

Decision Re: Allegations of Non-Compliance by IVCA, Prokam and Thomas Fresh
(Friday, December 22, 2017)

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INTRODUCTION

1. On or about October 10, 2017, the Commission delivered “Compliance Notices” to each of Island Vegetable Cooperative Association, Prokam Enterprises Ltd. (Prokam) and Thomas Fresh. The Compliance Notices described alleged non-compliance with the General Order and directed the stakeholders to cease and desist certain specified activities.
2. The Compliance Notices were intended to operate as the first step in a SAFETI-based process initiated by the Commission. The purpose of each Compliance Notice was to advise of the particulars of alleged violations, and to require compliance with the existing provisions of the General Order pending a show-cause hearing to be conducted by way of written submissions.
3. After October 10, 2017, the Commission provided various additional materials to the stakeholders to better particularize the alleged non-compliance. Then, in accordance with a schedule established by the Commission, the stakeholders made written submissions with respect to the alleged non-compliance. These submissions were then circulated among the stakeholders so that they would each have an opportunity to file a brief reply submission.
4. The allegations of non-compliance are fully particularized in the material provided to the stakeholders. The central allegation is that IVCA, a designated agency of the Commission, marketed potatoes grown by Prokam to Thomas Fresh at less than the minimum price established by the Commission.
5. On December 14, 2017, the Commission met to deliberate on the matter. At that meeting, the Commission reviewed the same material that had been provided to the stakeholders, as well as the written submission made by the stakeholders. The matter was considered by the Commission again on December 22nd, 2017.

KEY PROVISIONS OF THE GENERAL ORDER

6. Key provisions of the General Order that are germane to this matter include the following:

PART V AGENCIES

5. No Agency shall receive any Regulated Product from a Producer that was not grown by that Producer unless expressly authorized by the Commission.
14. Prices for all Regulated Crops subject to Commission minimum pricing must be approved by the Commission before coming into force or effect, unless otherwise authorized in writing by the Commission.

PART IV LICENCING

1. No person other than an Agency shall purchase Regulated Product from a Producer or market Regulated Product, within British Columbia or in interprovincial or export trade, except that:
 - (a) Regulated Product may be purchased from a Producer by a Consumer or by a Processor licensed by the Commission as permitted by these General Orders;
 - (b) Regulated Product may be marketed by a Producer, Producer-Shipper, Processor, Commission Salesperson or Wholesaler who is licensed in accordance with these General Orders in the manner permitted by the term of the licences, these General Orders, and any other Order of the Commission; and
 - (c) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may market Regulated Product as permitted by the Commission.

3. No Producer, shall grow, process or market Regulated Product unless that Producer:
 - (a) registers with the Commission;
 - (b) is qualified to and obtains annually from the Commission one or more of the appropriate licenses herein described; and
 - (c) Pays to the Commission annually the fees for such licences as described in Schedule 3 to these General Orders.

PART IX GENERAL PROHIBITIONS

2. A Wholesaler shall only buy, accept or receive a Regulated Product from an Agency or Producer-Shipper.

7. No Person shall sell, offer to sell, supply or deliver the Regulated Product to any Person other than an Agency or such other Person as the Commission may expressly direct or authorize.

9. No Producer or Agency shall sell or offer for sale Regulated Crops subject to Commission minimum pricing, and no Person shall buy Regulated Crops subject to Commission minimum pricing, at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.
11. No Producer, shall market or transport any Regulated Product unless the Producer is currently licensed with the Commission, except as expressly authorized by the Commission pursuant to Section 4 of Part IV of the General Order.
12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.

PART VII AGENCY RESPONSIBILITIES

1. Each Agency marketing crops subject to Commission minimum pricing shall notify the Commission and obtain approval from the Commission for the establishment of any price or change in price.
2. Each Agency marketing crops subject to Commission minimum pricing shall file with the Commission a copy of any price list, local or export, and particulars of any sales other than at listed prices.
3. No pricing for crops subject to Commission minimum pricing, below listed price can be made without the prior approval of the Commission.
6. Before finalizing a contract each Agency shall provide to the Commission for its prior approval as to form any proposed contracts with Processors or other firms approved by the Commission located in BC that are to receive regulated products regardless of end use.

PRIMA FACIE EVIDENCE

7. As noted in the material provided by the Commission to the stakeholders, the *prima facie* evidence suggests that:
 - 7.1. IVCA was engaged in the selling of Prokam potatoes to Thomas Fresh on fourteen occurrences between the dates of August 23rd and October 4th, 2017, at a price that was in contravention of the minimum price set by the Commission for that period, and executed without commission authorization.
 - 7.2. A total of 170 short tons (340,450 lbs) of regulated BC grown product was sold by IVCA between two cents (5%) and 34 cents (59%) below the Commission approved minimum price. This price is set weekly and in accordance with the approved policy for establishing weekly minimum prices for all BC grown regulated storage crops. All storage crop agency managers participate in establishing the weekly minimum price and are responsible to ensure that all agency sales are in compliance of the approved minimum price.
 - 7.3. The purchase order issued by Thomas Fresh was at pricing below the IVCA product quote sheet provided by IVCA to Thomas Fresh. Therefore, Thomas Fresh had knowingly procured regulated BC grown product at pricing below the price quoted by the agency and below the minimum price.
 - 7.4. The evidence also suggests that IVCA was not permitted to offer the product at a lower price than what was stated on the product quote sheet issued by IVCA to Thomas Fresh. Prices on each product quote sheet issued by IVCA to Thomas Fresh for the subject transactions were quoted at the Commission approved minimum price.
 - 7.5. The total volume of product acquired by Thomas Fresh at below minimum price and supplied from Prokam over this period is 2.688565 Million pounds.
 - 7.6. IVCA was engaged in the selling of Prokam potatoes to Thomas Fresh on a total of 125 occurrences between the dates of July 30th, 2017 and September 24th, 2017 at a price that was below the minimum price set weekly by the Commission over this period, and executed these sales without commission authorization.
 - 7.7. For each of the 125 invoices listed, the invoiced price was at pricing below the IVCA product quote sheet issued by IVCA to Thomas Fresh. Therefore, Thomas Fresh had knowingly procured regulated BC grown product at pricing below the price quoted by the agency and below the minimum price.

- 7.8. The evidence also suggests that IVCA was not permitted to offer the product at a lower price than what was stated on the price quote sheet. Prices on each quote sheet issued by IVCA to Thomas Fresh for the subject transactions were quoted at the Commission approved minimum price.
- 7.9. The evidence suggests that in week numbers 37 and 38, Kennebec Potatoes had been shipped by Prokam and sold by IVCA. Prokam does not have any delivery allocation rights for Kennebec Potatoes and therefore is not permitted to ship Kennebec Potatoes into the market, without special permission granted by the Commission. As the designated agency for Prokam, IVCA is also to be held accountable for allowing this product to enter the market without regard to delivery allocation rights of other IVCA producers and the industry.
- 7.10. IVCA's attempts to work with Prokam and Bob Gill have been futile and have resulted in extensive verbal abuse and constant refusal to communicate effectively and take direction from Brian Meyers, IVCA General Manager.
- 7.11. The actions of Bob Dhillon and Bob Gill demonstrate a complete lack of acknowledgement of the IVCA General Manager's authority over the operations of IVCA and the Agency's authority to manage the marketing of regulated products.
- 7.12. The actions of Bob Dhillon and Bob Gill have put undue stress on IVCA staff and created a toxic environment that impedes on their ability to operate effectively as an Agency to fairly represent all its producers in the market place and function in accordance of the authority granted to it by the Commission.
- 7.13. Through the actions of Bob Dhillon (Prokam Enterprises) and Bob Gill, their refusal to communicate effectively with the IVCA General Manager and his staff has inadvertently allowed for regulated product to be sold without a price being set and approved by the Commission and prohibits the General Manager from performing his responsibility to market and sell regulated product managed by IVCA.
- 7.14. Bob Gill has deleted records from IVCA's order entry system. This action has put IVCA into non-compliance with accounting traceability requirements and may provide further evidence to support the revocation of Bob Gill's authority to handle regulated product.
- 7.15. Thomas Fresh, a wholesaler licensed by the Commission, entered into a contract directly with Prokam (a registered producer of regulated vegetables) and Sam Enterprises (an entity that is not a registered producer of regulated vegetables).

- 7.16. Prokam, a producer licensed by the Commission, entered into a contract directly with Thomas Fresh.
- 7.17. Bob Gill, Prokam, and Thomas Fresh acted in blatant disregard of the Agency's authority, the Commission General Order, and established policy approved by the Commission as the first instance regulator to maintain orderly marketing of regulated BC grown vegetables.
- 7.18. Through the actions of Bob Gill (IVCA Sales Associate), IVCA had permitted an unauthorized contract to be signed directly between a wholesaler, Thomas Fresh, and a producer, Prokam, and facilitated the activity by allowing this contracted sale to be processed through the agency.
- 7.19. Through the actions of Bob Gill (IVCA Sales Associate), IVCA allowed for the shipment of product to the market through an un-licensed producer (Sam Enterprises Ltd.)

STAKEHOLDER SUBMISSIONS

8. IVCA does not take issue with the particulars of the sales made at less than the minimum price established by the Commission. Instead, IVCA submits that it did not believe that the Commission's minimum price was "relevant" to sales of regulated product made by it to out-of-province purchasers. In addition, IVCA asserts that it believed that the Commission had no jurisdiction over prices for sales of regulated product delivered out of the Province. Finally, IVCA asserts that it did not learn until the fall of 2017 that the Commission took the position that its minimum price was applicable to out-of-province sales.
9. Similarly, Prokam and Thomas Fresh do not appear to take issue with the particulars of the sales made at less than the minimum price established by the Commission. They assert that: (a) the sales at issue are interprovincial and took place outside of British Columbia; (b) Prokam, through IVCA, and Thomas Fresh agreed to enter into the sale transactions based on an understanding that the Commission did not purport to regulate the minimum price for sales of BC potatoes in Alberta and Saskatchewan, and the information disseminated to market participants including Prokam and Thomas Fresh by the Commission did not clearly indicate a minimum price for transactions in Alberta and Saskatchewan; and (c) there is no sound marketing policy that would support a decision of the Commission to impose a minimum price on sale of BC potatoes in Alberta and Saskatchewan.
10. With respect to the second assertion, Prokam and Thomas Fresh stated (among other things):

...the Commission takes the position that the minimum prices set by the Commission are confidential to the Commission and the Agencies, and the Commission has only provided pricing information for the specific impugned transactions, redacting the other prices on the list.

There is no suggestion that the Commission price lists were published or otherwise disseminated to Prokam or Thomas Fresh such that they were on notice of the minimum prices set by the Commission when the transactions at issue were entered into. It does not accord with principles of procedural fairness or SAFETI principles to punish Prokam or Thomas Fresh for failing to comply with minimum price requirements of which they had no notice, given that the Commission not only failed to give notice to these market participants of the minimum prices set, but also actively concealed the minimum prices from non-Agency market participants because of its policy of confidentiality.

PRELIMINARY FINDINGS

11. The Commission reviewed the matter at the Commission meeting held on December 14th, 2017. All Commissioners were present for the review of the binder of evidence and all submissions on the matter from IVCA, Prokam, Thomas Fresh, and BCVMC staff that were submitted up to and including December 13th, 2017.
12. On completion of this review, Peter, Corry and Hugh recused themselves from the meeting to avoid any appearance of a conflict of interest in the deliberations and any final decision to be made by the Commission.
13. The remaining Commission members continued with deliberations of the issues. The discussion lead to the following tentative thoughts, comments, and observations:
 - 13.1. Bob Gill, an employee of IVCA entered into contracted pricing on potatoes with Thomas Fresh at pricing that was not approved by the Commission and facilitated the selling of product at below minimum price. Furthermore, these contracts were established with Sam Enterprises, an unregistered producer with no delivery allocation rights for any regulated vegetable.
 - 13.2. Prokam Enterprises, Bob Dhillon, shipped potatoes through IVCA at pricing below the minimum price that was not approved by the Commission.
 - 13.3. Prokam Enterprises, Bob Dhillon, shipped Kennebec potatoes without having any delivery allocation rights to the market and did so without the approval of the Commission.
 - 13.4. Thomas Fresh is not privileged to the confidential minimum pricing sheets and the general orders that direct Agency behaviour. Though its behaviour is suspect, it is not reasonable beyond a doubt that Thomas Fresh acted in willful non-compliance of the general order and commission policy.
 - 13.5. Thomas Fresh entered into a contract to directly purchase regulated product with an un-licensed producer. This is in direct violation of the general order and the conditions attached to a wholesaler licence. All

sales of regulated vegetables must be managed by an Agency. All approved contracts are between a wholesaler (Thomas Fresh) and an Agency (IVCA)

- 13.6. IVCA sold product to Thomas Fresh at pricing that was below the established FOB minimum price and did not have approval to do so by the Commission.
- 13.7. The IVCA general manager and IVCA office staff had repeatedly informed Bob Gill and Bob Dhillon (Prokam) of the issues. Both Bob Gill and Bob Dhillon failed to take adequate action to respect IVCA management authority in the marketing of regulated vegetables and comply with the direction given to correct the issues.
- 13.8. Prokam Enterprises (Bob Dhillon) is licensed as a producer and has no authority to market regulated product. However, as a member of the IVCA board he is privileged to commission regulations and policy that guide how a designate agency is expected to perform to promote orderly marketing of regulated vegetables.
- 13.9. The IVCA office staff and members of the board have willfully complied with Commission staff to provide evidence on the matter. However, IVCA is also to be held accountable for the issues that have materialized.
- 13.10. The orderly marketing system for regulated storage crops is built on three components; the Agency, Pricing, and delivery allocation. Each component serves its own purpose; Agencies represent groups of producers in the market (leverage selling power), Price coordination stabilizes demand (maintains integrity in the system), delivery allocation manages an individual producer's access to the market (protects market rights). The delivery allocation component can only function if a coordinated pricing approach to the market is enforced. Together, these three components form the orderly marketing system for regulated vegetables.
- 13.11. The Commission designates its marketing authority to Agencies. For the system to be effective, Agencies need to be diligent in managing their responsibility and robust in maintaining compliance to commission regulations and in applying commission policies in its decision making. Agencies are to be held accountable for ensuring that all Commission regulations and polices are followed and a coordinated approach to the market is sustained.

DECISION

A) 'Was IVCA selling regulated product to Thomas Fresh at less than the Commission's minimum FOB price, and if so, how and why did this occur?

14. IVCA, Prokam and Thomas Fresh each allege that the Commission does not have authority to establish minimum pricing for extra-provincial sales. However, this "jurisdictional" argument is not pressed in any substantial way.
15. To the extent that the stakeholders might be asserting that the Commission is setting out to regulate interprovincial and export trade, the Commission disagrees. This is not a supply managed commodity. Therefore, orderly marketing within the Province cannot be achieved through the use of "quota". It can only be achieved by establishing the minimum price at which agencies may market regulated product. If the Commission is going to continue to permit multiple designated agencies to exist within the Province, it must ensure that those designated agencies are not competing for the same buyer (on price) with the same product. This would lead to a "race to the bottom" – the antithesis of "orderly marketing". Therefore, the minimum prices established by the Commission exist to promote orderly marketing within the Province in order to benefit British Columbia producers. They do not exist to regulate interprovincial or export trade.
16. The main position advanced by the stakeholders is that they simply did not understand that the minimum price would apply to extra-provincial sales.
17. Though there is ample reason to think that Prokam and Thomas Fresh engaged in a calculated effort to circumvent the Commission's minimum price, the Commission is satisfied that there is not a sufficient basis to find that either had "violated" the minimum price provisions. As their counsel correctly notes, minimum prices are considered confidential, and this information is shared only with the designated agencies that are charged with the responsibility to market regulated product in a manner that promotes orderly marketing. Though Prokam and Thomas Fresh may have been aware of the applicable minimum prices given the dual-role occupied by Mr. Dhillon, the Commission does not formally share that information with them.
18. Fundamentally, it appears that IVCA failed to fulfill its responsibilities as a designated agency of the Commission insofar as it failed to ensure that it was marketing regulated product at the Commission-ordered minimum price. In this regard, it should be remembered that IVCA is not merely an industry stakeholder, it is a delegate of the Commission charged with the responsibility to promote orderly marketing. IVCA's assertion that it didn't know that price controls applied when product is sold out of the province seems difficult to believe, given that IVCA must surely understand the essential role of minimum pricing as a tool to achieve orderly marketing. Furthermore, the position advanced by it would require one to "read in" words of limitation that do not exist (i.e., that the minimum price is applicable only to regulated product sold within the Province). Alternatively, if IVCA did not understand its responsibility to promote orderly marketing by adhering to the minimum price, then questions may arise about whether IVCA is a suitable entity to exercise that

delegated authority. British Columbia potatoes are sold throughout Canada, and it would obviously be detrimental to orderly marketing if agencies competed against each other on price “in a race to the bottom”. The following passages from the BCFIRB’s January 31, 2017 Supervisory Decision are apposite:

4. In British Columbia, the production and marketing of vegetables is regulated under the *NPMA*, the *NPMA Regulation* (“the Regulation”), and the *British Columbia Vegetable Scheme* (Scheme). The Scheme (s. 4(2)) grants the Commission the power set out in s. 11(1)(a) of the *NPMA* to “regulate the time and place at which and designate the agency through which a regulated product must be marketed”. The Commission has issued General Orders which govern the regulated industry actors, including designated agencies.

7. The specific rules governing agencies differ depending on the needs of the particular regulated industry. What is common across all regulated industries, however, is the agencies are licensed entities whose purpose is to market regulated product on behalf of registered producers. Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. They minimize burdens on each producer regarding finding outlets for sales of their delivery allocation (a mechanism for producers to share market access). Agencies also store, ship, and label product for producers. For consumers, they help ensure a steady supply of BC product by contributing to orderly marketing. In all this, one of their key roles is to grow the industry by looking for new markets. As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: “**Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers**”. Agencies thus play both a key front line role , and a larger strategic role, in assisting the Commission to regulate, manage and grow the industry in an orderly fashion: see generally January 7, 2013 Supervisory Decision, paras. 34 - 38; see also the Commission’s September 21, 2015 Stakeholder Engagement Discussion Paper, pp. 4 - 6.

74. **With respect to IVCA**, the Commission concluded that IVCA does contribute to the vision of regulated vegetable marketing on Vancouver Island, but that **its growth ambitions need to be monitored to ensure that any such ambitions that extend beyond the Vancouver Island market are not merely seeking to displace existing markets**. With respect to promoting collaboration, the Commission noted that IVCA does work with other agencies, but it is not clear how it manages delivery allocation, and it needs to be more transparent in how it manages

earned market entitlement between all its producers. With respect to IVCA's demonstration of good governance, the Commission stated "yes, but needs improvement". The Commission noted IVCA's long history as a non - profit co - op, its focus on growth and its new investment in technology and infrastructure. However, the Commission repeated its concern about the need to monitor delivery allocation, and noted that IVCA does not have written GMAs, which does not sufficiently protect the interests of growers. With respect to business planning, the Commission stated that IVCA "appears to have a focused vision and strategic direction for its business. It is committed to working with its growers to identify products that can be grown successfully in local soils". With respect to market demand, the Commission answered this as a positive, but expressed concern that IVCA's recent move to uniform packaging did not sufficiently differentiate Vancouver Island grown product. The Commission also noted that IVCA's agency designation does not currently extend to greenhouse crops and it had requested such an extension. The Commission agreed that "[it] would strengthen its competitive position in the Vancouver Island market by giving it the ability to represent all types of vegetables". (emphasis added)

19. IVCA's failure to fulfil its responsibilities as an agency could provide a basis for the Commission to decide to terminate that agency designation. However, two factors mitigate against termination. First, though the Commission has determined that Prokam and Thomas Fresh cannot be held to account for "contravening" the minimum price, it is nevertheless satisfied that they played a significant role in the marketing of regulated product at pricing below the minimum price established by the Commission. IVCA bears ultimate responsibility, but the circumstances in which this non-compliance arose cannot be ignored. In addition, the issues here only concern potatoes grown by Prokam. For these reasons, the Commission has determined that it would be more "proportionate" to move Prokam to another agency that is better equipped to manage the producer and ensure that pricing rules are followed.
20. In determining the designated Agency, the Commission has reflected upon the following questions:
 - 1) Does the Agency have sufficient staff with the necessary experience to effectively manage the producer's supply and market the regulated product?
 - 2) Does the move to this Agency enhance orderly marketing?
 - 3) What benefits, if any, not currently available to Prokam will accrue to this producer if their regulated product is marketed through this Agency?

21. BCfresh is the only Agency that is robust in upholding the principles of orderly marketing and can ensure fair representation of this producer in the market. The reasoning in support of this decision is as follows:

1) Does the Agency have sufficient staff with the necessary experience to effectively manage the producer's supply and market the regulated product?

22. Yes, BCfresh is an established marketer of BC product and represents the majority of regulated storage crop acreage in the province.

23. It's important that an agency has a clearly defined purpose in the market, can attract the resources it needs to grow, and be sustainable. To be sustainable it needs to be effective at protecting the producer's interests in the market.

24. BCfresh is clearly effective at protecting producer interests. The evidence is in the significant growth it has experienced in servicing both the BC and export markets. It is clearly capable of representing the market interests of their group of producers and has the staff and resources to effectively manage Prokam's product.

25. In addition, BCfresh has deep rooted relationships with numerous stakeholders in the market. They are relied upon by the Commission in setting minimum prices because of its depth of intelligence on the market conditions and therefore its ability to make informed recommendations.

26. This depth of intelligence is primarily a result of the Agency having established direct relationships in the market with the end customers in the supply chain that supply the consumer with regulated product. This is an important point to note. By selling packaged product directly to the retail and food service segments BCfresh has direct control over placement of the packaged consumer product in the market place – the driving force that defines demand. This depth to the market further enhances orderly marketing because the sales relationship is between the Agency, a designated marketing authority held accountable to BC producers, and the retail / food service buyer (servicing the consumer). Establishing these direct relationships is fundamental to insuring long term stability to BC producers. Only an Agency can justifiably ensure that the interests of the industry and their producers are protected in the market. This vested responsibility to promoting orderly marketing is essential to maximizing producer returns.

27. The mandate of an Agency is to represent a group of producers and carry out the marketing duties of the Commission's regulated vegetables;

- i. in compliance of the consolidated general order,
- ii. in respect of the operating principles of the orderly marketing system, and,
- iii. for the benefit of its producers and the industry.

28. A wholesaler has no legal obligation to represent the interests of BC producers.

2) Does the move to this Agency enhance orderly marketing?

29. Yes, by way of proficient management of Prokam's growth ambitions in the target market.
30. Demand is defined as the quantity of a good or service that consumers and business are willing to buy at a given price at a given time. Market demand is the sum of each individual demand for the product from buyers in the market. The price elasticity of demand is a measure of how responsive demand for a product is to the changes in its price. Research completed on potato consumption reveals that consumer demand for fresh market potatoes is inelastic, meaning that consumers are not very responsive to a price change. On the other hand, the demand for a business is more elastic because the buyer is motivated to procure the product for as little as possible to maximize margins. Canadian consumption statistics compiled by Statistics Canada also reveals that fresh potato consumption from 1997 has declined by 48%.
31. Growth, or "New Demand", cannot be argued as being derived from a displacement of product that is already supplying the market. The growth ambitions of an agency and its producers need to be validated against the current market being supplied by the industry and the industry's ability to satisfy the demands of this market.
32. BCfresh is the only other agency servicing the export market. Having one experienced agency that is well informed of the target export marketing environment to be responsible for coordinating supply to this market provides for enhancement of orderly marketing.
33. A potato is a potato. This is especially true in an export market where BC grown potatoes can't be positioned as the 'local' source to be sold to end users as the 'local' option and cater to an established niche market that demands local grown.
34. Market access is largely influenced by price, which directly impacts your ability to compete in the market against like product. A single agency approach to this market is an efficient and effective means of ensuring that a coordinated pricing approach is maintained and that only "truly" new market demand is being serviced by new supply.

3) What benefits, if any, not currently available to Prokam will accrue to this producer if their regulated product is marketed through this Agency?

35. BCfresh is in a position to provide a "hands on" approach to monitor and guide the growth ambitions of Prokam in an effective and efficient manner in consideration of other producer interests in the export market.
36. Enhances economic stability of both the producer and the industry through informed decision making that encourages growth of vegetable production in naturally strategic areas.

37. The producer will be privileged to informed decision making on market opportunities that will maximize returns.

4) Other Considerations

38. As noted in the Decisions and Recommendation document issued by the Commission on June 8, 2016 (as part of the Vancouver Island supervisory review), under the section 'BC Production on Scope of Total Market' (page 31);

"BC Production in Scope of Total Market"

81. Demand for BC product is local, driven by some degree of consumer preference for locally-grown food, and heavily dependent on a wholesaler and retailer's business and marketing plans. Retailers place preference on what will sell and are highly price-sensitive in the supply choices they make when procuring a mature commodity in a market saturated with numerous supplier options. Prices are set by the market in which BC producers are price takers. Purchasers demand quality product and high service levels. Competition for shelf space is fierce. This needs to be emphasized. Whether you look at the Vancouver Island, BC, or Canadian market for our regulated vegetables, the same situation applies....

82. In the 2015/16 season, total storage crop acreage and production of BC's regulated storage crop vegetables amounted to 5,516 acres producing 80,000 tons of product. Of this production, approximately 75% is in potatoes with the balance in other regulated storage crop vegetables (Cabbage, Carrots, Beets, Parsnips, Rutabagas, Turnips, Yellow Onions). Comparing our potato production to just the supply of competing potato growing regions in North America, US production dwarfs the BC industry. In 2014/15, the four Western US states produced 263,995,000 hundredweight of potatoes (one hundredweight is equal to 100 lb or 45.36 kg), whereas BC produced 1,616,146 hundredweight of fresh potatoes during the same period – that amounts to less than 0.06%. To put this in perspective, the combined 2014/15 fall production of the Western United States is approximately 163 times greater than BC potato production.

83. The point to be made is that BC production of regulated vegetables represents a small group of producers in the bigger picture and it emphasizes the need for all producers and all agencies to work together and consolidate as much as possible at the marketing level to efficiently deliver quality product to the market place. It is also important to emphasize that it is essential

for our survival as an industry to ensure interests representing the collective good of the community of producers always be placed in front of individual self-serving purpose.”

39. It is also clearly evident from the strategic analysis completed on the BC industry (page 37 of the same document) that the power lies with the buyers. The placement of Prokam with another Agency must result in a sound marketing framework that best services the industry. This becomes increasingly difficult when you represent a small producing region targeting an export market where BC is no longer the 'Local Choice'. It takes a concerted effort to ensure that BC producer interests are protected.
40. At this time there are no Agencies other than BCfresh that are qualified to effectively manage Prokam's growth ambitions in the export market.
41. If Prokam wishes to argue that they should be directed to another Agency, it may make such a submission and the Commission will give it due consideration. The submission is also to address the questions and considerations the Commission had reflected upon in making their choice.

B) Prokam Enterprises Ltd. Delivery Allocation & Licence

42. The Commission is of the view that Prokam's Delivery Allocation must be adjusted to negate the effect of shipments achieved through sales made at less than the minimum price. No permission was granted to IVCA to market at pricing below the established minimum price.
43. In addition, the shipments of Kennebec Potatoes will not count towards the calculation of delivery allocation for this product. Prokam does not have any delivery allocation for Kennebec potatoes and was not granted permission by the Commission to ship any Kennebec Potatoes into the market.
44. Prokam's licence class is to be adjusted to reflect its disregard of delivery allocation rights on Kennebec potatoes and in acknowledgement that it played a significant role in the marketing of regulated product at pricing below the minimum price established by the Commission.

C) Mr. Bob Gill's Certificate of Authority

45. The Commission has decided the temporary suspension of Mr. Gill's Certificate of Authority is to be addressed as an Agency matter. IVCA is to inform the Commission General Manager on how they would like to proceed.

D) IVCA Licence

46. IVCA's licence will remain status quo in acknowledgement that it played a significant role in bringing forth the evidence that product was being sold by IVCA at pricing below the minimum price established by the Commission. Though IVCA could not regain control, a concerted effort was made to address the situation.

E) Thomas Fresh Wholesaler Licence

47. Thomas Fresh's wholesale licence class is to be adjusted to reflect its disregard to orderly marketing of BC regulated vegetables. Thomas Fresh had entered into a contract to directly purchase regulated product with an un-licensed producer. This is in direct violation of the general order and the conditions attached to a wholesaler licence. The Commission is also satisfied that Thomas Fresh played a significant role in the marketing of regulated product at below the minimum price established by the Commission.

ORDERS

48. Therefore, the Commission orders are as follows:

48.1. Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.

48.2. Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

48.3. The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.

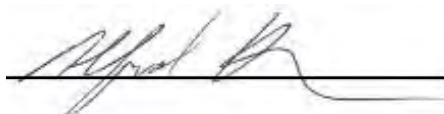
48.4. The suspension of Mr. Bob Gill's 2017-18 certificate of authority is to be addressed as an Agency matter. IVCA is to inform the Commission General Manager on if the certificate is to be re-instated or cancelled.

48.5. The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.

49. These are the decisions and reasons of the Commission as "first instance regulator". A person aggrieved by this decision may appeal the decision to the BCFIRB.

DATED AT SURREY, BRITISH COLUMBIA, THIS 22nd DAY OF DECEMBER

BRITISH COLUMBIA VEGETABLE COMMISSION

A handwritten signature in black ink, appearing to read 'Alf Krause', is written over a solid horizontal line.

Alf Krause - Chair

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM COMPLIANCE ORDERS OF THE BRITISH
COLUMBIA VEGETABLE MARKETING COMMISSION

BETWEEN:

PROKAM ENTERPRISES LTD
THOMAS FRESH INC.

APPELLANTS

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BCFRESH INC.

INTERVENER

DECISION

APPEARANCES:

For the British Columbia
Farm Industry Review Board

Al Sakalauskas, Member
Diane Pastoor, Member

For the Appellant:

Claire Hunter, Counsel

For the Respondent:

Robert Hrabinsky, Counsel
BC Vegetable Marketing Commission

Intervener:

Robert McDonell, Counsel
BCfresh Inc.

Date of Hearing

April 3- 5, May 22 - 24, &
June 13, 14, 2018

Place of Hearing

Delta and Vancouver, British Columbia,
and by written submissions

INTRODUCTION

1. This is a decision relating to four appeals commenced by vegetable producer, Prokam Enterprises Ltd. (Prokam) and vegetable wholesaler, Thomas Fresh Inc. (Thomas Fresh). These appellants appeal the decision of the British Columbia Vegetable Commission (Commission) on October 10, 2017 to issue cease and desist orders and the subsequent decision of December 22, 2017 (the December decision). The specific orders under appeal as set out in the December decision are as follows:

48.1 Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.

48.2 Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

48.3 The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.

48.5 The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.

2. The appeal was heard by a three member panel. Member Pastoor's appointment to the British Columbia Farm Industry Review Board (BCFIRB) expired on July 31, 2018; her appointment was extended to allow her to continue to exercise powers as a member of BCFIRB in this appeal. On November 15, 2018, the appointment of Chair Les was rescinded. As such, this is the decision of panel members Sakalauskas and Pastoor.

REGULATORY FRAMEWORK

3. The following is a brief summary of the legal framework governing this matter. Relevant sections are set out in more detail in Appendix A and will be discussed further below.
4. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (NPMA) the Lieutenant Governor in Council has the power to establish boards and commissions and to confer upon them certain powers (section 11).
5. Pursuant to this power, the Commission was established as part of the *British Columbia Vegetable Scheme*, B.C. Reg. 96/80 (Scheme). The Scheme vests the Commission with all the powers set out in section 11 of

the *NPMA*, and the power in the Province to regulate production, transportation, packing, storage and marketing of regulated product. Regulated product includes potatoes grown in the Province.

6. The Commission has, in turn, established General Orders which, among other things (and with some limited exceptions) provide that:
 - Producers can only sell regulated product to a designated agency.
 - Agencies must be approved by the Commission.
 - Wholesalers must buy regulated product from agencies (not producers) , but for regulated product that is subject to minimum pricing rules (as is the case with potatoes) those sales must receive Commission prior approval to ensure minimum prices (which are determined from time to time by the Commission) are respected.
 - Determining how much of an agency’s supply needs will be met by any one producer is determined using a process referred to as “Delivery Allocation” (DA). Producers must not produce or ship regulated product without a corresponding DA without Commission approval.¹
 - Agencies cannot market new or additional regulated product without Commission approval.
7. At the federal level, the *Agricultural Products Marketing Act*, RSC 1985, c. A-6 provides that the Governor in Council may make regulations to authorize a body that is empowered under provincial law with regulating marketing within a province to have the same powers in relation to interprovincial and international trade.
8. The Governor in Council has established such a regulation for vegetables produced in BC. It is known as the *British Columbia Vegetable Order*, SOR/81-49. It states that the Commission may “...by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province...” [emphasis added]
9. Finally, the federal *Statutory Instruments Act* sets out rules governing the creation of “regulations”. That term is broadly defined in section 2 to mean

¹ Despite the general prohibition in the General Orders against producers producing or shipping regulated product without DA unless otherwise authorized by the Commission, the appellants maintained that there was no prohibition on overplanting. This assertion appeared to be accepted by Commissioner Guichon but we note General Prohibition 12 was not put to him nor was he asked to explain the inter-relationship between General Prohibition 12 and the requirements set out in Part XVII for calculating DA.

“a statutory instrument ...made in the exercise of a legislative power conferred by or under an Act of Parliament..” The term statutory instrument is in turn defined to mean “... any order... made or established:

... in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates...

10. The *Statutory Instruments Act* also contains provisions regarding review of such instruments, the obligation of the Clerk of the Privy Council to register them and the requirement for such instruments to be published in the Canada Gazette. Section 9(1) provides, “No regulation shall come into force on a day earlier than the day on which it is registered...” (with certain limited exceptions).

EVIDENCE AND MATERIALS CONSIDERED

11. We have been provided with a very large amount of materials and submissions, which include:

- A 163 page Memorandum of Argument filed by the appellants
- A 63 page Memorandum of Argument filed by the Commission
- A two page reply from the intervener BC Fresh,
- A 21 page Memorandum of Argument filed by the appellants,
- A bound volume of documents entitled” “List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. “,
- A bound volume of documents entitled “Supplemental List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. “,
- A bound volume of documents entitled “Second Supplemental List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. “,
- A bound volume of documents entitled “Third supplemental list of documents of Prokam Enterprises Limited and Thomas Fresh Inc.”,
- Two large binders entitled” “Respondent’s brief of documents”,
- A smaller binder entitled “Respondent’s Mini Book of IVCA Documents”,
- A bound volume entitled “Application Record re Affidavit of Documents” ,
- A bound volume entitled “Documents Produced by Commission after May 24, 2018”, and
- Approximately 3000 pages of authorities.

12. In addition, an oral hearing – originally scheduled for 2 days – was held over an eight-day period in April, May and June 2018, resulting in approximately 1123 pages of transcripts and some further exhibits.

13. Despite our efforts to keep the hearing focused and efficient, the large amount of evidence tendered and the nature of the cross-examination conducted made the hearing of this matter and the review of materials for

the purposes of drafting this decision more onerous and time-consuming than it would otherwise have been. For this reason, we wish to expressly note that we have carefully considered all of the evidence and submissions referred to above, even though we do not intend to refer to all of it in the course of this decision.

14. In this regard, we adopt as generally applicable here the following words from Madame Justice Newberry in *BC Vegetable Greenhouse I, L.P. et al v. British Columbia Marketing Board*, 2005 BCCA 476 (CanLII):

We have received very lengthy – perhaps too lengthy – submissions over three days in these appeals from Mr. Justice Drost’s orders dated October 1, 2003. His reasons are indexed as 2003 BCSC 1508 and I do not propose to rehearse them since it is doubtful they will be of interest to persons other than the parties and other sophisticated persons in the industry. Nor do I intend to describe the many, many cases and statutes to which we were referred, since I do not view the appeals as turning on law which is in doubt. Rather, it turns on the applicability of clear rules to facts that are not in dispute. I propose simply to state in my words the conclusions I have reached without citing a great deal of law, and without deciding issues that are not required to be decided to dispose of the appeals. Counsel may be disappointed in this, but the upside for them is perhaps that the arguments may be made again another day.

FINDINGS OF KEY FACTS

Parties Involved

15. Mr. Dhillon and his wife own and operate Prokam, a registered vegetable producer in Abbotsford, BC. Prokam holds DA for potatoes in the amount of 26 tons purchased in late 2015 which represents production from approximately 60-70 acres. Prokam has early land and with skilled cropping practices has the potential to bring an early crop to market where it can command a premium price.
16. Thomas Fresh is registered as a wholesaler of vegetables in BC with operations in BC, Alberta and Saskatchewan.
17. Island Vegetable Co-operative Association (IVCA) is a designated agency of the Commission with its office on Vancouver Island. It is a cooperative with a board comprised of representatives of four of its approximately 8 growers. Since 2014, Prokam has shipped regulated and unregulated vegetables to IVCA and in 2017, was its largest shipper of potatoes with approximately 80 -90% of IVCA’s volume. Mr. Michell is IVCA’s president and Mr. Dhillon is its vice-president.
18. BCfresh is also a designated agency with its office in the Lower Mainland. BCfresh is the largest agency in BC and is a private company owned by its

31 grower/shareholders who provide approximately 90% of the regulated volume of vegetables it ships.

19. The Commission is created under the Scheme, a regulation enacted under the authority of the *NPMA*. The Commission has 8 directors and an appointed chair. At the time of the hearing, one director position was vacant, and there were four storage crop directors and three greenhouse directors. Of the four storage crop directors, three ship regulated product to BCfresh and of those three, one director, Mr. Guichon, is Chair of BCfresh.

Relationship of Prokam and IVCA

20. In 2017, Prokam increased its production of potatoes well in excess of its DA to 380 acres in response to IVCA's growth plan to fill the premium early wholesale retail market. In April 2017, Mr. Dhillon's brother-in-law Mr. Gill was hired as IVCA's mainland sales representative primarily to sell Prokam's potatoes.

Relationship of IVCA and Thomas Fresh

21. As early as 2015 IVCA, through its previous general manager and its president, was actively soliciting out-of-province sales with Thomas Fresh in Calgary and Saskatoon. IVCA supplied Prokam potatoes to Thomas Fresh in 2016. In March 2017, Thomas Fresh sent signed 60-day forward contracts to IVCA and in April 2017, Mr. Gill executed these contracts to supply Thomas Fresh with Prokam's potatoes at a set price.

Relationship of IVCA and Commission

22. The Commission was aware of Prokam's decision to plant potatoes in excess of its DA and in late January 2017, initiated a review process to coordinate agency production planning. Despite numerous requests to IVCA to submit a production plan, confirm planting intentions and agency growth expectations, IVCA remained silent on its planned market for Prokam's potatoes and its business relationship with Thomas Fresh, preferring to rely on an earlier submission in the Vancouver Island Agency Review.
23. The Commission made it clear that this earlier application for agency license was not a marketing plan for IVCA's regulated product and issued a warning notice, but IVCA remained non-compliant with Part XV of the General Orders requiring Commission approval where an agency intended to market new product (product not covered by DA). Mr. Dhillon in his role as vice-president of IVCA and Mr. Gill as an IVCA employee participated in these decisions to thwart Commission authority.

Impugned Transactions

24. Paragraph 7 of the Commission's December decision sets out a summary of the impugned transactions, specifically:
- 7.1 – sales between August 23 - October 4, 2017;
 - 7.2 – 170 short tons of regulated product sold between 2 and 34 cents below minimum price;
 - 7.3 – Thomas Fresh purchase orders show pricing below IVCA product quote sheet;
 - 7.4 – IVCA not permitted to offer product below its product quote sheet which reflect minimum price;
 - 7.5 – Total volume acquired by Thomas Fresh below minimum price – 2.688565 million pounds;
 - 7.6 – IVCA engaged in 125 occurrences of sales below minimum price (July 30 - September 24, 2017 without Commission authorization);
 - 7.7 – each of the 125 occurrences Thomas Fresh invoiced below IVCA price sheet;
 - 7.9 – In weeks 37 and 38, Prokam shipped Kennebec potatoes through IVCA without DA and without permission from the Commission. IVCA remained accountable for allowing product to enter market without regard to DA of other producers.
25. The appellants were critical that the Commission failed to disclose a letter, written by another producer Mr. Hothi dated October 25, 2017 (received by the Commission on November 24, 2017) prior to the show cause process. The Commission relied on this letter to make an adverse finding that Prokam sold Kennebec potatoes without DA at a time when Hothi had product ready to deliver.
26. On the evidence, there is no dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon confirmed that IVCA president Mr. Michell wanted to make sure that if there was a gap in production due to inconsistent quality, IVCA could fill the gap.
27. Mr. Dhillon, either in his role as the principal of Prokam or as a director of IVCA, did not seek approval from the Commission before producing or shipping regulated product not covered by or in excess of Prokam's DA as required by the General Orders.

Commission Process

28. On October 10, 2017, the Commission issued cease and desist orders against Prokam, Thomas Fresh and IVCA alleging that potatoes were being marketed and sold without Commission authorization below minimum price, knowingly permitting IVCA to be put in a position of non-compliance, placing its agency license at risk and without authority to

represent IVCA in marketing and sales of regulated product and shipping Kennebec potatoes in September 2017 without DA. By the time the cease and desist orders were issued, Prokam had sold approximately 348 tons of potatoes to Thomas Fresh.

29. Subsequently, the Commission conducted a written show cause process resulting in the December decision. Significant findings included lack of oversight by IVCA, Prokam's planting far in excess of its DA and selling potatoes "directly" to Thomas Fresh at less than minimum price where the use of "directly" reflects the Commission's view that the impugned transactions were "papered" through IVCA and IVCA was largely unaware of these "backdoor activities".
30. In its December decision, the Commission upheld its cease and desist orders denying the appellants and IVCA the ability to market and sell potatoes below minimum price, revoking and replacing the appellants' class 1 licenses with class 4 licenses and directing Prokam to BCfresh "as it is better equipped to manage the producer and ensure pricing rules are followed".
31. Upon reconsideration, the designation of BCfresh as Prokam's agency was upheld by the Commission in a decision dated January 30, 2018. The reconsideration decision is under appeal but in abeyance pending the results of these appeals.

Dysfunctional Nature of IVCA

32. Much evidence was heard at the hearing of the dysfunctional nature of IVCA. The Commission's view is that Mr. Dhillon, with the assistance of Mr. Gill, essentially co-opted the regulatory authority of IVCA and bypassed agency staff, allowing Prokam to sell potatoes in excess of DA directly to Thomas Fresh at prices below the Commission's minimum pricing. Mr. Dhillon disputed this characterization and downplayed his role within IVCA describing himself as a very busy farmer with little time to spare in the growing season who relied on his agency to meet any regulatory responsibilities. He denied putting undue stress on the agency or creating a toxic environment and distanced himself from Mr. Gill.
33. Having heard all the evidence, we find Mr. Dhillon's role to be a bit more nuanced than found by the Commission. Mr. Dhillon, in his role as IVCA vice-president and director, was a force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of the potato production in BC. This production significantly increased IVCA's capacity. Mr. Dhillon acknowledged that IVCA needed Prokam as a grower, both financially and for growth. Mr. Dhillon was not beneath threatening to fire staff or pulling his money

from the agency in order to get his way. With respect to Mr. Gill, Mr. Dhillon was instrumental in bringing him into IVCA and supported his employment handling IVCA's "mainland sales" which in fact were the sales of Prokam potatoes to Thomas Fresh. While Mr. Dhillon denied paying part of Mr. Gill's salary, we accept Mr. Gill's evidence that Mr. Dhillon negotiated half his salary to be paid through Mr. Dhillon's father's company, Sam Enterprises.

34. However, it is also clear that IVCA through its previous general manager and its current president actively solicited the Thomas Fresh account over several years. While Mr. Gill may have signed the contracts, he did so in full knowledge that IVCA wanted a long term agreement with Thomas Fresh to access the tonnage fees to address agency cash flow problems. While the current general manager may have been late to a realization that the contracts were signed and the implications of those contracts, the inescapable conclusion is that the management of IVCA (not just Mr. Dhillon) actively participated in obtaining these contracts. All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.

FINDINGS, ORDERS AND REASONS

35. Given the length and complexity of the submissions, we find it useful to set out our findings and orders first, with our supporting reasons set out below.

Finding **The Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, or to issue any related cease and desist orders respecting such sales. We reach this conclusion because the Commission has not complied with the federal *Statutory Instruments Act*, a step that is required for the Commission to be able to avail itself of the interprovincial price setting authority that is provided by the federal *Agricultural Products Marketing Act* and the *British Columbia Vegetable Order*.**

Order 1. **Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.**

36. The appellants provided extensive argument on this point, including a discussion of historic case law regarding the constitutional limits on provincial authority to regulate marketing. The respondents in turn have

argued that notice should have been given to the Attorney General, pursuant to the *Constitutional Question Act*, R.S.B.C., c. 68. Section 8 of that Act requires notice in proceedings where “the constitutional validity or constitutional applicability of any law is challenged, or... an application is made for a constitutional remedy.” The appellants reply that they are not seeking any such declaration and are simply referring to historic case law in order to help understand, and interpret, certain provisions in the *NPMA* and the Scheme.

37. We agree with the appellants’ position in this regard, and are of the view that it is both possible and appropriate to address the issues arising in this appeal simply as a matter of statutory interpretation.

38. In this regard, we note that, while the Commission’s General Orders do not impose specific limitations regarding extra provincial sales, they can only validly regulate such matters if and to the extent they are premised upon authority under the Scheme. Section 4 of the Scheme is relevant here. It states:

Powers

- 4 (1) The commission is vested with the power **in the Province** to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product.
- (2) Without restricting the generality of subsection (1), the commission is vested with the powers described in section 11 of the Act, and with the following additional powers.... [emphasis added]

39. Section 11 of the *NPMA* states:

Powers of marketing boards and commissions

- 11 (1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:
- (a) to regulate the time and place at which and to designate the agency through which a regulated product must be marketed;
 - (b) to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be marketed by a person at any time;
 - (c) to prohibit the marketing of a grade, quality or class of a regulated product;
 - (d) to determine the charges that may be made by a designated agency for its services;
 - (e) to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it;

- (f) to require persons engaged in the marketing of a regulated product to register with and obtain licences from the marketing board or commission;
- (g) to set and collect yearly, half yearly, quarterly or monthly licence fees from persons engaged in the marketing of a regulated product;
- (h) for the purposes of paragraph (g) and in respect of the persons affected by a regulation under that paragraph
- (i) to classify those persons into groups and set the licence fees payable by the members of the different groups in different amounts,
 - (ii) to set and collect from those persons fees for services rendered or to be rendered by the marketing board or commission, and
 - (iii) to recover the licence and other fees by proceedings in a court of competent jurisdiction;
- (i) to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;
- (j) to require full information relating to the marketing of a regulated product from all persons engaged in marketing activities, to require periodic returns to be made by those persons and to inspect the books and premises of those persons;
- (k) to set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia;
- (l) to authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those payments until the total net proceeds are distributed;
- (m) subject to section 16 (2) (b), to require the person in charge of a vehicle or other form of conveyance in which a regulated product could be transported to permit a member or employee of the marketing board or commission to search the vehicle;
- (n) to seize and dispose of any regulated product kept or marketed in violation of an order of the marketing board or commission;
- (o) to set and collect levies or charges from designated persons engaged in the marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission
- (i) to carry out the purposes of the scheme,
 - (ii) to pay the expenses of the marketing board or commission,

- (iii) to pay costs and losses incurred in marketing a regulated product,
 - (iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and
 - (v) to set aside reserves for the purposes referred to in this paragraph;
- (p) to delegate its powers to the extent and in the manner the marketing board or commission considers necessary or advisable for the proper operation of the scheme under which the marketing board or commission is constituted, but a power in paragraph (f), (g) (h) or (i) must not be exercised by any person other than the federal board, a marketing board or a commission;
- (q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product, and to amend or revoke them;
- (r) to purchase a regulated product in relation to which it may exercise its powers and package, process, store, ship, insure, export, sell or otherwise dispose of the product purchased by it;
- (s) to inquire into and determine the amount of surplus of a regulated product;
- (t) to acquire all or part of a surplus of a regulated product as the marketing board or commission may determine;
- (u) to market a surplus of a regulated product that it acquires;
- (v) to require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission.

40. Section 4 of the Scheme makes clear that the Commission’s power to regulate marketing is limited to activities “in the Province”. Further, to the extent that section 4 of the Scheme includes all of the powers of section 11 of the *NPMA*, we note that it contains an express geographic limitation in relation to the establishment of minimum prices. Specifically, section 11(1)(k) provides the power “to set ...minimum prices at which a regulated product ... may be bought or sold *in British Columbia*” (emphasis added). This is the only provision of section 11 that expressly contains such a limitation.

41. In our view, for the Commission to apply minimum pricing rules to the transactions at issue here would exceed the authority granted to the Commission by the Scheme, for the following reasons.

42. A plain reading of section 11 of the *NPMA* and section 4 of the Scheme make clear that the Legislature and the Lieutenant Governor in Council intended to allow minimum pricing rules only *in British Columbia*. Clearly this qualifying term has to have a purpose – and it only makes sense to interpret this as meaning the Commission cannot set minimum prices at which BC regulated product can be bought or sold outside the province.
43. It is not necessary for us to engage in a complex exercise of finding the “locus” of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.
44. It not necessary for us to rule on whether the General Orders (or any legislation) would fall outside the constitutional competence of the province under section 92 of the *Constitution Act*, 1867 and indeed the appellants have not asked for any such relief. (As such, the *Constitutional Questions Act* has no application.)
45. We do not accept the Commission’s argument that “it relies on the plenary powers of section 4 of the Vegetable Scheme and paragraph 11(1)(q) of the Act to establish the minimum price that may be charged by an agency as a means of regulating the returns to producers within the province...” In our view, section 4 of the Scheme includes a clear limitation related to regulation “in the Province”. And we do not accept that section 11(1)(q) of the *NPMA* gets the respondent around the clear language in section 11(k) limiting minimum price setting to “in British Columbia”. In our view, the power in section 11(1)(q) to make rules and orders necessary or advisable to promote, control and regulate effectively the marketing of a regulated product must be read in concert with section 11(1)(k), which is more specific – and more limiting – in terms of the geographic scope of minimum price setting. If we were to adopt the respondent’s arguments in this regard, it would render section 11(1)(k) – and other sections, such as the power to set and collect levies under 11(1)(o) – superfluous.
46. We do not accept the Commission’s assertions that the words “within the province” and “in British Columbia” as used in the Scheme and the *NPMA* should be understood to referentially incorporate expansions that may have occurred *in constitutional law cases*. This is particularly true where, as outlined in the written submissions of the appellants, there is a long series of cases going back many decades which have dealt specifically with the complex interrelationship between federal and provincial aspects of regulated marketing, eventually resulting in an elegant constitutional equilibrium involving integrated federal and provincial legislation. In this

regard, we note the following words of the Supreme Court of Canada in a 2005 case dealing specifically with regulated marketing:

38. With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. ... (*Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292)

47. There is no compelling reason to stretch the interpretation of the provincial regime to find for the Commission authority to regulate minimum prices for product sold outside BC on the basis that such authority would be an integral part of an overall effective regime for management *within* BC. This is because the Commission already has the power to regulate minimum price setting for interprovincial transactions under the federal *Agricultural Products Marketing Act* and the supporting *British Columbia Vegetable Order*.
48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the *Statutory Instruments Act*. This is accepted by the Commission, which stated in its submission, “in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been “Gazetted”. There is no dispute that Commission has not yet done so in respect of any orders related to minimum pricing.
49. These are not minor issues or legal technicalities. Nor are they matters that the Commission can be excused for being unaware of. As the appellants note, the application of, and compliance by the Commission with, the *Statutory Instruments Act* was the subject of considerable discussions before the Standing Joint Committee for Scrutiny of Regulations in late 2007 and early 2008. We pause here to note that the respondent objected to the admissibility of the transcripts of proceedings before this parliamentary committee on the basis of parliamentary privilege. The panel ruled that it was not appropriate to put the documents to the Commission witness and left the broader issues of parliamentary privilege, relevance and weight for closing argument. However, the parties did not raise the issue further in written argument. In the circumstances, the panel has decided that evidence of these proceedings is admissible for the limited purpose of noting that the issue of the requirements of the *Statutory Instruments Act* has been known to the Commission at least since 2008 when similar provisions were subject to considerable attention in the parliamentary committee.

50. Having reached these findings, the panel must consider what is an appropriate remedy in all the circumstances? Section 8(9) of the *NPMA* states:

(9) On hearing an appeal under subsection (1), the Provincial board may do any of the following:

- (a) make an order confirming, reversing or varying the order, decision or determination under appeal;
- (b) refer the matter back to the marketing board or commission with or without directions;
- (c) make another order it considers appropriate in the circumstances.

51. In our view, orders 48.3 and 48.5 of the Commission's December decision relied, to some degree, on the Commission's belief that it had the authority to apply its minimum pricing rules to the transactions at issue. In the circumstances, one option for the panel would be to simply reverse those orders on the basis that the Commission's position on the validity and applicability of its minimum pricing rules to the facts at issue has been rejected by the panel.

52. However, we also note that this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes and some remaining findings against Prokam in respect of DA issues (discussed below). We further note that a full review of the materials presented to us makes clear the conduct of Prokam and/or its officers was not beyond reproach.

53. In all the circumstances, we believe the question of whether the appellants' conduct warrants any further action by the Commission (irrespective of the minimum pricing rules in relation to interprovincial sales) is one that must still be answered, and it is one more appropriately considered in the first instance by the Commission – not the panel.

54. As such, we conclude that the most appropriate remedy is to refer orders 48.3 and 48.5 back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

Finding **The panel finds that the Commission breached principles of administrative fairness when it failed to seek submissions from the parties – before the December 22, 2017 order was issued - on the question of whether Commission members with ties to BCfresh should have recused themselves from consideration of any order to direct Prokam to BCfresh. This is a step that should have been taken by the Commission**

before reaching any conclusions as to whether there was or was not a conflict of interest.

Order 2 The Commission is directed to reconsider its decision to issue order 48.1.

Order 3 Prior to undertaking reconsideration pursuant to orders 1, 2 and 4 (discussed below), the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.

55. The appellants assert that the involvement in this matter (both the issuance of cease and desist orders and the show cause hearing process) by several commissioners with ties to BCfresh gives rise to a reasonable apprehension of bias.

56. In support of its position, the appellants rely upon case law for the proposition that a reasonable apprehension of bias must be considered based on whether a “reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... would think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.” (*Roberts v. R*, 2003 SCC 45 at para 60).

57. The appellants allege that a reasonable apprehension of bias exists due to the fact that Mr. Guichon considered whether to issue the cease and desist orders on the basis of whether it would affect his own personal interests as a producer. The appellants also alleged that BCfresh had an interest in the decision to move Prokam to BCfresh, as presumably BCfresh would stand to benefit in some way from such a decision.

58. The Commission in response asserts that the assessment of reasonable apprehension of bias must be made within the specific context of regulated marketing. It relies on prior findings of BCFIRB including its January 7, 2013 Supervisory Review Decision, where it stated:

47. Conflict of interest in Vegetable Commission decision-making was a serious issue raised in submissions. As has noted in the past, conflict of interest cannot be understood in regulated marketing in the same way as it applies in other contexts. The very structure of commodity boards, most of which still require a majority of elected producers, means that the legislation is prepared to accept a significant degree of “conflict” in the larger interests of producer governance in light of industry knowledge and expertise.

