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

PHASE II WRITTEN SUBMISSIONS OF PROKAM ENTERPRISES LTD.

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I. OVERVIEW

1. The administrative proceeding that has become known as Phase II of this supervisory review is fatally flawed.

2. The idea that an administrative tribunal has jurisdiction to examine a litigant's motives for availing itself of the judicial process, and to punish that litigant for having recourse to that process, is untenable both as a general principle and in the circumstances of this case.

3. The manner in which Phase II, a process designed to determine whether and how Prokam should be punished as a consequence of findings made in Phase I (throughout which Prokam was repeated assured it and its principals were not accused of anything) is incurably procedurally unfair.

4. Some of the sanctions against Prokam propounded by Hearing Counsel and the Non-Complainant Participants are beyond the Review Panel's statutory authority.

5. In sum, the Review Panel should decline to order any sanctions against Prokam for four main reasons:

   (a) *Jurisdictionally,* punishing Prokam in administrative proceedings for having sought a remedy in judicial proceedings, violates s. 96 of the *Constitution Act, 1867*, including the right of access to court.

   (b) *Procedurally*, it would be unfair to impose penalties on the basis of Phase I's findings, in which Prokam's principals were repeatedly assured that they were "not the subject of any allegations of wrongdoing",[1] and in which Prokam lacked notice prior to the Phase I decision of the jeopardy that would ensue from Phase I in the form of this Phase II;[2]

   (c) *Substantively*, and even on the Review Panel's finding that there was "no cogent" evidence of Messrs. Solymosi and Guichon's wrongdoing, no inference of Prokam's "bad faith, strategic or ulterior purposes" can properly be drawn from Phase I's findings; and

[1] BCFIRB, Decision: "Preliminary Matters: Allegations of Bad Faith and Unlawful Activity Review", January 26, 2022, p. 9.
[2] In this regard, it is noteworthy that the moniker "Phase I" only came into use after the spectre of a second phase that was raised in the July 14, 2022 "Allegations Review Decision" (as it was then called) became a reality as a result of the Panel's October 21, 2022 "Part II Process" decision.

(d) *Remedially*, it would be unreasonable for BCFIRB to punish Prokam, whether by reducing its delivery allocation, imposing costs, or otherwise.

6. Each of the above bases is sufficient by itself to decline to punish Prokam in Phase II; together, they make overwhelmingly clear that imposing sanctions against Prokam in this forum is neither permissible not appropriate.

II. THE REVIEW PANEL LACKS JURISDICTION TO PUNISH PROKAM FOR INVOKING A JUDICIAL PROCESS

7. Access to the courts is a constitutionally protected right. It is not, of course, consequence-free. When a party exercises that right by filing a civil claim in British Columbia Supreme Court, they should foresee a risk of losing on the merits, perhaps even on a summary basis. In some cases, perhaps they should foresee the risk of a sanction in the form of a judicial order to pay costs, perhaps even special costs.

8. However, a party who files a civil claim should never foresee, or be exposed to, a risk flowing from the exercise of that right of punishment in a separate administrative forum, arising from a compulsory regulatory process that is entirely collateral to the court proceeding. If such jurisdiction exists in the executive branch, which is doubtful, it must be extremely narrow. To hold otherwise would be to cast a chilling effect on any party who contemplates taking the state to court, not least among those with important administrative privileges.

9. Phase II is therefore constitutionally infirm. Punishing Prokam, in administrative proceedings, for having sought a remedy in judicial proceedings, interferes with its right of access to court protected by s. 96 of the *Constitution Act, 1867.*

10. Section 96 reads:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

11. This provision anchors an array of constitutional doctrines and concepts critical to the separation of powers and the rule of law. It bars legislative or executive measures that usurp the function of the superior courts, that impermissibly interfere with the court's control over its own processes, or that impermissibly interfere with the constitutional right

of access to court. Its purpose is to "maint[ain]…the rule of law through the protection of the judicial role."[3]

12. Here, to the extent that Phase II contemplates a collateral punishment for Prokam having filed a civil claim, it impermissibly interferes with Prokam's constitutional right of unfettered access to the court.

13. In a system that taxes legal services, and imposes fees for court services, Courts rightly reject the "proposition that every limit on access to the courts is automatically unconstitutional."[4] Still, some limits go too far. Courthouse picketing "will rally the court's powers to ensure the citizen of his or her day in court".[5] Hearing fees are unconstitutional when they "cause undue hardship to the litigant who seeks the adjudication of the superior court", in the sense of having to "sacrifice reasonable expenses."[6]

14. There is no prior restriction on the types of conduct that may infringe s. 96 — "interference from whatever source", taken to a certain stage, can suffice.[7] That stage, further, need not amount to a total bar or prohibition on access.[8] A practical approach to s. 96 recognizes that interferences may arise in many forms, from many settings, and to many extents, some of which will be unconstitutional.

15. The boundaries of s. 96 need not be mapped in this case. Claimants considering legal action against members of the executive branch of government should not need to consider whether the executive branch of government might seek to punish them for doing so. *Any* punishment amounting to interference, by the executive branch, with Prokam's right to bring legal disputes to court, is impermissible. Only the court has jurisdiction to determine the *fides* of Prokam's civil claim.

16. Section 96 applies to Phase II in three main ways. First, it precludes imposing punishment on Prokam since this would infringe Prokam's right of access to courts, both as a matter of principle and in the circumstances of this case. It precludes, for instance, imposing

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[3] *Reference re. Code of Civil Procedure (Que.), art. 35,* 2021 SCC 27 at para. 86 (emphasis deleted).
[4] *British Columbia (Attorney General) v. Christie,* 2007 SCC 21 at para. 17.
[5] *Re: B.C.G.E.U.,* [1988] 2 S.C.R. 214 at p. 230.
[6] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59 at paras. 45-46.
[7] *B.C.G.E.U.* at p. 230.
[8] See *R (on the application of UNISON) v. Lord Chancellor,* 2017 UKSC 51 at paras. 78-79; *Attorney General v. Times Newspapers Ltd.,* [1973] 3 All E.R. 54 (U.K. H.L.) at p. 73.

restrictions on Prokam's participation in the industry or imposing a cost (or "levy") order. Either would amount to substantial interferences with the right to access courts.

