

October 12, 2023

Nazeer T. Mitha, KC
D/ 604 283 8559

By Email (Justine.Lafontaine@gov.bc.ca)

nmitha@mithalawgroup.ca
Our file 1041-001

BC Farm Industry Review Board (BCFIRB)
2975 Jutland Road, 1st Floor
Victoria, BC V8T 5J9

Attention: Justine Lafontaine

Dear Sirs and Mesdames:

Re: Next Steps for Phase II of the Supervisory Review

I write this letter to discuss the next steps for Phase II of the Supervisory Review. However, before doing so, I provide a summary commencing with BCFIRB's Decision of July 14, 2022.

Summary of Submissions and Decisions from July 14, 2022 to September 2023

On July 14, 2022, BCFIRB issued its decision on phase one of the Supervisory Review ("Phase I Decision").

By letter dated July 27, 2022, I summarized key points arising from the Phase I Decision.

I noted, among other things:

Paragraph 261: In conclusion, there was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by the Complainant Participants.

Paragraphs 262-269: Serious concerns have been raised about the significant impact the Complainant's allegations have had, especially as the allegations were made without any proper factual foundation.

The serious concerns arising out of the allegations include:

- a. MPL's demands, allegations and conduct are nothing more than bullying tactics;

- b. The misfeasance claims were commenced for strategic or ulterior purposes and not to recover actual damages suffered;
- c. The unsubstantiated allegations were made for strategic purposes, specifically to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of regulated marketing in the Province;
- d. The allegations were advanced without any evidence of actual harm or damages;
- e. The serious allegations made by Prokam and MPL were based principally on speculation, which reduced the Supervisory Review to largely being an unsuccessful fishing expedition on the part of the Complainant Participants, at extraordinary expense to the Non-Complainant Participants and BCFIRB;
- f. The allegations made and the necessity of the Supervisory Review destabilized and caused a lack of confidence in the regulated vegetable industry and to some extent paralyzed aspects of the Commission's operations; and,
- g. The Commission has been deprived access to its General Manager in relation to the issues advanced by Prokam, CFP Marketing Corporation (CFP), MPL and their principals; and there has been a chilling effect on the willingness of producers to serve as elected Commission members.

Regardless of all of these concerns, 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.

The determination of whether there has been bad faith potentially gives rise to larger issues regarding the suitability of Prokam, CFP and MPL's participation in the regulated vegetable industry.

I then recommended continuation of the Supervisory Review in two steps. The first step was to consist of investigation of whether Prokam and MPL had any evidence to support the allegations made in the Supervisory Review and the second step was to consist of submissions on how to address BCFIRB's concerns as outlined above in subparagraphs a – g.

The various parties provided submissions on my proposed process and I provided a reply submission on September 9, 2022.

BCFIRB then provided its decision on October 21, 2022 ("Phase II Procedure Decision"). At paragraph 49 of the Phase II Procedure Decision, the Chair set out the process for Phase II of the Supervisory Review as follows:

49. For the reasons set out above, I make the following orders:

- a. The terms of reference will be amended as set out in Appendix A;

- b. MPL and Prokam will be provided an opportunity to provide any additional evidence if they choose to do so;
- c. All participants will then have the opportunity to provide me with written submissions on the following issues:
 - i. what conclusions or inferences should be drawn from the findings in the Decision, together with any additional evidence filed by Prokam and MLP, with respect to Prokam and MPL's motivations for advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi, and
 - ii. in light of any findings that might be made concerning Prokam and MPL's motivations, what, if any, orders or directions does the panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.

There was subsequently an agreed upon stay of Phase II of the Supervisory Review pending the outcome of judicial reviews filed by Prokam and MPL.

On March 6, 2023, after the court dismissed the judicial reviews, I wrote a letter suggesting a process and timing for Phase II of the Supervisory Review. Shortly afterwards, MPL entered into a settlement agreement, the result of which is that it was no longer part of Phase II.

On April 26, 2023, I wrote to BCFIRB and the parties recommending some further investigation about the relationship between Prokam and its agency, Okanagan Grown Produce Ltd. ("Okanagan"), and marketing arrangements Prokam had for storage crop over the past years and going forward.

After canvassing participants on my suggestion for further investigation, BCFIRB issued a decision on June 12, 2023. In its decision, BCFIRB ruled, in part:

I agree with Hearing Counsel and BCFresh that it is important to my determination of the issues in Phase II of the Supervisory Review that I have evidence about how Prokam might or could market its regulated storage crop.

BCFIRB then set out the procedure for Hearing Counsel to investigate the issue of how Prokam might or could market its storage crop and stated:

In addition, Prokam will be at liberty to bring an application to adduce additional evidence after Hearing counsel's investigation is complete.