48. Producer governance undoubtedly raises special challenges for commodity board members seeking to identify those situations where there might still be a special or unique conflict that exists over and above the fact that a person is a producer. However, until the legislation or schemes are amended, these are

challenges that must be met if commodity boards are to function effectively. Unless there is a true disqualifying conflict, commodity Board members must respect the election results and do their jobs to insure, to the best of their ability and in good faith, the proper governance of the industry. BCFIRB recognizes that this can be difficult, and as such is available to assist and advise commodity boards in respect of conflict management.

59. In light of the above, we do not accept the appellants' assertion that Mr. Guichon or any of the other commissioners would be in a conflict of interest simply by virtue of the fact that they are producers whose personal interests may be affected in that capacity.
60. However, the circumstances of the present case are more complex than that. Mr. Guichon is also chair of BCfresh – the agency that the Commission has directed Prokam to use. In addition, he (and perhaps) the other commissioners that use BCfresh as their agency are also shareholders in it. Whether such interests would give rise to a reasonable apprehension of bias on the facts of this particular case is something that needs to be carefully considered and documented.
61. Yet there is very little in the materials to indicate how the Commission and its members approached this question. There is no evidence that the Commission took up the offer of BCFIRB from the January 2013 supervisory decision that it is “available to assist and advise commodity boards in respect of conflict management”. There is no evidence that it gave specific consideration to whether the interests of Mr. Guichon and the other commissioners with ties to BCfresh fell – on the facts of this case and the decisions being entertained – within the permissible range for producers as discussed in the supervisory decision, or whether they were of a different nature.
62. What is clear however is that Mr. Guichon and the Commission did realize there was at least some concern in this regard, as Mr. Guichon (as well as the two other commissioners shipping to BCfresh) did not participate in the decision-making deliberations or cast a vote in relation to the December decision. Yet, as the respondent notes in its written argument, “he did make his views known to the Commission members that did deliberate on and decide the matter”.
63. In our view, having recognized the potential for a reasonable apprehension of bias to exist, Mr. Guichon and the Commission should have handled the matter differently. More specifically, what should have occurred is that as soon as the Commission (including Mr. Guichon and the other two BCfresh commissioners) became aware of a potential conflict of interest in relation to this matter, the Commission should have first determined whether the conflict was clear enough that some or all of the BCfresh commissioners should not participate in the matter. If that were the case, then they should

not have participated in any further discussions concerning the matter – it is not sufficient to participate in discussions leading up to – but not including – the actual voting. Conversely, if upon such preliminary consideration they felt that the potential conflict did not clearly meet the test of a reasonable apprehension of bias, the Commission should have nonetheless raised this matter with the parties to allow each party to make representations on the question before reaching a final conclusion.

64. As noted in S. Blake, *Administrative Law in Canada* (3rd edition, Butterworths, 2001) at page 106:

Typically the parties are unaware of any circumstances that may give rise to a reasonable apprehension of bias. A tribunal member who has or had a relationship with a party should mention it at the outset of the hearing and give the parties an opportunity to make submissions as to whether that relationship gives rise to a reasonable apprehension of bias.

65. The respondent notes that even if there had been an error in this regard, it should be considered cured by the *de novo* nature of these proceedings. While this is a possibility, it is only the case where the panel itself is prepared to render a decision on the merits of an issue under appeal that the error can be considered cured.
66. In the present case, we find ourselves with a limited record on the question of consideration of reasonable apprehension of bias by the Commission. Further, despite the length of the submissions by the parties, we do not believe that this issue has yet been fully canvassed, as it is not entirely clear from the appellants' submissions exactly what interests of what party give rise to a reasonable apprehension of bias in relation to which particular issue. These are matters that would be best addressed by the Commission in first instance, employing the process we have discussed above, particularly as it relates to the issue of whether Prokam should be ordered to use BCfresh as its agency.

Finding The panel does not accept the appellants' submission that there is any basis to vary or rescind Commission order 48.2 and no reconsideration of that order is required.

67. Order 48.2 states:

Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

68. In our view, this is a sound decision that is appropriate in all of the circumstances of this case. We reach that conclusion for the following reasons.

69. The General Orders set out the following General Prohibition on producers.
12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.
70. Part XV, XVI and XVII, the General Orders establish rules for DA and the marketing of new or additional regulated product. Part XV of the General Orders contemplates that new or additional regulated product can only be marketed by existing agencies with Commission approval. Section 2 requires an agency wanting to sell additional regulated product to submit a business plan covering the period of time specified by the Commission. Section 3 gives the Commission discretion to hold a hearing concerning the application by the agency to market new or additional regulated product.
71. In this case, IVCA and Prokam made a calculated decision not to provide a business plan satisfactory to the Commission for the new production and did not meet with the Commission to explain their intentions. Instead, they argue that IVCA's agency licence application submitted in November 2016 should have been adequate for the Commission's purposes. However, the Commission clearly and repeatedly articulated that the agency application was not sufficient for its purposes and asked for further information which was never provided.
72. With respect to Prokam's argument that the potatoes it shipped over DA are legitimate "gap fillers", the Commission explained its policy that gap fillers are to be registered and approved by the Commission on an annual basis. It recognized that gap fillers are needed to address shorting of orders by the agency for its established customer base and the agency must prove the market demand is new and not serviced by the industries' existing DA or supplied by another agency.
73. Commission witnesses explained that the purpose of gap filling was to allow growers to produce modest amounts over DA to take advantage of small, transitory, and temporary opportunities to fill market shortages throughout the marketing year. There is no dispute that Mr. Dhillon has early land and may well have had potatoes available for market a week or two before other growers and this would appear to be what the Commission would view as a legitimate "gap". However, in the absence of Commission authorization for producing, shipping and marketing in excess of DA and a determination that the regulated product was indeed a legitimate gap filler, Prokam and IVCA have not met their obligations under the General Orders to obtain Commission authorization.
74. Prokam appears to be arguing that had it applied, the authorization would have been given as these were legitimate gap fillers. But that is not Prokam's decision to make. Furthermore, we are not prepared to accept

that Prokam's marketing of huge volumes (348 tons) of potatoes falls within the concept of legitimate gap fillers as described by the Commission's witnesses. As a result, we agree with the Commission's decision not to include this production in Prokam's five year rolling average to calculate earned DA.

75. Similarly, there does not appear to be any dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon said he had a discussion with IVCA president Mr. Michell, who wanted to make sure that if there was a gap in production caused by another grower's inconsistent quality, IVCA could fill the gap. Both Mr. Dhillon and Mr. Gill acknowledged that Prokam shipped Kennebec potatoes without DA (about 4000 lbs) but suggest this was a permissible gap filler as no other grower could supply the product at the time.
76. On this same issue, the appellants took issue with the Commission's reliance on the Hothi letter referred to earlier in which Mr. Hothi advised he had Kennebec potatoes ready for shipment in September 2017. This letter was not disclosed in advance of the show cause process and the Commission relied on it to make an adverse finding which the appellants argue was procedurally unfair.
77. To the extent that the failure to disclose the Hothi letter was procedurally unfair, we conclude that the hearing *de novo* before BCFIRB is sufficient to cure that defect in the Commission's process. However, in our view, the Hothi letter is not the only basis upon which to base an adverse finding against Prokam and IVCA. The evidence of Commission general manager Mr. Solymosi was that if a grower plants regulated product without DA, he must acknowledge the priority of those growers with DA that had served the market over time; growers planting product without DA are not permitted to enter the marketplace without Commission approval.
78. In this case, IVCA had a grower with Kennebec DA. There is no record that IVCA met its obligations under Parts XV, XVI and XVII of the General Orders; it did not contact the Commission to demonstrate that there was in fact a quality or supply issue with their grower's potatoes nor did it obtain the Commission's authorization for gap filling. In the absence of Commission authorization, there is no basis for this panel to make a finding that Prokam's Kennebec production should have formed part of its five year rolling average to calculate earned DA.
79. In reaching the foregoing two conclusions with respect to DA generally, and Kennebecs specifically, we note that the Commission's order 48.2 was not premised upon the application of the minimum pricing rules to interprovincial sales discussed in Finding 1.

80. Further, in our view this order has the least potential relationship to the reasonable apprehension of bias issue discussed in Finding 2.
81. For those reasons, we do not believe it is necessary or advisable to order the Commission to reconsider this order. Further, even if the reasonable apprehension of bias issues did have some limited potential application to this order, we consider that cured (in respect of this issue) by the panel's hearing process and our resulting decision on the merits of this issue.

Finding **There are unresolved concerns about IVCA's ability to satisfy its obligations as a designated agency.**

Order 4 **The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.**

82. The panel concludes that the Commission placed too much weight on IVCA's cooperation with the Commission's investigation and not enough weight on the regulatory responsibility of IVCA as an agency. The very reason that this compliance issue arose rests with IVCA and its aggressive growth aspirations. It was IVCA that pursued Mr. Dhillon and his early land. It was IVCA that pursued the re-packer/wholesaler business of Thomas Fresh. It was IVCA that failed to meet its obligations under the General Orders as an agency to disclose its business plans to the Commission and actively pushed off the Commission's efforts to plan growth and ensure orderly marketing. These fundamental failings on the part of the designated agency are not in any way rectified or mitigated by the cooperation of IVCA staff in the subsequent compliance investigation.
83. While we observe that the appellants were critical of how the Commission dealt with IVCA, the December decision did not make any orders in relation to IVCA. However, the panel finds that there are many unanswered questions about IVCA's role in the events leading up to these appeals. We have significant concerns about whether IVCA has demonstrated the ability to perform the requisite front line role to ensure that marketing is conducted in an orderly fashion according to the General Orders and provide fair market access to all registered growers. As such, and as a matter of both our appellate and supervisory jurisdiction, we believe this is a matter that requires reconsideration by the Commission.

Finding **It is not clear based on the information submitted to the panel how the Commission's minimum price setting policy is integrated into its General Orders or otherwise given effect under the Scheme.**

Order 5 The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.

84. While the panel heard a great deal about minimum pricing in this appeal, we note that “minimum price” is not a defined term in the General Orders and the General Orders do not specifically establish a minimum pricing regime. Instead, they just contain various provisions which include the words “for crops subject to minimum pricing”.
85. The panel was provided with a Commission document called Policy – Procedures for Establishing Weekly Minimum Price for Storage Crops, dated May 14, 2009 and another draft document called Policy – Procedures for Establishing Weekly Minimum Price for Storage Crops, which policy was to be trialed from the week of July 2 to September 2, 2017. Neither of these appears to be an order of the Commission. Neither specifies which regulated product is subject to minimum pricing. The older one is extremely brief and the more recent “trial” version is still stamped draft. It is simply not clear from the information provided to the panel exactly what instrument(s) the Commission is using to regulate this issue and how that ties into the General Orders and its exercise of authority.
86. Given the above, and as a matter of transparency, the Commission should ensure that its minimum pricing policy is properly documented, adopted and integrated, as appropriate, with its General Orders and the Scheme.

Other Issues

87. The appellants argued that under the General Orders, the 60-day forward contracts were not required to be submitted to the Commission for approval. Given our finding above that the Commission lacks authority to apply its minimum pricing rules to the impugned interprovincial sales, it is unnecessary to deal with the 60-day contract issue except to say that whatever happens with 60-day contracts, the obligations on how agencies deal with new production in Part XV remain applicable and Commission approval was required.
88. The appellants made arguments that the Commission made decisions in the absence of any evidence giving two examples, that there was no evidence before the Commission at the time the cease and desist orders were issued that Thomas Fresh had done anything wrong, nor was there evidence before the Commission to support the findings about the adequacy of BCfresh as an agency. Given that these arguments are relevant to Orders 48.1, 48.3, 48.5, which orders we have remitted back to the Commission for reconsideration, there is no need to address them further.

ORDER

89. The following is a summary of the panel's orders:

- Order 1. Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.**
- Order 2 The Commission is directed to reconsider its decision to issue order 48.1.**
- Order 3 Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.**
- Order 4 The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.**
- Order 5 The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.**

90. There is no order as to costs.

Dated at Victoria, British Columbia this 28th day of February, 2019

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Al Sakalauskas, Member



Diane Pastoor, Member

Appendix A

REGULATORY FRAMEWORK

A. Provincial

1. *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 provides the statutory basis for the creation and powers of the Commission.

Powers of marketing boards and commissions

11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

- (a) to regulate the time and place at which and to designate the agency through which a regulated product must be marketed;
- (b) to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be marketed by a person at any time;
- (c) to prohibit the marketing of a grade, quality or class of a regulated product;
- (d) to determine the charges that may be made by a designated agency for its services;
- (e) to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it;
- (f) to require persons engaged in the marketing of a regulated product to register with and obtain licences from the marketing board or commission;
- (g) to set and collect yearly, half yearly, quarterly or monthly licence fees from persons engaged in the marketing of a regulated product;
- (h) for the purposes of paragraph (g) and in respect of the persons affected by a regulation under that paragraph
 - (i) to classify those persons into groups and set the licence fees payable by the members of the different groups in different amounts,
 - (ii) to set and collect from those persons fees for services rendered or to be rendered by the marketing board or commission, and
 - (iii) to recover the licence and other fees by proceedings in a court of competent jurisdiction;
- (i) to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;
- (j) to require full information relating to the marketing of a regulated product from all persons engaged in marketing activities, to require periodic returns to be made by those persons and to inspect the books and premises of those persons;
- (k) to set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be

bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia;

(l) to authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those payments until the total net proceeds are distributed;

(m) subject to section 16 (2) (b), to require the person in charge of a vehicle or other form of conveyance in which a regulated product could be transported to permit a member or employee of the marketing board or commission to search the vehicle;

(n) to seize and dispose of any regulated product kept or marketed in violation of an order of the marketing board or commission;

(o) to set and collect levies or charges from designated persons engaged in the marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission

- (i) to carry out the purposes of the scheme,
- (ii) to pay the expenses of the marketing board or commission,
- (iii) to pay costs and losses incurred in marketing a regulated product,
- (iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and

(v) to set aside reserves for the purposes referred to in this paragraph;

(p) to delegate its powers to the extent and in the manner the marketing board or commission considers necessary or advisable for the proper operation of the scheme under which the marketing board or commission is constituted, but a power in paragraph (f), (g) (h) or (i) must not be exercised by any person other than the federal board, a marketing board or a commission;

(q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product, and to amend or revoke them;

- (r) to purchase a regulated product in relation to which it may exercise its powers and package, process, store, ship, insure, export, sell or otherwise dispose of the product purchased by it;
- (s) to inquire into and determine the amount of surplus of a regulated product;
- (t) to acquire all or part of a surplus of a regulated product as the marketing board or commission may determine;
- (u) to market a surplus of a regulated product that it acquires;
- (v) to require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission.

(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.

(3) An order or rule made under subsection (1) may be limited as to time or place.

2. Pursuant to this provision and related regulation making powers, the province established the British Columbia Vegetable Scheme, B.C. Reg. 96/80 (the Scheme) which vests the Commission with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product. Regulated product includes potatoes grown in the Province.

Powers

4(1)The commission is vested with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product.

(2)Without restricting the generality of subsection (1), the commission is vested with the powers described in section 11 of the Act, and with the following additional powers:

- (a) to grant or lend money to assist
 - (i)in the construction or operation of facilities for preserving, packing, storing or conditioning of the regulated product, and
 - (ii)in research relating to the marketing of the regulated product;
- (b) to hypothecate, assign, draw, make, sign, accept, endorse, discount and issue bills of exchange, cheques and other negotiable and transferable instruments;
- (c) for the purposes of the scheme, to borrow money, provided that the aggregate outstanding indebtedness of the commission through borrowing shall not exceed \$100 000 at any time, and to secure repayment of the borrowed money in a manner the commission considers fit;

(d) to fix or alter the remuneration of its employees and, subject to the authority of the British Columbia Farm Industry Review Board, to fix or alter the remuneration of the chairman and other members of the commission.

3. Relying on this authority, the Commission has enacted General Orders; key provisions are set out below.

PART IV LICENCING

1. No person other than an Agency shall purchase Regulated Product from a Producer or market Regulated Product, within British Columbia or in interprovincial or export trade, except that:
 - (a) Regulated Product may be purchased from a Producer by a Consumer or by a Processor licensed by the Commission as permitted by these General Orders;
 - (b) Regulated Product may be marketed by a Producer, Producer-Shipper, Processor, Commission Salesperson or Wholesaler who is licensed in accordance with these General Orders in the manner permitted by the term of the licences, these General Orders, and any other Order of the Commission; and
 - (c) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may market Regulated Product as permitted by the Commission.
3. No Producer, shall grow, process or market Regulated Product unless that Producer:
 - (a) registers with the Commission;
 - (b) is qualified to and obtains annually from the Commission one or more of the appropriate licenses herein described; and
 - (c) Pays to the Commission annually the fees for such licences as described in Schedule 3 to these General Orders.

PART V AGENCIES

5. No Agency shall receive any Regulated Product from a Producer that was not grown by that Producer unless expressly authorized by the Commission.
14. Prices for all Regulated Crops subject to Commission minimum pricing must be approved by the Commission before coming into force or effect, unless otherwise authorized in writing by the Commission.

PART VII AGENCY RESPONSIBILITIES

1. Each Agency marketing crops subject to Commission minimum pricing shall notify the Commission and obtain approval from the Commission for the establishment of any price or change in price.
2. Each Agency marketing crops subject to Commission minimum pricing shall file with the Commission a copy of any price list, local or export, and particulars of any sales other than at listed prices.
3. No pricing for crops subject to Commission minimum pricing, below listed price can be made without the prior approval of the Commission.
6. Before finalizing a contract each Agency shall provide to the Commission for its prior approval as to form any proposed contracts with Processors or other firms approved by the Commission located in BC that are to receive regulated products regardless of end use.

PART IX GENERAL PROHIBITIONS

2. A Wholesaler shall only buy, accept or receive a Regulated Product from an Agency or Producer-Shipper.
7. No Person shall sell, offer to sell, supply or deliver the Regulated Product to any Person other than an Agency or such other Person as the Commission may expressly direct or authorize.
9. No Producer or Agency shall sell or offer for sale Regulated Crops subject to Commission minimum pricing, and no Person shall buy Regulated Crops subject to Commission minimum pricing, at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.
11. No Producer, shall market or transport any Regulated Product unless the Producer is currently licensed with the Commission, except as expressly authorized by the Commission pursuant to Section 4 of Part IV of the General Order.
12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.

4. Parts XV, XVI and XVII of the General Orders establish rules for Delivery Allocation.

PART XV MARKETING OF "NEW" OR ADDITIONAL REGULATED PRODUCT BY EXISTING AGENCIES & PRODUCER-SHIPPERS

1. No new or additional Regulated Product shall be marketed by existing Agencies or Producer-Shippers without Commission approval.
2. An Agency or Producer-Shipper seeking to market new or additional Regulated Product shall submit a Business Plan covering a period of time specified by the Commission which addresses matters relating to promotion, market development and planned expansion. In the case of agencies marketing regulated greenhouse crops, this requirement will occur within the Procedures outlined under General Orders Part XVI and XVIII.
3. At its discretion, the Commission may determine whether a hearing will be held, in either oral or written form, concerning the application by an existing Agency or Producer-Shipper to market new or additional Regulated Product. In exercising its discretion, the Commission shall consider:
 - (a) if and how other existing Agencies / Producer-Shippers, if any, will be affected;
 - (b) how the Commission will notify interested parties of the application and its decision to approve or dismiss the application.
4. The Commission shall consider:
 - (a) what benefits, if any, not currently available to Producers will accrue to them if new or additional Regulated Product is marketed by the Agency / *Producer-Shipper*;
 - (b) whether the Agency / *Producer-Shipper* has sufficient staff with the necessary experience to market the new or additional Regulated Product;
 - (c) whether a market exists for the new or additional Regulated Product; and
 - (d) whether the new or additional Regulated Product would enhance orderly Marketing

PART XVI PRODUCTION AND DELIVERY ALLOCATIONS – GENERAL

1. The purposes of the Delivery and Production Allocation Procedures contained in Part XVII and Part XVIII are to identify the principles and guidelines by which the Commission will support and enhance a regulated marketing system for the intraprovincial, interprovincial and export trade of regulated crops.

These purposes include:

- (a) The preservation of market access for Producers who have served the market over time.
- (b) The provision of access for new entrants.
- (c) The desire to create and maintain long-term, sustainable, food safe, farming and greenhouse operations.
- (d) The provision of opportunity for industry growth.
- (e) The provision of an orderly marketing system.....

PART XVII PROCEDURE FOR DETERMINING DELIVERY ALLOCATION FOR STORAGE CROPS

1. This Part covers Storage Crops as defined in Part I (5), *as follows*:

“**Storage Crops**” mean potatoes, onions, parsnips, cabbage, carrots, beets, rutabagas, white turnips and any other crop designated by the Commission.
2. Only Regulated Product shipped through an Agency or Producer-Shipper of the Commission shall be used for the calculation of Delivery Allocation levels or adjustments for Crops under this Part.
3. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.
4. Subject to section 5 and 6 in this Part, no Producer shall ship a quantity of Storage Crops in excess of their Delivery Allocation, unless otherwise authorized by the Commission.
5. Delivery Allocation within a period does not commence until supply exceeds demand. Any shipments made within a Delivery Allocation period prior to commencement of Delivery Allocation will count towards the building of Delivery Allocation.
6. After one round (100 percent) of all Delivery Allocations has been shipped for any Storage Crop in any Delivery Allocation period, Delivery Allocations shall be awarded equally to each registered

producer. For the purposes of this section registered Producers operating as a Family Unit may be grouped together and in those instances the Family Unit will receive the Delivery Allocation of only one registered Producer. ...

11. If a Producer is found guilty of violating a Commission Order, the Commission shall have the authority, in addition to any other measures set out in these orders, to suspend a Producer's Delivery Allocation for a period of time. Sales made during the period of violation will not be allowed to build Delivery Allocation.

B. Federal

5. The *Agricultural Products Marketing Act*, RSC 1985, c A-6 states, in part:

Governor in Council may grant authority to provincial boards

2 (1) The Governor in Council may, by order, grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of that agricultural product in interprovincial and export trade and for those purposes to exercise all or any powers like the powers exercisable by the board or agency in relation to the marketing of that agricultural product locally within the province.

REGULATIONS

3 The Governor in Council may make regulations prescribing the terms and conditions governing the granting and revocation of authority under section 2 and generally may make regulations for carrying the purposes and provisions of this Act into effect.

6. Pursuant to this authority, the British Columbia Vegetable Order, SOR/81-49 was created which states in part:

2 In this Order,

Act means the *Natural Products Marketing (British Columbia) Act* of British Columbia; (*Loi*)

Commodity Board means the British Columbia Vegetable Marketing Commission, established pursuant to the Act; (*Office*)

Plan means the *British Columbia Vegetable Scheme*, B.C. Reg. 96/80, as amended from time to time, and any regulations made under the Act to give effect to the Scheme; (*Plan*)...

3 The Commodity Board is authorized to regulate the marketing of vegetables in interprovincial and export trade and for such purposes

may, by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province under the Act and the Plan.

7. The *Statutory Instruments Act* states in part:

Definitions

2 (1) In this Act,

...

regulation means a statutory instrument

(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;...

regulation-making authority means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; ...

statutory instrument

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but

(b) does not include

(i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(iii) any instrument referred to in paragraph (a) and in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(iv) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, a rule made by the Legislative Assembly of Yukon under section 16 of the *Yukon Act*, of the Northwest Territories under section 16 of the *Northwest Territories Act* or of Nunavut under section 21 of the *Nunavut Act* or any instrument issued, made or established under any such law or rule....

EXAMINATION OF PROPOSED REGULATIONS

Proposed regulations sent to Clerk of Privy Council

3 (1) Subject to any regulations made pursuant to paragraph 20(a), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

Examination

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

- (a) it is authorized by the statute pursuant to which it is to be made;
- (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
- (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
- (d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Advise regulation-making authority

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

Application

(4) Paragraph (2)(d) does not apply to any proposed rule, order or regulation governing the practice or procedure in proceedings before the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada or the Court Martial Appeal Court....

Doubt as to nature of proposed statutory instrument

4 Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether a proposed statutory instrument would be a regulation if it were issued, made or established by that authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

TRANSMISSION AND REGISTRATION

Transmission of regulations to Clerk of Privy Council

5 (1) Subject to any regulations made pursuant to paragraph 20(b), every regulation-making authority shall, within seven days after making a regulation, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

Copies to be certified

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

Registration of statutory instruments

6 Subject to subsection 7(1), the Clerk of the Privy Council shall register

- (a) every regulation transmitted to him pursuant to subsection 5(1);
- (b) every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published; and
- (c) every statutory instrument or other document that, pursuant to any regulation made under paragraph 20(g), is directed or authorized by the Clerk of the Privy Council to be published in the *Canada Gazette*.

Coming into force

9 (1) No regulation shall come into force on a day earlier than the day on which it is registered unless

- (a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or
- (b) it is a regulation of a class that, pursuant to paragraph 20(b), is exempted from the application of subsection 5(1),

in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day on which it is made or on such later day as may be stated in the regulation.



**Reconsideration of 2017-12-22 Decision
on Allegations of Non-Compliance by the Island Vegetable Co-Operative
Association, Prokam Enterprises Ltd., and Thomas Fresh Inc.**

Effective Date: 2019-11-18

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INTRODUCTION

1. By decision dated February 28, 2019 in the matter of BCVMC ats. Prokam and Thomas Fresh (N1715, N1716, N1718, N1719), the BCFIRB directed the Commission to reconsider certain orders made by it on December 22, 2017.

2. The orders made by the Commission which are subject to the BCFIRB's reconsideration direction are as follows:

48.1 Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.

48.2 Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

48.3 The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.

48.5 The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.

3. The following is a summary of the February 28, 2019 directions made by the BCFIRB:

Order 1. Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

Order 2. The Commission is directed to reconsider its decision to issue order 48.1.

Order 3. Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.

Order 4. The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.

Order 5. The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.

4. This reconsideration decision addresses Orders 1, 2, and 4.

BACKGROUND

5. On or about October 10, 2017, the Commission delivered “Compliance Notices” to each of Island Vegetable Cooperative Association, Prokam Enterprises Ltd. (Prokam) and Thomas Fresh. The Compliance Notices described alleged non-compliance with the General Order and directed the stakeholders to cease and desist certain specified activities.
6. The Compliance Notices were intended to operate as the first step in a SAFETI-based process initiated by the Commission. The purpose of each Compliance Notice was to advise of the particulars of alleged violations, and to require compliance with the existing provisions of the General Order pending a show-cause hearing to be conducted by way of written submissions.
7. After October 10, 2017, the Commission provided various additional materials to the stakeholders to better particularize the alleged non-compliance. Then, in accordance with a schedule established by the Commission, the stakeholders made written submissions with respect to the alleged non-compliance. These submissions were then circulated among the stakeholders so that they would each have an opportunity to file a brief reply submission.
8. The allegations of non-compliance were fully particularized in material provided to the stakeholders. The central allegation was that IVCA, a designated agency of the Commission, marketed potatoes grown by Prokam to Thomas Fresh at less than the minimum price established by the Commission.
9. On December 14, 2017, the Commission met to deliberate on the matter. At that meeting, the Commission reviewed the same material that had been provided to the stakeholders, as well as the written submission made by the stakeholders. The matter was considered by the Commission again on December 22nd, 2017.
10. On December 22, 2017 the Commission issued the following Orders:
 - 48.1. Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency’s standard terms.**
 - 48.2. Prokam’s 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.**
 - 48.3. The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer’s compliance with these orders.**
 - 48.4. The suspension of Mr. Bob Gill’s 2017-18 certificate of authority is to be addressed as an Agency matter. IVCA is to inform the Commission General Manager on if the certificate is to be re-instated or cancelled.**
 - 48.5. The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.**
49. These are the decisions and reasons of the Commission as “first instance regulator”. A person aggrieved by this decision may appeal the decision to the BCFIRB.

11. Four appeals were filed with the BCFIRB by vegetable producer Prokam Enterprises Ltd. (Prokam), and vegetable wholesaler Thomas Fresh Inc. (Thomas Fresh). The appellants appealed the decision of the BCVMC on October 10, 2017 to issue the "Compliance Notices" and the subsequent decision that was issued December 22, 2017.
12. The appeal was heard by a three member BCFIRB panel consisting of members Diane Pastoor, Al Sakalauskas, and John Les as the presiding chair. Dianne Pastoor's appointment to the BCFIRB ended on July 31, 2018. However, her appointment was extended to allow her to continue to exercise her powers as a member of the BCFIRB on this appeal. On November 15, 2018 the appointment of Chair John Les was rescinded. A decision on the appeal that was made by the two remaining panel members was issued February 28, 2019.
13. The February 28, 2019 decision directed the BCVMC to reconsider the following Commission decisions: the replacement of Prokam's Class 1 Producer Licence with a Class 4 Licence; the replacement of Thomas Fresh's Class 1 Wholesaler Licence with a Class 4 Wholesaler Licence, and, directing Prokam to market through BCfresh Inc. Furthermore, the decision also directed the Commission to reconsider the question of whether any compliance or remedial action is necessary in relation to Island Vegetable Co-Operative Association (IVCA). And, as part of the reconsideration process, that the parties' views be canvassed on the question of whether any Commissioners must recuse themselves from the discussions and deliberations concerning the reconsideration.

RECONSIDERATION PROCESS

14. By letter dated March 15, 2019, the Commission wrote to Thomas Fresh, Prokam and IVCA to solicit their views concerning the composition of a Commission panel to be struck for the purpose of reconsidering the matters described in the BCFIRB's orders 1, 2 and 4. In particular, the Commission proposed a panel comprised of the following members: John Newell, Eric Schlacht, Mike Reed, Brent Royal (newly elected Commissioner representing peppers). None of those persons ship to, or are shareholders, directors or officers of, BCfresh. The Commission asked that any comments concerning the proposed panel be submitted to the Commission no later than March 29, 2019.
15. By letter dated April 23, 2019, the Commission advised that it had reflected on comments made by IVCA, Thomas Fresh and Prokam regarding the composition of the panel, and that it had decided that the panel would consist of the originally proposed members, namely: John Newell, Eric Schlacht, Mike Reed and Brent Royal. As the decisions resulting from the reconsideration would be decisions of the Commission, the Commission did not think that it would be useful to include persons on the panel who are independent from the Commission itself, as suggested by IVCA.
16. In the same letter, the Commission invited each of IVCA, Thomas Fresh and Prokam to make written submissions to the Commission regarding the matters to be reconsidered, before May 10, 2019. Each of IVCA, Thomas Fresh and Prokam would then have an opportunity to file a brief reply submission in order to address any matter raised in any other party's original written submission. Any such reply submission was to be delivered to the Commission and to the other parties entitled to make submissions on or before May 24, 2019.

17. Written submissions were received from each of IVCA, Thomas Fresh and Prokam. On May 10, 2019 these submissions were distributed to each of IVCA, Thomas Fresh and Prokam so that they would have an opportunity to file a brief reply submission in order to address any matter raised in any other party's original written submission.
18. Reply submissions were received from each of IVCA, Thomas Fresh and Prokam by May 24, 2019.
19. On June 11, 2019 the Panel sought to engage in further consultation with industry stakeholders (potato producers and agencies, in particular) with respect to the reconsideration of the Commission's decision to issue order **48.1**: *"Effective February 1, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms."* Potato producers and designated agencies were invited to make submissions **with respect to order 48.1** on or before Wednesday **July 10, 2019**.
20. By letter dated July 5, 2019 all potato producers and designated storage crop agencies were informed that the due date for submissions would be extended to **July 19, 2019**. This letter also advised that any submissions received by the Commission would be provided to Thomas Fresh, Prokam and IVCA so that each may have the opportunity to make a brief reply before the matter is tabled before the Panel for consideration. Thomas Fresh, Prokam and IVCA were advised that reply submissions would be due Friday **August 2, 2019**.
21. Submissions were received by July 19, 2019 from BCfresh, Okanagan Grown Produce Ltd., and Vancouver Island Farm Products Inc. All three submissions were forwarded to IVCA, Thomas Fresh and Prokam on July 22, 2019. No further reply submissions were received from IVCA, Thomas Fresh or Prokam.

PARTICIPATION ON THIS APPOINTED PANEL

22. This Appointed Panel has been established by the Commission to reconsider the decisions made by the Commission on December 22, 2017. Participation on this Panel has been requested because the selected panel members:
 1. Have less conscious or perceived levels of bias with this issue, and,
 2. Are deemed to have less conflict-of-interest, based on their arms-length involvement with the storage crop sector.
23. The Appointed Panel has arrived at a consensus-based recommendation for the consideration of the BCVMC as a whole and has used a designed accountability process, with the intent to manage or limit the amount of bias or perceived bias present in the final recommendations presented to the BCVMC as a whole. Debbie Etsell, Chairperson of the BCVMC, and Andre Solymosi, General Manager of the BCVMC co-facilitated the process used by the Appointed Panel. Both the Chair and the General Manager worked together to prepare any advance reading required by this Appointed Panel, and, any responses to questions requiring further information or documentation.

Design Elements

24. The design is based upon the need for clarity of Order 3, (FIRB decision, Feb. 28, 2019) and all points following this order that relate to the management of reasonable bias or perceived bias when effectively managing commodity boards, and the decisions they must make on behalf of the industry as a whole.
25. All design elements and tools are there to ensure that the BCVMC is delivering on Order 3 of the Feb. 28, 2019 FIRB Appeal decision.
26. **Order 3: Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvas the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.**
27. Producer governance undoubtedly raises special challenges for commodity board members seeking to identify those situations where there might still be a special or unique conflict that exists over and above the fact that a person is a producer. These are challenges that must be met if the commodity boards are to function effectively.
28. The design has tools developed for the use of the Panelists that will assist them to check their bias(es) at certain points, ensuring that the process has considered the many angles that will be required to make decisions based on the S.A.F.E.T.I. principles that the BCFIRB has designed as a guide for use by Commodity Boards.

Roles and Responsibilities

Commission Members as Panelists

29. Board members must respect their presence as elected officials and do their jobs to ensure and to the best of their ability and in good faith, the proper governance of the industry as a whole.

Appointed Chair of the BCVMC

30. The appointed chair will facilitate the process, ensuring that each Panel member has the ability to independently have the ability and opportunity to make their own decision, and present why they have arrived at such a decision, and how they have managed any potential bias(es).
31. The Chair will further ensure that the Panel will then listen to the individual panel presentations, discuss each thoroughly, and then, using a consensus-based model, synthesize until a representative decision is arrived at and is then collectively voted upon.
32. The Chair will be accountable for ensuring that all voices are heard, and if there are bias(es) that cannot be overcome, that the Panelist be able to clearly state what may be blocking them from voting on a consensus-based decision. The Chair will also present any further options for Panelists to stand aside with the final decision, (without blocking it from passing). In summary, the Chair will use and guide the process and use of tools for each question, until consensus is reached.

General Manager of the BCVMC

33. The general manager will assist the Panel as required to the facilitate their decision-making process.

REGULATORY FRAMEWORK

34. The overall purpose of regulated marketing is to provide a framework for producer economic stability and to satisfy other related public interests. It is intended to benefit producers, the sector's value chain, and the public.
35. The BC regulated vegetable industry is organized under the Natural Products Marketing (BC) Act and the British Columbia Vegetable Scheme (the Scheme). The Scheme prescribes the rules, procedures and application.
36. The Commission is the first instance regulator and acts by the authority delegated through the Natural Products Marketing (BC) Act and its Regulations. It is responsible for applying the Scheme, including coordinating producer activities, to ensure Orderly Marketing. Orderly Marketing is achieved through managing the promotion, control, and regulation of production, transportation, packing, storage, and marketing of vegetables.
37. The Commission's General Order sets out how the Commission manages the promotion, control, and regulation of production, transportation, packing, storage, and marketing of the vegetables it regulates.
38. In delivering its responsibilities, the Commission takes into account the economic stability of the industry, including producer price, and encourages growth of vegetable production in naturally strategic areas. To help support these actions the Commission pulls together current production and marketing data. The Commission also represents the interests of the industry inter-provincially, as well as nationally and internationally.
39. The Commission administers the Scheme, in part by way of a sub-delegation of powers to licensed Agencies.
40. Under the Natural Products Marketing (BC) Act (NPMA), BCFIRB is responsible for the general supervision of the Commission, including ensuring sound marketing policy. BCFIRB is also responsible for prior-approval in the designation of Agencies by the Commission under the NPMA Regulations, as well as hearing appeals of any Commission decision, determination, or Order.

SUMMARY OF ORDERS FOR RECONSIDERATION

ORDER 1. Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

BCVMC Decision Reference:

48.3 *The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.*

Question: Should the Class Three Licence previously issued to Prokam be revoked and replaced with a licence of a different class?

48.5 *The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.*

Question: Should the Class Three Licence previously issued to Thomas Fresh be revoked and replaced with a licence of a different class?

ORDER 2. The Commission is directed to reconsider its decision to issue order 48.1.

BCVMC Decision Reference:

48.1 *Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.*

Question: Should BCfresh be the designated Agency for Prokam and should Prokam sign a GMA under the Agency standard terms?

ORDER 3. Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.

Issue to address: Consideration on absence of bias.

ORDER 4. The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.

Question: Should any compliance or remedial actions be taken with or to IVCA?

KEY PROVISIONS OF THE GENERAL ORDER

41. The following provisions of the BCVMC General Order have been referenced. A complete copy of each section can be found in Appendix A:

Part IV Licensing

Part V Agencies

Part VII Agency Responsibilities

Part IX General Prohibitions

Part XIV Designation of Agencies

Part XV Marketing of “New” or Additional Regulated Product ...

Part XVI Production and Delivery Allocations – General

Part XVII Procedure for Determining Delivery Allocation for Storage Crops

Schedule III Annual Licence Fees

PRIMARY REFERENCE MATERIALS

- The BCVMC Decision issued December 22, 2017
- The BCFIRB Appeal Decision issued February 2, 2019
- Submissions received as part of the Reconsideration Process
- Agricultural Products Marketing Act, RSC 1985
- British Columbia Vegetable Order, SOR/81-49
- Natural Products Marketing (BC) Act
- British Columbia Vegetable Scheme
- The BCVMC General Order

42. The Panel has carefully considered all of the materials and submissions referred to above, even though it does not intend to refer to all of it in the course of this decision.

PANEL FINDINGS, REASONS, AND RECOMMENDATIONS

43. For each of the questions on the associated order to be reconsidered, findings, evidence and decisions are listed that are applicable to the reconsideration and taken from the

43.1. Decision document issued by the Commission on December 22, 2017

43.2. The BCFIRB decision on the appeal that was issued February 28, 2019

Thomas Fresh License Class

44. *Question: Should the Class Three Licence previously issued to Thomas Fresh be revoked and replaced with a licence of a different class?*

Prima Facie Evidence to be Reconsidered:

7.3. The purchase order issued by Thomas Fresh was at pricing below the IVCA product quote sheet provided by IVCA to Thomas Fresh. Therefore, Thomas Fresh had knowingly procured regulated BC grown product at pricing below the price quoted by the agency and below the minimum price.

7.7. For each of the 125 invoices listed, the invoiced price was at pricing below the IVCA product quote sheet issued by IVCA to Thomas Fresh. Therefore, Thomas Fresh had knowingly procured regulated BC grown product at pricing below the price quoted by the agency and below the minimum price.

7.17. Bob Gill, Prokam, and Thomas Fresh acted in blatant disregard of the Agency's authority, the Commission General Order, and established policy approved by the Commission as the first instance regulator to maintain orderly marketing of regulated BC grown vegetables.

7.15. Thomas Fresh, a wholesaler licensed by the Commission, entered into a contract directly with Prokam (a registered producer of regulated vegetables) and Sam Enterprises (an entity that is not a registered producer of regulated vegetables).

BCVMC Preliminary Findings to be Reconsidered:

13.4. Thomas Fresh is not privileged to the confidential minimum pricing sheets and the general orders that direct Agency behaviour. Though its behaviour is suspect, it is not reasonable beyond a doubt that Thomas Fresh acted in willful non-compliance of the general order and commission policy.

13.5. Thomas Fresh entered into a contract to directly purchase regulated product with an un-licensed producer. This is in direct violation of the general order and the conditions attached to a wholesaler licence. All sales of regulated vegetables must be managed by an Agency. All approved contracts are between a wholesaler (Thomas Fresh) and an Agency (IVCA)

BCVMC decision on Licence Class to be reconsidered:

47. Thomas Fresh's wholesale licence class is to be adjusted to reflect its disregard to orderly marketing of BC regulated vegetables. Thomas Fresh had entered into a contract to directly purchase regulated product with an un-licensed producer. This is in direct violation of the general order and the conditions attached to a wholesaler licence. The Commission is also satisfied that Thomas Fresh played a significant role in the marketing of regulated product at below the minimum price established by the Commission.

BCFIRB Findings of Key Facts to be considered:

16. Thomas Fresh is registered as a wholesaler of vegetables in BC with operations in BC, Alberta and Saskatchewan.

21. As early as 2015 IVCA, through its previous general manager and its president, was actively soliciting out-of-province sales with Thomas Fresh in Calgary and Saskatoon. IVCA supplied Prokam potatoes to Thomas Fresh in 2016. In March 2017, Thomas Fresh sent signed 60-day forward contracts to IVCA and in April 2017, Mr. Gill executed these contracts to supply Thomas Fresh with Prokam's potatoes at a set price.

BCFRIB Findings and Reasons to be considered:

35. Given the length and complexity of the submissions, we find it useful to set out our findings and orders first, with our supporting reasons set out below.

Finding The Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, or to issue any related cease and desist orders respecting such sales. We reach this conclusion because the Commission has not complied with the federal Statutory Instruments Act, a step that is required for the Commission to be able to avail itself of the interprovincial price setting authority that is provided by the federal Agricultural Products Marketing Act and the British Columbia Vegetable Order.

43. It is not necessary for us to engage in a complex exercise of finding the “locus” of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.

88. The appellants made arguments that the Commission made decisions in the absence of any evidence giving two examples, that there was no evidence before the Commission at the time the cease and desist orders were issued that Thomas Fresh had done anything wrong, nor was there evidence before the Commission to support the findings about the adequacy of BCfresh as an agency. Given that these arguments are relevant to Orders 48.1, 48.3, 48.5, which orders we have remitted back to the Commission for reconsideration, there is no need to address them further.

Panel Findings and Reasons:

45. Given that the BCFIRB has ruled that the Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, the panel is to reconsider if the licence issued to Thomas Fresh be reverted back to a Class 1 Licence. Though the BCFIRB made no findings with respect to whether Thomas Fresh had “entered into a contract to directly purchase regulated product with an un-licensed producer”. It is acknowledged that the Commission’s main concern was the role that Thomas Fresh played “in the marketing of regulated product at below the minimum price”.
46. The panel concludes that there is not sufficient factual evidence to find that Thomas Fresh directly acted contrary to the general order and commission policy. However, the panel does believe that Thomas Fresh indirectly facilitated the circumvention of the delivery allocation rules by Prokam. As stated in par.34 of the BCFIRB decision, “All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.” Thomas Fresh is a direct competitor to BCfresh. Having access to a significant volume of bulk, cheap, early potatoes would enable Thomas Fresh, a wholesaler, to directly compete with an agency on regulated BC storage crop vegetables in the table potato market outside the province of BC. This market is currently serviced by at least one of four Agencies licensed to market regulated BC storage crop vegetables.

Panel Recommendation:

47. The Class IV Licence issued to Thomas Fresh be replaced with a Class I License

48. In the absence of the Commission’s authority to apply its minimum pricing rules to these interprovincial sales, the Commission cannot hold Thomas Fresh accountable for this significant compromise of the regulatory framework and the major impact it has on orderly marketing. Therefore, a Class IV licence cannot be imposed on Thomas Fresh. The panel does believe that Thomas Fresh played a role, however, the agency should have been in a position to simply take action to correct the situation.

49. It is accepted that if an agency is functioning as is expected, the incident should have an insignificant impact or little disruption to an agency's normal operations and its ability to enforce compliance to the regulatory framework. Therefore, the conduct of Thomas Fresh is insignificant.

Prokam License Class

50. *Question: Should the Class One Licence previously issued to Prokam be revoked and replaced with a licence of a different class?*

BCVMC Prima Facie Evidence to be reconsidered:

7.9. The evidence suggests that in week numbers 37 and 38, Kennebec Potatoes had been shipped by Prokam and sold by IVCA. Prokam does not have any delivery allocation rights for Kennebec Potatoes and therefore is not permitted to ship Kennebec Potatoes into the market, without special permission granted by the Commission. As the designated agency for Prokam, IVCA is also to be held accountable for allowing this product to enter the market without regard to delivery allocation rights of other IVCA producers and the industry.

7.10. IVCA's attempts to work with Prokam and Bob Gill have been futile and have resulted in extensive verbal abuse and constant refusal to communicate effectively and take direction from Brian Meyers, IVCA General Manager.

7.11. The actions of Bob Dhillon and Bob Gill demonstrate a complete lack of acknowledgement of the IVCA General Manager's authority over the operations of IVCA and the Agency's authority to manage the marketing of regulated products.

7.12. The actions of Bob Dhillon and Bob Gill have put undue stress on IVCA staff and created a toxic environment that impedes on their ability to operate effectively as an Agency to fairly represent all its producers in the market place and function in accordance of the authority granted to it by the Commission.

7.13. Through the actions of Bob Dhillon (Prokam Enterprises) and Bob Gill, their refusal to communicate effectively with the IVCA General Manager and his staff has inadvertently allowed for regulated product to be sold without a price being set and approved by the Commission and prohibits the General Manager from performing his responsibility to market and sell regulated product managed by IVCA.

7.16. Prokam, a producer licensed by the Commission, entered into a contract directly with Thomas Fresh.

7.17. Bob Gill, Prokam, and Thomas Fresh acted in blatant disregard of the Agency's authority, the Commission General Order, and established policy approved by the Commission as the first instance regulator to maintain orderly marketing of regulated BC grown vegetables.

BCVMC Preliminary Findings to be reconsidered:

13.2. Prokam Enterprises, Bob Dhillon, shipped potatoes through IVCA at pricing below the minimum price that was not approved by the Commission.

13.3. Prokam Enterprises, Bob Dhillon, shipped Kennebec potatoes without having any delivery allocation rights to the market and did so without the approval of the Commission.

13.7. The IVCA general manager and IVCA office staff had repeatedly informed Bob Gill and Bob Dhillon (Prokam) of the issues. Both Bob Gill and Bob Dhillon failed to take adequate action to respect IVCA management authority in the marketing of regulated vegetables and comply with the direction given to correct the issues.

13.8. Prokam Enterprises (Bob Dhillon) is licensed as a producer and has no authority to market regulated product. However, as a member of the IVCA board he is privileged to commission regulations and policy that guide how a designate agency is expected to perform to promote orderly marketing of regulated vegetables.

BCVMC decision on Licence Class and Delivery Allocation to be reconsidered:

42. The Commission is of the view that Prokam's Delivery Allocation must be adjusted to negate the effect of shipments achieved through sales made at less than the minimum price. No permission was granted to IVCA to market at pricing below the established minimum price.

43. In addition, the shipments of Kennebec Potatoes will not count towards the calculation of delivery allocation for this product. Prokam does not have any delivery allocation for Kennebec potatoes and was not granted permission by the Commission to ship any Kennebec Potatoes into the market.

44. Prokam's licence class is to be adjusted to reflect its disregard of delivery allocation rights on Kennebec potatoes and in acknowledgement that it played a significant role in the marketing of regulated product at pricing below the minimum price established by the Commission.

BCFIRB Findings of Key Facts to be considered:

15. Mr. Dhillon and his wife own and operate Prokam, a registered vegetable producer in Abbotsford, BC. Prokam holds DA for potatoes in the amount of 26 tons purchased in late 2015 which represents production from approximately 60-70 acres. Prokam has early land and with skilled cropping practices has the potential to bring an early crop to market where it can command a premium price.

17. Island Vegetable Co-operative Association (IVCA) is a designated agency of the Commission with its office on Vancouver Island. It is a cooperative with a board comprised of representatives of four of its approximately 8 growers. Since 2014, Prokam has shipped regulated and unregulated vegetables to IVCA and in 2017, was its largest shipper of potatoes with approximately 80 -90% of IVCA's volume. Mr. Michell is IVCA's president and Mr. Dhillon is its vice-president.

20. In 2017, Prokam increased its production of potatoes well in excess of its DA to 380 acres in response to IVCA's growth plan to fill the premium early wholesale retail market. In April 2017, Mr. Dhillon's brother-in-law Mr. Gill was hired as IVCA's mainland sales representative primarily to sell Prokam's potatoes.

23. The Commission made it clear that this earlier application for agency license was not a marketing plan for IVCA's regulated product and issued a warning notice, but IVCA remained non-compliant with Part XV of the General Orders requiring Commission approval where an agency intended to market new product (product not covered by DA). Mr. Dhillon in his role as vice-president of IVCA and Mr. Gill as an IVCA employee participated in these decisions to thwart Commission authority.

26. On the evidence, there is no dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon confirmed that IVCA president Mr. Michell wanted to make sure that if there was a gap in production due to inconsistent quality, IVCA could fill the gap.

27. Mr. Dhillon, either in his role as the principal of Prokam or as a director of IVCA, did not seek approval from the Commission before producing or shipping regulated product not covered by or in excess of Prokam's DA as required by the General Orders.

33. Having heard all the evidence, we find Mr. Dhillon's role to be a bit more nuanced than found by the Commission. Mr. Dhillon, in his role as IVCA vice-president and director, was a force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of the potato production in BC. This production significantly increased IVCA's capacity. Mr. Dhillon acknowledged that IVCA needed Prokam as a grower, both financially and for growth. Mr. Dhillon was not beneath threatening to fire staff or pulling his money from the agency in order to get his way. With respect to Mr. Gill, Mr. Dhillon was instrumental in bringing him into IVCA and supported his employment handling IVCA's "mainland sales" which in fact were the sales of Prokam potatoes to Thomas Fresh. While Mr. Dhillon denied paying part of Mr. Gill's salary, we accept Mr. Gill's evidence that Mr. Dhillon negotiated half his salary to be paid through Mr. Dhillon's father's company, Sam Enterprises.

34. However, it is also clear that IVCA through its previous general manager and its current president actively solicited the Thomas Fresh account over several years. While Mr. Gill may have signed the contracts, he did so in full knowledge that IVCA wanted a long term agreement with Thomas Fresh to access the tonnage fees to address agency cash flow problems. While the current general manager may have been late to a realization that the contracts were signed and the implications of those contracts, the inescapable conclusion is that the management of IVCA (not just Mr. Dhillon) actively participated in obtaining these contracts. All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.

BCFRIB Findings, and Reasons to be considered:

43. It is not necessary for us to engage in a complex exercise of finding the "locus" of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.

51. In our view, orders 48.3 and 48.5 of the Commission's December decision relied, to some degree, on the Commission's belief that it had the authority to apply its minimum pricing rules to the transactions at issue. In the circumstances, one option for the panel would be to simply reverse those orders on the basis that the Commission's position on the validity and applicability of its minimum pricing rules to the facts at issue has been rejected by the panel.

52. However, we also note that this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes and some remaining findings against Prokam in respect of DA issues (discussed below). We further note that a full review of the materials presented to us makes clear the conduct of Prokam and/or its officers was not beyond reproach.

53. In all the circumstances, we believe the question of whether the appellants' conduct warrants any further action by the Commission (irrespective of the minimum pricing rules in relation to interprovincial sales) is one that must still be answered, and it is one more appropriately considered in the first instance by the Commission – not the panel.

Panel Findings and Reasons:

51. The BCFIRB decision on the appeal made the finding that all shipments on Kennebec potatoes and all exports are not to be included in the calculation of delivery allocation. The finding and reasons for this BCFIRB decision are provided below:

Finding **The panel does not accept the appellants' submission that there is any basis to vary or rescind Commission order 48.2 and no reconsideration of that order is required.**

67. Order 48.2 states: Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

68. In our view, this is a sound decision that is appropriate in all of the circumstances of this case. We reach that conclusion for the following reasons

69. The General Orders set out the following General Prohibition on producers.

12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.

70. Part XV, XVI and XVII, the General Orders establish rules for DA and the marketing of new or additional regulated product. Part XV of the General Orders contemplates that new or additional regulated product can only be marketed by existing agencies with Commission approval. Section 2 requires an agency wanting to sell additional regulated product to submit a business plan covering the period of time specified by the Commission. Section 3 gives the Commission discretion to hold a hearing concerning the application by the agency to market new or additional regulated product.

71. In this case, IVCA and Prokam made a calculated decision not to provide a business plan satisfactory to the Commission for the new production and did not meet with the Commission to explain their intentions. Instead, they argue that IVCA's agency licence application submitted in November 2016 should have been adequate for the Commission's purposes. However, the Commission clearly and repeatedly articulated that the agency application was not sufficient for its purposes and asked for further information which was never provided.

72. With respect to Prokam's argument that the potatoes it shipped over DA are legitimate "gap fillers", the Commission explained its policy that gap fillers are to be registered and approved by the Commission on an annual basis. It recognized that gap fillers are needed to address shorting of orders by the agency for its established customer base and the agency must prove the market demand is new and not serviced by the industries' existing DA or supplied by another agency.

73. Commission witnesses explained that the purpose of gap filling was to allow growers to produce modest amounts over DA to take advantage of small, transitory, and temporary opportunities to fill market shortages throughout the marketing year. There is no dispute that Mr. Dhillon has early land and may well have had potatoes available for market a week or two before other growers and this would appear to be what the Commission would view as a legitimate "gap". However, in the absence of Commission authorization for producing, shipping and marketing in excess of DA and a determination that the regulated product was indeed a legitimate gap filler, Prokam and IVCA have not met their obligations under the General Orders to obtain Commission authorization.

74. Prokam appears to be arguing that had it applied, the authorization would have been given as these were legitimate gap fillers. But that is not Prokam's decision to make. Furthermore, we are not prepared

to accept that Prokam's marketing of huge volumes (348 tons) of potatoes falls within the concept of legitimate gap fillers as described by the Commission's witnesses. As a result, we agree with the Commission's decision not to include this production in Prokam's five year rolling average to calculate earned DA.

75. Similarly, there does not appear to be any dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon said he had a discussion with IVCA president Mr. Michell, who wanted to make sure that if there was a gap in production caused by another grower's inconsistent quality, IVCA could fill the gap. Both Mr. Dhillon and Mr. Gill acknowledged that Prokam shipped Kennebec potatoes without DA (about 4000 lbs) but suggest this was a permissible gap filler as no other grower could supply the product at the time.

76. On this same issue, the appellants took issue with the Commission's reliance on the Hothi letter referred to earlier in which Mr. Hothi advised he had Kennebec potatoes ready for shipment in September 2017. This letter was not disclosed in advance of the show cause process and the Commission relied on it to make an adverse finding which the appellants argue was procedurally unfair.

77. To the extent that the failure to disclose the Hothi letter was procedurally unfair, we conclude that the hearing de novo before BCFIRB is sufficient to cure that defect in the Commission's process. However, in our view, the Hothi letter is not the only basis upon which to base an adverse finding against Prokam and IVCA. The evidence of Commission general manager Mr. Solymosi was that if a grower plants regulated product without DA, he must acknowledge the priority of those growers with DA that had served the market over time; growers planting product without DA are not permitted to enter the marketplace without Commission approval.

78. In this case, IVCA had a grower with Kennebec DA. There is no record that IVCA met its obligations under Parts XV, XVI and XVII of the General Orders; it did not contact the Commission to demonstrate that there was in fact a quality or supply issue with their grower's potatoes nor did it obtain the Commission's authorization for gap filling. In the absence of Commission authorization, there is no basis for this panel to make a finding that Prokam's Kennebec production should have formed part of its five year rolling average to calculate earned DA.