17. Second, s. 96 informs Phase II's evidentiary aspects. If the Review Panel has jurisdiction at all, it must set an exceptionally high standard of proof before it may draw an inference that Prokam's lawsuit was filed for "bad faith…strategic or ulterior purposes". Otherwise, the Panel risks not only undermining the value of solicitor-client privilege, but of creating a rule with so grave a chilling and deterrent effect on potential litigants that it amounts to an unconstitutional limitation on the right to access.

18. Third, s. 96 informs whether the Review Panel has jurisdiction to undertake Phase II under the *Natural Products Marketing (BC) Act.*[9] According to the "presumption of constitutionality", when "words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted."[10] Because there is no provision in the *NMPA* that expressly confers jurisdiction on BCFIRB to scrutinize (or punish) a grower's motives in filing a civil suit, the Review Panel must not find that jurisdiction by implication; it must prefer a reading of its statute that is consistent with s. 96. If the s. 96 doctrine itself does not dictate that result, then unwritten constitutional principles that have informed that doctrine - including the rule of law and the separation of powers - do.

III. PHASE II IS IRREMEDIABLY PROCEDURALLY UNFAIR

19. Prokam has maintained from the outset that Phase II cannot be procedurally fair insofar as it relies on findings made in Phase I.[11] In those proceedings, Prokam's principals were expressly "not the subject of any allegations of wrongdoing" and its jeopardy was not identified. Phase II turns the tables, pointing allegations at Prokam itself. But it is not designed to revisit Phase I's findings. Indeed, it adopts those findings as its premise.[12]

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[9] R.S.B.C. 1996, c. 330.
[10] *Reference re Impact Assessment Act,* 2023 SCC 23 at para. 71. Legislation must be presumed to conform not only with constitutionally entrenched rights, but also with constitutional norms and unwirtten principles, such as the rule of law: R. Sullivan, *The Construction of Statutes,* (7th Ed. 2022), at §16.03.
[11] See Prokam's submission dated August 24, 2022, pages 7-8; and BCFIRB, Decision, "Allegations Review PART II Process", October 21, 2022 at para. 33.
[12] BCFIRB, Decision "Allegations Review Part II Process", October 21, 2022, at paras. 38, 49(c)(i).

20. The Review Panel has already acknowledged that it owes Prokam a duty of fairness in respect of Phase II, including in respect of "proper notice of what is in issue, and what potential consequences might follow".[13]

21. The further content of procedural fairness is determined by the five non-exhaustive *Baker* factors: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.[14]

22. As the third *Baker* factor makes clear, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[15]

23. Reviewing these factors in the judicial review of Phase I, Brongers J. concluded that Prokam's entitlement to procedural fairness in Phase I fell "in the mid-range of the spectrum"[16] because Prokam "was not the focus of the review at that stage".[17]

24. Logically, with Prokam now "the focus of the review", its procedural entitlements must be greater. This Review Panel has itself said as much. While it denied Prokam procedural entitlements in Phase I on the grounds that its principles were "not the ones accused of wrongdoing", it stressed that those who *were* accused of wrongdoing were entitled to "a high degree of procedural fairness".[18] The same must be true here.

25. The problem in Phase II, however, is that the die has been cast. The Review Panel cannot: (1) fairly impose newly-identified punitive consequences (2) on the basis of factual determinations it has already made, (3) in a Phase I process that was expressly not tailored to those consequences, and (4) which fell far short of procedural protections those consequences would have required had they been identified from the outset.

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[13] BCFIRB, Oct. 21, 2022 Decision at para. 37.
[14] *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817 at paras. 23-27.
[15] *Baker* at para. 25.
[16] *Prokam Enterprises Ltd. v. British Columbia Farm Industry Review Review Panel,* 2023 BCSC 403 at para. 81.
[17] *Prokam Enterprises* at para. 81.
[18] BCFIRB, Decision, "Allegations Review", July 14, 2022, at para. 61.

26. Phase II's procedural flaws begin with its introducing new forms of jeopardy not accounted for in the design of Phase I — first and foremost an issue of adequate notice.[19] The need for amended terms of reference in Phase II is confirmation enough that Phase II was not inherent in Phase I, given that Phase I was framed by its terms of reference.

27. At paragraph 35 of its October 21, 2022 decision, the Review Panel sought to justify introducing a penalty phase for Prokam after rendering its final decision on the original terms of reference. The Review Panel did not deny that it had to advise Prokam at the outset of the Supervisory Review of the possibility of sanctions if the Review Panel had foreseen that possibility. Rather, the Review Panel says that it did not foresee and could not have foreseen the outcome of Phase I:

> 35. … This panel had no way of knowing at the outset the strength of the evidence that would be presented during the course of the proceedings. The panel finds itself considering these issues only because that is where the evidence led it. It is counterintuitive to suggest that the panel could have provided notice at the outset that these concerns would arise, or provided some kind of assurance that the Supervisory Review would not lead in the direction that it did, such that a legitimate expectation could be said to arise. In my view, these arguments effectively suggest that the panel should have pre-judged the process or the strength of the evidence available to support Prokam and MPL's allegations.

28. However, it is beyond question that in a Supervisory Review in which the Review Panel tasked itself with determining whether Prokam's allegations could be substantiated, a conclusion that there was no evidentiary foundation for the allegations was one of only a few possible outcomes. Indeed, it was a possible outcome that was specifically drawn to the Chair's attention in May 2021, before the Supervisory Review was initiated, when counsel for the Commission wrote to the Chair that the Prokam and MPL claims were "entirely without merit" and were "filed to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission" — that is, "for strategic purposes only."[20]

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[19] D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2022) at §9.36; *Lakeside Colony of Hutterian Brethren v. Hofer,* [1992] 3 S.C.R. 165 at p. 195.
[20] Letter from Robert Hrabinsky to Chair Donkers dated May 12, 2021, p. 2.

