BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

PHASE II SUBMISSIONS OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

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PART I - PROCEDURAL HISTORY AND BRIEF STATEMENT OF POSITION

Procedural History

1. On July 14, 2022, Chair Donkers issued a decision arising from a supervisory review into allegations of bad faith and unlawful activity made by Prokam Enterprises Ltd. ("Prokam"), MPL British Columbia Distributors Inc. ("MPL"), and Bajwa Farms Ltd. ("Bajwa") against certain members and staff of the British Columbia Vegetable Marketing Commission ("Commission").

2. In that decision, Chair Donkers concluded that there was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by Prokam, MPL and Bajwa (together, "the Complainant Participants"), and that in most cases the allegations were based on no more than speculation, rumour and innuendo.

3. Chair Donkers also identified serious concerns about the lack of evidentiary foundation for the allegations of wrongdoing made by Prokam and MPL, as well as the impact of those allegations on the Commission and orderly marketing in the Province. Because those concerns were not directly addressed during the course of the supervisory review, and also had the potential to impact other proceedings before the BCFIRB involving MPL and Prokam, he directed that Hearing Counsel and the participants provide him with submissions on what next steps might be required, and what consequences should follow from his findings in the decision.

4. After receiving and considering submissions made by Hearing Counsel and the participants, Chair Donkers issued a decision with respect to the "Phase II" process on October 21, 2022, as follows:

> 49. For the reasons set out above, I make the following orders:
>
> a. The terms of reference will be amended as set out in Appendix A;

b. MPL and Prokam will be provided an opportunity to provide any additional evidence if they choose to do so;

c. All participants will then have the opportunity to provide me with written submissions on the following issues:

i. what conclusions or inferences should be drawn from the findings in the Decision, together with any additional evidence filed by Prokam and MPL, with respect to Prokam and MPL'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 and MPL'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.

5. Consequently, the amended Terms of Reference[1] now provide, in part, as follows:

> The Supervisory Review will consider the following allegations, which form the terms of reference for the supervisory review:
>
> 3. Prokam and MPL advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi in bad faith or for strategic or ulterior purposes.
>
> The Supervisory Review will also consider what orders or directions it has 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:
>
> a. orders of costs against Prokam and MPL;
>
> b. advocacy by BCFIRB for legislative reform;
>
> c. restrictions on the participation of any of Prokam, CFP, MPL or their principals in the BC regulated vegetable industry;

[1] See also: Corrigendum dated November 2, 2022

d. directions or recommendations to the Commission on how to address future applications by, or further dealings with, Prokam, CFP, MPL or their principals; and

e. directions or recommendations to other BCFIRB panels on how to address appeals or other processes involving Prokam, CFP or MPL.

6. By letter dated January 25, 2023, Chair Donkers noted that steps had since been taken by MPL which would restore trust and confidence and ordered that Phase II of the Supervisory Review be concluded for MPL.

7. On October 20, 2023, Chair Donkers ordered:

> All participants will have the opportunity to provide me with written submissions on the following issues:
>
> i. what conclusions or inferences should be drawn from the findings in the Phase I Decision with respect to Prokam's motivations for advancing allegations of bad faith and unlawful conduct against Mr. Guichon 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.

Brief Statement of the Commission's Position

8. For the reasons that follow, the Commission respectfully submits that:

(a) There is ample evidence from which to infer that Prokam's allegations against Mr. Guichon and Mr. Solymosi were made in bad faith, and for a strategic or ulterior purpose, namely: to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission.

(b) The impact of Prokam's allegations has been significant. In particular: (i) the expense to the Commission has been significant; (ii) the time spent in relation to

the unsubstantiated allegations detracted from the Commission's ability to address substantive regulatory issues; (iii) while the allegations were outstanding, the Commission was deprived of access to a knowledgeable Commission member and to its General Manager, in relation to issues advanced by Prokam, CFP, and their principals or affiliated companies; (iv) the reputations of the Commission and the named respondent participants were unjustifiably sullied; (v) the unsubstantiated allegations had a chilling effect on other Commission members who feared that they too might be exposed to baseless allegations (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).

(c) On a proper interpretation of the *Natural Products Marketing (BC) Act* and the *British Columbia Vegetable Scheme*, the Commission (and, by extension, the BCFIRB) is vested with the authority to impose a charge against Prokam to recover costs in relation to the supervisory review, provided that the Commission (or the BCFIRB, as the case may be) considers it necessary or advisable to do so in furtherance of the promotion, control and regulation of the marketing of a regulated product. Further, both the Commission and the BCFIRB are authorized to impose such a charge, not only to recover the Commission's costs, but also to recover costs incurred by other non-complainant participants, for and on their behalf.