79. In reaching the foregoing two conclusions with respect to DA generally, and Kennebecs specifically, we note that the Commission's order 48.2 was not premised upon the application of the minimum pricing rules to interprovincial sales discussed in Finding 1.

52. For the same reasons presented in support of the above finding on Commission order 48.2, and the BCFIRB findings (par.15,17,20,23,26,27,33,34) that are outlined above, the Panel agrees that a Class I licence is not an appropriate outcome for Prokam. It is clear for the reasons stated in par. 68 to 75 in BCFIRB's decision that both Prokam and IVCA made calculated decisions to circumvent the general order and policy. Both Prokam and IVCA did not meet with the Commission to explain their intentions. The Commission had clearly and repeatedly articulated that the agency licence application submitted in November 2016 was not sufficient for satisfying PART XV of the General Order regarding the marketing of new or additional regulated product and parts XV, XVI and XVII that establish the rules for delivery allocation that are applied to all regulated storage crop vegetables.

53. Par.33 of BCFIRB's decision provides some context as to the extent of interdependence IVCA had with Mr. Dhillon in achieving growth aspirations. This business arrangement was an equal three way partnership and Mr. Dhillon, as stated in par.33, was a "force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of

the potato production in BC.” And furthermore, as stated in par.34 “All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.”

27. Mr. Dhillon, either in his role as the principal of Prokam or as a director of IVCA, did not seek approval from the Commission before producing or shipping regulated product not covered by or in excess of Prokam’s DA as required by the General Orders.

54. Delivery Allocation (DA) is allocated specifically to a producer but remains the property of the Commission¹. The decisions to plant Kennebec potatoes without delivery allocation, plant additional acreage in early potatoes that would yield a massive volume of potatoes way in excess of DA, and to not seek approval by the Commission rests with the producer. The producer is responsible for ensuring that they are in compliance with the General Order and the Commission’s authority. Mr. Dhillon was also a member of the IVCA board and was aware of Commission regulations and policy that guide how a designated agency is expected to perform to promote orderly marketing of regulated vegetables. These were deliberate decisions that were intentionally taken by Prokam. As a director and vice-president of IVCA and one of the two dominant producers in IVCA’s producer group, Prokam used its power and influence to get his way. Prokam would not have invested significant capital in the planting of an enormous crop of regulated vegetables if they did not intend to have the product marketed and sold. It is believed that Prokam was fixated on an opportunity to circumvent the orderly marketing system of regulated BC grown vegetables that was based on their understanding of the limitations on the BCVMC pricing authority. It had intentions to sell early potatoes for cheap for interprovincial sales to Thomas Fresh to take to the market. It had no intention to comply with the BCVMC general order and seek approval from the Commission because it was assumed by Prokam that these sales were outside of the Commission’s authority and an enormous GAP in the market was being filled. In fact, since the Commission was operating in a manner that controlled the contracted and minimum pricing on BC product to this market, the only reason why this opportunity existed was because of the cheap price that would be paid for the over 300 acres of potatoes that would be grown by Prokam without approved DA. If a coordinate pricing approach to the market was sustained, this opportunity would not have existed.

55. As stated in par. 47 – 48 of the BCFIRB in its decision, the Commission had not availed itself of this authority by complying with the Statutory Instruments Act. Under the current wording in the British Columbia Vegetable Order, SOR/81-49, it is not practical to do so and therefore minimum pricing jurisdiction remains limited to sales within BC.

40. Section 4 of the Scheme makes clear that the Commission’s power to regulate marketing is limited to activities “in the Province”. Further, to the extent that section 4 of the Scheme includes all of the powers of section 11 of the NPMA, we note that it contains an express geographic limitation in relation to the establishment of minimum prices. Specifically, section 11(1)(k) provides the power “to set ...minimum prices at which a regulated product ... may be bought or sold in British Columbia” (emphasis added). This is the only provision of section 11 that expressly contains such a limitation.

56. Regardless of the findings that there was no valid minimum price that could be issued on the inter-provincial sales, Prokam did not comply with the Commission’s authority over DA and approving

¹ General Order PART XVI Par.3 Delivery and Production Allocations are a privilege granted by the Commission under a Producer’s license. Delivery and Production Allocations shall have no monetary value.

new DA to service new markets. The massive volume of potatoes that was produced by Prokam dwarfed its actual approved DA. Planting 380 acres when you have DA for 60-70 acres is a deliberate action that is not constituted as a "GAP Filler". Prokam's actions were intentional and a direct violation of the principles of DA and the producer's obligations that are part of this privilege. Applicable excerpts from the General Order that apply,

PART XVI PRODUCTION AND DELIVERY ALLOCATIONS – GENERAL

1. The purposes of the Delivery and Production Allocation Procedures contained in Part XVII and Part XVIII are to identify the principles and guidelines by which the Commission will support and enhance a regulated marketing system for the intraprovincial, interprovincial and export trade of regulated crops.

These purposes include:

- (a) The preservation of market access for Producers who have served the market over time.
- (b) The provision of access for new entrants.
- (c) The desire to create and maintain long-term, sustainable, food safe, farming and greenhouse operations.
- (d) The provision of opportunity for industry growth.
- (e) The provision of an orderly marketing system.

2. In the event a Producer or any other Person realizes a benefit or advantage in regard to the application of the Procedures contained in Part XVII and Part XVIII, or the utilization of or access to Delivery or Production Allocations, that are not consistent with the object and purpose of these Procedures, the Commission may deny such Producer or Person that benefit or advantage and may interpret these Procedures in a manner consistent with the object and purpose of the policy as articulated in section 1 of this Part.

3. Delivery and Production Allocations are a privilege granted by the Commission under a Producer's license. Delivery and Production Allocations shall have no monetary value.

57. The rules that are in place in PARTs XV, XVI and XVII of the General Order are there to ensure that orderly marketing is maintained and that they facilitate an orderly process to manage growth. Prokam was aware of the volume of DA it was privileged to. The acceptable and appropriate approach to the "opportunity" by Prokam would have been to seek approval first by the Commission to be allocated additional DA, well in advance of buying the seed and planting the significant increase in acreage. As part of this approval process a business plan, including a marketing plan that is sponsored by their designated agency, would have been required to be submitted. Without a confirmed approval by the Commission, Prokam should not have been shipping potatoes to Thomas Fresh. Unless Market access is granted, these potatoes should have remained in the field or in storage.

58. In the appellant's submission, the appellant took the position that it is the responsibility of the agency, not the grower, to seek approvals by the Commission. Documentary evidence was also provided that shows that the extent of this failure to seek approval was a deliberate decision of IVCA President Mr. Michell, and the new business was to remain confidential between the IVCA general manager, the President (Mr. Michell) and Prokam (Mr. Dhillon). It is the panel's opinion that this evidence supports the fact that all three parties consented to what was being done and each played a role in the deceptive behavior and unsanctioned business opportunity. Such behavior is not acceptable and will not be tolerated by the Commission. The correct behavior would have been to

comply with the Commission's authority, consult with the Commission, and formally apply for new market DA approval. It appears that the actions were deliberate by both Prokam and IVCA.

Panel Recommendation:

59. The Class IV Licence issued to Prokam be replaced with a Class III License

60. It is expected that all producers comply with the Commission's General Order, respect its regulatory authority, and act in a manner that demonstrate regard to the privilege of Delivery Allocation (DA) granted under a Producer's license. Actions taken by a producer are expected to be conducive of the principles on which DA is granted.

61. The panel finds that Prokam's actions constitute a deliberate effort to circumvent the authority of the Commission and the regulated marketing scheme for BC grown vegetables. Mr. Dhillon would have known of the rules both as a producer and as a director of IVCA. The board of directors are in charge of the management of the company's business; they make the strategic and operational decisions of the company and are responsible for ensuring that the company meets its statutory obligations. He is expected to be aware that the actions he took would require to be sanctioned by the Commission. The scale of the action is not insignificant or minor, and therefore does not qualify for a Class I or Class II licence. This was a major non-compliance and is deserving of a Class IV licence. However, as noted in BCFIRB's decision par.52, "this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes" Some of this blame for why this situation occurred is equally attributed to the dysfunctional nature of the IVCA agency, and not just Mr. Dhillon in his role as the director and vice president. Both parties had something to gain. As a director and one of the two dominant producers in IVCA, Prokam used its power and influence to get his way to his own benefit. It is the panel view that the actions taken by Prokam were a consequence of a significant modification to the standard operational practices expected of an agency in the regulatory framework. A properly functioning agency should have been able to manage and control the situation and ensure that they are operating in compliance of the General Order and Commission authority. For this reason, the panel classifies the severity of the non-compliance as Moderate, and therefore Prokam is deserving of a Class III licence.

62. Prokam does not qualify to apply for a Producer-Shipper Licence

63. For the Commission to even consider an application from a producer for a producer-shipper licence, that producer would need to be deserving of the privilege, and therefore in good standing with the Commission. Once Prokam's Class III licence reverts back to a Class I licence it may submit an application to the Commission. As long as Prokam is an active producer growing regulated vegetables for the retail, wholesale, or food service markets, and remains compliant over the next three licence periods, this opportunity could be available to Prokam for the 2022/23 Crop Year.

BCfresh

64. Question: *Should BCfresh be the designated Agency for Prokam and should Prokam sign a GMA under the Agency standard terms?*

Agency designation Questions to be Reconsidered:

20. In determining the designated Agency, the Commission has reflected upon the following questions:

- 1) Does the Agency have sufficient staff with the necessary experience to effectively manage the producer's supply and market the regulated product?
- 2) Does the move to this Agency enhance orderly marketing?
- 3) What benefits, if any, not currently available to Prokam will accrue to this producer if their regulated product is marketed through this Agency?

BCFRIB Findings of Key Facts to be Considered:

18. BCfresh is also a designated agency with its office in the Lower Mainland. BCfresh is the largest agency in BC and is a private company owned by its 31 grower/shareholders who provide approximately 90% of the regulated volume of vegetables it ships.

BCFRIB Findings and Reasons to be considered:

88. The appellants made arguments that the Commission made decisions in the absence of any evidence giving two examples, that there was no evidence before the Commission at the time the cease and desist orders were issued that Thomas Fresh had done anything wrong, nor was there evidence before the Commission to support the findings about the adequacy of BCfresh as an agency. Given that these arguments are relevant to Orders 48.1, 48.3, 48.5, which orders we have remitted back to the Commission for reconsideration, there is no need to address them further.

Panel Findings and Reasons:

65. The panel finds that BCfresh is well positioned to represent Prokam in the market. For the reasons stated in in the BCVMC's December 22, 20187 decision, BCfresh has the resources and experience in the market that can support Prokam's growth ambitions within the constraints of the regulatory framework. BCfresh as the designated agency for Prokam is endorsed by both Okanagan Grown Produce Ltd. (OGP) and Vancouver Island Farm Products Inc. (VIFP) and its acceptance by BCfresh is confirmed in BCfresh's submission in the reconsideration process:

"BCfresh agrees with the analysis set out in the December 22, 2017 decision of the VMC and confirms that BCfresh is willing and able to act as agency for Prokam and will treat Prokam, as a producer, fairly and effectively, in the marketing of its produce. BCfresh will also work with Prokam to identify ways within the General Order that they can increase their future Delivery Allocation to accommodate some of their expanded production plans.

The above referenced reasons for the decision of the VMC to designate BCfresh as the agency for Prokam meet the standards of a S.A.F.E.T.I. analysis.

BCfresh has a long history of acting as an agency while, at the same time, acting in compliance with the VMC's General Orders."

66. However, the panel also believes that other licensed storage crop agencies have the ability to market Prokam’s regulated vegetables, but chose to express support for BCfresh as the preferred choice.
67. To understand why this is, we must revisit why this instance of non-compliance happened in the first place. Prokam, through IVCA, supplied Thomas Fresh with cheap bulk product that could be graded, sized and repacked into product packaged for end use². Giving the product in bulk to Thomas Fresh enables them to compete against agencies and permits them to be a de facto agency. By relinquishing control of the regulated BC grown product in the scale that was permitted, IVCA abdicated its implicit responsibility to act in a manner that enhances orderly marketing. IVCA lost control of its obligations to BC producers and the Commission over pricing and other aspects of marketing that it is delegated to carry out under the authority granted to it by the Commission, and pre-approved by the BCFIRB. Agencies need to maintain control over market access. A Wholesaler has no legal obligation to represent the interests of producers of regulated vegetables grown in BC. The volume of potatoes sold by IVCA to Thomas Fresh amounted to 9% of the 2017 potato production in BC and the bulk of the potato volume that was managed by the agency.
68. It is also the responsibility of agencies to represent growers and market the product in a manner that maximizes net grower return for the benefit of all producers. In the current and foreseeable market, net grower returns are maximized by an agency business model that adopts as its core business the marketing and sale of product packed for end use. An agency is not a commission salesperson who brokers product by arranging transactions between a buyer and a seller for a fee. This licence category is defined and already exists within the regulatory framework. The overarching mandate of an Agency is to represent a group of licensed producers and carry out the marketing duties of regulated vegetables;
- i. in compliance of the Consolidated General Order;
 - ii. in respect of the operating principles of the orderly marketing system;
 - iii. for the benefit of its producers;
 - iv. in agreement with the interests of the industry.
69. Regardless of whether or not a new market exists, it is paramount that the regulated product being placed into the market is food safe and that the actions of an agency, or of a producer of regulated BC grown vegetables, do not expose the industry to unnecessary food safety risk that can be mitigated under our regulatory authority. Food safety risk is mitigated when the washing, grading and packing of the regulated vegetable into a product packaged for end use are managed at the source, where the Commission and agencies have oversight.
70. Increasing our control over how we market product is within the Commission’s authority do so by the powers granted to it under the Natural Products Marketing (BC) Act. Providing clarity on the market that must be an agency’s primary target market segment enhances orderly marketing.
71. Therefore, the panel believes that it is in the best interest of the industry to introduce an Interim Order adopting the definition “Packed For End Use³” and mandating that products be marketed by an agency as “ Packed For End Use³” in all instances except where the express, prior, written

² “Packed For End Use” means graded and packaged in a Container in the manner in which the food: (a) is ordinarily sold to, used by, or purchased by, a retailer or a consumer; or (b) may reasonably be expected to be obtained by a food service institution; such that no further repacking occurs, or is necessary or contemplated.

approval of the Commission is sought and obtained. The section titled 'Interim Order' in this document provides details on the order that is to be enacted.

Panel Recommendation:

72. With the enactment of this interim order, the panel offers Prokam with three options:

- Prokam can chose to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.
- If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA that was entered into in February 15, 2018.
- If BCfresh releases Prokam from the GMA, Prokam can consult with other licensed storage crop agencies to represent the grower in consideration of the new interim order.

73. Regardless of what Prokam decides to do and which agency is the designated agency for Prokam, both the Producer and Agency need to comply with the Interim Order and the rules of DA. If the producer intends to plant in excess of their DA, for their designated agency to market this additional regulated product they need to comply with *PART XV of the General Order, Marketing Of "New" Or Additional Regulated Product By Existing Agencies and Producer-Shippers*.

IVCA

74. Question: *Should any compliance or remedial actions be taken with or to IVCA?*

Prima Facie Evidence to be reconsidered:

7.1. IVCA was engaged in the selling of Prokam potatoes to Thomas Fresh on fourteen occurrences between the dates of August 23rd and October 4th, 2017, at a price that was in contravention of the minimum price set by the Commission for that period, and executed without commission authorization.

7.2. A total of 170 short tons (340,450lbs) of regulated BC grown product was sold by IVCA between two cents (5%) and 34 cents (59%) below the Commission approved minimum price. This price is set weekly and in accordance with the approved policy for establishing weekly minimum prices for all BC grown regulated storage crops. All storage crop agency managers participate in establishing the weekly minimum price and are responsible to ensure that all agency sales are in compliance of the approved minimum price.

7.4. The evidence also suggests that IVCA was not permitted to offer the product at a lower price than what was stated on the product quote sheet issued by IVCA to Thomas Fresh. Prices on each product quote sheet issued by IVCA to Thomas Fresh for the subject transactions were quoted at the Commission approved minimum price.

7.5. The total volume of product acquired by Thomas Fresh at below minimum price and supplied from Prokam over this period is 2.688565 Million pounds.

7.6. IVCA was engaged in the selling of Prokam potatoes to Thomas Fresh on a total of 125 occurrences between the dates of July 30th, 2017 and September 24th, 2017 at a price that was below the minimum price set weekly by the Commission over this period, and executed these sales without commission authorization.

7.8. The evidence also suggests that IVCA was not permitted to offer the product at a lower price than what was stated on the price quote sheet. Prices on each quote sheet issued by IVCA to Thomas Fresh for the subject transactions were quoted at the Commission approved minimum price.

7.9. The evidence suggests that in week numbers 37 and 38, Kennebec Potatoes had been shipped by Prokam and sold by IVCA. Prokam does not have any delivery allocation rights for Kennebec Potatoes and therefore is not permitted to ship Kennebec Potatoes into the market, without special permission granted by the Commission. As the designated agency for Prokam, IVCA is also to be held accountable for allowing this product to enter the market without regard to delivery allocation rights of other IVCA producers and the industry.

7.14. Bob Gill has deleted records from IVCA's order entry system. This action has put IVCA into non-compliance with accounting traceability requirements and may provide further evidence to support the revocation of Bob Gill's authority to handle regulated product.

7.18. Through the actions of Bob Gill (IVCA Sales Associate), IVCA had permitted an unauthorized contract to be signed directly between a wholesaler, Thomas Fresh, and a producer, Prokam, and facilitated the activity by allowing this contracted sale to be processed through the agency.

7.19. Through the actions of Bob Gill (IVCA Sales Associate), IVCA allowed for the shipment of product to the market through an un-licensed producer (Sam Enterprises Ltd.)

Preliminary Findings to be considered:

13.1. Bob Gill, an employee of IVCA entered into contracted pricing on potatoes with Thomas Fresh at pricing that was not approved by the Commission and facilitated the selling of product at below minimum price. Furthermore, these contracts were established with Sam Enterprises, an unregistered producer with no delivery allocation rights for any regulated vegetable.

13.6. IVCA sold product to Thomas Fresh at pricing that was below the established FOB minimum price and did not have approval to do so by the Commission.

13.9. The IVCA office staff and members of the board have willfully complied with Commission staff to provide evidence on the matter. However, IVCA is also to be held accountable for the issues that have materialized.

13.11. The Commission designates its marketing authority to Agencies. For the system to be effective, Agencies need to be diligent in managing their responsibility and robust in maintaining compliance to commission regulations and in applying commission policies in its decision making. Agencies are to be held accountable for ensuring that all Commission regulations and polices are followed and a coordinated approach to the market is sustained.

BCFIRB Findings of Key Facts to be considered:

17. Island Vegetable Co-operative Association (IVCA) is a designated agency of the Commission with its office on Vancouver Island. It is a cooperative with a board comprised of representatives of four of its approximately 8 growers. Since 2014, Prokam has shipped regulated and unregulated vegetables to IVCA and in 2017, was its largest shipper of potatoes with approximately 80 -90% of IVCA's volume. Mr. Michell is IVCA's president and Mr. Dhillon is its vice-president.

20. In 2017, Prokam increased its production of potatoes well in excess of its DA to 380 acres in response to IVCA's growth plan to fill the premium early wholesale retail market. In April 2017, Mr. Dhillon's

brother-in-law Mr. Gill was hired as IVCA's mainland sales representative primarily to sell Prokam's potatoes.

21. As early as 2015 IVCA, through its previous general manager and its president, was actively soliciting out-of-province sales with Thomas Fresh in Calgary and Saskatoon. IVCA supplied Prokam potatoes to Thomas Fresh in 2016. In March 2017, Thomas Fresh sent signed 60-day forward contracts to IVCA and in April 2017, Mr. Gill executed these contracts to supply Thomas Fresh with Prokam's potatoes at a set price.

22. The Commission was aware of Prokam's decision to plant potatoes in excess of its DA and in late January 2017, initiated a review process to coordinate agency production planning. Despite numerous requests to IVCA to submit a production plan, confirm planting intentions and agency growth expectations, IVCA remained silent on its planned market for Prokam's potatoes and its business relationship with Thomas Fresh, preferring to rely on an earlier submission in the Vancouver Island Agency Review.

23. The Commission made it clear that this earlier application for agency license was not a marketing plan for IVCA's regulated product and issued a warning notice, but IVCA remained non-compliant with Part XV of the General Orders requiring Commission approval where an agency intended to market new product (product not covered by DA). Mr. Dhillon in his role as vice-president of IVCA and Mr. Gill as an IVCA employee participated in these decisions to thwart Commission authority.

32. Much evidence was heard at the hearing of the dysfunctional nature of IVCA. The Commission's view is that Mr. Dhillon, with the assistance of Mr. Gill, essentially co-opted the regulatory authority of IVCA and bypassed agency staff, allowing Prokam to sell potatoes in excess of DA directly to Thomas Fresh at prices below the Commission's minimum pricing. Mr. Dhillon disputed this characterization and downplayed his role within IVCA describing himself as a very busy farmer with little time to spare in the growing season who relied on his agency to meet any regulatory responsibilities. He denied putting undue stress on the agency or creating a toxic environment and distanced himself from Mr. Gill.

33. Having heard all the evidence, we find Mr. Dhillon's role to be a bit more nuanced than found by the Commission. Mr. Dhillon, in his role as IVCA vice-president and director, was a force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of the potato production in BC. This production significantly increased IVCA's capacity. Mr. Dhillon acknowledged that IVCA needed Prokam as a grower, both financially and for growth. Mr. Dhillon was not beneath threatening to fire staff or pulling his money from the agency in order to get his way. With respect to Mr. Gill, Mr. Dhillon was instrumental in bringing him into IVCA and supported his employment handling IVCA's "mainland sales" which in fact were the sales of Prokam potatoes to Thomas Fresh. While Mr. Dhillon denied paying part of Mr. Gill's salary, we accept Mr. Gill's evidence that Mr. Dhillon negotiated half his salary to be paid through Mr. Dhillon's father's company, Sam Enterprises.

34. However, it is also clear that IVCA through its previous general manager and its current president actively solicited the Thomas Fresh account over several years. While Mr. Gill may have signed the contracts, he did so in full knowledge that IVCA wanted a long term agreement with Thomas Fresh to access the tonnage fees to address agency cash flow problems. While the current general manager may have been late to a realization that the contracts were signed and the implications of those contracts, the inescapable conclusion is that the management of IVCA (not just Mr. Dhillon) actively participated in obtaining these contracts. All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.

BCFRIB Findings, and Reasons to be considered:

43. It is not necessary for us to engage in a complex exercise of finding the “locus” of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.

47. There is no compelling reason to stretch the interpretation of the provincial regime to find for the Commission authority to regulate minimum prices for product sold outside BC on the basis that such authority would be an integral part of an overall effective regime for management within BC. This is because the Commission already has the power to regulate minimum price setting for interprovincial transactions under the federal Agricultural Products Marketing Act and the supporting British Columbia Vegetable Order.

48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the Statutory Instruments Act. This is accepted by the Commission, which stated in its submission, “in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been “Gazetted”. There is no dispute that Commission has not yet done so in respect of any orders related to minimum pricing.

52. However, we also note that this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes and some remaining findings against Prokam in respect of DA issues (discussed below). We further note that a full review of the materials presented to us makes clear the conduct of Prokam and/or its officers was not beyond reproach.

- **Finding** **The panel does not accept the appellants’ submission that there is any basis to vary or rescind Commission order 48.2 and no reconsideration of that order is required.**

The reasons for this BCFIRB finding (par. 69 through 79) can be found under the Prokam Licence reconsideration section of this document on pages 13 through 20. Rather than restate these paragraphs please refer to these pages.

82. The panel concludes that the Commission placed too much weight on IVCA’s cooperation with the Commission’s investigation and not enough weight on the regulatory responsibility of IVCA as an agency. The very reason that this compliance issue arose rests with IVCA and its aggressive growth aspirations. It was IVCA that pursued Mr. Dhillon and his early land. It was IVCA that pursued the re-packer/wholesaler business of Thomas Fresh. It was IVCA that failed to meet its obligations under the General Orders as an agency to disclose its business plans to the Commission and actively pushed off the Commission’s efforts to plan growth and ensure orderly marketing. These fundamental failings on the part of the designated agency are not in any way rectified or mitigated by the cooperation of IVCA staff in the subsequent compliance investigation.

83. While we observe that the appellants were critical of how the Commission dealt with IVCA, the December decision did not make any orders in relation to IVCA. However, the panel finds that there are many unanswered questions about IVCA’s role in the events leading up to these appeals. We have significant concerns about whether IVCA has demonstrated the ability to perform the requisite front line role to ensure that marketing is conducted in an orderly fashion according to the General Orders and provide fair market access to all registered growers. As such, and as a matter of both our appellate and supervisory jurisdiction, we believe this is a matter that requires reconsideration by the Commission.

Panel Findings and Reasons:

75. Fundamentally, IVCA failed to fulfill its responsibilities as a designated agency of the Commission insofar as it failed to ensure that it was marketing “New” or additional regulated product with Commission approval. IVCA is not merely an industry stakeholder, it is a delegate of the Commission charged with the responsibility to promote orderly marketing. If IVCA did not understand its responsibility to promote orderly marketing by adhering to the General Order, which includes PART XV MARKETING OF “NEW” OR ADDITIONAL REGULATED PRODUCT BY EXISTING AGENCIES & PRODUCER-SHIPERS, then questions may arise about whether IVCA is a suitable entity to exercise that delegated authority. British Columbia potatoes are sold throughout Canada, and it would obviously be detrimental to orderly marketing if agencies fail to observe the regulations.

76. The following passages from the BCFIRB’s January 31, 2017 Supervisory Decision were also quoted in the BCVMC decision issued on December 22, 2017 that reveal there were matters of concern with IVCA and its operations at that time and its growth ambitions would need to be monitored:

4. In British Columbia, the production and marketing of vegetables is regulated under the NPMA, the NPMA Regulation (“the Regulation”), and the British Columbia Vegetable Scheme (Scheme). The Scheme (s. 4(2)) grants the Commission the power set out in s. 11(1)(a) of the NPMA to “regulate the time and place at which and designate the agency through which a regulated product must be marketed”. The Commission has issued General Orders which govern the regulated industry actors, including designated agencies.

7. The specific rules governing agencies differ depending on the needs of the particular regulated industry. What is common across all regulated industries, however, is the agencies are licensed entities whose purpose is to market regulated product on behalf of registered producers. Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. They minimize burdens on each producer regarding finding outlets for sales of their delivery allocation (a mechanism for producers to share market access). Agencies also store, ship, and label product for producers. For consumers, they help ensure a steady supply of BC product by contributing to orderly marketing. In all this, one of their key roles is to grow the industry by looking for new markets. As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: “Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers”. Agencies thus play both a key front line role, and a larger strategic role, in assisting the Commission to regulate, manage and grow the industry in an orderly fashion: see generally January 7, 2013 Supervisory Decision, paras. 34 - 38; see also the Commission’s September 21, 2015 Stakeholder Engagement Discussion Paper, pp. 4 - 6.

74. With respect to IVCA, the Commission concluded that IVCA does contribute to the vision of regulated vegetable marketing on Vancouver Island, but that its growth ambitions need to be monitored to ensure that any such ambitions that extend beyond the Vancouver Island market are not merely seeking to displace existing markets. With respect to promoting collaboration, the Commission noted that IVCA does work with other agencies, but it is not clear how it manages delivery allocation, and it needs to be more transparent in how it manages earned market entitlement between all its producers. With respect to IVCA’s demonstration of good governance, the Commission stated “yes, but needs improvement”. The Commission noted IVCA’s long history as a non - profit co - op, its focus on growth and its new investment in technology and infrastructure. However, the Commission repeated its concern about the need to monitor delivery allocation, and noted that IVCA does not have written GMAs, which does not sufficiently protect the interests of growers. With respect to business planning, the Commission stated that IVCA “appears to have a focused vision and strategic direction for its business. It is committed to working with its growers to identify products that can be grown successfully in local soils”. With respect to market

demand, the Commission answered this as a positive, but expressed concern that IVCA's recent move to uniform packaging did not sufficiently differentiate Vancouver Island grown product. The Commission also noted that IVCA's agency designation does not currently extend to greenhouse crops and it had requested such an extension. The Commission agreed that "[it] would strengthen its competitive position in the Vancouver Island market by giving it the ability to represent all types of vegetables". (emphasis added)

77. IVCA's failure to fulfil its responsibilities as an agency could provide a basis for the Commission to decide to terminate that agency designation. IVCA bears ultimate responsibility, but the circumstances in which this non-compliance arose cannot be ignored. The panel agrees with the BCFIRB findings that are outlined above (par. 17,20,21,22,23,32,33,34,43,47,48,52,69,70,71,72,73, 74,75,76,77,78,79,82,83).
78. This compliance issue arose because of a business opportunity that took advantage of the failure of the Commission to comply with the Statutory Instruments Act in order to have the legal federal authority to regulate minimum prices for product sold outside BC, and the failure of IVCA to seek approval from the Commission to market "new" or additional regulated product under PART XV of the General Order . "All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market."
79. The IVCA board of directors (including Mr. Dhillon) are in charge of the management of the company's business; they make the strategic and operational decisions of the company and are responsible for ensuring that the company meets its statutory obligations. The IVCA board of directors enabled the deceptive behavior and unsanctioned business opportunity. Such behavior by an agency is not acceptable by the Commission. The correct and acceptable action taken would have been to consult with the Commission, comply with Commission authority, and formally apply for approval to market the "new" or additional regulated product
80. It is the panel's opinion that IVCA has demonstrated a lack of capacity to perform the requisite front line role to ensure that marketing is conducted in an orderly fashion according to the General Order and provide fair market access to all registered growers.

Panel Recommendation:

81. It is expected that IVCA would ensure that it was marketing "New" or additional regulated product with Commission approval. To do so IVCA would have needed to comply with PART XV of the General Order and submit a business and marketing plan to the Commission for its consideration and final approval.
82. The Panel finds that IVCA's actions were deliberate to circumvent the authority of the Commission and the regulated marketing scheme for BC grown vegetables. The mandate of an agency is to represent a group of producers and carry out the marketing duties of the Commission's regulated vegetables;
 - 82.1. In compliance of the consolidated general order,
 - 82.2. In respect of the operating principles of the orderly marketing system, and,
 - 82.3. For the benefit of its producers and the industry.

83. IVCA failed to deliver on all three expectations of an agency in carrying out its marketing duties. The severity of this non-compliance is classified as catastrophic and deserving of a Class V license. Agencies play a strategic role in assisting the Commission to regulate, manage, and grow the industry in an orderly fashion. However, Noted in BCFIRB's decision par.52, "this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes" As was stated previously in the decision regarding Prokam's licence class, some of this blame for why this situation occurred is equally attributed to Mr. Dhillon in his role as the director and vice president and not just the dysfunctional nature of the IVCA agency. It is the panel view that the actions taken by Prokam were a consequence of operational practices and an agency governance structure that were endorsed by IVCA that allowed Mr. Dhillon to act in the manner that he did. For this reason the panel holds both Prokam and IVCA equally responsible, but for the different stated reasons.
84. Therefore, it is the panel's recommendation that the Class I Licence issued to Island Vegetable Cooperative Association (IVCA) be revoked and replaced with a Class III License with the following conditions attached:
- IVCA production growth is limited to its current delivery allocation. Planted acreage is to yield production that is commensurate with the delivery allocation that IVCA currently manages;
 - IVCA is not permitted to represent any additional or new producers of regulated vegetables;
 - An independent board member is to be appointed to the IVCA board by the Commission and is to remain on the board until a Class I licence is re-instated;
 - An audit is to be completed by the Commission on internal procedures, protocol and management practices within the IVCA Agency.

INTERIM ORDER

85. As noted, the Panel believes that the British Columbia market is at risk when cheap, bulk product is made available to a wholesaler. When this occurs, the agency is essentially abdicating its responsibility to market regulated product as expected by the Commission. When cheap, bulk product is received by a wholesaler, it acts as a de facto agency – but without any of the responsibilities of an agency. It can therefore compete against agencies and detrimentally affect the return to producers.
86. In this case, IVCA lost control of its obligations to BC producers and to the Commission over pricing and other aspects of marketing that it is delegated to carry out under the authority granted to it by the Commission. Agencies need to maintain control over market access. A Wholesaler, on the other hand, has no legal obligation to represent the interests of producers of regulated vegetable grown in BC. The volume of potatoes sold by IVCA to Thomas Fresh amounted to 9% of the 2017 potato production in BC and the bulk of the potato volume that was managed by the agency.
87. It is also the responsibility of agencies to represent growers and market the product in a manner that maximizes net grower return for the benefit of all producers. In the current and foreseeable market, net grower returns are maximized by an agency business model that adopts as its core business an offering of products packaged for end use to the market. An agency is not a commission salesperson who brokers product by arranging transactions between a buyer and a seller for a fee. This licence category is defined and already exists within the regulatory framework. The overarching

mandate of an Agency is to represent a group of licensed producers and carry out the marketing duties of regulated vegetables;

- i. in compliance of the Consolidated General Order;
- ii. in respect of the operating principles of the orderly marketing system;
- iii. for the benefit of its producers;
- iv. in agreement with the interests of the industry.

88. Also, it is paramount that the regulated product being placed into the market is food safe and that the actions of an agency, or of a producer of regulated BC grown vegetables, do not expose the industry to unnecessary food safety risk that can be mitigated under our regulatory authority. Food safety risk is mitigated when the washing, grading and packing of the regulated vegetable into a product packaged for end use are managed at the source, where the Commission and agencies have oversight.

89. For all these reasons, the Panel believes that it is in the best interest of the industry to introduce an Interim Order adopting the definition “Packed For End Use” and mandating that product be marketed by an agency as “Packed For End Use” in all instances except where the express, prior, written approval of the Commission is sought and obtained. The complete ‘Interim Order’ to be enacted is provided below:

**INTERIM ORDER
TO PRESERVE THE ORDERLY MARKETING OF STORAGE CROPS
PENDING FURTHER REVIEW**

**MADE BY THE
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION
ON NOVEMBER 18, 2019**

WHEREAS the British Columbia Vegetable Marketing Commission (the “Commission”) has established orders providing for the orderly marketing of storage crops that reflect three core principles: (1) coordinated marketing of regulated product by agencies on behalf of producers; (2) compliance by producers and agencies with delivery allocation rules; and (3) compliance by agencies with the minimum prices set by the Commission.

AND WHEREAS there is an urgent need to maintain the orderly marketing of storage crops pending a broad-based consultative process that will be undertaken with a view to effecting substantial revisions to the General Order.

NOW THEREFORE, the British Columbia Vegetable Marketing Commission orders as follows:

Application

1. (1) This Order supersedes and replaces all provisions in the Commission’s General Order concerning Delivery Allocation as applicable to Storage Crops.
- (2) In the event of any inconsistency between this Order and the Commission’s General Order, the provisions of this Order shall prevail.

- (3) The Commission's General Order continues to apply except to the extent of any inconsistency with the provisions hereof, and except with respect to the provisions in the General Order that concern Delivery Allocation as applicable to Storage Crops.

Definitions

2. In this Order:

"Container" means a sack, box, bag, crate, hamper, basket, carton, package, barrel, or any other type of receptacle used in the packaging, transportation, sale, or other handling of potatoes.

"Marketing Period A" means the period from the start of a new Storage Crop to July 31.

"Marketing Period B" means the period from August 1 to September 30.

"Marketing Period C" means the period from October 1 to January 31.

"Marketing Period D" means the period from February 1 to the end of an old Storage Crop.

"Packaged For End Use" means graded and packaged in a Container in the manner in which the food:

- (a) is ordinarily sold to, used by, or purchased by, a retailer or a consumer; or
- (b) may reasonably be expected to be obtained by a food service institution;

such that no further repackaging occurs, or is necessary or contemplated.

Books, Records and Accounts

3. (1) Every Storage Crop Producer, Storage Crop Producer-Shipper, and Agency shall keep complete and accurate books, records and accounts of all matters relating to the production, transportation, packing, storage and marketing of Storage Crop Regulated Product.
- (2) All books, records and accounts required to be kept under subsection (1) must be retained for a period of three years and shall be available for inspection by:
 - (a) the Commission;
 - (b) any officer or auditor of the Commission; and
 - (c) any other Person as may be authorized by the Commission from time to time.

Obligation to Furnish Information and Permit Inspection

4. (1) Every Storage Crop Producer, Storage Crop Producer-Shipper, and Agency shall, upon request, furnish to the Commission, or to any officer or auditor of the Commission, or to any other Person as may be authorized by the Commission from time to time, any information or documentation relating to the production, transportation, packing, storage and marketing of Storage Crop Regulated Product.
- (2) Every Storage Crop Producer, Storage Crop Producer-Shipper, and Agency shall make specific answers to any questions relating to the production, transportation, packing, storage and

marketing of Storage Crop Regulated Product, as submitted to that Person by the Commission, or by any officer or auditor of the Commission, or by any other Person as may be authorized by the Commission from time to time.

- (3) Every Storage Crop Producer, Storage Crop Producer-Shipper, and Agency shall permit the Commission, or any officer or auditor of the Commission, or any other Person as may be authorized by the Commission from time to time, to search vehicles in which Storage Crop Regulated Product is transported, and to inspect all farm or business premises owned, occupied or controlled by such Storage Crop Producer, Storage Crop Producer-Shipper, or Agency.

Agency Reporting to Commission

5. Every Agency shall, at the earliest possible opportunity, furnish the Commission with true and detailed reports disclosing:
 - (a) the name and address of each Storage Crop Producer from whom the Agency has received Storage Crop Regulated Product;
 - (b) the volume of Storage Crop Regulated Product received from each Storage Crop Producer in each Marketing Period, expressed in tons;
 - (c) the volume of Storage Crop Regulated Product marketed in each Marketing Period, expressed in tons;
 - (d) the volume of Storage Crop Regulated Product marketed as Packaged For End Use in each Marketing Period, expressed in tons;
 - (e) the volume of Storage Crop Regulated Product marketed as other than Packaged For End Use in each Marketing Period, expressed in tons; and
 - (f) the net return payable to each Storage Crop Producer expressed as an amount per ton, for each type and grade of Storage Crop Regulated Product, for each Marketing Period.

Marketing Obligations and Prohibitions

6.
 - (1) Each Agency is obliged to market Storage Crop Regulated Product with a view to securing the highest net return payable to each Storage Crop Producer for each type and grade of Storage Crop Regulated Product, for each Marketing Period.
 - (2) All Storage Crop Regulated Product must be marketed by each Agency as Packaged For End Use, except where the Agency has obtained the prior, express, written approval of the Commission.

DATED at Surrey, British Columbia on _____

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

Debbie Etsell, Chair

John Newell, Member

ORDERS

90. The Commission orders are therefore as follows:

91. Thomas Fresh Licence Class

The Class IV Licence issued to Thomas Fresh is to be revoked and replaced with a Class I License.

Thomas Fresh is to be refunded the difference in cost between what it has paid to be licenced as a Wholesaler under a Class IV Licence vs a Class I Licence.

92. Prokam Enterprises Ltd. Licence Class

Effective immediately, The order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III License to this producer.

Prokam was not licensed to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licensed as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

93. The INTERIM ORDER TO PRESERVE THE ORDERLY MARKETING OF STORAGE CROPS is enacted as of the date of this decision.

94. BCfresh as the Agency Designated to Prokam Enterprises Ltd.

With the enactment of this interim order, the panel offers Prokam with three options:

- Prokam can chose to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.
- If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018.
- If BCfresh releases Prokam from the GMA, Prokam can consult with other licensed storage crop agencies to represent the grower in consideration of the new interim order.

95. Island Vegetable Co-Operative Association (IVCA) Agency Licence Class

IVCA's Class I Licence be revoked and replaced with a Class III License with the following conditions:

- IVCA production growth is limited to its current delivery allocation. Planted acreage is to yield production that is commensurate with the delivery allocation that IVCA currently manages;
- IVCA is not permitted to represent any additional or new producers of regulated vegetables;
- An independent board member is to be appointed to the IVCA board by the Commission and is to remain on the board until a Class I Licence is re-instated;
- An audit is to be completed by the Commission on internal procedures, protocol and management practices within the IVCA Agency.

These are the decisions and reasons of the Commission as “first instance regulator”. A person aggrieved by this decision may appeal the decision to the BC FIRB.

S.A.F.E.T.I. PRINCIPLE

96. This decision satisfies the S.A.F.E.T.I. principles that are a foundation of the BC FIRB accountability framework and guide decision making by the Commission. Commissioners are committed to be proactive risk managers and applying principles-based decision making to achieve responsive governance. These decisions are determined to be in the best interest of sound, orderly marketing within British Columbia and reflects a principle-based approach to regulation. They are validated for the following reasons:

STRATEGIC	<ul style="list-style-type: none"> • Supports the fundamental principles of the existing Regulatory Framework for the accountabilities and responsibilities of an Agency and a Grower. • Supports the fundamental principles of the existing Regulatory Framework and its purpose to assist, to support, and to sustain Growers. • Appropriately reflects the severity of the findings on non-compliance. • Specifies an agency’s target market segment and enhances its responsibility to mitigate food safety risk.
ACCOUNTABLE	<ul style="list-style-type: none"> • Maintains accountability for the rights of all Growers and for the privilege of the existence of the Regulatory Framework in BC. • Ensures Grower and Agency accountability to their licensed requirements and the authority delegated to them by the Commission. • Demonstrates integrity to the intended objectives of the Regulatory Framework under section 11 NPMA (BC) Authorities that govern the BCVMC.
FAIR	<ul style="list-style-type: none"> • The process and decision-making framework used by the Commission allowed the management of presumptive bias(es) and full contribution of panel members in reviewing the entire set of documents and to the making of fair, unbiased, and defensible decisions. • Demonstrates fairness to all growers, wholesalers and agencies in consideration all circumstances that lead to the non-compliance, and fairness to the continued existence of the regulatory framework in BC.
EFFECTIVE	<ul style="list-style-type: none"> • Considers established levels of trust required by an agency and a grower to productively grow, and fairly market, a high quality, food safe product within the regulatory framework. • Demonstrates effective use of consequence at the appropriate level for the finding of non-compliance by Prokam and IVCA.
TRANSPARENT	<ul style="list-style-type: none"> • Provides clarity on grower and agency obligations.
INCLUSIVE	<ul style="list-style-type: none"> • Demonstrates sufficient consultation and that all appropriate interests have been considered including “the public interest” on application of regulatory oversight that is fair, transparent and accountable.

Respectfully submitted on behalf of the BC Vegetable Marketing Commission,



Debbie Etsell, Chair

APPENDIX A

PART IV LICENSING

Licences – Agencies

1. No Person other than an Agency shall purchase Regulated Product from a Producer or market Regulated Product, within British Columbia or in interprovincial or export trade, except that:
 - (a) Regulated Product may be purchased from a Producer by a Consumer or by a Processor licensed by the Commission as permitted by these General Orders;
 - (b) Regulated Product may be marketed by a Producer, Producer-Shipper, Processor, Commission Salesperson or Wholesaler who is licensed in accordance with these General Orders in the manner permitted by the term of the licences, these General Orders, and any other Order of the Commission; and
 - (c) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may market Regulated Product as permitted by the Commission.
2. A Person is authorized to act as an Agency if the Person:
 - (a) registers with the Commission and is designated as an Agency of the Commission;
 - (b) is qualified to and obtains annually from the Commission one of the appropriate licences herein described; and
 - (c) Pays to the Commission annually the fees for such licence as described in Schedule III to these General Orders.
 - (d) A Class I Licence may be issued on the initial application to the Commission or on any subsequent application if that Person or Agency has not had a licence of any class suspended or cancelled pursuant to Section 5.
 - (e) If any licence is suspended or cancelled, the Commission may issue a Class II, Class III, Class IV or Class V licence at its discretion; such a classification will be for a minimum of one year unless otherwise ordered by the Commission.

Licences – Packinghouse

3. No Person other than a Packinghouse shall receive Regulated Product from a Producer for the purpose of washing / sorting / grading / sizing and packing the produce within British Columbia, except that:
 - (a) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may pack the Regulated Product as permitted by the Commission.
4. The Packinghouse shall be assigned a designated Agency. No other Agency shall receive Regulated Product from a Packinghouse without approval of the assigned designated Agency unless otherwise ordered by the Commission.
5. No Person other than the assigned designated Agency shall have the authority to ship Regulated Product from the Packinghouse except that:
 - (a) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may ship Regulated Product from the Packinghouse as permitted by the Commission.

6. A Person is authorized to act as a Packinghouse if:
 - (a) The Person is registered with the Commission and is designated as a Packinghouse of the Commission;
 - (b) The Person is qualified to and obtains annually from the Commission one of the appropriate licenses herein described; and
 - (c) The designated Agency pays to the Commission annually the fees for such license as described in Schedule III to these General Orders;
 - (d) A Class I License may be issued on the initial application to the Commission or on any subsequent application if that Person or Agency has not had a license of any class suspended or cancelled pursuant to Section 5.
7. If any license is suspended or cancelled, the Commission may issue a Class II, Class III, Class IV or Class V at its discretion; such a classification will be for a minimum of one year unless otherwise ordered by the Commission.

Licences – Producer

8. No Producer, shall grow, process or market Regulated Product unless that Producer:
 - (a) registers with the Commission;
 - (b) is qualified to and obtains annually from the Commission one or more of the appropriate licenses herein described; and
 - (c) Pays to the Commission annually the fees for such licences as described in Schedule 3 to these General Orders.
9. A Class I Licence may be issued to any Producer on the initial respective application to the Commission, or on any other subsequent application by any respective Producer who has not had a licence of any class suspended or cancelled pursuant to Section 6 of this Part.
10. If any licence is suspended or cancelled, the Commission may issue a Class II, Class III, Class IV or Class V Licence at its discretion; such a classification will be for a minimum of one year unless otherwise ordered by the Commission.

Licences - Processor, Wholesaler, Commission Salesperson

11. No Processor, Wholesaler or Commission Salesperson shall grow process or market Regulated Product unless he:
 - (a) registers with the Commission;
 - (b) is qualified to and obtains annually from the Commission one or more of the appropriate licences herein described; and
 - (c) Pays to the Commission annually the fees described in Schedule 3 to these General Orders.
12. A Class I Licence may be issued to any Person under this section on the initial respective application to the Commission, or on any other subsequent application by any respective Person under this section who has not had a licence of any class suspended or cancelled pursuant to Section 6 of this Part.
13. If any licence is suspended or cancelled, the Commission may issue a Class II, Class III, or Class IV Licence at its discretion; such a classification will be for a minimum of one year unless otherwise ordered by the Commission.

Licenses – Producer - Shippers

14. No Producer-Shipper shall grow and market Greenhouse or Storage Vegetable Crops unless he:
 - (a) Registers with the Commission;
 - (b) Is qualified to and obtains annually the appropriate license from the Commission;

- (c) Pays to the Commission annually the fees for such licenses as described in Schedule III to these General Orders.

Licences - Issuance, Cancellation or Suspension

15. Every licence is subject to cancellation or suspension by the Commission:
 - (a) for a period of time to be determined by the Commission at its discretion if, in the opinion of the Commission, the licence holder has violated any Order, policy or direction of the Commission or if, in the opinion of the Commission, the actions of a licence holder are detrimental to the best interests of the industry.
 - (b) Before cancelling or suspending a licence, the Commission shall notify the licensee in Person, by facsimile transmission or email and by registered mail, to appear before the Commission to address the alleged violation and, where appropriate, to show just cause why the licence in question should not be cancelled or suspended for a period of time. The licensee may be represented by legal counsel, an agent or himself. If the licensee, his legal counsel or agent, do not appear before the Commission at the hearing, the hearing shall proceed and the licensee shall be sent, by registered mail, a copy of the decision of the Commission.
 - i. If the Commission cancels or suspends a licence, the Commission shall notify the licensee or his legal counsel or agent by facsimile transmission or email and by registered mail.
 - ii. If the Commission suspends or cancels a licence, the licensee may be subject to a Commission service fee, representing all or part of the expenses associated with the investigation, hearing and determination of the Commission leading to the cancellation or suspension of the licence.
16. Licenses are valid for one (1) year for the period commencing the day after the due date described in each instance below and expiring on the next annual due date. Every application for a license whether it is an initial application or a renewal must be made on a form prescribed by the Commission and shall be submitted to the Commission no later than the following due dates of each year:
 - (a) Producers *and Producer-Shippers* of Greenhouse Vegetable Crops– November 1.
 - (b) Other Producers *and Producer-Shippers of Storage Crops – May 1st*.
 - (c) Designated Agencies, Processors, Wholesalers and Commission Salespersons – March 1st.
17. Each application for a Producer's or producer-Shipper licence made in the name of a Person, farm, partnership or corporation must list on the licence application, the name of each owner, partner or shareholder, including percentage of shareholdings, as appropriate, and must identify the signing or voting authority for the farm, partnership proprietorship, or corporation, as the case may be, and must identify an individual who operates the farm.
18. Each licence issued by the Commission shall be issued to a named individual, or an individual and a corporation jointly, or to an individual and a farm name jointly, or, in the case of a partnership, to the partnership, at least one of the partners and an individual jointly.
19. No Producer, Producer-Shipper, Commission Salesperson, Processor, Wholesaler or Agency shall operate without a licence.
 - (a) Any Person who plans to act or who acts as an Agency must obtain an Agency licence and must be designated by the Commission as an Agency.
 - (b) Any Person who plans to act or who acts as a Processor must obtain a Processor's licence.
 - (c) Any Person who plans to produce or who produces Regulated Product must obtain a Producer's licence.
 - (d) Any Person who plans to act or who acts as a Wholesaler must obtain a Wholesaler's licence.

- (e) Any Person who plans to operate or who operates as a Producer-Shipper must obtain a Producer-Shipper licence.
 - (f) Any Person who plans to act or who acts as a Commission Salesperson must obtain a Commission Salesperson's licence.
20. Producers holding, in aggregate, less than 5,000 m² of Greenhouse Vegetable Production Allocation are not required to be licensed as Producer-Shippers nor are they required to market through an Agency unless otherwise directed by the Commission. Multiple registrations on the same physical site or several facilities under common ownership and management shall be considered single units for the purposes of determining applicability of this 5,000 m² exemption.

PART V AGENCIES

1. Designated Agencies and the Regulated Crops each are authorized to handle are listed on Schedule I to this General Order.
2. An Agency shall maintain an office located within the Regulated Area.
3. Agencies may, with the approval of the Commission, issue Transport Orders for specific Regulated Product. If authorized by the Commission, Transport Orders may contemplate that Regulated Product will be received, washed, graded and marketed and the proceeds pooled.
4. Each Agency shall deduct the appropriate Commission service fees from the Producer's net proceeds as prescribed by these General Orders or as directed by the Commission for the Regulated Product which the Agency is authorized to market, and for each month's sales Agencies shall hold such funds in trust and shall remit the funds to the Commission not later than the 20th day of the following month.
5. The Commission may withdraw the authority of an Agency to market Regulated Product and may cancel or suspend an Agency licence and strike the name of an Agency from the records of the Commission for failure to comply with an Order, directive or resolution of the Commission.
6. No Agency shall receive or market any Regulated Product from a Person in respect of which there has occurred any violation of, or non-compliance with, any Orders or directions of the Commission unless specifically ordered by the Commission to do so.
7. No Agency shall receive or market any Regulated Product from a Producer who does not have a current Producer Licence unless the net value of the Producer's shipments to date in the current year, including the shipment in question, does not exceed one thousand dollars (\$1,000).
8. No Agency shall receive any Regulated Product from a Producer that was not grown by that Producer unless expressly authorized by the Commission.
9. Every Agency shall be entitled to charge each Producer the service fees from time to time approved by the Commission for packing, cooling, grading, storing, washing, handling, transporting and Marketing the Regulated Product.
10. An agreement between an Agency and a Producer, which addresses terms and conditions upon which the regulated product shall be provided by the Producer and sold by the Agency (e.g., a Grower Marketing Agreement), shall be reduced to writing and is to be consistent with Commission policy.
11. All agencies shall cooperate with each other in the Marketing of Regulated Product and enter into inter-

Agency agreements when directed by the Commission. This may mean that Agencies with an excess of Regulated Product will be required to sell Regulated Product to Agencies in need of Regulated Product. On-going communication between Agencies is encouraged by the Commission in this regard.

12. Each Agency is authorized to and may conduct a pool or pools as directed by the Commission, for the distribution of all proceeds received from the sale of the Regulated Product. Each Agency shall distribute the proceeds of sale of each pool, after deducting necessary and proper disbursements, expenses and charges as permitted or required by the Commission.
13. All Agencies shall distribute the proceeds of sales not more than 20 days following the month during which the sales were made. If an Agency is unable, or does not wish to pay the proceeds within the specified time frame, it may apply to the Commission for a variance, stating the reasons for the request, the duration of the variance and the payment schedule requested. The Commission may approve, amend, or deny the request as it sees fit.
14. Prices for all Regulated Crops subject to Commission minimum pricing must be approved by the Commission before coming into force or effect, unless otherwise authorized in writing by the Commission.
15. All Agency facilities must meet minimum health standards of the regional district, municipality, area or city in which the facilities are located.
16. An Agency must have a valid business license and must be legally able to use any brand name it may adopt.

Products of Unmarketable Quality

17. An Agency or a Processor shall be entitled to refuse to accept or market any Regulated Product delivered to it, which in the opinion of the Agency or Processor, is not of marketable quality.
18. Any person who is aggrieved by the refusal of an Agency or Processor to accept or market Regulated Product may file a complaint with the Commission for a remedy and the decision of the Commission shall bind both the Agency or Processor and the aggrieved Person, subject to appeal provisions of the Act.
19. Any Person who is aggrieved by the manner in which Regulated Product is handled by an Agency or Processor may file a complaint with the Commission for a remedy and the decision of the Commission shall be binding on both the Agency or Processor and the aggrieved Person, subject to the appeal provisions of the Act.
20. Due to the perishability of some regulated products, a person filing a grievance under Sections 19, 20, or 21 of this Part, may request an expedited adjudication of their complaint and the Commission will make its best efforts to resolve the matter within the time constraints required.

PART VII AGENCY RESPONSIBILITIES

1. Each Agency marketing crops subject to Commission minimum pricing shall notify the Commission and obtain approval from the Commission for the establishment of any price or change in price.
2. Each Agency marketing crops subject to Commission minimum pricing shall file with the Commission a copy of any price list, local or export, and particulars of any sales other than at listed prices.
3. No pricing for crops subject to Commission minimum pricing, below listed price can be made without the prior approval of the Commission.

4. Each Agency shall supply to the Commission as requested or required, details in respect to the application of Delivery or Production Allocations and Producer's individual shipments. These details are required to be supplied to the Commission within 60 days of the close of a pool period or in the case of storage crops within 60 days of the close of a Delivery Allocation period.
5. Each Agency shall provide pool settlement statistics showing quantities, price ranges and final pool prices to the Commission on request.
6. Before finalizing a contract each Agency shall provide to the Commission for its prior approval as to form any proposed contracts with Processors or other firms approved by the Commission located in BC that are to receive regulated products regardless of end use.
7. Each Agency shall file with the Commission a copy of their year-end financial statements. A financial audit shall be undertaken if requested by the Commission.
8. Each Agency shall file a business plan or Marketing plan with the Commission upon request.
9. Each Agency shall file with the Commission all signed Grower Marketing Agreements with all Producers of Regulated Product shipped through that Agency by June 1st of each year.
10. Each Agency shall have a trace-back and recall system which adequately identifies and traces Regulated Product from the time it is specifically shipped by a particular Producer until it is received and purchased by a Wholesaler or Retailer.
11. Each Agency shall file with the Commission names of staff to be authorized to issue Transport Orders by April 1st of each year; any changes, which may occur subsequently, must also be filed.
12. Each Agency shall file with the Commission, for approval each year, a proposed list of fees or charges for Agency services provided to Producers for Marketing. Any fee or charge that has not been submitted to the Commission for its approval is a nullity. Where the Commission has exercised its discretion to decline to approve a fee or charge, such fee or charge becomes a nullity.
13. Each Agency shall provide the Commission with any other information relevant to Agency or inter-Agency transactions as may be required by the Commission from time to time.
14. An Agency shall accept for marketing, and shall market the regulated product from any licensed producer directed to that Agency by the Commission. If the Commission directs a producer to an Agency, that producer's regulated product shall be marketed, and he shall receive returns, in the same manner as other persons delivering regulated product to that Agency.