BCFIRB then made the following orders:

The procedure for Phase II of the Supervisory Review shall be as follows:

- a. Hearing Counsel shall investigate through interviews with Okanagan, Prokam, and such other members of the storage crop industry as he considers to be necessary how Prokam, as a producer, might or could market its regulated storage crop. That investigation shall be completed by June 30, 2023.
- b. Hearing Counsel shall prepare summaries of all the evidence he elicits, and provide copies to all participants.
- c. If it so chooses, Prokam may bring an application to provide additional evidence after its review of those summaries.
- d. All participants will then have the opportunity to provide me with written submissions on the following issues:
 - i. what conclusions or inferences should be drawn from the findings in the Phase I Decision with respect to Prokam's motivations for advancing allegations of bad faith and unlawful conduct against Mr. Guichon and Mr. Solymosi, and
 - ii. in light of any findings that might be made concerning Prokam's motivations, what, if any, orders or directions does the panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.
- e. The written submissions will be provided in the following order:
 - i. Hearing counsel;
 - ii. Non-complainant participants;
 - iii. Prokam; and
 - iv. Hearing counsel reply.
- f. Written submissions shall be no longer than 25 pages in length, including all appendices, and will be in 12 point Arial font with 1.5 line spacing. Hearing counsel reply shall be no longer than 10 pages in length. I grant liberty to apply if additional pages are required.

My investigation in accordance with the above process was completed on August 18, 2023. I invited submissions from other parties. Prokam responded by letter dated August 25, 2023. Prokam provided various additional information and then discussed the additional opportunity to provide further evidence and/or submissions. Prokam stated, in part:

In your closing submissions on the expansion of Phase II, you suggested that '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'. It is not clear, from the interview summaries, what new facts or issues are on the table.

We would ask that you consider providing greater specificity as to the facts and issues on which you propose to invite findings or make recommendations in relation to Prokam's agency going forward in order to allow us to properly consider the necessity of an evidentiary application.

By letter dated August 25, 2023, BCFresh also provided a submission in which it sought further investigation into various issues raised by Hearing Counsel's investigation into how Prokam has and will market storage crop.

Prokam wrote on September 1, 2023 taking issue with various facts and allegation set out in BCFresh's letter and seeking clarification on the Phase II process.

Finally, the Commission wrote on September 5, 2023 advising that with respect to the historical setting of Prokam's delivery allocation, there are records which are not yet before the Panel, meaning that BCFresh's concerns about the setting of delivery allocation for Prokam were being made without all the evidence.

Suggestions for Phase II Going Forward

The key issues arising from BCFIRB's Phase I decision remain outstanding, namely:

- a. what conclusions or inferences should be drawn with respect to Prokam motivations for advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi; and
- b. in light of any findings that might be made concerning what, if any, orders or directions does the panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.

Since the Phase I Decision, there has been some investigation done on how Prokam farmed and marketed storage crops since 2017 and how Prokam is set up to market storage crops going into the future. There are still some disputed facts about past history.

However, it is my view that there is no benefit to having continued investigation to try to sort out the disputed facts. Instead, I recommend that Phase II of the Supervisory Review continue with the original process BCFIRB set out in its June 2023 decision.

More specifically, there be written submissions in the following order:

- i. Hearing counsel;

- ii. Non-complainant participants;
- iii. Prokam; and
- iv. Hearing counsel reply.

Written submissions shall be no longer than 25 pages in length, including all appendices, and will be in 12 point Arial font with 1.5 line spacing. Hearing counsel reply shall be no longer than 10 pages in length. I grant liberty to apply if additional pages are required.

The purpose of the written submissions will be to address the following two issues as identified in BCFIRB' June 2023 Decision:

- i. what conclusions or inferences should be drawn from the findings in the Phase I Decision with respect to Prokam's motivations for advancing allegations of bad faith and unlawful conduct against Mr. Guichon and Mr. Solymosi, and
- ii. in light of any findings that might be made concerning Prokam's motivations, what, if any, orders or directions does the panel have the authority to make in furtherance of restoring orderly marketing and trust and confidence in the BC regulated vegetable industry.

The one modification I suggest to BCFIRB's June 2023 process is that after receiving Hearing counsel's submission, should Prokam or any other party consider they wish to make application to adduce additional evidence, they should be provided the opportunity to do so.

This process will address the concern of Prokam as set out in its August 25, 2023 letter, namely that this process will provide Prokam (and other parties) with greater specificity as to the facts and issues on which I, as Hearing counsel, propose to invite findings or make recommendations in relation to Prokam going forward. This will allow Prokam and other parties to properly consider the necessity of an evidentiary application.

In terms of timing, I suggest the following:

- a. Hearing counsel provide his submission by October 27, 2023;
- b. Any party be given the opportunity to make application for additional evidence by November 8, 2023;
- c. Any additional evidence, if approved be provided by November 22, 2023;
- d. Non-complainant participants provide their submissions in response to Hearing counsel's submissions by December 1, 2023;

- e. Prokam provide its submissions in response to Hearing Counsel's and Non-complainant submissions by December 15, 2023; and
- f. Hearing counsel provide reply submissions by December 29, 2023.

If anyone has comments on the recommendation in this letter, please provide any comments by October 17, 2023.

Yours very truly,
Mitha Law Group

Per:

A handwritten signature in blue ink, appearing to read 'N. Mitha', with a long horizontal flourish underneath.

Nazeer T. Mitha, KC *
* Law Corporation

NTM/mf

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 McDonnell, via email: rmcdonell@farris.com
Robert Hrabinsky, via email: RHrabinsky@ahb-law.com