(d) It is both necessary and advisable, in furtherance of the promotion, control and regulation of the marketing of a regulated product, to impose a charge against Prokam to recover costs in relation to the supervisory review. Of all possible regulatory actions, the imposition of a charge to recover these costs is most directly responsive to the nature of the harm resulting from the serious and unfounded allegations made by Prokam in "bad faith", and for a strategic or ulterior purpose. Furthermore, such an order is the only practical means to provide for the effective promotion, control and regulation of the marketing of a natural product, insofar as

the proposed charge is the only effective mechanism to deter the occurrence of such conduct in the future. There is no other order that would more directly, or effectively, address the harm in issue.

(e) Payment of the charge should be a condition of any licence or regulatory privilege held by Prokam, its principals, or related companies.

9. Finally, the Commission reiterates and relies on paragraphs 27 to 33 of its Closing Submissions dated June 17, 2022 with respect to potential amendments to section 19 of the NPMA.

PART II - WERE THE ALLEGATIONS MADE IN BAD FAITH AND FOR STRATEGIC OR ULTERIOR PURPOSES?

Bad Faith

10. It is clear on the authorities that "bad faith" does not correspond with intentional fault, but rather extends to include "recklessness or serious or extreme carelessness." Thus, the absence of good faith can be deduced, and bad faith presumed. In *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, LeBel, J. said:

> 37 What, then, constitutes bad faith? Does it always correspond to intentional fault? The courts do not appear to equate the state or acts of bad faith squarely with a demonstrated intent to harm another or, consequently, to require evidence of intentional fault. That direct linkage is made only in the case law relating to punitive damages under s. 49 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. For example, in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211, this Court adopted a narrow definition of intentional fault, based on the nature and function of that type of action. The actual consequences of the wrongful conduct must have been intended (para. 117). Proof of recklessness is not sufficient (paras. 114 and 121). This approach has been followed in subsequent decisions of this Court (see *Augustus v. Gosset*, [1996] 3 S.C.R. 268, at paras. 77-78; *Gauthier v. Beaumont*, [1998] 2 S.C.R. 3, at para. 105).

> 38 Outside the context of claims for punitive damages, the law of civil liability in Quebec does not, however, appear to take such a narrow view of the content of the concept of bad faith. It appears, rather, to accept evidence of conduct described as "l'insouciance ou l'incurie grave ou déréglée" (recklessness or serious or extreme carelessness), expressions that reflect an attempt to translate into French the legal concept of "recklessness" that is familiar to legal English. The application of that concept to the civil liability of governments has been debated. It has been observed that the interpretations applied to that concept have been varied and sometimes irreconcilable. In some cases, overly broad interpretations threatened to unduly extend the scope of public liability and deny administrative decision-makers the latitude and discretion they need in order to discharge their duties. In others, the interpretation was so narrow that bad faith was of very little practical use as a source of liability (P. Giroux and S. Rochette, "La mauvaise foi et la responsabilité de l'État", in Développements récents en droit administratif et constitutionnel (1999), vol. 119, 117, at pp. 127-33).
>
> 39 These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, 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…
>
> 40 An immunity provision such as the one set out in s. 193 of the Professional Code is intended to give professional orders the scope to act and the latitude and discretion that they need in order to perform their duties. In the case of duties relating to the management of disciplinary cases, it would be contrary to the fundamental objective of protecting the public set out in s. 23 of the Professional Code if this immunity were interpreted as requiring evidence of malice or intent to harm in order to rebut the presumption of good faith. Gross or serious carelessness is incompatible with good faith… (emphasis added)

11. Similarly, in In *Enterprises Sibeca Inc. v. Frelighsburg*, [2004] 3 S.C.R. 304, Deschamps, J. said at para. 26:

> Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly

> inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it. (emphasis added)

12. Though the above-referenced decisions went to the Supreme Court of Canada on appeal from Quebec, the principles apply equally to common law jurisdictions as was made clear by the Supreme Court of Canada in *Finney*, *supra* where it stated in para. 46 in part as follows:

> As the respondent pointed out, in common law, the Barreau would have been no less liable in the circumstances of this case if the analysis adopted by this Court in *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80 (S.C.C.), and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.), had been applied. The decisions made by the Barreau were operational decisions and were in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.