PART IX GENERAL PROHIBITIONS

1. No Person shall transport a Regulated Product unless it has been packed in a container authorized by a designated Agency or by the Commission.
2. A Wholesaler shall only buy, accept or receive a Regulated Product from an Agency *or Producer-Shipper*.
3. A Retailer located in BC shall only buy, accept or receive a Regulated Product from an Agency, a Processor, a Wholesaler, a Producer-Shipper in accordance with Part VIII of these Orders, or a Producer as authorized by a Manifest sales program.

4. No Processor shall sell or offer for sale or supply the Regulated product except in a processed or manufactured form.
5. No Processor shall buy, accept or receive Regulated Product from any Person other than a Wholesaler licensed by the Commission, an Agency designed and licensed by the Commission, or pertaining and limited to Processing Crops a Producer licensed by the Commission.
6. No Person, Producer or Processor, unless otherwise ordered by the Commission, shall grow, deliver, receive, accept or market Regulated Product for Processing, freezing, canning or preserving in any way unless there is a signed Commission approved Processing Crop contract which complies with all Commission Orders; such a contract shall be in compliance with and shall not deviate from the Master Contract negotiated for the Regulated Product in question and shall include a service charge.
7. No Person shall sell, offer to sell, supply or deliver the Regulated Product to any Person other than an Agency or such other Person as the Commission may expressly direct or authorize.
8. No Person other than a member or employee of the Commission shall move, destroy, sell or offer for sale any Regulated Product on which there has been put a detention tag or seizure tag, or with respect to which a notice of seizure has been given by any member or employee of the Commission or individual authorized by the Commission to effect such seizure, without the written authority of the Commission.
9. No Producer or Agency shall sell or offer for sale Regulated Crops subject to Commission minimum pricing, and no Person shall buy Regulated Crops subject to Commission minimum pricing, at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.
10. No Processor, or other authorized receiver of Regulated Product for Processing, shall receive or pay for any Regulated Product unless the Producer is currently registered with the Commission and is party to a current Commission approved Processing contract.
11. No Producer, shall market or transport any Regulated Product unless the Producer is currently licensed with the Commission, except as expressly authorized by the Commission pursuant to Section 4 of Part IV of the General Order.
12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.
13. No Producer-Shipper shall sell or offer to sell Regulated Product to, or buy or offer to buy Regulated Product from, an Agency, other Producers, other Producer-Shippers or Wholesalers except as specifically provided for in these Orders or as otherwise authorized by the Commission.
14. A Wholesaler cannot be licensed as a Packinghouse.

PART XIV PROCEDURES FOR DESIGNATION OF AGENCIES

1. The purpose of this Part is to facilitate and direct:
 - (a) the designation and appointment of new Agencies; and
 - (b) the conduct of periodic reviews of existing Agencies.
2. The designation of new Agencies and the review of existing Agencies may involve combinations of meetings scheduled by the Commission in its supervisory capacity and/or hearings conducted by the Commission to grant, review or revoke Agency designations.

Designating New Agencies

3. Any business that wishes to be designated as an Agency shall apply to the Commission in writing. The application shall consist of a detailed business plan outlining the following considerations:
 - (a) the proposed Agency's short and long term goals;
 - (b) the rationale for establishing the proposed Agency including such factors as:
 - (i) an indication of marketplace requirements and potential requirements that the proposed Agency will address, including customer and Producer support;
 - (ii) a description of the benefits to the primary producers of Marketing the Regulated Product through the proposed Agency;
 - (iii) anticipated benefits to the industry as a whole;
 - (iv) possible consequences, beneficial or adverse, to other existing Agencies.
 - (c) the type of Regulated Product intended to be marketed;
 - (d) the commencement date of the proposed Agency;
 - (e) the method by which, and time limits through which, existing Producers may transfer to the proposed Agency;
 - (f) steps taken to meet with, and seek the cooperation of, existing Agencies;
 - (g) the identities of the principals of the proposed Agency;
 - (h) the identities of all shareholders and/or individuals with a financial interest in the proposed Agency;
 - (i) letters of commitment from Producers who wish to market Regulated Product through the proposed Agency;
 - (j) a statement of financial worth, along with a forecast of the anticipated earnings, cash flow and sales forecasts to indicate the fiscal viability of the proposed Agency's operations;
 - (k) a business licence;
 - (l) the facilities out of which the proposed Agency will operate, including any office, warehouse or other facility;
 - (m) the management and staff complement of the proposed Agency, including the marketing experience and skill level of staff;
 - (n) the steps the proposed Agency wishes to take in relation to quality assurance, particularly with respect to such matters as:
 - (i) food safety including an acceptable trace-back and recall system for Regulated Product sold;
 - (ii) grade compliance;
 - (iii) handling and distribution;
 - (iv) record keeping;
 - (v) legal requirements; and
 - (o) an assessment of market supply and demand in areas where the proposed Agency wishes to market the Regulated Product;

- (p) the names of customers who wish to purchase Regulated Product from the proposed Agency;
- (q) letters of commitment from proposed customers who wish to market Regulated Product from the proposed Agency;
- (r) letters of reference from financial institutions which support the establishment of the proposed Agency;
- (s) details of a proposed contingency plan which addresses how Producers would be paid for their product if the Agency encounters financial difficulties. This contingency plan may include the posting of a bond, a letter of credit or other security; and
- (t) details of a label or product identification system whose objective is not to create confusion with other Agencies or product identifications.

Commission's Internal Investigation of a Proposed Agency Application

4. Once a completed Agency application is received by the Commission, the Chair of the Commission shall designate a five-member panel of the Commission ("Panel") to consider the Agency application.
5. This Panel will meet with the proposed Agency in its supervisory capacity to discuss its Agency application. At this meeting, the proposed Agency will be required to present its application and to disclose all information relevant to its application.
6. Following this meeting, and three weeks prior to a hearing where interested parties within the industry will be given an opportunity to be heard, the proposed Agency will prepare a briefing document for distribution to interested parties; this briefing document shall be filed with the Commission who will then distribute it to interested parties. This briefing document must address all matters contained in the Agency application; only information of a confidential, competitive nature may be omitted.
7. In conjunction with the proposed Agency, the Commission shall establish a date for the public hearing and will distribute a Notice of Hearing to all interested parties.
8. The issues to be considered by the Commission at this hearing will include, but will not be limited to:
 - (a) whether there is a market requirement for another Agency and whether the designation of another Agency would benefit the industry as a whole;
 - (b) assuming there is a requirement for another Agency, whether the evidence as a whole supports the designation of the specific Agency in question;
 - (c) whether the proposed Agency has the expertise to operate as an Agency;
 - (d) whether the proposed Agency intends to follow Commission Orders and the enabling legislation and regulations;
 - (e) where applicable, whether the proposed Agency intends to apply for approval to increase the Marketing of Regulated Product and/or new Regulated Product; and whether the proposed Agency has Producer support.

Criteria for Evaluating Proposed and Designated Agencies

9. The Commission will consider the following criteria when recommending new Agencies and reviewing existing Agencies:
 - (a) whether all criteria and terms and conditions outlined above in this Part have been satisfied;
 - (b) whether a potential conflict of interest exists in the appointment of an Agency by the Commission; if the Commission determines that a potential conflict of interest exists, it will refer the matter to the BC Farm Industry Review Board;
 - (c) whether existing Agencies have been given adequate notice of the proposed Agency application, sufficient to enable submissions to the Commission of:
 - (i) oral and written comment and/or objections;
 - (ii) proposals for the coordination of the existing Agencies with the proposed Agency;

- (d) whether affected Producers have been given the opportunity to address the proposal on the same basis as existing Agencies;
- (e) the adequacy of the proposed contingency plan;
- (f) whether the proposed Agency is aware of the Commission's General Orders and regulations concerning pricing, fees, levies, accounting requirements, record keeping and other related matters; and
- (g) whether the proposed Agency is willing to cooperate with existing Agencies and with the Commission to ensure that the Commission is able to carry out its governance responsibilities.

Reviewing of Existing Agencies

10. As considered necessary by the Commission in its discretion, a letter will be sent to a designated Agency or Agencies requesting a meeting to discuss ongoing operational issues which may be affecting the industry.
11. Following delivery of this letter, a meeting shall be scheduled with the Agency in question and an agenda will be drafted in cooperation with the Agency to address issues which may be of concern both to the Commission and the Agency. The Commission may review the Agency's operations at this time and may request further documentation from the Agency concerning volume of annual sales, grading, quality of product sold, and overall expenses of the Agency, as well as any issue the Commission deems relevant to the conduct of its responsibilities.
12. In cases where the Commission is of the view that the viability of an Agency is at serious risk, the Agency shall develop a plan, as directed by the Commission, to address issues that require attention.
13. At any time, when the Commission has serious concerns about the viability of an Agency, a hearing may be scheduled, at the discretion of the Commission, which will address whether the Agency designation should be continued, amended or revoked.
14. The designation of an Agency by the Commission is not a warranty concerning any aspect of the Agency's business, including the ability of the Agency to pay for products marketed by it.
15. The designation of an Agency is a privilege under the Act. It is non-transferable and it is not an approval in perpetuity. The designation of any Agency may be reviewed by the Commission upon any material changes in the conditions giving rise to its initial approval.
16. Any sale of all or a portion of an Agency by way of sale of assets or shares, must receive approval from the Commission. Without prior approval, the Agency designation in question will terminate.

PART XV MARKETING OF "NEW" OR ADDITIONAL REGULATED PRODUCT BY EXISTING AGENCIES

1. No new or additional Regulated Product shall be marketed by existing Agencies without Commission approval.
2. An Agency seeking to market new or additional Regulated Product shall submit a Business Plan covering a period of time specified by the Commission which addresses matters relating to promotion, market development and planned expansion. In the case of agencies marketing regulated greenhouse crops, this requirement will occur within the Procedures outlined under General Orders Part XVI and XVIII.
3. At its discretion, the Commission may determine whether a hearing will be held, in either oral or written form, concerning the application by an existing Agency to market new or additional Regulated Product. In exercising its discretion, the Commission will consider:
 - (a) if and how other existing Agencies, if any, will be affected;
 - (b) how the Commission will notify interested parties of the application and its decision to approve or dismiss the application.
4. The Commission shall consider:
 - (a) what benefits, if any, not currently available to Producers will accrue to them if new or additional Regulated Product is marketed by the Agency;
 - (b) whether the Agency has sufficient staff with the necessary experience to market the new or additional Regulated Product;
 - (c) whether a market exists for the new or additional Regulated Product; and
 - (d) whether the new or additional Regulated Product would enhance orderly Marketing.

PART XVI PRODUCTION AND DELIVERY ALLOCATIONS – GENERAL

1. The purposes of the Delivery and Production Allocation Procedures contained in Part XVII and Part XVIII are to identify the principles and guidelines by which the Commission will support and enhance a regulated marketing system for the intraprovincial, interprovincial and export trade of regulated crops.

These purposes include:

 - (a) The preservation of market access for Producers who have served the market over time.
 - (b) The provision of access for new entrants.
 - (c) The desire to create and maintain long-term, sustainable, food safe, farming and greenhouse operations.
 - (d) The provision of opportunity for industry growth.
 - (e) The provision of an orderly marketing system.
2. In the event a Producer or any other Person realizes a benefit or advantage in regard to the application of the Procedures contained in Part XVII and Part XVIII, or the utilization of or access to Delivery or Production Allocations, that are not consistent with the object and purpose of these Procedures, the Commission may deny such Producer or Person that benefit or advantage and may interpret these Procedures in a manner consistent with the object and purpose of the policy as articulated in section 1 of this Part.

3. Delivery and Production Allocations are a privilege granted by the Commission under a Producer's license. Delivery and Production Allocations shall have no monetary value.
4. Only Persons eighteen (18) years of age and over and holding a valid Producer's licence from the Commission may hold or be assigned Delivery or Production Allocations.
5. Only Persons holding Canadian citizenship or Permanent Resident Status may hold Delivery or Production Allocations. If the applicant for a Delivery or Production Allocation is a corporate applicant, then 51% common beneficial ownership must be retained by a Person or Persons holding Canadian citizenship or Permanent Resident Status.
6. A change of name on a registration or a Delivery or Production Allocation does not necessarily constitute a transfer of a Delivery or Production Allocation.
7. A change of name on a registration of a Delivery or Production Allocation does not negate any Grower Marketing Agreement between a Producer and an Agency.
8. Throughout the Regulated Area Delivery and Production Allocation is transferable between and among licensed producers and prospective producers intending to obtain a producer license. For the purpose of reaching decisions and determinations regarding the transfer of Production and Delivery Allocation the VMC will rely on what is provided for in Part XVII and Part XVIII of this General Order as well as policies established regarding Production and Delivery Allocation transfer, which may change from time to time.
9. Designated Agencies having the authority to market storage crops are to use each individual producer's assigned Delivery Allocation for the purpose of determining the Producer's delivery opportunity in accordance with the established Delivery Allocation period.

PART XVII PROCEDURE FOR DETERMINING DELIVERY ALLOCATION FOR STORAGE CROPS

1. This Part covers Storage Crops as defined in Part I (5), *as follows*:

"Storage Crops" mean potatoes, onions, parsnips, cabbage, carrots, beets, rutabagas, white turnips and any other crop designated by the Commission.
2. *Only Regulated Product shipped through an Agency or Producer-Shipper of the Commission shall be used for the calculation of Delivery Allocation levels or adjustments for Crops under this Part.*
3. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.
4. Subject to section 5 and 6 in this Part, no Producer shall ship a quantity of Storage Crops in excess of their Delivery Allocation, unless otherwise authorized by the Commission.
5. Delivery Allocation within a period does not commence until supply exceeds demand. Any shipments made within a Delivery Allocation period prior to commencement of Delivery Allocation will count towards the building of Delivery Allocation.
6. After one round (100 percent) of all Delivery Allocations has been shipped for any Storage Crop in any Delivery Allocation period, Delivery Allocations shall be awarded equally to each registered producer. For the purposes of this section registered Producers operating as a Family Unit may be grouped together and in those instances the Family Unit will receive the Delivery Allocation of only one registered Producer.

7. Where a Producer is called to provide Regulated Product and cannot or will not supply the Regulated Product demanded by the market, that Producer will be bypassed and will be deemed to have shipped the quantity of Regulated Product requested, and other Producers will be contacted. Producers holding a Delivery Allocation will be contacted first and new Producers will be contacted if Producers holding a Delivery Allocation cannot supply the Regulated Products requested.
8. Regulated Product produced outside of British Columbia shall not be used to fill or increase a Delivery Allocation for a Producer.
9. Regulated Product produced by one Producer may not be used to fill or increase a Delivery Allocation of another Producer.
10. Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.
11. If a Producer is found guilty of violating a Commission Order, the Commission shall have the authority, in addition to any other measures set out in these orders, to suspend a Producer's Delivery Allocation for a period of time. Sales made during the period of violation will not be allowed to build Delivery Allocation.

Transfer of Delivery Allocations

12. Except in extenuating circumstances, transfer of a Delivery Allocation by any Producer can only take place once a year and is subject to the following conditions:
 - (a) all applications for transfer of a Delivery Allocation must be on a form prescribed by the Commission;
 - (b) all applications for transfer of Delivery Allocations must be filed with the Commission not later than March 15 each year; and;
 - (c) unless otherwise specified by the Commission, all transfers of Delivery Allocation shall take effect the following crop year.
13. When transferring a Delivery Allocation, only that portion of a Delivery Allocation that has been earned can be transferred. Earned Delivery Allocation constitutes Delivery Allocation based on actual shipments and shall not include any Delivery Allocation that has been previously granted by the Commission.
14. In the case of potatoes only, to qualify for transfer, the minimum earned Delivery Allocation must total an aggregate ten tons when all categories and Delivery Allocation periods are combined.
15. Any Delivery Allocation earned or acquired must be utilized by the licensed Producer for a minimum of two (2) years before it may be transferred, except in extenuating circumstances.
16. Delivery Allocation periods for Storage Crops shall be as set out in Schedule VI – *Delivery Allocation Periods for Storage Crops*.

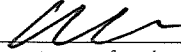
Schedule III Annual Licence Fees

Licensee	Class 1	Class 2	Class 3	Class 4	Class 5
Designated Agency					
\$500 plus an amount equivalent to 0.025% of annual sales*	Base amount	Class 1 times 2	Class 1 times 3	Class 1 times 4	Class 1 times 5
Packinghouse	-----	\$1,250	\$2,500	\$12,500	\$50,000
Producer					
Storage / Greenhouse / Processing Crops (except Strawberries)	\$250	\$1,250	\$2,500	\$12,500	\$50,000
Processing – Strawberries	\$50	\$1,250	\$2,500	\$12,500	\$50,000
Producer - Shipper					
\$500 plus an amount equivalent to 0.025% of annual sales*	Base amount	Class 1 times 2	Class 1 times 3	Class 1 times 4	Class 1 times 5
Processor	\$1,000	\$2,000	\$6,000	\$10,000	N/A
Wholesaler	\$1,000	\$2,000	\$6,000	\$10,000	N/A
Commission Salesperson	\$50	\$2,000	\$6,000	\$12,000	N/A

*Annual Sales based on most recently completed financial statement

This is Exhibit "142" to the Affidavit #1 of
Jamilla Ng, affirmed before me at
Vancouver, in the Province of British Columbia
this 8 day of June, 2020

5518


A Commissioner for taking Affidavits for the
Province of British Columbia

November 29, 2019

File: N1908

DELIVERED BY E-MAIL

Claire Hunter
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2100-1040 West Georgia Street
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Dear Sir/Mesdames:

RE: Prokam Enterprises Ltd. (Prokam) v BC Vegetable Marketing Commission

On November 27, 2019 I wrote to the parties in my capacity as the presiding and sole member of the above captioned appeal panel to advise that I was giving consideration to whether it was appropriate in the circumstances to defer further consideration of this appeal in accordance with s. 8(8) of the *Natural Products Marketing (BC) Act (NPMA)*. I gave the parties the opportunity to provide their positions on BCFIRB addressing the appeal-related matters in its supervisory capacity and have now received and reviewed their submissions.

The BC Vegetable Marketing Commission (Commission) submission provides a review of the many procedural steps taken in these matters since October 2017. It is not necessary to review that history here. The Commission position is that the recursive nature of the process to date demands that this latest appeal be deferred in accordance with s. 8(8) of the *NPMA* until the existing supervisory process has been completed.

Prokam agrees that it makes sense to have issues raised by this appeal addressed by the same supervisory Panel to which the earlier CFP Marketing Corporation (CFP) appeal was deferred. However, Prokam says that neither Prokam nor CFP has yet been given an opportunity to meet with the supervisory panel or the Commission in the context of the ongoing supervisory process to which CFP's appeal has been deferred, and to which Prokam's September 2019 application for an interim producer-shipper license was forwarded. If this appeal is deferred to the supervisory review, Prokam expects to be afforded significant and timely participatory rights in the supervisory review process.

Second, Prokam is concerned that deferral may result in additional delay and suggests that any prejudice to Prokam by this deferral could be mitigated through the granting of the interim relief it seeks, namely granting Prokam an interim producer-shipper licence pending the outcome of this process either within the appeal or within the supervisory process.

Prior to consenting to deferral of the appeal, Prokam wants meaningful and direct input into the timeline and the procedure to be adopted on supervisory review and suggests that the pre-hearing conference scheduled in the appeal be used to canvass interested parties which it describes as, at a minimum, BCFIRB, Prokam, CFP, and the Commission to discuss issues of procedure and timing and establish a procedural roadmap for a supervisory review, agreeable to all parties.

Decision

I have considered the positions of the parties and specifically Prokam's position that the conference call scheduled in relation to its appeal before me as Presiding Member to hear from the parties on their positions with respect to the deferral should somehow be used as a mechanism to create a roadmap for the supervisory process misinterprets my role. To be clear, I cannot make determinations that would tie the hands of the supervisory Panel.

Further and in light of the fact that both parties acknowledge that this appeal should properly be deferred pending the completion of the supervisory review that is already underway, I order that further consideration of Prokam's appeal be deferred in accordance with s. 8(8) of the *NPMA* until the supervisory process has been completed.


In making this Order, I cannot limit the supervisory Panel as to the issues it may consider, the process it will follow or the time frame to conclude its supervisory process. Having made the decision that I have sufficient information before me based on the submissions of the parties to make my decision and as I conclude it is appropriate in these circumstances to defer the appeal, it is now up to the supervisory Panel to determine how it will incorporate the issues raised in this appeal in its supervisory process. Any roadmap for the supervisory review process must be developed by the supervisory Panel.

As those members would not be in attendance on a pre-hearing conference call held in the appeal proceedings, I can see no utility in conducting the pre-hearing conference scheduled for Monday, December 2, 2019. To adopt such a process would only add to the delay the appellant seeks to avoid.

This decision will be provided to the supervisory Panel and the parties should expect to hear from that Panel in due course.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

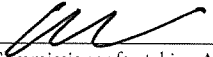
Per:



Pawanjit Joshi
Presiding Member

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

This is Exhibit "15" to the Affidavit #1 of
Jamilla Ng, affirmed before me at
Vancouver, in the Province of British Columbia
this 8 day of June, 2020


A Commissioner for taking Affidavits for the
Province of British Columbia

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
INTERIM RELIEF SOUGHT BY PROKAM ENTERPRISES INC.

January 10, 2020

INTRODUCTION

1. This matter results from an extensive series of decisions, appeals and requests related to vegetable producer, Prokam Enterprises Ltd. (Prokam), and the British Columbia Vegetable Marketing Commission (Vegetable Commission). The following is a brief summary of some of the key events leading to this decision.
2. On February 28, 2019, and following an eight-day oral hearing, the British Columbia Farm Industry Review Board (BCFIRB) issued a decision¹ arising from an appeal between Prokam, wholesaler Thomas Fresh Inc. (Thomas Fresh), and the Vegetable Commission (the Prokam appeal decision). BCFIRB found that the Vegetable Commission breached principles of administrative fairness by failing to adequately address reasonable apprehension of bias concerns related to the participation of BC Fresh Vegetables Inc. (BCfresh) Commissioners in compliance and enforcement proceedings.
3. The BCFIRB Prokam appeal decision directed the Vegetable Commission to reconsider several Commission Orders made with respect to compliance and enforcement, including directing Prokam to market through BCfresh.
4. On June 28, 2019, the Vegetable Commission issued a separate decision summarily dismissing a Class 1 Agency Application from CFP Marketing Corporation (CFP), and imposing a moratorium on all designated agency and producer-shipper licence applications. Prokam had requested that the Vegetable Commission consider directing Prokam to CFP in the event of CFP being granted a designated agency licence.
5. On July 3, 2019, CFP appealed this summary dismissal. In its Notice of Appeal, CFP stated that “BCVMC [Vegetable Commission] failed to follow its own processes (regarding designated agency approval) and conducted itself in a manner that was procedurally unfair and gives rise to a reasonable apprehension of bias”. CFP “...seeks an order setting aside BCVMC’s summary dismissal of its application for agency status and that BCFIRB direct the BCVMC to approve CFP as a designated agency or alternatively to forthwith process CFP’s application in a manner consistent with its General Orders.”
6. On September 10, 2019, a BCFIRB appeal panel, after hearing from the parties, deferred consideration of CFP’s appeal subject to completion of a supervisory process. Subsequently BCFIRB established a supervisory panel.
7. Prokam applied on September 20, 2019 to the remaining panel member of the Prokam appeal decision seeking direction that the Vegetable Commission provide Prokam with a producer-shipper licence, that its 2020/21 delivery allocation be

¹ 2019 February 28. BCFIRB. In the Matter of the *Natural Products Marketing (BC) Act* and Appeals from Compliance Orders of the British Columbia Vegetable Marketing Commission.

calculated without regard for 2018/19 and 2019/20 growing seasons and for leave to apply for a producer-shipper licence for 2020/21. The BCFIRB panel member concluded they were *functus officio* (without power) and forwarded the application to the supervisory panel for consideration on October 7, 2019.

8. On November 18, 2019, the Vegetable Commission issued its reconsideration decision as directed by BCFIRB in the Prokam appeal decision (see footnote 1).
9. Prokam appealed the reconsideration decision to BCFIRB on November 20, 2019 taking issue with being directed to market through BCfresh and being granted a more costly Class III licence. It requested reinstatement of its Class I licence, a producer-shipper licence or direction to CFP (should it be granted an agency licence), freezing of its delivery allocation as of October 10, 2017 and that the Vegetable Commission's Interim Order related to agencies be set aside. After hearing from the parties, a BCFIRB appeal panel deferred the appeal pending completion of the supervisory review already underway (November 29, 2019).
10. In its November 20, 2019 notice of appeal, Prokam indicated it needed a timely decision in order to make business arrangements for the 2020/21 crop year.
11. Given the nature of the supervisory review, the supervisory panel determined it was appropriate to consider Prokam's requests for interim relief for the 2020/21 crop year and established a submission process to hear from the interested parties.
12. While Prokam seeks alternate marketing arrangements and production approvals, the panel encouraged Prokam (December 4, 2019) to plan to the extent it was able based on the delivery allocation the Commission approved while the supervisory panel considered whether any interim direction was necessary.

ISSUE

13. In light of the ongoing supervisory process and the deferral of Prokam's appeal of the Vegetable Commission's reconsideration decision, does Prokam require an interim order from the supervisory panel to grow and market regulated product for 2020/21?

LEGAL AUTHORITIES

14. In British Columbia, the production and marketing of vegetables is regulated under the *Natural Products Marketing (BC) Act (NPMA)* and the British Columbia Vegetable Scheme (Scheme).
15. Under the Scheme, the Vegetable Commission may regulate all vegetables grown in the province. At this time storage, greenhouse and processing crops, as defined in the Vegetable Commission General Orders, are regulated "south of the 53rd parallel

- north, including Vancouver Island and the Gulf Islands and excluding the Queen Charlotte Islands”.
16. Among other extensive powers, the Scheme grants the Vegetable Commission the authority to require persons marketing regulated product to obtain condition-based licences. The legislation and Scheme do not contemplate a “right” to hold a licence.
 17. The legal authority granted to the Vegetable Commission, as first instance regulator of the BC vegetable industry, imposes a corresponding responsibility to ensure that this authority is exercised in accordance with fundamental principles of good governance and sound marketing policy in the public interest.
 18. The Vegetable Commission’s General Orders set out the rules it uses when undertaking promotion, control, and regulation of the production, transportation, packing, storing, and marketing of regulated vegetables in BC.
 19. BCFIRB is responsible for the general supervision of all marketing boards and commissions under the *NPMA*, including the Vegetable Commission. BCFIRB has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact, law and discretion arising or required to be determined by BCFIRB.

PROCESS

20. On December 4, 2019, the supervisory panel requested written submissions from Prokam, BCfresh and the Vegetable Commission. In setting the questions, the panel took in to consideration the extensive information produced to date through the Prokam appeal decision process and the Vegetable Commission’s reconsideration process. The questions provided to the parties were as follows:
 - a) Production
 - i. What is Prokam’s delivery allocation as set by the Commission for 2020/21, and what was included in the calculation (years and volumes)?
 - ii. What acreage is Prokam planning on planting to produce the delivery allocation?
 - iii. Is there a sound marketing policy reason for this amount of delivery allocation to be modified for 2020/21? Please explain why or why not.
 - b) Marketing
 - i. Is the current Grower Marketing Agreement (GMA) between Prokam and BCfresh directed by the Commission to continue for 2020/21 viable? (Is this a viable marketing option?) Why or why not?

- ii. Apart from BCfresh, is any other agency a viable option for use by Prokam? Why or why not?
 - iii. What are the risks and benefits to orderly marketing of issuing Prokam a producer-shipper licence?
21. Parties made their final submissions to BCFIRB on or before December 16, 2019. BCFIRB posted all submissions to its web site, redacting confidential business information.
22. On December 30, 2019 the panel received a letter from Prokam raising procedural concerns with the supervisory review process, "...particularly in respect of decisions that impact Prokam's right to a licence that would permit its product to be marketed". The concerns related to supervisory panel meetings with the Vegetable Commission (October 28, 2019 and November 14, 2019) and the redacting of information from BCfresh's submission received in this supervisory process (paragraph 20 above). BCfresh requested that the panel resolve these issues to avoid further legal proceedings (January 3, 2020 and January 8, 2020). The panel received a further replay from Prokam on January 9, 2020.
23. In its January 9, 2020 response to the concerns raised by Prokam, the supervisory panel ruled as follows:

The panel has determined it is in a position to address Prokam's objections without further submissions from the parties or any further process and has considered all necessary and relevant information.

...

...the panel has determined that the redacted paragraph of the BCfresh submission, which provides specific details of BCfresh's markets and contracts, is not material to the interim decision it is presently making. At issue is whether Prokam has a legitimate opportunity to market regulated vegetables for 2020/21. The panel finds that it can proceed to make its decision without reference to the redacted information provided by BCfresh.

....

Prokam also objects to the panel's meetings with the Commission on October 28, 2019 and November 14, 2019. We find this objection to be without merit.

...

As all of the parties are well aware, BCFIRB is conducting a supervisory process relating to high level issues within the industry. Importantly, the panel and the Commission met on both occasions prior to the Commission making its reconsideration decision... Also, the meetings occurred before the panel established

the process to address Prokam's requests for interim relief...specific to the 2020/21 production year ...(which) are narrow and specific compared with those issues which the panel expects to deal with through its supervisory review which will be different in scope than the specific appeals and have industry-wide application.

...

The panel finds that it can decide on these interim matters without reference to the broader industry and project background information sought from the October and November 2019 meetings with the Commission.

ANALYSIS

24. The Vegetable Commission made the following decisions regarding Prokam as part of its reconsideration decision:

92. Prokam Enterprises Ltd. Licence Class

Effective immediately, [t]he order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III License to this producer.

Prokam was not licensed to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licensed as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

62. Prokam does not qualify to apply for a Producer-Shipper Licence

Once Prokam's Class III licence reverts back to a Class I licence it may submit an application to the Commission. As long as Prokam is an active producer growing regulated vegetables for the retail, wholesale, or food service markets, and remains compliant over the next three licence periods, this opportunity could be available to Prokam for the 2022/23 Crop Year.

94. BCfresh as the Agency Designated to Prokam Enterprises Ltd.

With the enactment of this interim order, the panel offers Prokam with three options:

- Prokam can chose (sic) to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.
- If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018.

- If BCfresh releases Prokam from the GMA, Prokam can consult with other licensed storage crop agencies to represent the grower in consideration of the new interim order.
25. In this decision, the panel is not considering Prokam's appeal request to have its Class I licence reinstated. Prokam has a valid licence and as such can produce and market vegetables. The issue of what is the appropriate class of licence for Prokam cannot be resolved in this process.
 26. In considering whether to amend or vary a decision of the first instance regulator on an interim basis, this panel would only do so if it found the process followed by the Vegetable Commission was substantially flawed (as in the case of the finding in the Prokam appeal decision where the BCFIRB panel found failure to address reasonable apprehension of bias concerns required a remittal back to the decision maker for reconsideration) and/or the Vegetable Commission made a substantive sound marketing policy error in its directions.

Vegetable Commission's Process

27. In the panel's view, the Vegetable Commission has taken reasonable steps to address the administrative fairness issues identified in the Prokam appeal decision. Specifically, it fulfilled the appeal direction to canvas interested persons' views on the reconsideration panel composition. In establishing the reconsideration panel, the Vegetable Commission consulted with Thomas Fresh, Prokam and Island Vegetable Cooperative Association (IVCA). The final panel was composed of Vegetable Commission members who do not ship to, and are not shareholders, directors, or officers of BCfresh. All storage crop members recused themselves from the Vegetable Commission's final decision discussion and vote.
28. The panel observes that Prokam, in its November 20, 2019 Notice of Appeal, did not dispute the Vegetable Commission's steps to address the potential conflict of interest concerns in decision-making.
29. While the reconsideration process was lengthy, the panel is satisfied it was fair and inclusive. The Vegetable Commission shared the written submissions with all parties and provided opportunity for reply. Following the first process, the Commission panel requested input from BC potato producers and agencies on the direction of Prokam to BCfresh. The Commission subsequently provided a submission extension. The Vegetable Commission shared the submissions with IVCA, Thomas Fresh and Prokam, who did not make reply submissions to the Vegetable Commission.

Commission's Decision to Direct Prokam to Market through BCfresh

30. Prokam seeks to have the Vegetable Commission direction to market through BCfresh overturned and be granted a producer-shipper licence.

31. The government of BC established regulation for the vegetable industry in the interest of vegetable producers and the public. Vegetable producers to whom the Scheme applies (see paragraphs 14 to 17 above) are required to operate within the regulated system, including abiding by the terms of a condition-based licence.
32. The Vegetable Commission General Orders operate as a whole to facilitate the orderly production and marketing of regulated storage crops for the benefit of all storage crop producers. Disruptions through over or under-supply, or marketing, negatively impacts all regulated storage crop producers.
33. Under the General Orders, regulated storage crop producers are required to market through a designated agency, unless they are granted a Producer-Shipper licence or an exception. Agencies manage delivery allocation so that all producers have an equal opportunity to market their product and share in maximizing returns. Agencies are delegated legislative authorities by the Vegetable Commission and BCFIRB. The agencies are accountable to the Vegetable Commission, and ultimately BCFIRB, for these delegated authorities.
34. In reaching its reconsideration decision, the Vegetable Commission considered Prokam's previous non-compliance with the General Orders regarding delivery allocation² and planning for new or additional regulated product (acknowledged and summarized by BCFIRB in the Prokam appeal decision), the position of other storage crop agencies on marketing Prokam's regulated product, and agency accountability.
35. In light of Island Vegetable Cooperative Association's³ "dysfunctional nature" the Vegetable Commission upgraded Prokam's Class IV licence to a Class III licence to recognize Prokam's demonstrated non-compliance with the General Orders regarding delivery allocation and planning for new or additional production.
36. The Vegetable Commission found in its reconsideration decision that BCfresh meets the objectives and obligations of an agency under Part V (Agencies) and Part VII (Agency Responsibilities) of the Commission General Orders. It also found that BCfresh has the resources and experience to support Prokam's growth ambitions within the current regulatory framework. The Vegetable Commission noted that while other designated agencies have the ability to market Prokam's regulated crops, these agencies expressed support for BCfresh as the preferred choice.
37. The panel accepts that the Vegetable Commission determination to direct Prokam to market through BCfresh for 2020/21 if Prokam chooses to grow regulated product or

² How much regulated product a producer can deliver to an agency or market within a specified time period.

³ At the time of the Prokam appeal, Prokam was marketing through the Island Vegetable Cooperative Association.

if BCfresh will not release Prokam from the current Grower Marketing Agreement is consistent with sound marketing policy for the following reasons:

- a) BCfresh has expressed willingness to work with Prokam and committed to selling Prokam regulated product;
- b) BCfresh has experience and connections in potato marketing across Western Canada and should have the capacity to successfully market Prokam's regulated product;
- c) As reported in the reconsideration decision, other storage crop agencies which also have the capacity to market Prokam's regulated product expressed support for BCfresh serving as Prokam's agency;
- d) The Prokam appeal decision found that Prokam was not in compliance with the Vegetable Commission's General Orders regarding delivery allocation and planning of new or additional production;
- e) The reported BCfresh track record of compliance with the General Orders can support Prokam's compliance efforts;
- f) Prokam has the opportunity to demonstrate its ability and willingness to operate within the regulated system by working with BCfresh; and,
- g) Once Prokam demonstrates its ability and willingness to operate within the regulated system it has the opportunity to transition to a Class I licence and be in a position to apply for a Producer-Shipper licence for 2022/23.

Prokam Request for a Producer-Shipper Licence

38. The Panel now turns to evaluate Prokam's request to be granted a Producer-Shipper licence instead of being directed to BCfresh.
39. Storage crop Producer-Shipper licences are not common. Part VIIA of the General Orders states that "A Producer-Shipper licence is an extraordinary licence issued under exceptional circumstances. The circumstances are inclusive of, but not limited to, the history, geography and economics associated with the applicant." Currently, there is one storage crop producer, operating on Vancouver Island, holding a Producer-Shipper licence granted under specific circumstances⁴. The Vegetable Commission observed that in order to consider such an application, the producer would need to be in good standing with the Commission's General Orders. The Commission has outlined how Prokam can be eligible to apply for a Producer-Shipper

⁴ 2017 January 31. BCFIRB. In the Matter of the Natural Products Marketing (BC) Act and the Future of Regulated Vegetable Production on Vancouver Island – Agency Designation.

licence in two years (2022/23 – see paragraph 24), and the panel accepts this evaluation.

40. Prokam’s justification for this request is based in large part on its stated view that it cannot work with BCfresh, citing past acrimony between Prokam and BCfresh management staff. This leads Prokam to a concern that BCfresh will also not explore or pursue market opportunities that Prokam suggests, and those opportunities will be lost. Conversely, BCfresh expressed a willingness to work with Prokam and notes that it will assist Prokam in maximizing its opportunities to market its potatoes at a potentially better price than it would receive as a Producer-Shipper.
41. The panel understands BCfresh and Prokam have made very limited efforts to develop a working relationship. Prokam references some initial spring 2018 discussions with BCfresh, where Prokam disagreed with terms put forward by BCfresh. Following this exchange, discussions appear to have ended. Prokam states, among other matters, that BCfresh would not accede to Prokam’s wish to expand into extra-provincial markets, that BCfresh would limit Prokam’s plantings, and that Prokam would need to construct storage.
42. With respect to this latter point, the panel observes that as a designated agency, BCfresh is responsible for ensuring all producers shipping through its agency have shared access to the opportunity to market their vegetables by managing delivery allocation assigned by the Vegetable Commission. Producer plantings typically are based on and reflect delivery allocation adjusted for normal production losses and some market adjustments (or “gap filling”). The role of the agency necessarily extends to monitoring acreage under production and ensuring producers have storage for their crops. Crop storage is not only a common practice for regulated BC potato producers, but is a necessity, as agencies do not typically have the capacity to provide storage for their producers.
43. The Vegetable Commission General Orders establish a clear process by which new or expanded markets can be met. The panel does not agree that the solution to meeting potential new or expanded market demands, if such exist, is to grant Prokam a Producer-Shipper licence. Even if Prokam is granted a Producer-Shipper licence it has obligations under the General Orders and is still bound by its delivery allocation should supply exceed demand.
44. Shipping over delivery allocation requires Commission authorization whether Prokam ships through an agency or direct markets as a Producer-Shipper. The panel recognizes that Prokam wishes to demonstrate ways it can offer additional product at times other producers are not able to do so or offer product to meet specific niches others do not meet. Prokam did not provide the panel any substantive information that would lead it to find that BCfresh is unable or unwilling to consider these types of proposals by Prokam as long as they can be achieved through compliance with the General Orders.

45. The marketing framework provided by the Commission's General Orders has been developed to serve all registered growers of regulated product. It is the panel's position that it is incumbent on Prokam to now demonstrate its willingness to work within the regulated system and to re-establish its good standing before seeking concessions. The panel is not satisfied that Prokam has demonstrated there are historical, regional or economic circumstances that warrant granting it a Producer-Shipper licence for 2020/21.
46. As noted in paragraph 44 Prokam's avenue to expand production to fill new or additional markets is not closed. Should Prokam, in cooperation with BCfresh, identify opportunities for marketing new or additional regulated product in 2020/21, application can then be made to the Vegetable Commission under Part XV of its General Orders (Marketing of "New" or Additional Regulated Product by Existing Agencies and Producer-Shippers).
47. The panel finds Prokam, in being directed to BCfresh, has an avenue to market its regulated crops for 2020/21 and an opportunity for growth should the market allow. In making this finding for the 2020/21 crop year, it is unnecessary for this panel to consider that part of Prokam's November 20, 2019 appeal relating to an agency designation for CFP.
48. In closing, while Prokam commits to abiding by the General Orders going forward, the panel would need to see Prokam demonstrating its willingness to comply with the General Orders before issuing it a Producer-Shipper licence.

Delivery Allocation

49. According to Part XVI of the Vegetable Commission's General Orders, delivery allocation management is intended to support orderly marketing, including preserving market access for producers who have served the market over time; allowing for new entrants, and providing opportunity for industry growth. The Orders also reflect that delivery allocation is a privilege and is issued by the Commission at its discretion based on producers meeting certain conditions.
50. Prokam has made several requests to the Vegetable Commission, and again as part of this supervisory process, for its zero-potato production in 2018/19 and 2019/20 not to be included in the calculation of the five-year rolling average delivery allocation calculation by the Vegetable Commission for 2020/21. The Vegetable Commission has not responded to date, nor did BCFIRB direct the Vegetable Commission to reconsider Prokam's delivery allocation in the Prokam appeal decision. As such, the panel has undertaken to address Prokam's delivery allocation calculation for 2020/21 under this process as part of its supervisory jurisdiction.
51. The panel agrees with Prokam that including the two non-production years (2018/19 and 2019/20) has a significant impact on Prokam's total delivery allocation. It also

recognizes that BCFIRB found in the Prokam appeal decision that the Commission's decision-making process regarding a number of operational matters was significantly flawed. It took the Commission several months to establish and conduct its reconsideration of those matters and issue its decisions. In the meantime, Prokam has filed a number of appeals, adding cumulative time and uncertainty to achieving a consistent business environment for Prokam's operations.

52. For the purposes of this decision, the panel finds that the two years of business uncertainty were in part created by the flawed Vegetable Commission process which necessitated the initial appeal and then the reconsideration. In the panel's view, the delay to resolve the process concerns amounts to special circumstances and those years should be excluded from calculation of delivery allocation.
53. Nonetheless, parties should be aware that the Commission's General Orders provide (Part XVII paragraph 10): "Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation."
54. In this decision, the panel determined it necessary to deal with two of Prokam's requests, as set out above, related to marketing arrangements and calculation of delivery allocation for 2020/21, as interim matters critical to business uncertainty for Prokam. The panel expects Prokam to make its business decisions regarding planting regulated product in light of this decision and the Vegetable Commission General Orders.

DECISION

55. There are insufficient process grounds for the panel to set aside or amend the Vegetable Commission's November 18, 2019 decision to direct Prokam to market regulated product through the agency BCfresh.
56. The panel finds that the Vegetable Commission's November 18, 2019 decision to direct Prokam to BCfresh accords with sound marketing policy.
57. Prokam has not satisfied the panel that conditions exist as a basis for the Commission to decide to issue a Producer-Shipper licence to Prokam. Without any of these conditions being met, there are insufficient sound marketing policy grounds on which to grant Prokam a Producer-Shipper licence for the 2020/21 crop year.
58. The Vegetable Commission (as represented by appropriate members and staff) is directed to meet with BCfresh and Prokam to assess if or when an application seeking new or additional product beyond the delivery allocation approved by the Commission, under Part XV of the General Orders may be justified, and to discuss the Commission's application requirements.

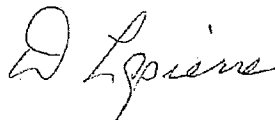
59. In calculating Prokam's delivery allocation for 2020/21, the Vegetable Commission is directed to:

- a) Exclude 2018/19 and 2019/20 crop years from calculating Prokam's 2020/21 delivery allocation;
- b) Abide by the Prokam appeal decision finding that Prokam's 2017-18 crop year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation; and,
- c) Submit Prokam's 2020/21 delivery allocation to the panel for prior approval.

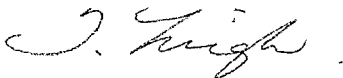
Dated at Victoria, British Columbia, this 10th day of January 2020.



Daphne Stancil
Member



Dennis Lapierre
Member



Tamara Leigh
Member

January 17, 2020

DELIVERED BY ELECTRONIC MAIL

Supervisory Panel
BC Farm Industry Review Board

Bob Dhillon,
Prokam Enterprises Inc.

Murray Driediger
President and CEO
BC Fresh Vegetables Inc.

Dear Sirs/Mesdames:

RE: Vegetable Supervisory Review and Prokam Enterprises Ltd.

On January 10, 2020 the Supervisory Panel issued a decision on the interim relief sought by Prokam Enterprises Inc. The decision directed the Commission as follows:

58. *The Vegetable Commission (as represented by appropriate members and staff) is directed to meet with BCfresh and Prokam to assess if or when an application seeking new or additional product beyond the delivery allocation approved by the Commission, under Part XV of the General Orders may be justified, and to discuss the Commission's application requirements.*

59. *In calculating Prokam's delivery allocation for 2020/21, the Vegetable Commission is directed to:*

- a) *Exclude 2018/19 and 2019/20 crop years from calculating Prokam's 2020/21 delivery allocation;*
- b) *Abide by the Prokam appeal decision finding that Prokam's 2017-18 crop year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation; and,*
- c) *Submit Prokam's 2020/21 delivery allocation to the panel for prior approval.*

Attached to this letter is Prokam's 2020/21 delivery allocation that is calculated by excluding the 2018/19 and 2019/20 crop years. The calculated delivery allocation is therefore based on shipments for 2013/14, 2014/15, 2015/16, 2016/17, and 2017/18. As directed the 2017/18 shipments have been adjusted to exclude exports.

Yours truly,



Debbie Etsell, Chair

FRESH RUSSET POTATOES

Shipments (Tons)					
Crop Year	Total	A	B	C	D
2013/14	94.69	-	2.48	44.96	47.25
2014/15	551.46	-	25.00	329.55	196.91
2015/16	22.01	-	-	22.01	-
2016/17	0.25	-	0.25	-	-
2017/18	3.94	-	3.94	-	-

Total 5Yr Shipments					
Crop Year	Total	A	B	C	D
2013/14 to 2017/18	672.35	-	31.67	396.52	244.16

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2018/19	134.47	-	6.33	79.30	48.83

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2020/21	134.47	-	6.33	79.30	48.83

FRESH WHITE POTATOES

Shipments (Tons)					
Crop Year	Total	A	B	C	D
2013/14	89.79	35.98	30.91	22.90	-
2014/15	46.00	2.78	10.64	26.77	5.81
2015/16	192.70	0.80	84.59	40.93	66.38
2016/17	705.28	249.10	348.86	107.32	-
2017/18	584.18	253.25	323.31	7.62	-

Total 5Yr Shipments					
Crop Year	Total	A	B	C	D
2013/14 to 2017/18	1,617.95	541.91	798.31	205.54	72.19

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2018/19	323.59	108.38	159.66	41.11	14.44

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2020/21	323.59	108.38	159.66	41.11	14.44

FRESH RED POTATOES

Shipments (Tons)					
Crop Year	Total	A	B	C	D
2013/14	156.06	-	57.61	41.07	57.38
2014/15	181.67	0.70	12.32	113.34	55.32
2015/16	88.42	-	21.38	43.45	23.59
2016/17	682.59	119.25	373.03	190.31	-
2017/18	247.23	84.56	136.29	26.38	-

Total 5Yr Shipments					
Crop Year	Total	A	B	C	D
2013/14 to 2017/18	1,355.98	204.51	600.64	414.55	136.28

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2018/19	271.20	40.90	120.13	82.91	27.26

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2020/21	271.20	40.90	120.13	82.91	27.26

FRESH YELLOW POTATOES

Shipments (Tons)					
Crop Year	Total	A	B	C	D
2013/14	192.95	-	73.32	52.28	67.35
2014/15	225.92	1.05	15.69	144.24	64.94
2015/16	110.21	-	27.22	55.30	27.69
2016/17	741.05	141.62	312.56	286.87	-
2017/18	319.04	23.10	252.96	42.98	-

Total 5Yr Shipments					
Crop Year	Total	A	B	C	D
2013/14 to 2017/18	1,589.16	165.77	681.74	581.67	159.98

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2018/19	317.83	33.15	136.35	116.33	32.00

Delivery Allocation (Tons)					
Crop Year	Total	A	B	C	D
2020/21	317.83	33.15	136.35	116.33	32.00

- Note 1:** Delivery allocation (D.A.) is established on a rolling 5-year average of shipments.
(D.A. Calculation = Sum of past 5Yrs of shipments divided by 5)
- Note 2:** 2016/17 - Prokam's first year of shipments as a licensed producer.
- Note 3:** 2017/18 - Prokam shipments exclude export shipments.
- Note 4:** 2018/19 - Prokam did not produce
- Note 5:** 2019/20 - Prokam did not produce
- Note 6:** 2020/21 - Prokam's delivery allocation excludes shipments over the 2018/19 and 2019/20 crop years from the calculation and therefore is frozen at the 2018/19 delivery allocation.
- Note 7:** For the 2021/22 crop year, delivery allocation will be calculated as the five year average of 2014/15, 2015/16, 2016/17, 2017/18, and 2020/21 shipments.

March 18, 2020

By Email

Andre Solymosi
General Manager
BC Vegetable Marketing Commission
15252-32nd Avenue
Surrey, BC

Dear Mr Solymosi:

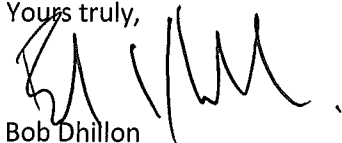
Re: Planting Intentions for 2020-2021 Growing Season

I write to follow up on the offer presented by BC Fresh to Prokam Enterprises Ltd to grow approximately 140 acres of potatoes for 2020-2021 season.

Unfortunately, due to the current unforeseen and special circumstances revolved around the COVID-19 crisis that the BC Farming Industry is experiencing, we are unable to make any decisions for the 2020-2021 season.

As a result, we are requesting a freeze to our delivery allocation for the 2020-2021 season. The largest challenge we face is organizing our labor force for Prokam Enterprises Ltd. As you are aware, this special circumstance (state of emergency) that British Columbia is facing has left the agricultural industry with a high level of uncertainty at this time.

Yours truly,



Bob Dhillon

Prokam Enterprises Ltd

6048359666

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

PANEL CONFERENCE CALL
2020-NOV-17
2:30 PM

Join Zoom Meeting

<https://us02web.zoom.us/j/5670292116?pwd=RzBDRXlQSHVZY1Via3hMTmRlbkx6Zz09>

Phone: +1 778 907 2071

Meeting ID: 567 029 2116

Passcode: 600233

PANEL MEMBERS: Debbie Etsell – Chair
John Newell – Member
Mike Reed – Member
Brent Royal – Member
Armand VanderMeulen – Member

ABSENT: None

Staff: A. Solymosi – General Manager

MEETING PURPOSE:	<ul style="list-style-type: none">To review Prokam’s delivery allocation freeze request for the 2020/21 CROP YEAR.This meeting is a follow-up to the 2020-08-17 panel meeting.
CALL TO ORDER	At 2:33pm Chair Debbie Etsell called the meeting to order.
AGENDA ITEMS	
1. BACKGROUND	<ul style="list-style-type: none">2020-03-18 - A letter was received by the Commission staff on March 18, 2020 from Prokam that requested a freeze on 2020/21 delivery allocation.2020-04-08 - On April 8th a letter was issued by Commission staff requesting further information from Prokam on the freeze request.2020-05-05 - Commission staff received a reply submission from Prokam.2020-06-17 - Commission meeting. A panel was struck to address this matter. Panel members are John Newell, Mike Reed, Brent Royal and Armand Vander Meulen in addition to the BCMVC Chair.2020-08-17 - A meeting of the panel was set for 2020-Aug-17. The Book of documents was circulated to panel members to review. <p>The Chair reviewed S.A.F.E.T.I. with the panel members.</p>

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

2. DISCUSSION

PROKAM's 2020-05-05 Letter

Prokams' May 5, 2020 Letter was reviewed and the following statements were noted:

- At a high level Prokam express's that special circumstances are warranted due to two factors 1) Delays in the Commission's reconsideration decision-making process, 2) The emergency response to COVID-19.
- Prokam states that it required a decision on its application for a producer-shipper licence and confirmation on its delivery allocation by December in order to make planting decisions, reserve seed, and secure land.
- In February 2020 the BCFRIB accepted that Prokam was entitled to a delivery allocation freeze for the 2018-2019 and 2019-2020 seasons because of the ongoing appeals. The revised delivery allocation for the 2020/21 Crop Year was prior approved by the BCFIRB.
- In February 2020 Prokam already made arrangements to lease the approximately 170 acres it owns to Sam Enterprises to produce unregulated vegetables and made its own arrangements for temporary foreign workers to plant this squash.
- Prokam notes that " it had long been seeking about how many acres of potatoes it would be permitted to plant" By February it had missed the opportunity "and had not started the process to hire temporary foreign workers who would be required to assist with planting."
- Planning for the planting season for vegetables must begin many months in advance of the actual planting itself. In the past Prokam has hired TFWs to arrive in February to plant, cultivate and ultimately harvest the crops. In the past, the process from advertisement of the position to arrival in Canada typically takes at least 2 to 3 months.
- Prokam had some discussions with another potato producer on the possibility of leasing Prokam's delivery allocation to grow potatoes.

The panel explicitly does not agree with the following statements made by Prokam:

"At the time that Prokam was provided the information it had long been seeking about how many acres of potatoes it would be permitted to plant – February 2020 – Prokam had already missed the opportunity to reserve seeds for certain potato varieties."

"Prokam's position since the matters at issue in the appeals first arose in 2017 has been that it is in the interests of the British Columbia vegetable marketing industry for it to be able to produce and have marketed as many potatoes as it can produce for sale to a willing buyer."

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

“... Prokam has been fighting ... for the right to produce potatoes in excess of its delivery allocation ... Prokam was forced to mitigate its losses by refraining from ordering potato seeds it might not be permitted to plant”

It is the Panel’s view that it was Prokam’s decision not to plant potatoes for the 2018, 2019, and 2020 Crop Years. Prokam has always had access to the market through its designated agency. The panel made reference to the 2020-09-16 BCMVC written submission to the BCFIRB Supervisory Panel, that storage crop delivery allocation:

“is a system based on regulating access to a market. The Commission does not make decisions to approve planting in excess of delivery allocation. The Commission approves decisions to grant delivery allocation. Delivery allocation manages the flow of product to the market place.

Delivery allocation is a mechanism used to provide for orderly marketing in the storage crop segment. The fundamental principle of delivery allocation is to make it possible for fair and equitable sharing of market access amongst all producers. It is also used to coordinate the expansion and contraction of supply and the movement of product to the market. The benefit to producers is the assurance that their market access is secured, predictable, and coordinated with all producers of the regulated vegetable. It controls market access of regulated storage crop vegetables.

Designated agencies are responsible for managing the delivery allocation of each of their Producers. Growth ambitions of any particular designated agency must take into account the collective view of market growth and expansion opportunities. This is achieved by requiring designated agencies to apply for additional delivery allocation under PART XV of the Commission’s General Order. No agency is permitted to ship in excess of the aggregate delivery allocation held by its producers unless authorized by the Commission.”

