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## BC Farm Industry Review Board

June 12, 2023

File: 44200-60\AREV

### DELIVERED BY EMAIL

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Dear All:

### RULING REGARDING PHASE II HEARING COUNSEL INVESTIGATION RECOMMENDATION

This decision arises out of “Phase II” of the ongoing supervisory review commenced pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (the “Act” or “NPMA”) in May 2021 to investigate allegations of bad faith and unlawful activity advanced by, inter alia, Prokam Enterprises Ltd. (“Prokam”) against members and staff of the BC Vegetable Marketing Commission (“Supervisory Review”).

In this decision, I address a proposal from Hearing Counsel that he pursue additional investigation into the relationship between Prokam and its current designated agent, Okanagan Grown Produce Ltd. (“Okanagan”), with a view to examining how Prokam might or could market its regulated storage crop.

#### I. Background and Position of the Participants

As set out in the Amended Final Terms of Reference, Phase II will address whether Prokam advanced allegations of bad faith and unlawful conduct against the General Manager of the BC Vegetable Commission (“Commission”) Andre Solymosi and former Commission Vice Chair Peter Guichon in bad faith or for strategic or ulterior purposes. It will also consider what orders or directions I have the authority to make, and which may be required to restore orderly marketing, trust and confidence in the BC regulated vegetable industry.

On October 21, 2022, I made an order that the following process would be followed for Phase II of the Supervisory Review:

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1. Prokam and MPL will be provided an opportunity to provide any additional evidence if they choose to do so;
2. All participants will then have the opportunity to provide me with written submissions on the following issues:
  - a. 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
  - b. 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.
3. The written submissions will be provided in the following order:
  - a. Hearing counsel;
  - b. Non-complainant participants;
  - c. Prokam and MPL; and
  - d. Hearing counsel reply.

Prokam elected not to tender any additional evidence.

On April 26, 2023, I received a submission from Hearing Counsel, who indicated that he required additional information or evidence about the relationship between Prokam and Okanagan, as well as whether there are possible marketing arrangements with other storage crop agencies to market Prokam's product in the future. In Hearing Counsel's view, the question as to how Prokam might or could market its regulated storage crop is an important factor in ensuring orderly marketing in the future.

Hearing Counsel therefore requested that he be permitted to investigate the issue of Prokam's current business or marketing relationship with Okanagan and to potentially consider other feasible agency arrangements. He proposed to speak with Prokam and Okanagan about their relationship, and to discuss with them potential marketing agreements with other storage crop agencies. Hearing Counsel proposed that after speaking to Prokam and Okanagan, depending on the information he received, he might speak to other storage crop agencies. He has also indicated that he will prepare summaries of all his discussions and circulate them to the participants, following which they would have the opportunity to make submissions. He proposes to complete that investigation by June 30, 2023.

In its May 25, 2023 submission, BC Fresh Vegetables Inc ("BCFresh") supports Hearing Counsel's proposal, but adds that Hearing Counsel should speak to other designated storage crop agencies and growers irrespective of the outcome of his interviews with

Prokam and Okanagan. BC Fresh submits that speaking to other agencies and growers would provide the full context of the interests to be served in restoring orderly marketing, trust and confidence in the BC regulated vegetable industry as contemplated by the Amended Final Terms of Reference.

For its part, in its submission dated May 31, 2023, Prokam objects to Hearing Counsel's proposal. Prokam argues that I have already determined the procedure that will apply to Phase II, and there is no change in circumstances which would justify amending that procedure. In Prokam's view, a further "evolution of this supervisory review presents an inherent procedural fairness problem, which will only be exacerbated if Phase II is permitted to evolve yet further." Prokam also says procedural fairness entitles it to tender its own evidence and test any adverse evidence obtained through Hearing Counsel's investigation. Prokam also questions the increased cost associated with this additional step in the process.

No responses were received from Mr. Guichon or Mr. Solymosi. The Commission took no position on Hearing Counsel's proposal.

