

June 5, 2023

Nazeer T. Mitha, KC
D/ 604 283 8559

By Email (Wanda.Gorsuch@gov.bc.ca)

nmitha@mithalawgroup.ca
Our file 1041-001

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

Attention: Wanda Gorsuch

Dear Sirs and Mesdames:

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

I write in response to letters from counsel for BC Fresh Vegetables Inc. (BC Fresh) and Prokam Enterprises Ltd. (Prokam) which were provided in response to the proposal made in my letter dated April 26, 2023.

Letters from BC Fresh and Prokam

In its letter of May 25, BC Fresh suggests that Hearing Counsel add to the proposed investigation, including discussion with a representative of BC Fresh and identified growers.

In its letter of May 31, Prokam argues there should be no additional evidence-gathering phase as proposed, or at all.

Prokam makes two arguments. First, it argues that the Review Panel has already determined the procedure that will apply to Phase II. As no circumstances have been identified which would justify changing the procedure, it should remain as is.

Second, Prokam argues that there has been a continual evolution of the supervisory review which presents an inherent procedural fairness problem that becomes exacerbated if Phase II is permitted to further evolve with this additional evidence-gathering phase.

Response to letters from BC Fresh and Prokam

As I stated in my letter of April 26, the Review Panel issued the Amended Final Terms of Reference ("AFTOR"), under which it intends to consider what orders or directions it has the authority to make, to restore orderly marketing, trust and confidence in the BC regulated vegetable industry.

Addressing the AFTOR essentially requires three steps. First, the Panel will need to consider what conclusions or inferences can be drawn about the motivations of Prokam in advancing its allegations against the Commissioners and Mr. Solymosi. Second, there will be arguments about the jurisdiction or authority that BCFIRB has to consider certain types of orders or directions. Lastly, there will be consideration of what orders or directions should be made to restore orderly marketing, trust and confidence. To address that last step, it will be important to understand how Prokam might or could market its regulated storage crop.

In my submission, consideration of how Prokam might be able to market its storage crop is not a fundamental change of process or an evolution of the supervisory review as suggested by Prokam. Rather, it is simply an opportunity to gather additional evidence which will assist the Panel in restoring orderly marketing to the regulated storage crop sector, the fundamental objective of the AFTOR. The real question is whether my proposal creates any procedural unfairness that will cause prejudice to Prokam.

The jurisprudence makes clear that tribunals are masters of their own procedure as long as they comply with procedural fairness. In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, ("*Baker*") the Supreme Court of Canada discussed at length the factors to be considered in determining the content of the duty of procedural fairness. The court ended by stating at para 28 that:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.
(emphasis added)

In *Interpaving Ltd v Greater Sudbury (City)*, 2018 ONSC 3005, the City made a decision to debar Interpaving from bidding on City contracts for four years. This decision was made without providing Interpaving the opportunity to provide submissions on the decision. However, after the decision was made, the City reconsidered its decision and in the context of the reconsideration, the City provided Interpaving an opportunity to be heard and to make submissions. The court ruled that as Interpaving had been provided a fair opportunity to be heard in the reconsideration process, the City did not breach the rules of procedural fairness. The court held at para 85:

Interpaving was given a full opportunity to meet with City's Decision-Makers twice to make submissions on the Debarment Decision after receiving notice in the Debarment Letter of the grounds upon which the Debarment Decision was based and there were further written communications exchanged. These steps cured the initial lack of procedural fairness resulting from the failure to give Interpaving an opportunity to respond prior to the decision of the City's Decision-Makers.

The important point arising out of these cases is that a tribunal can set its own procedure as long as it complies with the duty of procedural fairness. The key factor in the duty of procedural fairness is whether persons are provided with an opportunity to present their case fully and fairly before decisions concerning their rights or interests are made.

Nothing in the process of investigation suggested in my letter of April 26 precludes Prokam from having the opportunity to present its case fully and fairly before any decision is made by the Review Panel. In fact, as stated in my letter, once I obtain further information from the investigation which I propose to conduct, I will prepare summaries of all my discussions and circulate them so that all parties have an opportunity to provide any submissions on that information. Steps should be taken to ensure that Prokam is given the full opportunity to provide further evidence and/or submissions about any new facts or issues before any decision is made by the Review Panel.

In sum, permitting me to conduct the proposed investigation furthers the AFTOR's goal of restoring orderly marketing, trust and confidence in the BC regulated vegetable industry and does not compromise the rules of procedural fairness for Prokam or any of the other parties. As a result, I respectfully submit that the Review Panel should approve the investigation I propose to conduct as set out in my letter dated April 26, 2023.

With respect to BC Fresh's request for me to speak with other growers and agencies, I propose to address that after I have had a chance to conduct the initial phase of my investigation. If I determine that I do not need to have those discussions, I will give BC Fresh and the other participants an opportunity to provide further submissions at that time.

In terms of next steps and timing should my proposal be approved by the Panel, and assuming the reasonable availability of all parties, I anticipate being able to complete the investigation no later than the end of June, 2023. Subsequently, a schedule of submissions could be set depending on the results of that investigation.

Yours very truly,
Mitha Law Group

Per:



Nazeer T. Mitha, KC *
* Law Corporation

NTM/mc

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, KC, via email: munderhill@arvayfinlay.ca
 Robert McDonell, via email: rmcdonell@farris.com
 Robert Hrabinsky, via email: RHrabinsky@ahb-law.com