2) BCfresh’s 2020-06-03 Letter

The panel reviewed BCfresh’s June 3, 2020 Letter. The following statements were noted by the panel:

- A 3-year GMA was signed with BCfresh in January 2018. This GMA expires at the end of the 2020/21 Crop Year.
- For three consecutive years Prokam has chosen not to grow potatoes. BCfresh is willing to market Prokam’s potatoes and work with them to expand their acreage. BCfresh is not aware of any reason why Prokam could not have continued to grow and market potatoes through BCfresh over the past three Crop Years.
- On March 2, 2020 a meeting was held between the Commission, BCfresh and Prokam. It was expressed by Mr. Dhillon that he wanted to produce 300 to 400 acres of potatoes for the 2020/21 Crop Year though he has delivery allocation only for approximately 65 acres potatoes. At this meeting he also advised that he had made arrangements to secure sufficient seed and land to grow this acreage.

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

- BCfresh supported an increase in acreage that was in excess of Prokam’s delivery allocation and marketable by BCfresh over the 2020/21 Crop Year . This ‘Without Prejudice’ offer was attached to the letter and made in person.
- Labour and work required for the planting, maintenance, and harvesting of un-regulated vegetables is far in excess of the labour and work required for the production of potatoes.
- All of BCfresh’s producers have planted on time and have managed with a mix of local and foreign labour.
- Part XVII Procedure for Determining Delivery Allocation for Storage Crops, *Par.9) Regulated Product produced by one Producer may not be used to fill or increase a Delivery allocation of another Producer*

Tentative thoughts, comments and observations:

- Leasing of Delivery Allocation is not permitted. Part XVII Par.9 of the General Order states that production by one producer may not be used to fill or increase delivery allocation of another producer.
- It is not labour intensive to plant the potatoes.
- Prokam made its own decision not to plant any potatoes. This was also noted in the BCFIRB supervisory Panel’s decision to grant Prokam’s freeze request for the 2019/20 Crop Year.
- In a “Without Prejudice” offer, BCfresh expressed that they believe there would be an opportunity to market up to 140 acres of Prokam potatoes over the 2020/21 Crop Year. This is 75 acres more than the estimated acreage Prokam would need to plant to fulfill its 2020/21 delivery allocation.
- Under Part XVII Procedure for Determining Delivery Allocation for Storage Crops, Par.10 states that *“unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.”*
- The freeze request can be considered due to special circumstances with specific regard to securing labour and seed. There are reasonable arguments presented that these special circumstances presented obstacles to Prokam. November, and in particular December, are key months to securing labour and seed.
- The freeze request can’t be denied in entirety on this occasion with specific regard to labor and seed.

MINUTES OF THE
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	<ul style="list-style-type: none">• It was felt that a freeze request will not be granted again and if Prokam does not plant this year the delivery allocation can be rescinded.• The GMA with BCfresh expires at the end of the 2020/21 Crop Year. This GMA will need to be extended with BCfresh. Or, if BCfresh releases Prokam, a GMA can be signed with another storage crop Agency.• It is expected that Prokam will be taking all reasonable steps to produce their delivery allocation in the 2021/22 Crop Year. <p><i>M/S/C To approve the freeze request for the 2020/21 Crop Year due to some extenuating circumstances with specific regard to securing labour and seed.</i></p> <p>ACTION: The GM is to draft a letter for final review and approval.</p>
ADJOURNMENT	On a motion the meeting adjourned at



Debbie Etsell, Chair



John Newell, Member

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
THE 2019-20 VEGETABLE REVIEW

December 22, 2020

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Decision Summary

1. The BC Farm Industry Review Board (BCFIRB) established a panel to undertake this Supervisory Review (Review) in September 2019. The panel began considering the Review scope based on a number of appeals arising from BC Vegetable Marketing Commission (Commission) decisions and Commission management projects. The appeals raised questions regarding:
 - a. perception of bias and potential conflict of interest in Commission decision-making;
 - b. the Commission's oversight of agencies, who exercise delegated legislated authorities to fulfill their role in the regulated vegetable marketing system; and,
 - c. certain aspects of the Commission's storage crop Delivery Allocation orders and management.
2. Before finalizing the scope of the Review, the panel issued an Interim Relief decision¹ in January 2020 for Prokam Enterprises Ltd. (Prokam), a commercial vegetable producer. The panel found it was sound marketing policy to ensure Prokam had an avenue to market its regulated products in 2020/21 and to respond to Prokam's 2020/21 Delivery Allocation calculation concerns.
3. In early 2020 the panel, in consultation with the Commission and industry, finalized the Review areas of focus: Commission Structure and Governance, Agency Accountability and Storage Crop Delivery Allocation. The panel invited input from the Commission and industry on these areas of focus, based on a background and consultation document. The panel met with 25 interested industry individuals and groups through a series of virtual or telephone meetings in the summer, as well as the Commission and a Commission Working Group² into the fall. Industry and the Commission also had opportunity to make written submissions. To ensure transparency, the process steps, correspondence, decisions, consultation summaries, meeting summaries and other Review documents were posted to the BCFIRB web site.³ The consultations helped inform the panel's answers to the following questions:
 - a. Vegetable Commission Structure and Governance

¹ 2020 January 10. BCFIRB. [In the Matter of the *Natural Products Marketing \(BC\) Act and Interim Relief Sought by Prokam Enterprises Ltd.*](#)

² The Working Group was composed of the Commission Chair, three Commission members representing the storage crop and greenhouse sectors and the Commission General Manager.

³ The Review process is described in more detail starting at paragraph 32.

- i. Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?
 - ii. Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?
 - b. Agency Accountability
 - i. What should an agency accountability framework include?
 - ii. How should an agency accountability framework be used?
 - c. Storage Crop Delivery Allocation
 - i. Is market access being managed effectively and strategically for storage crop producers through delivery allocation?
 - ii. What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?
4. Prior to issuing this decision, and upon being satisfied with the Commission's progress on the agency accountability framework, the panel directed the Commission in October 2020 to lift its moratorium on accepting new agency and producer-shipper licence applications. The Commission had put the moratorium in place in June 2019 to allow it time to complete an agency accountability project and update its strategic plan.
5. Although not unanimous, the panel heard clear industry support for the provincially regulated vegetable marketing system from many industry members and strong recognition for its value from many producers. Through this Review, the panel identified several areas for improvement to ensure the effectiveness of the Commission in regulating the vegetable industry.
6. For the reasons set out in this decision, the panel makes the following directions and recommendations to the Commission.

Vegetable Commission Structure and Governance: Directions and Recommendation

7. The Commission is to:
 - a. Immediately review its member conflict of interest disclosure form to ensure it includes pertinent questions (including those related to pecuniary interests, agency ownership and affiliation and association positions).

British Columbia Farm Industry Review Board
Vegetable Review
December 22, 2020

- b. Submit a copy of the Commission's conflict of interest disclosure form to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
 - c. Immediately review its Code of Conduct to ensure the Code of Conduct provides sufficient guidance on conflict of interest considerations, how to manage and enforce them, and that it is understood by Commission members.
 - d. Submit a copy of the Commission's Code of Conduct to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
8. Until Commission composition changes are fully enacted as outlined below in paragraph 11, the Commission is to:
 - a. On a decision-by-decision basis and guided by perception of bias and conflict of interest considerations, continue to use panels comprised of non-sector producer members from the sector which is the subject of decision.
 - b. The panels are to seek input from the relevant advisory committee(s) and or/retain third party expertise as necessary to ensure fully informed, effective, and strategic decisions.
9. The Commission is to revise its Election Rules and receive BCFIRB's prior approval under s.3(6) of British Columbia Vegetable Marketing Scheme (Scheme), prior to the 2021 election, to reflect that producers holding a director position on an agency are not eligible for nomination and election.
10. The Commission is to review its Election Rules, as soon as practical and no later than the 2022 election, in consultation with industry, to assess whether it is necessary and effective to place restrictions on elected Commissioner positions to ensure representation across agencies and avoid concentration of Commissioners in one agency.
11. BCFIRB recommends and will immediately pursue the following changes to the British Columbia Vegetable Marketing Scheme B.C. Reg 96/80:
 - a. The addition of two appointed independent members.
 - i. Members to be appointed by the Commission following a merit-based candidate selection process developed in consultation with, and prior approved by, BCFIRB under s.3(6) of the Scheme.

- b. A corresponding reduction of two elected commercial producer members, so that there can be up to 6 commercial producers, but no less than 4, on the Commission, elected by commercial producers.
 - i. Members to be elected: three from the greenhouse producers; three from the field crop producers, after considering whether there should be a member representing processing production. These changes, as well as any change needed to reduce producer members from six to four while maintaining equal sector representation, must be incorporated in the Commission's Election Rules, and prior approved by BCFIRB.

Agency Accountability: Directions and Recommendation

12. The Commission is to:

- a. Make orders as necessary to extend the type of reporting requirements in the November 2019 Interim Order to include greenhouse agencies as appropriate to the sector;
- b. Make an order, which at a minimum, requires agencies to submit a business or marketing plan, or particular elements of a marketing plan, within or by a specified time;
 - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought into force;
- c. Make an order, which at a minimum, requires agencies to submit pool settlement statistics for all regulated vegetable crops, within or by a specified time;
 - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought into force.
- d. Identify any outstanding information submission and timeline requirement needs and make orders as necessary to support the practical goal of agency accountability within the proper exercise of legislated authority.
 - i. Any draft amending orders are to be submitted to BCFIRB for review prior to being brought into force.
- e. Provide BCFIRB a timeline for completing the directions in paragraphs a. through d. inclusive within 30 day of this decision.

13. The Commission is to:
 - a. Develop and implement a rules-based agency compliance reporting template no later than December 31, 2021;
 - b. Develop and implement a public annual agency compliance report by April 2022.
14. The panel recommends the Commission:
 - a. Further develop its information management system to support and align with collecting, storing, analyzing, and auditing agency information on production, transportation, packing, storage and marketing of regulated products.
 - b. Give future consideration to an on-line information reporting system for agencies to aid timely information collection and submission and reduce agency and Commission staff time.

Storage Crop Delivery Allocation: Directions and Recommendation

15. The Commission is to implement the following prior to determining if substantive changes are required to its new entrant and growth-related Delivery Allocation orders:
 - a. The panel's directions and recommendation as set out in "Commission Structure and Governance", paragraphs 7 to 11, inclusive; and,
 - b. The panel's directions for collecting comprehensive industry data on a regularly scheduled basis, as set out in "Agency Accountability", paragraphs 12 and 14.
16. Once the Commission has implemented the above directions, the panel expects the Commission to, as it does all BC commodity boards, regularly review its new entrant program. When the Commission does so, the panel recommends it include an assessment of growth and regional opportunities, and consideration of how to calculate Delivery Allocation when it is transferred between producers.

INTRODUCTION

Introduction

17. This Supervisory Review (Review) arises out of a series of appeals and related BC Vegetable Marketing Commission (Commission) projects. The supervisory panel, in consultation with the Commission and industry, determined the Review would focus on Commission Structure and Governance, Agency Accountability and Storage Crop Delivery Allocation. The review process is described starting at paragraph 32.

Industry Background

18. Production and marketing in the BC vegetable industry is regulated provincially. The Commission is the first instance regulator of the industry under BCFIRB's supervision (see Legislative Context).
19. According to the Commission's 2020 Public Accountability Reporting Project report, there are 73 commercial storage crop producers, 67 commercial greenhouse producers and 9 commercial processing crop producers in BC (2019). Total farm gate cash receipts for 2019 are estimated at approximately \$368 million.
20. A person qualifies to be commercial producer (producer) if they grew and marketed at least \$5,000 worth (gross) of regulated products the previous year.
21. All producers must market their regulated production through designated agencies except in limited circumstances specified in the Commission's General Orders. Designated agencies are private vegetable produce marketing businesses that are licensed and delegated regulatory authorities by the Commission and prior approved by BCFIRB. Once a business is designated as an agency, it can market regulated BC vegetable products to the exclusion of others.
22. There are presently 10 designated agencies in BC. Five agencies are licensed to market greenhouse crops only: BC Hot House Foods; Country Fresh Produce Inc.; Global Greenhouse Produce Inc.; Greenhouse Grown Foods Inc.; and, Village Farms Operations Canada Inc. Three agencies are licensed to market greenhouse and storage crops: Island Vegetable Co-op Association; Okanagan Grown Produce Ltd.; and Vancouver Island Farm Products Inc. Two agencies are licensed to market storage crops only: BC Fresh Vegetables Inc.; and, Fraserland Organics Inc.
23. BC Fresh Vegetables Inc. (BCfresh) markets the largest volume of storage crops. It markets regulated products for about 60 producers holding approximately 80% of storage crop Delivery Allocation. Okanagan Grown Produce Ltd. markets the second largest volume. It markets regulated product for 6 producers holding approximately 7% of storage crop Delivery Allocation. The remaining 3 agencies licenced to market storage crops have agreements with 2 to 8 producers and hold

approximately 1% to 3% of Delivery Allocation. The one producer-shipper holds approximately 2% of Delivery Allocation.

24. Greenhouse Grown Foods Inc. markets the largest volume of greenhouse crops. It markets regulated product for about 18 producers holding approximately 28% of greenhouse Production Allocation. BC Hot House Foods markets the second largest volume of greenhouse vegetables, with about 8 producers holding approximately 24% of greenhouse Production Allocation. Vancouver Island Farm Products Inc. markets regulated product for about 11 producers holding approximately 15% of Production Allocation. Country Fresh Produce and VF Operations Canada Inc. market product for about 4 producers respectively holding approximately 11% and 12% of Production Allocation respectively. The 1 remaining agency markets for about 4 producers holding approximately 2% of Production Allocation. Three producer-shippers hold approximately 5% of Production Allocation.
25. Unlike storage crop agencies or greenhouse/storage crop agencies, major greenhouse agencies are part of businesses with production enterprises located in the United States and/or Mexico.

Legislative Context

26. Under the Scheme, enacted under the *Natural Products Marketing (B.C.) Act (NPMA)*, the Commission has the authority to “promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product”. Regulated product is defined as vegetables, and includes a) potatoes, and b) strawberries intended expressly for manufacturing purposes, grown in the Province.
27. The Commission’s powers, duties and obligations are derived from section 11 of the *NPMA*, the *Natural Products Marketing (BC) Act Regulations (NPMA Regulations)* and are established by the Scheme.
28. The Commissions’ General Order sets out the rules it uses when undertaking promotion, control, and regulation of the production, transportation, packing, storing, and marketing of regulated vegetables in BC.
29. The General Order specifies “storage crops”, “processing crops” and “greenhouse crops” as being currently regulated “south of the 53rd parallel north, including Vancouver Island and the Gulf Islands and excluding the Queen Charlotte Islands”:

"Storage Crops" (formerly Root Crops) include beets (tops off), green cabbage, white (purple top) turnips, yellow onions, and potatoes (all types and varieties) when the end use is not for seed.

"Processing Crops" includes peas, beans, corn, broccoli, Brussels sprouts, cauliflower, potatoes (all types and varieties) and strawberries when the end use is manufacturing/processing.

"Greenhouse Crops" includes cucumbers (all types), tomatoes (all types), peppers (all types), and butter lettuce.

30. Under s. 7.1 of the *NPMA*, BCFIRB is responsible for the general supervision of all marketing boards and commissions in the Province, including the Commission. Section 4(1) of the *NPMA* Regulation confirms BCFIRB has general supervision over the operations of all marketing boards, commissions or their designated agencies constituted or authorized under the Act.
31. Section 8 of the *NPMA* Regulation states no agency designation is effective unless approved in writing by the Provincial board (BCFIRB).

Review Process

32. As noted in the Introduction, this review arises in part from a number of appeals and Commission projects. The following summarizes the key events and the overall Review process from September 2019 to December 2020.
33. On September 10, 2019, a BCFIRB appeal panel, after hearing from the parties, deferred an appeal by CFP Marketing Corporation (CFP) of a Commission decision (June 28, 2019) to dismiss CFP's agency application and place a moratorium on new agency and producer-shipper applications until a supervisory process was completed. CFP alleged that the Commission had conducted itself in a procedurally unfair manner that gave rise to reasonable apprehension of bias.
34. As the Review got underway, on September 20, 2019 Prokam applied to the remaining member of the BCFIRB panel that rendered the appeal decision in *Prokam Enterprises Ltd. et al v. BC Vegetable Marketing Commission* (February 28, 2019). As the appeal panel member was *functus officio*, they forwarded the application to the supervisory panel (October 7, 2019). Given the Commission, as directed by BCFIRB in the February 2019 Prokam appeal decision, was in the process of following those directions and reconsidering a number of matters, including the avenue for Prokam to market its regulated crops for the 2020/21 production year, the Review panel determined it was appropriate to wait until the Commission issued its reconsideration decision before addressing the Prokam application.
35. As part of its scope and process considerations, the panel met with the Commission on October 28, 2019. The panel held a follow-up meeting with the Commission Chair and Executive Director on November 14, 2019. Subsequently,

the Commission formed a Working Group⁴ to support the review process. Panel meetings with the Working Group were held March 30, 2020, May 14, 2020, June 15, 2020, September 29, 2020 and October 16, 2020. Meeting summaries and/or related documents were posted to BCFIRB's web site for transparency.

36. Prokam appealed the Commission's November 18, 2019 reconsideration decision⁵ made at the direction of a BCFIRB appeal panel in its February 2019 decision. In summary, Prokam does not agree with the Commission's compliance and enforcement-related directions. It takes the position that the Commission's process was procedurally unfair and the reconsideration decision, as related to Prokam, was not sound marketing policy, nor in accord with SAFETI⁶. After consulting with the parties, the presiding BCFIRB appeal member deferred consideration of Prokam's appeal on November 29, 2019 pending the completion of this Review.

Interim decision

37. On December 4, 2019, in light of the November 29 deferral of Prokam's appeal, this panel established a submission process to address Prokam's on-going requests for relief in advance of the 2020/21 growing season.
38. Prokam sought alternate marketing arrangements to those directed by the Commission in its reconsideration decision, and alternate delivery allocation approvals. The panel interrupted the Review to allow the parties to make submissions and the panel to deal with the matter immediately.
39. This panel issued its Interim Relief decision on January 10, 2020⁷ related to the 2020/21 growing season. The panel declined to consider Prokam's request for a Class I licence in place of the more costly Class III licence⁸, as it determined Prokam had a valid licence and could produce and market regulated vegetables. It concluded the Commission took reasonable steps to address the administrative fairness issues identified in the February 2019 appeal decision and noted that Prokam did not raise conflict of interest in its appeal to BCFIRB of the Commission's reconsideration decision. It upheld the Commission's direction that Prokam market through BCfresh unless Prokam chose not to grow regulated vegetables or BCfresh released Prokam given BCfresh's marketing experience and connections, the support of other agencies and Prokam's non-compliance with

⁴ The Working Group was composed of the Commission Chair, three Commission members representing storage crop and greenhouse sectors and the Commission General Manager.

⁵ 2019 November 18. BCVMC. Reconsideration of 2017 December 22 Decision on Allegations of Non-Compliance by the Island Vegetable Co-Operative Association, Prokam Enterprises Ltd., and Thomas Fresh Inc.

⁶ Strategic, Accountable, Fair, Effective, Transparent, Inclusive

⁷ 2020 January 10. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and Interim Relief Sought by Prokam Enterprises Ltd.](#)

⁸ The Commissions' November 2019 reconsideration decision amended the Commission's original decision to issue Prokam a Class IV licence to a decision to issue a Class III licence.

the Commission's Orders as found in the February 2019 appeal decision (2017/18 crop year). The panel found that working with BCfresh would give Prokam an avenue to market its regulated crops in 2020/21 and an opportunity for growth should the market allow. The panel declined to issue Prokam a producer-shipper licence for 2020/21, finding no historical, regional or economic circumstances that warranted granting such a licence. The Commission was directed to meet with BCfresh and Prokam to discuss whether there would be new or expanded market opportunities for Prokam's products. The panel gave Prokam relief on its delivery allocation by ordering that the 2018/19 and 2019/20 crop years (zero production years) were not to be included when calculating Prokam's 2020/21 delivery allocation.

40. On February 11, 2020, following a submission process, the panel prior approved the Commission's calculation of Prokam's delivery allocation for 2020/21 which followed the panel's January 10, 2020 directions.
41. The panel understands that, despite the Interim Relief decision, the granted relief on its delivery allocation and the meeting with BCfresh and the Commission to discuss market opportunities, Prokam chose not to grow regulated crops for the third consecutive year (2020/21 crop year).

Resumption of supervisory review process

42. Once the panel resumed the supervisory review in mid-February 2020, all regulated vegetable producers and stakeholder were invited to provide written input on three proposed supervisory review topics (Commission Structure, Agency Accountability and Storage Crop Delivery Allocation) by April 30, 2020. After receiving feedback from eight stakeholders, the panel finalized the review topics (Commission Structure and Governance, Agency Accountability, and Storage Crop Delivery Allocation) and subsequently asked all stakeholders to complete an online engagement survey by May 29, 2020 on how they wanted to be consulted (e.g. in writing, via telephone or video conference meeting). Due to COVID-19, in-person meetings were not considered a safe consultation option.
43. In spring 2020, Mastronardi Produce Ltd. (Mastronardi), a greenhouse operation based out of Ontario, started contacting BCFIRB about the Commission moratorium on new agency licences. Mastronardi was seeking an agency licence in order to market regulated BC greenhouse products.
44. In June 2020, Prokam and CFP filed a petition for judicial review with the Supreme Court of BC, appearing to impugn no less than thirteen (13) decisions made by the Commission and/or BCFIRB in the administration of the provincial regulated vegetable industry going back to October 2017. In addition, the petition sought to restrict or curtail this supervisory review of the regulated vegetable industry. The judicial review proceedings proceeded on a parallel but separate track to the supervisory review.

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45. The panel met by video or teleconference with 25 industry individual and groups who requested a meeting with the panel (July/August 2020). The panel relied on questions and background information provided in a July 10, 2020 Consultation Document sent to participants in advance of the consultation meetings to guide the discussions. Participants included: storage crop producers, greenhouse growers, designated storage agencies, designated storage crop/greenhouse agencies, other supply chain members, producer associations, and two businesses applying to become designated agencies. BCFIRB summarized the comments and published a “What We Heard” summary document on August 14, 2020 which was updated on August 19, 2020.
46. In addition, the panel invited all regulated vegetable producers and stakeholders to provide written submissions on the review topics by August 19, 2020 (subsequently extended to August 26, 2020). The industry submitted 9 written submissions. The panel accepted one submission on August 27, 2020 following an extension request. BCFIRB published all submissions on its web site.
47. The Commission provided a closing submission on September 16, 2020 (extended from September 4, 2020). The panel held a closing video conference meeting with the Commission Working Group on September 29, 2020 to enable the Commission to speak to its submission. A follow-up meeting was held on October 16, 2020 to address specific panel questions on agency accountability. BCFIRB published the questions and answers on its website.
48. On October 21, 2020, the panel directed the Commission to lift the moratorium on new agency and producer-shipper licence applications. In the panel’s view it was not sound marketing policy to put business on hold indefinitely and industry certainty was needed to allow for planning. The panel was satisfied that the Commission’s progress on its strategic planning and accountability framework projects was sufficient to allow the Commission to effectively manage any current and pending applications. The panel recognized and supported that the Commission may need to enhance its agency application process to reflect some of the concerns identified in the supervisory review by the Commission and sector stakeholders.
49. Subsequently, CFP withdrew its appeal of the Commission’s June 28, 2019 decision dismissing its agency application and placing a moratorium on new agency and producer-shipper applications and discontinued its judicial review petition.
50. On October 22-23, 2020, the Supreme Court of BC heard BCFIRB and the Commission’s application to strike certain relief claimed by the petitioners and on December 2, 2020 the Supreme Court of BC dismissed Prokam’s petition for judicial review in its entirety.

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51. Throughout the Review the panel received and responded to correspondence from Prokam, CFP and Mastronardi about the review process, timelines and requests for specific accommodations.

VEGETABLE COMMISSION STRUCTURE AND GOVERNANCE

Vegetable Commission Structure and Governance

52. The panel considered the following questions:
- a. Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?
 - b. Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?

Background

53. The Commission's structure is set by regulation in the BC Vegetable Marketing Scheme (Scheme). The Scheme states that the Commission must be made up of:

A Chair, appointed by government; and,

Up to eight members who are commercial producers⁹, elected by commercial producers.

54. As the first instance regulator, the Commission sets a strategic vision, establishes rules, makes regulatory decisions and carries out enforcement activities in support of producers, the industry and the public interest. The structure of the Commission is an important factor determining its ability to make informed and balanced regulatory decisions for the benefit of producers, industry and the public. It is also an important factor determining its ability to manage perception of bias and conflict of interest in decision-making.
55. The Commission makes regulatory decisions in a complicated environment. The scope of the Commission's legislated mandate, which extends to both storage and greenhouse crops, contributes to this complexity, as does retailer consolidation, rapidly changing markets and consumer demands, increasingly stringent food safety requirements, and uncontrolled imports.

⁹ "Commercial Producer" means a Producer whose name has been entered and remains registered in one or more of the registers of Commercial Producers referred to in Section 5 of the Scheme. In accordance with Section 7 of the Scheme, a Producer qualifies to be registered as a Commercial Producer in the district register for a district in which he operates a farm if, during the immediately preceding 12 months, Regulated Product of at least a gross value to the Producer of \$5,000 has been grown on the farm and marketed from it through an Agency or licensed processor." BC Vegetable Marketing Commission General Orders.

56. The Commission's structure reflects government's policy decision that producers play a key role in industry regulation. The regulations under the *NPMA* establishing BC's other seven commodity boards reflect a similar government policy decision.
57. In 2001, the BC government Core Services Review¹⁰ recognized the need to strengthen the structure of BC's commodity boards so the boards could better meet their legislated responsibilities. Achieving the "right mix" of representation on boards was a key recommendation of the Core Services Review. The recommendation resulted in all BC commodity boards receiving Order in Council appointed independent chairs, starting in 2005.
58. Government made other changes to commodity board structures either at the request of a commodity board or on its own initiative, to incorporate a broader range of skills, expertise and knowledge. For example, the BC Cranberry Marketing Commission (Cranberry Commission) has an additional independent member appointed by the Cranberry Commission, the BC Milk Marketing Board has an additional independent member appointed by the Milk Industry Advisory Committee, and the BC Chicken Marketing Board has two additional independent members appointed by Order in Council.
59. The Commissioner positions, as per the Commission's Election Rules, are established as four greenhouse producers, three storage crop producers and one member producing for processing.
60. Commission greenhouse member positions are currently established by crop (tomatoes, peppers, cucumbers, any regulated greenhouse crop). Commission storage crop member positions are currently established by District¹¹ as follows: District I; District II, III; and District I, II, III. The processor member position is also set by District (District I, II, III).
61. "Governance" is broadly defined and often means different things to different people. For the purposes of this decision, the panel considered the relationship between Commission structure and decision-making and specifically, the role board structure plays in:
 - a. apprehension of bias and conflict of interest; and,

¹⁰ The provincial government's 2001 Core Services Review assessed the performance of all provincial programs and activities – including all provincial agencies, tribunals, and boards – with the goal of improving service delivery and management of taxpayer's dollars.

¹¹ "District I" means that part of the Province west of the 121st meridian of west longitude and south of the 50th parallel of north latitude, excluding Vancouver Island and the Gulf Islands" [Lower Mainland]; "District II" means Vancouver Island and the Gulf Islands; "District III" means that part of the Province south of the 53 parallel of north latitude and not in the first or second District [Interior]

- b. it's ability to make balanced decisions considering supply chain and public interests.

Decision-making and apprehension of bias/conflict of interest

62. In its February 2019 Prokam appeal decision, BCFIRB concluded the Commission acted in a procedurally unfair manner in failing to address bias and/or conflict of interest in Commission decision-making:

The panel finds that the Commission breached principles of administrative fairness when it failed to seek submissions from the parties – before the December 22, 2017 order was issued - on the question of whether Commission members with ties to BCfresh should have recused themselves from consideration of any order to direct Prokam to BCfresh. This is a step that should have been taken by the Commission before reaching any conclusions as to whether there was or was not a conflict of interest.

63. BCFIRB, in its appellate function, directed the Commission to reconsider its compliance and enforcement decision after "...canvassing the parties' views on the question of whether any members of the Commission must recuse themselves from the discussion and deliberations concerning the reconsideration."
64. The procedural fairness issue arose from the Commission's composition. Currently three of the four storage crop Commissioners¹² ship to and are shareholders in one agency. Three of the four storage crop members also sit as directors on their respective agencies (two on one agency, one on another agency). At this time each of the greenhouse producer members ship to separate agencies, none are directors and one has an ownership interest in the agency they ship to.
65. The Commission acknowledged perceived apprehension of bias and conflict of interest management issues related to Commission structure and composition. Coming out of the reconsideration process, it endeavored to address the importance of retaining producer expertise in decision-making with management of apprehension of bias and conflict of interest through:
 - a. Establishment of panels of Commission members to manage perception of bias and conflict of interest in decision-making on certain questions (e.g. greenhouse members making decisions on storage crop matters, and vice versa);

¹² Currently, the producer representing the processing vegetable sector is also a storage crop producer.

- b. Establishment of three advisory committees with representatives from storage crops, greenhouses and agencies to provide industry expertise (see the Advisory Committee Terms of References); and,
 - c. Seeking the addition of an independent member.
66. The Commission is applying the tools listed in 65 (a) and (b) discriminately and as necessary dependent on the decisions it is making.

Industry input

67. Through the supervisory review consultation process, industry stakeholders provided a variety of input and recommendations on Commission structure and decision-making. While the panel considered all input and recommendations received through consultation meetings and in writing, the following summarizes the input that is directly relevant to the panel's final recommendations.
68. Overall, participants emphasized that trust is a cornerstone for success/good relationships. Some felt there are no trust problems with the Commission while others indicated serious trust issues. Some stated that perception of bias/conflict of interest with Commission members contributes to a lack of trust.
69. Many participants felt the Commission generally makes good decisions and noted that the Commission operates in a tough decision-making environment. However, there were varying degrees of concern, some very strongly articulated, regarding perception of bias and conflict of interest improperly influencing decision-making. Some felt there is both systemic bias (institutional bias) and operational bias (individual bias) in the decisions the Commission makes. A key issue for many participants is the length of time the Commission takes to make decisions – specifically its decisions on new entrant and delivery allocation applications.
70. Some participants felt that the recent use of panels and advisory committees has helped address perception of bias and conflict of interest issues with decision-making and noted this was a return to how the Commission operated in the past. Others were concerned that conflicted members, although they may not directly participate in a decision, may still inappropriately influence Commission decisions – through member roles on the advisory committees or through existing long-standing relationships outside of the Commission. A key concern raised by many participants about reliance on panels was the ability of greenhouse members to make sound storage crop related decisions and vice-versa, due to lack of panel member industry specific knowledge and despite advisory committee supports. One or two participants suggested knowledge deficits could also be addressed by contracting with industry experts.

71. Some participants raised bias-related questions about Commission decision-making arising out of multiple Commissioners marketing through the same agency. They question the fairness of decision-making where power appears overly vested in one agency, not the Commission. There is a risk of systemic bias as Commissioners, without fully considering the effect of their actions on other agencies, may make decisions that are seen to favour that one agency. Other participants said the unfairness arises because members affiliated with an agency pursue outcomes favourable to the agency they supply. The panel heard that actual or perceived unfairness erodes trust.
72. Most participants supported the addition of further independent member(s)¹³ to the Commission. Comments included acknowledgement of the importance and value of bringing new ideas, outlooks and skills from other areas of the supply chain, or business and governance in general, to further aid Commission decision-making and assist with managing perception of bias and conflict of interest. Several supported independent members with experience and expertise in areas such as wholesaling, marketing or retailing. Some observed that vegetable industry businesses, including some storage crop agencies, have benefited by adding independent members to their boards.
73. As identified by participants, the main risk to having independent members is a lack of agriculture/industry specific knowledge negatively impacting Commission decision-making. Others noted the risk, if independent members outnumbered producer members, that independent members could “out vote” industry members. Generally, participants preferred industry having a direct role in appointing additional independent members, primarily to ensure usefulness and a good fit. Some supported government appointment, with input or referral from industry.

Analysis

74. The structural and related decision-making challenges faced by the Commission are driven by the context in which it operates. Apprehension of bias and/or actual conflict of interest issues with Commission decision-making arise from the central and necessary role agencies play in marketing regulated vegetables. All producers are required, with some limited exceptions¹⁴, to market their product through agencies. These same producers have some form of vested interest in the agency that markets their products (e.g. shipping contract, ownership, director). However, only producers are eligible under the Scheme to sit on the Commission, other than the appointed Chair, to make regulatory decisions affecting agencies.

¹³ Some supported the addition of one independent member, others supported two and/or alternative structures involving additional independent members.

¹⁴ The Commission’s General Orders establish the requirement to market through an agency and the limited exceptions.

75. A 2018 Commission agency audit shows that at least eight of the 10 current agencies, whether cooperatives or corporations, are fully or partially owned by producers. The relatively small number of producers in the greenhouse and storage crop sectors respectively also increases the odds of a producer Commissioner having a significant personal or business connection to a Commission decision. This is particularly found in the storage crop sector where the majority of producers ship to one agency.
76. Compounding the producer-agency tie, the Commission is the regulatory body responsible for licensing and overseeing agencies. Agencies compete directly with each other for producers and markets. It is easy to see how a Commissioner's tie to an agency may lead persons to question that Commissioner's independence and whether decisions are biased in favour of the agency that they have a tie with. For more about the Commission's agency oversight role, see Agency Accountability.
77. There is a recognized inherent bias created by the *NPMA* and Scheme requirements that producers sit on BC commodity boards; however, a producer Commissioner voting on Commission decisions does not ordinarily result in a biased or conflicted decision.
78. The duty to be a regulatory decision-maker, taking into consideration the interests of the full industry as well as the public interest, is more easily discharged where members' interests are no different than the interests of other producers.
79. As with all BC commodity boards, conflict of interest can arise where a member has a direct personal interest in a decision being made (e.g. a decision results in a benefit to the Commissioner or a family member), beyond the general benefit to all producers. These types of situations are usually addressed through conflict of interest disclosures, Code of Conduct guidance and recusal where necessary.
80. However, as noted above, commercial vegetable producers rely on agencies to market their product, and in turn, producers, including producer Commissioners, often have some form of vested interest in those same agencies. There is a significant difference between tolerating a bias in decision-making that arises from a member simply being a producer or identifying a conflict due to special circumstances of a benefit to the Commissioner or family member, and a bias/conflict that arises where there is "something more".
81. In this Review, the panel is concerned about the following scenarios which give rise to different degrees of "something more":
 - a. a Commissioner is a director of an agency;

- b. a Commissioner has an ownership interest in an agency¹⁵, and/or
 - c. a Commissioner ships to an agency.
82. On the farther end of the “something more” scale, the one that is most challenging to appropriately manage is when a Commissioner also serves as an agency director. As a result, they are clearly in a position of both regulating and being regulated.
83. A Commissioner owes a duty to act in the best interest of the Commission’s legislated regulatory responsibilities. The Commission is responsible “to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product” (Scheme (s. 4(1)), on behalf of all producers and in the public interest. The Commission as a whole has a duty to make decisions, in the best interests of the whole industry and in the public interest.
84. An agency director owes a fiduciary duty to act in the best interests of the agency. Where the role of agency director and Commissioner rests in the same person, the legal duties owed to each entity are irreconcilable. The divided legal loyalties create, at a minimum, a reasonable apprehension that the Commissioner’s decisions may be unduly influenced by what is in the best interests of the agency that they serve. There may also be situations where the undue influence of agency interests on a Commissioner’s decision making meets the test for actual conflict of interest. When a Commissioner is part of the “operating mind” of both the regulator (Commission) and regulated (agency), it is as a practical matter beyond comprehension that the Commissioner could compartmentalize the dual functions to avoid the influence of one over the other.
85. Moving down the “something more” scale, a more manageable scenario is where a Commissioner has some degree of ownership interest in an agency but does not sit on the agency’s board of directors. The size or degree of the ownership interest is an important factor in assessing whether a reasonable apprehension of bias or conflict of interest could arise in agency-related decision-making.
86. The current Commission structure involves several Commissioners with some degree of ownership in the same agency. Given the structure of member positions (see paragraph 60) and the fact that District I (Lower Mainland) has the majority of producers and associated production volume (greenhouse and storage crop), there is potential for three of four of the storage crop and processing Commissioners to be shipping to a single agency. With positions reflecting crop type, there is potential for four of four greenhouse Commissioners, and, in the case of storage crop Commissioners, two or three, to be shipping to a single agency. These outcomes may generate concerns about one agency having too much influence over Commission decisions for the respective sectors. Again, the

¹⁵ E.g. Having an ownership interest as a shareholder in a cooperative or corporation.

context and circumstances relevant to the decision being made will determine if a Commissioner's participation in a decision could result in a reasonable apprehension of bias or actual conflict of interest.

87. The third scenario where one or more Commissioner(s) have a marketing agreement with the same agency with falls even further down the "something more" scale. Here, as in the previous scenario the context and circumstances relevant to the decision being made will determine if participation in a decision could result in an apprehension of bias or actual conflict of interest.
88. BCFIRB, in its supervisory role, requires all commodity boards to ensure that board members make conflict of interest declarations, records of which are ordinarily kept by board staff and used as necessary. A Code of Conduct is intended to provide self-directing guidance for members. Commissioners need to assess the implications of their specific relationship(s) arising from their ties to an agency as well as other components of the supply chain for bias/conflict concerns on a decision-by-decision basis and have clear rules for recusal to preserve the integrity of the Commission's independent decision-making.
89. BCFIRB evaluates and addresses apprehension of bias and/or conflict issues with commodity board decision-making on a case by case basis under its supervisory or appellate authorities as appropriate. While the common law provides a framework within which to assess reasonable apprehension of bias and conflict of interest, this framework recognizes the inherent bias of BC's commodity boards created by the *NPMA* and Scheme requirements of having producer members on commodity boards.

Commission structure and composition

90. The Commission adopted a "panel and advisory committee decision-making model" for the November 2019 reconsideration decision. This model creates a tension with the legislative intent of bringing producer expertise to decision-making. Industry expressed concern about regulatory decisions being made by Commissioners not familiar with the production and sale of specific crops (e.g. greenhouse producer Commissioners making decisions about storage crop delivery allocation and vice versa). Commissioners described finding themselves under pressure to make critical decisions about a sector they are not thoroughly familiar with. This tension is mitigated, in part, by providing panels access to industry advisory committees.
91. Adding independent members (persons with no direct vested industry interest) to the Commission structure is one means of resolving the tension between potentially biased/conflicted decisions and producer expertise for the long-term. As noted earlier, several BC commodity board structures include one to two independent members appointed through various means.

92. A board structure that includes independent members promotes procedurally fair decisions and mitigates concerns that a board as a whole is making decisions based on any member's particular interests. Such a structure could alleviate the Commission's challenges with retaining producer expertise and quorum in decision-making while still managing apprehension of bias and conflict of interest scenarios that may arise due to the close ties between producers and agencies.
93. Independent regulatory board members bring additional benefits for industry and the public. Under the *NPMA*, the Commission is responsible for regulating "marketing". Marketing is broadly defined as the "producing, packing, buying, selling, storing, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person". By extension, Commissioners require a broad range of skills and knowledge to make effective, strategic decisions (e.g. producer expertise, financial management knowledge; experience in other components of the supply chain; business management and/or governance skills; and/or a regulatory background). No one individual Commissioner can bring the full set of important skills and knowledge to the decision-making table.
94. Adding independent members for fixed terms would result in regular infusion of new views and outlooks to decision-making. History shows a lack of regular turnover in Commissioners, and an absence of candidates during elections. Given the challenging environment the Commission operates in, some producers are reluctant to stand for election, while others are simply overburdened with other obligations. The panel heard from industry that there are a limited number of people with time to be involved in organizations in addition to managing their main business of growing vegetables. There are an increasing number of industry-related associations and committees relying on producer participation and competing for the time and expertise of vegetable producers. Commissioner positions are part-time, but the actual time commitment can become significant.
95. Board size is also a consideration when looking at a board structure change.
96. The Commission, with a total of nine members including the Chair, is large compared to other BC commodity boards. Other commodity boards range in size from three to six, with most being five members, including the Chair. The Commission's size is a matter of history and appears to reflect the objective of retaining expertise in diverse regulated vegetable crop types and provincial regions.
97. There are a range of factors related to determining the appropriate size of a commodity board. These include, but are not limited to: the nature of the board's work; the expectation that every member be a contributing working member; having an appropriate range of expertise; having sufficient members available for specialized tasks such as panels and committees (sharing the load); and, whether

individual member participation becomes more honorary than governing as board size increases.

98. Smaller boards can be more economical. Board discussions may be shorter and more focused. There is more opportunity for every member's participation to be meaningful. They may be able to meet more often than larger boards. Smaller boards also mean less risk of positions going unfilled. On the other hand, fewer members may result in burn out from workload and important opinions or views may not be at the table.

Conclusions

99. The close ties that exist between producers and agencies are not contemplated by the legislative framework and create apprehension of bias and potential conflict of interest that jeopardize the Commission's independent decision-making. Compounding this situation is the Commission's regulatory oversight over agencies.
100. The panel considered whether the issues of irreconcilable legal duties owed by a Commissioner/agency director and compartmentalizing the functions of operating minds for both the Commission and agencies, can be managed through appropriate and timely recusals. The conclusion is recusal by member(s) under those circumstances cannot resolve these circumstances. After considering the decisions that the Commission has made pertaining to the production and marketing of storage crops over the last three to four years, it is clear that the Commission cannot effectively compartmentalize the oversight of agencies' functions to ensure independent decision-making free from reasonable apprehension of bias, since those functions are intrinsically tied to the regulation of the industry. It is inescapable that the roles of regulator and the regulated agency will be at odds from time to time and result in an appearance of bias or an actual conflict of interest.
101. Commissioners with a director-level legal fiduciary duty to an agency are in an irreconcilable conflict with their duty to make many regulatory decisions in the best interests of industry and in the public interest. Even where the Commission and agencies' objectives or interests are completely aligned, it would not be surprising for a reasonable person to apprehend or perceive that the mind of that Commissioner would be biased in favour of the agency they direct over the interests of other agencies. These concerns would be magnified when the Commission exercises its compliance and enforcement powers as part of its agency oversight role. In the long-run, recusals are insufficient to address the underlying competing obligations.
102. The panel is satisfied that the Commission's "panel and advisory committee decision-making model" is strategic in that it allows for sufficient management of apprehension of bias and conflict of interest in decision making until short and

long-term structure changes can be made. The Commission cannot simply abdicate its responsibility to regulate the industry in response to perceived apprehension of bias or conflict of interest issues. While biased or conflicted decisions are not in the interests of industry or the public, it is also not sound marketing policy to put decision-making on hold. The use of advisory committees can provide valuable information in support of panel and full Commission decision-making for the short and long-term.

103. As noted above, the panel finds that the “panel and advisory committee decision-making model” is sufficient to manage apprehension of bias and conflict of interest in the short-term. To preserve experience and expertise and limit disruption in decision-making, Commissioners who are currently agency directors need not step down before their term of office expires. The Commission can address this situation through panel composition and recusal as necessary, until the Election Rules are changed to restrict agency director producers’ eligibility.
104. When Commissioner ownership in an agency raises apprehension of bias or conflict of interest concerns, the Commissioner should ordinarily be able to rely on disclosure and appropriate recusal as a means of avoiding any procedural unfairness in decision-making and should do so.
105. A reasonable person may also question agency-related decisions where several Commissioners ship to one agency. Modifying the member position requirements under the Election Rules to ensure all producer Commissioner members ship to separate agencies may be an option. However, how practical this is given the structure of the industry, particularly in the storage crop sector where the majority of producers ship to one agency, requires exploration by the Commission with industry.
106. While the Commission has a conflict of interest form and Code of Conduct document, these need to be “living” documents and a central part of the Commission’s governance culture. The documents must take into account the various producer-agency ties so it is readily apparent to the appointed Chair who is tasked with managing such issues and the Commissioners themselves, when recusal is necessary.
107. Given producer-agency ties are likely to persist in the regulated vegetable industry and will periodically require Commissioners to recuse themselves from decision-making, an effective long-term solution will require a change to the Commission structure by adding independent members to the Commission through a Scheme amendment. This solution has the additional benefits of bringing new skills and knowledge to Commission decision-making for the benefit of the industry and the public.

108. While awaiting a potential permanent structural change, the Commission can amend its Elections Rules, with BCFIRB prior approval, to clarify when producer agency directors are not eligible for election due to irreconcilable conflicts.¹⁶
109. Any permanent change to the Commission's structure needs to be carefully managed to avoid disruption in the Commission's functions and the industry.
110. In the panel's opinion, the addition of a minimum of two independent members is necessary for effective change. Given the nature and number of ties that producers have with agencies, and the importance of bringing new perspectives and expertise to decision-making, the panel concludes that the addition of one independent member is not sufficient to mitigate concerns about having enough Commissioners for decision-making when potential producer-Commissioner bias or conflict of interest issues result in recusals and to sufficiently broaden the base of decision-making.
111. The panel also finds any permanent structure change should retain producer expertise but not result in an unduly large board.¹⁷ If two independent member positions are added, the panel recommends two elected producer positions be removed. The Commission would remain with nine total members and retain important producer expertise in the storage crops and greenhouse sectors.
112. A Scheme change that establishes the maximum number of Commission members (e.g. one OIC Chair, two independent members, and up to six elected commercial producer members), enables the Commission to make future determinations about further reducing its membership while maintaining producer expertise. This approach is strategic, accountable, effective and supports fair decision-making. It allows the Commission and the industry to adjust to the addition of independent members and a corresponding reduction of producer members. The Commission could then assess over the next three to five years, if a further reduction in producer Commissioners is effective and strategic. Any reduction could be managed through Election Rule amendments and not require a further Scheme amendment if the flexibility recommended above is drafted into the Scheme.
113. Since the BC vegetable processing industry is shrinking and the role of the Commissioners is to regulate not represent sectors, the Commission needs to consider whether having a processing member position filled through election continues to be strategic, accountable or effective.
114. Either an Order in Council or Commission-run appointment process for independent members is effective provided that the required skills and expertise are well understood and achieved by the recruitment process. The panel favours

¹⁶ British Columbia Vegetable Scheme s. 3(6)

¹⁷ The Commissions operating budget is funded for the most part by producer levies.

the selection and appointment of independent members through a Commission process approved by BCFIRB and documented in the Commission's Election Rules. This would allow the Commission to select for specific skill sets it requires and to establish the maximum term for each independent member to balance expertise, experience and maintenance of a fresh perspective. BCFIRB and the Commission are familiar with the vegetable sector and the Commission's strengths, weaknesses, and needs and can cooperatively identify and recruit candidates with the skills and experience needed to successfully regulate the industry.

115. If Scheme amendments are made as outlined above, a transition plan developed by the Commission, in consultation with BCFIRB, will be needed to allow for continued informed and procedurally fair decision-making in the interim. The plan would address consequential amendments to Election Rules and deal with further reduction in up to two more producer members should the Commission wish to make that reduction.
116. The panel answers the questions pertaining to Commission structure posed by this review in reverse order:

Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?

The current Commission structure does not allow the Commission to effectively, fairly or accountably manage potential conflicts of interest and apprehension of bias in its decision-making.

Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?

The current Commission structure and the ties of producer members to agencies results in Commission decisions being perceived as biased or resulting in conflict of interest. Apprehension of bias and conflict of interest results in procedurally unfair decisions which are potentially neither effective nor strategic.

Change is required to the Commission structure to address these concerns. Immediate change can be made to the Election Rules to clarify agency directors are not eligible for election due to irreconcilable conflicts. Long-term, effective structural change requires a Scheme amendment to increase the number of independent members and to decrease the number of elected commercial producers

Directions and Recommendations

117. The Commission is to:

- a. Immediately review its member conflict of interest disclosure form to ensure it includes pertinent questions (including those related to pecuniary interests, agency ownership and affiliation and association positions).
- b. Submit a copy of the Commission's conflict of interest disclosure form to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
- c. Immediately review its Code of Conduct to ensure the Code of Conduct provides sufficient guidance on conflict of interest considerations, how to manage and enforce them, and that it is understood by Commission members.
- d. Submit a copy of the Commission's Code of Conduct to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.

118. Until Commission composition changes are fully enacted as outlined below in paragraph 121, the Commission is to:

- a. On a decision-by-decision basis and guided by perception of bias and conflict of interest considerations, continue to use panels comprised of non-sector producer members from the sector which is the subject of decision.
- b. The panels are to seek input from the relevant advisory committee(s) and or/retain third party expertise as necessary to ensure fully informed, effective, and strategic decisions.

119. The Commission is to revise its Election Rules and receive BCFIRB's prior approval under s.3(6) of British Columbia Vegetable Marketing Scheme (Scheme), prior to the 2021 election, to reflect that producers holding a director position on an agency are not eligible for nomination and election.

120. The Commission is to review its Election Rules, as soon as practical and no later than the 2022 election, in consultation with industry, to assess whether it is necessary and effective to place restrictions on elected Commissioner positions to ensure representation across agencies and avoid concentration of Commissioners in one agency.

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121. BCFIRB recommends and will immediately pursue the following changes to the British Columbia Vegetable Marketing Scheme B.C. Reg 96/80:
- a. The addition of two appointed independent members.
 - i. Members to be appointed by the Commission following a merit-based candidate selection process developed in consultation with, and prior approved by, BCFIRB under s.3(6) of the Scheme.
 - b. A corresponding reduction of two elected commercial producer members, so that there can be up to 6 commercial producers, but no less than 4, on the Commission, elected by commercial producers.
 - i. Members to be elected: three from the greenhouse producers; three from the field crop producers, after considering whether there should be a member representing processing production. These changes, as well as any change needed to reduce producer members from six to four while maintaining equal sector representation, must be incorporated in the Commission's Election Rules, and prior approved by BCFIRB.

AGENCY ACCOUNTABILITY

Agency Accountability

122. The panel considered the following questions:

- a. What should an agency accountability framework include?
- b. How should an agency accountability framework be used?

Background

123. The *NPMA* and Scheme enable the Commission to designate agencies. Designated agencies are intended to market regulated vegetables on behalf of producers and harness the collective power of producers to gain market access for regulated products. Rather than individual producers seeking out markets for their vegetables, agencies take on that job and, by “pooling” production from multiple producers, can sell to larger markets (e.g. grocery chains such as Sobeys). Agencies minimize marketing burdens on each producer by finding sales outlets, securing sales, collecting sales funds and distributing them to producers. Agencies may also store, ship, and label product for producers. They are entitled to collect fees for these services. For consumers, agencies help ensure a steady, safe, high quality supply of BC product by marketing in an orderly manner. As the point in the supply chain where “money changes hands”, agencies deduct Commission levies from sales income and remit it on behalf of producers to the Commission. One of the important functions of agencies is to grow the industry by looking for new markets.
124. Agency designation is a privilege. It is non-transferable and is not approved in perpetuity. The Commission may review its designation of an agency as part of its annual licence renewal process or from time to time and upon any material changes in the conditions giving rise to the initial approval.
125. Key agency responsibilities, including providing information to the Commission, are found in the Commission’s General Orders Part V “Agencies”, Part VII “Agency Responsibilities” and the November 2019 Interim Order.

Agency Accountability Framework

126. As part of the recent Vancouver Island supervisory review¹⁸, the Commission developed an agency accountability framework (a specialized set of evaluation criteria) to assess the existing Vancouver Island agencies and make recommendations to BCFIRB as to continued agency designations. Following the supervisory review, the Commission started working towards an agency

¹⁸ 2017 January 31. BCFIRB. In the Matter of the *Natural Products Marketing (BC) Act* and the Future of Regulated Vegetable Production on Vancouver Island – Agency Designation.

accountability framework for all BC agencies to establish a comprehensive, consistent and fair approach to the Commission's oversight.

127. In 2018, the Commission conducted an audit of existing agencies to "...develop an understanding on how each Agency is currently functioning in accordance to its overarching purpose and mandate, and assess opportunities for improvement in monitoring accountability and Agency performance."¹⁹ The Commission released a "Report on Agency Compliance Observations" in July 2020.
128. The audit identified gaps in agency information required by the Commission to effectively and strategically regulate the sector. Agency reporting deficiencies included:
 - a. Minimum standards and filing requirements to Commission;
 - b. Quarterly and annual reporting requirements; and,
 - c. Criteria to monitor the wholesaling function of an agency.
129. Other areas of "primary significance" identified through the audit included agency governance and corporate structure; and, criteria for becoming and maintaining an agency.
130. Since 2018, the Commission, in or on:
 - a) Spring 2019 assessed agencies against specific General Order Part V and Part VII requirements²⁰ as part of its annual licence renewal process.
 - b) June 2019 established a moratorium on new agency and producer-shipper applications, in part to allow time to complete the agency accountability project. The panel directed the Commission to lift the moratorium on October 21, 2020 (see paragraph 48).
 - c) November 18, 2019 passed an Interim Order that requires storage crop agencies to provide, or be prepared for inspection of, documents related to production, transportation, packing, storage and marketing information. The Order also requires storage crop agencies to secure the highest net return payable to producers and to obtain Commission prior approval if marketing regulated product that is not packed for end use.

¹⁹ 2018 July 10. BCVMC. RE: Introduction of Agency Reviews.

²⁰ Refer to Appendix I

131. In its September 16, 2020 supervisory review submission, the Commission stated it was working with existing agencies on developing its agency accountability framework. The panel summarizes the Commission's framework objectives as follows:

- a. To provide a clear understanding for agencies of the Commission's oversight, expectations, objectives, "risk appetite", and reporting requirements.
- b. To inform and assure agency boards of directors and stakeholders that the agencies are operating in compliance with all relevant rules and are meeting their responsibilities.
- c. Ensure that agencies complete internal audits as part of their obligations outlined in a governance framework.
- d. Create sound governance practices and promotes best practice.
- e. Renew focus on agency and producer ownership as being BC based.
- f. Ensure agencies clearly articulate in their business plans the basis for proposals to expand supply when making submissions for approval to the Commission.
- g. Enable flexibility for producers to move between agencies.
- h. Assign roles and responsibilities to clearly establish a consistent and regular methodology for audits.

132. On October 19, 2020 the Commission held a third party facilitated workshop with its Storage Crop Advisory Committee and Greenhouse Advisory Committee (one session); and, the Agency Advisory Committee (separate session). The topics discussed included: agency governance and corporate structure; and, an agencies requirement framework (criteria for becoming and maintaining an agency designation).

Industry Input

133. During its consultation with the regulated vegetable sector, the panel heard general agreement that agencies need to be responsible and accountable, and that producer-agency relationships are important to industry. There were differing views on who agencies should be accountable to, and included the Commission, industry, producers and the public. Many recognized the need for checks and balances to be applied consistently across all agencies, so every producer receives fair prices and maximum return on investments through the application of common rules.

