

Reply Attention of: Robert J. McDonell
Direct Dial Number: 604 661 9371
Email Address: rmcdonell@farris.com

FARRIS

File No: 332958 7

December 1, 2023

BY EMAIL

BC Farm Industry Review Board
2975 Jutland Road
Victoria, BC V8T 5J9

Attention: Justine Lafontaine

Dear Mesdames/Sirs:

**Re: Supervisory Review – Allegations of Bad Faith and Unlawful
Activity – Phase II**

Kindly accept this letter as the Phase II submission of BC Fresh.

BC Fresh adopts the portions of the submissions of Hearing Counsel and the VMC in regard to inferences of bad faith to be drawn against Prokam.

As stated in BC Fresh's letter submission to Hearing Counsel dated August 25, 2023, a copy of which is attached hereto for reference, BC Fresh's concern is that every measure reasonably available be taken to avoid a repetition of the disruption in the industry caused by Prokam, commencing in 2016. In addition, in the context of Prokam's misconduct, steps must be taken to restore trust in the future for the regulation of storage crops.

In this regard, BC Fresh supports the recommendation of Hearing Counsel in his submission dated October 27, 2023 that the VMC be directed to undertake a transparent process toward a determination of Prokam's Delivery Allocation for crop year 2024/2025 in accordance with the provisions of the VMC General Orders. Again, on the subject of delivery allocation, BC Fresh relies on its letter of August 25, 2023, attached hereto. Confidence can only be restored if it is clear to all industry stakeholders that the application of the General Orders to Prokam has been appropriately addressed having regard to the evidence since 2016, especially relating to delivery allocation.

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25th Floor - 700 W Georgia Street Vancouver, BC Canada V7Y 1B3
Tel 604 684 9151 farris.com

BC Fresh also supports Hearing Counsel's recommendation requiring quarterly reporting. BC Fresh knows from its extensive experience that quarterly reports from growers provide an excellent means of administrative control over a grower's compliance with the General Orders.

BC Fresh takes no position in regard to Hearing Counsel's recommendations relating to Prokam's class of grower's license or Mr. Dhillon's possible future participation in an agency.

BC Fresh also supports and adopts the submission of the VMC as to the jurisdiction of the Panel and the VMC to levy a charge against Prokam to recover the costs incurred by the VMC and third parties, including BC Fresh, arising from Prokam's conduct.

The regulatory scheme in place under the General Orders is dependant upon compliance by the growers of the identified storage crops. All growers know when they apply for and obtain licences as producers of regulated crop that their compliance is required, failing which the scheme is compromised and the other participating growers and agencies suffer due to the harm and disruption caused to orderly marketing by a non-compliant grower.

The evidence in Phase I establishes that Prokam decided that it was going to act, with wilful intent, contrary to the rules for orderly marketing for its own benefit. This first began in 2016 when it shipped potatoes grossly in excess of its delivery allocation. This occurred again in 2017 and the disruption accelerated through Prokam's interference with the operations of IVCA in the sale of potatoes in excess of Prokam's delivery allocation. Prokam's defence to its violation of the General Orders was on the basis (in addition to blaming IVCA) of a challenge to the VMC's jurisdiction in 2017 to establish minimum prices for export sales. Legal issues relating to extra-provincial pricing have nothing to do with a grower shipping potatoes in excess of or without delivery allocation.

On June 14, 2017, the VMC wrote a letter to Prokam expressing concern about Prokam's shipments in excess of its delivery allocation in 2016 (Common Book, p. 847). At that point in time, as is clear from any reading of Prokam's July 10, 2017 (Common Book, p. 891) response (as well as considering the broad circulation it gave its letter) , for reasons only known to Prokam, it had decided for its own purposes to launch a campaign against the VMC and the regulatory scheme. As the evidence reflects, its attacks on the regulatory scheme were unduly focussed on BC Fresh. BC Fresh is singled out for attack in the July 10, 2017 letter.

For further proof of Prokam's campaign to attack BC Fresh as an agency licensed by the VMC, one need only look at the summaries of proposed witnesses for the hearing in Phase 1. In advance of the hearing, Prokam delivered 18 witness statements. Prokam advised of its anticipation that 12 of these 18 witnesses could testify that there was improper conduct as between the VMC, its Commissioners and BC Fresh whose alleged purpose was to act wrongfully, in violation of their statutory duties and the General Orders, to maintain BC Fresh's market share.

