IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL RESULTING FROM RECOMMENDATIONS MADE BY THE
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

BETWEEN:

VANCOUVER ISLAND PRODUCE LTD. (VIP)

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Chris K. Wendell, Presiding Member
For the Appellant:	Patrick K. McMurchy, Counsel Mont & Walker Law Corporation
For the Respondent:	Robert Hrabinsky, Counsel BC Vegetable Marketing Commission

I. Introduction

1. The issue addressed in this decision is whether the appeal commenced by Vancouver Island Produce Ltd. (VIP) on January 18, 2017 should be summarily dismissed pursuant to any or all of ss. 31(1)(c), (f) and (g) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (*ATA*):

> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> > (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
> >
> > (f) there is no reasonable prospect the application will succeed;
> >
> > (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.[1]

II. Background

2. On January 18, 2017, the Appellant appealed from British Columbia Vegetable Marketing Commission (Commission) recommendations dated December 20, 2016. The filing fee was received January 19, 2017, the last day of the 30 day appeal period.

3. The Commission's recommendations that are the subject of this appeal were part of an extensive supervisory process formally commenced by the British Columbia Farm Industry Review Board (BCFIRB) on October 10, 2014 "to evaluate whether or not vegetable production on Vancouver Island should continue to be regulated and, if continued, what that looks like". The primary focus of the Commission's recommendations concerned the appropriate agency structure on Vancouver Island for the marketing of regulated vegetables.

4. The Commission's December 20, 2016 recommendations were an integral part of the supervisory process commenced on October 10, 2014 – they were in fact the penultimate regulatory step in the supervisory process. The supervisory process was designed to culminate in a BCFIRB supervisory decision issued under s. 7.1 of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (*NPMA*).

5. Among its other recommendations pertaining to agency structure on Vancouver Island, the Commission recommended that VIP be granted a Producer-Shipper licence in lieu of an agency licence, and recommended that the Commission's General Orders be amended to

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[1] Section 31 of the *ATA* applies to appeals filed under s. 8 of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (*NPMA*) by virtue of s. 8.1(1)(a) of the *NPMA*.

create this new licence category in light of VIP's "long history as a grower and the situation it has evolved from over the past six years (2012)". The Commission stated:

> The Producer-Shipper Licence allows VIP to continue to market its product independent of an Agency to Retailers and Food Service companies doing business on Vancouver Island. No other growers are allowed to market through a Producer – Shipper.
>
> VIP's grower retains the option to join another agency as an alternative to accepting a Producer –Shipper licence that will commence with the start of the 2017-18 crop year.
>
> The Producer-Shipper licence is only extended to the current grower (multi-farm entity) shipping under VIP. Any change in ownership to the multi-farm entity will trigger a re-evaluation by the Commission of the Producer –Shipper licence.
>
> Licensing VIP's grower as a Producer-Shipper will require a re-write of the General Order to accommodate Producer-Shippers of storage crops.

6. VIP's January 18, 2017 Notice of Appeal set out 26 paragraphs challenging several aspects of the process by which the Commission arrived at its recommendations to BCFIRB, as well as the merits of its recommendations as a matter of policy.

7. As VIP's appeal of the Commission's recommendations arose in the midst of an ongoing and longstanding supervisory process, I instructed staff to write to the parties on January 24, 2017 giving them until January 27, 2017 to make submissions on the issue whether further consideration of the appeal should be deferred until after the current supervisory process was completed. BCFIRB's January 24, 2017 letter referred to s. 8(8) of the NPMA which states as follows:

> 8(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.

8. Section 8(8) of the *NPMA* is a unique statutory provision, enacted in 2004 to recognize BCFIRB's dual supervisory and appellate mandates. Section 8(8) recognizes that there will be situations where an appeal filed by a particular individual should give way to a more flexible supervisory process designed to resolve systemic marketing policy questions affecting numerous stakeholder interests within an industry.

9. I pause here to note that the 2004 amendments creating s. 8(8) also enacted s. 8(8.4), which states:

> 8(8.4) If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial board must proceed with and decide the appeal.

10. Previous BCFIRB appeal panels have held, and I agree, that an appeal panel's duty to "proceed with and decide" an appeal that has been deferred under s. 8(8) does not preclude the panel exercising all of its appeal powers, including the summary dismissal power in s. 31 of the *ATA*: *V.I.P. Produce Ltd. v. BC Vegetable Marketing Commission*, April 9, 2013, paras. 18-28; *Appeals from the October 31, 2013 decision of the British Columbia Vegetable Marketing Commission regarding Agency Statute*, Letter Decision, January 22, 2014, paras. 14-26.

11. On January 26, 2017, I granted VIP an extension of time to make submissions on the s. 8(8) deferral issue in view of its legal counsel's litigation schedule. In granting the extension, I advised the parties as follows:

> Given counsel's representation that he cannot possibly meet the timeline, I am prepared to grant the requested extension. However, as a matter of case management, I note that the Commission recommendations under appeal speak to the commencement of the 2017 growing season. The timing and outcome of the supervisory decision is in the hands of the supervisory panel. I will simply advise the parties if a supervisory decision has been rendered by February 10, 2017, the s. 8(8) issue would no longer be relevant and the parties would then be invited to provide submissions on the impact of any supervisory decision on this appeal. [emphasis added]

12. As matters unfolded, on January 31, 2017, a supervisory panel of BCFIRB issued its decision (the Final Supervisory Decision) in respect of the agency status of three current agencies, including VIP. As will be noted in more detail below, the Final Supervisory Decision addressed all of the grounds that VIP advanced in its Notice of Appeal, which grounds were reproduced verbatim (along with three others) in VIP's submissions in the supervisory process.

13. With respect to VIP, the Final Supervisory Decision directed as follows:

> That the Commission shall, as soon as practicable, amend its General Orders as proposed in Appendix "B" of its recommendations in order to create a Producer--Shipper Licence applicable to storage crops, and grant that Licence to VIP for the 2017-18 Crop Year upon expiry of VIP's agency licence on March 1, 2017. The Producer-Shipper licence granted to VIP is subject to the terms set out at paragraphs 96-98 of the Commission's recommendations.

