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 DECISION

March 15, 2024

Contents

I. Introduction

1. On October 21, 2022, I issued my **Phase II Procedure Decision**, in which I ordered that this Supervisory Review would proceed to a second phase ("**Phase II**"), where I would consider, on notice to Prokam Enterprises Ltd. ("**Prokam**") and MPL British Columbia Distributors Inc. ("**MPL**"), the question of whether Prokam and MPL advanced allegations in bad faith or for strategic or ulterior purposes, and what orders or directions I have the authority to make and are necessary to restore orderly marketing, trust and confidence in the BC regulated vegetable industry.

2. These are my reasons with respect to Phase II in connection with Prokam.[1] First, there is no issue with section 96 of the *Constitution Act, 1867*, including Prokam's right of access to the courts, as this decision is concerned with the allegations of wrongdoing advanced in this Supervisory Review, and their impact on orderly marketing in the regulated vegetable industry. Second, Phase I did not result in any incurable unfairness, and Prokam was given a full opportunity to present evidence and make submissions in Phase II such that it was procedurally fair.

3. Based on all of the evidence before me, I have drawn an inference that Prokam advanced and maintained its very serious allegations of wrongdoing in this Supervisory Review in bad faith in the sense that it was reckless with respect to the truth of its allegations. Even if there was not a basis to draw that inference, I am satisfied that Prokam's continued pursuit of the allegations during this Supervisory Review warrants the orders and directions I summarize in the next paragraph.

4. As a result, in order to restore trust and confidence in the industry, I have determined that I have the authority to issue the following orders and directions that were recommended by Hearing Counsel, and that I should do so in the circumstances of this case. First, I direct that future consideration of Prokam's delivery allocation ("**DA**") and license class be dealt with through a transparent process before the BC Vegetable Marketing Commission ("**Commission**"). Second, Prokam and its designated agency must report to the Commission on a quarterly basis for a period of 24 months. Third, Prokam's principal, Bob Dhillon, will be restricted from being involved with a designated agency or receiving a producer-shipper license for a minimum period of 24 months, after which any participation would be subject to prior approval by BCFIRB.

5. Lastly, I have determined that recommendations for legislative reform are not warranted, and that there is no authority in the statutory scheme to impose a charge against Prokam in respect of the legal costs incurred by the Commission and other participants in this Supervisory Review.

[1] As described in more detail below, Phase II was discontinued in respect of MPL in January 2023.

II. Procedural History

6. The history of Phase I of the Supervisory Review is explained in detail at paragraphs 7-29 of the Phase I Decision, which I will not repeat here.

7. I issued the **Phase I Decision** on July 14, 2022, wherein I concluded that "despite the extensive investigation, document production, and the evidence of 16 witnesses, there simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing by the Complainant Participants**."** With respect to Prokam in particular, I found that Prokam's allegations were grounded in evidence that fell far short of the evidentiary threshold for proving the type of serious allegations that Prokam had advanced against Messrs. Solymosi and Guichon. Given the lack of a foundation for the allegations, and the fact I found Prokam's principal, Mr. Dhillon, lacked credibility, a question arose with respect to Prokam's motives for advancing the allegations and, more generally, Mr. Dhillon's willingness to participate in good faith in the BC regulated vegetable industry going forward.

8. The Commission, amongst others, suggested I ought to draw an inference that Prokam and MPL had advanced their allegations in bad faith or for an ulterior or strategic purpose. While I expressed concern that the allegations were advanced largely on speculation, and had a significant impact on the Commission, I also noted that the specific question 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 the Supervisory Review, or put to any of Prokam's witnesses. As a result of those concerns, I requested written submissions on what next steps were appropriate to address my concerns, and what consequences should follow.

9. After receiving those submissions, I issued the Phase II Procedure Decision on October 21, 2022. In that decision, I dismissed the argument which Prokam has now renewed in its final submissions; namely, that imposing adverse regulatory consequences for the filing of its civil claim would infringe on its right of access to the superior courts. I confirmed that I had made no findings about whether the tort of misfeasance in public office had been made out, that my findings in the Phase I Decision would not prevent Prokam from prosecuting its misfeasance in public office claim, and that my primary focus in Phase II would "continue to be on ensuring orderly marketing in the BC regulated vegetable industry, consistent with BCFIRB's statutory jurisdiction over sound marketing policy."

10. I went on to consider how Phase II could be structured in a way that was procedurally fair. I determined it would be appropriate to amend the Final Terms of Reference ("**FTOR**") to provide Prokam with notice of what would be considered going forward and the potential consequences. I specifically issued Amended Final Terms of Reference ("**AFTOR**") that put in issue the following:

> 3. Prokam and MPL advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi 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

e. directions or recommendations to other BCFIRB panels on how to address appeals or other processes involving Prokam, CFP or MPL.

11. I also considered how Prokam could be afforded an opportunity to be heard on the question of whether it had advanced allegations of wrongdoing in bad faith. I directed a process that permitted Prokam to present further evidence if it wished to do so, and for all participants to provide 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 MPL, 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.

12. By way of a January 25, 2023 ruling, I discontinued Phase II of the Supervisory Review with respect to MPL, in light of the steps it voluntarily took to restore trust and confidence in orderly marketing in the BC vegetable industry. Those steps included discontinuing its civil action, paying costs to the Commission, switching its focus back to advancing the marketing of greenhouse vegetables, committing to becoming a constructive member of the BC regulated vegetable sector, committing to comply with the three key components of orderly marketing, and submitting to quarterly reporting to BCFIRB. Accordingly, I concluded it was no longer necessary to pursue Phase II as against MPL.

13. Both Prokam and MPL had commenced judicial review proceedings with respect to the Phase I Decision in the fall of 2022, and Prokam’s application proceeded to

hearing in late January of 2023. Justice Brongers dismissed the judicial review petition on February 13, 2023. Prokam appealed that decision, but did not seek a stay of Phase II. The appeal was argued in January 2024, and the decision remains under reserve.

14. The first step in Phase II was for Prokam to provide any additional evidence, which it elected not to do. In reasons dated June 12, 2023, I agreed to allow Hearing Counsel to conduct additional investigation into Prokam's relationship with its existing agency, Okanagan Grown Produce, and other potential marketing arrangements. I set out a procedure that would give Prokam disclosure of any evidence Hearing Counsel gathered, as well as an opportunity to provide additional evidence in light of the disclosure. Prokam again elected not to produce any additional evidence after receiving Hearing Counsel's disclosure.

15. Final submissions were received from the parties between October 27, 2023, and January 8, 2023. Those submissions have raised the following issues, which I address in turn below: (a) whether Phase II infringes the constitutional right of access to the court; (b) the fairness of the Phase II procedure; (c) whether I should infer Prokam advanced its allegations in bad faith; and (d) whether I have the authority to and should issue a number of orders and directions.