29. Moreover, identifying the possible consequences is not to "pre-judge…the process"; indeed, it is a precondition to fair proceedings. It is no barrier to a tribunal approaching factual matters with an open mind.

30. However, even if the outcome of Phase I was not foreseeable as a possible outcome from the outset (which Prokam denies), to accept that this could justify the Review Panel introducing legal jeopardy to Prokam partway through the Supervisory Review, after repeatedly assuring Prokam that it was not accused of anything, would be to turn the duty of procedural fairness on its head. It is not the Review Panel to whom a duty of procedural fairness is owed, or whose legitimate expectations colour the content of the duty. Rather, the Review Panel owes the duty of procedural fairness to Prokam, and who is constrained by Prokam's legitimate expectations arising from the Review Panel's own statements that Prokam was not facing any legal jeopardy in this Supervisory Review.

31. The procedural choices made in Phase I, some on the express basis that Prokam had no "case" against it,[21] preclude using the Phase I findings in a case against Prokam in Phase II. Those choices took several forms, all with an effect prejudicial to Prokam. In a case proposing regulatory sanctions for company's alleged misconduct — where a high degree of procedural fairness was owed — we would not, for instance, expect that company to:

    (a) Be denied the chance to lead its witnesses (here Prokam's principals) on the grounds that it would confer an opportunity to "frame the issues and the direction of the hearing";[22]

    (b) Have their cross-examination of a key witness capped at one hour when its principals had faced 14 hours of cross-examination[23]; or

    (c) Be twice denied adjournments after an investigator's work turned up gaps, including omitting to interview material witnesses on the basis that knowledge of a specific legal requirement (here the need to gazette the specific export minimum pricing orders) could be inferred from knowledge of a general legal requirement (the gazetting requirement).

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[21] BCFIRB, Decision, "Ruling regarding February 2, 2022 Adjournment Application", February 3, 2022 at p. 4.
[22] BCFIRB, Decision, "Preliminary Matters", January 26, 2022, at p. 9. The ability to lead witnesses is a staple of the principle of party presentation.
[23] While cross-examination in administrative proceedings need not mirror courtroom entitlements, it should not be curtailed lightly: *Innisfil (Township) v. Vespra (Township),* [1981] 2 S.C.R. 145 at pp. 166-167.

32. Justice Brongers concluded that the above features did not render Phase I procedurally unfair. The same cannot be said of Phase II. Because it rests on a different *consequential* footing from Phase I, it cannot rest on the same *factual* footing. Its doing so makes it procedurally unfair, and the Review Panel must decline to impose any sanctions against Prokam in Phase II arising from any findings made in Phase I.

IV. SUBSTANTIVE ISSUES

33. For the reasons set out above, Prokam disputes that Phase II can proceed to conclusion at all, both because of want of jurisdiction and irremediable procedural unfairness that goes to the core of Phase II's nature. In case the Review Panel disagrees, however, Prokam addresses substantive issues and arguments under this heading.

A. Hearing Counsel seeks to expand the Scope of the AFTOR

34. The overall trend since the inception of this Supervisory Review has been to expand its scope beyond the terms of reference, in ways that have been prejudicial exclusively to Prokam (and the other "Complainant Participants"). Hearing Counsel's submission continues this trend by inviting the Review Panel to impose sanctions on bases that exceed the scope of the Amended Final Terms of Reference ("**AFTOR**") for this Phase II.

35. The backdrop to Phase II is by now well-canvassed. Prokam did so in its closing submissions in Phase I. Some points, however, deserve highlighting.

36. Phase I's terms of reference were as follows:

> The Supervisory Review will consider the following allegations, which form the terms of reference for the supervisory review:
>
> 1. The Commission's exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self interest of members of the Commission…
>
> 2. Commission members and staff exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

37. On its face, then, Phase I was clearly framed as an inquiry into the conduct of *the subjects* of Prokam's civil claim, not as an inquiry into the conduct of Prokam itself. The Review

Panel reiterated this in its procedural rulings, explaining that Prokam's principals were "not the subject of any allegations of wrongdoing".[24]

38. The ensuing Phase I decision exonerates Messrs. Solymosi and Guichon of wrongdoing. While Prokam sought judicial review of the finding that there was "no cogent evidence presented to substantiate the very serious allegations of wrongdoing"[25] (and has since appealed from the dismissal of that judicial review petition), it does not seek to challenge Messrs. Solymosi or Guichon's exoneration. That case has concluded.

39. Phase II, however, stands on an entirely different footing. As with Phase I, it is critical to recall what is at issue. The AFTOR state:

> The Supervisory Review will consider the following allegations, which form the terms of reference of 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;
>
> 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
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> e. directions or recommendations to other BCFIRB panels on how to address appeals or other processes involving Prokam, CFP or MPL.

40. Hearing Counsel proposes to expand the scope of this Phase II even more broadly. He argues that the "overarching question is whether Prokam acted in bad faith", without limiting the scope of the issue to the conduct of filing the civil claim.[26] He stresses the

[24] BCFIRB, Decision, "Preliminary Matters", January 26, 2022 at p. 9; BCFIRB, Decision, "Allegations Review", July 14, 2022 at para. 61.
[25] BCFIRB, Decision, "Allegations Review", July 14, 2022 at para. 261.
[26] Submissions of Hearing Counsel at para. 52.

findings related to Prokam's potato growing and IVCA's sales in 2017,[27] on the theory that Phase II "is not limited to only consideration of the Allegations".[28] And on this basis, he says even the absence of bad faith — ostensibly the "overarching question" of the proceeding — is not fatal:

> 66. … 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."

41. He concludes that the Review Panel must determine what orders or directions are within its jurisdiction "[o]n the basis of a finding of bad faith, or the finding that Prokam has destabilized the industry".[29]

42. The Review Panel should reject this broad approach. The AFTOR serve little purpose if they fail to govern Phase II's parameters. They say nothing about "bad faith" generally, nor about events in 2017 which have been (and are) the subject of separate proceedings.

