prokam; as a producer, might or could market its regulated storage crop.
 - b. Hearing Counsel will prepare summaries of all the evidence he elicits and provide copies to all participants.
 - c. If it so chooses, Prokam can bring an application to provide additional evidence after review of those summaries.
22. I completed the investigation and on July 31, 2023, provided the investigation materials, including notes from both interviews and Prokam's Delivery Allocation Report, to the participants. The following relevant information was obtained from the investigation:
 - a. Prokam has not marketed any potatoes since 2017;
 - b. Prokam set out various reasons why it failed to grow and market potatoes, which included the floods in the Sumas Valley in November 2021;
 - c. notwithstanding the usual rule of the Commission that if a grower does not grow a crop for two years, its DA would be zero, in this case, the Commission granted a freeze to Prokam's DA for the 2020/2021 growing year and the 2021/2022 growing year;
 - d. Prokam has applied to also freeze its DA for the 2022/2023 growing year;
 - e. Prokam anticipates being able to grow and sell potatoes in the spring of 2024 and continuing into 2024/2025;
 - f. Prokam will market its potatoes through OGP;

- g. Prokam currently has a class 3 licence; and
 - h. Prokam says it will commit to complying with the Commission's General Orders for future growing and marketing years.
23. There were a number of concerns raised about the evidence that I collected from my interviews of Prokam and OGP. Those concerns included:
- a. Prokam's reasons for failing to grow and market potatoes from 2017 onwards;
 - b. Prokam's storage capacity in the past;
 - c. Prokam's ability to profitably grow different strains of potatoes; and
 - d. what Prokam's DA should be in the future.
24. Not all of these concerns are germane to the issues BCFIRB has to address in the Phase II hearing process, but may well be relevant in a future DA determination by the Commission.
25. There were some key issues relating to Prokam's DA going forward. Counsel for Prokam provided information and justification about Prokam's previous lack of production and why the Commission froze its DA notwithstanding that it did not grow and market potatoes for a number of years.
26. Counsel for BCFresh raised a number of concerns, including that there are no special circumstances which would justify Prokam's DA being anything other than zero. Counsel for BCFresh also raised the concern that since Prokam has not grown potatoes for a number of years, Prokam's DA has been absorbed by potatoes produced by other BC growers. Those growers should not now face the prejudice, increased costs and risks of having their market access compromised by Prokam shipping in excess of its DA, which properly calculated, should be zero.
27. Further, it is the position of BCFresh that Prokam's assurance that it will comply with the Commission's General Orders is insufficient to protect confidence in orderly marketing and the interests of growers and agencies who have built their businesses based on compliance with the General Orders.

28. The Commission responded to the letter from counsel for BCFresh by stating that the evidentiary record which was before the Commission when it set Prokam's DA has not been before the Panel. Specifically, the Panel has not seen the records relating to Prokam's DA in late 2022.
29. On October 12, 2023, I outlined my view that there was no benefit to further investigating the disputed facts about past history. Instead, I recommended that Phase II of the Supervisory Review continue with the original process set out in BCFIRB's June 12, 2023 decision; namely, that the participants provide written submissions for the purposes of answering the outstanding two issues from the Phase I Decision (as set out below), with one modification to address the concern of Prokam as set out in its August 25, 2023 letter. To this end, I recommended that after my submission, should Prokam or any other party wish to make an application to adduce additional evidence, they should be provided the opportunity to do so. This allows Prokam and other participants to properly consider the necessity of an evidentiary application in the context of the issues to be decided in Phase II.
30. On October 20, 2023, BCFIRB ordered that the participants were to provide their written submissions on the following two issues:
- a. What conclusions or inferences should be drawn from the findings in the Phase I Decision with respect to Prokam's motivation for advancing allegations of bad faith and unlawful conduct against Mr. Guichon and Mr. Solymosi; and
 - b. In light of any findings that might be made concerning Prokam's motivations, what, if any, orders or directions does the Panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.

Legal Argument

31. In what follows below, I address both questions posed by BCFIRB.
- 1. What conclusions or inferences should be drawn with respect to Prokam's motivations?**
32. The first key issue is what inferences should be drawn from BCFIRB's finding at paragraph 261 of the Phase I Decision:

There simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by Prokam. The allegations were based on no more than speculation, rumour and innuendo.