Similar to Prokam's attempt to divert responsibility for its wrongs to IVCA, Prokam throughout its campaign since 2017 to attack orderly marketing has continually alleged that BC Fresh and its directors have engaged in wrongful misconduct. None of these allegations were shown to have any merit. But all of them caused reputational harm for BC Fresh and the industry and all of them thereby, in turn, posed risks for orderly marketing. And all of them needed to be and were appropriately resisted by BC Fresh in the various proceedings of the VMC and BC FIRB since 2017.

In the lawsuit that prompted this Supervisory Review, Prokam named as defendants in the lawsuit, the Chair of the Board of Directors of BC Fresh, Mr. Guichon and another BC Fresh Director, Mr. Gerrard. The wrongdoing alleged by Prokam, which was found to be wholly without merit, was alleged to be wrongfully for the benefit of the business of BC Fresh, as an agency of the VMC.

On December 22, 2017, the VMC unilaterally exercised its authority under the General Orders to designate BC Fresh to act as the agency for Prokam in the sale of regulated crop. The order was made by the VMC without BC Fresh's agreement to act as agency. However, BC Fresh complied with the VMC's order and attempted to work with Prokam as its designated agency.

Simply put, the VMC was in a regulatory dispute with Prokam over Prokam acting with contempt for the General Orders, and BC Fresh was seen by the VMC as having the ability to take on the agency role under the General Orders, as ordered by the VMC. The objective was, no doubt, for sales of Prokam's potatoes to be undertaken responsibly by BC Fresh in accordance with the General Orders. If there was to be any chance that Prokam would act in accordance with a grower's obligation in future potato production, the VMC thought that BC Fresh gave that regulatory objective the best chance.

The practical effect of the VMC's order that BC Fresh act as Prokam's agency was to put BC Fresh squarely in the crosshairs for further attacks by Prokam. In addition, for reasons again only known to

Prokam, it decided not to grow potatoes in 2018 and the years following. Prokam needed to divert responsibility for this decision to another party so it decided to blame BC Fresh for its decision to not plant potatoes in 2018 and ongoing.

Since the spring of 2018, Prokam increased the outpouring of unsubstantiated, unwarranted allegations against BC Fresh. Notwithstanding this conduct, BC Fresh attempted to get Prokam's agreement to a marketing plan for 2018 and subsequent years, as required by the VMC, that would have seen Prokam's delivery allocation increase for all types of potatoes. Prokam rejected the proposal without any good reason. The reason Prokam gave for rejecting for the plan was falsely stated to be due to no reasonable volumes of sales of coloured potatoes. This is shown to be false on any fair reading of BC Fresh's proposal (Phase 1, Exhibit 29).

Prokam also attempted to justify its decision to not plant potatoes on "personal differences". Cross examination of Mr. Dhillon as to these alleged "personal differences" revealed the "differences" arose because BC Fresh, when selling regulated produce for Mr. Dhillon had advised the delivery allocation rules needed to be observed. Mr. Dhillon advised that following the rules "...wouldn't work for us" (see BC Fresh Submission, Phase 1, para 42).

The Panel heard evidence as to the disruption caused and consequences flowing to the members of the VMC as a result of Prokam's unwarranted attacks. This disruption and its consequences was not limited to within the VMC but also caused an extensive period of disruption broadly in the industry and specifically to BC Fresh.

BC Fresh has been put to substantial costs as a result of Prokam's assaults of the VMC's scheme for orderly marketing. If Prokam wasn't acting, in advancing false allegations, with a goal to disrupt the existing marketing scheme, what exactly has it been doing? What rational conclusion can be drawn other than Prokam was acting to compromise orderly marketing for what it viewed to be for its own commercial benefit?

In all the circumstances of Prokam's misconduct and attacks on the regulatory regime, there is a clear and compelling basis for a levy against Prokam that includes compensation to BC Fresh as a third party, as outlined in the submissions of the VMC.

If the VMC hadn't appointed BC Fresh as Prokam's agency, BC Fresh may have been involved to a much lesser degree in the ensuing proceedings, culminating in Prokam commencing the misguided lawsuit against members of the Board of Directors of BC Fresh, that lead to this Supervisory Review. However, given the importance of the General Orders being properly applied, BC Fresh, as an agency licenced by the VMC, was fully warranted in responding to Prokam's unsubstantiated allegations against BC Fresh.

BC Fresh respectfully agrees with the deferral of providing its evidence relating to Prokam's delivery allocation. This evidence will establish that Prokam has been planting and harvesting crops on its land other than potatoes since 2017, every year, including 2022 (following the November, 2021 floods) and 2023 and that other licenced growers have increased their delivery allocation for all types of potatoes since 2017.