III. Right of Access to the Superior Courts

16. Prokam takes the position that "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."[2] In its view, imposing sanctions for the filing of a civil claim would amount to BCFIRB (part of the executive branch of government) punishing it for accessing the courts. As a result, any sanctions for filing a claim in bad faith – be they restricting participation in the industry or imposing a costs award – would amount to an impermissible restriction on its right to access the superior courts.[3]

17. In his reply submission, Hearing Counsel argues that the premise of Prokam's submission is fundamentally flawed. He notes that from the outset, it has been accepted by everyone, including Prokam, that the Supervisory Review was not designed to determine whether there had been misfeasance in public office. As a result, the Supervisory Review has been focused on the allegations set out in the FTOR, and now the AFTOR, not the abuse of public office allegations advanced in Prokam's civil claim.[4] Thus, Phase II is not designed to punish Prokam for commencing a civil proceeding, but rather to ensure orderly marketing and public confidence in the regulated vegetable industry. As a result, he says that section 96 of the *Constitution Act, 1867* is not engaged and no constitutional issue arises.[5]

[2] Prokam's Submission, para. 12
[3] Prokam's Submission, paras. 15-16
[4] Hearing Counsel' Reply Submission, paras. 18-22
[5] Hearing Counsel' Reply Submission, para. 27

18. I addressed a version of this argument in the Phase II Procedure Decision, where I confirmed that my focus would be on the impact of the allegations that were first advanced in Prokam's civil claim, and subsequently expanded upon in the FTOR for this Supervisory Review. While I acknowledge that the Phase II Procedure Decision did refer to an inquiry into whether the civil claims were filed for an improper purpose, I agree with Prokam that it would not be appropriate for me to impose consequences for the filing of a civil claim in the BC courts. Rather, as Hearing Counsel has emphasized in his submissions, my focus must be on the allegations in what are now the AFTOR.

19. In that regard, I do not agree with Prokam that it should be viewed merely as a party participating in "a compulsory regulatory process".[6] In its June 4, 2021 submission, it expressly welcomed this Supervisory Review, characterizing it as a "positive development", and chose to renew and expand upon the allegations of wrongdoing in its civil claim such that they formed part of the FTOR. At no point during or after Phase I of the Supervisory Review did Prokam resile from those allegations; indeed, it went so far as to apply in Phase I to assume the powers of Hearing Counsel to conduct investigations and require participants to answer its questions. It continues to defend its decision to advance its allegations in its Phase II submissions. In contrast, as set out in my January 25, 2023 ruling, MPL withdrew its allegations, and voluntarily committed to participating in the industry and supporting orderly marketing.

20. Thus, this decision is focused on Prokam's conduct in this Supervisory Review, and the harm that has flowed from the advancement of the allegations that it sought to have included in the FTOR and continues to defend in this Supervisory Review (its civil claim has now been discontinued). I need to consider whether it has advanced its positions in bad faith or for an improper purpose, as well as what remedies are needed to restore trust and confidence so that the Commission can effectively regulate Prokam and its principals. In my view, that task in no way implicates section 96 of the *Constitution Act, 1867*, or impairs any constitutional right Prokam may have to access the superior courts.

IV. Procedural Fairness

21. Prokam argues that it is procedurally unfair to impose penalties on Prokam on the basis of the Phase I Decision findings, given that Prokam lacked notice prior to the Phase I Decision of the fact it could face sanctions in Phase II.[7] Prokam submits that its procedural entitlements in Phase II, where its conduct is at issue, are higher than its procedural entitlements in Phase I, which Justice Brongers accepted were at the mid-range of the spectrum.[8] In its view, however, given that Phase II might involve the imposition of sanctions based on evidence led and findings grounded in Phase I, "the die has been cast" by insufficient procedural entitlements from the outset.[9] It points to a

[6] Prokam's Submission, para. 8
[7] Prokam's Submission, para. 19
[8] Prokam's Submission, paras. 23-24
[9] Prokam's Submission, paras. 25-26

number of entitlements that it says it ought to have received in Phase I, including the opportunity to lead its witnesses and frame the direction of the hearing; full cross-examination of a key witness; and rights to two adjournments.[10]

22. Hearing Counsel notes that when considering the procedural entitlements owed to Prokam, I must take my authority under s. 7.1 of the *NPMA* into account. That provision permits me to exercise my powers at any time, with or without a hearing, and in the manner I consider appropriate to the circumstances.[11] I should also consider that at the outset of the proceedings, I had to assume the allegations may be true and could not prejudge them, and therefore could not have given notice to Prokam of the repercussions if its claims were not borne out, as that might have been interpreted as prejudgment.[12]

23. Thus, Hearing Counsel says that in the circumstances, procedural fairness did not require the panel to warn Prokam that it might face consequences if there was no basis for its allegations. He observes that Prokam's suggestion that it might have called different evidence or cross-examined differently in Phase I had it known the case against it rings hollow given the lack of any explanation of what that evidence might have been, noting that Justice Brongers rejected a similar argument in Prokam's judicial review of the Phase I Decision.[13] Hearing Counsel also notes that Prokam's procedural fairness concerns have already been addressed by giving Prokam specific notice of the allegations and the potential consequences, providing an opportunity for written submissions, and inviting it to tender additional evidence, which Prokam declined to do.[14]

24. I agree with the basic principles underlying Prokam's arguments, and accept that Prokam was entitled to proper notice of what is in issue at Phase II, as well as of the potential consequences that might follow. The requirement for notice is a basic tenet of procedural fairness. I also agree that Prokam was owed a heightened degree of procedural fairness in Phase II given it could face adverse consequences.

25. I disagree, however, that these principles render the Phase II proceedings "irremediably" unfair in the manner Prokam suggests. As Hearing Counsel notes, procedural fairness is eminently variable, inherently flexible, and context specific.[15] Its aim is to ensure that decisions are made according to "a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[16] In this case, I am satisfied the procedure adopted in Phase II was fair, open, and appropriate, and that

[10] Prokam's Submission, para. 31
[11] Hearing Counsel's Reply Submission, para. 32
[12] Hearing Counsel's Reply Submission, paras. 34-37, 47
[13] Hearing Counsel's Reply Submission, paras. 41-43, 52
[14] Hearing Counsel's Reply Submission, paras. 49-51
[15] Hearing Counsel's Reply Submission, para. 53
[16] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, para. 22

Prokam has had the opportunity to present its views and evidence fully on the questions raised at this stage of the proceeding.

26. In reaching this conclusion, I am mindful of the context in which the Phase II proceedings arose. That context includes my broad discretion to design a supervisory process under the *NPMA.* The *NMPA* vests BCFIRB with broad discretion to shape and control its processes. As Hearing Counsel observes, under s. 7.1(2) of the *NPMA*, the BCFIRB may exercise its supervisory powers at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.

27. The context also includes the manner in which this hearing proceeded. As I said in a number of rulings, including my January 26, 2022 ruling on Prokam's applications to interview witnesses and for an adjournment, and as noted by Justice Brongers in the judicial review of the Phase I Decision, the review process is inherently "iterative".[17] If new issues arise in the course of a proceeding, such that further evidence and submissions may be needed, it is open to me to enlarge the scope of the review accordingly. The evidence and findings in this case are what led to the need to consider Prokam's motives and what remedies are needed to restore trust and confidence in the BC regulated vegetable industry.

28. As with Prokam's section 96 arguments, I have already addressed the substance of this argument in the Phase II Procedure Decision. As I said there, it would not have been possible for me to provide notice any earlier because doing so would have prejudged the matters before me. Accepting that Prokam required notice, I issued the AFTOR to provide express notice of the matters to be considered in Phase II. I also provided Prokam with the opportunity to present further evidence and make written submissions.

29. In my view, taking those steps provides a full answer to any allegation that Prokam had insufficient notice of the case against it. The AFTOR gave Prokam ample notice of the case it had to meet. Prokam was given the opportunity to provide further evidence and submissions. To the extent there was any evidence it might have led at Phase I, had it known what would be at stake at Phase II, it has now had the opportunity to lead that evidence.