43. The focus on Prokam's motivations in "advancing allegations" by way of a civil claim, moreover, ought to be clear given Phase II's origins. The Phase I decision states:

> 269. … 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 this Supervisory Review, and was not put to any of the Complainant Participants' witnesses. Moreover, the answer to that question potentially gives rise to larger issues regarding the suitability of Prokam, CFP and MPL to participate in the regulated vegetable industry, issues which may need to be otherwise addressed in the prior approval and appeal processes already underway with respect to the MPL and CFP agency applications.
>
> 270. Accordingly, I want to first receive written submissions from Hearing Counsel on what next steps are appropriate to address these very serious concerns, and in addition, what other consequences should follow from my findings in this decision, including the issues of costs and legislative reform raised by the Commission…[30]

44. There is another reason that Phase I findings about the events of 2017 cannot be allowed to form the basis for any inference in Phase II. Relying on findings about Prokam's past

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[27] Submissions of Hearing Counsel at paras. 10, 50-51, 63, 66.
[28] Submissions of Hearing Counsel at para. 65.
[29] Submissions of Hearing Counsel at para. 67, emphasis added.
[30] BCFIRB, Decision "Allegations Review", July 14, 2022, emphasis added. See also para. 3 of the October 21, 2022 decision.

behaviour would raise the same procedural fairness problems discussed above. The invitation to rely on those findings for new punitive purposes in Phase II is no less problematic than the invitation to rely on findings about the evidentiary basis for Prokam's lawsuit, and for the same reasons. Even if the Phase I process, viewed in isolation, was fair, it was not sufficiently fair (including owing to insufficient notice of the issues and the jeopardy they might attract) to support the consequences proposed in Phase II.

45. Phase II therefore can *only* be about whether Prokam "advance[ed] allegations of bad faith and unlawful conduct…in bad faith or for strategic or ulterior purposes" and what should flow, if anything, from such a finding.

B. No Inference of Bad Faith can or should be Drawn

46. The substantive question in Phase II, according to the AFTOR, is "[w]hether Prokam advanced allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi for bad faith, strategic or ulterior purposes".

47. There is no direct evidence that Prokam filed its claim for these motives.[31] And the question was never directly put to Prokam's principal (given Prokam was ostensibly not the focus of Phase I), such that no adverse inference can be drawn. But in any event, such motives cannot be inferred from Phase I's findings.

48. There is no dispute that the Review Panel rejected the evidence Prokam presented in Phase I, sometimes in stark terms. But even if those findings were correct — which Prokam disputes — they do not support an inference that Prokam filed its civil claim for "bad faith…strategic or ulterior purposes".[32]

49. A starting point (but not the ending point) for understanding those terms and their standard of proof is the standard that courts apply when they exercise their (exclusive, Prokam says,) jurisdiction to control their processes by imposing special costs. As a private actor availing itself of the court system, Prokam should at minimum be assessed on the standards that courts apply to private litigants. On that standard, Prokam's conduct in

[31] When asked about the basis for filing the civil claim, Bob Dhillon explained several times in testimony that he relied on his counsel: February 3, 2022, 33:19-33 and 84:23-25; February 4, 2022, 82:6-17; 83:8 - 84:13; February 7, 2022, 34:14-25. This highlights the solicitor-client privilege issue with respect to seeking evidence of a party's motives in filing a lawsuit.
[32] Prokam also addressed this point in its August 24, 2022 letter at pgs. 3-4.

filing its lawsuit was not reprehensible: the claim was neither frivolous, vexatious, nor abusive, and there is no evidence that it was driven by any "strategic or ulterior" advantage. Indeed, with a risk of Phase II trespassing on s. 96's right of access to courts, such findings should only be made if there is no other possible explanation for Prokam's conduct. There is no evidence sufficient to rebut the presumption of Prokam's good faith,[33] let alone to satisfy that higher standard.

50. The Review Panel's finding[34] that has led to the genesis of Phase II is that Prokam made allegations of bad faith against Messrs. Guichon and Solymosi based purely on speculation. Ironically, in their Phase II submissions, Hearing Counsel and the Non-Complainant Participants do precisely the same thing.[35] They submit that Prokam filed its civil claim in bad faith, but they have nothing except speculation to support that very serious allegation. For example, BCfresh asks: "[i]f Prokam wasn't acting…with a goal to disrupt the existing marketing scheme, what exactly has it been doing?"[36]

51. As the ensuing analysis demonstrates, the natural, and *only* available inference in the absence of clear and direct evidence to the contrary, is that Prokam filed its civil claim out of a good faith belief in the action's *prima facie* legal merit.

1. Analytical Framework

52. Two initial questions should be asked: (1) what does it mean to advance allegations for "bad faith…strategic or ulterior purposes"?; and (2) on what standard of proof must such inferences be evaluated?

53. The first question arises because the terms "bad faith…strategic or ulterior purposes" are used in many legal contexts, in both private and public law.

54. Hearing Counsel and the Commission each rely on passages from *Finney v. Barreau du Québec*[37] and *Enterprises Sibeca Inc. v. Frelighsburg,*[38] where the Supreme Court of

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[33] *Blair v. Consolidated Enfield Corp.,* [1995] 4 S.C.R. 5 at para. 35.
[34] Which Prokam maintains to have been patently unreasonable.
[35] Hearing Counsel acknowledges this at paragraph 55 of his written submission, but then goes on at paras. 56-62 to endorse the same sort of speculative conclusion with respect to Prokam's motivations.
[36] Submissions of BCFresh at p. 4.
[37] [2004] 2 S.C.R. 17.
[38] [2004] 3 S.C.R. 304.

Canada, in Quebec civil cases, construed the concept of bad faith to extend beyond "intentional fault" to "encompass…serious carelessness or recklessness".[39]

55. Prokam takes no issue with the proposition that "bad faith" may be shown by more than just "intentional fault". But the same cannot be said of "strategic or ulterior motives". Indeed, the Commission's charge that Prokam's civil suit was filed "to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission"[40] calls Prokam's intentions into question directly. Such a conclusion cannot be made without compelling evidence of those intentions (which is entirely absent here).