33. In order to understand what types of inferences can be made, it is necessary to review the jurisprudence about how inferences can be drawn and what constitutes bad faith.

A. The Law on Drawing Inferences

34. A factual inference is a conclusion as to the existence of further facts that may be drawn from a proven fact or group of facts.

British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd, 2023 BCCA 70 [Angel Acres] at para. 172

35. To draw an inference, a decision-maker must rely on logic, common sense and experience, taking into account the totality of the evidence.

R v. Calnen, 2019 SCC 6 at para. 112,
as cited in *Rain Coast Water Corp v. British Columbia*, 2019 BCCA 201 [Rain Coast] at para. 69

36. An inference grounded in evidence differs from one grounded in speculation, as speculation is “mere conjecture based on guesswork”. To this end, if there is an evidentiary gap between proven facts and the proposed inference, the inference is unavailable. However, if an inference is reasonably and logically drawn from the proven facts, a decision-maker may choose from among any number of available reasonable inferences.

Rain Coast at para. 69

B. The Law on Bad Faith, Strategic or Ulterior Purposes

37. Bad faith covers a wide range of conduct, including dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable, based on improper motive or undertaken for an improper, indirect or ulterior purpose.

MacMillan Bloedel Ltd v. Galiano Island Trust Committee, [1995] B.C.J. No 1763 (C.A.) at para. 153

38. A finding of bad faith does not require evidence of intentional fault. While bad faith certainly includes intentional fault, it has a broader meaning that encompasses serious carelessness or recklessness. As stated by the Supreme Court of Canada, “recklessness implies a fundamental breakdown of the orderly exercise of authority to the point that absence of good faith can be deduced and bad faith presumed.”

Finney v. Barreau du Quebec, 2004 SCC 36 at para. 39, emphasis added

39. The BC Supreme Court recently summarized the law on inferring bad faith, stating that a decision-maker “must be able to conclude that the acts in question could not reasonably have been performed in good faith or, in other words, that there is no other reasonable inference other than bad faith.”

Greengen Holdings Ltd v. British Columbia (Minister of Agriculture and Lands),
2023 BCSC 1758 at para. 156, emphasis added

40. In *O’Connell Electric Ltd. v. British Columbia Hydro and Power Authority*, 2006 BCSC 1632, a plaintiff made various claims against BC Hydro including breach of contract, abuse of office, negligence, breach of fiduciary duty, defamation, inducing breach of contract, interference with contractual relations, and conspiracy.
41. BC Hydro sought to have all the claims dismissed and sought special costs. The court commented that an award of special costs would require a finding of bad faith conduct. The court dismissed the plaintiff’s claims and awarded special costs in part on the basis that the plaintiff had made improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct (para. 22).
42. The court noted that a party may honestly believe that he has been wronged, but he has a responsibility as a litigant to bring claims that have a reasonable prospect of success. The court also noted that a party risks censure for bringing claims that have the effect of besmirching the reputation of other parties or making unfounded allegations about the conduct of counsel (para. 22).
43. The court commented that it was sympathetic to the plaintiff’s argument that it is difficult to come up with direct evidence of a conspiracy prior to discoveries. However, while there may be cases where circumstantial evidence is sufficient to justify the commencing of an action, or “evidence from which an inference of an intention to deceive could be drawn”, in that case, the circumstantial evidence could not meet any reasonable threshold (para. 31).
44. In the end, the court found that there was no factual basis for the plaintiff to allege dishonesty and conspiracy and improper motive by BC Hydro. Accordingly, the court found that the plaintiff acted in bad faith and was therefore liable to pay special costs.
45. Labour arbitrators have held that bad faith extends to embellishing and exaggerating serious false allegations without a reasonable basis, and making serious allegations where the individual should have known the allegations were untrue or with reckless disregard for

the truth. Accordingly, bad faith will be found both where the individual knew the allegations were false, and where they honestly believed the allegations but were reckless or grossly negligent as to whether they were true or not.