13. Thus, in the context of workplace complaints made in bad faith, arbitrators have adopted the Supreme Court of Canada's expansive definition of bad faith as expressed in *Finney* and *Sibeca*, *supra*. For example, in *Ontario Public Service Employees Union v. Peterborough Regional Health Centre (Blondeau Grievance)*, [2019] O.L.A.A. No. 416 at par. 119, Arbitrator McIntyre quoted with approval from Arbitrator Kirkwood's decision in *Imperial Parking Canada Corp. and UFCW, Local 175 (Zere)*, Re 2004 CarswellOnt 10505, as follows:

> …a distinction must be drawn between those complaints which are laid against another, but which on the balance of probabilities are found not be substantiated, and those which are laid in bad faith. Although bad faith most commonly requires an improper motive, it has been extended to include "dishonesty, recklessness or gross negligence" (*Kripps v. Touche Rose & Co.* (1990) 48 B.C.L.R. (2d) 171 (C.A.). Allegations where there has been reckless disregard for its truth have been found not to be made in good faith (*University of Victoria and Professional Employees Assn*). Similarly, allegations which have been found to be

> frivolous or vexatious have been the subject of discipline. (*Toronto Hydro Electric System and CUPE* (*supra*)). *Condominium Corporation No 9813678*, 2010 CSHG para 95,691, 2009 ABQB 493, [2009] AJ No 916

Inferences to be Drawn from the Evidence

14. The allegations made by Prokam against Mr. Guichon and Mr. Solymosi were succinctly summarized by Hearing Counsel in his closing argument dated May 16, 2022 at paragraphs 11 to 16. The Commission adopts that summary and will not reproduce it here.

15. The Commission submits that there is ample evidence from which to infer that Prokam made these allegations in bad faith, and for a strategic or ulterior purpose.

16. First, it is to be noted that the allegations made by Prokam are among the most serious allegations that can be made against public officials. At paragraphs 63 and 64 of the Allegations Review Decision dated July 14, 2022, Chair Donkers correctly observed as follows:

> 63. Hearing Counsel emphasizes the need for restraint when dealing with allegations of misfeasance or wrongdoing. The allegation of misfeasance is an extremely serious one, and proof commensurate with the seriousness of the alleged wrong is required. It is among the most egregious of conduct as it carries with it the "stench of dishonesty".
>
> 64. To the same effect, counsel for the Commissioners observes that the allegations are particularly serious as they have the effect of undermining confidence in the regulated industry and can have a chilling effect on government actors. Thus, courts consider such claims "skeptically" on an exacting standard, and require clear proof commensurate with the seriousness of the wrong. They further say that the claims should only be brought with caution and restraint, and require well-particularized pleadings. (emphasis added)

17. However, despite the obvious and substantial impact that such allegations would have on Mr. Guichon, Mr. Solymosi, the Commission, and the industry in general, and despite the legal requirement for "clear proof commensurate with the seriousness of the

wrong", Prokam was unable to substantiate its allegations to the requisite standard, or to any reasonable extent at all. Following an extensive examination of Prokam's allegations at paragraphs 70 – 165, Chair Donkers summarized his conclusions at paragraphs 166 and 261, as follows:

> 166. This supervisory review heard 16 days of evidence. Despite this, in its final submissions, Prokam relies almost exclusively on evidence arising out of the Prokam 2018 Appeal, with the exception of a few selected statements made by witnesses in this proceeding, and extracts from emails. When I consider that evidence in the context of all the evidence adduced in this proceeding, including the extensive cross-examination of Mr. Solymosi and Mr. Guichon, it becomes clear that Prokam's allegations are not substantiated. The evidence relied upon by Prokam falls far short of the evidentiary threshold for proving the type of serious allegations that Prokam advanced against Messrs. Solymosi and Guichon.
>
> . . . . .
>
> 261. As I outlined above, despite the extensive investigation, document production, and the evidence of 16 witnesses, <u>there simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing by the Complainant Participants. In most cases, I have found that the allegations were based on no more than speculation, rumour, and innuendo</u>. (emphasis added)

18. The dearth of evidence to substantiate the very serious allegations made by Prokam fell so far short of the requirement for "clear proof commensurate with the seriousness of the wrong" that one cannot reasonably conclude that Prokam was acting in good faith. Prokam's "serious carelessness or recklessness" with respect to its ability to substantiate those serious allegations implies bad faith.

19. In this regard, it is notable that Prokam's principal has made allegations with "serious carelessness or recklessness" on other occasions. At paragraph 83 of the Allegations Review Decision, Chair Donkers commented on the July 10, 2017 letter from IVCA addressed to the Commission, the BCFIRB, and the Minister of Agriculture, as follows:

> 83. …It is clear to me that Mr. Dhillon had significant involvement in the drafting of the July 10 Letter. I also note that Mr. Dhillon agreed with significant portions of the July 10 Letter, including portions which can be fairly characterized as containing inflammatory but entirely unfounded allegations (such as "harassment", "threats", and "borderline prejudicial human rights violations"). (emphasis added)