30. Those measures are also sufficient to dispose of any concerns about the potential fairness gap between Phases I and II. First, I note that Justice Brongers specifically upheld the fairness of the procedure adopted at Phase I on judicial review.[18] While I accept that Prokam was entitled to greater procedural protections in Phase II, I am not persuaded that the procedure followed fell short even of this heightened standard.

---

[17] *Prokam Enterprises Ltd. v British Columbia Farm Industry Review Board*, 2023 BCSC 403, para. 84 [***Prokam***]
[18] *Prokam,* paras. 76-87.

31. In any case, Prokam has now had the opportunity to lead any evidence, and make any submissions relevant to the issues raised at Phase II, that it was unable to make at Phase I as a result of any procedural deficiency. Hearing Counsel specifically proposed a procedure whereby he would investigate any additional evidence Prokam might have put forward to substantiate its allegations. Prokam opposed that, effectively waiving its right to lead additional evidence to support its allegations. The AFTOR additionally gave Prokam the opportunity to provide additional evidence concerning its motivations.

32. The fact that Prokam declined the opportunity to provide additional evidence with respect to both the substance of its allegations and its motives is important. I agree with Hearing Counsel that in the face of that refusal, Prokam's argument rings hollow. Not only has it failed to demonstrate what evidence it might have led, had it been afforded the degree of fairness it claims it was owed, it was in fact given the opportunity to lead such evidence, and chose not to. In my view, Prokam cannot have it both ways: it cannot claim that it did not have the chance to meet the case against it, but not take the opportunities that were provided to it.

33. For these reasons, I am satisfied that the Phase II proceedings were procedurally fair. Any procedural deficiency arising from the relationship between Phases I and II has been adequately remedied by the AFTOR, and by providing Prokam with the opportunity to lead additional evidence and make further submissions.

V. Drawing an Inference of Bad Faith

34. The primary determination I must make in this decision is whether Prokam advanced its allegations against the Commissioners and Mr. Solymosi "in bad faith or for strategic or ulterior purposes." This raises two questions: first, what it means to act "in bad faith" or "for strategic or ulterior purposes"; and second, whether an inference of bad faith can and should be drawn in this case.

A. What is Bad Faith?

35. Hearing Counsel submits that the caselaw establishes that bad faith can cover a wide range of conduct, does not require evidence of intentional fault, and may be based on serious carelessness or recklessness. He notes that bad faith will be found even where an individual honestly believes the allegations, but was reckless or grossly negligent as to whether they were true or not. He further observes that bad faith includes the absence of any genuine or objectively reasonable effort to investigate allegations before making them public.[19] The Commission likewise takes the position that "bad faith" extends to include "recklessness or serious or extreme carelessness".[20]

[19] Hearing Counsel's Submission, paras. 37-47, 49
[20] Commission's Submission, paras. 10-13

36. With respect to what constitutes bad faith, Prokam accepts Hearing Counsel's submission that bad faith may be shown by more than just intentional fault.[21] However, it says that given the risk that sanctions could limit Prokam's right of access to the courts, the standard for reprehensible conduct must be exceptionally high.[22] Prokam draws an analogy to the law of bad faith in special costs, and says the conduct must at least be a "reprehensible" misuse of the process.[23]

37. The participants have pointed me to caselaw from a number of different areas of law. I accept that "bad faith" is an imprecise concept, and that its content will vary from one area of law to another.[24] The participants agree, and I accept, that it includes intentional fault, or acts committed deliberately with an intent to harm.[25] As such, a finding that Prokam acted for strategic or ulterior purposes would likely also amount to a finding that it acted in bad faith.

38. The participants also appear to agree that bad faith encompasses more than just intentional fault. It also includes circumstances in which a party has advanced serious allegations with reckless disregard for their truth—that is, where a party has been "subjectively reckless" or "willfully blind".[26] In other words, even short of a finding that Prokam advanced its allegations for some specific improper purpose, it is enough if it did so recklessly.

39. This wider definition of bad faith has also been applied in circumstances similar to this one, where it is alleged that private parties have made serious, but unfounded, allegations against other parties.

40. As noted by Hearing Counsel, in the labour arbitration context, bad faith has been held to include conduct such as: embellishing and exaggerating serious false allegations without a reasonable basis, making false allegations in retribution for perceived slights, and making serious allegations in circumstances where the party in question should have known they were untrue, or with reckless disregard for their truth.[27]

41. Hearing Counsel also referred me to cases concerning the law of defamation, where a question sometimes arises whether a person made defamatory statements with malice or in bad faith. In that context, bad faith is not limited to "actual malicious intent… but also instances where the defendant speaks dishonestly or with reckless disregard for the truth." This can be inferred from factors such as "the nature of the allegations,

[21] Prokam's Submission, para. 55
[22] Prokam's Submission, para. 58
[23] Prokam's Submission, paras. 58-61
[24] *Entreprises Sibeca Inc. v. Frelighsburg (Municipality),* 2004 SCC 61, para. 25
[25] *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 at para. 39 [***Finney***]
[26] *Finney*, para. 39
[27] Hearing Counsel's Submission, para, 45, citing *Teck Coal Ltd v. United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied Industrial and Service Workers International Union, Local 7884* (Lybacki Grievance), [2021] BCCAAA No 114, para. 187

the absence of any factual basis to support them, and the absence of any genuine much less objectively reasonable effort to vet or investigate the allegations before making them public."[28]

42. Prokam does not dispute that bad faith includes more than just intentional fault. The key question that then arises is at what point does an allegation cross over from being merely wrong, to having been made recklessly, and thus in bad faith?

43. Both Hearing Counsel and Prokam refer to a number of cases concerning awards of special costs on the basis of improper or unfounded allegations of dishonest conduct.[29] Prokam suggests these cases provide a "helpful framework" for understanding the meaning of bad faith in this context.[30] I agree, although it appears to me that the question in special costs cases is somewhat different, given it asks whether a litigant behaved reprehensibly, which might include but is not limited to "bad faith". [31]

44. However, I believe that several principles from the caselaw on special costs relied on by the participants are of assistance here.

45. First, to justify an award of special costs, it is not enough simply to establish that a plaintiff's allegations were not proven. A plaintiff who advances a difficult case that ultimately fails does not meet the threshold of reprehensible conduct.[32]

46. At the same time, however, a litigant cannot avoid an award of special costs simply because they held an honest belief in the truth of their allegations. This is because a "party may honestly believe that he has been wronged, but he has a responsibility as a litigant to bring claims that have a reasonable prospect of success."[33] A litigant who recklessly advances a meritless allegation without regard for its prospects of success can be just as blameworthy as one who does so for a specific ulterior motive.[34]

47. The ultimate question is whether the plaintiff acted improperly in making or maintaining the allegations, or otherwise acted improperly in how they conducted the litigation. In other words, it must be shown, not just that the allegation was wrong, but that it was "obviously unfounded, reckless or made out of malice."[35]

---

[28] Hearing Counsel's Submission, para. 46; *Canada Easy Investment Store Corporation v MacAskill*, 2022 BCSC 202, para. 54, 56
[29] Hearing Counsel's Submission, para. 47; Prokam's Submission, paras. 58-60
[30] Prokam's Submission, para. 58
[31] *Hung v. Gardiner*, 2003 BCSC 285, paras. 4-6 [***Hung***]
[32] Prokam's Submission, para. 59; *Hung*, para. 16
[33] *Genesee Enterprises Ltd. v. Abou-Rached,* 2001 BCSC 1172, para. 11
[34] Hearing Counsel's Submission, paras. 40-43; *O'Connell Electric Ltd. et al v. British Columbia Hydro and Power Authority et al*, 2006 BCSC 1632, paras. 26-31
[35] *Hung,* para. 16

48. The matter must be considered from the point of view of the claimant at the time they made or maintained the allegations.[36] Direct proof of malice or recklessness is not required, however. In its absence, the court may consider questions such as "whether the party's allegations were reasonable at the time they were made",[37] or whether they persisted in pursuing them even though they "knew or should have known that there was no reasonable basis on which to [do so]."[38] Whether the lack of a reasonable basis for an allegation meets the threshold of reprehensible conduct, however, depends ultimately on the court's assessment of the litigant's conduct as a whole.[39]

49. The question in this case is different, but related. The question here is not whether Prokam's conduct was reprehensible enough to merit the punishment of an award of costs. It is whether it advanced and maintained its allegations in this Supervisory Review in bad faith. In my view, however, similar considerations apply.