Teck Coal Ltd v. United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied Industrial and Service Workers International Union, Local 7884 (Lybacki Grievance), [2021] BCCAAA No 114 at paras 187-188 & 194

46. In relation to the term “reckless disregard for the truth”, the BC Supreme Court recently held, in a defamation case, that relevant considerations include the nature of the allegations at issue, the absence of any factual basis to support them, and the absence of any genuine or objectively reasonable effort to investigate the allegations before making them public.

Canada Easy Investment Store Corp v. MacAskill, 2022 BCSC 202 at para. 56

47. Moreover, the BC Supreme Court has awarded special costs where a plaintiff makes serious allegations of bad faith and misconduct that are completely unfounded. As stated by the court:

Given the seriousness of these allegations and the fact that the plaintiff persisted in pursuing them even though he knew or should have known that there was no reasonable basis on which to pursue these claims, I have concluded that the plaintiff did conduct himself in a reprehensible manner deserving of the reproof or rebuke of the court. (See: *Garcia v. Crestbrook Forest Industries Ltd.* (supra); *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 (S.C.) *Capital City Auto Ltd. v. BMW Canada Inc.*, [1991] B.C.J. No. 3644 (S.C.) and *Zaleschuk Pubs Ltd. v. Barop Construction Ltd.* (1992), 68 B.C.L.R. (2d) 340 (S.C.)).

Walker v. College of Dental Surgeons of British Columbia, [1997] BCJ No 829 (SC) at para. 15, as cited in: *Kalesnikoff v. Insurance Corp of British Columbia*, 2006 BCSC 1068 at para. 34

48. In summary, concerning the drawing of inferences, what is clear from the jurisprudence is:
- a. inferences can be drawn from from a proven fact or group of facts;
 - b. in drawing inferences, a decision-maker must rely on logic, common sense and experience, taking into account the totality of the evidence; and
 - c. an inference can reasonably and logically be drawn from the proven facts and a decision-maker may choose from among any number of available reasonable inferences.
49. Concerning bad faith, the jurisprudence makes clear that:
- a. bad faith covers a wide range of conduct;

- b. a finding of bad faith does not require evidence of intentional fault; it can be based on conduct which encompasses serious carelessness or recklessness;
- c. bad faith will be found even where an individual honestly believed the allegations but was reckless or grossly negligent as to whether they were true or not;
- d. bad faith can be found even when party honestly believes that he has been wronged. Regardless, a party has a responsibility as a litigant to bring claims that have a reasonable prospect of success and risks censure for bringing claims that have the effect of besmirching the reputation of other parties or making unfounded allegations; and
- e. bad faith includes the absence of any genuine or objectively reasonable effort to investigate the allegations before making them public.

C. *Applying the Law of Inference and Bad Faith to Prokam*

50. In determining how these principles apply to Prokam, it is useful to summarize the material facts, including the Panel's findings regarding the conduct of Prokam and the evidence that was before it. They are as follows:
- a. as a result of letters sent by the Commission to all growers and agencies in the spring of 2017, Prokam was aware that the Commission would be taking seriously the requirement of producers and agencies to comply with the rules including not shipping in excess of the delivery allocation assigned by the Commission;
 - b. notwithstanding Prokam's knowledge of the requirement to comply with its DA, in the 2016/2017 crop year, Prokam shipped potatoes significantly in excess of its DA;
 - c. on June 14, 2017, the Commission sent Prokam a letter setting out its concern that Prokam was shipping in excess of its DA and violating the General Orders;
 - d. on July 10, 2017, Prokam responded with a letter which was widely distributed including to the Minister of Agriculture. The July 10 letter ignored the concerns set out in the Commission's June 14, 2017 letter. Instead, the July 10 letter was extremely critical of the Commission and included comments such as:

- i. why is approval required from the Commission for every step of the process? The policies are monopolizing the industry and are considered by many borderline prejudicial human rights violations;
 - ii. there are so many penalties affecting day-to-day business of producers, shippers, storage crop agencies and packing houses, the following are consequences food for thought considering the democratic country we live in;
 - iii. the present Commission consistently bogs the system with red tape, policies and restrictions;
 - iv. In the Commission's letter dated June 14, 2017, the Commission is threatening IVCA and its growers with the consequences of doing a good job marketing its products and looking beyond BC borders for new business. Why?
- e. subsequently, Prokam filed the NOCC and provided the allegations in its July 23, 2021 submission. BCFIRB has found that there was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by Prokam. The allegations were based on no more than speculation, rumour and innuendo;
- f. even after the Phase I Decision, Prokam has not accepted that it acted improperly. All the steps taken by Prokam after the Phase I Decision make clear that Prokam continues to consider it has done nothing wrong. This is consistent with Mr. Dhillon's testimony at the Supervisory Hearing. He was asked, in the context of the July 10 letter, whether he thought Prokam had done anything wrong and his response was: "As a grower I definitely wasn't doing anything wrong". This testimony was provided shortly after he had admitted shipping product significantly in excess of Prokam's DA.
51. It is important to recognize that the destabilization of the industry, lack of confidence in the industry, and paralyzing of aspects of the Commission's operations, were caused not only by Prokam's unfounded allegations, but also by its flagrant breach of the General Orders throughout 2017, while at the same time attacking the Commission for trying to enforce the General Orders.
52. Applying the law to these facts, the overarching question is whether Prokam acted in bad faith. The sub-questions are whether Prokam made its allegations against Mr. Guichon and

Solymosi for an ulterior purpose or whether it made its allegations with reckless disregard for truth.

53. In making this finding, BCFIRB can draw an inference from the proven facts. However, to do so, the inference must be reasonably and logically drawn from the proven facts, and there cannot be an evidentiary gap between the two.
54. Turning first to consider whether Prokam made its allegations with any ulterior purpose, the Commission has argued that because Prokam's allegations were made in a context where Prokam was seeking relief from the Commission, the inference should be drawn that the allegations were made for strategic purposes, specifically to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission.

Phase I Decision at para. 265

55. However, bad faith cannot be presumed simply because Prokam was seeking relief from the Commission at the time it made its allegations. If that were the case, bad faith would be presumed for any party that alleges wrongdoing by an administrative body before which they have an ongoing dispute. Without more, such an inference is merely based on speculation, and leaves an evidentiary gap.
56. Nevertheless, in my submission, bad faith can reasonably be inferred here on the basis that Prokam made and maintained serious allegations of wrongdoing with a reckless disregard for the truth.
57. To this end, there is no dispute that the allegations Prokam made were serious. As I argued during the hearing, the allegation of misfeasance is extremely serious, and is among the most egregious of conduct as it carries with it the "stench of dishonesty". Moreover, Prokam's claim and the necessity of the Supervisory Review destabilized and caused a lack of confidence in the regulated vegetable industry, and effectively paralyzed aspects of the Commission's operations.

Phase I Decision at para. 62 & 268

58. In light of the seriousness of Prokam's allegations, the findings from the Phase I Decision, as set out in paragraph 10 of these submissions, are pertinent and relevant.
59. As previously outlined, reckless disregard for the truth can be found based on the nature of the allegations at issue, the absence of any factual basis to support them, and the

absence of any genuine or objectively reasonable effort to investigate the allegations before making them public.

60. Here, Prokam continued to maintain its allegations throughout and after the Supervisory Review. BCFIRB found that Prokam advanced allegations principally on speculation without any cogent evidence. In other words, Prokam made very serious allegations without any factual basis to support them and did not make any genuine or objectively reasonable effort to investigate its allegations before advancing them in this Supervisory Review.

61. It is clear from the evidence that the serious allegations made by Prokam in this Supervisory Review had no reasonable prospect of success and that they were made recklessly.

Phase I Decision at para. 83

62. Consequently, based on the findings of the Phase I Decision, BCFIRB can reasonably draw an inference of bad faith on the part of Prokam in advancing its allegations against Mr. Guichon and Mr. Solymosi.

63. Additionally, BCFIRB should consider the advancement of the allegations in the context of Prokam's flagrant improper conduct (as outlined in para. 52 above), which further supports the inference that Prokam acted in bad faith. In other words, Prokam's unfounded allegations are properly seen as part of a continuing course of conduct to undermine the Commission.

64. In its AFTOR, BCFIRB stated it will consider:

- i. Whether Prokam advanced allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi for bad faith, strategic or ulterior purposes; and
- ii. What orders or directions BCFIRB had the authority to make, and which may be required to restore orderly marketing, trust, and confidence in the BC regulated vegetable industry,

65. Paragraph (i) relates to consideration of the Allegations. Paragraph (ii) allows BCFIRB to consider generally what orders are needed to restore orderly marketing which can include consideration of the Allegations but is not limited to only consideration of the Allegations.