20. Finally, the circumstances in which the allegations were made by Prokam invite the additional[2] inference that that they were made for a strategic or ulterior purpose, namely: to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission: First, the allegations were made in a context where there were then live and contentious issues between Prokam and the Commission arising from Prokam's appeal from the Commission's Reconsideration Decision dated November 18, 2019 (Appeal N1908). The live issues then remaining in that appeal included Prokam's licence class, and its application for an "interim producer-shipper license."[3] Second, it is significant to note that approximately two months after Prokam had filed its civil suit, CFP submitted to the Commission an amended application for a Class 1 designated agency licence.[4]

21. In light of these circumstances, the only reasonable inference that can be drawn is that Prokam made serious and unfounded allegations in "bad faith", and as an improper means of generating leverage against the Commission with respect to its extant litigation and CFP's pending application for an agency licence.

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2 At paragraphs 54 and 55 of his submission, Hearing Counsel appears to suggest that the Commission has taken the position that bad faith may be "presumed simply because Prokam was seeking relief from the Commission at the time it made its allegations." With respect, this misses the point of the Commission's position. The Commission has consistently asserted that an additional inference may be drawn with respect to the strategic and ulterior purpose of the allegations, having regard to both the facts that imply bad faith, and the circumstances in which the allegations were made. Notably, this position seems to be consistent with the position advanced by BC Fresh, at least as that position was summarized by the BCFIRB at paragraph 264 of the Phase I Decision.

3 See: Letter from BCFIRB dated March 30, 2021 in the matters of N1908 and N2101. Those issues remain extant today.

4 The application was summarily dismissed by the Commission on April 11, 2022. That decision is presently the subject of an outstanding appeal brought by CFP (N2216)

PART III - WHAT ORDERS OR DIRECTIONS CAN AND SHOULD BE MADE?

Charge to Recover Costs

Authority of the Commission

Introduction

22. For all the reasons that follow, it is submitted that the Commission is vested with the authority to impose a charge against Prokam to recover costs in relation to the supervisory review, provided that the Commission considers it necessary or advisable to do so in furtherance of the promotion, control and regulation of the marketing of a regulated product. It is further submitted that the Commission is authorized to impose such a charge to recover its own costs, and to recover costs incurred by other non-complainant participants for and on their behalf.

23. This authority:

(a) is expressly conferred, in general terms, pursuant to section 2, paragraph 11(1)(q) and subsection 12(1) of the *Natural Products Marketing (BC) Act*, and subsections 4(1) and (2) of the *British Columbia Vegetable Scheme*; and

(b) is expressly conferred, in more specific terms, pursuant to paragraphs 11(1)(o)(i) and (ii) of the *Natural Products Marketing (BC) Act*, and subsections 4(1) and (2) of the *British Columbia Vegetable Scheme*.

24. Further, the authority of commodity boards to impose levies and charges, and to use the proceeds thereof to recover the commodity board's own legal fees and expenses, as well as the legal fees and expenses incurred by third parties, has been recognized in both *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al.*, 2003 BCSC 1508, and *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013). See also: *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board et. al.*, 2023 BCSC 1150.

25. Consequently, an interpretation of the *Act* and *Scheme* that would operate to exclude the power to impose a levy or charge for the purpose of recovering legal fees and expenses incurred by the Commission and others:

(a) cannot not be reconciled against section 2, paragraphs 11(1)(q), 11(1)(o)(i) and 11(1)(o)(ii), and subsection 12(1) of the *Natural Products Marketing (BC) Act*, and subsections 4(1) and (2) of the *British Columbia Vegetable Scheme*;

(b) would be counter to section 8 of the *Interpretation Act*, which provides that "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

(c) would "require the reading down or narrowing of what is a broadly worded power which is not consistent with the legislative intent"[5];

(d) would be inconsistent with a "purposive analysis"[6] of the *Act* and *Scheme* which justifies a large, liberal interpretation of the scope of powers conferred on the Commission; and

(e) would be counter to the decision of Drost, J. in *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al.*, 2003 BCSC 1508, as well as the BCFIRB's decision in *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013), both of which have held that a commodity board may impose levies and charges and use the proceeds thereof to pay the commodity board's legal fees and expenses, as well as the legal fees and expenses of third parties. See also: *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board et. al.*, 2023 BCSC 1150.