14. On February 2, 2017, BCFIRB's case manager for appeals sent out an email to the parties to this appeal stating as follows:

> Further [to] the release of BCFIRB's Supervisory Review Decision on January 31, 2017, as per Mr. Wendell's January 26th correspondence, the parties are requested to provide submissions on whether any issues remain with respect to the appeal.

15. In its February 7, 2017 submission, VIP argued that its appeal should proceed – that it has the right to have the appeal heard on the merits notwithstanding the Final Supervisory Decision. In the same letter, however, VIP also appeared to argue that its right of appeal

had effectively been denied, and that any appeal heard now "raises serious issues with respect to bias and prejudice, and violates the principles of natural justice and fairness".

16. Thus, as matters stood on February 7, 2017, the circumstances were that VIP had on January 18, 2017 filed an appeal from the Commission's December 20, 2016 recommendations, BCFIRB issued its Final Supervisory Decision on January 31, 2017, and the issue whether the appeal should be deferred under s. 8(8) pending a supervisory process had been rendered academic as the supervisory process had now completed.

17. In its February 9, 2017 submission, the Commission argued that in view of BCFIRB's January 31, 2017 supervisory decision, VIP's appeal should be summarily dismissed under s. 31(1)(c) of the *ATA* as there were no outstanding issues to be appealed.

18. On February 14, 2017, I wrote to the parties outlining the procedural history of the appeal, citing section 31 of the *ATA* and advising as follows:

> Given that the supervisory process is now complete, the s. 8(8) *NPMA* issue is no longer relevant. The issue now, identified by the Commission, is whether the appeal should be summarily dismissed under s. 31 of the *ATA*. That issue must be addressed as a preliminary issue.
>
> While VIP has already been given an opportunity to respond to staff's February 2, 2017 email, it is my view VIP should be given the opportunity to specifically address whether its appeal should or should not be summarily dismissed under s. 31. While the Commission has referred to s. 31(1)(c), VIP is also specifically invited to address whether s. 31(1)(f) and (g) also apply. With respect to these issues, VIP is invited to comment on previous appeal panel decisions in *V.I.P. Produce Ltd. v. BC Vegetable Marketing Commission* (April 9, 2013) and *Re Appeals From the October 31, 2013 Decision of the British Columbia Vegetable Marketing Commission Regarding Agency Status*, January 22, 2014 letter decision. While those decisions are not binding on the present panel, VIP is invited to make submissions, in addition to any other submissions it wishes to make, as to whether or why this panel ought to take a different analytical approach, and as to whether or why the circumstances here are distinguishable.
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> VIP will have until the end of business on **February 22, 2017** to make its submission. The Commission will have until the end of business on **February 24, 2017** to reply.

III. VIP's position

19. In its February 22, 2017 submission, VIP argues that its appeal "asks the panel to consider whether or not an agency, and the growers attached to that agency, should be treated fairly in accordance with the principles of natural justice, due process and the SAFETI principles that are intended to govern the processes administered by the VMC".

20. VIP argues that nothing in the Final Supervisory Decision speaks to the issues being brought forward in its appeal, and therefore it cannot be said pursuant to s. 31(1)(g) of the *ATA* that the appeal issues have been appropriately addressed by the supervisory panel. VIP argues that the supervisory process is not in any event "another proceeding" within

the meaning of s. 31(1)(g) of the *ATA* as it does not relate to either of a breach of an agreement, a contravention of an enactment or a wrong or breach of a duty for which a remedy is claimed under an enactment, common law or in equity. VIP argues that, having regard to the legislative scheme as it relates to the supervisory process and appeal proceedings, "there is nothing to suggest that the supervisory panel's decision should be applied to usurp the function of the appeal panel".

21. VIP argues that an appeal decision dated April 9, 2013 summarily dismissing one of VIP's previous appeals filed in the midst of an earlier supervisory process was fundamentally in error when it stated "where issues have been decided in that [supervisory] process it would be an abuse of the appellate process to require those issues to be decided all over again". VIP says the opposite is true: "it is an abuse of the appellate process to have a supervisory panel 'decide' - without considering – issues of fundamental justice under appeal".

22. VIP also argues that its rights were "abrogated" when it was not given the opportunity to comment on the s. 8(8) deferral issue. VIP argues that because "the supervisory panel continued on its path", VIP lost the opportunity to argue that the appeal should proceed, and the appeal panel did not consider whether the subject matter was more appropriately dealt with by the supervisory process. VIP argues that in view of the impact of the Commission recommendations on VIP, "a better approach would have been for the supervisory panel to await the outcome of the appeal panel's decision".

23. VIP argues that ss. 31(1)(c) and (f) of the *ATA* have no application here. With respect to s. 31(1)(c), VIP argues that its appeal raises different issues from those considered in the supervisory process, and that relying on s. 31(1)(c) undermines the integrity of the appeal process. With respect to s. 31(1)(f), VIP notes that the appropriate test is not particularly high, and argues that this is not a case where the appeal has no reasonable prospect of success, or where the evidence falls outside the realm of conjecture.

24. Finally, VIP argues that the circumstances of this case are distinguishable from those that prevailed when BCFIRB appeal panels, on April 9, 2013 and January 22, 2014, dismissed its earlier appeals from Commission decisions and recommendations made within related supervisory processes. With respect to the 2013 appeal decision, VIP submits that "while we maintain that the process followed by the VMC in Appeal #12-05 was unfair, this was not specifically decided by the panel in the Decision, which instead taking [sic] the view that fairness is not a concern as long as the "right decision is reached". VIP argues that while both the 2013 and 2014 appeal decisions found that the orders appealed no longer had any effect, the Commission's recommendations under appeal here "have an ongoing and future effect, and the remedy being asked for – that an agency licence be granted to VIP – will remedy the wrong".

IV. Commission's reply

25. The Commission's February 24, 2017 reply describes in some detail the current supervisory review process which formally commenced on October 10, 2014 and culminated in the January 31, 2017 Final Supervisory Decision.