56. Further, even accepting the extended understanding of "bad faith" from *Finney* and *Entreprises Sibeca,* those cases' public law contexts must also be recalled. Each involved claims under art. 1457 of the Quebec Civil Code, against the Barreau du Québec and a municipality, respectively. In *Finney,* the Court found the Barreau liable for failing to protect the public from a lawyer's misconduct. In *Entreprises Sibeca,* the Court found the municipality not liable for passing a particular bylaw, and criticized the trial judge for reversing the onus of proof by requiring the municipality to demonstrate its good faith.[41]

57. Both cases are far removed from the circumstances here, being the allegation that a private actor filed a lawsuit for "bad faith…strategic or ulterior purposes". Unlike the Barreau in *Finney,* or the municipality in *Entreprises Sibeca,* Prokam is not a public body or regulator with positive duties to regulate public matters. Rather, Prokam filed its lawsuit as a private actor. Its conduct must therefore be assessed as such.

58. In that context, Prokam agrees with Hearing Counsel's submission that a helpful framework — if the matter is within the Review Panel's power (which Prokam denies) — is misuse of the court process.[42] Such conduct, when it rises to the level of being "reprehensible", is generally punished through special costs.[43] The analogy is imperfect, since Phase II contemplates more than a cost award, extending to "potentially include restrictions on the future role and participation of Prokam…and [its] principals in the

[39] *Finney* at para. 39.
[40] BCFIRB, Decision, "Allegations Review," July 14, 2022 at para. 265.
[41] *Entreprises Sibeca* at para. 31.
[42] Submissions of Hearing Counsel at paras. 40-44, 46-47, 49(d),
[43] *Smithies Holdings Inc v. RCV Holdings Ltd.,* 2017 BCCA 177 at para. 56.

industry."[44] And as discussed above, the standard for imposing punishment ought to be extremely high if Phase II is to potentially avoid violating s. 96 of the Constitution. As a framework, special costs therefore understates the standard. But it offers guidance.

59. Exceptionally, special costs may be awarded when an allegation of bad faith or malice was "obviously unfounded, reckless or made out of malice."[45] Special costs are *not* awarded, however, merely because such an allegation fails to be proven on a balance of probabilities.[46] Nor are they awarded merely because:

(a) The party "may have gone farther, in terms of alleging bad motive, than was necessary";[47]

(b) The party's belief in the claim was "genuine but…wrong and without a factual basis"[48]; or

(c) The claim "lacked legal merit".[49]

60. The proper standpoint for assessing a party's motives is furthermore "when the allegations were made or maintained and not later with the benefit of hindsight",[50] once credibility has been tested and findings have been made.

61. To be punishable, then, Prokam's supposed "bad faith…strategic or ulterior" behaviour ought at least to have been: (1) a "reprehensible" misuse of the court process; (2) at the time it occurred; and (3) on the standard that applies to a private litigant.

62. This leads to the second question: what is the evidentiary threshold for inferring that Prokam acted for "bad faith…strategic or ulterior purposes"? In other words, when can such a finding be made without direct evidence?

63. The general principles for drawing inferences in civil contexts are well established:

(a) A factual inference must "flow logically and reasonably from established facts";[51]

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[44] BCFIRB, Decision, "Allegations Review PART II Process", October 21, 2022 at para. 28.
[45] *Hung v. Gardiner,* 2003 BCSC 285 at para. 16.
[46] *Hung* at para. 16; *Young v. Young,* [1993] 4 S.C.R. 3 at para. 251.
[47] *Hung* at para. 17.
[48] *Hung* at para. 18.
[49] *Li v. Huang,* 2007 BCSC 1806 at para. 8.
[50] *Finness Yachting Inc. v. Menzies,* 2015 BCSC 2351 at para. 9.
[51] *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.,* 2023 BCCA 70 at para. 172.

(b) The inference, however, "need not prove conclusively the proposition of fact for which it is offered", nor be "the most probable inference to draw from the evidence";[52]

(c) Instead, the evidence must "establish…[the] particular factual inference…on a balance of probabilities";[53]

(d) That done, civil triers of fact are entitled to "choose among any number of available reasonable inferences".[54]

64. Yet a finding of improper motives is no ordinary finding. In some contexts, such as applications to bring a derivative action, good faith is not presumed.[55] In others, such as allegations of misfeasance in public office, there must be "no other reasonable inference other than bad faith".[56] The appropriate threshold here should therefore be identified.

65. Prokam rejects Hearing Counsel's suggestion that the threshold is met when an inference of improper motives "can" be drawn,[57] or is merely one "from among any number of available reasonable inferences".[58] That threshold would have the Review Panel take a fundamentally uncharitable stance, akin to legal settings like derivative action applications where courts act with express skepticism.

66. Prokam also rejects the Commission's suggestion that bad faith can be "presumed" if the concept includes serious carelessness or recklessness.[59] In *Finney,* which the Commission cites, the Court was addressing the bad faith of *public*, not private actors:

> 39. … 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*…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…[60]

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[52] *Angel Acres* at paras. 173-174.
[53] *Angel Acres* at para. 174.
[54] *Angel Acres* at para. 176.
[55] *2538520 Ontario Ltd. v. Eastern Platinum Limited,* 2020 BCCA 313 at para. 30.
[56] *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations),* 2023 BCSC 1758 at para. 156.
[57] Submissions of Hearing Counsel at paras. 56, 62, 99, and 113.
[58] Submissions of Hearing Counsel at para. 48(c).
[59] Submissions of The Commission at para. 10.
[60] Emphasis added.

67. Prokam has no state power to abuse. A similar approach would be inappropriate here.

68. Indeed, in *Finney* the Court wrote that recklessness amounts to bad faith when a public act is "inexplicable and incomprehensible", or there is "no other explanation for [the authority's] negligence" aside an actual abuse of power.[61] So too in *Entreprises Sibeca,* the Court explained that *Finney*'s broader definition of bad faith captures "acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."[62] This imposes a much higher standard, albeit, again, in reference to public actors.