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5 *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013), par. 58

6 Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002, pp. 225 - 229

The Statutory Provisions

26. The relevant provisions of the *Natural Products Marketing (BC) Act* are as follows:

> 2 (1) **The purpose and intent of this Act is to provide for the promotion, control and regulation of the marketing of natural products**, including…
>
> (2) **The Lieutenant Governor in Council may**
>
> (a) **establish**, amend and revoke **schemes for the promotion, control and regulation of the marketing of natural products**,
>
> (b) **constitute** marketing boards and **commissions to administer the schemes**, and
>
> (c) **vest in those** marketing boards and **commissions <u>the powers considered necessary or advisable to enable them to carry out effectively the purpose and intent of this Act</u>**.
>
> . . . . .
>
> 11 (1) **<u>Without limiting other provisions of this Act</u>, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers**:
>
> (o) **to set and collect** levies or **charges from designated persons engaged in the marketing of the whole or part of a regulated product** and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, **and to use those** levies or **charges** and other money and licence fees **received by the marketing board or commission**
>
> (i) **<u>to carry out the purposes of the scheme</u>**,
>
> (ii) **<u>to pay the expenses of the marketing board or commission</u>**,
>
> . . . . .
>
> (q) **to make orders and rules <u>considered by the marketing board or commission necessary or</u>**

> **advisable to promote, control and regulate effectively the marketing of a regulated product**, and to amend or revoke them;
>
> . . . . .
>
> 12 (1) **In accordance with section 2, the Lieutenant Governor in Council may provide for the establishment of a marketing commission to administer, under the supervision of the Provincial board, regulations for the promotion, control and regulation of the marketing of a regulated product**. (emphasis added)

27. The relevant provisions of the *British Columbia Vegetable Scheme* are as follows:

> 4 (1) **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**.
>
> (2) **Without restricting the generality of subsection (1)**, the commission is vested with the powers described in section 11 of the Act… (emphasis added)

28. For purposes of the interpretational analysis that follows, it is also material to note that, 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.

Principles of Interpretation

29. In Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002, at page 219, the learned author describes judicial reliance on purpose in interpretation as follows:

> In *McBratney v. McBratney*, Duff C.J. wrote:
>
> > Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute…; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.
>
> In this passage Duff C.J. asserts two principles that govern judicial reliance on purpose in interpretation.
>
> (1) If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> (2) If the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted.
>
> These principles are often expressed in a negative form: an interpretation that would tend to frustrate or defeat the legislature's purpose should be rejected if there is a plausible alternative.

30. As noted, the purpose of the Act is expressed in broad terms, i.e., “to provide for the promotion, control and regulation of the marketing of natural products…”. It therefore follows that the BCFIRB should reject an interpretation that favours reading a provision narrowly, particularly where the issue concerns the scope of powers and discretions conferred by statute on the commodity board. In *Sullivan*, *supra*, the leaned author states at pages 225 and 228:

> Purposive analysis is often used to justify rejecting an invitation to read a provision narrowly, even though there are legitimate grounds for doing so.
>
> . . . . .
>
> An important use of purposive analysis in modern interpretation is to help establish the scope and discretions conferred by statute on governmental officials and agencies and as well as independent bodies and tribunals.

31. This necessity to engage in such a "purposive analysis" is reflected in section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

32. Thus, in *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013), par. 58, the BCFIRB employed a purposive analysis and rejected an invitation to narrowly construe a commodity board's power to use the proceeds of levies or charges "to carry out the purposes of the scheme":

> 58. In the panel's view, to import a notion that only "necessary" expenses or expenses "necessarily" incurred in the furtherance of the purposes of the Scheme are properly funded significantly alters the meaning of the phrase "expenses incurred…in carrying out the purposes of the scheme." In our view, to adopt this approach would require the reading down or narrowing of what is a broadly worded power which is not consistent with the legislative intent. Clearly, the kinds of expenses incurred that can be identified as "necessary" for the purposes of the Scheme would be considerably fewer and more restrictive than expenses incurred in "carrying out the purposes of the scheme". The panel cannot agree that this approach is consistent with the language, purpose or context of the Act which creates a system of orderly marketing and which requires the Chicken Board to make policy decisions to best achieve the objectives of regulated marketing. (emphasis added)

Legal Precedent

33. In *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al.*, 2003 BCSC 1508, the Petitioner argued (among other things) that the Commission had no authority to impose a levy for the purpose of paying the legal fees and expenses of the Commission, as well as the legal fees and expenses incurred by a third party. At paragraph 123, Drost, J. noted that the Commission has "virtually unlimited powers to regulate and make orders with respect to the production and marketing of vegetables in British Columbia." With respect to the propriety of a levy used to pay the legal fees and expenses incurred by a third party, Drost J. said:

> 128 In light of those facts and the circumstances of this case, I have concluded that the expenses, although incurred by Hot House, were incurred for the purposes of the BCVC, and that the broad grant of authority contained in s. 3 of the *British Columbia Vegetable Order*, when combined with the powers conferred on it by the *Scheme* and the *Act*, clothes the BCVC with authority to impose and collect the levies in issue in these proceedings. (emphasis added)