26. The Commission notes that VIP seeks to proceed with its appeal from a Commission recommendation after BCFIRB has already issued its Final Supervisory Decision in relation to that recommendation.

27. The Commission argues that the notion that BCFIRB's supervisory jurisdiction is subordinate to its appellate jurisdiction is untenable. The Commission submits that the supervisory jurisdiction, set out in s. 7.1 of the *NPMA*, is "plenary in nature, and co-exists with BCFIRB's appellate jurisdiction". The Commission points out that the supervisory review predated VIP's appeal, and argues that "the Appellant's position is akin to arguing that the making of any adjudicative decision is 'procedurally unfair' because it impedes the ability of a litigant to launch a second, subsequent proceeding among the same parties and involving the same issues". The Commission argues that this would up-end the doctrines of *res judicata, issue estoppel*, collateral attack and abuse of process.

28. The Commission also disputes VIP's argument that the issues raised on appeal differ from those under consideration in the supervisory review. The Commission submits that "much of the supervisory review was concerned with process, and all stakeholders, including the Appellant, have been given every opportunity to express their concerns (if any) with process in the context of that supervisory review. At this juncture, any concerns that the Appellant might have with respect to the process undertaken in the supervisory review must be made the subject of an application for judicial review. The BCFIRB cannot hear an appeal with respect to alleged procedural errors when it has already approved the procedure in the context of the supervisory review."

29. The Commission argues that the appeal panel's April 9, 2013 decision in *V.I.P. Produce Inc. v. BC Vegetable Marketing Commission*, at paras. 15-23, is directly on point.

V. Decision

30. It is my decision, for the reasons that follow, that VIP's appeal in this matter should be dismissed under ss. 31(1)(c), (f) and (g) of the *ATA*. In my opinion, the substance of this appeal has been appropriately, finally and conclusively addressed in BCFIRB's January 31, 2017 Final Supervisory Decision. It would be an abuse of the appeal process for BCFIRB to entertain the current appeal. The appeal is therefore also vexatious and has no reasonable prospect of success.

31. Since this decision turns on the significance of the supervisory process and Final Supervisory decision on the current appeal, it is appropriate to begin with a review of the

NPMA, the fundamental role and purpose of BCFIRB and the relationship between BCFIRB's supervisory and appellate functions.

A. Purpose of the NPMA

32. The *NPMA*'s purpose is set out s. 2(1)(a) as follows: "The purpose and intent of this Act is to provide for the promotion, control and regulation of marketing of natural products…" The *NPMA* is part of a complex fabric of companion provincial and federal statutes governing regulated marketing in Canada: *NPMA*, ss. 4-7. To help carry out this purpose, the legislature created BCFIRB.

B. BCFIRB

33. BCFIRB, originally established in 1934 as the British Columbia Marketing Board, is a "specialized statutory tribunal independent of government"[2] with "overall responsibility for natural products marketing in the province".[3]

34. To exercise this authority, BCFIRB requires broad authority and expertise. As described in a 2002 court decision:

> The Provincial Board is a specialized administrative tribunal given wide discretionary powers to carry out its mandate and the policy of the *Act*…. [T]he Legislature clearly intended the members of the Provincial Board to have significant knowledge and experience in the complex realm of regulated marketing. The members of the Provincial Board are required to be aware of the intricacies of the subject area, the economic principles that lie at the core of regulated marketing, and the delicate balance that must be preserved among competing interests within and between commodity sectors in order to function effectively in the public interest.[4]

35. To achieve a statute's purposes, a legislature may confer multiple functions on an administrative tribunal. To achieve the purposes of the *NPMA*, BCFIRB has been given several unique statutory functions. One is BCFIRB's general supervisory role over all the commodity boards and commissions. Another is its appeal function.

C. The supervisory function

36. BCFIRB's supervisory function, which is recognized throughout the *NPMA*, the *NPMA Regulation* and the *Vegetable Scheme*, is set out in s. 7.1 of the *NPMA*. Sections 7.1(1)(a) and 7(2) read as follows:

> 7.1 (1) The Provincial board
>
> > (a) has general supervision over all marketing boards or commissions established under this Act...

[2] *Hallmark Poultry Processors Ltd. v. BC (Marketing Board)*, [1999] B.C.J. No. 2980 (S.C.) at para. 6
[3] *British Columbia Chicken Marketing Board v. Brad Reid*, 2002 BCSC 1451 at para. 6.
[4] *Ponich Poultry Farm Ltd. v. British Columbia (Marketing Board),* [2002] B.C.J. No. 2194 (S.C.) at para. 4.

(2) The Provincial board may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.

37. Section 7.1 of the *NPMA* must also be read with s. 11(2) of the *NPMA*, which states:

> 11(2) The Provincial board may, at any time, amend, vary or cancel an order or rule made before or after February 11, 1975 by a marketing board or commission under a power vested in it under this section and sections 13 and 14, or under a power exercisable under the federal Act.

38. As noted, BCFIRB's supervisory responsibility is reflected throughout the regulatory scheme. For example, the Commission, as first instance regulator, administers the *Vegetable Scheme* "under the supervision of the British Columbia Farm Industry Review Board".[5] All marketing boards and commissions administer their schemes subject to the supervision of BCIFB.[6]

39. BCFIRB's power of general supervision extends not only to boards and commissions, but also to "their designated agencies constituted or authorized under the Act".[7] No agency may be designated in any regulated industry without prior approval by BCFIRB.[8]

40. BCFIRB's supervisory function, which is deeply entrenched in its history[9], makes it unique among provincial administrative tribunals. In a 2002 decision that also arose from the vegetable greenhouse industry, BCFIRB (then the BCMB) described the supervisory role, as it existed prior to the 2004 amendments, as follows:

> The supervisory power is, and has always been, a feature of the BCMB's statutory jurisdiction in relation to the subordinate commodity boards. However, this feature was given renewed emphasis in 1974 when it was enshrined for the first time in the Act itself. Consistent with the reality that legislators may confer multiple functions on administrative tribunals in order to carry out legislative policy, the Legislature in 1974 conferred supervisory and appellate roles on the BCMB. It is thus incorrect to think of the BCMB as simply an appeal board. The BCMB's supervisory power is no less important than the appeal power and is not to be minimized. Consistent with ss. 2(1) and 3(1) of the Act, the BCMB's supervisory role is inextricably linked with the BCMB's purposes, and the purposes of the Act itself. It has enabled the BCMB to review any matter related to regulated marketing and to give direction to commodity boards, in a proactive fashion, regarding emerging issues and conflicts within the commodity industries, ranging from the specific to the systemic. In some cases, the matters will have been addressed, or partly addressed, by the administering commodity boards or commissions in one fashion or another. In other matters, there are pressing issues that the commodity boards or commissions have omitted to address, and in respect of which BCMB direction has been required.[10]

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5 Vegetable Scheme, s. 3(1)
6 *NPMA*, ss. 10(1), 12(1).
7 Natural Products Marketing (BC) Act Regulations, s. 4(1).
8 Natural Products Marketing (BC) Act Regulations, B.C. Reg. 328/75, s. 8
9 *Regulations Under the Natural Products Marketing (British Columbia) Act*, OIC 905/35.
10 *BC Greenhouse Industry Supervisory Review*, September 2002, p. 2. http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-

41. In 2004, the supervisory function was given renewed prominence with the enactment of s. 7.1 of the *NPMA*, as well as the enactment of s. 8(8) referred to above.

D. The appeal function

42. The appeal function, established in 1974, is set out in s. 8(1) of the *NPMA*:

> s. 8(1) A person aggrieved or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial Board.

43. As with all statutory appeals, BCFIRB appeals are party-driven. Section 8 appeals reflect "an adjudicative scheme", in which the Provincial board "almost always conducts its appeal hearings with witnesses, sworn testimony, oral submissions, and provides the parties with the opportunity to be represented by counsel": *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002 BCCA 473 at para. 13.

E. Reconciling the supervisory and appeal functions

44. As BCFIRB recognized in the *Greenhouse Industry Supervisory Review* (pp. 1, 2):

> ....supervision, if it is to be meaningful, does not limit itself to merely sit, wait and subsequently adjudicate if a dispute emerges. Supervision enables the supervisor to review, to oversee and, where deemed necessary and appropriate, to give to direction to those being supervised in relation to the proper means and ends of their assigned tasks. Supervision is not supervision if it does not include the power to direct the person being supervised, or to collect information in a fashion that, while fair, is more flexible than a formal adjudicative process... The BCMB's effective and meaningful supervisory function has been essential to ensuring that the regulated marketing system operates in a fair and orderly fashion and achieves the purposes of the Act. This purpose could not be served simply by relying on the appeal power, or by subtracting from it any matter that could potentially go to appeal (which would leave virtually nothing).

45. In *Global Greenhouse Produce Inc. et al v. BC Marketing Board et al*, 2003 BCSC 1508, several petitioners argued that the BCMB exceeded its role when it imposed a supervisory process and issued supervisory directions to the Commission instead of allowing the Commission to make its own "decisions", which could then be appealed. The petitioners argued as follows:

> [73] They submit that, whatever the extent of the BCMB's supervisory powers may be, they do not entitle it to alter the legislative scheme and deprive a citizen of his or her right to a decision from the BCVC, an administrative appeal to the BCMB in accordance with section 8 of the Act, as well as the right to a further appeal to this Court pursuant to section 9 of the Act. They say that the "take over" by the BCMB of the decision-making and adjudicative role of the BCVC was a "novel adjudication process", one that is clearly inconsistent with the process contemplated by the Act for adjudication, decision and appeal.

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board/regulated-marketing/supervisory-reviews/supervisory-review-decisions/bc-vegetable-marketing-commmission-decisions/bc_greenhouse_veg_ind_sep11_02.pdf

46. After citing from the *NPMA*, the Court rejected that argument:

> [76] Earlier, when outlining the regulatory structure in this province, I set out certain relevant provisions of B.C. Reg. 96/80 (which established the Vegetable Scheme), including s. 3(1) which stipulates that the BCVC is to administer the scheme "under the supervision of the British Columbia Marketing Board". In *New Brunswick Telephone Co. v. Kenny et al*. (1988), 55 D.L.R. (4th) 711, the New Brunswick Court of Appeal considered the meaning of s.5(1) of the *Public Utilities Act* of that province which provided that " the Board shall have general supervision of all public utilities" and the court held that:
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> > The phrase "general supervision" is not defined in the Act nor does it appear to have been the subject of any reported case. The words should therefore be given their ordinary meaning in the context of the mandate given to the Board by the Act, i.e., "to investigate", "to examine", "to inquire", " to oversee", "to direct".
>
> [77] By definition, a "supervisor" is one having authority over others (*Black's Law* Dictionary (1999), 7th ed.). In this case the BCMB has general supervision over all marketing boards or commissions constituted under the *Act* and, in my view, sections 11(1) and 11(2) of the Act clearly illustrate the legislature's intent that the Marketing Board is to be the ultimate decision maker in this area, and that it be a pro-active, rather than a passive, regulatory body.
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> [78] I find that, in addition to the authority to amend, vary or cancel orders or rulings made by subordinate marketing boards or commissions, that general supervisory authority gives it the power, where it deems it appropriate, to give policy directions to those marketing boards or commissions in order to ensure that they take the action that the BCMB, as their supervisor, considers necessary and in the public interest.
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> [79] For those reasons, I find that the extent of the BCMB's intervention in this case fell within the scope of its supervisory mandate and that the supervisory decisions and directions set forth in its report of September 11, 2002, were validly made and given.

47. *Global Greenhouse* makes clear that BCFIRB is not fettered from using the supervisory function to find industry-wide solutions simply because a particular industry actor (who might down the road be adversely affected by the outcome) would have preferred to have its concerns resolved in the appeal process. As correctly submitted by the Commission in this case, the supervisory function is plenary in nature and not subordinate to the appeal function.