50. The mere fact that Prokam's allegations failed does not mean it acted in bad faith. At the same time, the fact that Prokam may have held an honest sense it had been wronged does not mean it advanced its allegations in good faith.

51. Absent direct proof of malice or recklessness, it is relevant to consider the extent to which Prokam had a reasonable, objective basis to advance its allegations. The absence of a reasonable factual basis makes it more likely that an allegation was brought in bad faith – that is, maliciously, dishonestly, or recklessly. The ultimate question remains whether the totality of the evidence supports an inference of bad faith.

B. When can an inference of bad faith be drawn?

52. There is no direct evidence that Prokam had an improper motive in advancing the allegations of wrongdoing in the Supervisory Review. Nor is there any direct evidence that it knew its allegations were untrue, or that it was indifferent to whether they were capable of being proven. If a finding of bad faith is to be made, all participants accept it can only be made by inference. This leads to the second question: when is it appropriate to draw an inference of bad faith?

53. Hearing Counsel argues that caselaw establishes that inferences can be drawn from a proven fact or group of facts; that in drawing inferences I must rely on logic and common sense taking into account the totality of the evidence; that an inference must be reasonably and logically grounded in proven facts; and that I may choose from among any number of available reasonable inferences.[40]

---

[36] *Garcia v. Crestbrook Forest Industries Ltd.,* [1994] BCJ No 2486 (BC CA), para. 23
[37] *Seagull Paving Ltd. v. Terasen Gas (Vancouver Island) Inc.,* 2006 BCSC 347, para. 23
[38] *Walker v. College of Dental Surgeons of British Columbia*, (1997), 70 A.C.W.S. (3d) 365 (B.C.S.C.), para. 15
[39] *Austin Industries v. General Elevator Maintenance Co*., 2004 BCSC 820, para. 23
[40] Hearing Counsel's Submission, paras. 34-36, 48

54. Prokam agrees with Hearing Counsel that the inference must flow logically and reasonably from established facts. It further says the inference must typically be established on a balance of probabilities, and that triers of fact may choose among any number of available reasonable inferences.[41] However, Prokam says that in the particular context of this case, it is entitled to a presumption of good faith, and any inference of bad faith must be demonstrated by compelling evidence that ousts that presumption.[42] It further says that an inference of bad faith or strategic or ulterior motives should not be drawn unless there is no other explanation for Prokam's conduct.[43]

55. The participants agree on the general principles applicable to the drawing of factual inferences. A factual inference must "flow logically and reasonably from established facts".[44] In deciding whether to draw an inference, a trier of fact "must rely on logic, common sense and experience, taking into account the totality of the evidence".[45] Inferences cannot be drawn based on speculation or conjecture.[46]

56. Prokam's submissions, however, raise the question of the applicable threshold for drawing an inference of bad faith in this context. As Prokam points out, different thresholds apply in different contexts. Prokam cites as an example applications by shareholders to bring derivative actions against directors or management, where bad faith is presumed, and the onus is on the party resisting the application to disprove it.[47] In others, such as allegations of misfeasance in public office, it has been held that an inference cannot be drawn unless there is "no other reasonable inference other than bad faith".[48]

57. I agree with Prokam that an inference must be more than merely "available" to be drawn. Bad faith is not presumed simply because it can be inferred. However, I disagree that an inference of bad faith can only be drawn if it is the only reasonable inference available. I understand that is the standard of proof applicable in criminal proceedings.[49] In a civil case, by contrast, "a judge may choose among any number of available reasonable inferences"[50].

58. It appears that the criminal standard may have been applied in some misfeasance cases where there was a question of whether a public officer acted in bad

---

[41] Prokam's Submission, para. 63
[42] Prokam's Submission, paras. 68-69
[43] Prokam's Submission, para. 70
[44] *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70, para. 172 [***Angel Acres***]
[45] *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 69 [***Raincoast***]
[46] *Angel Acres*, para. 172
[47] Prokam's Submission, para. 64, citing *2538520 Ontario Ltd. v. Eastern Platinum Limited,* 2020 BCCA 313, para. 30
[48] Prokam's Submission, para. 54, citing *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations),* 2023 BCSC 1758, para. 156
[49] *Angel Acres,* para. 175
[50] *Raincoast,* para. 69

faith. Given the seriousness of misfeasance claims, courts tend to require "clear proof commensurate with the seriousness of the wrong."[51]

59. Significantly though, in Phase II of this Supervisory Review, I am not concerned with whether a public actor acted in good faith, as I was in Phase I of the Supervisory Review. My present concern is with the good faith of Prokam in levelling allegations of wrongdoing against a public actor. In these circumstances, I see no reason to depart from the standard applicable to all other civil proceedings, where the question is simply whether the evidence establishes a particular factual inference on a balance of probabilities.[52] I note that this is the standard that is applied in the special costs context, which Prokam submits is a helpful framework for me to apply in the circumstances.

C. Application to Prokam

60. Hearing Counsel takes the position that I ought to draw an inference that Prokam advanced the allegations it did in bad faith because it showed a reckless disregard for the truth of its actions.[53] Hearing Counsel observes that Prokam's allegations were serious, and destabilized and caused a lack of confidence in the regulated vegetable industry.[54] He notes my conclusion in Phase I that Prokam advanced allegations principally on speculation without any cogent evidence. He says this supports an inference that Prokam did not make any genuine or objectively reasonable effort to investigate its allegations before advancing them in this Supervisory Review.[55] Hearing Counsel also notes that the allegations were advanced in the context of Prokam's ongoing improper conduct in its dealings with the Commission dating back to 2017, and form part of a continuing course of conduct to undermine the Commission, which he says provides further evidence to support an inference of bad faith.[56]

61. Counsel for the Commission argues that Prokam's allegations against Messrs. Guichon and Solymosi were both made in bad faith. He says that there is ample evidence to support these inferences, emphasizing the seriousness of the allegations and the lack of evidence to support the allegations.[57]

62. The Commission goes on to argue that the circumstances in which the allegations were made by Prokam invite the additional inference that they were made for a strategic or ulterior purpose, namely: to harass, intimidate, cause expense and cast a pall of suspicion over the conduct of the Commission. The Commission notes that when the allegations were advanced, there were live and contentious issues between Prokam and the Commission. It takes the position that the allegations were