34. In *Rainbow Poultry*, *supra*, the BCFIRB similarly confirmed that commodity boards are vested with the statutory authority to impose levies and charges, and to use the proceeds thereof to pay the commodity board's legal fees and expenses, as well as the legal fees and expenses of third parties:

> 54. The starting point of the panel's statutory interpretation is that "the Act and the Scheme must be given a fair and liberal interpretation so as to make effective the legislative intent as applied to the administrative scheme involved", *Maple Lodge Farms v. Canada*, [1982] 2 S.C.R. 2 at QL p.4 and *Hallmark Poultry Processors Ltd. v British Columbia (Marketing Board)*, 2000 BCSC 569 at para 18.
>
> 55. We accept that the Act is a clear example of legislation which must be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. The purpose of the Act is to preserve orderly marketing – sufficient but not overabundant supply: *Truong Mushroom Farm Ltd. v. British Columbia (Mushroom Marketing Board)*, [1999] B.C.J. No. 1079 (S.C.) at para. 81. The purpose of the Scheme is to

impose orderly marketing on the production of chicken in the province through the creation of the Chicken Board with broad regulatory powers.

56. The Act gives the Chicken Board broad powers to raise and allocate funds (s. 11(1) (o)), the Scheme authorizes the Chicken Board to use any monies received by the board in carrying out the purposes of the scheme including “paying to the British Columbia Broiler Growers' Association6 any portion or all of the expenses incurred by the said association with the authority of the board in carrying out the purposes of the scheme” (s. 4.01 (k)).

57. The Scheme does not say, as the appellants argue, that the Chicken Board pay only those expenses of the Association “necessarily” incurred in furtherance of the Scheme. This is an important distinction. The Oxford Canadian Dictionary, 2004 defines “necessarily” as meaning “as a necessary result; inevitably” and “necessary” as meaning “requiring to be done, achieved etc.; requisite, essential”.

58. In the panel’s view, to import a notion that only “necessary” expenses or expenses “necessarily” incurred in the furtherance of the purposes of the Scheme are properly funded significantly alters the meaning of the phrase “expenses incurred…in carrying out the purposes of the scheme.” In our view, to adopt this approach would require the reading down or narrowing of what is a broadly worded power which is not consistent with the legislative intent. Clearly, the kinds of expenses incurred that can be identified as “necessary” for the purposes of the Scheme would be considerably fewer and more restrictive than expenses incurred in “carrying out the purposes of the scheme”. The panel cannot agree that this approach is consistent with the language, purpose or context of the Act which creates a system of orderly marketing and which requires the Chicken Board to make policy decisions to best achieve the objectives of regulated marketing.

59. We say this for the following reasons. The Scheme gives the Chicken Board broad discretion to regulate the industry. It is mandated through government policies such as the Ministry of Agriculture’s 2004 *Regulated Marketing Economic Policy* to ensure that the regulated marketing system operates in the interests of all British Columbians and that boards are “responsive to the needs of British Columbia producers, as well as to processors, consumers and other participants in the British Columbia food system.”

84. It follows that the appellants’ application seeking an order prohibiting the Association from using Chicken Board funds to pay legal fees and expenses incurred in relation to its intervener role in the appeal is also dismissed….

35. More recently, in *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board et. al.*, 2023 BCSC 1150, Chan, J. confirmed that commodity boards may impose levies and charges to recover costs and losses incurred by third parties, and explicitly rejected an attempt by the BCFIRB to narrowly construe those powers:

> [41] The BCFIRB made a finding that the Milk Board did not have the statutory authority to impose a charge unless the loss related to a loss suffered by the Milk Board itself, and not some other party. This finding is stated in paras. 102 and 108 of its decision, where BCFIRB referenced the lack of "actual regulatory authority" and the absence of "actual authority". The BCFIRB ignored relevant legislation, including ss. 2 and 11 of the *NPMA* and s. 7 of the *Milk Board Regulation*, which provide the Milk Board a broad scope of authority.
>
> [42] Sections 2 and 11 of the *NPMA* set out the purpose of the *NPMA* and the powers that can be vested in the Milk Board. The purpose of the *NPMA* is "to provide for the promotion, control and regulation of the marketing of natural products", and the Lieutenant Governor in Council may establish marketing boards and vest in them "the powers considered necessary or advisable to enable them to carry out effectively the purpose and intent" of the *NPMA*: s. 2 of *NPMA*.
>
> [43] Section 11(1) of the *NPMA* describes the powers that can be vested in marketing boards and starts with the words "Without limiting other provisions of this Act". This makes it clear that the powers that can be granted to a marketing board is beyond those specifically listed in s. 11(1). There are a wide range of powers under s. 11(1) of the *NPMA* which can be granted to marketing boards. For clarity, I will note in particular the power to set and collect levies or charges in s. 11(1)(o) and the power in s. 11(1)(q) to make orders and rules considered necessary to promote, control and regulate the marketing of a regulated product:
>
> . . . . .
>
> [46] Reading the *NPMA* together with the *Milk Board Regulation* and the Consolidated Order, it is clear that the Milk Board has the power to set and collect levies or charges from licenced producers and to use those levies or charges for various purposes including to carry out the purpose of the scheme, to pay the expenses of the Milk Board and to pay costs and losses incurred in marketing milk. The Milk Board is not restricted in collecting levies and charges only for expenses incurred by