48. When s. 8(8) of the *NPMA* was enacted in 2004, the legislature recognized that an appeal might be filed while a supervisory process is underway, or that BCFIRB might decide, after an appeal has been filed, that the matter is more appropriately addressed in a supervisory process. Section 8(8) only reinforced the legislature's intention to allow a more flexible supervisory process to operate in those cases where BCFIRB determines it is necessary to address regulated marketing issues. The intent was to ensure that BCFIRB could make the necessary decisions to address emerging or ongoing issues without being fettered by the narrow interests, timing or tactical decision-making of a particular appellant.

49. Section 8(8.4) makes clear that after the supervisory process is completed, the appeal panel must "decide the appeal", which decision must obviously have regard to what if any matters, arising on appeal, have already been finally and conclusively decided in the supervisory process.

50. In this case, as noted earlier, a *potential* s. 8(8) issue arose as VIP filed this appeal 29 days after the Commission's recommendation – after it had been given the opportunity to make representations in the supervisory process, and of course prior to the Final Supervisory Decision. As matters unfolded, however, I did not need to invoke s. 8(8), as the Final Supervisory Decision was rendered before the decision whether to defer the appeal was made.

51. In *Global*, the petitioners did not purport to appeal Commission recommendations made during a supervisory process, presumably because they recognized that an appeal would be futile since the BCMB's decision addressed the specific substantive issues that they would have raised on appeal. Their appeal focused instead on whether it was appropriate for the BCMB to have proactively engaged the issues at all. As noted above, the Court rejected that argument.

F. Final and conclusive decision-making

52. One of the key amendments made by the legislature in 2004 was to enact the privative clause set out in s. 9 of the *NPMA:*

> **9** (1) The Provincial board has exclusive jurisdiction to <u>inquire into, hear and determine</u> all those matters and questions of fact, law and discretion arising or required to be determined by the Provincial board under this Act or a federal Act and to make any order permitted to be made.
>
> (2) Without limiting subsection (1), the Provincial board has exclusive jurisdiction to <u>inquire into, hear and determine</u> whether a decision, order or determination of a marketing board or commission accords with either or both of the following:
>
> (a) sound marketing policy;
>
> (b) a scheme or the orders of the marketing board or commission.
>
> (3) A <u>decision</u>, order or determination of the Provincial board under this Act on a matter in respect of which the Provincial board has exclusive jurisdiction is <u>final and conclusive</u> and is not open to question or review in any court. [emphasis added]

53. As is apparent, this language was crafted so as to capture both the supervisory and appellate functions. It makes clear that BCFIRB may render "final and conclusive" decisions under either branch of its unique statutory mandate.

G. The current appeal

54. In this case, unlike *Global Greenhouse*, the Appellant has appealed the Commission's recommendation that preceded BCFIRB's Final Supervisory Decision. The question that I must now decide is whether that appeal warrants summary dismissal based on any of the *ATA* grounds listed below:

> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
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> > (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
> >
> > (f) there is no reasonable prospect the application will succeed;
> >
> > (g) the substance of the application has been appropriately dealt with in another proceeding.
>
> (2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard

H. Section 31(1)(g)

55. Section 31(1)(g) of the *ATA* states that a tribunal may dismiss all or part of an appeal if it determines that the substance of the application has been appropriately dealt with in another proceeding.

56. VIP argues that "nothing in the supervisory panel's decision speaks to the issues being brought forward in this appeal", including the "process" questions that it says are key to its appeal.

57. With respect, this submission flies in the face of the supervisory process and the Final Supervisory Decision.

58. The very "decision" VIP seeks to appeal[11] is the Commission's recommendation which was an integral part of the design of the supervisory process. The very point of the Final Supervisory Decision was for BCFIRB to consider and assess that recommendation.

59. On January 16, 2017, before making the Final Supervisory Decision, BCFIRB granted VIP and the two other agencies the opportunity "to make any final written submissions the parties deemed appropriate, no later than January 20, 2017, with respect to any legal, factual or policy issue arising out of the Commission's December 20, 2016 recommendations regarding agency designations": Final Supervisory Decision, para. 68.

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[11] For the purpose of this decision, I will assume, without deciding, that the Commission's December 20, 2016 recommendation was a "decision" that is capable of being appealed under s. 8(1) of the *NPMA*.

60. The chronology following BCFIRB's January 16, 2017 supervisory letter is as follows:

(a) January 18, 2017: VIP filed this appeal, with filing fee received January 19, 2017. VIP's Notice of Appeal lists 26 paragraphs under the heading "Specify why the decision should be changed and state the outcome (BCFIRB decision) requested".

(b) January 20, 2017: VIP files its written submission in the supervisory process. VIP's written submission in the supervisory process includes, verbatim, all of the paragraphs listed in its Notice of Appeal, plus three others.

61. The Final Supervisory Decision addressed each of VIP's arguments advanced in the supervisory process: Final Supervisory Decision, paras. 88-115. To assert that the supervisory panel "has not addressed the issues at all" is simply incorrect.

62. The substance of VIP's grounds of appeal was squarely before the supervisory panel and was addressed by that panel. If the Appellant disagrees with those findings, the appropriate remedy is judicial review of that final and conclusive decision, not a BCFIRB appeal seeking to revisit precisely the same arguments advanced before and considered by the supervisory panel after a carefully designed supervisory process that commenced in October 2014 and culminated in the Final Supervisory Decision.

63. The Appellant argues that s. 31(1)(g) of the *ATA* can have no application here because the supervisory process is not "another proceeding" for the purposes of s. 31(1)(g) of the *ATA*. The Appellant cites two administrative tribunal decisions it says stand for the proposition that a "proceeding" is limited to proceedings related to an allegation of either the breach of an agreement, a contravention of an enactment or a wrong or breach of duty for which a remedy is claimed under an enactment, the common law or in equity: *Sunrise Poultry Processors Ltd. v. United Food & Commercial Workers, Local 1518,* 2015 Can LII 72322 (BCLA), *paras. 24-25; Pruss v. Irwin and Paramount (No. 3),* 2008 BCHRT 434, para. 30.