134. Generally, producers expect agencies to work with them as markets and consumer demands change. Some observed that agencies are not cooperating with each other. Agency representatives were clear that agencies cooperate to a certain degree with each other but reminded the panel that they are also direct competitors. Each agency is distinct and is able to compete because of the client relationships they develop, and the particular business focus they adopt. There were concerns about a small number of agencies controlling the bulk of production. Views were expressed that agencies should be innovators, developing new products or specialty products capable of displacing imports.
135. The majority of participants reported that an agency's objectives, personnel and bylaws/policies were more important for agency success than any particular business structure the agency may have adopted. Some clearly supported corporate structures, others supported direct producer involvement. Many observed that co-op business structures are becoming uncommon.
136. A few people noted that producers will determine if agencies are accountable by changing their agency if they are not satisfied with the agency's performance. The panel heard there should be a meaningful choice of agencies. The majority of producer participants expressed general satisfaction with the type and frequency of information provided to them by their agencies through regular provision of certain documents (e.g. price reports), phone calls and annual meetings. One grower indicated that the agency communication was inadequate.
137. The panel consistently heard that the Commission lacks sufficient market intelligence on demand, changes in demand, market competition and imports to the detriment of its decision-making.
138. Agency representatives were specifically concerned about reporting becoming onerous or an undue burden, particularly for smaller agencies. In relation, the panel heard about increasing regulatory requirements in all areas of farming and marketing and "regulatory fatigue" setting in amongst producers and agencies.
139. Most participants supported the concept of a Commission agency compliance report (compliance with Commission Orders). There was general support for making a compliance report public, provided it did not include confidential business information. The vegetable markets are highly competitive and there is constant pressure from cross border competitors. Some noted that public reporting should not be required as agencies are private companies who already must meet applicable business laws. Some felt quite strongly that agency accountability should be limited to regulatory compliance and that competition would address agency performance.
140. The panel heard several other ideas from participants. The need for regular communication between the Commission/Commission General Manager and agencies was one theme. Growth, producer returns, review of agency sales

systems, audits of grower payments systems, annual grower contract reviews and annual review of grower sales accounting and costs were all suggested as components for agency accountability reporting.

Analysis

141. BCFIRB has a role in ensuring the Commission is taking a systematic, SAFETI²¹-based approach to agency accountability. BCFIRB has a legislated agency supervisory role (NPMA Regulations s. 4(1)) and prior approval role (NPMA Regulations s.8). For example, BCFIRB exercised its legislated supervisory responsibility to ensure sound marketing policy and orderly marketing in the Vancouver Island agency designations supervisory review. It is again exercising its supervisory responsibilities in this Review.
142. The regular application of an accountability framework should:
- a. provide transparency on agency responsibilities and compliance;
 - b. provide scheduled reporting to the Commission, producers and public as appropriate;
 - c. provide the Commission with current information on the state of the provincial sector, market, production, sales and price;
 - d. set a basis for agency licence renewals; and,
 - e. set a basis for graduated compliance and enforcement actions.

These framework objectives are similar in essence to many of the Commission's September 2020 objectives; however, they are directly focused on, and specific to, the practical goal of agency accountability within the proper exercise of legislated authority.

143. Agencies have a combination of regulatory and business responsibilities. Agencies have certain privileges not normally part of a private business environment. They are delegated certain legislated authorities such as the authority to conduct a price pool. While agencies face significant competition from businesses outside of BC, the number of BC competitors is limited by the fact that not just any interested business can market regulated product. With some limited exceptions, only agencies can market regulated product. Specializing in crop types and/or markets (e.g. regional) enables several agencies to operate successfully even though they may compete directly with each other. The regulated operating environment also enables agencies to cooperate with each other in the best interests of their businesses.

²¹ Strategic Accountable Fair Effective Transparent Inclusive

144. A requirement for regular, demonstrated public accountability for granted statutory authorities and responsibilities is not a new approach to oversight of BC's regulated marketing system. In 2018, BCFIRB established an annual public accountability report requirement for all BC commodity boards. The Public Accountability and Reporting Project (PARP) includes reporting against commodity board regulatory compliance and governance performance measures. Commodity boards also set and report on performance targets and publish industry data.
145. Given the foregoing, the panel narrowed its focus to two accountability themes to gain insight into what an agency accountability framework should include and how it should be used:
- a. agency compliance with the Commission's General Orders; and,
 - b. agency performance.

Agency Compliance

146. Agency compliance with the Commission's General Orders and any interim orders is essential for achieving and maintaining orderly marketing. Systematically tracking, managing and reporting on agency compliance enables the Commission to proactively oversee and manage the industry's regulated system. In turn, it meets BCFIRB's SAFETI-based²² expectations of transparency and accountability.
147. The Commission's 2018 agency audit focused on three areas: regulatory compliance, results-based management and, governance. The audit questions were guided by the Commission's General Orders and included supplementary questions. Conducting this "environmental scan" of its agencies was an effective starting point for building an agency accountability framework. It gave the Commission insight into the current function and structure of agencies, reminded agencies of their regulatory obligations, and highlighted gaps in the market and management information that the Commission routinely requires from agencies for oversight and regulatory decision-making purposes.
148. The 2019 changes to the Commission's agency licence renewal process included a compliance assessment and follow-up. This type of rules-based activity demonstrates the primary and core purpose of an agency accountability framework.

Agency Information

149. General Orders Parts V and VII show that agencies are to: contribute to and respect Commission established prices; collect sale proceeds for producers; track sales against production and delivery allocation/production allocation; and, submit the information to the Commission. Production, pricing and sales tracking and

²² Strategic Accountable Faire Effective Transparent Inclusive

management by a regulatory board are key components for regulating any marketing system. The panel agrees with the consultation input and the 2018 audit outcome that the Commission requires full, correct and timely information from agencies to fulfill its functions.

150. Some sections of the General Orders Part V and Part VII “require” agencies to provide specific information, while under others, information is submitted “by request”. For example, agency business or marketing plans (currently by request); and pool settlement statistics (currently by request). See Appendix I.
151. In some cases, it is unclear if information is always required or only required if requested by the Commission. For example, Part VII s. 4 states:

Each Agency shall supply to the Commission *as requested or required* (emphasis added), details in respect to the application of Delivery or Production Allocations and Producer’s individual shipments. These details are required to be supplied to the Commission within 60 days of the close of a pool period or in the case of storage crops within 60 days of the close of a Delivery Allocation period.
152. In other cases, the timing of the request and submission of information is not clear. For example, Part V s.14 (regulated crop prices for prior approval), Part VII s. 8 (business or marketing plan); and, s. 15 (information relevant to agency transactions). See Appendix I.
153. Lack of required period by period agency reporting on producer shipments, application of delivery allocation/production allocation, and marketed volumes is a significant gap in the General Orders. The November 2019 Interim Order addresses this gap for storage crops. See Appendix II.
154. The Interim Order was made as part of the Commission’s reconsideration decision following the 2019 Prokam appeal. Lack of regular and complete information from the agency involved in that appeal contributed to delayed Commission compliance and enforcement actions. As such, orderly marketing was disrupted when a significant volume of potatoes entered the market over and above the producer’s Delivery Allocation, and other potatoes entered the market for which the producer did not hold Delivery Allocation. Producers can only ship above their Delivery Allocation with Commission authorization. In this circumstance, and despite requests for information, the producer or agency did not seek Commission authorization.
155. The panel asked the Commission about collecting import data to help inform decision-making (e.g. decisions on Delivery Allocation applications). The Commission explained that it is close to impossible for it to access sufficiently detailed and reliable data on inter-provincial and out-of-country imports of regulated vegetables because there is no cross-border tracking of these products leading to a data base that the Commission could access. The Commission has

access to some information from US producer organizations and from agencies, but these sources do not provide complete information.

156. Given the Commission is responsible for orderly marketing, including the assignment and management of storage crop Delivery Allocation and greenhouse Production Allocation, the Commission needs sufficient information to meet its oversight and other regulatory responsibilities, effectively and strategically.

Agency Performance

157. Producer success is based in part on agencies effectively marketing their products and maximizing the prices they receive. However, directly assessing and reporting on agency performance is not straightforward. Questions immediately arise as to what aspects of an agency's performance the Commission should be overseeing and which metrics to use.
158. The panel heard several times that if an agency is not performing well, producers can and often will move to another agency. Commission reports on agency compliance are one tool producers could use to determine if an alternate agency represents a meaningful option.
159. In the panel's view, if an agency is not complying with the Commission's orders, including submitting information as required, this in and of itself is a signal of deficient agency performance. Producers also have a direct interest in ensuring agencies meet their sales and payment expectations. Producers can also approach the Commission at any time regarding concerns about an agency's actions and request approval to change agencies.
160. The Commission is considering establishing best management/governance practice guidelines, in consultation with its advisory committees, as a proactive tool to mitigate the risk of agencies under-performing or not complying with the Commission's orders. The concept of establishing best management/governance practices is sound. Best management practices are successfully developed, adopted and applied in business areas such as food safety. While this approach has demonstrated success, it requires considerable effort, time and resources to turn the concept into practice. There is risk that this approach, compounded by the potential activities discussed in paragraph 164, may reach into aspects of agency operations that are beyond the Commission's proper regulatory scope.
161. The current operating environment, the need to complete projects (such as strategic planning), and the need to consider new agency applications are placing heavy demands on the Commission's time and resources. In addition, the Commission must deal with ongoing day to day operations; and must respond to critical and often urgent matters such as trade related issues. All of these demands are shared and supported by a small and fairly new team of employees. These

matters raise the need for the Commission to consider how it should apply its limited resources and efforts to meet its core statutory responsibilities.

Agency business structure and accountability

162. The panel heard from industry that agency bylaws, policies and staff are more important factors in agency success than any particular business structure. The panel is also aware that there are strong views that agencies will only work in the best interest of producers if they are producer owned. The Commission is questioning if producer ownership should be a condition of agency designation.
163. At least eight of BC's 10 agencies have some form of producer ownership. However, the panel agrees with the Commission that there is sufficient evidence that producer ownership alone is insufficient to ensure agencies are operating in the best interest of producers and the sector as a whole.
164. There is some indication the Commission may be considering establishing specific requirements or guidelines for agency business structures and operations. The Commission's 2018 Agency Audit Guidance Document includes a check list on governance-related business operations (s. 18 e.g. incentive structures, executive management behavior, management and monitoring of performance against business purpose and mandate). The subsequent July 2020 "Report on Agency Compliance Observations" states an expected outcome of the agency accountability work is to "[e]xplore acceptable Operations Management models". It is not clear if this is linked to the stated task of "Develop an Agency Structure Document" in the same document. Overall, the panel is unclear if there is a sufficient marketing-based rationale for the Commission to establish specific agency business structure and operations requirements.

Conclusions

165. Agencies play a critical role in the regulated marketing system; one they could not play without the authority and business environment derived from the *NPMA*. As a consequence, agencies are subject to Commission and BCFIRB oversight for the aspects of their business that deal with production, transportation, packing, storage and marketing of regulated crops.
166. Establishing an agency accountability framework based on agency compliance with the Commission's orders ("rules-based accountability") as soon as practical is the first step in meeting the following objectives established in paragraph 142:
 - a. providing transparency on agency responsibilities and compliance;
 - b. providing scheduled reporting to the Commission, producers and public as appropriate;

- c. providing the Commission with current information on the state of the provincial sector, market, production, sales and price;
 - d. setting a basis for annual agency licence renewals; and
 - e. setting a basis for graduated compliance and enforcement actions.
167. In the panel's view, the Commission's framework objectives as listed in its September 2020 submission (paragraph 131 of this decision) overlap with these objectives to some extent but are not sufficiently focused on core statutory responsibilities to produce an effective, strategic outcome. Some of the objectives risk the Commission straying outside of its jurisdiction of regulating the production, transportation, packing, storage and marketing of regulated crops and into areas of business structure and governance. The focus of an accountability framework should be the essential elements of sound marketing policy as provided by the *NPMA*, adopted by the Scheme and delegated to agencies as necessary for them to support orderly marketing.
168. The panel is not satisfied that the development and adoption of best management/governance practices for agencies will enable the Commission to achieve its full regulatory responsibilities. The panel also questions the Commission's potential thinking involving business structures/models, as reflected in paragraphs 18 and 19 of the July 2018 Agency Audit Guidance Document and its September 2020 submission objectives summarized in paragraph 10, c, d and e. It is not clear to the panel if the Commission's jurisdiction extends to these matters or would result in a benefit to orderly marketing. It may be that the Commission requires agency structure information to understand how the agency is managing the production, transportation, packing, storage and marketing of regulated crops. The panel questions if regulating agency structure is necessary or consistent with the marketing objectives of the Commission.
169. Rules-based accountability supports orderly marketing for the benefit of producers and can build and maintain trust between the Commission and agencies. Rules should clearly and consistently establish the standards against which agencies will be assessed.
170. A systematic approach to monitoring, assessing and reporting on agency compliance with the rules, must result in the Commission receiving the information it needs to help fulfill its oversight and other regulatory responsibilities. Agencies can plan on scheduled reporting and auditing and build these requirements into their business plans.
171. While agencies are expected to comply with all Commission orders related to agency functions, the panel focuses on the Commission's information provision orders in the following section.

Agency Information

172. Agencies need to provide timely production, transportation, packing, storage and marketing information to the Commission. Provision of this information gives early and regular indication of agency compliance and performance. It is also necessary for Commission decision-making purposes to ensure orderly marketing and sound marketing policy.
173. Before finalizing its agency accountability framework, the Commission must address the immediate gaps in agency information provision (greenhouse sector), provide clarity as to what information is required pertaining to markets, shipments, sales and price, and provide clear expectations for when that information is to be provided for storage crop and greenhouse sectors.
174. The Commission identified a need to undertake a comprehensive review of its General Orders. This review should not forestall establishing and implementing a rules-based accountability framework, based on agency core statutory functions necessary to support orderly marketing. The Commission will in all likelihood need to enact new rules to support this. Once experience is gained from using and reporting on a framework, a review of the General Orders will be more effective and result in iterative improvements to agency compliance reporting and information provision as changes are adopted and incorporated into the Consolidated General Orders.
175. The panel acknowledges the difficulty in accessing comprehensive, reliable import data. Until the Commission has developed an agency accountability framework, including developing the rules to support one, and has applied the framework for several production cycles, the Commission's focus on industry data should be within BC.
176. Collecting and analyzing information is not an effective or strategic use of resources unless:
 - a. the rationale for the collection of the information is clear and supports orderly marketing;
 - b. the appropriate systems/tools are in place for receiving, organizing, storing, analyzing and presenting information collected from agencies; and,
 - c. the Commission can rely on the information to determine if the agencies are complying with regulatory requirements and to determine if production and demand are aligned.

Framework Development and Reporting

177. To effectively develop and implement an agency accountability framework, a staged approach is required. An accountability framework should not place an undue burden on agencies. The Commission must also consider its resources and tools. The first step as outlined above, is to ensure the Commission has enacted the necessary information-related rules. The second is to determine how the Commission will assess compliance and how often and finally, how it will report on the outcome of that assessment.
178. The Commission and agencies require appropriate tools for agencies to provide regular, fulsome information and for the Commission to collect, store, analyze and audit agency information. The Commission may need to assess its current tools against its information management needs and seek outside resources as necessary. For example, considering whether a shared on-line reporting tool could potentially reduce the agency reporting burden while increasing Commission staff efficiency.
179. Developing a rules-based accountability report can be as simple as requiring agencies to state if they have provided the required documents and/or information to satisfy the orders and have met any other requirements under the orders (e.g. prior approval for shipping new or additional regulated product). To ease the reporting burden, the Commission could consider providing a reporting template listing the specific orders and providing a place for an agency to indicate what it has done and make any comments. This is similar to BCFIRB's approach to commodity board reporting under PARP.
180. An annual public "report card summary" could be developed from this information and published without concerns of confidential business information being made public. As with BCFIRB's PARP, the Commission would want to consider some form of periodic review and audit process to confirm agency self-reporting.

Agency Best Management/Governance Practices

181. The panel agrees with the Commission that developing a culture of "good agency performance" through the promotion of best governance/management practices can reduce non-compliance and can enhance agency performance for the benefit of producers. However, the Commission must determine, after it has developed and applied a rules-based framework if this extra effort will deliver sufficient benefits to its oversight role before continuing with it. The Commission's strategic plan will assist the Commission with prioritizing demands on its resources.

Agency Business Structure and Operations

182. An agency's ownership structure does not pre-determine its accountability and is not a performance or compliance guarantee. How the efforts of the agency are directed, and the outcomes of that direction will determine this.
183. For the reasons in paragraph 163 and 164 and because of the varied ownership structures of existing agencies, the panel cautions the Commission about requiring producer ownership in agencies as a condition of agency designation. The panel also cautions the Commission about exploring specific business structure and government requirements for agencies. Evidence of compliance with the Commission's rules based on agency functions demonstrates an effective, fair and strategic approach to agency oversight without the risk of stepping outside of statutory functions.

Closing

184. After considering Commission and industry input, and the above analysis and conclusions, the panel answered the review questions as follows:

What should an agency accountability framework include?

Framework content should be based on agencies demonstrating compliance with Commission-required agency functions, including related information provision, as per the General Orders. Agency functions include, but are not limited to:

- i. Planning for and meeting market demands;
- ii. Identifying, developing and expanding markets;
- iii. Managing shared producer market access;
- iv. Ensuring fair returns for producers;
- v. Contributing to new producer entry;
- vi. Contributing to orderly marketing.

How should an agency accountability framework be used?

A framework should be used to ensure and annually demonstrate that agencies understand and are meeting their regulatory-based obligations to producers, the Commission and BCFIRB. The framework should meet the following objectives:

- i. provide transparency on agency responsibilities and compliance;

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- ii. provide scheduled reporting to the Commission, producers and public as appropriate;
- iii. provide the Commission with current information on the state of the provincial sector, market, production, sales and price;
- iv. set a basis for annual agency licence renewals; and
- v. set a basis for graduated compliance and enforcement actions.

Directions and Recommendations

185. The Commission is to:

- a. Make orders as necessary to extend the type of reporting requirements in the November 2019 Interim Order to include greenhouse agencies as appropriate to the sector;
- b. Make an order, which at a minimum, requires agencies to submit a business or marketing plan, or particular elements of a marketing plan, within or by a specified time;
 - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought in to force;
- c. Make an order, which at a minimum, requires agencies to submit pool settlement statistics for all regulated vegetable crops, within or by a specified time;
 - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought in to force.
- d. Identify any outstanding information submission and timeline requirement needs and make orders as necessary to support the practical goal of agency accountability within the proper exercise of legislated authority.
 - i. Any draft amending orders are to be submitted to BCFIRB for review prior to being brought in to force.
- e. Provide BCFIRB a timeline for completing the directions in paragraphs a. through d. inclusive within 30 day of this decision.

186. The Commission is to:

- a. Develop and implement a rules-based agency compliance reporting template no later than December 31, 2021;

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- b. Develop and implement a public annual agency compliance report by April 2022.
187. The panel recommends the Commission:
- a. Further develop its information management system to support and align with collecting, storing, analyzing, and auditing agency information on production, transportation, packing, storage and marketing of regulated products.
 - b. Give future consideration to an on-line information reporting system for agencies to aid timely information collection and submission and reduce agency and Commission staff time.

STORAGE CROP DELIVERY ALLOCATION

Storage Crop Delivery Allocation

188. The panel considered the following questions:

- a) Is market access being managed effectively and strategically for storage crop producers through delivery allocation?
- b) What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?

Background

189. Storage crop Delivery Allocation (Delivery Allocation) is a regulatory tool to ensure orderly marketing. It is used by the Commission and agencies to provide shared market access for all producers once supply exceeds demand. It achieves this through rotational market access where producers take turns shipping their product. Delivery Allocation authorizes a producer to deliver specific amount of regulated product within a specified time period to an agency, or to market as otherwise directed or approved by the Commission.

190. As per the Commission's General Orders Part XVI, Delivery Allocation intended to:

- a) Preserve market access for producers who have served the market over time;
- b) Provide market access for new entrants;
- c) Incentivize the creation and maintenance of long-term, sustainable, food safe, farming and greenhouse operations;
- d) Provide opportunity for industry growth; and,
- e) Provide for orderly marketing.

191. Each registered storage crop producer is assigned an amount of Delivery Allocation by the Commission. Delivery Allocation can also be bought and sold between producers at a price negotiated by the parties. Any transfers must be approved by the Commission. Delivery Allocation can be granted by the Commission on application by new entrants or granted through coordination with agencies seeking to market additional or new products.

192. Each year the Commission calculates a producer's individual Delivery Allocation using a five-year rolling average of shipments. If a producer's shipments increase, they receive increased marketing opportunities through an increase in Delivery Allocation for the following crop year. Agencies use Delivery Allocation to help determine, in consultation with their producers, how much of each crop producers

should plant each crop year to meet forecasted market demand. The Commission does not require producers get approval for plantings in excess of their Delivery Allocation. However, producers require Commission authorization for shipping storage crops if the quantity exceeds their Delivery Allocation (Part XVII s.4).

193. The Commission's General Orders Part XVI state that agencies are to use each individual producer's assigned Delivery Allocation for the purpose of determining the producer's delivery opportunity in accordance with the established period. The panel heard that agencies have their own system for managing and applying Delivery Allocation for their producers.
194. Delivery Allocation was sometimes referred to as "quota" during the consultations. Quota is a different regulatory tool. In supply management, quota is a licence to produce a specified quantity of a regulated product for an assured market. Delivery Allocation does not limit how much a producer can grow nor does it guarantee sales. Rather, it is a tool for managing shared market access (crop type, time and volume).

Vegetable Commission Delivery Allocation review

195. While Delivery Allocation rules have not substantively changed, the regulatory system and the industry context has changed. In the past, producers could only market through an agency located in the geographic District where they farmed. In today's regulatory system, producers can market through any agency in the province, regardless of where they farm. Agencies and wholesalers are facing increasing competition with each other and with lower priced imports. All are competing in an environment where food safety, quality, rapidly changing consumer demands and retailer consolidation are key business factors.
196. Given these changes and the recent compliance and enforcement issues with Delivery Allocation as per the issues raised in the Prokam appeal, the Commission started a review of its Delivery Allocation orders.
197. The Commission's Delivery Allocation vision, according to its September 16, 2020 submission, is to ensure its rules are clear. Its stated intention is to clarify and define agency "aggregate delivery allocation" with the goal of establishing standard costs and losses charges should shipments exceed authorized market access.
198. The Commission is piloting an administrative policy to manage storage crop agency market access (2020) and started initial discussions with its advisory committees (spring 2020).

Industry Input

199. Through the supervisory review consultation process, industry stakeholders provided input and recommendations on Delivery Allocation orders and management. While the panel considered all information provided through the

consultation meetings and in writing, the following summarizes the input that is directly relevant to the panel's decision.

200. The panel heard general agreement that Delivery Allocation provides stability for producers. For example, it prevents large volumes of regulated product suddenly entering the market and impacting markets and prices. Participants explained Delivery Allocation allows for long-term planning, including cash flow, and in turn, assists with accessing bank loans.
201. While Delivery Allocation is not based on acreage, it acts as a guide for producers on how much to plant. The Commission's rules provide opportunity for producers to increase their Delivery Allocation over time if they take the risk of growing over 100% of their Delivery Allocation.
202. Several participants commented that it is important to have an identified market for a "new" product before Delivery Allocation is granted. Some participants observed that producers must focus on market demands as Delivery Allocation does not guarantee a producer will be able to sell all that they plant.
203. Several participants raised that agencies are responsible for managing Delivery Allocation and for building good relationships with purchasers by providing trusted, quality product. Some spoke to the need for the Commission to have better information and information management so it can effectively manage/regulate provincial production and volumes across the industry.
204. The panel heard from the Commission and some industry stakeholders that the BC regulated storage crop market is mature. There are limited growth and innovation opportunities. The majority of production growth is coming from western markets and some export markets rather than increased BC demand. Other industry stakeholders reported that there are significant BC market opportunities through displacing imports.
205. Specific concerns included:
 - a. The way the rules to grow Delivery Allocation are set out provides more opportunity for larger producers.
 - b. Managing by delivery period can favour larger, established farms and makes it difficult to balance market opportunities across all producers.
 - c. Delivery Allocation removes producer motivation to increase orders.
 - d. The private transfer of Delivery Allocation between producers is not fair to all producers.
 - e. Increasing individual Delivery Allocation holdings using shoulder seasons is not viable as it is a slow process.

- f. Delivery Allocation cannot achieve its purpose unless imports are restricted or tracked.

New Entrants

206. There was general support for new people entering the sector. Views varied on whether the Commission should grant Delivery Allocation to new entrants. Some felt there are adequate opportunities to start earning Delivery Allocation by filling production and market gaps (e.g. shoulder seasons).
207. Many participants were concerned about the time the Commission takes to make decisions on new entrant and growth Delivery Allocation applications. The industry needs effective, transparent and timely decision-making.
208. Several participants thought that anyone with a good business plan and agency support or proof of a valid new market should be able to grow regulated product. While some indicated that new producers should not be able to grow large quantities and risk displacing those who have worked their way up through the system, others suggested that new growers should receive an incentive in the form of prime season Delivery Allocation.
209. Concerns were raised about the capacity of Delivery Allocation rules and management to adapt to market opportunities and to accommodate new growers. Commission rules favour existing producers and create barriers to entry.
210. The panel heard that building Delivery Allocation through shoulder season markets is not effective for new producers as these seasons are higher risk production, and success requires extensive up-front capital investment in storage and infrastructure. In addition, new producers holding produce to sell in the shoulder-seasons are more likely to suffer storage-related losses. It was also noted that the longer new entrants are restricted from entering the industry in a meaningful way, the more likely people are to turn to appeals and litigation.
211. Various ideas were shared, including:
 - a. Consider regional market demands in Delivery Allocation management, particularly in relation to new producers.
 - b. Establish separate allocations for product intended for out of province sales.
 - c. Establish a rule on what volume is acceptable to plant above Delivery Allocation.
 - d. Establish a "Delivery Allocation bank" for new entrants.

- e. Manage Delivery Allocation on the basis of quality, not “first in time, first in right” and producer size.
- f. Give new entrants delivery priority.
- g. Replace tonnage-based Delivery Allocation with acreage-based or use both.
- h. Require unused Delivery Allocation to revert to the Commission rather than being privately traded or left unused.

Analysis

- 212. The panel considered the Delivery Allocation orders in a broader context than order clarity and the Commission’s goal of developing of an “aggregate delivery allocation.”
- 213. Regulated marketing systems restrict entry and manage producer production and/or marketing to ensure orderly marketing for the benefit of producers and in the public interest. The Commission, as the first instance regulator, is responsible for managing entry and production/marketing to ensure orderly marketing. This requires fulsome market, production, pricing and sales information and consideration of multiple and often competing interests.
- 214. Delivery Allocation management by the Commission, agencies and producers is not straight forward. For example, producers can choose to over-plant their Delivery Allocation to try to capture the opportunity to increase their Delivery Allocation through extra shipments authorized by the Commission. At the same time, they also bear the risk of being unable to ship the extra production if there is no market. Part XV of the General Orders allows for the marketing of new or additional regulated products by agencies with Commission approval following an evidence-based process where the Commission determines if there is a market or if the additional production will displace another agency’s sales. Agencies must consider customer specifications (type, quality, volume) when managing shared producer market access under Delivery Allocation. A producer may not have the opportunity to ship if their product doesn’t meet the customer specifications.
- 215. As regulated markets mature, jockeying for entry and market access increases. In this context, Delivery Allocation and its management becomes increasingly important for enabling shared market access and orderly marketing. Unlike supply managed commodities, there are very limited federal trade protections from lower cost, high volume imports entering BC.
- 216. Effectively managing entry and growth opportunities is a common challenge for most BC regulated marketing boards. In the panel’s view, it is the Commission’s job to ensure entry and consider growth opportunities. However, it is not the Commission’s job to guarantee success or guarantee a producer’s particular

growth plan. Rather, the Commission's challenge is to determine what amount of Delivery Allocation to grant a new entrant and/or for growth while respecting marketing shares built by established producers. This can become more complex if there is a number of new entrants.

217. The Commission established a New Entrant Program Policy where new commercial producers can apply for Delivery Allocation, at no cost, from the Commission. The Commission does not pre-determine the amount of Delivery Allocation it grants. Rather, it takes into consideration the amount requested by the new producer, and advice from the agency through which the producer will be marketing their product. It is unclear what other industry data the Commission may consider. Applications can be made at any time. A review of the New Entrant Policy shows it was modeled on BCFIRB's 2005 new entrant policies and directions²³ to BC's supply managed commodity boards.
218. The panel learned during the consultation that there are seven ways for producers to access Delivery Allocation and increase their holdings:
- a. Buy an existing farm, with its associated Delivery Allocation;
 - b. Purchase Delivery Allocation from another producer;
 - c. Apply to the Commission for new entrant Delivery Allocation under the Storage Crop New Entrant Program Policy;
 - d. Work with an agency to identify niche supply shortages and marketing opportunities (e.g. specific variety and volume for specified delivery period);
 - e. Over plant Delivery Allocation, bearing the opportunity and risk that the excess product can be shipped;
 - f. Utilize the Commission's manifest sales program to increase shipments; and/or,
 - g. Work with an agency to apply to the Commission for new or expanded marketing opportunities.

Several of the above options require Commission authorization as per the General Orders. The panel also learned that marketing during certain periods (e.g. storage crops marketed straight from the field) results in the best returns and the least

²³ 2005 September 1. BCFIRB. [Specialty Market and New Entrant Submissions: Policy, Analysis, Principles and Directions.](#)

costs to producers, making these the most desirable periods for Delivery Allocation.

219. Although there are multiple avenues for producers to acquire and grow Delivery Allocation, some industry members reported that entry opportunities are too restrictive, growth opportunities are inadequate for new and/or smaller producers, and that Delivery Allocation growth rules unduly advantage larger producers.
220. The panel also noted the following consideration regarding entry opportunities and Delivery Allocation in its February 11, 2020 decision prior approving Prokam's Delivery Allocation for 2020/21:²⁴

The panel recognizes Prokam's point that there may be a need for the Commission to revisit how it calculates delivery allocation for new producers that enter through transferred quota. Currently producers entering through transferred delivery allocation have their future delivery allocation calculations impacted by the previous producers' shipment volumes.

221. The Commission and industry stakeholders reported a need for the Commission to review its new entrant program and consider whether the entry and growth opportunities for new and smaller producers are effective and strategic.

Conclusions

222. Delivery Allocation, as a tool for managing shared market access, is not unduly restrictive nor are its purposes generally disputed by industry. Although not precise, Delivery Allocation generally provides producers with sufficient guidance about what and how much to plant, usually in consultation with their agencies. Commission orders allow for producers and agencies to fill new and growing markets beyond established Delivery Allocations and for producers to over-ship their Delivery Allocation with authorization. The Commission's orders also allow agencies to manage practical challenges that can arise with shared market access, such as when customers want a specific product and volume at a specified time.
223. Three issues remained for the panel:
- a. Timely Commission decision-making on Delivery Allocation applications;
 - b. Reported inadequate growth opportunities for new entrants/small producers; and,
 - c. Reported inadequate entry or growth opportunities to displace imports.

²⁴ 2020 February 11. BC FIRB. [Prokam Enterprises Ltd. \(Prokam\) Delivery Allocation Prior Approval Decision](#).

224. Without the regular provision of production, transportation, packing, storage and marketing information to the Commission as per panel's Agency Accountability directions, it is unlikely to be able to establish and maintain Delivery Allocation application decision-timelines. The Commission will then have the information it needs on hand when prospective producers or agencies apply to access new opportunities for growth to meet, for example, changing product demand or supplying new products. Delivery Allocation applications based on displacing imports will be more challenging to assess given the lack of detailed import data (e.g. volume of specific crop types, source and the importers cost of production).
225. The panel was unable to determine the degree to which the growth opportunities for new entrants and small producers are limited by the Delivery Allocation orders versus operating in a mature market where there are seasonal and storage supply limitations and competition with high volume imports. In a mature market, growth opportunities are limited to increased demand due to population growth, shifts in consumer demand, development of a new product or finding an unfilled niche in a current market.
226. The panel also was not able to determine the degree to which the reported inadequate opportunities to displace imports is due to Commission decision-making and/or its Delivery Allocation orders versus the industry's production capacity to successfully outcompete imports.
227. The panel expects that regular industry data provided to the Commission by agencies over time as per the panel's Agency Accountability directions and recommendations will help inform the Commission as to whether adjustments are needed to its Delivery Allocation orders and New Entrant Policy regarding entry and growth opportunities.
228. The panel also finds that implementation of its directions on Vegetable Commission Structure and Governance will sufficiently address the question of apprehension of bias or conflict of interest with Commission decisions on Delivery Allocation applications.
229. Overall, the panel is satisfied that at this time, and until additional industry data is available, that the Commission's Delivery Allocation orders and New Entrant Policy allow for reasonable entry and growth opportunities. A future review will need to address entry, growth and other related Delivery Allocation questions.

Closing

230. After considering Commission and industry input, and the above analysis and conclusions, the panel answered the review questions as follows:

Is market access being managed effectively and strategically for storage crop producers through delivery allocation?

The panel did not identify immediate Delivery Allocation-related market access issues disrupting orderly marketing.

What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?

The panel was not able to identify specific changes to Delivery Allocation orders and management at this time required for sound marketing policy.

Directions and Recommendation

231. The Commission is to implement the following prior to determining if substantive changes are required to its new entrant and growth-related Delivery Allocation orders
 - i. The panel's directions as set out in "Commission Structure and Governance" (see paragraphs 117 to 121 inclusive, of the full decision) and,
 - ii. The panel's directions and recommendations for collecting comprehensive industry data on a regularly scheduled basis, as set out in "Agency Accountability" (see paragraphs 185 and 187 of the full decision),
232. Once the Commission has implemented the above directions, the panel expects the Commission to, as it does all BC commodity boards, regularly review its new entrant program. When the Commission does so, the panel recommends it include an assessment of growth and regional opportunities, and consideration of how to calculate Delivery Allocation when it is transferred between producers.

Closing

233. Although not unanimous, the panel heard clear industry support for the regulated marketing system from many industry members and strong recognition for its value from many producers. Through this review, the panel has identified several areas for improvements to ensure the effectiveness of the Commission in regulating the vegetable industry. These are discussed in this decision and outlined and summarized in paragraphs 7 to 16, inclusive.

234. In accordance with s. 57 of the *Administrative Tribunals Act*, “an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued.”

Dated at Victoria, British Columbia, this 22nd day of December 2020.



Daphne Stancil, Panel Chair



Tamara Leigh, Member



Dennis Lapierre, Member

British Columbia Farm Industry Review Board
Vegetable Review
December 22, 2020

Appendix I

BC Vegetable Marketing Commission General Orders Part V and VII: Agency Information

General Orders	Information	Function	Required/ By Request	When
Part V				
s. 14	Regulated crop prices for prior approval unless otherwise authorized	Price	Required	Not specified
Part VII				
s. 2	Any price list and particulars of sales at other than listed prices ²⁵	Price	Required	Not specified
s.4	Application of delivery allocation/production allocation & individual shipments.	Production & marketing	Required & by request	Within 60 days of close of pool period or close of delivery allocation period
s. 5	Pool settlement statistics (quantities, price ranges, final pool prices)	Price	By request	Not specified
s. 6	Any proposed processor or other firm contracts for prior approval	Production & price	Required	Before finalizing contract
s. 8	Business or marketing plan	Marketing	By request	Not specified
s. 9	All signed Grower Marketing Agreements (licenced producers)	Production, price, marketing	Required	June 1 st each year
s. 11	Agency staff authorized to issue Transport Orders	Marketing	Required	By April 1 st of each year
s. 12	List of fees/charges charged licenced producers for prior approval	Price	Required	Each year
s. 13	Any information relevant to agency or inter-agency transactions	Production, price, marketing	Required & by request	Not specified

²⁵ Those crops subject to minimum price.

British Columbia Farm Industry Review Board
Vegetable Review
December 22, 2020

Appendix II

BC Vegetable Marketing Commission Interim Order November 18, 2020: Agency Information

Interim Order	Information	Function	Required/ By Request	When
s. 3(2)	All books, records and accounts on all matters related to the production, transportation, packing, storage and marketing of regulated storage crop products shall be available for inspection	As stated	Required	Retain for 3 years
s. 4(1)	Any information or documentation relating to the production, transportation, packing, storage and marketing of storage crops	As stated	By request	Not specified
s.4 (2)	Answers to any questions related to the production, transportation, packing, storage and marketing of regulated storage crops.	As stated	By request	Within 60 days of close of pool period or close of delivery allocation period
s. 5(a)	Name and address of producer whom agency received product from	Production, price & marketing	Required	
s. 5(b)	Volume of regulated storage crop product from each producer	Production	Required	Each marketing period
s. 5(c)	Volume of regulated storage crop product marketed	Production & marketing	Required	Each marketing period
s.5(d)	Volume of regulated storage crop product marketed packaged for end use	Marketing	Required	Each marketing period
s. 5(e)	Volume of regulated storage crop product marketed as other than packed for end use	Marketing	Required	Each marketing period
s. 5(f)	Net return to licenced storage crop producers	Price	Required	Each marketing period



BC Farm Industry Review Board

March 30, 2021

File: N1908, N2101

DELIVERED BY EMAIL

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Dear Sir/Mesdame:

RE: PROKAM ENTERPRISES LTD. V BC VEGETABLE MARKETING COMMISSION

Introduction

1. By letter dated December 29, 2020, Counsel for Prokam Enterprises Ltd. (**Prokam**) wrote to the British Columbia Farm Industry Review Board (**BCFIRB**) asking to reinstate Appeal #N1908, which was an appeal from a November 18, 2019 decision of the British Columbia Vegetable Marketing Commission (the **Commission**). A BCFIRB appeal panel deferred Appeal #N1908 to allow a supervisory panel to conclude its review.
2. On January 11, 2021, I established a submission schedule to give the parties an opportunity to identify what, if any, issues remained to be determined in Appeal #N1908.
3. On January 5, 2021, Counsel for Prokam filed Appeal #N2101 seeking to set aside what Prokam alleges was a Commission decision of November 17, 2020, and communicated in correspondence on December 7 and 14, 2020, that Prokam market through BCfresh under a renewed General Marketing Agreement (**GMA**) commencing June 1, 2021. By letter dated January 12, 2021, Counsel for the Commission seeks summary dismissal of Appeal #N2101.
4. The following is my decision on the question of whether there are any live issues left to be heard in Appeal #N1908, following the supervisory review, and the Commission's summary dismissal application in Appeal #N2101.

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Background

Deferral of Appeal #N1908

5. In the decision of *Prokam v. British Columbia Vegetable Marketing Commission*, February 28, 2019 (the **Appeal Decision**), the BCFIRB appeal panel issued orders directing the Commission to reconsider certain decisions it had made.
6. In September 2019, BCFIRB established a supervisory panel to undertake a supervisory review arising out of a series of appeals from Commission decisions (including the Appeal Decision) and related Commission management projects (the **Vegetable Review**).
7. On November 18, 2019, the Commission released its decision of those matters remitted to it in the Appeal Decision (the **Reconsideration Decision**) and made the following orders:

62. Prokam does not qualify to apply for a Producer-Shipper Licence

[...] Once Prokam's Class III licence reverts back to a Class I licence it may submit an application to the Commission. As long as Prokam is an active producer growing regulated vegetables for the retail, wholesale, or food service markets, and remains compliant over the next three licence periods, this opportunity could be available to Prokam for the 2022/23 Crop Year.

92. Prokam Enterprises Ltd. Licence Class

Effective immediately, [t]he order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III Licence to this producer.

Prokam was not licenced to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licenced as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

94. BCfresh as the Agency Designated to Prokam Enterprises Ltd.

With the enactment of this interim order, the panel offers Prokam with three options:

- *Prokam can chose (sic) to continue to not produce any BC regulated vegetables, or, to grow unregulated vegetables, and therefore does not require a designated Agency.*
- *If Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018.*

- *If BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop agencies to represent the grower in consideration of the new Interim Order.*

8. The Reconsideration Decision also included an interim order to preserve the orderly marketing of storage crops (the **Interim Order**). The Commission found it was in the best interest of the industry to introduce the Interim Order adopting the definition “Packed For End Use” and mandating that product be marketed by an agency as “Packed For End Use” in all instances except where the express, prior, written approval of the Commission is sought and obtained.
9. On November 20, 2019, Prokam filed Appeal #N1908 of the Reconsideration Decision alleging the Commission’s process was procedurally unfair and unreasonably delayed as well as that the Reconsideration Decision had substantive errors, was not supported by adequate reasons, and did not accord with sound marketing policy. Prokam sought reinstatement of its Class 1 licence retroactive to December 22, 2017; the setting aside of the Commission direction of Prokam to market through BCfresh pursuant to the terms of the February 15, 2018 GMA; the granting of a producer-shipper licence or direction to CFP Marketing Corporation if it obtains an agency licence; the freezing of Prokam's delivery allocation as at October 10, 2017; and the setting aside of the Interim Order. Prokam also applied for an interlocutory order for an interim producer-shipper licence pending the determination of its appeal.
10. On November 29, 2019, the presiding member of the BCFIRB appeal panel issued a decision deferring the Appeal #N1908 until the Vegetable Review was completed (the **Deferral Decision**).
11. On January 10, 2020, the supervisory panel issued an interim relief decision sought by Prokam (the **Interim Supervisory Decision**), which made the following decisions:
 - **Paragraph 25** – the panel did not consider Prokam’s request to have its Class 1 licence reinstated as Prokam had a valid licence and could produce and market vegetables.
 - **Paragraph 27** – the Commission took reasonable steps to address the administrative fairness issues identified in the Appeal Decision.
 - **Paragraph 29** – while the reconsideration process was lengthy, the panel was satisfied it was fair and inclusive.
 - **Paragraph 37** – the panel accepted that the Commission’s decision to direct Prokam to market through BCfresh for 2020/21 was consistent with sound marketing policy given BCfresh’s expressed willingness to work with Prokam, its experience and connections in potato marketing across Western Canada, the express support of other storage crop agencies for BCfresh to serve as Prokam’s agency, the findings in the Appeal Decision of Prokam’s non-compliance with the General Orders, BCfresh’s track record of compliance, and the opportunity for Prokam to demonstrate its willingness to operate within the regulated system so that it could

transition to a Class I licence and be in a position to apply for a producer-shipper licence for 2022/23.

- **Paragraph 45** – the panel was not satisfied that historical, regional or economic circumstances warranted granting Prokam a producer-shipper licence for 2020/21.
 - **Paragraph 47** – the panel concluded that the direction of Prokam to BCfresh gave it an avenue to market regulated crops for 2020/21 and therefore, the panel found it was unnecessary to consider that part of Appeal #N1908 on Prokam’s request for an agency designation to CFP.
 - **Paragraph 48** – the panel concluded Prokam needed to demonstrate its willingness to comply with the General Orders before a producer-shipper licence could be issued.
 - **Paragraph 52** – the panel directed the Commission to remove the 2018/2019 and 2019/2020 growing seasons from the calculation of Prokam’s delivery allocation for the 2020/2021 growing season.
12. On November 30, 2020¹, the Commission issued a decision approving Prokam’s request for a delivery allocation freeze for the 2021/22 growing season (the **Delivery Allocation Freeze Decision**). This decision had the effect of freezing Prokam’s delivery allocation such that Prokam’s allotted future marketing volumes were not impacted by its non-production years.
 13. On December 22, 2020, the supervisory panel issued its directions and recommendations in the decision, In the Matter of the *Natural Products Marketing (BC) Act* and the 2019-20 Vegetable Review (the **Supervisory Review Decision**).
 14. On December 29, 2020, Prokam sought to reinstate Appeal #N1908 stating that the following issues were not addressed in the Supervisory Review Decision and remain live issues in Appeal #N1908:
 1. *Prokam’s licence class*: Prokam continues to seek the reinstatement of its Class 1 licence retroactive to December 22, 2017;
 2. *Prokam’s designated agency*: Prokam continues to seek an order setting aside the *direction* that Prokam market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018 (Order 94 of the Reconsideration Decision); and
 3. *Interim Order to Preserve the Orderly Marketing of Storage Crops*: Prokam seeks an order setting aside the Interim Order, made as part of the Reconsideration Decision, on the basis the Interim Order introduced a requirement that Prokam’s products be “packed for end use”.
 15. During the submission process, Prokam added fairness concerns arising out of the Commission’s reconsideration process and renewed its request for a producer-shipper licence.

¹ This decision was made November 17, 2020 as reflected by Commission Minutes.

Appeal #N2101

16. On January 5, 2021, Prokam filed Appeal #N2101. The alleged issue arises primarily from a letter dated December 7, 2020 from the Commission's General Manager to Prokam (the **December 7 letter**) in which the Commission confirmed the delivery allocation freeze and also stated:

[I]f Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018, and a renewed GMA that commences June 1st, 2021. If BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become [Prokam's] designated Agency. [Emphasis added.]

17. On December 11, 2020, Mr. Dhillon wrote to the Commission as follows:

Andre:

Your e-mail of November 30 referred to a decision made regarding the delivery allocation freeze only. Your letter of December 7 referred again to the decision regarding the delivery allocation freeze but also made reference to a decision directing Prokam to sign a renewed GMA with BCfresh commencing June 1, 2021. My questions are:

- 1. Were these two decisions made separately or are they part of the same decision?*
- 2. What is the date or dates of the decision or decisions? [Emphasis added.]*

18. The Commission's letter dated December 14, 2020 (the **December 14 letter**) responded as follows to Prokam's questions:

The Commission made one decision to grant the freeze of your 2020/2021 delivery allocation. This decision was made by the Commission on November 17, 2020. This decision was communicated by e-mail November 30 and by letter dated December 7, 2020.

The Commission did not make any further decision to direct Prokam to market through BCfresh. Rather, the decision recognizes that BCfresh is presently Prokam's designated agency. Thus, if BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become your designated Agency. Further, this does not preclude the possibility of future applications or orders regarding the manner in which Prokam's regulated product may be marketed.

19. In Appeal #N2101, Prokam seeks an order that the alleged direction that Prokam market through BCfresh under the terms of a renewed GMA commencing June 1, 2021 be set aside. The Commission, however, is seeking summary dismissal of this appeal arguing that it is clearly deficient because it fails to identify any order, decision or determination, which could be the subject matter of an appeal under s. 8 of the *Natural Products Marketing (BC) Act*.

20. In my view, Appeal #N2101 raises issues, which overlap with the issues raised in Appeal #N1908. As such, I will address Appeal #N1908 first.

Decision

Appeal #N1908

21. Prokam and the Commission have an extensive history of appeals, appeal-related litigation proceedings and a supervisory process, which culminated in the Supervisory Review Decision. I will not set out that history in this decision but it is aptly summarized at paragraphs 32 to 51 of the Supervisory Review Decision.
22. After reviewing the submissions of the parties, Prokam and the Commission agree that Prokam's licence class and the Interim Order remain extant on Appeal #N1908, so I am directing that these matters be set down for hearing. Despite their agreement on what remains "live" issues in this appeal, the parties disagree on the overall results of the Interim Supervisory Decision.
23. The Commission's position is that the Interim Supervisory Decision conclusively addressed the following issues:
- (a) the Commission's direction that Prokam market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018 (Order 94 of the Reconsideration Decision)
 - (b) Prokam's application for a producer-shipper licence, and
 - (c) the Commission's "process".
24. Prokam strenuously disagrees and refers to Mr. Justice Mayer's reasons for judgment dated December 2, 2020² (the **Court Judgment**), which upheld the applications of BCFIRB and the Commission to strike aspects of the judicial review petition commenced by Prokam. Prokam states that the Commission's position is inconsistent with Mr. Justice Mayer's characterization of the Interim Supervisory Decision where he stated:
- [123] I am satisfied that the [Interim] Supervisory Decision was only made, and therefore the reasons supporting this decision only apply, in respect of Prokam's application for an interim producer-shipper licence for [the 2020/21 crop year]. For this reason, I agree with the submission of BCFIRB that this decision is now moot and there is therefore no reason for it to be judicially reviewed.*
25. Prokam argues that the characterization of the Interim Supervisory Decision as being applicable only to the 2020/21 crop year, which was argued by BCFIRB and accepted by the Court, suggests that the issue of Prokam's designated agency beyond the 2020/21 crop year is unresolved.

² *Prokam Enterprises Ltd. v. British Columbia Farm Industry Review Board*, 2020 BCSC 2138.

26. Prokam further argues that the Commission and BCFIRB both took the position in the judicial review petition that the issue of the Commission's direction of Prokam to market through BCfresh should not be heard by the Court and should be addressed by BCFIRB, as the "adequate alternative remedy" (discussed further below). Prokam submits that for the Commission to argue now that this issue should not be addressed by BCFIRB in Appeal #N1908 amounts to an inconsistent pleading and constitutes an abuse of process.
27. Prokam also argues that the Commission's Order 94 of the Reconsideration Decision may be interpreted as either that BCfresh remains Prokam's designated agency until its GMA expires, following which Prokam will be without a designated agency, or that BCfresh is Prokam's designated agency in perpetuity, unless BCfresh releases Prokam or the Commission orders otherwise. Prokam believes the Commission takes the latter, broader view of Order 94, that is, Prokam was directed to BCfresh indefinitely and not merely until the expiry of the three-year GMA. Prokam argues that the latter interpretation appears to align with the Commission's theory of why its purported direction of Prokam to enter into a renewed GMA with BCfresh beginning in June 2021 was not a decision (which argument is addressed below). Prokam submits its appeal seeks to set aside Order 94 of the Reconsideration Decision in its entirety and since neither interpretation has yet been determined, the appeal should proceed.
28. For completeness, I asked the Commission to respond to Prokam's interpretation of the Court Judgment and to address the implications, if any, of Part VI of the General Orders on the issues under appeal.
29. Part VI provides:

PART VI TRANSFER OF PRODUCERS BETWEEN AGENCIES

1. If a Producer and the Agencies involved agree, a Producer in good standing with the Commission may transfer from one Agency to another Agency. The parties must notify the Commission of the transfer before it takes effect.
 2. If a producer wishes to transfer from one Agency to another Agency, or if an Agency wishes to discontinue receiving Regulated Product from a producer but one or more of the involved parties does not agree the Commission may make a determination binding upon the Producer and the Agency or Agencies.
 3. No transfer registered with the Commission and no determinations made by the Commission pursuant to this Part shall be intended to negate, terminate or diminish established, agreed commercial arrangements or contracts between an Agency and a Producer.
30. In its brief reply of February 10, 2021, the Commission agrees that the Interim Supervisory Decision was only made on Prokam's request for an interim producer shipper licence for the 2020/2021 crop year. The Commission submits that if

Prokam wishes to reapply for a producer-shipper licence, it may do so by reapplying to the Commission and presumably, by pointing to new considerations or changed circumstances. The Commission argues that it is an abuse of process for Prokam to use this appeal process as a vehicle to apply directly to BCFIRB for a producer-shipper licence and circumvent the Commission entirely.

31. The Commission further argues that Prokam either misunderstands the ruling in the Court Judgment on the nature of the “adequate alternative remedy” or is mischaracterizing that ruling in its submissions to BCFIRB. The Commission states the Court found that it was an abuse of process for Prokam to bring on judicial review proceedings when there is a statutory right of appeal of Commission decisions to BCFIRB. The “adequate alternative remedy” analysis focussed on the appropriate forum and did not in any way suggest that there is merit in any of the positions taken by Prokam in this appeal. The Commission submits that the live issues in Appeal #N1908 are properly before the BCFIRB, and the ruling in the Court Judgment does not oblige BCFIRB to rule in Prokam’s favour, either on interlocutory procedural issues or final substantive issues.
32. In response to the application of Part VI of the General Orders, the Commission argues that it does not, and cannot, operate to preclude the Commission from making an order changing Prokam’s designated agency; granting a producer-shipper licence; or making any other order that conflicts with a GMA between Prokam and BCfresh. Part VI also does not preclude Prokam from reapplying to the Commission for a producer-shipper licence.
33. In its reply of February 12, 2021, Prokam agrees that the reinstatement of Prokam’s licence class and the setting aside of the Interim Order are live issues in Appeal #N1908, but then adds that three other issues remain to be determined in this appeal, namely: the setting aside of the direction of Prokam to market through BCfresh; the granting of a producer-shipper licence or a direction to CFP (if it obtains an agency licence); and the fairness of the Commission’s reconsideration process.
34. Prokam submits that it is not necessary for BCFIRB to consider the Commission’s submissions that Prokam is required to apply to the Commission for a producer-shipper licence, or that it is abusive for Prokam to seek that relief in this appeal. Prokam further submits that the Commission’s arguments are beyond the scope of this submission process, which Prokam understood to be aimed at identifying those aspects of Appeal #N1908 that remain to be determined by BCFIRB.
35. Prokam argues that the Commission is no longer maintaining its position that the question of whether BCFIRB could or should grant Prokam a producer-shipper licence has already been determined, and is instead asking BCFIRB to determine this issue, based on a new substantive argument, that such an order must first be sought from the Commission. Prokam states that if this is a “live” issue, the time and place for arguments about it is within Appeal #N1908.

36. Prokam further argues that it is not necessary for BCFIRB to decide on the issue of the Commission's "inconsistent pleading", which arose from the Commission taking the position that the direction of Prokam to BCfresh had already been determined in the Interim Supervisory Decision, because Prokam submits the Commission is no longer taking this position. Prokam then argues that it is not necessary for BCFIRB to decide on whether treating the direction of Prokam to BCfresh as a "live" issue would be inconsistent with the Court's ruling on the adequate alternative remedy because the only argument for how it could be said to be anything but "live" – the contention that it was resolved in the Interim Supervisory Decision – has fallen away in the face of the Court's ruling on that point.
37. As for the implications, if any, of Part VI of the General Orders, Prokam argues the effect of Order 94 of the Reconsideration Decision must mean that Prokam's designated agency is BCfresh unless BCfresh agrees to release it (consistent with s. 1 of Part VI) or the Commission grants a transfer application (s. 2 of Part VI). Prokam states this is consistent with its position in these submissions that Prokam's challenge of the Commission's direction of Prokam to BCfresh was not determined by the Interim Supervisory Decision and will not be rendered moot by the expiry of the 2018-2021 GMA.
38. I have already found that the issues related to Prokam's licence class and the Interim Order remain "live" and will be set down for hearing. I will now consider what, if any, other issues remain to be determined.

Direction of Prokam to Market through BCfresh

39. Significantly, Order 94 of the Reconsideration Decision was a direction that Prokam market any regulated products through BCfresh for the 2020/21 growing season, under the terms of the three-year GMA entered into on February 15, 2018, nothing more. Order 94 was subsequently replaced with the Interim Supervisory Decision, also for the 2020/21 growing season.
40. Before issuing the Interim Supervisory Decision, the supervisory panel had conducted a submission process to consider Prokam's request for immediate relief from certain aspects of the Reconsideration Decision, including the direction directed to market through BCfresh. Prokam also raised procedural concerns with the Commission's reconsideration process.
41. The supervisory panel accepted that the Commission's decision to direct Prokam to market through BCfresh for the 2020/21 growing season was consistent with sound marketing policy and gave supporting policy rationale (paragraph 37 of Interim Supervisory Decision).
42. The panel also upheld the Commission's process, concluding that the Commission took reasonable steps to address the administrative fairness issues identified in the Appeal Decision. While the reconsideration process was lengthy, the panel was satisfied it was fair and inclusive (see paragraphs 27 and 29 of Interim Supervisory

Decision). As presiding member of this appeal, I do not sit in review of supervisory panel decisions.

43. I have considered the impact of the ruling in the Court Judgment on the findings of mootness and adequate alternative remedy. Given that the supervisory panel decision was limited to the 2020/2021 growing season, and consistent with the transcript of BCFIRB's counsel from the notice to strike application relied on by Prokam in its submissions, it is understandable why the Court found Prokam's challenge to BCfresh as its agency for the 2020/21 growing season moot. The growing season was, for all intents and purposes, over at the time of the application hearing.³
44. I have also considered the impact of the Court's ruling on the "adequate alternate remedy". In my view, this ruling needs to be understood in the context of Prokam's judicial review petition, which sought sweeping constitutional relief, not initially sought before BCFIRB, and also attempted to circumvent the Deferral Decision and supervisory process to obtain a different result from the Court. I understand the Court's conclusions as affirming BCFIRB's supervisory and appeal processes as adequate alternative remedies to Prokam's court challenges to decisions made by the Commission.
45. I agree with the Commission that the Court Judgment focussed on the adequacy of the forum provided by BCFIRB as "an expert tribunal with a statutory grant of exclusive jurisdiction to deal with the issues in dispute", "whose decisions are protected by a strong privative clause."⁴ The Court's reasons do not dictate any particular result. BCFIRB is free to consider the issue of what remains a live issue, in the usual course.
46. To the extent that Prokam is trying to use this appeal to seek a ruling from BCFIRB on its agency for the 2021/22 growing season, an issue that was not considered by the Commission in its Reconsideration Decision or the supervisory panel in its Interim Supervisory Decision, it is misguided. In my view, the Court's findings on Prokam's judicial review petition that such a tactic is an abuse of process is equally applicable here.
47. As such, I conclude that the direction of Prokam to BCfresh for the 2020/21 growing season is not a "live" issue in Appeal #N1908.