the Milk Board itself in marketing milk; this fails to consider s. 11(1)(o)(iii) of the *NPMA*.

[47] In its analysis of the Milk Board's calculation of the $195,184.77, the BCFIRB Decision does not contain any discussion of s. 11 of the *NPMA* or s. 7 of the *Milk Board Regulation*. The BCFIRB started with the assumption that the Milk Board can only collect levies or charges to recover expenses incurred by the Milk Board itself, and did not consider the power of the Milk Board to impose a charge for losses incurred by third parties such as the Producer Pool in the marketing of milk. The BCFIRB Decision does not explain how it arrived at the conclusion that only losses incurred by the Milk Board can be the subject of a levy or a charge. There is no tenable line of reasoning evident in the BCFIRB Decision to support this interpretation of the Milk Board's powers.

[48] In my view, reading the relevant statutory provisions together, the Milk Board has broad authority to set and collect levies or charges and to use those levies or charges for various purposes including to carry out the purpose of the scheme and to pay costs and losses incurred in marketing milk. I agree with the Milk Board and the Dairy Association that the proper approach is a purposive analysis of the governing legislation, giving it a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. The narrow interpretation given by the BCFIRB in its decision ought to be rejected, in the context of a marketing system with its purpose to provide for the promotion, control and regulation of the marketing of milk: the decision of the BCFIRB in *Rainbow Poultry Ltd. et al. v. BCCMB et al.* (December 18, 2013) at paras. 54–59 [*Rainbow Poultry*] and *Global Greenhouse Produce Inc. v. British Columbia Marketing Board*, 2003 BCSC 1508 at paras. 123, 128 [*Global Greenhouse*].

[49] Mr. Stuyt argues the decisions of *Rainbow Poultry* and *Global Greenhouse* are distinguishable, as in those cases the expenses of the third parties had actually been incurred. Those decisions concerned imposition of charges for payment of legal fees and expenses of third parties. Mr. Stuyt argues that in this case, the losses to the Producer Pool fall into a different category, as no expenses have been or would have been incurred by the Milk Board or any third party for the purposes of the Milk Board's regulatory proceedings. With respect, even if that was a factual basis to distinguish *Rainbow Poultry* and *Global Greenhouse*, in my view the principle of those decisions is still applicable – the grant of power to the commodity board by the governing statute is to be broadly interpreted. (emphasis added)

The Scope of the BCFIRB's Supervisory Authority

36. The general nature and scope of the BCFIRB's supervisory authority was addressed by Drost, J. in *Global*, *supra*, as follows:

> 77 By definition, a "supervisor" is one having authority over others (Black's Law Dictionary (1999), 7th ed.). In this case the BCMB has general supervision over all marketing boards or commissions constituted under the Act and, in my view, sections 11(1) and 11(2) of the Act clearly illustrate the legislature's intent that the Marketing Board is to be the ultimate decision maker in this area, and that it be a pro-active, rather than a passive, regulatory body.
>
> 78 I find that, in addition to the authority to amend, vary or cancel orders or rulings made by subordinate marketing boards or commissions, that general supervisory authority gives it the power, where it deems it appropriate, to give policy directions to those marketing boards or commissions in order to ensure that they take the action that the BCMB, as their supervisor, considers necessary and in the public interest.

37. Thus, if the Commission is vested with the authority to impose levies and charges, and to use the proceeds thereof to pay the commodity board's legal fees and expenses, as well as the legal fees and expenses of third parties, then the BCFIRB is authorized to direct the Commission to do so.

