

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
PART II PROCESS

October 21, 2022

I. Introduction

1. On July 14, 2022, I issued my decision (“Decision”) on a supervisory review process (“Supervisory Review”) pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (the “Act” or “NPMA”) to address allegations of bad faith and unlawful activity arising out of civil claims filed by two entities, Prokam Enterprises Ltd. (“Prokam”) and MPL British Columbia Distributors Inc. (“MPL”), which named certain members and the General Manager of the British Columbia Vegetable Marketing Commission (“Commission”).
2. In the Decision, I concluded that there was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by MPL, Prokam and Bajwa Farms Ltd. (together, “the Complainant Participants”), and that in most cases the allegations were based on no more than speculation, rumour and innuendo.
3. I also identified serious concerns arising out of the lack of evidentiary foundation for the allegations of wrongdoing made by Prokam and MPL in particular, and the impact that the allegations have had on the Commission and orderly marketing in the Province. Because those concerns were not directly addressed during the course of the Supervisory Review to date, and also had the potential to impact other proceedings before the BC Farm Industry Review Board (“BCFIRB”) involving MPL and Prokam, I directed that Hearing Counsel and the participants provide me with submissions on what next steps might be required, and what consequences should follow from my findings in the Decision.
4. This is my decision on the process that should now be followed.

II. Submissions of Hearing Counsel and the Participants

5. In his initial submission dated July 27, 2022, Hearing Counsel proposed a two-step process for addressing the concerns expressed in the Decision, taking into account the key principles of procedural fairness and administrative efficiency. First, Hearing Counsel proposed to investigate whether Prokam and MPL have any additional evidence, not already introduced during the Supervisory Review, to support the allegations that they raised. The investigation would also look into the relationship between Prokam’s principal, Mr. Dhillon, and CFP Marketing Corporation (“CFP”), an applicant for an agency license with the Commission, as well as the issue of damages suffered by Prokam and MPL. This would culminate in a report to BCFIRB and the participants.
6. As a second step, Hearing Counsel and the participants would make submissions on how the concerns identified in the Decision should be addressed, including what, if any, inferences should be drawn, and appropriate consequences. This panel would then make a final decision on all of those issues.

7. Participants provided submissions in response to Hearing Counsel's proposal, including counsel for Commission members John Newell, Mike Reed, Corey Gerrard, Blair Lodder and Peter Guichon (the "Commissioners"), who raised the question of whether new Terms of Reference ought to be issued for this second phase of the Supervisory Review.
8. For its part, Prokam initially did not provide substantive submissions, taking the position that no further steps should occur in the Supervisory Review unless and until the BC Supreme Court heard and determined a stay application arising out of Prokam's application for judicial review of the Decision.
9. On or about August 17, 2022, I wrote to the participants and requested that all the participants provide submissions on whether new Terms of Reference were required, and that Prokam provide a submission in respect of Hearing Counsel's proposal in his July 27 submission. I also afforded Hearing Counsel a final right of reply.
10. From the summary provided by Hearing Counsel in his reply submission, I see the following issues arising out of the submissions for consideration in this decision:
 - a. whether this panel is *functus officio*;
 - b. the impact of a second phase on the right of access to the superior courts;
 - c. jurisdiction of this panel under the *NPMA* and the existing terms of reference to continue with a second phase;
 - d. whether to proceed under new or amended terms of reference;
 - e. procedural fairness issues; and,
 - f. whether an investigation is necessary or whether the matter can be dealt with through submissions from counsel.
11. Given the submission from Mr. Solymosi, I add to that list of issues the role of Bajwa Farms Ltd. ("Bajwa Farms") in the process going forward. I address those issues in the discussion below.

III. Discussion

12. I will first address what may be best characterized as three preliminary objections to the Supervisory Review proceeding any further: (a) the doctrine of *functus officio*; (b) denial of a right of access to the courts; and, (c) lack of jurisdiction.

A. *Functus Officio*

13. MPL submits that this panel is *functus officio*, as it has already made a final decision on the issues that were the subject of the Supervisory Review. In reply, Hearing

Counsel says that the Decision clearly left open that additional issues or concerns would potentially be addressed in future proceedings, such that the principle of finality central to the doctrine of *functus officio* is not engaged. This is not a case, Hearing Counsel submits, where this panel has reached a final decision and then changed its mind.