66. Thus, even if BCFIRB determines that it cannot draw the inference that Prokam acted in bad faith, it is within the AFTOR to still consider whether any orders or directions are required to ensure orderly marketing in the regulated vegetable industry. In my submission, this is required in light of the express findings regarding Prokam’s improper conduct in 2017, and its continued pursuit of the Allegations in the Supervisory Review, which destabilized and caused a lack of confidence in the regulated vegetable industry [para. 268 of Phase I Decision]. In other words, regardless of what conclusions BCFIRB reaches about Prokam’s motivations or bad faith, BCFIRB must act on its mandate to ensure orderly marketing.

2. What, if any, orders or directions does the Panel have the authority to make?

67. On the basis of a finding of bad faith, or the finding that Prokam has destabilized the industry, the Panel must go on to determine what orders or directions it has the jurisdiction to make. In what follows below, I first consider the general nature of BCFIRB’s jurisdiction and then deal with BCFIRB’s jurisdiction to impose the directions or orders set out in paragraph 3 of the AFTOR.

A. General Jurisdiction

68. BCFIRB is a highly specialized tribunal that operates within a “web of legislation, regulatory schemes and adjudicative processes”, and is an expert tribunal pursuant to s. 3.1(o) of the *Act* and s. 58(1) of the *Administrative Tribunals Act*, SBC 2004, c. 45 (the “ATA”).

Patton (cob Cedar Creek Farms Ltd) v. British Columbia Farm Industry Review Board,
2021 BCCA 75 (“Patton”) at paras 6 & 107
Prokam Enterprises Ltd v. British Columbia Farm Industry Review Board,
2020 BCSC 2138 (“Prokam BCSC 2020”) at para. 73

69. Pursuant to s. 7.1 of the *Act*, BCFIRB has “general supervision” over the Commission, and may exercise its supervisory powers at any time, with or without a hearing, and in the manner it considers appropriate in the circumstances.

70. While the term “general supervision” is not defined in the *Act*, the case law explains that BCFIRB is the ultimate decision-maker and has overall responsibility for natural products marketing in BC.

71. In *New Brunswick Telephone Co. v. Kenney et. al.* (“*New Brunswick Telephone*”), the New Brunswick Court of Appeal considered the phrase “general supervision” in the *Public*

Utilities Act in that province and concluded that the words should be given their ordinary meaning:

The phrase "general supervision" is not defined in the Act nor does it appear to have been the subject of any reported case. The words should therefore be given their ordinary meaning in the context of the mandate given to the Board by the Act, i.e., "to investigate", "to examine", "to inquire", "to oversee", "to direct".

New Brunswick Telephone Co v. Kenny et al, (1998) 55 DLR (4th) 711 (NBCA)

72. This passage was later cited with approval by the BC Supreme Court ("BCSC") in the context of the BC Marketing Board (now BCFIRB) in *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al* ("*Global Greenhouse*").

Global Greenhouse Produce et al v. BC Marketing Board et al,
2003 BCSC 1508 at para. 76 ("*Global Greenhouse*"),
affirmed 2005 BCCA 476,

leave to appeal to the Supreme Court of Canada dismissed [2005] SCCA No 510 (SCC)

73. In *Global Greenhouse*, the BCSC observed that by definition, a "supervisor" has authority over others, and accepted that the then BC Marketing Board (now BCFIRB) is the "ultimate decision maker in this area", and that it is "a pro-active, rather than a passive, regulatory body". In addition to the authority to amend, vary or cancel orders or rulings made by subordinate marketing boards or commissions, the general supervisory authority includes the power to give policy directions to those marketing boards or commissions to ensure that they take the action that the BC Marketing Board, as its supervisor, considers necessary and in the public interest.

Global Greenhouse, at paras 77 & 78

74. Moreover, in *Verdonk v. British Columbia Farm Industry Review Board*, the BCSC stated: "The BCFIRB does not act simply as an appeals commission. It has the 'overall responsibility for natural products marketing in the province.'"