Yours truly,

FARRIS LLP

Per:



Robert J. McDonell

RJM/lis

Enclosure

cc: Naz Mitha, K.C., Mitha Law Group
Claire Hunter, K.C., Hunter Litigation Chambers
Ryan Androsoff, Hunter Litigation Chambers
Ken McEwan, K.C., McEwan Partners
William Stransky, McEwan Partners
Ravi Hira, K.C., Hira Rowan
Mark G. Underhill, K.C., Arvay Finlay LLP
Robert P. Hrabinsky, Affleck Hrabinsky Burgoyne

Reply Attention of: Robert J. McDonell
Direct Dial Number: 604 661 9371
Email Address: rmcdonell@farris.com

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File No: 32958-0001

August 25, 2023

BY EMAIL

Nazeer T. Mitha, KC
MLG Law Corporation
570 Granville Street, Suite 300
Vancouver, BC
V6C 3P1

Attention: Nazeer T. Mitha, KC

Dear Sir:

Re: Supervisory Review Phase II Investigation

Kindly accept this as the submission of BC Fresh regarding the Phase II Hearing Counsel Investigation. BC Fresh has two objectives in this proceeding, ensuring trust and confidence in orderly marketing in the future if Prokam grows and ships regulated produce and, secondly, cost recovery for BC Fresh's participation in this review that Prokam caused it to incur.

1. The general concern of BC Fresh is that every measure reasonably available must be taken to ensure there is no repetition of the disruption to the industry caused by Prokam, commencing in 2017. In this proceeding, the BC FIRB has the statutory authority of the BC Vegetable Marketing Commission under the Natural Products Marketing (BC) Act, [RSBC 1996], C. 330, to exercise as necessary to avoid repeated market disruption, prevent Prokam from causing undue prejudice and loss to other industry participants and instill confidence in the future regulation of the scheme.

2. The specific concern of BC Fresh at this juncture is that, without orders from the BC FIRB, industry participants, including BC Fresh, other agencies and licensed potato growers will be prejudiced if Prokam, in the future, ships potatoes in excess of its delivery allocation, properly calculated in accordance with the General Orders.

3. The General Orders of the VMC provide at Part XVII as follows:

3. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.

10. Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.

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Tel 604 684 9151 farrlls.com

4. Delivery allocation is a producer's earned share of the market. When a producer vacates that market, that producer's share is then filled by other producers. Vacating a market for 6 years and then demanding that other producers, who filled that market, reduce sales is contrary to the principles of orderly marketing and fairness.
5. There are no special circumstances established in regard to the two most recent years, 2022 and 2023, during which Prokam did not ship potatoes. Accordingly, under the General Orders, Prokam's deliver allocation should be zero.
6. The result is the same if the delivery allocation is calculated based on a 5-year rolling average commencing in either 2018 or 2019.
7. As to any suggestions of delivery allocation freezes by the Commission granted to Prokam, these need to be investigated, reviewed and objectively analyzed with transparency, given the history of events over the last 6 years.
8. BC Fresh was aware of some communications, a number of years ago, between the VMC and Prokam in regard to delivery allocation, however, to the knowledge of BC Fresh, the industry has not been consulted by the VMC on the issues arising in regard to Prokam's delivery allocation and the risk of prejudice arising to BC growers.
9. In the circumstances of this Supervisory Review wherein the potential for further industry participation (and disruption) by Prokam is being considered, before any determinations are made as to Prokam's delivery allocation for 2024/2025, further investigation is needed to avoid undue benefits accruing to Prokam and corresponding undue prejudice arising to industry participants. This is especially the case for growers who, adding to years of work and investments, in compliance with the General Orders, have increased their delivery allocations by meeting market demand during the years since 2017 when Prokam has, for its own reasons, not shipped potatoes.
10. The market that IVCA sold to by shipping Prokam potatoes has, since 2017, 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 delivery allocation, which properly calculated, should be zero.
11. As stated in the General Orders, Part XVI, section 1 (a), an important purpose served by the application of the delivery allocation rules is the preservation of market access for growers who have served the market over time.
12. In its letter dated May 25, 2023, BC Fresh recommended Hearing Counsel conduct interviews of industry participants other than Prokam. This is necessary to both establish the risk of prejudice to other growers if Prokam's delivery allocation is not calculated in accordance with the General Orders and to establish the number of factual issues that arise out of the Interview Notes of Hearing Counsel from his interview with Mr. Dhillon, speaking on behalf of Prokam. BC Fresh is confident that further investigation will establish that there are no special circumstances that warrant Prokam having any delivery allocation at this point in time.