14. It is well accepted that once a tribunal has reached a final decision, it cannot revisit its decision, absent a material change of circumstances or an error in its analysis. However, the doctrine of *functus officio* is applied more flexibly in the tribunal context, and if a tribunal fails to dispose of an issue which is properly raised in a proceeding, and the tribunal is empowered by its enabling statute to dispose of it, it will be allowed to complete its statutory task.¹
15. In the Decision, I expressly declined to decide whether the concerns about the lack of an evidentiary foundation for the allegations were substantiated, and whether any inferences about the motivations of MPL and Prokam in raising them should be drawn. Nor did I determine what consequences should flow from any such findings. Indeed, I specifically invited submissions on a process to address those issues. Accordingly, I find that *functus officio* does not apply in these circumstances.

B. Right of Access to the Superior Courts

16. MPL argues that any finding by this panel on its motivations in raising the allegations in its civil claim would be an impermissible infringement on MPL's right to access the courts and would usurp their role. Similarly, Prokam submits that imposing adverse regulatory consequences for having filed a notice of civil claim that this panel might find lacked a proper evidentiary foundation would be a contravention of the right of access to the superior courts, citing *Trial Lawyers Association of British Columbia v. British Columbia*, 2014 SCC 59. Prokam further suggests that this raises constitutional issues requiring the delivery of a Notice of Constitutional Question.
17. Hearing Counsel takes the position that Prokam and MPL's arguments are misguided. He says that this panel's focus is, and always has been, on supporting orderly marketing within the regulated vegetable industry, which is squarely within its statutory mandate. In furtherance of that mandate, to the extent this panel would make any findings about the motivations behind, or the evidentiary foundation for, the allegations in the civil claims, it would in no way impact access to the superior courts. The superior courts would not be bound by any findings this panel might make, and neither Prokam nor MPL would be prevented from pursuing their civil claims.
18. In my view, the principles in the *Trial Lawyers Association* case are not engaged here, and no constitutional issue arises such that a Notice of Constitutional Question is required. I agree with Hearing Counsel that my primary focus must continue to be on ensuring orderly marketing in the BC regulated vegetable industry, consistent with

¹ *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 at 861-862

BCFIRB's statutory jurisdiction over sound marketing policy. The concern that has now arisen in this Supervisory Review is the impact of the filing of civil claims for potentially ulterior purposes on the Commission and orderly marketing in the vegetable industry, and how that impact should be managed. To the extent I inquire into that issue in furtherance of my statutory mandate, and make any findings, those findings will not be binding on any court, and will not prevent MPL or Prokam from prosecuting their claims for misfeasance in public office and seeking a remedy in damages. I have been very clear that I have made no findings about whether that tort has been made out in this Supervisory Review.

19. Accordingly, my inquiry will not impede access to the courts for either of those participants.

C. Jurisdiction of BCFIRB

20. MPL takes the position that this panel lacks jurisdiction under the terms of reference and the *NPMA* to make any inquiry into its motivations in filing its claim, arguing that BCFIRB has no authority to investigate private citizens or industry members. With respect to the Terms of Reference, MPL specifically notes that they do not put in issue MPL's motivations in filing its claim.
21. Prokam likewise argues that I ought to reject Hearing Counsel's proposal to proceed to another phase of this supervisory review. Prokam argues that the subject matter of any further phase — namely, whether to draw an inference of bad faith or ulterior motives, and orders that might follow — would be outside the statutory authority of BCFIRB.
22. Hearing Counsel says that BCFIRB has jurisdiction under the existing terms of reference (with some clarification), and has authority under the *NPMA* to make any directions or orders needed to promote orderly marketing. Hearing Counsel notes that BCFIRB can and should address the concerns of bad faith or ulterior motives within the context of whether the conduct affects the mutual trust and public confidence that is required for the proper operation of the BC regulated vegetable industry, and if necessary, make orders to restore that trust and confidence. He suggests such an inquiry would be consistent with the jurisprudence and sections 7.1 and 9 of the *NPMA*.
23. I will first address the question of this panel's authority under the *NPMA*. Under that legislation, it is well accepted that BCFIRB exercises both an appellate as well as a supervisory power over the Commission. BCFIRB's supervisory jurisdiction is a unique function amongst administrative tribunals, and the BC courts have confirmed that it allows BCFIRB to investigate, examine, inquire, oversee and direct the Commission, and be a proactive rather than a passive regulatory body. Where BCFIRB deems it appropriate, it can not only amend, vary or cancel orders or rulings, but can also give policy directions to marketing boards or commissions established