Verdonk v. British Columbia Farm Industry Review Board, 2010 BCSC 601 at para. 32

75. Accordingly, BCFIRB clearly has the jurisdiction to 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.
76. I turn now to discuss BCFIRB's jurisdiction with regard to the orders and directions set out in paragraph 3 of the AFTOR.

B. Jurisdiction to Impose Costs

77. The Commission has stated that it intends to make a detailed submission on BCFIRB's jurisdiction to award costs. As a result, I believe it is appropriate to provide my submission on costs in reply after hearing from the Commission. If any participant feels it is necessary to provide a response to my costs submission, I suggest that the Panel grant leave to provide such a submission on a specified timeline.

C. Jurisdiction to Advocate for Legislative Reform

78. There can be no doubt that BCFIRB has the jurisdiction to advocate for legislative reform. The question is whether it should do so. Again, I propose to address that question in reply after the Commission has provided its submissions on the issue.

D. Jurisdiction to Impose Restrictions on Participation in the BC Regulated Vegetable Industry

79. BCFIRB also has the jurisdiction to impose restrictions on the participation of Prokam and Mr. Dhillon in the regulated vegetable industry in British Columbia, which flows from its authority to step into the shoes of the Commission.

80. The Commission's authority to impose restrictions emanates from its responsibility to ensure orderly marketing of regulated vegetables in British Columbia. Under s. 4 of the British Columbia Vegetable Scheme, "the Commission is vested with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product" (emphasis added).

81. Turning first to Prokam, the Commission has broad jurisdiction to impose restrictions on Prokam's licence and/or DA, as a result of the Commission's authority to both licence and monitor licences for producers and agencies, and to set DA.

82. Regarding licences, Part IV, s. 17 of the General Orders provides that, subject to notification and a hearing, every licence is subject to cancellation or suspension by the Commission, including:

(a) for a period of time to be determined by the Commission at its discretion if, in the opinion of the Commission, the licence holder has violated any Order, policy or direction of the Commission or if, in the opinion of the Commission, the actions of a licence holder are detrimental to the best interests of the industry.(emphasis added)

83. With respect to DA, under Part XVII, s. 3, DA shall be established on a rolling 5-year average for storage crops, unless otherwise directed by the Commission. Additionally

under s. 10, unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their DA. Pursuant to s. 11, if a producer is found guilty of violating a Commission order, the Commission has the authority, in addition to any other measures, to suspend a producer's DA for a period of time.

84. As a result of these sections, the Commission can impose restrictions on Prokam's licence and/or DA.
85. Turning to Mr. Dhillon, the Commission has the authority to impose restrictions on his ability to act as a principal or director of a designated agency by virtue of imposing terms and conditions on the designated agency.
86. Under Part XVI, s. 1(3) of the General Orders, an application for designated agency status must include the identities of all principals, shareholders, and other persons with a direct or indirect financial interest in the proposed agency.
87. Pursuant to Part XVI, s. 2, the Commission has the authority to grant (or not grant) designated agency status. Under s. 2(4), the Commission may summarily dismiss an application for designated agency status if it is satisfied that it would not be in the interests of the industry to grant designated agency status.
88. Furthermore, pursuant to Part XVI, s. 3, the Commission has the authority to review existing agencies to assess whether agency status should be maintained, suspended, made subject to terms and conditions, or revoked.
89. In making determinations under both ss. 2 and 3, the Commission is to consider several factors, including:
 - whether the presence of the Agency is disruptive to orderly marketing;
 - whether the Agency has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations;
 - whether the Agency complies with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province; and
 - whether the Agency has a detrimental effect on the delivery allocation and production allocation of existing producers not represented by the Agency.

90. In sum, the Commission has the authority to impose terms and conditions on designated agencies, including whether Mr. Dhillon can be a principal or director of a designated agency.
91. Similarly, under s. 16 of Part IV Licences - Producer-Shippers and Part VIIA Producer- Shipper Responsibilities, the Commission has discretion whether to issue a producer-shipper licence. It is an extraordinary licence to be issued in exceptional circumstances. The Commission may place market restrictions on the producer-shipper licence or deny an applicant all together if it is not in the best interests of the industry that the producer-shipper licence be issued with full authority or be granted at all.
92. The Commission has the authority to decide whether it is in the best interests of the industry to issue a producer-shipper licence and to impose terms and conditions on any such licence.