64. The administrative tribunal decisions cited by VIP are unhelpful. The *Sunrise* case (a labour arbitration decision) and the *Pruss* case (a human rights decision) both cite the definition of "proceeding" set out in the *Personal Information Protection Act*. That definition does not govern the *ATA*. Indeed, it is trite law that the terms used in statutes must be interpreted in context, and given such fair, large and liberal interpretation as best ensures the attainment of their objects: *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.

65. The purpose of s. 31(1)(g) has been set out by the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, a case that arose in the context of an identically worded provision in the *Human Rights Code*:

> 36 Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and

> delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.
>
> 37 Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

66. As noted above, the *NPMA* has created two types of proceedings by which BCFIRB can address regulated marketing issues – supervisory proceedings and appeal proceedings. Where, as here, BCFIRB had supervisory jurisdiction to address VIP's ongoing agency status in the context of larger industry issues, where BCFIRB determined that this was in fact the preferable way to address that issue given that the issue pertained to industry structure and involved numerous actors and interests, where the supervisory process was carefully designed to give all stakeholders, including VIP, a meaningful opportunity to have their views known throughout the supervisory process, and where BCFIRB provided VIP a specific opportunity to respond to the Commission's recommendations, there can be no question that substance of VIP's appeal has been appropriately dealt with despite the fact that the supervisory process did not "mirror" an appeal. This is a clear case where it makes no sense to expend public and private resources on the re-litigation, in an appeal, of the very issues BCFIRB considered in the supervisory process before rendering the Final Supervisory Decision.

67. In *Figliola*, the Court also stated as follows:

> [38] What I do *not* see s. 27(1)(f) as representing is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

68. While the two proceedings in *Figliola* arose under different statutes rather than under the same statute, it would obviously put form over substance to limit s. 31(1)(g) of the *ATA* to proceedings by different tribunals under separate statutes – to say that s. 31(1)(g) would apply if the supervisory and appeal powers were exercised by different tribunals (as is for example the case in Ontario[12]), but it cannot apply where they are exercised by the same tribunal under the *NPMA*. Where, as under the *NPMA*, the legislature has vested one tribunal with jurisdiction to address a particular matter in one of two types of statutory proceedings (a supervisory proceeding or an appeal proceeding), s. 31(1)(g) is fully applicable where all issues have been addressed in the supervisory process, and the substance of the appeal has been appropriately dealt with in that other proceeding. Section 31(1)(g) is not, to use the Court's language, an invitation to have a BCFIRB appeal panel "reconsider a legitimately decided issue in order to explore whether it might yield a different outcome".

69. The Appellant argues that this outcome "usurps" the function of the appeal panel. However, given that BCFIRB has jurisdiction to resolve an issue through its supervisory process, nothing is being "usurped" unless an appellant has an absolute right, by appealing a commodity board action, to frustrate, fetter and stall a supervisory process BCFIRB had jurisdiction to undertake – here, a supervisory process that was started several years before the Appellant even filed its appeal, where the appeal is taken from a Commission action whose very purpose was to be the penultimate step within that supervisory process. Such an absolute right would not only undermine the supervisory function; it would turn s. 31(1)(g) on its head. The very point of s. 31(1)(g) is to avoid "forum shopping" by an appellant who would prefer to dictate the forum in which a matter is decided. In an area as difficult and important as regulated marketing, it must be the regulator, not any particular appellant advancing its private interest, who decides the means by which a particular matter is best resolved as a matter of sound marketing policy, in the public interest.

70. The Appellant argues that it "abuses the appellate process to have the supervisory panel 'decide' – without considering – issues of fundamental justice under appeal". I disagree that the supervisory panel failed to consider the issues VIP seeks to raise on appeal.

71. As noted earlier, all of the grounds VIP lists in its Notice of Appeal are grounds it advanced, verbatim, in the supervisory process. The fact that VIP does not agree with the supervisory panel's answers does not mean that its arguments were not considered. While VIP's most recent submission appears to emphasize its procedural concerns from out of the numerous grounds listed in its Notice of Appeal, I am satisfied that the supervisory panel, which had all the same grounds advanced, was alive to those concerns, addressed those concerns, and in particular was satisfied that the supervisory process, viewed as a

[12] In Ontario, the supervisory and appeal roles are divided between the Ontario Farm Products Marketing Commission (*Farm Products Marketing Act*) and the Agriculture, Food and Rural Affairs Appeal Tribunal (Ministry of Agriculture, Food and Rural Affairs Act).

whole, was consistent with "a SAFETI-based review process to evaluate the Vancouver Island Agency structure": *Final Supervisory Decision*, para. 58. I am also satisfied that the supervisory panel was alive to VIP's arguments on the "merits" of the marketing policy questions, and was satisfied that the answers it reached – including that VIP's agency licence should be replaced by a producer-shipper licence for the current year – represented sound marketing policy.

72. The Appellant has argued that its "right" to be heard under s. 8(8) was abrogated by the process that unfolded here, because I concluded that the s. 8(8) issue was no longer relevant after the supervisory panel had rendered the Final Supervisory Decision. Once again, the Appellant's submission is based on a misunderstanding of how the legislation works. Section 8(8) of the *NPMA* does not stay an existing supervisory process, nor can an appeal panel stay a supervisory process. Further, there is no indication that the Appellant ever made an application to the supervisory panel to stay its proceedings given the filing of its appeal.

73. Section 8(8) is simply about whether an *appeal* should or should not be deferred in light of an ongoing or contemplated supervisory process. The fact that an appeal can be deferred only reinforces the legislative recognition that BCFIRB can and does address matters arising on appeal in its supervisory capacity. Indeed, even if an appeal is not deferred under s. 8(8), this does not bind a supervisory panel.

74. Where, as here, the Final Supervisory Decision was made while the s. 8(8) issue was in process – a possibility I specifically identified when I granted the Appellant an extension of time to make its submission – the issue whether to defer the appeal became moot. At that point, there was no purpose in making a decision about whether to "defer" the appeal. The only issue then was whether the Appellant wished to proceed with its appeal. Once the Appellant answered yes, the issue then arose, as is being decided here, whether the appeal should be summarily dismissed under s. 31(1) of the *ATA*.