under the *Act* to ensure they take whatever action BCFIRB deems necessary in the public interest.²

24. The Board's "proactive" supervisory power was confirmed by legislative amendments in late 2004 that created s. 7.1 of the *NPMA*. These amendments provided that the supervisory power may be exercised "at any time, with or without a hearing, and in the manner [BCFIRB] considers appropriate in the circumstances".³
25. Does this next potential phase of the Supervisory Review fall within this broad supervisory power?
26. BCFIRB's overarching concern in the exercise of any of its supervisory or appellate powers is to ensure marketing boards act within the regulatory authority granted under their scheme and consistent with sound marketing policy to ensure the equitable and orderly marketing of natural products. It appears to be well-accepted by all of the participants that orderly marketing requires trust and confidence. That includes mutual trust and confidence between the Commission and industry participants (particularly for those participants who might potentially act as an agent with delegated fiduciary responsibilities from the Commission), as well as public confidence in the Commission's ability to effectively regulate and industry participants' willingness to follow that regulation to achieve industry stability.
27. The concern at the heart of this next phase is the very significant disruption of, and loss of trust and confidence in, the Commission and regulated vegetable industry as a result of the allegations of wrongdoing advanced in the civil claims (and in turn this Supervisory Review). That disruption included the Commission being deprived, at least in part, of access to its General Manager for an extended period of time, as well as reputational damage to both the Commissioners and the General Manager. It is also worth noting that at one point during the Supervisory Review, the Commission was facing mass resignations from its Commissioners and was unable to form decision making panels, requiring direct intervention by this panel.
28. Had I had found cogent evidence supporting the allegations of bad faith and misfeasance, there is no doubt that BCFIRB would have had to take steps to restore confidence in the Commission's ability to effectively regulate. Similarly here, if the allegations of wrongdoing were brought forward without a proper foundation and for an improper purpose, this panel has to consider what steps are required, including providing direction and assistance to the Commission, to restore orderly marketing and confidence in the industry. Depending on my ultimate findings, those orders could potentially include restrictions on the future role and participation of Prokam, MPL and their principals in the industry. Providing direction and assistance to the Commission with a view to restoring industry confidence and orderly marketing is in my view a

² See *Global Greenhouse Produce Inc. v. British Columbia Marketing Board*, 2003 BCSC 1508 at paras. 76-79

³ Section 7.1(2)

prudent exercise of BCFIRB's supervisory power that is consistent with its broad supervisory mandate as the body with overall responsibility for regulated marketing in the province.

29. I do not agree with any suggestion that BCFIRB would improperly fetter the Commission by providing directions before the Commission has exercised first-instance decision making. BCFIRB is entitled to step into the shoes of the Commission and supervise to the extent necessary. That forms part of its ability to proactively direct the Commission to promote sound marketing policy. Of course, such steps must only be taken with restraint and to the extent necessary to restore industry confidence and orderly marketing.
30. That leaves the remaining issue of whether this panel has the authority to move forward under the existing Terms of Reference. As I outline in the next section, I accept Hearing Counsel's recommendation that it is necessary to amend the Terms of Reference in order to provide proper notice to the Complainant Participants and define the scope of the next phase.