69. As with every party who appears in court proceedings, Prokam must, "as a matter of ordinary decency and law",[63] be "assumed to act in good faith unless proven otherwise."[64] An inference of improper motives must therefore be more than merely "available". It must at least be demonstrated by compelling evidence that ousts the presumption that Prokam acted in good faith.

70. The Review Panel must not draw an inference of "bad faith…strategic or ulterior motives" unless there is "no other explanation"[65] for Prokam's filing of the notice of civil claim.

71. However, such an inference cannot possibly be drawn from the Phase I conclusions. However strongly stated, Phase I's conclusions show only that the Panel did not accept Prokam's evidence. They do not show, either to the requisite standard or at all, that Prokam acted for "bad faith…strategic or ulterior motives."

2. Analysis

72. The natural starting point is the evidence Prokam outlined in its final submissions in Phase I at paras. 45-136.[66] Even taking the decision in Phase I as correct, it cannot reasonably be said that Prokam's civil claim was so clearly brought for "bad faith…strategic or ulterior purposes" as to (1) rebut the presumption of its good faith, (2) leave "no other explanation" for Prokam's actions, and (3) warrant the imposition of penalties.

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[61] *Finney* at para. 39.
[62] *Entreprises Sibeca* at para. 26.
[63] BCFIRB, "Allegations Review", Written Submissions of the Commissioners at para. 1.
[64] *Blair v. Consolidated Enfield Corp.,* [1995] 4 S.C.R. 5 at para. 35.
[65] *Finney* at para. 39.
[66] Prokam also addressed the substantive question in Phase II at pages 3-4 of its August 24, 2022 letter, which it repeats and adopts here.

73. Prokam's evidence included the following:

(a) **Mr. Solymosi's investigation**: "when Mr. Meyer presented Mr. Solymosi with information in September 2017 that IVCA was not in compliance with the export minimum prices that had been set, Mr. Solymosi immediately formed the view that as between Prokam and IVCA, Prokam was responsible for the purported non-compliance…start[ing] with the malicious premise that Prokam was a 'rogue producer'"[67];

(i) Mr. Solymosi's September 27, 2017 emails;

(ii) Mr. Solymosi's September 29, 2017 email;

(iii) Messrs. Solymosi and Krause's October 3, 2017 meeting with IVCA;

(iv) Mr. Solymosi's October 5 and 6, 2017 draft C&D Orders;

(v) Mr. Solymosi's October 10, 2017 issuance of C&D Orders to Prokam, Thomas Fresh, and IVCA;

(vi) Mr. Solymosi's continued evidence gathering from IVCA in October and November 2017;

(vii) Mr. Solymosi's participation in the November 7, 2017 Agency Managers Meeting and November 22, 2017 letter;

(viii) November letters between Mr. Solymosi and IVCA;

(ix) Mr. Solymosi's November 20, 2017 report to the Commissioners;

(x) Mr. Solymosi's failure to disclose the October 25, 2017 Hothi letter before the show-cause hearing;

(xi) The outcome of the December 22, 2017 show-cause decision, which downgraded Prokam's license but not IVCA's.

(b) **Mr. Solymosi's knowledge of the export minimum pricing orders' unlawfulness:** "at the material times, Mr. Solymosi (and Mr. Guichon) proceeded with enforcement measures against Prokam for purported violation of export minimum pricing orders knowing that there was a vulnerability as to their lawfulness and being reckless as to whether the export minimum pricing orders were in fact valid"[68]:

[67] Phase I, Written Submissions of Prokam at para. 46.
[68] Phase I, Written Submissions of Prokam at para. 90, emphasis in original.

(i) January and April, 2017 correspondence on a draft amended levies order, concluding with the federal levies order's amendment September 6, 2017;

(ii) Mr. Solymosi's correspondence in August 2017, after the export minimum prices at issue were set, adverting to the federal *APMA;*

(iii) Mr. Solymosi's September 2017 correspondence with Natural Farm Products counsel over the Gazetted amended federal levies order;

(iv) Mr. Solymosi's post-C&D Orders correspondence on the orders' validity;

(v) Discussion, attended by Mr. Solymosi, at the Commission's December 14, 2017 meeting over the orders' validity.

(c) **Mr. Guichon's motives in issuing the C&D Orders:** Mr. Guichon "was motivated by an improper or ulterior purpose — his own self-interest and the interests of his fellow BCfresh growers who could not sell into Alberta — and…he knew that his exercise of his power in that way for that purpose would cause harm to Prokam"[69]:

(i) Mr. Guichon's testimony in 2018 that did not disagree he was a decision-maker in respect of the C&D Orders;

(ii) Mr. Guichon's testimony in Phase I that his anger as a grower ("I'm not very happy about" contracts for $0.22/pound) motivated his decision to issue the C&D Orders.

(d) **Mr. Guichon's participation in discussions and deliberations related to Prokam:** "Mr. Guichon participated in discussions and deliberations related to Prokam…knowing that he was in a conflict"[70]:

(i) Mr. Guichon's attendance and participation in the Commission's December 14, 2017 meeting;

(ii) Mr. Guichon's participation in the Commission's January 26, 2018 meeting by phone;

(iii) Mr. Guichon provided draft comments on the Commission's January 30, 2018 variation decision by email on January 29, 2018.

(e) **Mr. Guichon's knowledge of the export minimum pricing orders' unlawfulness:** "in or around October 2017…from his service as a Commissioner…and continuing through the September 2017 Federal Levies

[69] Phase I, Written Submissions of Prokam at para. 120.
[70] Phase I, Written Submissions of Prokam at para. 124.

discussion, Mr. Guichon either knew, or was wilfully blind to the fact that the Commission's regulation of interprovincial and export trade required the exercise of federally delegated authority, or was reckless as to whether federally delegated authority was required"[71]:

(i) Mr. Guichon testified to recalling a 2006 meeting where the Commission's extraprovincial levies were discussed as being legally vulnerable;

(ii) Mr. Guichon was aware that Messrs. Leroux and Hrabinsky had gone to Ottawa in 2008 to give evidence at a joint parliamentary committee;

(iii) Mr. Guichon attended an October 18, 2006 Commission meeting that discussed the need for a federal order;

(iv) Mr. Guichon attended a September 5, 2007 meeting in which a new federal order was mentioned and the commissioners voted to repeal the *British Columbia Interior Vegetable Marketing Review Panel (Interprovincial and Export) Regulations*;

(v) Mr. Guichon attended and voted on a motion in a November 17, 2009 meeting to approve the BCVMC Federal Levies Order;

(vi) Mr. Guichon attended the Commission meeting on September 6, 2017 when the Federal Levies order was discussed, weeks before consenting to or approving the C&D Orders.