[51] *Raincoast,* para. 63
[52] *Angel Acres*, para. 174
[53] Hearing Counsel's Submission, para. 56
[54] Hearing Counsel's Submission, para. 50
[55] Hearing Counsel's Submission, paras. 60-62
[56] Hearing Counsel's Submission, paras. 63-66
[57] Commission's Submission, paras. 15-19

advanced as an improper means of generating leverage against the Commission with respect to its extant appeals and CFP's pending application for an agency licence.[58]

63. BC Fresh argues that Prokam advanced false allegations with a goal of disrupting the existing marketing scheme, and that there is no other rational conclusion other than that Prokam was acting to compromise orderly marketing for its own commercial benefit.[59]

64. For its part, Prokam says that the evidence in Phase I does not support an inference that it advanced its allegations in bad faith or for strategic or ulterior purposes. It points to evidence that it says supported the allegations it advanced in support of Messrs. Guichon and Solymosi.[60]

65. Prokam additionally says that improper motives cannot be inferred from the prior context dating back to 2017, or from the fact that its allegations caused disruption and destabilized the Commission.[61] Indeed, Prokam suggests that Hearing Counsel's submission goes beyond what was envisioned in the AFTOR, which do not address "bad faith" generally, or the events in 2017, which it says are the subject of different proceedings. In Prokam's submission, relying on the events of 2017 as a basis to impose sanctions would be procedurally unfair because Prokam did not have notice of the potential sanctions flowing from those findings. It says that it is clear from the AFTOR that I am limited to examining whether any remedies are warranted for Prokam's motivations in advancing allegations in bad faith or for strategic or ulterior purposes.[62]

66. In reply, Hearing Counsel argues that he has not expanded the scope of the AFTOR, and confirms his reference to conduct in 2017 is meant to show Prokam's advancement of the allegations was part of a continuing course of conduct, which in turn supports the inference that Prokam acted in bad faith.[63]

67. As I noted above, my concern is with whether the evidence supports an inference that Prokam pursued its very serious allegations throughout Phase I in bad faith or for an improper or ulterior purpose. In my view, taking into account all the evidence, it is proper to draw an inference that Prokam advanced its claims through the Supervisory Review in bad faith in the sense that they were advanced with reckless disregard for their truth.

68. Prokam advanced and maintained very serious allegations against Messrs. Solymosi and Guichon, including that they were motivated by self-interest and a personal animus against Prokam. With respect to Mr. Solymosi, Prokam argued that

[58] Commission's Submission, para. 20
[59] BCFresh's Submission, p. 2
[60] Prokam's Submission, paras. 72-73
[61] Prokam's Submission, paras. 75-76
[62] Prokam's Submission, paras. 34-45
[63] Hearing Counsel's Submission, paras. 56-60

Mr. Solymosi: (1) engaged in a malicious and unfair investigation of Prokam; (2) knew, was willfully blind, or was reckless with respect to the minimum export price orders being invalid; and (3) maliciously or in bad faith induced its agency (Island Vegetable Co-operative Association, or "**IVCA**") to cooperate in an investigation against Prokam.

69. With respect to Mr. Guichon, Prokam argued that he: (1) exercised his powers as vice-chair of the Commission to approve the Cease and Desist Orders in bad faith and with malice; (2) knew, was willfully blind or was reckless with respect to the minimum export price orders being invalid; and (3) that he exercised his powers to participate in the show cause and reconsideration hearings in bad faith, for an improper purpose, or with malice.

70. In the Phase I Decision I ultimately found no cogent evidence to support these allegations, and that the allegations were advanced principally on speculation. Despite almost 16 days of evidence, in its final submissions, Prokam relied almost exclusively on evidence that it has cited since 2018, with the exception of a few selected statements made by witnesses in this proceeding, and extracts from emails. I found that evidence as a whole did not reasonably support the gravity of the allegations. The most compelling evidence Prokam presented at the hearing was: (a) an email where Mr. Solymosi referred to Prokam as a "rogue producer" and stated IVCA's license would be protected if it worked honestly in pursuit of orderly marketing; (b) Mr. Guichon stating that he was concerned with Prokam's conduct "as a grower"; and (c) evidence of what transpired at a Parliamentary Committee in 2007, the significance of which would not necessarily have been clear to Mr. Guichon or Mr. Solymosi. That evidence, and the evidence Prokam relied on as a whole, falls far short of the evidentiary threshold for proving the type of serious allegations that Prokam advanced against Messrs. Solymosi and Guichon.

71. In my view, the lack of evidence suggests that Prokam did not undertake the types of genuine or objectively reasonable investigations that would be warranted to continue pursuing its extremely serious allegations throughout this Supervisory Review. Moreover, as I noted in the Phase I Decision, more investigations or discovery in this Supervisory Review would not have helped.

72. I also take into account the background to the allegations that Prokam advanced. Prokam, after having been warned by the Commission that it would be taking the requirement for producers to comply with rules concerning DA seriously, shipped potatoes significantly in excess of its DA. When the Commission wrote to it and expressed concern, Prokam and IVCA responded with the inflammatory and widely distributed July 10 Letter, which Mr. Dhillon was directly involved in drafting, that questioned the Commission's governance structure, and accused the Commission of human rights violations and being bad for businesses.

73. I accept Prokam's submission that I should not impose sanctions on it for that conduct specifically, as it is the subject of other proceedings. However, I do consider that background to be relevant to the question whether it is possible and appropriate to

draw an inference Prokam was acting in bad faith. The totality of the evidence of Prokam's earlier dealings with the Commission demonstrates a clear and continuing animus against the Commission. Its allegations in this Supervisory Review flow from, and represent a clear escalation of, the approach Prokam took to its dealings with the Commission in 2017, including my finding in the Phase I Decision that Mr. Dhillon had significant involvement in drafting the inflammatory and unfounded allegations set out in the July 10 Letter. The background thus lends further support to an inference that its conduct in raising and maintaining the allegations of wrongdoing in this Supervisory Review is part of a continuing course of reckless conduct.

74. I also consider my findings concerning Mr. Dhillon's credibility to be relevant to this analysis. Among other things, in his evidence at the Supervisory Review, Mr. Dhillon refused to accept any responsibility for the July 10 Letter and went so far as to agree with some of the letter's more inflammatory and unsupportable allegations. Mr. Dhillon likewise attempted to deflect responsibility for planting well in excess of his DA and selling below minimum pricing orders onto IVCA, when I found he was a sophisticated businessman who knew very well what he was doing. Mr. Dhillon's failure to take responsibility and lack of credibility provide further support for my finding that he, as Prokam's principal, was reckless in his advancement of allegations against the Commission in this Supervisory Review.

75. Ultimately, taking into account the background to the allegations, Mr. Dhillon's evidence on behalf of Prokam, the gravity of the allegations and the lack of evidence to support them, it is logical to infer that Prokam has advanced its allegations in this Supervisory Review in bad faith. At a minimum, it acted with a reckless disregard for the truth.

76. I am not, however, prepared to accept the Commission's argument that Prokam was advancing its allegations for a strategic or ulterior purpose. I accept the position of Hearing Counsel and Prokam that bad faith cannot be presumed simply because Prokam was seeking relief from the Commission at the time it made its allegations. As Hearing Counsel argued,[64] that conclusion would be grounded in speculation.

VI. Orders and Directions

77. Given my conclusion that Prokam advanced its allegations in this Supervisory Review in bad faith, it is necessary for me to go on to consider what orders or directions I have the authority to make that are needed to restore orderly marketing, trust and confidence in the BC regulated vegetable industry.