E. Jurisdiction to Provide Directions to the Commission

93. BCFIRB has the jurisdiction to provide directions or recommendations to the Commission on how to address future applications by Prokam or Mr. Dhillon based on its general supervisory powers over the Commission.
94. As set out above, the Commission has broad jurisdiction, including the right to grant and restrict licences, set DA, grant designated agency status, and impose terms and conditions on designated agencies and licences.
95. As the entity with supervisory powers over the Commission, BCFIRB can provide directions or recommendations to the Commission on any of these actions.

F. Jurisdiction to Provide Directions or Recommendations to other BCFIRB Panels

96. BCFIRB also has the jurisdiction to provide directions or recommendations to other supervisory panels on how to address other processes involving Prokam.
97. In summary, BCFIRB has the jurisdiction to advocate for legislative reform, impose restrictions on participation in the regulated vegetable industry, and provide directions or recommendations to both the Commission and other supervisory panels.

Recommendations

98. In considering what steps BCFIRB should take, the overarching consideration is the goal of BCFIRB as described in its October 21, 2022 decision: "...orderly marketing in the BC regulated vegetable industry, consistent with BCFIRB's statutory jurisdiction over sound marketing policy". Further as set out in paragraph 22 of the October 21, 2022 decision: "BCFIRB can and should address the concerns of bad faith or ulterior motives within the context of whether the conduct affects the mutual trust and public confidence that is required for the proper operation of the BC regulated vegetable industry, and if necessary, make orders to restore that trust and confidence."
99. My recommendations are made through the lens of the inference of bad faith that I say BCFIRB can draw, or alternatively through the Panel's findings regarding the destabilizing impact on the market and a lack of confidence in the industry. In addition, I have taken into account the concerns expressed by BCFresh about the impact of Prokam's production in a future growing season on the other growers in the industry given Prokam's lack of production since 2017.
100. Accordingly, my recommendations are as follows.

1. Transparency in and Prior Approval of Delivery Allocation and Class of Licence

101. As I noted above, BCFIRB made specific findings (at para. 135) that Prokam and Mr. Dhillon ignored warnings from the Commission about its role in the production and shipping of product in excess of its DA, choosing instead to bring baseless allegations against the Commission in the July 10 letter (notably, Mr. Dhillon's evidence that he had no involvement in the July 10 letter was expressly rejected). It then maintained the very serious Allegations against the Commission throughout and after Phase I of the Supervisory Review. The Panel also noted that IVCA specifically advised the Commission that Prokam was bringing the agency into non-compliance, and that it could not control Prokam. Mr. Dhillon's repeated efforts to place all blame on IVCA were also rejected by the Panel. Lastly, in my investigation during Phase II, I identified a number of outstanding issues and concerns about Prokam's lack of production since 2017 which need to be addressed by the Commission.

102. Accordingly, to address all of these concerns, it is my recommendation that there needs to be a transparent Commission process for determination of Prokam's DA, with the involvement of other industry stakeholders. Specifically, as part of this process, the Commission needs to consider Prokam's various reasons for not producing regulated product (or meeting its DA) since 2017 in the broader context of the storage crop industry and the regulated producers who actually grew the regulated product for the market in Prokam's place. Those producers who have grown their DA as a result of Prokam's non-production should be given an opportunity to provide their input on how DA should be apportioned to reflect market share before the Commission makes a decision on what, if any, DA should be assigned to Prokam.
103. The Commission will also need to consider what class of licence should be assigned to Prokam, especially in light of the General Orders which provide that unless there are special circumstances, if a producer ceases production for two consecutive years, the Commission shall rescind their DA.
104. This measure will address the concern raised by BCFresh that other producers who have stepped in and filled Prokam's DA over the past approximately 6 years should have the chance to make their views known to the Commission. In effect, this measure will bring about necessary transparency which will promote orderly marketing of storage crop in the industry.
105. At the same time, Prokam will still have the opportunity to argue that due to special circumstances, its DA should be maintained and/or its licence class should be adjusted.
106. Finally, a transparent DA and licence review addresses the concern over lack of confidence in the industry. The transparency ensures that all growers and agencies in the industry have the opportunity to present their views and understand the views of others so that any final decision made by the Commission about how the actual production and marketing of regulated product that has occurred since 2017 is properly reflected, understood and justified through DA and licencing.
107. As a final recommendation, the Commission's decision on DA and licence class should be subject to BCFIRB prior approval to promote industry stability and certainty. This will avoid a further cycle of allegations being made against the Commission and the destabilization that would result.