13. Some specific concerns and issues that arise out of the Interview Notes include the following:
- Question 1 – Mr. Dhillon's evidence is that 10-15 tons of potatoes can be produced from one acre (see the answer to Q. 4 and Mr. Dhillon's evidence at the Phase 1 Hearing). If Prokam's Delivery Allocation was 26 tons, this volume could have been produced on 2 acres, not 60-70 acres.
 - Question 3 - Mr. Dhillon's evidence relating to storage is, at best, inconsistent. He first answers that Prokam did not have storage in the "first year". Then he states, "Prokam has never been in the position of not having enough storage. It is an easy fix to buy micro-bins and store them. Prokam would have had the storage space back in 2017 and 2018." The evidence at the Phase I Hearing was that, as of February 2018, Prokam was taking the position that its potatoes had to be sold before the end of October each year "because Prokam does not presently have storage facilities." (BCVMC, Doc, 0608, Letter from Prokam's counsel to BC Fresh).
 - Questions 4, 22 and 33 – Mr. Dhillon says that planting 80-100 acres of each type of potato (reds, whites and yellows) is required for economic farming. It may be recalled that he made a similar statement in his evidence at the BC FIRB appeal heard in 2018, resulting in an audible reaction from a number of growers attending the hearing who, for years, have maintained potato farming operations smaller than 100 acres. There are over 25 commercial potato growers in BC and only 3 grow more than 100 acres of each type of potato. Those growers have built up that production level through decades of work and investment, while abiding by the General Orders. Mr. Dhillon says, at Question 33, Prokam rejected BC Fresh's proposal in the spring of 2018 because little in the way of coloured potatoes was offered. This is false. The offer would have substantially increased Prokam's delivery allocation for coloured potatoes. In any event, if it is not economic to plant less than 100 acres of each type of potato, why did Prokam plant only 20 acres in 2021? Also, if, to be economic, 100 acres of each type of potato, including coloured potatoes, must be planted, why did Prokam plant only russets in 2021? Mr. Dhillon's evidence is highly suspect and wholly unreliable.
 - Questions 32 and 33- Mr Dhillon says he grew 20 acres of russets in 2021. At the Phase I Hearing, his evidence was that it was "about 20 some odd....20, 30 acres." (Cross Examination of Bob Dhillon, page 57, lines 39-41, Feb 4, 2022). The document sent with the Interview Notes relating to Delivery Allocation indicates that, in 2021, Prokam had a delivery allocation of 134 tons for russets. At a yield of 15 tons per acre, 300 tons would be harvested from 20 acres, or 450 tons if 30 acres were planted. (See Cross Examination of Bob Dhillon, page 54, lines 33-44 for evidence regarding yields). Mr Dhillon's evidence is that this 300 tons was about to be shipped when the November, 2021 flood occurred. This evidence of Prokam intending to ship more than 100% in excess of its delivery allocation in 2021 provides a strong basis for concern as to future compliance of the General Orders by Prokam.
14. The delivery allocation calculation forwarded by Hearing Counsel with the Interview Notes is not in accordance with the General Orders. As stated above, if calculated on the basis of a grower who does

not produce for two years, the delivery allocation would be zero. If calculated on the basis of a 5-year rolling average, the delivery allocation would also be zero.

15. In addition to Prokam planting and intending to ship volumes of russets grossly in excess of its delivery allocation in 2021, also troubling is the calculation of Prokam having a purported delivery allocation for red, whites and yellows. How can Prokam have any delivery allocation for any variety of coloured potatoes given that it has not shipped a coloured potato in over 6 years? Again, in the interests of avoiding future market disruption caused by Prokam and instilling confidence in orderly marketing, these concerns need to be investigated and appropriately addressed in this Supervisory Review. During this 6-year period, other growers have increased BC's potato production and earned their own increases in delivery allocation in accordance with the General Orders. In BC Fresh's experience, there is no regulatory precedent in the Storage Crop industry for the calculation of the delivery allocation as shown in the document attached to the Interview Notes.

16. BC Fresh requests that BC FIRB either apply the General Orders and determine that Prokam's delivery allocation is zero for all types of potatoes or that further investigations be undertaken to fairly determine whether Prokam is entitled to any delivery allocation or whether there are special circumstances necessitating some adjustment.

17. In regard to delivery allocation freezes due to the November 2021 flooding, BC Fresh is confident that investigation will show that growers in the Sumas Prairie in the area of Prokam's land were able to plant and ship potatoes in 2022.

18. BC Fresh observed that other growers in Sumas Prairie were able to plant their regular acreage in the spring of 2022, notwithstanding the November 2021 floods. Prokam's choice to plant other non-regulated crops during all of the last 6 years is not a special circumstance justifying a freeze in its delivery allocation for potatoes.