78. In any event, I also find that even if I had not inferred that Prokam had advanced its allegations in bad faith, it would still be necessary for me to consider what orders

[64] Hearing Counsel's Submission, para. 55

might be necessary to restore trust and confidence to ensure orderly marketing. This is clear from the AFTOR, which state that I will consider:

> ii. What orders or directions BCFIRB had the authority to make, and which may be required to restore orderly marketing, trust, and confidence in the BC regulated vegetable industry,

79. Regardless of whether Prokam's allegations were advanced recklessly, the trust and confidence between Prokam and the Commission have been considerably eroded by the allegations having been advanced and maintained throughout this Supervisory Review on minimal evidence. There is in my view a significant concern about the ability of Prokam and the Commission to return to a proper regulatory relationship without direction from BCFIRB. The Commission and the industry as a whole need to be assured that Prokam will participate in the industry and cooperate with its regulator in good faith going forward. Restoring trust and confidence in the industry requires no less.

80. As a result, I consider below whether the orders and directions proposed by Hearing Counsel are warranted as a result of Prokam having advanced its allegations recklessly, and more generally to restore orderly marketing and trust and confidence in the BC regulated vegetable industry.

A. Delivery Allocation

81. Hearing Counsel, supported by BC Fresh, proposes a transparent Commission process for determination of Prokam's DA and license class going forward. He says that a transparent process with involvement from other stakeholders will allow Prokam to argue its DA should be maintained or adjusted, while also addressing concerns raised by BC Fresh that other producers have filled Prokam's DA over the past six years. In that way, it will assist to promote orderly marketing of storage crops in the industry. [65] Prior approval by BCFIRB will avoid a further cycle of allegations being made against the Commission and resulting destabilization.[66]

82. BC Fresh supports this submission, and indicates that 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 2017, and especially the evidence related to DA.[67]

83. Prokam argues that the panel should not revisit Prokam's DA and license class, which it says are the subject of other proceedings. It further says that the sanction bears no relation to the scope of Phase II as defined by the AFTOR, and that procedural fairness concerns arise because Hearing Counsel is linking this sanction to findings

[65] Hearing Counsel's Submission, paras. 102-106
[66] Hearing Counsel's Submission, para. 107
[67] BCFresh's Submission, p. 1

made in Phase I concerning the events of 2017, findings for which Prokam was not provided proper notice.[68]

84. In reply, Hearing Counsel clarifies that he did not intend to invite the panel to revisit Prokam's DA and license class in this Supervisory Review. He confirms that his intention was only to address how Prokam's DA and license class should be dealt with by the Commission going forward.[69]

85. I do not understand anyone to dispute that I have the statutory authority to direct the Commission with respect to how it will deal with Prokam's DA and license class as an incident of my supervisory powers. The real question is whether directions are warranted, and if so, what they should be.

86. I am satisfied that they are warranted here. Questions concerning Prokam's DA and license class will inevitably need to be determined by the Commission given Prokam's lack of production of potatoes under its DA after 2017. At the same time, the essence of Prokam's allegations advanced through this Supervisory Review was that the Commission acted improperly in its dealings with Prokam's growing of potatoes in excess of DA. DA and license class are at the centre of the lack of trust and confidence between Prokam, the Commission and the industry as a whole.

87. It is essential that any further proceedings do not give rise to similar allegations of wrongdoing, and that the relationship between the Commission and Prokam, as well as the balance of the industry, is supported such that trust and confidence in the BC vegetable industry is restored.

88. Hearing Counsel specifically proposes a transparent process for the determination of Prokam's DA going forward. That process must involve submissions from Prokam on why it has not produced regulated product; an opportunity for producers who have grown their DA as a result of Prokam's nonproduction to provide input on how DA should be apportioned; and be subject to prior approval by BCFIRB. I note that Prokam did not provide any substantive concerns with Hearing Counsel's proposal.

89. A transparent process will ensure that the views of the regulated vegetable sector and Prokam are heard and accounted for by the Commission, which will assist in restoring trust and confidence in the Commission's ability to regulate Prokam. I agree that prior approval by BCFIRB will avoid a further cycle of allegations being made against the Commission and further destabilization of the vegetable industry.

90. While I am prepared to accept Hearing Counsel's recommendation generally, neither the Commission nor any other participant has provided substantive submissions on exactly what that process needs to entail, and I anticipate that the Commission may require further direction from BCFIRB. It is therefore open to the Commission or any

[68] Prokam's Submission, paras. 79-82
[69] Hearing Counsel's Reply Submission, paras. 76-78

other participant to seek such directions with respect to this specific order within 21 days of the date of this decision. I will then determine if submissions are required from any other participant before issuing any further direction.

B. Mandatory Reporting

91. Hearing Counsel, supported by BC Fresh, proposes that Prokam and any agency it ships through should be required to provide confidential, joint quarterly reports to the Commission that:

a. set out the quantity of different varieties of potatoes Prokam intends to grow and has grown;

b. provide information about the quantity of potatoes that Prokam has provided to its agency and that Prokam's agency has marketed on behalf of Prokam and confirm that it is only marketing potatoes in compliance with Prokam's DA and/or with Commission approval;

c. confirm compliance with the Commissions' General Orders and polices relating to DA and minimum pricing; and

d. identify any allegations or findings of non-compliance.[70]

92. BC Fresh adds that in its experience, quarterly reports from growers provide an excellent means of administrative control over a grower's compliance with the General Orders.[71]

93. Prokam did not make any submissions with respect to the mandatory reporting requirement. No participant disputes that I have the authority to impose mandatory reporting requirements on Prokam. I agree with and adopt Hearing Counsel's submission[72] that I have that authority.

94. I therefore conclude that Hearing Counsel's proposed mandatory reporting requirement is appropriate. In light of my inference of bad faith, quarterly reporting will assist the Commission in regulating Prokam's activities and regaining trust in its commitment to co-operating with the Commission in a productive manner going forward. Quarterly reporting will also ensure regular communication between the Commission and Prokam, which in turn will restore trust and confidence on both sides.

95. Like my previous order concerning the process for dealing with Prokam's DA, I did not receive substantive submissions from any of the participants. To the extent that

[70] Hearing Counsel's Submission, paras. 108-109
[71] BC Fresh's Submission, p. 2
[72] Hearing Counsel's Submission, paras. 93-95

the Commission or any other participant requires further direction on the terms of this specific order, they should seek it within 21 days of the date of this decision.

C. Restrictions on Mr. Dhillon's Involvement with a Designated Agency or Receiving a Producer Shipper Licence

96. Hearing Counsel also submits that I ought to impose restrictions on Mr. Dhillon's ability to act as a principal or director of any designated agency, or being issued a producer-shipper license, for a minimum period of two years. Any subsequent application to the Commission after that time period will require prior approval by BCFIRB.

97. Prokam did not make any submissions with respect to these proposed orders.

98. No participant disputes that I have the power to direct the Commission with respect to Mr. Dhillon's involvement with a designated agency or receiving a producer-shipper licence. I agree with and adopt Hearing Counsel's submissions that I have that authority.

99. I consider that Hearing Counsel's proposal is necessary and appropriate. As I explained in the Phase I Decision, I note that both agencies and those who operate a producer-shipper license operate in a fiduciary relationship with the Commission. Given my finding of bad faith, there is plainly not enough trust and confidence between the Commission and Mr. Dhillon for that type of relationship to be productive at this time. Requiring prior approval by BCFIRB will again ensure that there is not a further cycle of allegations advanced against the Commission.