38. Furthermore, paragraph 7.1(1)(b) makes plain that the BCFIRB must directly exercise the powers vested in a commodity board, where doing so is necessary to carry out the purposes of the Act:

> **Supervisory power**
>
> 7.1 (1) The Provincial board
>
> (a) has general supervision over all marketing boards or commissions established under this Act, and
>
> (b) must perform the other duties and functions and exercise the authority the Lieutenant Governor in

> Council prescribes in order to carry out the purposes of this Act. (emphasis added)

The Import of Paragraph 8.1(1)(b) of the NPMA

39. The incorporation by reference of section 47 of the *Administrative Tribunals Act* (power to award costs) for the purpose of appeals under section 8 of the Act does not contra-indicate the power of the Commission, or the BCFIRB, to impose levies and charges, and use the proceeds thereof to pay the commodity board's legal fees and expenses, as well as the legal fees and expenses of third parties. The BCFIRB's supervisory jurisdiction is substantially more broad and more flexible than its appellate jurisdiction. It is therefore unsurprising that the legislature saw fit to incorporate a power to award costs in the context of the more formal and rigid appeal jurisdiction, while the BCFIRB's supervisory authority is expressed in broader terms reflecting its broader and more flexible supervisory jurisdiction.

40. As noted by learned author in Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002, at page 192: "Express reference to something may be necessary or appropriate in one context but unnecessary or inappropriate in another." For that, and other, reasons, the "implied exclusion" argument has been described as "a dangerous master to follow":

> As Newcombe J. wrote in *Turgeon v. Dominion Bank*:
>
> > The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said. while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur, that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

> These observations are insightful and they have been taken to heart by both courts and commentators. In Canada, the following passage from Côté is frequently relied on:
>
> > *A contrario*, especially in the form *expressio unius est exclusio alterius*, is widely used. But of all the interpretive arguments it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and ...it is frequently rejected.
>
> See: *Sullivan, Sullivan and Driedger on the Construction of Statutes*, 4th ed., 2002, at pages 192 - 193

Concluding Summary

41. The impact of Prokam's allegations has been significant. This is addressed in greater detail in paragraph 8(b) above.

42. The Commission submits that it is both necessary and advisable, in furtherance of the promotion, control and regulation of the marketing of a regulated product, to impose a charge against Prokam to recover costs in relation to the supervisory review. Of all possible regulatory actions, the imposition of a charge to recover these costs is most directly responsive to the nature of the harm resulting from the serious and unfounded allegations made by Prokam in "bad faith", and for a strategic or ulterior purpose. Furthermore, such an order is the only practical means to provide for the effective promotion, control and regulation of the marketing of a natural product, insofar as the proposed charge is the only effective mechanism to deter the occurrence of such conduct in the future. There is no other order that would more directly, or effectively, address the harm in issue.

43. Given that MPL has already paid 50% of the Commission's actual legal fees and expenses as of January 25, 2023, the charge against Prokam (at least with respect to costs incurred by the Commission) should be limited to 50% of the Commission's actual legal fees and expenses up to January 25, 2023, and 100% of those fees and expenses thereafter. The Commission makes no submissions with respect to costs incurred by other non-complainant participants, other than to assert that both the Commission and

the BCFIRB are vested with the statutory authority to impose a charge to recover legal fees and expenses incurred by third parties. Payment of the charge should be a condition of any licence or regulatory privilege held by Prokam, its principals, or related companies.

Statutory Immunity

44. The Commission reiterates and relies on paragraphs 27 to 33 of its Closing Submissions dated June 17, 2022 with respect to potential amendments to section 19 of the Act.

Hearing Counsel's Recommendations

45. The Commission makes no submissions with respect to recommendations made by hearing counsel that do not necessarily relate to Prokam's allegations of bad faith and unlawful conduct[7], other than to note the following:

(a) The matter of Prokam's delivery allocation (which includes "issues and concerns about Prokam's lack of production since 2017"[8] and "Prokam's various reasons for not producing regulated product (or meeting its DA since 2017"[9]) has already been the subject of supervisory directions made by the BCFIRB, at least in part. See: BCFIRB Supervisory Decision dated January 10, 2020, par. 49 to 54, (Common Book of Documents pages 5604 to 5605). See also: Letter from BCFIRB dated February 11, 2020 re: Delivery Allocation Prior Approval Decision.

(b) Prokam's licence class, and its application for an "interim producer-shipper license"[10] are already the subject of an extant appeal before the BCFIRB.

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7 See: Submissions of Hearing Counsel dated October 27, 2023, par. 65 and 66
8 See: Phase II Submission of Hearing Counsel, par. 101
9 See: Phase II Submission of Hearing Counsel, par. 102
10 See: Letter from BCFIRB dated March 30, 2021 in the matters of N1908 and N2101. Those issues remain extant today.

(c) CFP's application for a Class 1 designated agency licence is already the subject of an extant appeal before the BCFIRB.[11]

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 23rd DAY OF NOVEMBER, 2023

Counsel for the British Columbia Vegetable Marketing Commission

[11] The application was summarily dismissed by the Commission on April 11, 2022. That decision is presently the subject of an outstanding appeal brought by CFP (N2216)