19. Also, BC Fresh does not accept the evidence of Mr. Dhillon in regard to packing and processing. His description is not consistent with industry packing and grading for customers in the BC industry today.

20. In regard to labour issues, the planting of potatoes is much less labour intensive than planting unregulated vegetables (such as beans, squash, zucchini, peppers etc). which are highly labour intensive compared to potatoes. How is it that Prokam managed to plant and harvest those crops throughout the 6-year period but could not find the labour to plant potatoes?

21. Prokam farms "early land" and is usually able to plant and harvest "early" in the season. However, for greater clarity, Prokam is not the only grower with early land and Prokam's land is not necessarily the "earliest land". Prokam is not the only grower who is able to ship potatoes in the first period of the year, ie., "Period A" which runs from the beginning of the calendar year to July 31.

22. Mr. Dhillon's evidence in the Investigation Report, like his testimony during the hearing at the Allegations Review, lacks credibility (Allegations Review Decision, July 14, 2022, paras. 83-85).

23. In regard to the "Other Information" described on page 10 of the Hearing Counsel's Interview Notes, they provide a further illustration of Mr. Dhillon's consistent tendency (as found by the Panel in

the Decision on Phase I, para. 85) to attempt to deflect attention away from his own conduct because his own conduct cannot withstand analysis. He complains about price competition in unregulated produce. Is there price competition in unregulated vegetables? Of course there is, hence, the use of the word "unregulated". BC Fresh's experience is that Prokam is one of the first producers to lower prices for the sale of unregulated vegetables. In regard to sales of early potatoes to the US, the BC industry doesn't sell early potatoes to the US as that market is filled by peak season shipments of early produce available from California, Arizona or Oregon, which is available before BC's early potatoes.

24. Mr. Dhillon says Prokam is being singled out because it grew potatoes in 2017 in excess of its delivery allocation and points to the fact that other growers plant in excess of their delivery allocation. The critical difference is that Prokam, in 2017, shipped volumes of potatoes grossly in excess of its delivery allocation (and intended to do the same in 2021) whereas other growers who plant in excess of their delivery allocation take the risk that their agencies may or may not be able to find a market for sales in accordance with the General Orders for that grower's produce. Even where a market may be available, potatoes shipped in excess of a grower's delivery allocation can only be sold after all potatoes produced by growers having delivery allocation during that period have been sold.

25. Acceptance of Mr. Dhillon's answer to Question 60 that he will comply with the VMC's General Orders without further investigation and analysis is wholly insufficient to protect confidence in orderly marketing and the interests of growers and agencies who, year after year, have built their businesses based on compliance with the General Orders.

26. Under the General Orders, Prokam is required to show special circumstances why its delivery allocation should not be zero for all varieties at present. Mr. Dhillon's evidence alone must not be accepted in determining whether special circumstances exist. At this juncture, there is no proof of special circumstances. Accordingly, if Prokam applies for a producer's license under the General Orders in November of this year, it may do so, however, that license would have no delivery allocation for potatoes for any period.

27. In regard to costs, BC Fresh adopts the submission of the VMC in regard to costs or charges payable by Prokam. BC Fresh intervened to respond to the numerous allegations Prokam unnecessarily levied against BC Fresh, none of which were proved by Prokam and, also, to provide industry evidence, contrary to the various unsubstantiated positions taken by Prokam, to assist the Panel in this Supervisory Review.

28. If any party, including Prokam or the VMC, submits further evidence or arguments relevant to BC Fresh's submissions herein, BC Fresh wishes to reserve the right to provide reply submissions. Also, BC Fresh stands ready to assist the Panel or Hearing Counsel in any further investigations the Panel or Hearing Counsel wish to undertake. If there are to be further submissions or investigations, BC Fresh requests that the issue of costs be deferred for consideration until all other Phase II matters are concluded.

Thank you for your consideration of the above

August 25, 2023

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Yours truly,

FARRIS LLP

Per: *RJ McDonell*

Robert J. McDonell

RJM/pm

Cc Claire Hunter, KC, via email: chunter@litigationchambers.com
Ryan Androsoff, via email: randrosoff@litigationchambers.com
Ken McEwan, KC, via email: kmcewan@mcewanpartners.com
William Stransky, via email: wstransky@mcewanpartners.com
Ravi Hira, KC, via email: RHira@hirarowan.com
Ashleigh Hall, via email: AHall@hirarowan.com
Mark Underhill, via email: munderhill@arvayfinlay.ca
Robert Hrabinsky, via email: RHrabinsky@ahb-law.com