100. Once again, while I am accepting this recommendation, in the absence of submissions from the other participants, the Commission and other participants are at liberty to seek further direction concerning the terms of this order within 21 days of the date of this decision.

D. Recommendations for Legislative Change

101. The Commission takes the position that BCFIRB should advocate or recommend legislative change to give members of the Commission statutory immunity from prosecution for actions taken in good faith in the performance of their statutory duties.[73] The Commission notes that s. 19 of the *NPMA* gives that protection to members of BCFIRB, but not members of the Commission. It suggests that statutory immunity should properly extend to elected commodity board members and staff, excluding anything done or omitted by a person in bad faith.

[73] Commission's Submission, para. 44, incorporating by reference the Closing Submission of the Commission in Phase I, paras. 27-33

102. No other participant commented on the Commission's submission.

103. I am not satisfied that it is necessary or advisable to make a proposal for legislative reform at this time. Such a recommendation would have far reaching implications for all marketing boards and commissions, and requires input from, and careful consideration by stakeholders that were not participants in this Supervisory Review.

E. Imposing a Charge Against Prokam for Costs

104. The Commission, supported by Messrs. Solymosi and Guichon, as well as BC Fresh, takes the position that I should impose a charge against Prokam for the legal costs of the Commission and non-complainant participants.[74] The Commission relies on ss. 11(1)(o) and11(1)(q) of the *NPMA* and ss. 4(1) and (2) of the *Vegetable Scheme*. It says these provisions vest it with both a general and a specific power to impose a charge on one party to indemnify another for its legal costs.[75]

105. The Commission further suggests that the authority of commodity boards to impose levies and charges, and to use the proceeds thereof to recover the commodity board's own legal fees and expenses, were recognized in cases including *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al.,* 2003 BCSC 1508, *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013) and *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board et. al.,* 2023 BCSC 1150.[76] The Commission argues that any other interpretation would be contrary to a broad and purposive interpretation of the legislation.[77]

106. The Commission says that it is both necessary and advisable, in furtherance of the promotion, control and regulation of the marketing of a regulated product, to impose a charge against Prokam to recover costs associated with this Supervisory Review. In its submission, the imposition of a charge to recover costs is most directly responsive to the nature of the harm resulting from the serious and unfounded allegations made by Prokam in bad faith and for a strategic or ulterior purpose. It further says it is the only effective mechanism to deter the occurrence of such conduct in the future.[78]

107. Both Prokam and Hearing Counsel say that the Commission, and, by extension, BCFIRB, do not have the statutory authority to make an order of this nature. They argue that the Commission is effectively seeking an award of costs, in the absence of any statutory authority to do so.[79]

[74] Commission's Submission, paras. 22-43
[75] Commission's Submission, paras. 26-28
[76] Commission's Submission, paras. 33-35
[77] Commission's Submission, paras. 29-32
[78] Commission's Submission, paras. 41-43
[79] Prokam's Submission, paras. 83-101; Hearing Counsel's Reply Submission, paras. 79-85

108. First, I agree that the Commission is effectively seeking an award of costs. I note that the term "costs" in the context of legal proceedings has a different meaning from either compensation or expenses. Costs are compensation for legal expenses and services in the course of litigation.[80] They are awards made in favour of a successful litigant at the end of a legal proceeding, related to allowable expenses relevant to a legal case.[81] In my view, this is the essence of what the Commission is seeking.

109. It appears that all of the participants agree that neither the Commission nor BCFIRB has express authority under the *NPMA* or the *Vegetable Scheme* to order costs in the context of a supervisory review (as opposed to the express authority to do so in an appeal). Instead, the Commission relies predominantly on its power under s. 11(1)(o) to "set and collect levies and charges" for certain specified purposes. The question, therefore, is whether its powers to set and collect levies should be read as including the power to impose an award of costs.

110. As Prokam argues, [82] a "charge" or "levy" differs from an award of costs. A levy or charge is an appropriation or tax collected by an agency to defray the cost of certain specified activities.[83] It is not an order made in favour of a successful party requiring an unsuccessful party to pay its costs.

111. Despite this, the Commission argues it may impose a levy or charge to force Prokam to indemnify it for its legal costs. By imposing a charge on Prokam, and then distributing the proceeds among the participants, it suggests it can achieve indirectly what it has no power to do directly: that is, to order Prokam to pay the legal expenses of the other participants.

112. I do not accept this argument for a number of reasons.

113. First, as noted above, the authority to award costs is a distinct and well-defined legal concept. The absence of an express power to award costs in a supervisory process weighs heavily against the Commission's interpretation of the *NPMA.* As Prokam argues, and as the Supreme Court of Canada noted in *Mowat*, "[i]f Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose."[84]

114. As emphasized by Hearing Counsel,[85] this omission is all the more significant given that the *NPMA* makes express provision for an award of costs elsewhere. As I noted above, the *NPMA* expressly contemplates BCFIRB issuing costs awards in the

[80] *Canada (Attorney General) v Mowat*, 2011 SCC 53, para. 40
[81] *Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, p. 32
[82] Prokam's Submission, para. 95
[83] *812069 Ontario Ltd. v. Bramalea Ltd.*, [1990] O.J. No. 1879 (Ont. Gen. Div.), para. 12; *493540 B.C. Ltd. v. Comox-Strathcona (Regional District),* 2004 BCSC 365, para. 28
[84] Prokam's Submission, para. 93; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, para. 40
[85] Hearing Counsel's Reply Submission, paras. 83-84

context of an appeal from an order of the Commission. For the purposes of an appeal, s. 8.1(1)(b) of the *NPMA* specifically incorporates s. 47 of the *ATA*, which provides as follows:

> 47(1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a)requiring a party to pay all or part of the costs of another party or an intervener in connection with the application;
>
> (b)requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the application;
>
> (c)if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay all or part of the actual costs and expenses of the tribunal in connection with the application.

115. There is unambiguous statutory authority to order the costs of an appeal. Its absence in respect of a supervisory review is thus all the more telling. The decision of the Legislature to afford BCFIRB this power in the context of appeals implies the Legislature did not intend BCFIRB to exercise that power in the context of a supervisory review.

116. On this point, I note the decision of the Ontario Superior Court in *Karumanchiri v. Ontario Liquor Control Board*. There, the court held that "by expressly providing boards of inquiry with authority to award costs" under one provision of the Ontario *Human Rights Code*, "the legislature has excluded jurisdiction to award costs otherwise under the Code."[86] I see no basis on which to distinguish this case here.

117. Second, contrary to the Commission's argument, a purposive analysis of the provisions in question does not require the Panel to effectively read in a power to award costs. I of course accept that the powers of the Commission are to be interpreted broadly. As set out in s. 2(1) of the *NPMA*, the purpose of the Act is to "provide for the promotion, control and regulation of the marketing of natural products". However, in my view, there is no specific connection between the power to order costs, which is a procedural power, and this statutory purpose. To the extent granting additional procedural powers to the Commission could be said to further the purposes of the Act in a broad sense, that argument could be made in respect of any conceivable statutory scheme.