Producer-shipper Licence

48. It appears, based on Prokam's February 12, 2021 submission, that Prokam also maintains that the issue of its application for a producer-shipper licence remains to be determined in Appeal #N1908. I have reviewed the Interim Supervisory Decision, specifically paragraphs 39 to 48, which provide the supervisory panel's

³ Paragraph 123, *Prokam, supra*

⁴ Paragraph 91, *Prokam, supra*

comprehensive reasons for why it did not think it was appropriate to grant Prokam a producer-shipper licence. Specifically, paragraph 45 states:

45 *The marketing framework provided by the Commission's General Orders has been developed to serve all registered growers of regulated product. It is the panel's position that it is incumbent on Prokam to now demonstrate its willingness to work within the regulated system and to re-establish its good standing before seeking concessions. The panel is not satisfied that Prokam has demonstrated there are historical, regional or economic circumstances that warrant granting it a Producer-Shipper licence for 2020/21. [Emphasis added.]*

49. To the extent that the supervisory panel dismissed Prokam's request for a producer-shipper licence, I conclude this is not a live issue before me on this appeal. I do not sit in review of decisions of a BCFIRB supervisory panel.
50. Should Prokam be successful on its challenge to its Class 3 Licence and receive a Class 1 licence as part of its remedy in Appeal #N1908, the General Orders contemplate a process by which a producer in good standing (i.e. one with a Class 1 licence) can apply for a producer-shipper licence from the Commission. It would be premature for BCFIRB to weigh in on this issue before Prokam makes an application to the Commission for a 2021/22 producer-shipper licence, and the Commission, as the first instance regulator, has an opportunity to make its decision.

Process Issues

51. Prokam argues that its process issues have not been addressed and these remain live issues. On this point, I note that the Interim Supervisory Decision made the following findings:
27. *In the panel's view, the Vegetable Commission has taken reasonable steps to address the administrative fairness issues identified in the Prokam Appeal Decision. Specifically, it fulfilled the appeal direction to canvas interested persons' views on the reconsideration panel composition. In establishing the reconsideration panel, the Vegetable Commission consulted with Thomas Fresh, Prokam and Island Vegetable Cooperative Association (IVCA). The final panel was composed of Vegetable Commission members who do not ship to, and are not shareholders, directors, or officers of BCfresh. All storage crop members recused themselves from the Vegetable Commission's final decision discussion and vote.*
28. *The panel observes that Prokam, in its November 20, 2019 Notice of Appeal, did not dispute the Vegetable Commission's steps to address the potential conflict of interest concerns in decision-making.*
29. *While the reconsideration process was lengthy, the panel is satisfied it was fair and inclusive. The Vegetable Commission shared the written submissions with all parties and provided opportunity for reply. Following the first process, the Commission panel requested input from BC potato producers and agencies on the direction of Prokam to*

BCfresh. The Commission subsequently provided a submission extension. The Vegetable Commission shared the submissions with IVCA, Thomas Fresh and Prokam, who did not make reply submissions to the Vegetable Commission.

52. Further, the Supervisory Review Decision made extensive directions on the Commission's governance and structure to address Commission decision-making and manage conflicts of interest and any reasonable apprehension of bias (Supervisory Review Decision, paragraphs 99 to 121). The directions include both short-term directions (i.e. use of non-sector panels and advisory committees and revision of election rules to make agency directors ineligible to sit as Commissioners) and long-term recommendations to government (i.e. regulatory amendments to add further independent Commission directors).
53. In light of the above and the *de novo* nature of BCFIRB appeals, it is difficult to see what live process issues remain to be determined. I do not find Prokam's submissions of assistance on this point. To the extent there are any process issues that need to be determined, they can only be for the two remaining live issues related to Prokam's licence class and the Interim Order.

Appeal #N2101

54. In its submission of January 14, 2021, Prokam argues that the Commission made a "decision requiring Prokam to sign a renewed GMA with BCfresh commencing June 1, 2021" in both its December 7 and December 14 letter (the **December letters**). For ease of reference, I include the relevant passages from the December letters here:

[I]f Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018, and a renewed GMA that commences June 1st, 2021.

The Commission did not make any further decision to direct Prokam to market through BCfresh. Rather, the decision recognizes that BCfresh is presently Prokam's designated agency. Thus, if BCfresh releases Prokam from the GMA, Prokam can consult with other licenced storage crop Agencies to become your designated Agency.

55. Although the Commission did not say so in its December letters (or with any great clarity in its submissions), I take the above passage as a reference to Part VI of the General Orders:

PART VI TRANSFER OF PRODUCERS BETWEEN AGENCIES

1. If a Producer and the Agencies involved agree, a Producer in good standing with the Commission may transfer from one Agency to another Agency. The parties must notify the Commission of the transfer before it takes effect.
2. If a producer wishes to transfer from one Agency to another Agency, or if an Agency wishes to discontinue receiving Regulated Product from a

producer but one or more of the involved parties does not agree the Commission may make a determination binding upon the Producer and the Agency or Agencies.

3. No transfer registered with the Commission and no determinations made by the Commission pursuant to this Part shall be intended to negate, terminate or diminish established, agreed commercial arrangements or contracts between an Agency and a Producer.
56. In my view, Part VI of the General Orders speaks to the ongoing nature of the producer-agency relationship in the orderly marketing of vegetables. The regulatory framework for vegetables in BC, in the usual course, contemplates an ongoing marketing relationship between a producer and an agency. In a functioning producer/agency relationship, the agency and producer enter into a GMA, which would be renewed from time to time, on terms agreed to between the parties.
57. Part VI established the process for producers to change agencies should either the producer or the agency determines the marketing relationship is no longer meeting their respective business needs. The Commission requires notification when a producer changes their agency to ensure orderly marketing. Part VI also establishes that the Commission may issue directions, as needed to ensure orderly marketing should a producer and agency disagree about terminating a GMA.
58. I note that there is no requirement for, or a reference to, GMAs being automatically renewed between producers and agencies in Part VI or elsewhere in the General Orders. Furthermore, the GMA executed between Prokam and BCfresh in February 2018 is for a three-year term and will expire on May 31, 2021. The GMA does not contain any "automatic renewal" clause. Finally, I note the position of the Commission in its December 14 letter wherein it states that the Commission did not make any further decision to direct Prokam to market through BCfresh.
59. Based on the operation of basic contract law, and in the absence of any further decision of the Commission directing Prokam to market through BCfresh for the 2021/22 growing season, and having not been referred to any provision of the General Orders to the contrary, Prokam's GMA with BCfresh expires on May 31, 2021.
60. On a plain language interpretation of the December letters, I find that they do not contain an order, decision or determination. The only decision made by the Commission was the Delivery Allocation Freeze Decision, which decision Prokam is not challenging. While the passages that Prokam does take exception to are less than clear, especially given the mention of "renewal", I am satisfied that the December letters do not generate a right of appeal.

61. BCFIRB has previously held that an appellant cannot, simply by writing a letter to a commodity board objecting to a given order or seeking an interpretation or clarification of that order, generate a right of appeal: see *Saputo v. British Columbia Milk Marketing Board*, (May 29, 2008), *Klaas Korthuis dba Try Poultry Farms. v British Columbia Chicken Marketing Board*, October 18, 1999.
62. Here, and as discussed above, by virtue of the Interim Supervisory Decision, there is an existing relationship between Prokam and BCfresh as evidenced by their GMA. This relationship expires on May 31, 2021, full stop. If Prokam chooses to market regulated vegetables in the 2021/22 growing season, Prokam has a business decision to make. If it wants to enter into a GMA with an agency and should it result in a transfer from BCfresh, Prokam must notify the Commission under Part VI.
63. To my knowledge, Prokam has not taken any steps to date. Given that I do not accept that the December letters are an “order, decision or determination” of the Commission, it follows that there is no associated right of appeal. As such, I summarily dismiss Appeal #N2101.

If you have any questions, do not hesitate to contact Case Manager, Gloria Chojnacki directly at 778-974-5789.

Yours truly,



Harveen Thauli
Presiding Member
BC Farm Industry Review Board



BC Farm Industry Review Board

July 7, 2021

File: N1908

DELIVERED BY EMAIL

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Dear Sir/Mesdame:

RE: PROKAM ENTERPRISES LTD. V BC VEGETABLE MARKETING COMMISSION

Prokam Enterprises Ltd. (**Prokam**) filed Appeal N1908 on November 19, 2019, appealing the November 18, 2019 reconsideration decision (the **reconsideration decision**) of the British Columbia Vegetable Marketing Commission (the **Commission**). On November 29, 2019, the presiding member of the British Columbia Farm Industry Review Board (**BCFIRB**) appeal panel issued a decision deferring the Appeal #N1908, pending the conclusion of the 2019 vegetable supervisory review (the **2019 supervisory review**).

The decision of the 2019 supervisory review was released December 22, 2020, following which Prokam sought to reinstate Appeal N1908 on the basis that the 2019 supervisory review did not address certain issues. After receiving submissions from the parties identifying what, if any, issues remained extant in Appeal N1908, I found on March 30, 2021 that Prokam's appeal of the reconsideration decision on the issues of its licence class and the interim order to preserve the orderly marketing of storage crops (the **interim order**) remained live issues and directed that these two issues could proceed to a hearing.

In advance of the April 20, 2021 pre-hearing conference (**PHC**), I was made aware of a Notice of Civil Claim (**NOCC**) filed by Prokam alleging misfeasance in public office and bad faith against two persons: Commission member, Peter Guichon and General Manager, Andre Solymosi. Based on my review of the NOCC, it appears that the circumstances relied on to support the NOCC arise out of the 2017 compliance and enforcement proceedings which Prokam appealed (the **original appeal**).¹ The decision of the original appeal ultimately led to the reconsideration decision and is the basis of the

¹ The original appeal resulted in the decision of *Prokam v. British Columbia Vegetable Marketing Commission*, February 28, 2019. In this decision, the BCFIRB appeal panel issued orders directing the Commission to reconsider certain decisions it had made. After reconsidering its decisions, the Commission made orders in the reconsideration decision.

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two remaining issues in Appeal N1908. As such, I asked the parties to address the implications of the NOCC during the PHC. After hearing from the parties, on April 27, 2021, I granted the Commission's request for an adjournment to provide its position on the impact of the NOCC on the two issues remaining in Appeal N1908.

On May 12, 2021, the Commission applied for an adjournment of Appeal N1908, pending the final disposition of the allegations made against Mr. Solymosi in the NOCC. I gave Prokam until May 27, 2021 to respond to the Commission's request for an adjournment. However, on May 26, 2021, a day before the close of the submission process, I was advised that BCFIRB would be undertaking a supervisory review process, pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act (NPMA)*, in part to address the allegations of bad faith and unlawful activity against Messrs. Guichon and Solymosi raised by Prokam in its NOCC and other similar allegations raised by MPL British Columbia Distributors Inc. (**MPL**) in its NOCC (the **2021 supervisory review**). I note MPL's NOCC, in addition to Messrs. Guichon and Solymosi, makes allegations against three other Commission members (Messrs. Reed, Gerrard and Lodder).

In light of these developments, I asked for further submissions from the parties on deferring Appeal N1908 until the completion of the recently announced 2021 supervisory review, pursuant to s. 8(8) of the *NPMA*, and extended the time for Prokam to respond to the Commission's position on deferring Appeal N1908.

In addition to the positions of the parties on the PHC, which were confirmed in writing on April 20, 2021, I have reviewed the following submissions on adjourning and deferring Appeal N1908:

- a) Commission submissions on adjournment dated May 12, 2021;
- b) Prokam submissions on adjournment and deferral with attached Schedule 1 (containing excerpts from Prokam's submissions filed in the original appeal) dated May 27, 2021; and,
- c) Commission submissions on deferral and its reply to Prokam dated May 28, 2021.

Review of Submissions of Parties

Adjournment

Prokam's position at the PHC was that its appeal should be allowed to proceed and there is no need for an adjournment because the parties to the proceedings are different, the NOCC and Appeal N1908 deal with a different subject matter, and the relief sought is different and non-overlapping. Prokam argues it would be unfair and prejudicial to defer Appeal N1908 again, pending completion of the court action as this could take years to resolve. Further, Appeal N1908 was already deferred for a year due to the 2019 supervisory review, which delay forced Prokam to file its NOCC while Appeal N1908 was extant. Prokam submits that even if Appeal N1908 and its NOCC deal with the same subject matter, there is no general prohibition against simultaneously proceeding in both administrative and judicial forums, unless the judicial proceeding is a collateral attack, which in Prokam's view, is not the case and cites *Greengen Holdings Ltd. v. British*

Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2018 BCCA 214.

For its part, the Commission argues Appeal N1908 should be adjourned generally. The Commission does not dispute Prokam's assertions that Appeal N1908 and the NOCC involve different parties, subject matter, and relief sought, and further agrees that there is no general prohibition against proceeding simultaneously in both administrative and judicial forums. However, the Commission argues that Prokam's NOCC is "*entirely without merit*", and was filed for the purposes of harassment, intimidation and to cast a pall over the conduct of the Commission. The NOCC alleges the General Manager had an animus towards, and sought to punish, Prokam and that he acted intentionally, recklessly or wilfully blind to the unlawfulness of his conduct. The Commission points out that Mr. Solymosi has acted in the capacity of General Manager throughout the entirety of the events that are the basis of the two remaining issues in Appeal N1908. If the allegations of animus are proven, this impacts all of his dealings with Prokam, including the 2017 compliance and enforcement matters. The Commission submits that it is not possible for BCFIRB to close its eyes to "*the lingering existence of these allegations in the appeal proceedings*", and as a result, it would not be fair or appropriate to proceed with Appeal N1908 when Mr. Solymosi's integrity has been so profoundly impugned. Fairness requires determination of these allegations before Appeal N1908 is heard. Permitting the appeal to proceed allows Prokam to benefit from the "*true, strategic purpose*" of its NOCC. The Commission further argues that if the suspicions of improper motives behind the NOCC are proven, this could be material to BCFIRB's *de novo* disposition of the two remaining issues in Appeal N1908.

In its reply submissions, Prokam argues that since the Commission is *ad idem* on the above four criteria, this is sufficient to dispense with its request for an adjournment.

On the balance of the issues raised by the Commission, Prokam makes several arguments. Prokam first argues that there is no factual basis for the allegation that its NOCC was filed "*to harass; to intimidate; to cause expense; and to cast a pall of suspicion over the conduct of the Commission*". Prokam disputes the Commission's assertion that these "*sudden and explosive allegations of bad faith and misfeasance*" were never advanced before BCFIRB. Prokam submits that the only allegations about Mr. Solymosi's conduct raised in the NOCC, not advanced in the original appeal, relate to his state of knowledge about the unlawfulness of his conduct, and that proof of such knowledge was not germane to any of the issues in the original appeal. Prokam further submits that issues on the unlawfulness of the minimum price orders, procedural unfairness of the investigation, and a preconceived view of Prokam as a "rogue producer" were all advanced in the original appeal. Prokam points to excerpts from its submissions in the original appeal to support its position. Prokam also states that animus was also raised during the 2019 supervisory review (attributed to unnamed "persons of influence" within the Commission), as was the allegation that the Commission purported to enforce export minimum price orders, which were knowingly made without jurisdiction, and that Mr. Guichon exercised his power for personal gain.

Prokam also submits it has a right to a timely appeal and should not be deprived of that right based on hypotheticals of what might be proven in another proceeding. Prokam states the Commission's arguments are without merit and it questions the significance of proving animus of the General Manager when his animus cannot establish bias on the part of the Commission. Prokam further submits the suggestion that the true aim of the NOCC is to harass and intimidate the Commission is unsubstantiated speculation, devoid of factual foundation and cannot support an adjournment decision prejudicial to Prokam. Finally, Prokam argues that the Commission has not explained how its suspicions about improper motives behind filing the NOCC "*could conceivably be material to BCFIRB's de novo jurisdiction to hear the appeal*", and "*it is inconceivable*" that the NOCC could be material to BCFIRB's determination of the remaining two issues in Appeal N1908 on the correctness and fairness of the Commission's decision.

Deferral

Prokam argues that because Appeal N1908 has already been deferred once, it is not open to BCFIRB to defer it a second time in light of ss. 8(8.4) of the *NPMA*, which Prokam claims places a mandatory obligation on BCFIRB to "*proceed with and decide*" this appeal.

Section 8(8) and 8(8.4) provide:

(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.

(8.4) 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. [emphasis added by Prokam]

Prokam argues that once it gave notice under ss. 8(8.4), BCFIRB cannot defer Appeal N1908 a second time in favour of the 2021 supervisory review. If BCFIRB considered that certain issues raised in Appeal N1908 would have been better dealt with by a supervisory process, it could and should have incorporated those terms of reference (**TOR**) into the 2019 supervisory review as the allegations in the NOCC were the subject of submissions made to BCFIRB in both the original appeal and the 2019 supervisory review. Prokam then states that BCFIRB could have crafted the TOR for the 2019 supervisory review as broadly or as narrowly as necessary to capture as many or as few issues raised in Appeal N1908 into the supervisory process. BCFIRB instead took the opportunity to defer Appeal N1908 and that opportunity is now spent. Finally, Prokam argues that there is no prospect that the two remaining issues in Appeal N1908 will be determined in the 2021 supervisory review based on its review of the TOR recently announced.

The Commission disagrees with Prokam and argues that there is no rational basis to conclude that BCFIRB's mandatory obligation "*to proceed with and decide the appeal*" is not itself subject to BCFIRB's authority to "*defer further consideration of the appeal*" as provided under ss. 8(8), where circumstances so warrant. As to Prokam's assertion that

it is entitled to a timely disposition of its appeal, timeliness must be assessed in the circumstances. Here, the Commission states that Appeal N1908 should be deferred pending completion of 2021 supervisory review into the allegations of bad faith and unlawful conduct.

DECISION

The Commission's application for adjournment has been overtaken by my consideration of whether Appeal N1908 should be deferred pending the conclusion of the newly announced 2021 supervisory review into allegations of bad faith and unlawful conduct made against Commission members and staff.

Jurisdiction to Consider Further Deferral

First, I agree with the Commission that it is open to me to consider whether to defer the remaining issues in Appeal N1908 until the completion of the 2021 supervisory review, even in the face of the deferral decision of November 29, 2019. In my view, ss. 8(8.4) should not be read as creating a mandatory direction to BCFIRB that on receiving an appellant's notice of intention to proceed with an appeal, it can only proceed with hearing the appeal. Subsection 8(8) creates an ongoing obligation on an appeal panel to consider whether an appeal is more properly dealt with in a supervisory process. Circumstances often change and as presiding member, I must always be concerned about running a fair and effective appeal. Where there is the potential for a supervisory process to impact issues in an appeal before BCFIRB, the need to consider deferral arises. I am satisfied that the circumstances are such that it is appropriate for me to consider whether a deferral pending the completion of a supervisory process is appropriate.

I find little merit in Prokam's suggestion that BCFIRB should have drafted its TOR for the 2019 supervisory review in sufficiently broad terms to capture its current allegations. Prokam was consulted on the TOR, and had it wished to raise the allegations of actual bias and intentional harm that are now advanced in the NOCC, it could have done so. Furthermore, it is reasonable to conclude that the supervisory panel would have amended the TOR accordingly given its focus on matters relating to Commission governance.

Deferral Decision

For reasons that follow, I find that the allegations of misfeasance (intent to harm) raised by Prokam and MPL in their NOCCs against certain Commissioner members and staff are new circumstances, which were not before BCFIRB in the original appeal or the 2019 supervisory review.

I have carefully reviewed Prokam's submissions filed in the original appeal. I observe that while Prokam raised the issue of Mr. Solymosi's animus in the original appeal, it did so as part of its broader submissions on findings of credibility of certain witnesses, including Mr. Solymosi, and what adverse inferences should be drawn. While the submission acknowledges at paragraph 367 that "*a breach (of) the duty of procedural fairness will therefore be established where the circumstances of the decision give rise*

either to actual bias or a reasonable apprehension of bias”, Prokam specifically chose to make submissions on how the facts supported a finding of reasonable apprehension of bias on the part of “*Mr. Guichon and the other BCfresh commissioners*” in the 2017 compliance and enforcement proceedings. These allegations fall far short of, and are properly distinguished from, the allegation of actual bias now being made in Prokam’s NOCC, based on what Prokam acknowledges are the same (or overlapping) facts.

The supervisory panel in the 2019 supervisory review made interim orders in January and February 2020 at Prokam’s request. The supervisory panel established draft TOR, confirming it would be examining Commission governance. Prokam was given an opportunity to comment on the TOR and how it wanted to participate: see letter from Prokam and CFP Marketing Corporation to BCFIRB dated April 30, 2020. While the letter raised limited concerns on the conflict of interest with Mr. Guichon’s participation in the 2019 supervisory review given his dual role as a director of BCFresh, Prokam did not seek to revise the TOR to include allegations of actual bias or intent to harm by the Commission and/or its staff.

Turning to the recently announced 2021 supervisory review, its stated purpose is to determine whether the allegations of bad faith and unlawful activity raised in the Prokam and MPL NOCCs, alleging misfeasance of public office by Commission members and staff, can be substantiated and what resulting orders or directions by BCFIRB may be required: Notice of Supervisory Review (May 26, 2021). Draft interim orders have been circulated which contemplate impugned Commission members and staff being prohibited from participating in Commission deliberations or decision making on any rights or interests of Prokam, CFP and MPL until the conclusion of the 2021 supervisory review. Following the supervisory hearing, if the allegations are found to be substantiated, it will be open to the supervisory panel to make orders, which could include revisiting, reversing or varying any or all of the Commission decisions made in support of the 2017 compliance and enforcement proceedings, including those that are the basis of the two remaining issues in Appeal N1908.

In contrast to the supervisory review process, my role is constrained by the specific matters on appeal. The appeal panel in the original appeal rendered a decision following eight days of hearing. The appeal panel made certain findings of fact on compliance and enforcement and remitted certain issues back to the Commission for determination based on the findings of the appeal panel. The Commission revisited its enforcement decisions based on the appeal panel’s findings and the reconsideration decision then followed. Just as it was not open to the Commission to dispute the panel’s findings in the original appeal, I too must accept those findings. The first issue in Appeal N1908 is whether, given the appeal panel’s findings, the penalty of a Class 3 licence imposed on Prokam, is appropriate or proportional to the finding of non-compliance. The second issue involves considering whether the interim order is consistent with sound marketing policy.

Contrary to Prokam’s position that “*it is inconceivable*” the allegations of bad faith and unlawful conduct in its NOCC are material to my determination of the remaining two issues in Appeal N1908, and there is no prospect that they will be determined in the 2021 supervisory review, I find that to proceed would - at best - result in a duplication of BCFIRB resources allocated to the same or similar issues, and would - at worst - create

a risk of inconsistent and contradictory findings between the supervisory review and appeal processes.

If the allegations of bad faith and unlawful conduct of the Commission members and staff are proven in the 2021 supervisory process, multiple Commission decisions made in the compliance and enforcement proceedings could possibly be rescinded or varied. In short, if the Commission and its General Manager are found to have unlawfully targeted Prokam, the supervisory panel could set aside or vary any decisions, including the issuance of a Class 3 licence and/or the enactment of the interim order.

As mentioned above, the narrow focus of my appeal is whether the Commission's sanctions were appropriate given the findings of the appeal panel in the original appeal. I may uphold or vary Prokam's Class 3 licence and determine whether the interim order was consistent with sound marketing policy. The remedy for any process concerns is less clear but I note that process issues (especially those involving the motivation behind certain steps taken) will form part of the 2021 supervisory review. I see a significant risk that my findings in Appeal N1908 may overlap or conflict with the findings of the supervisory panel.

Thus, pursuant to ss. 8(8) of the *NPMA*, I conclude that at least part of the subject matter of Appeal N1908 is more appropriately dealt with in the 2021 supervisory process. Once we have the benefit of the supervisory panel's findings, it will then be more appropriate to determine what issues, if any, remain to be determined in Appeal N1908.

On Prokam's concerns about delay, it is my view that this additional delay could have been avoided if Prokam had properly brought forward its concerns earlier. As I set out above, I do not accept that Prokam had previously raised the allegations of bias and intent to harm that are now advanced in its NOCC, despite having had multiple opportunities to do so, including in the 2019 supervisory review. Prokam made the decision to raise these allegations at a later date and in a different forum, and the consequence of that is another supervisory process and the corresponding need to defer Appeal N1908. Having said that, the supervisory review is proceeding on a relatively expedited basis, and I am satisfied that any additional delay will not be inordinate in any event.

Yours truly,



Harveen Thauli
Presiding Member
BC Farm Industry Review Board



May 17, 2022

B.C. Vegetable Marketing Commission
#207 – 15252 – 32nd Ave
Surrey, B.C.
V3Z 0R7

RE: 2022-2023 Delivery Allocation

Dear Sir/Madam:

Please accept this letter as a formal request to freeze our delivery allocation for this upcoming season for Potatoes. We continue to recover from extensive damages incurred from the November 2021 floods and will not have the infrastructure in place in time for this growing season.

If you have any questions, please do not hesitate to contact me at (604) 835-9666. Let me know if you require any further information to support this request.

Best Regards,

A handwritten signature in black ink, appearing to read "B. Dhillon".

Bob Dhillon

604-835-9666

Andre Solymosi

From: Claudia Trigo
Sent: October 5, 2022 11:01 AM
To: Debbie Etsell
Cc: Andre Solymosi; Debbie Oyenuga
Subject: BCVMC BULLETIN: Freezing of Delivery Allocation Due To Sumas Floods
Attachments: BCVMC - Info Req. & Evaluation Criteria D.A. Freeze Request.pdf

Follow Up Flag: Follow up
Flag Status: Completed

To Storage Crop Producers & Agencies,

RE: Freezing of Delivery Allocation Due to Sumas Floods

Applications Due: **October 28th, 2022**

All storage crop producers who were affected by the November 2021 Sumas floods are invited to make an application to the Commission to freeze their delivery allocation. We are requesting that all applications be submitted to the Commission office by October 28th for review in early November.

The attached document provides information on application requirements & evaluation criteria.

Please submit your application to Claudia and you will receive an e-mail confirming receipt of it in 2 business days.

Claudia Trigo

Administrative Assistant
direct line 604.542.9734 Ext.122
claudia@bcveg.com

If you submitted your application prior to this notice, it will also be reviewed in early November. You may contact **Claudia Trigo** to confirm receipt as well.

Attachment:

[BCVMC - Info Req. & Evaluation Criteria D.A. Freeze Request](#)

Note: A producer may submit a freeze request application on your own accord. All applications are assessed by the Commission. This bulletin provides notice that the Commission acknowledges this specific event has impacted numerous producers and that these producers may qualify for a freeze on their delivery allocation.

Regards,

Claudia Trigo for *Andre Solymosi, General Manager*



Andre Solymosi | General Manager

#207, 15252 – 32nd Avenue, Surrey BC V3Z 0R7

toll free: 1.800.663.1461 | direct line: 604.542.9734 Ext.125 | fax: 604.542.9735 | cell: 1.604.388.9578

asolymosi@bcveg.com | bcveg.com | [Download vCard](#)

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Information Required & Evaluation Criteria
[Freeze Request – Delivery Allocation](#)

A freeze on delivery allocation can be granted by the Commission if unusual circumstances prevent a specific grower or a group of growers in a growing region from producing a crop commensurate with their delivery allocation for a specific period and Crop Year. The Commission will deny any request that gives a producer an advantage over other producers.

Circumstances are considered to be unusual when the situation is not typical, the occurrence is beyond a producer's control, and, there is evidence that the circumstance has negatively impacted performance in the execution of a producer's intent to grow the regulated vegetable.

Information Required to Assess Your Delivery Allocation Freeze Request

The Commission requires the following information to assess a request to freeze delivery allocation:

1. Actions taken by the Producer that demonstrate an intention to produce the regulated vegetable crop for the Crop Year / delivery allocation period in question.
2. Evidence that supports the list of actions provided under point one above.
3. A description of the circumstance(s) that prompted this freeze request including,
 - a. How have these circumstances inhibited your ability to plant or produce vegetable crops for the specific period / Crop Year?
 - b. What delivery allocation period(s) are affected?
 - c. What actions, if any, were taken to mitigate the risk?
 - d. What actions, if any, were taken to mitigate the impact of this occurrence?
4. Field addresses of the fields that are implicated.
5. It is expected that your Agency is also made aware of the circumstance(s). We further require that you provide a letter of support from your agency for this freeze request. This letter is also to include information on other agency growers that are faced with the same challenge, and confirmation on if the circumstances have had the same impact on these growers.



October 28, 2022

BY EMAIL

BC Vegetable Marketing Commission
#207 – 15252 32nd Ave
Surrey, BC V3Z 0R7

**Attention: Andre Solymosi, General
Manager**

Dear Mr. Solymosi,

Re: Sumas Flooding - DA Freeze Application of Prokam Enterprises Ltd.

Further to the BCVMC bulletin of October 5, 2022, please accept this letter, together with its schedules, as the application of Prokam Enterprises Ltd. for a freeze of Prokam's delivery allocation for the 2021-22 and 2022-23 crop years.

2021-22 Crop Year

Prokam planted late in the 2021-22 crop year due to uncertainty over how its potatoes would be marketed. Once the uncertainty was resolved and Prokam was freed from its GMA with BCfresh on May 31, 2021, Prokam purchased seeds in June, 2021 and planted 20 acres of Russet potatoes (roughly 280-300 tonnes). Those potatoes were harvested in the fall and placed in storage for sale in November/December (Period C) and later as needed (Period D). A truckload was set to go out in late November, but the area was evacuated before it could be picked up. The rest of the crop was in storage and was destroyed.

The circumstances of Prokam's non-production in the 2021-22 crop year are set out in paragraphs 17 to 19 of an affidavit Prokam has filed in the judicial review proceeding, which is attached as Schedule "A" to this letter.

Attached as Schedule “B” to this letter is documentation of Prokam’s 2021 fall production, including receipts for the seed potatoes, a copy of our producer marketing agreement with Okanagan Grown Produce Ltd. dated November 5, 2021, a purchase order for Thomas Fresh Calgary, and email correspondence with Lillian Posch, general manager of Okanagan Grown, indicating that the flood struck before the load could be picked up and that the rest of the crop had been lost.

Attached as Schedule “C” is a series of photos of the flooding, showing the extreme water levels in and around Prokam’s fields and packing shed. The fields affected by the flood, by Parcel Identification Number, are as follows: 010-839-917 (3219 Tolmie Road, Abbotsford, V9X 2A9), 010-841-571 (40836 No. 5 Road, Abbotsford, V3G 2T9), 011-197-501 (3275 Boundary Road, Abbotsford, V3G 2N1), 011-211-717, 011-259-353, 011-259-370, 011-259-396.

Flood Mitigation

The bulletin asks “what actions, if any, were taken to mitigate the risk?” Prokam has industry standard drainage systems in place, but its fields and potato packing shed are located on a flood plain, and the Sumas flooding was catastrophic. There was nothing that could have been done to prevent it.

2022-23 Crop Year

The reasons for Prokam’s non-production in 2022-23 are set out in paragraph 20 of the affidavit attached as Schedule “A” to this letter. Prokam did not plant potatoes for the 2022-23 crop year because it was not possible to repair the necessary infrastructure – the packing shed and the wash line – in time.

Prokam never formed any specific intentions with respect to planting in 2022-23. Initially, there was uncertainty over whether the fields were contaminated and whether testing could be completed in time. Attached as Schedule “D” is an email thread between Bob Gill and Arif Lalani of the Ministry of Agriculture regarding flood recovery, including an inquiry on December 14, 2021, regarding soil testing.

In terms of mitigating the impact of the flood, Prokam has been working to repair its infrastructure since January, 2022. Attached as Schedule “E” is a letter from Prokam’s repair contractor explaining the sequence of the work, and why it is not yet complete.

Were it not for the flood, we expect that Prokam would have planted at least its delivery allocation. Prokam had, and continues to have, a positive relationship with its agency, Okanagan Grown. Lillian Posch reached out to Prokam to express willingness to work with us to get potatoes to market. That email exchange is exhibit “D” to the affidavit attached to this letter as Schedule “A”.

2023-24 Crop Year

Prokam hopes to plant a full crop of potatoes for the 2023-24 crop year. We have invested considerable resources in repairing the packing shed and wash line, and our contractor expects that those repairs will be complete in time. We have the support of our current agency, Okanagan Grown. Lillian Posch has indicated that Okanagan Grown supports our application and would be pleased to continue as our agency for 2023-24. She has said she will provide a letter to that effect. The letter has not yet arrived, but we will forward in due course and hope that the Commission will consider it in connection with our application.

Prokam looks forward to receiving the Commission's calculation of its delivery allocation so that it can begin to make plans for the 2023-24 crop year.

Yours truly,

Prokam Enterprises Ltd.

Per:

A handwritten signature in blue ink, appearing to read "Bob Dhillon", written over the printed name.

Bob Dhillon, President



Schedule 'A'

This is the 1st affidavit of B. Dhillon
and it was made on September 12, 2022

No. S-226532
Vancouver Registry

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, c.241

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROKAM ENTERPRISES LTD.

PETITIONER

AND:

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD and BRITISH COLUMBIA
VEGETABLE MARKETING COMMISSION; MASTRONARDI PRODUCE LTD., BCFRESH
VEGETABLES INC., ANDRE SOLYMOSSI, JOHN NEWELL, COREY GERRARD, BLAIR
LODDER, PETER GUICHON

RESPONDENTS

AFFIDAVIT

I, Bob Dhillon, farmer, of 3219 Tolmie Road, Abbotsford, B.C., V3G 2T9, SWEAR THAT:

1. I am the principal of Prokam Enterprises Ltd. and as such, have personal knowledge of the facts and matters hereinafter deposed to, save and except where such facts and matters are stated to be made upon information and belief, and as to such facts and matters I verily believe them to be true.
2. I incorporated Prokam in 2014 with a view to purchasing delivery allocation for potatoes from Hothi Farms as a new entrant into the regulated vegetable market. Prokam operates from the same farm on which my father began his farming business, Sam Enterprises Ltd., in 1980. Sam Enterprises continues to produce unregulated vegetables, including on land leased from Prokam.

3. Prokam has made significant investments in its potato farming business, including a washline (\$950,000), a digger (\$150,000), a bagger (\$350,000), a sprayer (\$250,000) and facility upgrades (\$300,000).
4. In its first year (2015-16), Prokam sold potatoes under the Hothi Farms label. Prokam then sold potatoes through its then-designated agency, the Island Vegetable Cooperative Agency, for one complete season (2016-17) and one partial season (2017-18) before the Commission issued cease and desist orders in the fall of 2017, alleging that Prokam's sales contravened its General Order.

The Potato Farming Cycle

5. Potato production requires significant advance planning. Although planting itself occurs in the spring, planting decisions are best made in November or December of the preceding year. Those decisions allow us to arrange for land, seed, and labour.
6. Prokam would usually place deposits on seeds in November or December for the upcoming growing season. If Prokam is late in ordering seeds, then the most desirable varieties and quality are generally no longer available.
7. Similarly, if Prokam does not have arrangements in place for land by around November or December, then typically the land Prokam would require is leased by other growers and will not be available for the upcoming growing season.
8. In terms of labour, Prokam hires temporary foreign workers, which requires a lengthy application process each year before workers receive permits to come to Canada.

Prokam's post-2017 operations and current delivery allocation

9. The B.C. Vegetable Marketing Commission intervened in Prokam's operations in the fall of 2017 (during the 2017-18 growing season). Prokam did not participate in the 2018-19 or 2019-20 growing seasons – the years during which Prokam's initial appeal from the Commission's orders against Prokam, and the Commission's subsequent reconsideration process, took place.

10. Prokam did not participate in the 2020-21 growing season either. The Commission's reconsideration decision was released in November, 2019. At that point, there was still time for Prokam to reserve land and seeds for a spring-2020 planting. However, there were a couple of issues to be resolved, including an outstanding request that the Commission issue Prokam a producer-shipper licence and a question as to whether the zero-production years would be included in the calculation of Prokam's five-year rolling average for delivery allocation purposes.
11. In its reconsideration decision, the Commission had maintained the requirement that Prokam-grown potatoes be marketed through BCfresh, something that we were unwilling to do. Prokam appealed again. That appeal was deferred pending a supervisory review that had begun the previous summer. As an interim solution, Prokam asked the B.C. Farm Industry Review Board supervisory panel to issue it a producer-shipper licence. That request was declined.
12. As part of that same process, Prokam asked the BCFIRB supervisory panel to exclude the two zero-production years (2018-19 and 2019-20) from the calculation of Prokam's delivery allocation – known as a “delivery allocation freeze”. That request was granted.
13. However, the calculation of Prokam's delivery allocation was still not entirely sorted out in February 2020. By then, I believed that the seed varieties we would have had to purchase were no longer available, and Prokam had already leased its land to my father's company, Sam Enterprises Ltd., which had purchased squash seeds to plant. Still, I began looking into whether there would be a way to plant potatoes in 2020. Then the COVID-19 Pandemic began. This caused delays in temporary foreign workers and other public safety issues that would impact Prokam's operations for the planting season. Based on what I knew in March, 2020, I believed the soonest Prokam would be in a position to plant would be the end of summer, which would not give enough time for the potatoes to grow and be harvested prior to the ground freezing over. We abandoned plans to grow potatoes in the 2020-21 growing season. I wrote to the Commission on March 18, 2020 requesting a delivery allocation freeze.

14. In the fall of 2020, we were hoping to start making planting decisions for the 2021-22 growing season (for planting in the spring of 2021). The issue of Prokam's designated agency had yet to be resolved, but we were hopeful that something would be sorted out (and it ultimately was). However, there was still a question as to what Prokam's delivery allocation would be – specifically, whether Prokam's delivery allocation would be reduced on account of the zero-production year in 2020-21.
15. The Commission responded to Prokam's March 18, 2020 request for a delivery allocation freeze on November 30, 2020. By follow up letter on December 7, 2020, attached as **Exhibit "A"**, the Commission's general manager, Andre Solymosi, said:

The freeze of your 2020/21 delivery allocation has been granted on the basis that there were special circumstances in 2020 with specific regard to securing labor and seed. This decision is not to be taken as indicative that any future application for a freeze will be successful. It is expected that you will be taking all reasonable steps to produce this delivery allocation in the 2021/22 Crop Year.
16. Prokam's delivery allocation was set at its 2020-21 delivery allocation, as calculated in a letter from Mr. Solymosi dated April 8, 2020, attached as **Exhibit "B"**. The total delivery allocation, across categories and periods, is 1,047 tonnes. An acre of planting usually yields about 15 tonnes of potatoes, so this corresponds to approximately 70 acres of planting.
17. There was still some uncertainty in the spring of 2021 as to whether Prokam would have an agency through which to market any potatoes that it planted. Prokam's contractual relationship with BCfresh was set to end on May 31, 2021, but a comment in Mr. Solymosi's letter of December 7, 2020 had created confusion over whether Prokam might be required to enter into a renewed contract with BCfresh.
18. That uncertainty was eventually resolved by the BCFIRB as part of its preliminary determination of certain issues in appeals before it. The BCFIRB confirmed that Prokam would be without a designated agency as of May 31, 2021. Prokam planted potatoes in the summer of 2021, and the Commission eventually decided that those potatoes could be marketed through the agency Okanagan Grown Produce Ltd.

19. The Fraser Valley suffered severe flooding in November, 2021. Prokam's entire crop was lost, and our facilities and equipment were badly damaged.
20. Prokam is not participating in the 2022-23 growing season. Planting decisions would have needed to be made in late 2021, in the immediate aftermath of the flooding. There was still a great deal of uncertainty during those initial months over whether we would even be able to get our infrastructure back up and running in time, whether there would be funding available to do so, and whether there was ground contamination that would prevent us from putting a crop in. We began the initial work on restoring our infrastructure in late January, 2022. It soon became apparent to me that it would not be possible to complete the work in time for the 2022-23 growing season.
21. Prokam requested a delivery allocation freeze by letter submitted to the Commission along with its application for a 2022-23 producer licence. A copy of that letter is attached as **Exhibit "C"**. We have not had a response.
22. On May 19, 2022, Lillian Posch, the General Manager of Okanagan Grown Produce Ltd., reached out to find out if we were growing. I advised that we were not. She said that Okanagan Grown would be happy to work with us once we are ready to plant again. A copy of that email exchange is attached as **Exhibit "D"**.
23. Much of Prokam's infrastructure still needs to be replaced. We expect the total work to cost approximately \$700,000. We expect federal government grants will cover approximately 70%. The deadline for federal government funding is December of this year. The necessary work is underway, but has not yet been completed. I believe it can be completed within two to three months.

Anticipated Losses if Prokam is unable to participate in the 2023-24 growing season

24. Based on my current projections as to crop prices and costs for next year, Prokam's potential revenue from potato sales in the 2023-24 growing season could be as follows:
 - (a) For 70 acres of planting, approximately \$426,200;
 - (b) For 100 acres of planting, approximately \$631,000;

25. A chart detailing the estimated revenues and expenses is attached as **Exhibit “E”**.
26. The latter scenarios would involve planting in excess of the delivery allocation calculated by the Commission in April 2018 (as set out in the letter attached as Exhibit “B”), in the hopes that there might be opportunities or those potatoes to be sold to fill “gaps” in the market, allowing Prokam to earn additional delivery allocation.
27. The alternative is for Prokam to lease its land to other growers. I would expect to earn approximately \$1,800 per acre from leasing land to other growers. Prokam has a total of 175 acres of farmland.

CFP Marketing Corporation

28. In addition to being the principal of Prokam, I am a director of CFP Marketing Corporation (“**CFP**”), a company that has for the past three years been seeking to be licensed as a new agency for the vegetable industry.
29. Right now, BCfresh is the only storage crop agency in the lower mainland. In 2019, we began looking at forming a new company to make an application for agency status. I had heard from a number of farmers who were not producing regulated vegetables but would be interested in acquiring delivery allocation if there was a lower mainland agency option that was not BCfresh. I spoke to others who expressed – confidentially – a cautious interest in moving. I have personally invested significant funds in CFP – upwards of \$250,000 – in order to put it in a position to make a strong agency application.
30. The founders of CFP were concerned about the possibility that the Commission’s October 2017 cease and desist orders and related appeals and other proceedings were tarnishing Prokam’s reputation in the industry, and that this reputational damage could negatively reflect on CFP. We decided to make sure that people well-known and independent were on the board of CFP to combat the perception that CFP was just an extension of Prokam.
31. The first such person was Robin Smith, who has a long history of working in regulated marketing, including most recently as immediate past chair of the British Columbia



BC VEGETABLE MARKETING COMMISSION

#207, 15252 – 32nd Avenue
Surrey, British Columbia, Canada V3Z 0R7
Telephone: (604) 542-9734 • Fax: (604) 542-9735 • Toll Free: 1-800-663-1461
Website: www.bcveg.com

December 7, 2020

DELIVERED BY EMAIL

Bob Dhillon,
Prokam Enterprises Inc.
P.O. Box 4399 Stn. Yarrow Main
Chilliwack, BC V2R 5H8

CC: Murray Driediger
BC FRESH Vegetables Inc.

Dear Mr. Dhillon:

RE: 2020/21 Delivery Allocation Freeze Request

On Monday November 30th, 2020 I sent you an e-mail that informed you of the Commission’s decision to grant you a freeze request for the 2020/21 Crop Year. This letter provides you with further information on this decision and is being copied to your designated Agency.

The Panel considered your application for a freeze request as set out in your May 8, 2020 letter and supporting documents. Fundamentally the Commission remains of the view that market access for Prokam’s delivery allocation has been maintained and that Prokam made its own decision not to produce regulated storage crop potatoes for the 2018/19, 2019/20 and 2020/21 Crop Years. However, in your application you refer to complications arising in securing seed and the difficulty in securing labor. Consequently, the Commission fees that the freeze request can’t be denied in entirety on this occasion with specific regard to labor and seed. Therefore, the Commission grants the request to freeze Prokam’s 2020/21 delivery allocation due to these complications.

In addition, if Prokam chooses to grow regulated vegetables, it is directed to market through BCfresh under the terms of the three-year GMA agreed to on February 15, 2018, and a renewed GMA that commences June 1st, 2021. If BCfresh releases Prokam from the GMA, Prokam can consult with other licensed storage crop Agencies to become your designated Agency.

The freeze of your 2020/21 delivery allocation has been granted on the basis that there were special circumstances in 2020 with specific regard to securing labor and seed. This decision is not to be taken as indicative that any future application for a freeze will be successful. It is expected that you will be taking all reasonable steps to produce this delivery allocation in the 2021/22 Crop Year.

A copy of the April 8th letter that calculates 2020/21 delivery allocation is attached to this letter. With this freeze, your delivery allocation remains unchanged for the 2021/22 Crop Year.

Yours truly,

Andre Solymosi, General Manager

This is Exhibit "A" to the Affidavit #1 of
Bob Dhillon, sworn before me at
Vancouver, in the Province of British Columbia
this 12th day of September, 2022

A Commissioner for taking Affidavits for the
Province of British Columbia

Attachment: April 8, 2020 letter to Prokam Enterprises Inc.



BC VEGETABLE MARKETING COMMISSION

#207, 15252 – 32nd Avenue

Surrey, British Columbia, Canada V3Z 0R7

Telephone: (604) 542-9734 • Fax: (604) 542-9735 • Toll Free: 1-800-663-1461

Website: www.bcveg.com

April 8, 2020

DELIVERED BY E-MAIL AND POST

Bob Dhillon,
Prokam Enterprises Inc.
P.O. Box 4399 Stn. Yarrow Main
Chilliwack, BC V2R 5H8

Cc: Murray Driediger
BC Fresh Vegetables Inc.

Dear Mr. Dhillon:

RE: 2020-21 Crop Year Delivery Allocation

This letter addresses the noted error in the calculation of your 2020-21 delivery allocation and your request for a freeze of your 2020-21 delivery allocation.

If a freeze request of your 2020-21 delivery allocation is granted, you will need to register as a licensed producer for the 2020-21 Crop Year. Please be aware that if you do not produce regulated vegetables in 2020-21 and your delivery allocation freeze request is denied, you will have no shipments reported for the 2020-21 Crop Year and you are not required to be licensed as a producer. Furthermore, Prokam will be required to register as a Class III license. After one crop year of production of regulated vegetables as a Class III licensee, Prokam may be eligible for a Class II license in the subsequent year as long as Prokam continues to produce, and subject to Commission approval.

Furthermore, the General Order *PART XVII PROCEDURE FOR DETERMINING DELIVERY ALLOCATION FOR STORAGE CROPS* directs as follows:

10. Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.

It is noted that if you chose not to produce any regulated vegetables for the 2020-21 Crop Year, this will be your third consecutive year of not producing. In addition, your current 2020-21 delivery allocation supports approximately 65 acres of production in 2020.

During this COVID-19 crisis agriculture is considered an essential service. The federal and provincial governments are committed to ensuring that the agriculture industry has the resources available to enable growers to continue to produce food for the Canadian population. We encourage Prokam to find solutions that would enable you to produce potatoes during this time of crisis when staple goods, which includes potatoes, are in strong demand and the government is working diligently to secure access to domestic food production.

*This is Exhibit "B" to the Affidavit #1 of
Bob Dhillon, sworn before me at
Vancouver, in the Province of British Columbia
this 12th day of September, 2022*

A Commissioner for taking Affidavits for the
Province of British Columbia

2020-21 Delivery Allocation

At the March 2nd, 2020 meeting with BCfresh I had acknowledged the recording error to Prokam Enterprises Inc.'s (Prokam) 2016-17 Period A shipments. The 66.38 tonnes had been incorrectly recorded as a 2015-16 Period D shipment of Hothi Farms. The February 11, 2020 decision on delivery allocation issued by BCFIRB directed that the Commission is to resolve this directly with Prokam. *Appendix A* provides you with the approved BCFRIB 2020-21 delivery allocation adjusted for this reporting error.

Delivery Allocation Freeze Request

In your letter dated March 18, 2020 you informed the Commission that you are not able to make any decisions for the 2020-21 Crop Year and have requested that your delivery allocation be frozen:

"... due to the current unforeseen and special circumstances revolved around the COVID-19 crisis that the BC Farming Industry is experiencing, we are unable to make any decisions for the 2020-2021 season.

As a result, we are requesting a freeze to our delivery allocation for the 2020-2021 season. The largest challenge we face is organizing our labor force for Prokam Enterprises Ltd. As you are aware, this special circumstance (state of emergency) that British Columbia is facing has left the agriculture industry with a high level of uncertainty at this time."

On receipt of your March 18, 2020 letter BCfresh was notified that Prokam would not be able to make any decisions for the 2020-2021 season. A follow up email was sent on March 24th to both yourself and BCfresh that shared information on recent federal government announcements including the exemption from travel restrictions of temporary foreign workers and other seasonal workers. The letter also requested if you now find yourself in a position to produce that you get in touch with BCfresh and the BCVMC as soon as possible.

A freeze on delivery allocation can be justified if special circumstances impact a specific grower or the group of growers in the growing area. Special Circumstances will be considered where they are not typical for the producer, beyond their control, and where there is evidence that they have negatively affected their performance in the execution of their intent to grow the regulated vegetable.

If a freeze of a specific producer's delivery allocation gives that producer an advantage over other producers, the freeze request can be denied.

In assessing a delivery allocation freeze request, the Commission will need to determine if there are valid special circumstances that inhibited the producer from acting on an intention to produce the regulated vegetable in the specified Crop Year.

Additional Information Required to Assess Your Delivery Allocation Freeze Request

The Commission requires the following information to assess your request to freeze your delivery allocation for the 2020-21 Crop Year:

1. A list of all actions taken by Prokam that demonstrate its intention to grow a regulated vegetable crop for the 2020-21 Crop Year.
2. Evidence that supports this list of actions provided under point one above.
3. How have these special circumstances inhibited your ability to plant regulated and unregulated vegetable crops for the 2020-21 Crop Year?
4. How have these special circumstances inhibited your ability to produce vegetable crops for the 2020-21 Crop Year?
5. Field addresses of the fields that are impacted by your inability to make any decisions on regulated vegetables for the 2020-21 Crop Year.
6. Referring to the field addresses above (5.), are crops being planted in these fields in 2020 and if so, what specific crops? And, when are they being planted into these fields?
7. It would be expected that a producer's Agency is also immediately made aware of how the special circumstance has impacted your ability to grow and produce the regulated vegetable. BCFresh had been notified through the Commission staff. We further request that you provide a letter of support from your agency for your freeze request. This letter is also to include information on other agency growers that are faced with the same challenge, and confirmation on if the special circumstances have had the same impact on these growers.

A copy of this letter has been forwarded to your designated agency, BCFresh Inc.

Thank you.

Yours truly,



Andre Solymosi
General Manager

APPENDIX A

PROKAM ENTERPRISES LTD.
2020/21 DELIVERY ALLOCATIONIssued: 07-Apr-20
(ADJUSTED for Recording Error, Ref. Note 8)

FRESH RUSSET POTATOES

Shipments (Tons)

Crop Year	Total	A	B	C	D
2013/14	94.69	-	2.48	44.96	47.25
2014/15	551.46	-	25.00	329.55	196.91
2015/16	22.01	-	-	22.01	-
2016/17	0.25	-	0.25	-	-
2017/18	3.94	-	3.94	-	-

Total 5Yr Shipments

2013/14 to					
2017/18	672.35	-	31.67	396.52	244.16

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2018/19	134.47	-	6.33	79.30	48.83

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2020/21	134.47	-	6.33	79.30	48.83

FRESH WHITE POTATOES

Shipments (Tons)

Crop Year	Total	A	B	C	D
2013/14	89.79	35.98	30.91	22.90	-
2014/15	46.00	2.78	10.64	26.77	5.81
2015/16	126.32	0.80	84.59	40.93	-
2016/17	771.66	315.48	348.86	107.32	-
2017/18	584.18	253.25	323.31	7.62	-

Total 5Yr Shipments

2013/14 to					
2017/18	1,617.95	608.29	798.31	205.54	5.81

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2018/19	323.59	121.66	159.66	41.11	1.16

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2020/21	323.59	121.66	159.66	41.11	1.16

FRESH RED POTATOES

Shipments (Tons)

Crop Year	Total	A	B	C	D
2013/14	156.06	-	57.61	41.07	57.38
2014/15	181.67	0.70	12.32	113.34	55.32
2015/16	88.42	-	21.38	43.45	23.59
2016/17	682.59	119.25	373.03	190.31	-
2017/18	247.23	84.56	136.29	26.38	-

Total 5Yr Shipments

2013/14 to					
2017/18	1,355.98	204.51	600.64	414.55	136.28

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2018/19	271.20	40.90	120.13	82.91	27.26

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2020/21	271.20	40.90	120.13	82.91	27.26

FRESH YELLOW POTATOES

Shipments (Tons)

Crop Year	Total	A	B	C	D
2013/14	192.95	-	73.32	52.28	67.35
2014/15	225.92	1.05	15.69	144.24	64.94
2015/16	110.21	-	27.22	55.30	27.69
2016/17	741.05	141.62	312.56	286.87	-
2017/18	319.04	23.10	252.96	42.98	-

Total 5Yr Shipments

2013/14 to					
2017/18	1,589.16	165.77	681.74	581.67	159.98

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2018/19	317.83	33.15	136.35	116.33	32.00

Delivery Allocation (Tons)

Crop Year	Total	A	B	C	D
2020/21	317.83	33.15	136.35	116.33	32.00

- Note 1:** Delivery allocation (D.A.) is established on a rolling 5-year average of shipments.
(D.A. Calculation = Sum of past 5Yrs of shipments divided by 5)
- Note 2:** 2016/17 - Prokam's first year of shipments as a licensed producer.
- Note 3:** 2017/18 - Prokam shipments exclude export shipments.
- Note 4:** 2018/19 - Prokam did not produce
- Note 5:** 2019/20 - Prokam did not produce
- Note 6:** 2020/21 - Prokam's delivery allocation excludes shipments over the 2018/19 and 2019/20 crop years from the calculation and therefore is frozen at the 2018/19 delivery allocation.
- Note 7:** For the 2021/22 crop year, delivery allocation will be calculated as the five year average of 2014/15, 2015/16, 2016/17, 2017/18, and 2020/21 shipments.
- Note 8:** White Potatoes - 66.38 tonnes was incorrectly recorded as a Hothi shipment for 2015/16 period D. This shipment is a 2016/17 Period A shipment by Prokam.



May 17, 2022

B.C. Vegetable Marketing Commission
 #207 – 15252 – 32nd Ave
 Surrey, B.C.
 V3Z 0R7

RE: 2022-2023 Delivery Allocation

Dear Sir/Madam:

Please accept this letter as a formal request to freeze our delivery allocation for this upcoming season for Potatoes. We continue to recover from extensive damages incurred from the November 2021 floods and will not have the infrastructure in place in time for this growing season.