D. Amending the Terms of Reference and Procedural Fairness

31. The issue of whether new or amended Terms of Reference are required was first put in issue by the Commissioners. It was suggested that new Terms of Reference would allow Hearing Counsel to conduct a proper investigation, permit BCFIRB to anticipate and address procedural issues, and demarcate the two processes.
32. Both Prokam and MPL submit, however, that any second phase of this Supervisory Review, no matter what its terms of reference might be, would constitute a fundamental breach of procedural fairness.
33. Prokam says that it is immaterial whether any second phase proceeds on the basis of new or amended terms of reference, as it was not provided with notice that its conduct was at issue, or any potential consequences for it, at the outset of the Supervisory Review. Prokam further says it is impossible for any second phase to be procedurally fair, as Prokam had a reasonable expectation that the procedure would not "morph" into one in which findings of misconduct would be made against Prokam.
34. Similarly, MPL argues that it also had a reasonable expectation that the Supervisory Review would be conducted within the scope of the Terms of Reference, and departing from the Terms of Reference and inquiring into MPL's motivations at this late stage is unfair. Additionally, MPL submits that it would suffer irreparable prejudice if the matter were to proceed as hearing counsel suggests, as MPL would have conducted the proceedings differently by examining witnesses on different issues and calling additional witnesses if it knew its conduct was in issue. MPL emphasizes that investigating its motivations would be a breach of procedural fairness even if the Terms of Reference were amended, as an amendment would not rectify the issues it has raised.

35. I do not see how these arguments can be sustained. This Supervisory Review was commenced to inquire into very serious allegations of wrongdoing raised by the Complainant Participants against the Commissioners and the Commission's General Manager. This panel had no way of knowing at the outset the strength of the evidence that would be presented during the course of the proceedings. The panel finds itself considering these issues only because that is where the evidence led it. It is counterintuitive to suggest that the panel could have provided notice at the outset that these concerns would arise, or provided some kind of assurance that the Supervisory Review would not lead in the direction that it did, such that a legitimate expectation could be said to arise. In my view, these arguments effectively suggest that the panel should have pre-judged the process or the strength of the evidence available to support Prokam and MPL's allegations.
36. I similarly do not understand MPL's argument that it would have led different evidence had it received notice at the outset that its own conduct in raising the allegations was in issue. If MPL had additional evidence to support the allegations, presumably MPL would have led it. I do not see what other kind of evidence could be relevant, and MPL has not specified what that other evidence would be. Accordingly, I do not accept that it is inherently unfair to proceed with a second phase of this review.
37. However, I do agree with Hearing Counsel (and the other participants) that this next phase of the review must be procedurally fair, and in particular that Prokam and MPL are entitled to proper notice of what is in issue, and what potential consequences might follow. As Hearing Counsel observes, and as Prokam appears to agree, that may be achieved either by modifying the existing terms of reference, or by issuing new terms of reference.
38. In my view, the best way to proceed forward is by amending the existing terms of reference. This makes it clear that the evidence that was presented in the first phase of the Supervisory Review, and in turn my findings arising out of that evidence, will form part of and be considered in the second phase. Moreover, there is a clear link between the first and second phase of this review, insofar as it is the evidence (or lack thereof) in the first phase that gives rise to the issue of the motives for which the allegations were advanced, and whether any further orders or directions are warranted to ensure orderly marketing in the vegetable industry.
39. Amending the Terms of Reference will provide MPL and Prokam with notice of what will be considered going forward and the potential consequences for them. In other words, they will know, and have a fair opportunity to respond to, the case they have to meet. I turn now to the design of the process that should be followed to ensure procedural fairness.

1. What process should be followed?

40. Hearing Counsel originally proposed that he conduct a further investigation prior to the participants having an opportunity to provide submissions to the panel. In

response, Prokam submits that undertaking an investigation into whether Prokam has additional evidence to support its allegations would involve needless time and expense, and that such an investigation would very likely trench on matters covered by solicitor-client privilege. Prokam similarly says that the specific issues of damages to Prokam, and the relationship between Mr. Dhillon/Prokam and CFP, do not merit investigation as the facts underlying those issues are well established.

