

Hunter Litigation Chambers

KAARDAL/SMART/HUNTER

May 31, 2023

File No: 3211.002

BY EMAIL

BC Farm Industry Review Board
1st floor 2975 Jutland Road
Victoria, BC V8T 5J9

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

Re: Allegations Supervisory Review

We write further to Hearing Counsel's May 19, 2023 correspondence inviting submissions with respect to his proposal as stated in his letter dated April 26, 2023 in this supervisory review. In Prokam's submission, the Review Panel should reject Hearing Counsel's proposal.

The context in which Hearing Counsel's current proposal arises is as follows.

Hearing Counsel initially proposed¹ that this Phase II of this supervisory review itself proceed via two phases: an evidence-gathering phase, in which Hearing Counsel would interview Prokam and its counsel to explore the bases on which it brought the misfeasance claim, and a submissions phase, in which the parties to this supervisory review would make submissions regarding what inferences can or should be drawn from the evidence gathered by Hearing Counsel and what consequences should be considered.

The Review Panel invited submissions from the parties on Hearing Counsel's recommendations.²

Prokam submitted that there should be no evidence-gathering phase, and that if Phase II was to proceed over Prokam's jurisdictional and procedural fairness objections – objections that Prokam maintains – it should proceed on the basis of written submissions only.³

In Hearing Counsel's reply, he altered his original recommendations by recommending that the Review Panel proceed to Phase II "without the need for Hearing Counsel to conduct any further investigations".⁴

¹ July 27, 2022 correspondence from Hearing Counsel regarding process recommendations.

² July 28, 2022 correspondence from the Review Panel.

³ August 24, 2022 correspondence from Claire Hunter, K.C.

⁴ September 9, 2022 correspondence from Hearing Counsel.

The Review Panel accepted Hearing Counsel's revised recommendations for the Phase II procedure, including that it be by way of written submissions only after Prokam was provided with an opportunity to tender additional evidence if it chose to do so.⁵

On March 6, 2023, Hearing Counsel wrote to propose a schedule for the steps to be taken in Phase II as set out in the Review Panel's October 21, 2022 decision. On March 24, 2023, the Review Panel confirmed the schedule proposed in Hearing Counsel's March 6, 2023 letter. That schedule contemplated the following steps:

1. Prokam would have an opportunity to determine whether it wished to provide any additional evidence and if so to furnish such evidence by March 31, 2023.
2. Hearing counsel would provide written submissions;
3. The non-complainant participants would provide their written submissions;
4. Prokam would provide its written submissions; and
5. Hearing counsel would provide reply submissions.

Prokam did not indicate that it intended to provide further evidence, and did not do so. It is not apparent that evidence about Prokam's agency relationship with Okanagan Grown falls within the scope of the Amended Terms of Reference.

Hearing Counsel's proposal is to add an additional step to the procedure, for the purpose of "investigat[ing] the issue of Prokam's current business or marketing relationship with Okanagan and...potentially consider[ing] other feasible agency arrangements". That additional step was described as follows:

As a result, I request time to investigate the issue of Prokam's current business or marketing relationship with Okanagan and to potentially consider other feasible agency arrangements. As part of my investigation, I propose to speak with a representative of Okanagan and to speak to Prokam about their business or marketing relationship and to discuss with them their views of other potential marketing agreements with other storage crop agencies. After speaking with these two organizations, I may speak to other designated storage crop agencies. Whether I speak to other agencies will depend, to some extent, on the information I gather from my discussions with Prokam and Okanagan.

As I did in the past, I will prepare summaries of all my discussions and circulate those summaries. Once I have completed this investigation, I will

⁵ October 21, 2022 Decision at para. 46.



propose a revised schedule for submissions for comment by the parties and a decision by the panel.

BCfresh has submitted⁶ that the question of whether Hearing Counsel should speak to other designated storage crop agencies should not depend on the outcome of his discussions with Prokam and Okanagan Grown. Rather, BCfresh submits that Hearing Counsel should incorporate into his interviews discussions with a representative of BCfresh and with growers who ship through that agency.

The Review Panel has already determined the procedure that will apply to Phase II. All parties were permitted to make submissions on that procedure. The procedure that the Review Panel determined would apply to this phase of the supervisory review was based on Hearing Counsel's own recommendations. Hearing Counsel has not identified a change in circumstance that would justify changing the procedure now.

Prokam remains of the view that the continual evolution of this supervisory review presents an inherent procedural fairness problem, which will only be exacerbated if Phase II is permitted to evolve yet further. There must surely be a point at which the procedure is treated as fixed. If Hearing Counsel wished to leave open the possibility of recommending changes to Prokam's agency relationship, and of gathering the information necessary to properly delve into that subject, it was incumbent on him to raise that when the Phase II procedure was being decided.

In any event, the interests that appear to be at stake for Prokam and its principals in Phase II (including their future ability to participate in the regulated vegetable industry and, now, the spectre of another involuntary agency relationship) are such that it would be procedurally unfair for post-interview witness summaries authored by Hearing Counsel to form the basis for any such decisions. Prokam would be entitled, as a matter of procedural fairness, to tender its own evidence and test any adverse evidence. The process did not stop with Hearing Counsel summaries when the interests of the non-complainant participants were at stake in Phase I; it is not clear why it should stop with Hearing Counsel summaries now, given the gravity of the interests potentially at stake for Prokam in Phase II.

It follows that, if the Review Panel permits Hearing Counsel to undertake this line of investigation, Prokam's procedural fairness entitlements would eventually require that the procedure be more expansive than Hearing Counsel's proposal contemplates.

Hearing Counsel's proposal thus introduces uncertainty in the procedure underlying this phase of the supervisory review that, if accepted, would increase the likelihood that the procedure will need to continue to expand and evolve in order to address problems arising from previous changes. BCfresh's submission is an example of this. The continual

⁶ May 25, 2023 correspondence from Robert McDonell.

adjustment and expansion of the procedure applicable to this supervisory review will broaden the scope and increase costs to all parties in a context in which the cost associated with the previous phase of this supervisory review is already being criticized.

For all of these reasons, the Review Panel should reject Hearing Counsel's proposal to modify the procedure applicable to Phase II.

All of the above is submitted without prejudice to Prokam's right to argue that Phase II of this supervisory review already exceeds the Review Panel's jurisdiction and is irremediably procedurally unfair, for reasons including those set out in our correspondence dated August 24, 2022. Prokam maintains those objections, and intends to address them as part of its Phase II submissions.

Yours truly,

Hunter Litigation Chambers

Per: 

Claire E. Hunter, K.C.

CEH/RJA/APC

cc: all counsel