2. Quarterly Reporting

108. In light of the concerns outlined above with respect to Prokam's and Mr. Dhillon's role in producing and shipping regulated product in excess of DA, the failure to work with IVCA to account for new or additional production in compliance with DA rules, the July 10 letter, and the unfounded Allegations, I recommend that for a period of 24 months, Prokam and any agency that Prokam is shipping through, be required to provide joint quarterly reports to the Commission that:

- a. set out the amount of different varieties of potatoes Prokam intends to grow and has grown;
- b. provides information about the potatoes that Prokam has provided to its agency and that Prokam's agency has marketed on behalf of Prokam and confirm that it is only marketing potatoes in compliance with Prokam's DA and/or with Commission approval;
- c. confirms compliance with the Commissions' General Orders and polices relating to DA and minimum pricing; and
- d. identifies any allegations or findings of non-compliance.

109. Such reports should be confidential and not shared with other producers or agencies.

110. This measure is intended to address Prokam's previous refusals and failures to comply with its obligations under the General Orders, to work cooperatively with its agency IVCA to manage its DA, and to market its new or additional production consistent with the Commission's directions and requirements, and to ensure orderly marketing in the industry.

3. Restriction on Mr. Dhillon's Involvement with a Designated Agency or Receiving a Producer Shipper Licence

111. In light of the findings related to Mr. Dhillon's credibility and his significant disruptive role within IVCA during the relevant time period, including the drafting of the July 10 letter, I recommend that BCFIRB impose restrictions on his ability to act as a principal or director of any designated agency for a minimum period of two years. There should also be a restriction on Mr. Dhillon being issued a producer-shipper licence for that same time period. Any subsequent application to the Commission involving Mr. Dhillon after that time period will require prior approval by BCFIRB. The authority to make orders concerning Mr. Dhillon

personally is implicit in BCFIRB's authority to ensure orderly marketing in the industry generally: *Pugliese v. British Columbia (Registrar of Mortgage Brokers)*, [2008] B.C.J. No. 503 BCCA 130; *Villetard's Eggs Ltd. v. Canada*, [1995] 2 FC 581, (FCA).

112. The above three proposals are my recommendations vis-à-vis Prokam and Mr. Dhillon. I recommend that any and all other matters be left to the Commission.

Conclusion

113. It is my position that BCFIRB can draw an inference of bad faith from the findings in the Phase I Decision with respect to Prokam's motivation for advancing allegations of bad faith and unlawful conduct against Mr. Guichon and Mr. Solymosi. Alternatively, even if such an inference is not drawn, the Panel's findings regarding the impact of Prokam's conduct and the Allegations on orderly marketing give it the jurisdiction under the AFTOR to issue orders or directions regarding the restoration of orderly marketing and confidence in the industry.

114. In terms of BCFIRB's jurisdiction to issue orders and directions, it is my view it has the jurisdiction to advocate for legislative reform, impose restrictions on participation in the regulated vegetable industry, and provide directions or recommendations to both the Commission and other BCFIRB supervisory panels. I will address the jurisdiction to issue costs in my reply submission, along with the issue of whether BCFIRB should advocate for legislative reform.

115. The overall goal of BCFIRB is orderly marketing in the BC regulated vegetable industry, consistent with BCFIRB's statutory jurisdiction over sound marketing policy and ensuring mutual trust and public confidence that is required for the proper operation of the BC regulated vegetable industry.

116. In light of this, I have recommended that the Commission make transparent its process for setting DA for Prokam and establishing its licence class; that for a period of 24 months, Prokam be required to provide quarterly compliance reports to the Commission; and that for two consecutive licensing periods, Mr. Dhillon be restricted from acting as a principal or director of any designated agency or being issued a producer-shipper licence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Date: October 27, 2023

Nazeer T. Mitha, KC