74. No party has suggested, further, that it was obvious in advance that the Review Panel would find Mr. Dhillon not credible, or that it would find Messrs. Solymosi and Guichon credible.[72] The Review Panel wrote that Mr. Dhillon's lack of credibility "emerged during his extensive cross examination", while Mr. Solymosi's credibility was confirmed "under multiple hours of cross-examination."[73]

75. Nor can improper motives be inferred from the prior context to the civil claim, or the existence of a prior, live dispute. By definition, misfeasance in public office claims arise in the context of an interaction, often but not always negative, with public authorities. Prokam therefore agrees with Hearing Counsel that "bad faith cannot be presumed simply because Prokam was seeking relief from the Commission at the time it made its

[71] Phase I, Written Submissions of Prokam at para. 136.
[72] BCFIRB, Decision, "Allegations Review", July 14, 2022 at paras. 53, 83, 114, and 131.
[73] BCFIRB, Decision, "Allegations Review," July 14, 2022 at para. 53.

allegations".[74] Prokam disagrees with his suggestion, however, that in view of events in 2017, Prokam's civil claim is "properly seen as part of a continuing course of conduct to undermine the Commission."[75] There is simply no evidence for that assertion.

76. Nothing can be inferred, further, from any destabilization of the Commission that the lawsuit may have caused[76] — "[t]here is always stress and disruption when a lawsuit occurs."[77] This is not to minimize those stresses or disruptions, but only to say they are inherent in an adversarial justice system. Absent evidence that such destabilization in fact *motivated* Prokam (and none has been shown here), they are no basis for punishment.

77. Nor did the Phase I decision, or any party, identify "easy and obvious enquiries" that Prokam could have made to allay its suspicions about Messrs. Solymosi or Guichon's conduct, as have sometimes justified special costs in other contexts.[78]

78. Given the above, no "bad faith…strategic or ulterior purposes" can be inferred from Phase I, let alone with such certainty that "no other explanation" is possible. That being the case, there is no basis to punish Prokam consistent with Phase II's terms of reference.

V. THE PROPOSED PENALTIES ARE IMPERMISSIBLE

A. The Proposal to Reopen Prokam's Delivery Allocation

79. Hearing Counsel invites the Panel to revisit Prokam's delivery allocation and licence class.[79] But as the Commission points out, these matters, including Prokam's application for an interim producer-shipper license and CFP's application for a Class 1 designated agency licence, have been or are the subject of other proceedings.[80] That is sufficient reason to not address them in Phase II.

80. Prokam applied for and received delivery allocation freezes from the Commission in the years 2018-2023. Those decisions are final decisions and no appeals were taken from

[74] Submissions of Hearing Counsel at para. 55.
[75] Submissions of Hearing Counsel at para. 63.
[76] See Submissions of the Commission at para. 8(b).
[77] *Groberman v. Groberman,* 2005 BCSC 999 at para. 35.
[78] *Seagull Paving Ltd. v. Terasen Gas (Vancouver Island) Inc.,* 2006 BCSC 347 at para. 24.
[79] Submissions of Hearing Counsel at paras. 102-107.
[80] Submissions of the Commission at para. 45.

them. It would be contrary to the principle of finality for these statutory decisions of the Commission to now be reopened and re-argued.

81. Any matters decided in other administrative proceedings would call for an analysis of issue estoppel; any subject to ongoing proceedings would call for an analysis of collateral attack.[81] None of the parties have undertaken this analysis, and nor should the Panel.

82. Moreover, this proposed sanction bears no relation to the scope of Phase II as defined by the AFTOR. Rather, Hearing Counsel bases this recommendation on adverse findings made with respect to Prokam's participation in the regulated vegetable industry since 2017 — findings that were made beyond the scope of Phase I's terms of reference and after lengthy cross-examinations of Prokam's representative without notice that these issues would be canvassed. Any sanction based wholly or in part on these findings would be an indefensible breach of procedural fairness.

B. The Review Panel does not have Jurisdiction to Award Costs

83. Costs — the "compensation for legal services and expenses incurred in the course of litigation" — is a familiar term of art.[82] So when legislators confer the power to award them, they use express wording. They have done this in many contexts, including in BCFIRB appeals.[83] The practice is so common that courts do not recognize tribunal powers to award costs by necessary implication.[84] Had the legislature wished for the Review Panel to be able to award costs in supervisory reviews, then, it needed to expressly confer that power. It did not.

84. The Commission says, however, that the statute speaks by circumlocution. Although the *NPMA* does not expressly confer the power to award costs in supervisory reviews under s. 7.1 (despite doing so for appeals under s. 8.1(1)(b)), the Commission says BCFIRB can direct it to impose a charge on Prokam under ss. 11(1)(o), 11(1)(q) and 12(1) of the *NPMA.* That charge, it says, should be "50% of the Commission's actual legal fees and expenses up to January 25, 2023, and 100% of those fees and expenses thereafter".[85]

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[81] Brown & Evans, *Judicial Review of Administrative Action,* at §3.32.
[82] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 at para. 40.
[83] *NMPA* s. 8.1(1)(b).
[84] *Canada (Attorney General) v. Mowat,* 2009 FCA 309 at paras. 91 and 94, aff'd 2011 SCC 53.
[85] Submissions of the Commission at para. 43. And see para. 37.