75. As noted earlier in this decision, this is not the first appeal that VIP has filed from Commission findings that had been or were being addressed within BCFIRB supervisory processes concerning Vancouver Island agencies in the vegetable sector.

76. In the spring of 2012, VIP appealed from the three Commission actions that were the origin of the supervisory processes that followed: (i) a decision to temporarily allow one of its former producers to direct market vegetable (Appeal #12-03); (ii) a recommendation that Vancouver Island Farm Products Inc. (VIFP) be granted agency status (Appeal #12-05A), and (iii) a decision that VIP's agency status be revoked outright (Appeal #12-05B). In November 2012, all three appeals were, under s. 8(8), deferred to a supervisory process, which supervisory process resulted in a January 7, 2013 Supervisory Decision making both short term and longer term supervisory orders.

77. On April 9, 2013, an appeal panel summarily dismissed Appeal #12-03 under s. 31(1)(c) of the *ATA* on the basis that it concerned a short term situation, involving perishable vegetables, and that the Appellant pointed to no practical remedy that could be granted: 2013 Appeal Decision, paras. 9-13.

78. With regard to Appeal #12-05A and B, the appeal panel summarily dismissed those appeals under s. 31(1)(g) on the basis that the Commission's actions had been "overtaken and superseded" by BCFIRB's January 2013 supervisory decision: 2013 Appeal Decision, paras. 22-28. Significantly, the appeal panel rejected the argument that VIP's procedural concerns with the Commission's process could overcome the impact of the Supervisory Decision:

> 23. While I appreciate the appellant wants to argue about the procedural defects of the Vegetable Commission's process in coming to its April 2012 decision, that decision has in effect been overtaken and superseded by BCFIRB's January 2013 decision. The appeal panel cannot now, based on procedural defects, grant a remedy which returns everything to its previous state of affairs when a new decision affecting both licences has since been made by a supervisory panel, which decision itself contemplates further action and regulatory decision-making.
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> 24. What this reflects is a reality of licensing in the highly specialized regulated marketing sector. BCFIRB is not a mere surrogate for a court on judicial review. While a court might quash a licensing decision based solely on procedural grounds, BCFIRB, which exercises supervisory authority and de novo appeal powers (which would normally cure any defects in the process below) will not always consider remittal on procedural grounds to be the appropriate outcome. As a regulatory body, BCFIRB will at times be required to look beyond the procedural complaints to examine underlying substantive marketing policy issues arising in respect of the order that was made. There will be times when, in this process, the ultimate regulatory order made by BCFIRB must turn on the substantive policy question concerning "what is the right order to make" in the context of sound marketing policy rather than on a simple view of whether there was a procedural flaw.
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> 25. I should add that in this particular case, the procedural defects asserted by VIP do not appear to have been lost on the supervisory panel, as they have informed the panel's order restoring VIP's licence on an interim basis (together with that of VIFP) and requiring the Vegetable Commission to undertake a broader industry review, with ongoing BCFIRB supervision, before making long term decisions with respect to designation of agencies on Vancouver Island, and have restored VIP's licence during this period.
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> 26. If the appellant wants to challenge the supervisory decision, that should be done directly through judicial review, not indirectly through the hearing of these appeals. I am not prepared to substitute my view of an appropriate resolution for that of the supervisory panel or to engage in a collateral attack on its decision.
>
> 27. I am of the view that sections 31(1)(c)(f) and (g) of the Administrative Tribunals Act all have application in these circumstances. These appeals could be seen as "vexatious" as a vexatious appeal is one even in the absence of an intent to harass which abuses the board's processes because it is asking the board, and the opposing party, to commit resources to matters that have been addressed in another proceeding. These appeals could also be seen as frivolous in that a "frivolous" appeal is one that is inappropriate to refer to a hearing because it has no reasonable prospect of success in respect of the ultimate remedy sought. It is fundamentally unfair and contrary to the public interest to establish a

hearing with regard to an appeal that has no reasonable prospect of success. Finally, with respect to s. 31(1)(g), and contrary to the arguments of the appellant, the substance of these appeals has been appropriately dealt within the supervisory proceeding. The BCFIRB supervisory panel has not just "managed" the situation; the orders under appeal no longer have any force or effect because they have been replaced by orders of the supervisory body. In these circumstances, there is no meaningful remedy I can offer in respect of orders that have no effect.

79. In November 2013, VIP filed a further appeal from a Commission decision made in the wake of BCFIRB's January 7, 2013 supervisory decision. That appeal sought to challenge a Commission recommendation that VIFP be granted agency status. On December 23, 2013, BCFIRB issued a further supervisory decision concerning the very recommendation VIP had sought to appeal. Once again, the appeal panel summarily dismissed the appeal under s. 31(1)(g) on the basis that it had been appropriately dealt with in the supervisory process:

> 20. In my view, the substantive issue raised in IVCA's and VIP's respective appeals, namely the Vegetable Commission's October 31, 2013 decision recommending that VIFP be granted conditional agency status based on a defined relationship with BC Fresh, was dealt with in its entirety in BCFIRB's supervisory decision of December 23, 2013 when the Supervisory Review panel approved those recommendations. Although the appellants submit that the decision was made without the benefit of a strategic plan from the Vegetable Commission that it was directed by the Supervisory Review Panel to provide in its January 7, 2013 decision, I find that this circumstance was taken into account by the Supervisory Review panel in making its decision (as set out in paragraph 12 above).
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> 21. The appellants also submit that sound marketing policy would require that there be only one agency acting for producers on Vancouver Island. However, I find that the appellants made submissions regarding this matter during the Supervisory Review and that they were considered by the Supervisory Review Panel in making its decision.
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> 22. I am mindful that the Notices of Appeal allege some procedural defects during the hearing process that gave rise to the October 31, 2013 decision of the Vegetable Commission and that they seek remedies including rectifying alleged 'structural (or governance) problems' with the Vegetable Commission. In my view, however, the alleged procedural defects were cured by virtue of the fact that the Vegetable Commission's decision was super-ceded by BCFIRB's Supervisory Review decision. I am also mindful that the Supervisory Review panel declined to deal with the "structural (or governance) problems" of the Vegetable Commission but do not find this submission persuasive given that the panel turned their mind to this matter and exercised their discretion in deciding that "BCFIRB will address separately issues with respect to the governance and composition of the Vegetable Commission."
>
> 23. I do not agree that the issue arising on VIP's and IVCA's appeals was not addressed in the Supervisory Review. In my view, there was only one issue [whether the conditional agency designation of VIFP and its relationship with BC Fresh accorded with sound marketing policy] and that issue was addressed. Having regard to the submissions of the appellants, however, it is apparent that they do not believe the issue was addressed to their satisfaction. If the appellants want to challenge the

supervisory decision, their remedy is to apply for judicial review of that decision and not to try to re-litigate the issue through BCFIRB's appeal process.