In reply, Hearing Counsel says that his proposal does not present a fundamental change to the Supervisory Review which would give rise to any procedural fairness concerns. He notes that the interviews he proposes to undertake will examine how Prokam might or could market its regulated storage crop as part of the consideration of what orders or directions might be made to restore orderly marketing, trust and confidence in the industry. With respect to whether the process is unfair, Hearing Counsel argues that his proposed procedure gives Prokam the opportunity to present its case fully and fairly before any decision is made by the Panel. Hearing Counsel agrees that such an opportunity must be provided, including the provision of further evidence and/or submissions about any new facts or issues.

## **II. Discussion**

I agree with Hearing Counsel and BCFresh that it is important to my determination of the issues in Phase II of the Supervisory Review that I have evidence about how Prokam might or could market its regulated storage crop. Phase II will not just examine what inferences can be drawn from Prokam's advancement of allegations of bad faith against Mr. Guichon and Mr. Solymosi. It will also consider what orders are within my jurisdiction and which might be necessary to restore orderly marketing, trust and confidence. Providing the Commission with guidance on how to manage Prokam in a manner that restores trust, confidence and orderly marketing will entail consideration of how Prokam has been operating, and will operate as a producer going forward.

I see Prokam raising two principal issues: (1) whether the evolution of the process to include more investigation by Hearing Counsel is in and of itself procedurally unfair; and (2) whether the proposed procedure deprives it of the right to respond to and test whatever evidence Hearing Counsel elicits.

As noted in Hearing Counsel's submission, procedural fairness has two aspects: the right to be heard and a right to an unbiased decision maker. I accept that the right to be heard requires notice and an opportunity to fully and fairly respond. The full extent of those rights varies with the specific context of the decision.

I do not consider that the "evolution" of the process to include more investigation by Hearing Counsel deprives Prokam of its right to be heard. It might be that if the Phase II procedure were changed mid-stream, after Prokam had already made its submissions, that Prokam would be deprived of notice and thus a fair opportunity to respond. That is not what has happened here. Prokam has yet to make any submissions or tender any evidence in Phase II; this investigation will effectively be the first step. Prokam is being provided with full notice of what investigations Hearing Counsel intends to make, and will be interviewed. The additional step in the process has not deprived Prokam of its right to notice.

I am also of the view that Hearing Counsel's proposed procedure will allow Prokam a fair opportunity to respond. Hearing Counsel will interview Prokam's principal as part of his proposed investigation. Prokam will also be provided with copies of the evidence summaries, and it is my expectation that Hearing Counsel will seek additional evidence from Prokam if matters arise that in his view require a response from Prokam. In addition, Prokam will be at liberty to bring an application to adduce additional evidence after Hearing Counsel's investigation is complete. That, in my view, addresses any procedural fairness concerns which might be said to arise.

This is particularly so in light of the topic that the investigations will concern. As Hearing Counsel submits, the investigations will be directed at how Prokam might be able to market its regulated storage crop, not allegations of wrongdoing by Prokam (in this way the investigations differ from the evidence that was elicited through the investigations of alleged Commission wrongdoing in Phase I of the Supervisory Review).

### **III. Conclusion and Orders**

For all of these reasons, I make the following orders:

1. The procedure for Phase II of the Supervisory Review shall be as follows:
  - a. Hearing Counsel shall investigate through interviews with Okanagan, Prokam, and such other members of the storage crop industry as he considers to be necessary how Prokam, as a producer, might or could market its regulated storage crop. That investigation shall be completed by June 30, 2023.
  - b. Hearing Counsel shall prepare summaries of all the evidence he elicits, and provide copies to all participants.

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

- g. Hearing counsel is to provide me with a proposed schedule for the completion of these steps after consulting with counsel for the participants by July 7, 2023.

Regards,

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is stylized with a large, looped initial "P" and a long, sweeping underline.

Peter Donkers,

Chair

cc: Rose-Mary Basham, K.C.  
Emma Irving  
Mark Underhill, K.C.  
Kate Phipps  
Nazeer Mitha, K.C.  
BCFIRB web site