118. In this regard, I find the reasoning of the Nova Scotia Court of Appeal in *Johnson v. Halifax (Regional Municipality) Police Service*, 2005 NSCA 70 persuasive. In that case, the court considered whether the Nova Scotia *Human Rights Act* conveyed the power to award costs on a board of inquiry. In concluding it did not, the court specifically

[86] *Karumanchiri v. Ontario Liquor Control Board*, [1988] O.J. No. 167, para. 47

addressed the question of whether a broad and purposive interpretation required it to read in the power to award costs:

> [39] That said, I believe it is one thing to give the Nova Scotia Act a broad and liberal interpretation so as to ensure its objects are met. It is quite another to cloak the Board with jurisdiction that the legislature did not give to it. The very important and worthwhile objects of this legislation can be met without empowering the Board to order costs relative to the complaint process. In other words, this authority is not necessary to achieve the stated legislative objectives.

119. The court went on to cite *Karumanchiri* for the proposition that "[t]he rule[s] of liberal interpretation to carry out the objects of the Code to remedy, as far as possible, the effects of and prevent discrimination do not apply to procedural matters or the question of costs."[87] The same reasoning applies in this case.

120. Finally, I do not agree that the case law cited by the Commission supports its broad interpretation of its powers.

121. In *Global Greenhouse,* the issue was not whether the Commission had the power to award costs, but whether it had the power to exact a levy to fund the "prosecution of a trade dispute before the Canadian International Trade Tribunal in the matter of greenhouse tomatoes".[88] Although the Commission itself was not a party to the litigation, the court concluded that the expenses of this litigation had been incurred for its purposes, because the litigation was in interests of the industry at large.[89] As such, the levy in question fell within the Commission's authority under s. 11(1)(o)(i) to exact levies for the "purposes of the scheme".

122. The levy at issue in *Global Greenhouse*, unlike the charge proposed in this case, was not akin to an award of costs. The purpose of the levy was not to provide compensation to a successful party at the expense of an unsuccessful one. It was to fund litigation pursued in the best interests of the industry at large. It bore few of the hallmarks of an award of costs, and is in my view distinguishable from the order sought in this case.

123. The question in *Rainbow Poultry*, an appeal before BCFIRB of a decision of the British Columbia Chicken Marketing Board (the "Chicken Board"), was similar. Specifically, that case considered the authority of the Chicken Board to use a levy to fund a non-profit society with a mandate to "unite the 330 provincially registered chicken growers for the betterment of the industry."[90] Among other things, the society had used

---

[87] Cited in *Johnson,* para. 41
[88] *Global Greenhouse Produce et. al. v. B.C. Marketing Board et. al.*, 2003 BCSC 1508 [***Global Greenhouse***], para. 111
[89] *Global Greenhouse,* paras. 127-128
[90] *Rainbow Poultry Ltd. et. al. v. BCCMB et. al.* (December 18, 2013) [***Rainbow Poultry***], para. 1

Chicken Board funds to participate in various legal proceedings, including as an intervenor in the appeal itself.

124. The Panel found no issue with that use of Chicken Board funds. It found that the participation of the society in proceedings before the Chicken Board served "a useful purpose under the Scheme, assisting the Chicken Board with finding 'the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest'".[91] With respect to its participation in the appeal itself, the Panel held that its presence as an intervenor was "consistent with the need for a strong grower representation on matters like those raised on this appeal which are significant to the chicken industry in the province."[92]

125. I do not see that *Rainbow Poultry* supports the proposition that the Commission has the power to impose an order of costs through the mechanism of a levy. Rather, it suggests that a levy may be used to provide funding to an organization to participate in legal proceedings, where its participation in those proceedings would serve a useful purpose under the scheme.

126. The most recent judicial statement on the authority of the Commission to impose a levy or charge is found in the *Milk Board* case.[93] However, it is my view that this case also does not assist the Commission.

127. The issue in that case arose out of the illegal sale of unpasteurized milk by a farmer over a period of several years. At first instance, the British Columbia Milk Marketing Board ("**BCMMB**") calculated that the activities in question had resulted in a loss of approximately $200,000 of revenue to the producer pool. Accordingly, it imposed a charge against the farmer to recover those losses.

128. On appeal, BCFIRB overturned the BCMMB's decision to impose the charge in question. It concluded that the BCMMB lacked the statutory authority to impose a charge unless the loss related to a loss suffered by the BCMMB itself, and not some other party.

129. This determination was overturned on judicial review. According to the court, BCFIRB failed to consider s. 11(1)(o)(iii), which gives the BCMMB the power to collect charges for "costs and losses incurred in marketing a regulated product".[94] Because the producer pool had suffered a loss of revenue related to the marketing of milk, the court found this provision gave the BCMMB the authority to impose the charge in question.

130. I do not think that reasoning is of assistance here. I accept that the Commission has the power to impose a charge for the recovery of losses suffered in marketing a

[91] *Rainbow Poultry,* para.75
[92] *Rainbow Poultry*, para. 84
[93] *British Columbia Milk Marketing Board v. British Columbia Farm Industry Review Board et. al.,* 2023 BCSC 1150 [***Milk Board***]
[94] *Milk Board,* para. 46

regulated product. I also accept that it may impose such a charge regardless of the identity of the party who suffered the losses. Unlike the losses to the producer pool in the *Milk Board* case, however, the legal expenses at issue here cannot be characterized as costs or losses "incurred in marketing a regulated product". Accordingly, I do not find the decision to be helpful.

131. When the authorities are reviewed as a whole, it is my view that they generally support the conclusion that the power to order costs under s. 11 of the *NPMA* should not be implied in the absence of an express grant of authority, particularly where, as here, the Legislature has specifically made provision for that power elsewhere in the same statute.

132. As a result, I conclude that neither BCFIRB, nor the Commission, has the statutory authority to make an order of costs, either directly, or through indirect means. In my view, this includes the Commission's residual power under s. 11(1)(q) of the *NPMA* to make orders and rules considered "necessary or advisable to promote, control and regulate effectively the marketing of a regulated product". In the face of the Legislature's clear intention to exclude the power to award costs, I find that the order sought is beyond the jurisdiction of the BCFIRB.

VII. Conclusion

133. I confirm that I am making the following orders and directions:

a. Any future consideration of Prokam's delivery allocation (DA) and license class must be considered by the Commission through a transparent process with an opportunity for submission by all stakeholders, and subject to prior approval by BCFIRB;

b. For a period of 24 months, Prokam and any agency that Prokam ships through, must provide confidential joint quarterly reports to the Commission that:

    1. set out the quantity of different varieties of potatoes Prokam intends to grow and has grown;

    2. provides information about the quantity of potatoes that Prokam has provided to its agency and that Prokam's agency has marketed on behalf of Prokam and confirm that it is only marketing potatoes in compliance with Prokam's DA and/or with Commission approval;

    3. confirms compliance with the Commissions' General Orders and polices relating to DA and minimum pricing; and

    4. identifies any allegations or findings of non-compliance.

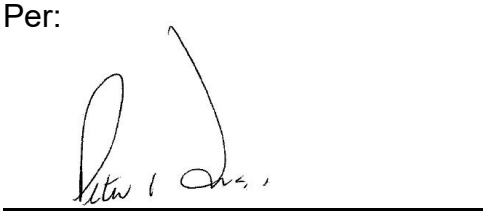
c. For a period of 24 months, the Commission shall not permit Mr. Dhillon to participate as a principal or director of any designated agency, and shall not issue a producer-shipper license to Mr. Dhillon. Any subsequent application to the Commission involving Mr. Dhillon after that time period will require prior approval by BCFIRB.

134. As set out above, the Commission and other participants can seek further directions regarding these orders within 21 days of the date of this decision.

Dated at Victoria, British Columbia this 15th day of March 2024.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Peter Donkers

Presiding Member