85. Put differently, the Commission seeks costs, without direct statutory authority to award them, in an amount far higher than would likely have been awarded in court, and in administrative proceedings that Prokam neither initiated nor advanced. The Review Panel should resist this invitation to do indirectly what it cannot do directly.

86. The Commission's theory rests on ss. 11(1)(o), 11(1)(q) and 12(1) of the *NPMA* and ss. 4(1) and (2) of the *BCVS*.[86] It fails because these provisions do not allow it, or the Review Panel acting in its supervisory capacity, to award "costs" for supervisory reviews.

87. The provisions of ss. 4(1) and (2) of the *BCVS* vest "the commission" with (1) "the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product"; and (2) "the powers described in section 11 of the Act".

88. Section 11 of the Act includes the following powers, which it bestows on "marketing boards" or "commissions"[87]:

> 11(1) Without limiting other provisions of this Act, 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) to carry out the purposes of the scheme,
>
> (ii) to pay the expenses of the marketing board or commisison,
>
> (iii) to pay costs and losses incurred in marketing a regulated product,
>
> (iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and
>
> (v) to set aside reserves for the purposes referred to in this paragraph.

[86] Submissions of the Commission at para. 23.
[87] *NMPA* s. 1, sv. "marketing board" and "Provincial board".

> …
>
> (q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product, and to amend or revoke them…

89. Section 12(1) of the Act reads:

> 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.

90. The words of these provisions must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]".[88] Three further rules assist.

91. The first is the presumption of consistent expression: different terms in the same legislation "must be understood to have different meanings", since "otherwise the legislature would have employed only one term or the other".[89] The word "costs" — adopted from s. 47 of the *Administrative Tribunals Act* via s. 8.1(1)(b) of the *NPMA* — must therefore mean something different from "levies or charges" under s. 11(1)(o).

92. Second, the *NPMA*'s use of "levies or charges" engages the "associated words" rule. This is "properly invoked when two or more terms linked by 'and' or 'or' serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature…[which] is then relied on to resolve ambiguity or limit the scope of the terms."[90] The term "levies or charges" should therefore be construed according to a common feature.

93. And third, the "implied exclusion" rule, according to which "[t]he Legislature's failure to include the expected thing leads to the inference that it was deliberately excluded", carries force here. Legislatures "have demonstrated their ability in various pieces of legislation to explicitly confer on tribunals a general power to award costs"; "nothing less than express authority", therefore, "will suffice".[91]

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[88] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21.
[89] *Alberta (Information and Privacy Commissioner) v. University of Calgary,* 2016 SCC 53 at para. 53.
[90] *Bowe v. Bowe,* 2022 BCCA 35 at para. 90, citing Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed. (Markham: LexisNexis, 2014) at 8.35.
[91] *Mowat* FCA at paras. 91 and 94.

94. Application of these statutory interpretation principles supports the conclusion that a power to award "costs" (1) is distinct from "levies or charges"; (2) is distinct from a common feature uniting "levies or charges"; and (3) cannot be inferred in the absence of express language. The fact that costs is not an express power in this context is dispositive. But the term's distinction from "levies or charges" leads to the same result.

95. The distinction between the terms is relatively clear. Costs are "compensation for legal services and expenses incurred in the course of litigation". The term "levy", by contrast, has been defined as "a tax, 'appropriation by the State of a fixed proportion of all or some of the wealth on the country'".[92] And a "charge" has been defined as "money collected to defray the cost of specific services rather than to raise revenue for general purposes".[93] The terms "levy" and "charge" are therefore general and specific means by which a body collects funds to, in turn, provide services. Collecting money purely to compensate litigation expenses, with no promise of future services, falls outside their purview.

96. This is consistent with the I-5 decision. There, the British Columbia Vegetable Commission imposed two levy orders on tomato growers "to fund expenses associated with [a] trade dispute with the United States".[94] The levies aimed to promote what was essentially public interest litigation on behalf of tomato growers as a whole. They were not designed merely to compensate for past litigation expenditures, and so cannot be characterized as orders for "costs".[95]

97. Here, by contrast, the stated purpose of the sanction proposed by the Non-Complainant Participants is either compensatory, punitive, or both. The remedy that is proposed is an order that Prokam pay the legal fees of the Non-Complainant participants incurred in this proceeding. It is in substance an award of costs, despite the Non-Complainant Participants' artful attempt to style the award as a "levy" or a "charge" or by any other moniker. It is an effort to achieve indirectly what the Commission recognizes BCFIRB cannot achieve directly. It is an invitation to circumvent a plain and obvious want of statutory jurisdiction, and the Review Panel should not accept it.

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[92] *812069 Ontario Ltd. v. Bramalea Ltd.,* [1990] O.J. No. 1879 (Ont. Gen. Div.) at para. 12.
[93] *493540 B.C. Ltd. v. Comox-Strathcona (Regional District),* 2004 BCSC 365 at para. 28.
[94] *Global Greenhouse Produce Inc. v. British Columbia Marketing Review Panel,* 2003 BCSC 1508 at para. 113, and see para. 111, aff'd 2005 BCCA 476.
[95] See *Global Greenhouse* BCSC at para. 128: "the expenses, although incurred by Hot House, were incurred for the purposes of the BCVC".

98. But even if the Review Panel has jurisdiction to order (or direct the BCVMC Commission to order) costs in the *Commission's* favour, that power could not extend to ordering costs to other non-complainant participants.[96] In addition to the purpose of "levies or charges", discussed above, the text of s. 11(1)(o) contemplates levies or charges "received by the marketing board or commission", which are to be used for the purposes listed in ss. 11(1)(o)(i) to (v). On a fair reading, those provisions do not capture legal costs incurred by third parties.

99. Nor can a "levy or charge" be used to target a single grower, to the extent of a full indemnity, without amounting to an improper use of legislative power.

100. The Review Panel lacks jurisdiction to direct the Commission to impose what in substance is a costs award in the form of a "levy or charge".

101. For all of these reasons, the Review Panel should decline to order any punitive sanctions against Prokam.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 15, 2023

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[96] Submissions of the Commission at para. 8(c).