80. The reasoning set out in these decisions is, in my view, persuasive. They demonstrate not only that s. 31(1)(g) is appropriately invoked where an appeal is taken from a Commission decision whose subject matter has since been addressed in the supervisory process, but also that an appellant will not necessarily succeed on appeal merely because it has identified a procedural flaw in the first instance proceedings.

81. The Appellant argues that "a better approach" in this case would have been for the supervisory panel to await the outcome of the appeal panel's decision given that the Commission's recommendations "almost exclusively impact the appellant" and the appeal "raises the issue of a fundamental flaw in the process".

82. I disagree with the Appellant on every element of this submission.

83. First, if the Appellant believed the supervisory panel should have awaited the outcome of the appeal panel's decision, it was obliged to raise that issue before the supervisory panel. It did not do so. Now that a Final Supervisory Decision has been made, the Appellant cannot now complain that the supervisory panel did not delay its decision.

84. Second, it is not accurate to state that the recommendations and supervisory decision almost exclusively impacted the Appellant; in fact, the recommendations and decision concerned the industry structure on Vancouver Island – they affected all agencies, and the industry as a whole. Furthermore, with regard to the specific impact on VIP, the supervisory decision and direction accepting the Commission's recommendation that VIP's agency licence not be renewed significantly mitigated that impact through the creation, for VIP, of a new licence class that, in practical terms, allows VIP "to carry on just as it has been doing for the past five years": Final Supervisory Decision, paras. 76-77; 88-96.

85. Third, as noted above, the supervisory panel clearly rejected the view that there was a fundamental flaw in the process. The Supervisory Decision describes the steps that were taken, over a lengthy period of time, in the design and implementation the supervisory process. Clearly, the supervisory panel was persuaded that the supervisory process had not only invited all necessary stakeholder input, but had provided BCFIRB with the information that was necessary to make a final and informed supervisory decision. The supervisory panel made this decision with benefit of precisely the same assertions that were made in VIP's Notice of Appeal.

86. I have noted the Appellant's February 7, 2017 submission alleging that BCFIRB "has already passed judgment on the core issues of the appeal". That submission not only reinforces the analysis above – it directly contradicts the submission the Appellant made on February 22, 2017 that "nothing in the supervisory panel's decision speaks to the issues

being brought forward on this appeal". While the Appellant made its February 7, 2017 statement in support of the argument that hearing an appeal now would raise issues of "bias and prejudice", its concession only reinforces my conclusion that the appeal has been appropriately dealt with in the supervisory process.

87. The Appellant submits that the Final Supervisory Decision "prejudices the appellant in every conceivable way". If so, its remedy was and is to seek judicially review of the Final Supervisory Decision. For reasons given above, however, I conclude that this is a clear case where the appeal should be summarily dismissed on the basis of s. 31(1)(g).

Section 31(1)(c)

88. In view of my decision that the appeal should be dismissed on the basis of s. 31(1)(g) of the *ATA*, it is strictly speaking unnecessary to address sections 31(1)(c) and (f). However, as the parties were asked to address those provisions, and for completeness, I address them below.

89. Section 31(1)(c) of the *ATA* states that a tribunal may dismiss all or part of an appeal if it determines the application is frivolous, vexatious or trivial or gives rise to an abuse of process.

90. Clearly, the reference to "abuse of process" in section 31(1)(c) overlaps with the finality and re-litigation concerns specifically addressed in s. 31(1)(g).

91. For the reasons that informed my conclusion that s. 31(1)(g) applies in this case, I have no hesitation in concluding this appeal is vexatious and an abuse of BCFIRB's appeal process. As noted above, the current supervisory process commenced in October 2014. Its very purpose and design was to culminate in Commission recommendations and

BCFIRB's Final Supervisory Decision. The supervisory panel gave the Appellant a specific opportunity to respond to the Commission's recommendations, which opportunity the Appellant exercised without seeking a stay of the supervisory process. Only after it was given the opportunity, in the supervisory process, to make submissions, did the Appellant file this appeal, which set out grounds that would be submitted, verbatim, and ruled on, in the supervisory process. Where a party is seeking to invite an appeal panel to address a matter that was finally and conclusively addressed in the supervisory process, it is in my view vexatious and abuses the appeal process to ask BCFIRB and the opposing party to commit resources to a matter that has already been finally and conclusively addressed in the supervisory process.

Section 31(1)(f)

92. Section 31(1)(f) of the *ATA* states that a tribunal may dismiss all or part of an appeal if it determines the application has no reasonable prospect of success. As stated in the April 2013 appeal decision, a "frivolous" appeal is one that is inappropriate to refer to a hearing because it has no reasonable prospect of success in respect of the ultimate remedy sought. It is fundamentally unfair and contrary to the public interest to establish a hearing with regard to an appeal that has no reasonable prospect of success. Where, as here, the supervisory decision has addressed the matter under appeal, and has given rise to a decision that is final and conclusive, and having regard to the reasons of the supervisory panel, I conclude that this appeal is also appropriately dismissed under s. 31(1)(f) of the *ATA*.

Conclusion

93. For the reasons given above, the appeal is dismissed under ss. 31(1)(c), (f) and (g) of the *ATA*.

Dated at Victoria, British Columbia this 23rd day of March, 2017.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Chris K. Wendell
Presiding Member