41. Moreover, Prokam says that it had some evidence to support its allegations, and the only issue is that the panel did not agree with Prokam that the evidence substantiated the allegations. Such a disagreement, it says, cannot give rise to an inference of bad faith or ulterior motives. As a result, Prokam argues that I should reject the assertion of bad faith on a preliminary basis at the outset.
42. Alternatively, Prokam submits that any second phase should proceed based only on argument, without any need for an investigation and presentation of findings
43. MPL's position is less clear. It appears to argue that it ought to have the same opportunity to defend itself as other participants, and that it would be unfair to curtail MPL's rights by only proceeding by way of an investigation by hearing counsel.
44. As a preliminary matter, I cannot at this stage accept Prokam's argument that this second phase should not proceed because it plainly had "some evidence" to support its allegations, such that an inference of bad faith cannot arise. I will need to hear submissions from hearing counsel and the other participants before considering that argument.
45. As I understand it, after reviewing Prokam's submissions, Hearing Counsel now accepts that this next phase of the Supervisory Review can be limited to submissions from the participants, without any need for him to conduct a further investigation. However, particularly in light of the uncertainty regarding MPL's position, he recommends that I leave it open for Prokam and/or MPL to provide further evidence if they wish to do so.
46. I agree with and accept Hearing Counsel's revised proposal. As I outline below in the Conclusion, I will provide an opportunity for the provision of further evidence, and will then entertain written submissions from hearing counsel and the participants. If any participant considers that an opportunity for oral submissions is required, they may make that request when providing their written submissions, and I will consider it after hearing from the other participants and Hearing Counsel.

2. Role of Bajwa Farms in the next Phase

47. Lastly, Mr. Solymosi has suggested that several findings in the Decision support the need for Hearing Counsel to also investigate whether Bajwa Farms acted in bad faith. In response, Bajwa Farms says that there is nothing in the Decision which supports an inference of bad faith, and it should not be the subject of any further phase of this Supervisory Review.

48. In my view, the allegations advanced by Bajwa Farms are on a different footing than those advanced by Prokam and MPL. While I concluded in the Decision that the evidence did not substantiate Bajwa Farms' allegations, I also said that I understood "...why Ms. Bajwa may have hoped that Mr. Solymosi would reach out to her, and accept that it may have been prudent for him to do so" (Decision, para. 260). Moreover, I do not understand that Bajwa Farms has any extant applications before the Commission that would support any inference that its allegations were advanced to improperly influence the Commission. Therefore, I do not consider any investigation into Bajwa Farms' conduct is warranted, and do not see any need for it to participate in the second phase of the Supervisory Review.

IV. Conclusion and Orders

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 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.
50. The written submissions will be provided in the following order:
- a. Hearing Counsel;
 - b. Non-complainant participants (Mr. Solymosi, the Commissioners, the Commission and BCFresh);
 - c. Prokam and MPL; and,
 - d. Hearing Counsel reply.

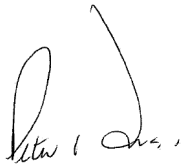
British Columbia Farm Industry Review Board
Allegations Review PART II Process
October 21, 2022

51. 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.
52. Hearing Counsel is to consult with counsel for the participants and provide me with a proposed schedule by October 26 for the provision of any additional evidence by Prokam and MPL, and submissions from the participants. The schedule should proceed in a timely manner, acknowledging that the judicial review petitions are currently scheduled to proceed to hearing in the week of December 5, 2022.

Dated at Victoria, British Columbia this 21st day of October, 2022

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Peter Donkers, Chair

APPENDIX A

AMENDED FINAL TERMS OF REFERENCE

Scope and Focus

BCFIRB's supervisory review is directed by two objectives:

- ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and,
- ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector.

The Supervisory Review will consider the following allegations, which form the terms of reference for the supervisory review:

1. The Commission's exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self interest of members of the Commission, including:
 - a. Self-interested prevention of new agencies from entering the British Columbia market to further the Commission members' economic interests, by both failing to adjudicate agency licence applications, and preventing the granting of additional production allocation to growers thought to be aligned with applicants;
 - b. Collusion by members to "vote swap" on agency applications; and,
 - c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest.
2. Commission members and staff exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.
3. Prokam and MPL advancing allegations of bad faith and unlawful conduct against the Commissioners and Mr. Solymosi for strategic or ulterior purposes.

British Columbia Farm Industry Review Board
Allegations Review PART II Process
October 21, 2022

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.