If you have any questions, please do not hesitate to contact me at (604) 835-9666. Let me know if you require any further information to support this request.

Best Regards,

Bob Dhillon

604-835-9666

This is Exhibit "C" to the Affidavit #1 of
 Bob Dhillon, sworn before me at
 Vancouver, in the Province of British Columbia
 this 12th day of September, 2022

A Commissioner for taking Affidavits for the
 Province of British Columbia

From: lillianp@okanagangrown.com
Date: May 19, 2022 at 12:06:55 PM PDT
To: prokam@telus.net
Subject: RE: Growing for the season?

Hi Bob

Thank you for letting me know

Please keep in touch, and let me know when you are going to plant again.

We will be happy to work with you to get the product to the market.

Thank you
Lillian

From: prokam prokam@telus.net <prokam@telus.net>
Sent: May 19, 2022 11:59 AM
To: lillianp@okanagangrown.com
Subject: Re: Growing for the season?

Morning Lillian.

This is Exhibit "D" to the Affidavit #1 of
Bob Dhillon, sworn before me at
Vancouver, in the Province of British Columbia
this 12th day of September, 2022



A Commissioner for taking Affidavits for the
Province of British Columbia

Hope all is well. I have requested to commission to freeze my quota this year. I take it Andre reached out to you?

Thank you
Bob Dhillon
Sam Ent.
604-835-9666

On May 19, 2022, at 11:29 AM,
lillianp@okanagangrown.com wrote:

Hi Bob

Hope all is well with you

Will you be planting for the upcoming season?

Please let me know if you are staying with our Agency?

If you are, it would be good to know what you are growing and volumes you will be estimating

Look forward to hearing from you

Thanks

Lillian

Prokam Enterprises Ltd. Estimated Potato Revenue 2023-24

	70 acres	100 acres	15 ton per acre average
Crops Sales	1,260,000	1,800,000	avg. price \$30 / 50 lbs case
Expenses:			
Licenses/Fees	2,500	2,500	
Packaging	189,000	270,000	
Irrigation	5,000	7,500	
Agency Fee	63,000	90,000	
Shipping & Handling	63,000	90,000	
Chemicals/Fertilizers	75,000	90,000	
Freight & Trucking	42,000	60,000	
Gasoline, Fuel, and Oil	44,100	63,000	
Insurance	10,000	10,000	
Payroll Expenses	252,000	360,000	
Repairs & Maintenance	25,200	36,000	
Seeds	63,000	90,000	
Total Expenses	833,800	1,169,000	
Net income	426,200	631,000	

Investments:	Washline	950,000
	Digger	150,000
	Bagger	350,000
	Facility Upgrades	300,000
	Planter	50,000
	Hiller	25,000
	Potato Trucks	25,000
	Sprayer	250,000
	Shredder	35,000
		<u>2,135,000</u>

This is Exhibit "E" to the Affidavit #1 of
Bob Dhillon, sworn before me at
Vancouver, in the Province of British Columbia
this 12th day of September, 2022


A Commissioner for taking Affidavits for the
Province of British Columbia

BCVMC

BC VEGETABLE MARKETING COMMISSION

DECISION RE:

IN THE MATTER OF AN APPLICATION MADE BY
CFP MARKETING CORPORATION ("CFP")
FOR AN ORDER DESIGNATING IT AS AN AGENCY

BEFORE: The British Columbia Vegetable Marketing Commission
Debbie Etsell, Chair
John Newell, Member
Armand Vander Meulen, Member
Blair Lodder, Member

This is Exhibit "F" to the Affidavit #1 of
Bob Dhillon, sworn before me at
Vancouver, in the Province of British Columbia
this 12th day of September, 2022

DATE: April 11, 2022


A Commissioner for taking Affidavits for the
Province of British Columbia

Introduction

"Designated agencies" are a critical component of the regulatory system for vegetables in British Columbia. They are the means by which the Commission achieves its main policy objective of maximizing producer returns through centralized, coordinated marketing of regulated product. The appropriate agency structure for the marketing of regulated vegetables contributes to orderly marketing by ensuring market growth opportunities for producers, and a steady supply of BC product for consumers.

Under the *Natural Products Marketing (BC) Act* (NPMA), the Commission can delegate authority to designated agencies to support the purposes of regulated marketing. Among other things, the Commission is empowered to: (a) regulate the time and place at which and to designate the agency through which a regulated product must be marketed; (b) determine the charges that may be made by a designated agency for its services; (c) set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia; and (d) authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those

payments until the total net proceeds are distributed. Every designation of an agency must be approved in writing by the BC Farm Industry Review Board (BCFIRB).

As a result of the agency review process that commenced in 2018, it became apparent to the Commission that its current orders regarding the designation of new agencies, and the review of existing agencies, were deficient. In the Commission's view, the orders then in effect did not clearly articulate the Commission's policy objective of promoting the interests of the industry as a whole through coordinated marketing that will maximize the returns of all producers. Furthermore, it was the Commission's view that the orders then in existence contained too many ambiguities. Consequently, On March 15, 2021, the Commission passed Amending Order 54, which implemented comprehensive changes to the Commission's orders regarding the designation of new agencies, and the review of existing agencies.

On June 1, 2021 the Commission received an amended application for a NEW Class 1 designated agency licence (pursuant to Amending Order 54) from CFP for the marketing of regulated vegetables.

On August 20, 2021, September 15, 2021 and September 24, 2021, the BCFIRB made certain orders and directions concerning the composition of the panel that is to address CFP's application. In accordance with those orders and directions, a panel of the Commission was struck to review the application. The panel members consist of Debbie Etsell (Chair), John Newell (Member), Armand Vander Meulen (Member) and Blair Lodder (Member).

On September 27, 2021, the panel met to conduct a preliminary review of CFP's application. The panel met again on November 3, 2021 to conduct a more thorough examination of the application. At that meeting, the panel decided to invite CFP to present its application, and to provide answers to certain questions, on November 16, 2021.

Because of the Sumas Prairie floods, the date for CFP's presentation was adjourned. Ultimately, CFP attended before the panel on December 3, 2021 to present its application.

Following CFP's presentation, the panel met to deliberate on the application on the following dates: January 28, 2022, March 25, 2022, March 28, 2022 and March 29, 2022.

Analysis

The designation of a new agency is not a routine matter akin to the issuance of a producer licence. Unlike some other regulated commodities, the vegetable industry is not supply managed. Centralized, coordinated marketing through agencies is the primary mechanism by which the Commission maintains orderly marketing, promotes the development of the industry, and ensures that producer returns are maximized. Consequently, the decision to grant or refuse agency status is a matter of fundamental marketing policy.

In its January 1, 2017 Supervisory Decision, the BCFIRB said:

7. The specific rules governing agencies differ depending on the needs of the particular regulated industry. What is common across all regulated industries, however, is the agencies are licensed entities whose purpose is to market regulated product on behalf of registered producers. **Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. They minimize burdens on each producer regarding finding outlets for sales of their delivery allocation (a mechanism for producers to share market access). Agencies also store, ship, and label product for producers. For consumers, they help ensure a steady supply of BC product by contributing to orderly marketing. In all this, one of their key roles is to grow the industry by looking for new markets. As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: “Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers”. Agencies thus play both a key front line role, and a larger strategic role, in assisting the Commission to regulate, manage and grow the industry in an orderly fashion: see generally January 7, 2013 Supervisory Decision, paras. 34 - 38; see also the Commission’s September 21, 2015 Stakeholder Engagement Discussion Paper, pp. 4 - 6. (emphasis added)**

Significantly, the BCFIRB’s comments concerning the role of agencies and the undesirability of agencies “competing for the same buyer” reflect an awareness of the natural tension that arises from having multiple agencies. On the one hand, multiple agencies may provide some resiliency and choice for producers. On the other hand, if these agencies are left to their own devices, they might erode producer returns by competing against each other on price in the same market space. In the greenhouse sector, this tension was the subject of certain decisions and directions made by the BCFIRB in the *Global Greenhouse* matter.

In *Global Greenhouse Produce Inc. et. al. v. BCMB et. al.*, 2003 BCSC 1508, Drost, J. quoted from the Commission’s recommendations to the BCFIRB, as follows:

31. BCHH is currently the sole designated marketing agency for regulated greenhouse vegetables in Districts I & II. Hot House and its tomato producers have been going through a difficult financial period of late, largely as a result of the significant preliminary duty impose upon it by the U.S. Department of Commerce....It was clear from the evidence presented to the Panel that at least some growers remain largely dissatisfied with the manner in which BCHH has been operating as a marketing agent, and that these growers wish to have an alternative....Simply put, they do not want to do business with BCHH any longer and they seek the opportunity to market their product more effectively. They may or may not succeed in this regard, but they want to try.

.....

33. The Panel has also considered the impact of a second agency designation on the industry as a whole at this time. Concerns were expressed to the Panel that

the existence of a second seller of B.C. product would result in price erosion in the market place. The Panel recognizes that Globals (sic) proposed marketing plan will result in additional access to markets and enhanced sales opportunities. The Global application attempts to deal with these issues by committing to market the product outside BCHH's traditional markets of western Canada and the I-5 Corridor. BCHH expressed doubt that any such commitment would be effective.

.....

35. In the result, the Panel has concluded that, in light of the circumstances in which the hothouse industry is currently operating it is an appropriate time to provide producers with an alternative to marketing product through BCHH.... (emphasis added)

At the time of the *Global Greenhouse* case, the Commission acted to address the detrimental impact of inter-agency competition in the greenhouse sector by imposing strict territorial limitations. The necessity for regulatory mechanisms to protect against price erosion from inter-agency competition is reflected in the BCFIRB's January 1, 2017 Supervisory Decision, as follows:

72. The Commission's reasons noted that these criteria were being applied in a broader context that considered the appropriate marketing options for growers (while it is beneficial to have multiple agencies, too many agencies can lead to market confusion and undermine orderly marketing), the local supply for a proposed agency, an agency's ability to manage its delivery allocation and plan for positive growth as opposed to merely competing in existing markets and the Commission's reliance on the timely market intelligence provided by agencies to the Commission when the Commission establishes minimum price.

85. Despite the criticisms that some, including the agencies, have leveled over the years about the regulatory system, all of them support ongoing regulation as being in the best interests of the industry – as supporting the fundamental goals of regulated marketing, which ensures the equitable and orderly marketing of natural products, which helps mitigate the extreme and sometimes destructive swings in production and price that can take place absent regulation. These extreme swings can be detrimental to producers and the value chain, including consumers. BCFIRB decided, in our June 15, 2016 supervisory decision letter that "regulation of the Vancouver Island vegetable industry continues to represent sound marketing policy".

In summary, the designation of a new agency should only follow where the panel is satisfied that the presence of an additional agency will not result in price erosion, lead to market confusion or otherwise undermine orderly marketing. Furthermore, the panel must be satisfied that the presence of an additional agency will enhance orderly marketing, promote the development of the industry, and ensure that producer returns are maximized. There is a high threshold that must be satisfied before an application for agency status will be granted.

These considerations are expressed in more detail in Part XIV of the Commission's General Order. The relevant provisions are as follows:

1. (3) Applications for designated Agency status must include a detailed business plan addressing:
 - (a) the structure of the proposed Agency, including:
 - (i) the identities of the principals of the proposed Agency;
 - (ii) the identities of all shareholders and other Persons with a direct or indirect financial interest in the proposed Agency; and
 - (iii) particulars of the management and staff of the proposed Agency, including their marketing experience and skill level.
 - (b) commencement and operational capacity, including:
 - (i) the date that the applicant proposes to commence operations;
 - (ii) particulars of the facilities from which the proposed Agency will operate;
 - (iii) particulars of any other facilities that may be owned or operated by the proposed Agency including grading, packing, warehouse and storage facilities; and
 - (iv) particulars of the applicant's capacity to market regulated product, the methods by which this is to be achieved, and the applicant's short and long-term objectives in relation thereto;
 - (c) access to regulated product, including:
 - (i) particulars of how the applicant intends to secure arrangements with Producers who will ship regulated product to the proposed Agency, and the dates on which such arrangements are expected to be secured;

- (ii) a copy of the applicant's proposed GMA in a form that complies with the minimum standards established by the Commission;
 - (iii) copies of all letters of commitment obtained from arms-length Producers who wish to market regulated product through the proposed Agency; and
 - (iv) the amount of existing storage crop delivery allocation (tons) and/or greenhouse production allocation (m2) that is proposed to be transferred to the proposed Agency;
- (d) marketing strategy and framework, including;
- (i) particulars of the applicant's target market, including the type of regulated product intended to be marketed, the total amount of regulated product to be marketed by the applicant, and the total amount of regulated product to be received from each Producer who will market through the proposed Agency;
 - (ii) the applicant's assessment of market supply and demand, including an assessment of market supply and demand in areas where the proposed Agency intends to market regulated product;
 - (iii) particulars of the applicant's intended market placement of delivery and production allocation by target market category as defined by the Commission;
 - (iv) particulars of the applicant's intended application of delivery and production allocation towards the domestic (BC) market and towards the export (external to BC) markets; and
 - (v) particulars of the applicant's intended volumes of sales packed for end use and in bulk for further processing and/or repacking;
 - (vi) the names and contact information of proposed customers of the proposed Agency; and

- (vii) copies of all letters of commitment obtained from proposed customers of the proposed Agency;
 - (viii) particulars of any commercial agreements with third parties that may assist with transportation, grading, packaging, storage or marketing on behalf of the proposed Agency;
- (e) operational procedures, including:
- (i) particulars of quality assurance procedures relating to:
 - A. food safety, including an acceptable trace-back and recall system;
 - B. grade compliance;
 - C. handling and distribution;
 - D. record keeping; and
 - E. any label or product identification system;
 - (ii) particulars of the manner in which shared market access will be managed among the proposed Agency's Producers, including the method by which proceeds from sales would be distributed.
 - (iii) particulars of the manner in which shipments of regulated storage crops will be monitored in relation to delivery allocation, and the proposed Agency's production plan;
- (f) financial viability and risk management, including:
- (i) an asset statement;
 - (ii) a breakdown of all disbursements, expenses and charges to be deducted from sales proceeds on payment to Producers;
 - (iii) forecasts of anticipated earnings, cash flow and sales;

- (iv) copies of all letters of reference obtained from financial institutions supporting the proposed Agency;
 - (v) a copy of a valid business licence;
 - (vi) a copy of a performance bond, letter or credit, or particulars of a contingency plan addressing how Producers will be paid for regulated product in the event that the Agency encounters financial difficulties;
 - (vii) proof of product, third party, and director liability insurance;
- (g) advancement of Producer and industry interests, including:
- (i) particulars of how the proposed Agency would prioritize the marketing of regulated product;
 - (ii) particulars of how the proposed Agency would encourage collaboration in Agency decision-making with their Producers regarding the production, transportation, packaging, storage, and marketing of regulated vegetables; and
 - (iii) details on how the proposed Agency would comply with all applicable minimum pricing orders in relation to sales occurring both within and outside the Province.
- (4) Applications for designated Agency status must also:
- (a) demonstrate to the satisfaction of the Commission that the applicant's primary business objective is the marketing of regulated product in a manner that benefits the Commission and the British Columbia industry as a whole;
 - (b) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the regulatory requirements and limitations imposed on Agencies under the Commission's General Orders;
 - (c) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the market

- access system established under the Commission's General Orders for all applicable regulated products;
- (d) demonstrate to the satisfaction of the Commission that the applicant has sufficient knowledge and ability to service markets in British Columbia and Canada;
 - (e) demonstrate to the satisfaction of the Commission that the applicant has the capacity to directly market regulated product without excessive reliance on wholesalers, or third-party grading, packing, warehouse and storage facilities, or that the applicant will otherwise make arrangements with such third parties in a manner that:
 - (i) would retain the proposed Agency's control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user;
 - (ii) would not expose the industry to unnecessary food safety risk;
 - (iii) would not be disruptive to orderly marketing;
 - (f) demonstrate to the satisfaction of the Commission that the applicant has taken all reasonable steps to meet with, and seek the cooperation of, existing Agencies, and provide particulars of the result of such initiatives.
 - (g) provide a rationale in support of the application with specific reference to the following:
 - (i) existing and anticipated requirements of the market that could be serviced by the proposed Agency;
 - (ii) how the proposed Agency would benefit producers shipping through that Agency;
 - (iii) how the proposed Agency would benefit the industry as a whole; and
 - (iv) the impact that the proposed Agency would have on existing designated Agencies.

2. (4) Following the applicant's presentation, the panel may summarily dismiss the application if it is satisfied that it would not be in the interests of the industry to grant designated Agency status.
- (5) Where the panel has decided that the application should not be summarily dismissed, the panel will engage in further consultation with industry stakeholders concerning the application. The applicant will be given an opportunity to prepare a redacted version of the application for review by industry stakeholders, provided that only information that is confidential, proprietary or constitutes a trade secret may be so redacted from the application reviewed by the panel.
- (6) Following consultation with industry stakeholders, the panel will decide whether to grant designated Agency status to the applicant. The panel will grant designated agency status only where it is satisfied that:
 - (a) there is a market requirement for the proposed Agency, and the designation of that Agency would benefit the industry as a whole having regard to the interests of all producers, including those marketing through other Agencies;
 - (b) it would not be in the interests of the industry for the proposed regulated product to be marketed by an existing Agency;
 - (c) the presence of the proposed Agency will not be disruptive to orderly marketing and will not result in increased competition among Agencies on price, which may have a detrimental effect on producer returns;
 - (d) the proposed Agency has demonstrated an understanding of the regulatory system and has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations;
 - (e) there is evidence-based demand for the specific product(s), grouped by end use customer, that are to be marketed by the proposed Agency, which demand is not already satisfied by existing Agencies;
 - (f) there is evidence-based support from multiple licensed Commercial Producers, who are at arms-length from each

other, and who intend to market regulated product through the proposed Agency;

- (g) the primary responsibility for marketing regulated product will rest with the proposed Agency, rather than wholesalers who may market regulated product on behalf of the proposed Agency;
- (h) the proposed Agency will comply with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province;
- (i) the proposed Agency will not have a detrimental effect on the delivery allocation and production allocation of existing producers not represented by the proposed Agency; and
- (j) the proposed Agency has the knowledge, capacity and ability to operate effectively as an Agency.

The panel has carefully considered CFP's application. However, it is not possible to refer to the substantive content of CFP's application in any detail in these reasons, given the stringent restrictions imposed by CFP regarding disclosure of any information included in its application. In its covering letter dated May 31, 2021, CFP states:

Please understand that the information contained in the application is **CONFIDENTIAL** as it contains business proprietary data and plans and is **explicitly supplied in confidence**. Disclosure of the information contained in the application to third parties would be harmful to the business interests of CFP Marketing Corporation, including the manner contemplated under s.21 of the *BC Freedom of Information and Protection of Privacy Act* ("*FIPPA*").

Except for the Executive Summary **this application cannot be discussed with or shown to any person who is connected to any other field/storage crop vegetable marketing agency including staff, directors, shareholders or those shipping to that agency.**

If the BC Vegetable Marketing Board at any point in time intends to disclose under *FIPPA* any of the information contained in the application, CFP Marketing Corporation requires that it be provided with advance notice of the intended disclosure in compliance with s.23 of *FIPPA*.

For the reasons that follow, the panel is satisfied that it would not be in the interests of the industry to grant designated Agency status to CFP. However, given the stringent restrictions

against disclosure of any of the substantive content of its application, the panel is essentially precluded from relating these reasons to the specific content of CFP's application.

Lack of Evidence, Clarity and Particulars

It is the panel's view that CFP's application is largely aspirational in nature, and that it is not sufficiently supported by evidence, clarity and particulars.

For example, in its executive summary, CFP states that it "intends to introduce concepts that will benefit growers including new ideas for branding and marketing, working with retailers on in store promotions". This statement is lacking in both substance and particularity. While the panel is constrained from disclosing the substance of CFP's application beyond the scope of its executive summary, it is fair to say that this statement is typical of the kind of amorphous, aspirational statements made throughout the application.

Though it is the panel's view that CFP's application is generally lacking in substance and particularity, some aspects of the application warrant specific comment.

Reliance on Wholesaler

It is useful to note again that paragraph 1(4)(e) of Part XIV of the Commission's General Order provides as follows:

Applications for designated Agency status must also:

- (e) demonstrate to the satisfaction of the Commission that the applicant has the capacity to directly market regulated product without excessive reliance on wholesalers, or third-party grading, packing, warehouse and storage facilities, or that the applicant will otherwise make arrangements with such third parties in a manner that:
 - (i) would retain the proposed Agency's control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user;
 - (ii) would not expose the industry to unnecessary food safety risk;
 - (iii) would not be disruptive to orderly marketing;

It is reasonable to infer from CFP's application that it intends to rely on a wholesaler to market at least some regulated production. However, it is impossible to discern from the application the actual extent to which CFP would rely on a wholesaler to market regulated product. This is critical information, and the applicant's inability to clearly address this point is cause for concern. From a policy perspective, the maximization of producer returns is enhanced by the minimization of

reliance on wholesalers. The Commission expects that the agency should be primarily responsible for marketing regulated product “without excessive reliance on wholesalers”. Whenever an agency relies on a wholesaler to market regulated product, additional costs and inefficiencies are introduced. Further, wholesalers are not subject to the same kind of stringent oversight that is applicable to agencies. When a wholesaler performs the functions that are expected to be performed by an agency, this regulatory oversight is compromised. Finally, there is no detail in the application on how the off-loading of marketing responsibilities to a wholesaler would “would retain the proposed Agency’s control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user”.

Support of Retailers

No real detail was provided about CFP’s unique marketing advantage with respect to retailers. Only one letter of support was provided by a small retailer. CFP expresses its intention to maximize direct sales to retail grocers, and states that it anticipates that the majority of its sales will be made directly to retailers. However, this statement is aspirational in nature and was not supported by clear evidence.

Though CFP points to experience marketing unregulated vegetables to certain retailers, there is nothing in the application that would support the notion that it is better positioned in relation to those retailers than existing agencies. In this respect, it is the panel’s view that CFP’s application is premised, at least in part, on the notion that the addition of another designated agency is *inherently beneficial*, because it would provide an additional option for both growers and customers. The panel does not agree. The Commission’s primary function is to facilitate orderly marketing through centralized, coordinated marketing. Centralized marketing, through a limited number of selling desks, is the very means by which grower returns are maximized under the regulatory system administered by the Commission. The decentralization of marketing as an end to itself will not serve that policy objective, and indeed, is counter-productive to it. This is not to suggest that there is no scope for additional agencies. However, there must be evidence showing how the introduction of a new agency would benefit the industry as whole despite further decentralization of marketing. The panel is not satisfied that CFP has met that threshold.

Marketing Plan

CFP’s marketing plan is vague. New packaging, customer education and field technology do not guarantee sales contracts. The application did not identify actual sales channels and customers with sufficient particularity, with the exception of one small retailer as noted above.

CFP’s stated objective is to displace imported product. However, with the notable exception of reliance on a wholesaler (which is problematic for the reasons discussed above), the means by which this objective is to be pursued was not supported by a sufficiently detailed, evidence-based plan.

Support of Producers

CFP's application did not initially identify by name any producers in support of its application (with one exception), and it claimed that producers were unwilling to identify themselves for fear of repercussions from the industry. When asked to supply this information, CFP did provide the names of some of its proposed producers. Nevertheless, it is evident that there would be one main producer. No letters of support from producers were submitted with the application. CFP claims that there are other producers who support the application, but was unwilling to provide evidence, even on a confidential basis.

The panel is also concerned that the main proposed producer is currently licensed as "Class 3". There has been little evidence demonstrating this producer's ability or willingness to follow all applicable regulatory requirements, given that it had elected not to produce regulated storage crops since the issuance of that Class 3 licence, at least until the last season. However, this crop did not make it to market.

Support of Agencies

CFP's application did not provide evidence of any initiatives to contact other agencies in order to solicit support support for its application. Further, CFP did not provide a detailed plan addressing how it would work towards collaborating with other agencies.

Decision

After due consideration, the panel has decided to summarily dismiss CFP's application pursuant to subsection 2(4) of Part XIV of the Commission's General Order. The panel is satisfied that it would not be in the interests of the industry to grant designated Agency status to CFP.

It is the panel's considered view that this decision reflects a principles-based approach to supervision and regulation. This principled approach has been defined by the BCFIRB as six principles collectively referred to as the "SAFETI" principles:

Strategic: The decision reflects the panel's identification of key opportunities as well as systemic challenges. Because centralized marketing is the primary mechanism by which grower returns are maximized, the panel is cognizant that new agencies should not be admitted unless there is evidence showing how the introduction of a new agency would benefit the industry as whole despite further decentralization of marketing. The panel is not satisfied that CFP has met that threshold.

Accountable: The panel has maintaining legitimacy and integrity by discharging its responsibilities according to the detailed criteria for new agency applications published in Part XIV of the General Order.

Fair: The panel has ensured procedural fairness by providing the applicant with an opportunity to craft an application in response to the criteria set out in Part XIV of

the General Order, and by providing an opportunity for CFP to present its application to the panel.

Effective: The high threshold for the grant of an agency designation, as well as the process by which such applications are to be made, are both clearly defined in Part XIV of the General Order. The Commission's expectations are therefore clearly defined for the applicant.

Transparent: The panel has taken all appropriate measures to ensure that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed.

Inclusive: The panel has taken all appropriate steps to ensure that appropriate interests are considered.

Any person aggrieved or dissatisfied with this decision may appeal this decision to the BCFIRB within 30 days from the date of this decision.

DATED AT SURREY, BRITISH COLUMBIA, THIS 11TH DAY OF APRIL 2022

BRITISH COLUMBIA VEGETABLE COMMISSION

A handwritten signature in cursive script, appearing to read "Debbie Etsell", is written over a horizontal line.

Debbie Etsell, chair

PRODUCER MARKETING AGREEMENT
Regulated Commodities

This Agreement is made effective the 5 day of Nov, 2021

Between:

Okanagan Grown Produce Ltd
3302 - 28th Street, Vernon, BC V1T 4Z8

and the

Company Name: Prokam Enterprises Ltd. **Producer.**
Address: 3219 Tolmie Road, Abbotsford, BC, V3G 2T9
Phone 604 835 9666 **Fax:** _____ **E-mail:** prokam@telus.net

Hereinafter referred to as the **Agency** and the **Producer** as the context may require, and collectively referred to as the **Party (ies)**.

The **agreement** shall continue in force for a period of one (1) year, (in case of Greenhouse product, the **Producer** agrees not to change size or crop at any time without the prior approval of the **BC Vegetable Marketing Commission (Commission)**) or due to extraordinary circumstances is terminated by mutual agreement of the **Party (ies)**.

1) Authority

Okanagan Grown Produce Ltd has been designated by the **Commission** under the Natural Products Marketing (BC) Act as the Designated Agency through which Storage Crops (Beets-tops off, Green Cabbage, Red Cabbage, Carrots-tops off, Potatoes, Onions (sweet onions only until after September 1st annually), Silver Skin Onions), or Greenhouse Crops (Long English Cucumbers, Tomatoes and Peppers) as defined in the BC Vegetable Scheme, shall be marketed.

2) Okanagan Grown Produce Ltd (the Agency)

Agrees to perform all of the obligations of a designated **Agency** under the Act, the Regulations, the BC Vegetable Scheme and the General Orders of the **Commission**

3) Pooling System

The **Agency** is authorized by the **Commission** to establish and maintain a system for the regular payout of proceeds from the marketing of **Regulated Commodities**.

All aspects of all pools operated by the **Agency**, including the allocation among Pool participants of Pool proceeds, and the determination of Pool categories on the basis of **Regulated Commodity** characteristics, such as; grade, size, colour, and type, shall be subject to the authority and requirements of the **Commission**.

4) Levies

Levies are subject to approval of the **Board of Directors** of the **Agency**. The **Levies** in the fee schedule set for the 2021 crop year:

5) Commission Fees

The **Commission** fees and other related fees for 2021 crop season are at the discretion and are authorized from time to time as per the **Commission**. The **Producer** authorizes the **Agency** to deducted **Commission** fees from each pool.

6) Quality Control, Food Safety and Genetically Modified Products

- a) All **Products** shall meet at least a Canada No. 1 Grade, Canada No. 2 Grade, or such other grade as the **Agency** and the **Agency's Customers** may require.
- b) The **Agency** agrees to provide where necessary and the **Producer** agrees to adhere to a quality control schedule for each of the commodities to be marketed as defined from time to time.
- c) The **Producer** agrees to follow all licensing requirements and Federal and Provincial Regulations with respect to the application of fertilizer, pesticides, or any other crop protection materials.
- d) The **Producer** shall keep daily records of all applications of crop protection materials on the products to be marketed by the **Agency** and agrees to make the records available upon request to authorized Agency personnel, authorized Federal or Provincial personnel, or any other person authorized by the **Commission**.
- e) The **Producer** agrees to indemnify the **Agency** for any loss, damages or compensation incurred by the **Agency** as a consequence of the application or misapplication, use or misuse of any crop protection materials or any other product by the **Producer** or his agent(s), resulting in residuals in the product provided by the **Producer** to the **Agency**, in excess of those laid down by law.
- f) The **Producer** also agrees to follow all guidelines the **Agency** or the **Commission**, may provide, in relation to acceptable On Farm Food Safety practices.

- g) The **Producer** agrees to have forwarded all or any On Farm Food Safety Inspection Reports or findings to the **Agency**.
- h) The **Producer** where applicable, agrees to have at least one qualified person with a pesticide application license on the premises.
- i) The **Producer** agrees to identify his/her product by way of a **Producer** identity number, as required by the **Agency** to assist the **Agency** in implementing a trace-back and recall system.
- j) The **Producer** agrees to allow access to its land and premises by the **Agency** for any inspection purposes that may be required.
- k) The **Producer** agrees to carry liability coverage as required by the **Agency** on an annual basis and to provide proof of coverage upon request. The amount of liability coverage required by the **Agency** for each **Producer** for the 2021 calendar year is \$2,000,000. A copy of the **Producer** insurance policy must be kept on file at the **Agency**. The **Agency** also agrees to carry liability coverage of \$5,000,000 for the 2021 calendar year.
- l) The **Producer** agrees not to produce any Regulated Commodities on his/her farm that have been genetically altered or modified without the prior written approval of the **Agency**.

7) Products Of Unmarketable Quality

- a) The **Agency** shall be entitled to refuse to accept or market any Regulated Commodity, which in the opinion of the **Agency** is not of marketable quality.
- b) Any person who considers himself/herself aggrieved by the refusal of the **Agency** to accept or market the Regulated Commodity may appeal to the **Commission** and the decision of the **Commission** shall bind both the **Agency** and the appellant.

8) Guarantee & Indemnity

- a) The **Producer** warrants and guarantees that, as of the date of delivery, every product included in each and every delivery hereafter made by the **Producer** to, or on the order of the **Agency**, was produced and packaged in strict compliance with the **Agency's** specifications and is on the date of delivery of merchantable and good quality, free from defects and not adulterated or misbranded or mislabelled within the meaning of the Food and Drugs Act or Regulations, the Consumer Packaging and Labelling Act or under any other pure food and drug or health laws, safety or environmental laws, regulations or ordinances of any province or other government authority which are applicable to such shipment or delivery.

- b) The **Producer** agrees to indemnify, defend and save the **Agency** harmless from and against any and all claims, charges, actions and proceedings brought against the **Agency** for or on account of any alleged adulteration, misbranding of or other law violations pertaining to such product referred to in subparagraph no. 9(a) hereof for which the **Producer** is responsible and liable hereunder, including the loss and reasonable expenses, if any, incurred by the **Agency** as a result thereof.
- c) The **Producer** agrees to indemnify, defend and save the **Agency** harmless from and against any and all claims, demands, actions and causes of action which are hereafter made or brought against the **Agency** by any person for the recovery of loss or damages for the injury, illness and/or death of any person or animal or other loss or damages which is caused or alleged to have been caused by the handling, delivery, consumption or use by such person or animal of any product shipped or delivered by the **Producer** to the **Agency**, including, but without limitation, any judgment rendered against or settlement paid by or on behalf of the **Agency** in any such action and the reasonable legal fees and costs, if any, incurred by or on behalf of the **Agency** in connection therewith.
- d) This guarantee is executed by the **Producer** upon and subject to the condition that the **Producer** does not guarantee against any such product becoming adulterated or misbranded after delivery to the **Agency**, by reason of causes beyond the **Producer's** control (provided, that any adulteration or misbranding which is found to exist after such delivery and which is caused by any defect in the processing or packing of any such product by the processor or packer thereof or by the defective condition of any raw materials used in the processing or packing of such product or by any defect in the container in which the product is packed shall be regarded as having existed at the time of such shipment or delivery for the purposes of subparagraph no. 9(a) hereof), and in those cases in which a product is shipped under the **Agency's** brand labels, the **Producer's** responsibility for misbranding shall be limited only to that resulting from the failure of the product to conform to the specifications or label furnished by the **Agency**, provided that the **Producer** shall not be responsible for such misbranding if the **Agency** insists upon the use of the **Agency's** brand label after the **Producer** has notified the **Agency**, in writing, of any defects of the label giving rise to any such liability.

9) Packaging

- a) The **Producer** agrees to supply all Crops in packaging approved by the **Agency**.
- b) Manifest Sales of Regulated Commodities must also be sold in approved **Agency** packaging.
- c) The **Agency** agrees to arrange the purchase of all packaging materials required for the marketing of Regulated Commodities agreed to in this contract.
- d) The **Agency** shall be responsible for payment and payment terms with each supplier. The **Producer** will pay for their packaging through a pool payment deduction plan based on an equal payment over not less than three months unless prior arrangement(s) are made with the **Agency**.

- e) In order to aid in recall and trace back, all packaging is required to have an **Agency assigned Producer Identity Number**.
- f) The **Agency** retains ownership of all name(s), logo's, layout, and design of all packaging materials and the **Producer** is prohibited from making any changes to said design
- g) The **Producer** is prohibited from marking any **Agency** packaging with any other logo, name, brand, and/or any other identifying marks except as contained paragraph 9(e)

10) Prohibited Or Restricted Sales

- a) The **Producer**, upon annual registration with the **Commission**, shall be allowed to sell his/her Regulated Product without payment of any **Agency** levies or **Commission** fees, at a stall rented or operated at a recognized Municipal (Farmer) Market, provided the purchaser:
 - 1) is purchasing the Regulated Product only for use and consumption by himself and his/her household and not for resale, and
 - 2) the maximum amount does not exceed 300 lbs. of storage or field crops or 60 lbs. of greenhouse crops daily.
- b) The **Producer**, upon registration with the **Commission** and upon holding a valid Producer/Vendor License shall be allowed to sell his/her regulated product without payment of any **Agency** levies or **Commission** fees, directly to the consumer from a location on his/her own farm provided the purchaser:
 - 1) is purchasing the Regulated Product only for use and consumption by himself and his/her household and not for resale, and
 - 2) the maximum amount does not exceed 300 lbs. of storage or field crops or 60 lbs. of greenhouse crops daily.
- c) The **Producer**, upon registration with the **Commission** and upon holding a valid Off-Farm Producer/Vendor License shall be allowed to sell his/her regulated product without payment of any **Agency** levies or **Commission** fees, directly to the consumer from a location off his/her farm, provided the purchaser:
 - 1) is purchasing the regulated product only for use and consumption by himself and his/her household and not for resale, and
 - 2) the maximum amount does not exceed 300 lbs. of storage or field crops or 60 lbs. of greenhouse crops daily.
- d) The **Producer** agrees to abide by all Orders of the **Commission** and with the exceptions of clause 9(a)(b)(c), shall only market Regulated Commodity through the **Agency**.

- e) The **Agency** agrees to provide a Prohibited Customer List. Customers that are named on the Prohibited Customer List are ineligible for Manifest Sales.

11) Penalties

- a) Failure of the **Producer** to abide by this contract may result in the reduction of the **Producer's** delivery allocation by the Commission and/or the assessment of a service fee in an amount as determined from time to time by the Commission.
- b) A **Producer** not reporting manifest sales or shipping to a prohibited customer may result in the reduction of the **Producer's** delivery allocation by the Commission and/or the assessment of a service fee in an amount as determined from time to time by the Commission.
- h) Failure of the **Producer** to abide by this contract may result in the **Agency** ceasing to market the **Producer** product until it is determined that the **Producer** is abiding by this contract.
- i) Failure of an **Agency** to abide by this contract may result in the suspension or cancellation of their license. The Commission may also withdraw such authority and strike the name of the **Agency** from the records of the Commission for failure to comply with an Order, Directive or Resolution of the Commission.

12) Payment

The **Agency** agrees to pay all proceeds from the sales less the applicable levies and charges based on the following schedule:

Sales Pooling Cut-Off Date	Payment Date
Fifteenth (15 th)	Fifth (5 th) of following month
End of Month	Twentieth (20 th) of following month

13) Payment Withholdings

The **Agency** will retain the right to withhold payments to **Producer's** to cover the potential cost of any claims or charge backs. The amount of the withholding(s) will vary time to time at the discretion of the **Agency**.

14) Termination Of Agreement

Either party, upon providing 30 days written notice may terminate the marketing agreement. Termination of the agreement results in the **Agency** no longer marketing the **Producer's** product and or crop.

15) Dispute Resolution

- a) Any dispute arising out of this **Agreement** shall be resolved in accordance with the terms set forth in this section. In the event of a dispute under this **Agreement** the **Party (ies)** shall meet within ten (10) days and attempt to resolve the dispute. If the **Party (ies)** are unable to resolve the dispute within ten (10) days, or within a longer or shorter period as the **Parties** may agree, the matter will go to the **Commission** for arbitration. The **Commission** shall hear and determine the question in dispute and render a decision within forty-five (45) days after the referral of the matter to the **Commission**, subject to any reasonable delay due to unforeseen circumstances. The decision of the **Commission** shall be given in writing, and shall be final and binding upon the **Parties** as to the question in dispute and the **Parties** shall be bound by such decision and the terms and conditions thereof.
- b) Each of the **Parties** agrees to cooperate fully with the **Commission**.

16) General Provisions

- a) Each **Party** represents to the other this **Agreement** and its provisions have been duly authorized and approved by the directors of the **Party**.
- b) Any notice to be given by a **Party** under this **Agreement** shall be in writing and shall be delivered to the other **Party** at its address set forth in the first page of this **Agreement**, or such other address as a **Party** may direct in writing, and will be deemed to be received at the time of delivery, provided that if such date is a Saturday, Sunday or statutory holiday in BC, delivery will be deemed to have occurred on the first day following such a date which is not a Saturday, Sunday or statutory holiday.
- c) This **Agreement** will be binding upon and will ensure to the benefit of the **Parties** and their successors and assigns.
- d) This **Agreement** shall be constructed and enforced in accordance with the rights of the **Parties** to this **Agreement** shall be governed by the laws of BC.

17) Professional Code Of Conduct

- a) The **Agency** General Manager will be responsible for administrative enquiries and complaints of a general nature.
- b) All other complaints regarding employee conduct or performance will be directed, in writing, to the **Agency** General Manager.
- c) All other complaints regarding the **Agency** General Manager's conduct or performance will be directed, in writing, to the President or Secretary of the **Agency** Board of Directors.
- d) Written or verbal complaints/harassment to employees of the **Agency** will not be tolerated, and if they persist will result in the necessary action of the Board.

18) Invalidity

The invalidity of or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions and any such invalid or unenforceable provision shall be deemed to be severable.

In witness whereof the Parties have executed this Agreement

On behalf of Okanagan Grown Produce Ltd:

Per: _____
Authorized Signatory

On behalf of the Producer:

Per:  _____
Authorized Signatory



THOMAS FRESH INC.
 5460 76TH AVE. S.E.
 CALGARY, ALBERTA
 T2C 4S3

Purchase Order

P/O #	Page
10312	1

Order Date
11/15/2021

Phone - (403) 236-8234 Fax - (403) 236-5986

Ordered From	Ship from / Pick up at	Ship to
OKANAGAN GROWN PRODUCE LTD. 3302 28TH STREET VERNON, BC V1T 4Z8	SAM ENTERPRISES ABBORTSFORD, BC	THOMAS FRESH INC. 5460 76TH AVE. S.E. CALGARY, ALBERTA T2C 4S3 CANADA

Reference #	Vendor #	Buyer	Order given to	Status
	OKANAG	HERON		P

Terms	Load #	Ship via	Pick up #	Date Expected
NET 14 DAYS	8039	MVSCAN - TRUCK		11/17/2021

Quantity	Stock #	Description	Price	Extension
672.00	000489	BAKER POTATOES - 80CT CAN	26.7500	17,976.00
84.00	000486	BAKER POTATOES - 50CT CAN	26.7500	2,247.00
168.00	000491	BAKER POTATOES - 100CT CAN	16.7500	2,814.00
			CAD Total	23,037.00

Redacte for irrelevance

-----Original Message-----

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>
Sent: Wednesday, November 24, 2021 6:28 AM
To: prokam@telus.net
Subject: RE: Order #43058 - Confirmation

Good morning Bob

Oh my goodness I am so sorry to hear this

Hopefully, you and your family are doing okay

Lillian

-----Original Message-----

From: prokam@telus.net <prokam@telus.net>
Sent: Nov 23, 2021 2:15 PM
To: lillianp@okanagangrown.com
Subject: RE: Order #43058 - Confirmation

Hi Lillian

No the PO did not end up shipping. The potatoes were packed and ready to ship and now are under water. I think it is safe to say that the remaining potatoes we had are no longer available.

Thank you

Bob Dhillon
6048359666

-----Original Message-----

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>
Sent: Tuesday, November 23, 2021 6:45 AM
To: prokam@telus.net
Subject: FW: Order #43058 - Confirmation

Good morning Bob

How are things with you and your area?

Would you please confirm if this load was picked up by Thomas Fresh?

Thank you

-----Original Message-----

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>

Sent: Nov 16, 2021 11:19 AM
To: 'prokam@telus.net' <prokam@telus.net>
Subject: FW: Order #43058 - Confirmation

-----Original Message-----

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>
Sent: Nov 15, 2021 2:17 PM
To: 'prokam@telus.net' <prokam@telus.net>
Subject: Order #43058 - Confirmation

Order #43058 - Confirmation processed via FAMOUS Workflow.

You will need the Adobe Acrobat Viewer to view the attached file.
You can download it from <http://get.adobe.com/reader>

Redacted for irrelevance

From: Roxanna Kuurne <mkuurne@hotmail.com>
Date: June 6, 2021 at 1:15:02 PM PDT
To: prokam@telus.net
Subject: Kuurne Farms Inc. Receipts

Hi Bob,

Attached are 2 receipts for the e transfer payments for Russet Norkotah Elite 2 seed potatoes that we received this morning.

Thank you for your business. We hope that everything is satisfactory.

Cheers,

Roxy Kuurne



Kuurne Farms Inc

9318 Pemberton Meadows Road
 Pemberton, British Columbia V0N 2L2
 Canada
 roxannakuurne@gmail.com

RECEIPT

Receipt No.:

2021248

06/06/2021

Amount Received

\$1,800.00

From:

Prokam Enterprises Ltd
 Bob Dylan

Signature



Kuurne Farms Inc					
Prokam Enterprises Ltd			06/06/2021	Receipt No.: 2021248	
	Discount	Amount Received		Discount	Amount Received
20210427		1,800.00			
Total					1,800.00

Kuurne Farms Inc					
Prokam Enterprises Ltd			06/06/2021	Receipt No.: 2021248	
	Discount	Amount Received		Discount	Amount Received
20210427		1,800.00			
Total					1,800.00

Kuurne Farms Inc

9318 Pemberton Meadows Road
Pemberton, British Columbia V0N 2L2
Canada
roxannakuurne@gmail.com

RECEIPT

Receipt No.: 2021247
06/06/2021

Amount Received \$3,000.00

From:
Prokam Enterprises Ltd
Bob Dylan

Signature 

Kuurne Farms Inc					
Prokam Enterprises Ltd			06/06/2021	Receipt No.: 2021247	
	Discount	Amount Received		Discount	Amount Received
20210427		3,000.00			
Total					3,000.00

Kuurne Farms Inc					
Prokam Enterprises Ltd			06/06/2021	Receipt No.: 2021247	
	Discount	Amount Received		Discount	Amount Received
20210427		3,000.00			
Total					3,000.00

Schedule 'C'











Schedule 'D'

Redacted for irrelevance

From: Bob Sam Ent
Sent: Friday, February 18, 2022 8:58 AM
To: Lalani, Arif AFF:EX <Arif.Lalani@gov.bc.ca>
Cc: Hansen, Erin AFF:EX <Erin.Hansen@gov.bc.ca>
Subject: RE: Sumas Prairie Flood Zone - Soil Testing

Good morning Arif

I hope I find you well this morning.

I am following up on the agri recovery program that I received. The question I have is regarding the sizable packaged product we had in our coolers that we had to discard. I was under the impression that this was an item that would be covered under the agri recovery program. Are you able to provide some insight regarding this?

Thank you

Bob Gill
Sam Enterprises Ltd
7783477101

From: Lalani, Arif AFF:EX <Arif.Lalani@gov.bc.ca>
Sent: Tuesday, December 14, 2021 3:43 PM
To: Bob Sam Ent <accounting@samenterprisesltd.com>
Cc: Hansen, Erin AFF:EX <Erin.Hansen@gov.bc.ca>
Subject: RE: Sumas Prairie Flood Zone - Soil Testing

Bib - we are close but likely won't be an AgriRecovery based support initiative announced before Christmas. Both the Federal Government and my Ministry need to get approvals from our respective treasury boards. But there will be relief coming for recovery costs not covered under private and government insurance, AgriStability, or BC's Disaster Financial Assistance .

For Impacted producers that will face significant cash flow challenges, we are intending to provide supports for the following broad categories of on farm extraordinary recovery costs:

- Animal welfare: predominately cattle pigs and chickens (e.g. feeding, housing restoration and cleaning, injury, mortality, transportation)
- Production infrastructure clean-up and restoration (e.g. barns, water and waste systems, livestock containment fences, rental of temporary production facilities)
- Crop loss (e.g. perennial plant death)
- Flood clean-up and restoration of agricultural land to restore it to a safe environment for agricultural

production; this may include drainage infrastructure.

- Rebuild reasonable on farm protective works (e.g. dykes, riprap).

Arif Lalani | ADM | Agriculture Resource Division | Ministry of Agriculture, Food and Fisheries

C 250.208.9902 | **E** arif.lalani@gov.bc.ca

I respectfully acknowledge that I live and work on the traditional territory of the Lekwungen (Songhees and Esquimalt) people.

From: Bob Sam Ent <accounting@samenterprisesltd.com>

Sent: December 14, 2021 2:11 PM

To: Lalani, Arif AFF:EX <Arif.Lalani@gov.bc.ca>

Subject: Re: Sumas Prairie Flood Zone - Soil Testing

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Thanks Arif

Is there any updates on a federal relief program?

Bob Gill

7783477101

On Dec 14, 2021, at 8:47 AM, Lalani, Arif AFF:EX <Arif.Lalani@gov.bc.ca> wrote:

Bob thanks for your email. I have passed on to my staff working on the soil testing and they will reach out to you. Thanks.

Arif Lalani | ADM | Agriculture Resource Division | Ministry of Agriculture, Food and Fisheries

C 250.208.9902 | **E** arif.lalani@gov.bc.ca

I respectfully acknowledge that I live and work on the traditional territory of the Lekwungen (Songhees and Esquimalt) people.

From: Bob Sam Ent <accounting@samenterprisesltd.com>

Sent: December 14, 2021 7:09 AM

To: Lalani, Arif AFF:EX <Arif.Lalani@gov.bc.ca>

Subject: Sumas Prairie Flood Zone - Soil Testing

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Good Morning Arif,

Thank you for your visit to our area last week. We met briefly at Ripples Winery and spoke about our neighboring field vegetable farm on Tolmie Rd. Are you able to provide us with any further details regarding the proposed soil testing that the Ministry of Agriculture will be conducting in conjunction with Canadagap. It has been circulated

that they will be working with Mactavish Consultants and are looking for farms to do some initial testing. We would be very interested in having our farm participate in this group and would appreciate your assistance in getting touch or being referred to the appropriate person in the Ministry or to Mactavish Consultants.

We are hoping to have a site visit in the near future with the Ministry of Agriculture's office to discuss the very real concerns of Field/Root Vegetable Farmers and the full effects of this flood event. The future at the moment feels very uncertain on how to move forward. Initial ground, infrastructure and equipment assessments have been made difficult with a lack of resources and time available by the appropriate authorities to get us to the next step. We have inventory sitting in our coolers that we cannot touch until the proper assessments can be made by investigators that still have not come out for a site visit. Our time to salvage anything is dwindling.

Best Regards,

Bob Gill
1-778-347-7101

WaterTec

23160 72nd Ave, Langley, BC, V2Y 2K2 604-882-7405

Oct 26th, 2022

Mr. Bob Dhillon,
Prokam Enterprises
3219 Tolmie Road,
Abbotsford, BC

As per our recent discussion regarding your washing and packing facility located at 3219 Tolmie Road.

As you know, as a result of the extensive flooding in November 2021, your washing and packing facility suffered extensive damage to the building and equipment. WaterTec led the original installation of the equipment and service in the facility and were therefore contracted to complete the repairs.

In order to commence with the repairs, the structural damage needed to be completed first, followed by tear down and repair of the equipment, motors, electrical systems, water systems, controls, etc. Because of the massive amount of work to be completed on the rest of the facility, the structural repairs were not able to be complete in a timely manner, resulting in delays to begin the wash/pack line repairs. By the time the wash/pack line repairs commenced, we found ourselves in the midst of the serious supply chain shortage situation that continues to this day.

We did begin repairs on all conveyors and motors, receiving bearings and motors in June. Electrical components such as frequency drives are still on backorder, and not expected to arrive until November. It is anticipated that repairs will be completed by the end of January 2023.

We apologize for the delays and the fact that this impacted your ability to grow certain crop that were dependant on the wash/pack facility that we are responsible to repair, but with the extensive repairs and supply shortages, the delays were unavoidable.

Regards,

Doug Jarvie
WaterTec Irrigation Ltd.

Andre Solymosi

From: Claudia Trigo
Sent: October 31, 2022 2:33 PM
To: Andre Solymosi; Aanchal Sandhu
Subject: More info for DA freeze application

Follow Up Flag: Follow up
Flag Status: Flagged

FYI.

Please check below.

Regards,



Claudia Trigo | Administrative Assistant
#207, 15252 – 32nd Avenue, Surrey BC V3Z 0R7
toll free: 1.800.663.1461 | direct line: 604.542.9734 Ext.122 | fax: 604.542.9735
claudia@bcveg.com | bcveg.com

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From: prokam@telus.net <prokam@telus.net>
Sent: October 31, 2022 2:26 PM
To: Claudia Trigo <claudia@bcveg.com>
Subject: FW: Next year

Hi Claudia

As mentioned in our DA freeze application request letter, I am forwarding an email received from Lillian Posch for consideration as part of our application, with apologies for the delay. Could you please ensure that it is directed to the appropriate department?

Thank you

Bob Dhillon
6048359666

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>
Sent: Monday, October 31, 2022 1:31 PM
To: prokam@telus.net
Subject: RE: Next year

Good day Bob

Last year was unfortunate for growers like yourself that lost crops due to the flood

You signed the marketing agreement with Okanagan Grown Produce Ltd and we were all prepared to work together to get the product to market

We are looking forward to your product next year and are prepared to market the potatoes

Please keep us updated as to planting intentions, varieties planted and expected volumes

Should you have any questions please do not hesitate to contact me

Thank you
Lillian

From: prokam prokam@telus.net <prokam@telus.net>

Sent: Oct 28, 2022 2:14 PM

To: lillianp@okanagangrown.com

Subject: Re: Next year

Hi Lillian

As per our conversation yesterday. Commission deadline is today. Can I get a letter of support today?

Thank you
Bob Dhillon

On Oct 27, 2022, at 1:51 PM, lillianp@okanagangrown.com wrote:

250-545-0694

From: prokam prokam@telus.net <prokam@telus.net>

Sent: Oct 27, 2022 11:53 AM

To: Lillian <lillianp@okanagangrown.com>

Subject: Next year

Morning Lillian.

Been trying to call you keeps saying all lines are busy. Good thing must be busy.

Can you give me a call want to discuss next year potatoes. Unfortunately this year with flood we had our challenges but will be ready for next year. Thanks

Thank you
Bob Dhillon
604-835-9666

November 24, 2022

DELIVERED BY EMAIL

Bob Dhillon
Prokam Enterprises Ltd.
P.O. Box 4399 Stn. Yarrow Main,
Chilliwack, BC V2R 5H8

CC: Lillian Posch
Okanagan Grown Produce Ltd.

Dear Mr. Dhillon,

RE: Delivery Allocation Freeze Request for 2021/2022 and 2022/2023 Crop Years

The Commission has reviewed your request to freeze your 2021/2022 and 2022/2023 Crop Year Delivery Allocations. This letter is to inform you that the Commission has approved your request.

We have made the adjustments to our database and your revised 2023/2024 Crop Year Delivery Allocation Report is attached.

Attachment:
2022-11-23 – Prokam D.A. Report

Thank you.

Sincerely,



Randy Cox
Licensing and Compliance Manager

**BC Vegetable Marketing Commission
 Producer Shipments with Delivery Allocation Calculations
 2023/2024 Crop Year**

Prokam Enterprises Ltd.

3219 Tolmie Road
 Abbotsford British Columbia
 V3G 2T9

Report Date: 2022-11-23

Okanagan Grown Produce Ltd. Potatoes (Red)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	40.90	0.00	120.13	0.00	82.91	0.00	27.26	0.00	271.20
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	40.90	0.00	120.13	0.00	82.91	0.00	27.26	0.00	271.20
DA Calc 2023		40.90		120.13		82.91		27.26		271.20

All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

Prokam Enterprises Ltd.

3219 Tolmie Road
Abbotsford British Columbia
V3G 2T9

Report Date: 2022-11-23

Okanagan Grown Produce Ltd. Potatoes (Russets)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	0.00	0.00	6.33	0.00	79.30	0.00	48.83	0.00	134.46
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	0.00	0.00	6.33	0.00	79.30	0.00	48.83	0.00	134.46
DA Calc 2023		0.00		6.33		79.30		48.83		134.46

Okanagan Grown Produce Ltd. Potatoes (White)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	121.66	0.00	159.66	0.00	41.11	0.00	1.16	0.00	323.59
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	121.66	0.00	159.66	0.00	41.11	0.00	1.16	0.00	323.59
DA Calc 2023		121.66		159.66		41.11		1.16		323.59

All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

Prokam Enterprises Ltd.

3219 Tolmie Road
Abbotsford British Columbia
V3G 2T9

Report Date: 2022-11-23

Okanagan Grown Produce Ltd. Potatoes (Yellow)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	33.15	0.00	136.35	0.00	116.33	0.00	32.00	0.00	317.83
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	33.15	0.00	136.35	0.00	116.33	0.00	32.00	0.00	317.83
DA Calc 2023		33.15		136.35		116.33		32.00		317.83

All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>
<lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>>
Sent: Oct 17, 2023 3:03 PM
To: 'prokam prokam@telus.net<<mailto:prokam@telus.net>>' <prokam@telus.net<<mailto:prokam@telus.net>>>
Subject: FW: OGP Delivery Allocation Question

Hi Bob

I received this information from the Commission today

Thank you
Lillian

From: BCVMC – Andre Solymosi <asolymosi@bcveg.com<<mailto:asolymosi@bcveg.com>>>
Sent: Oct 17, 2023 2:09 PM
To: lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>
Cc: BCVMC – Aanchal Sandhu <aanchal@bcveg.com<<mailto:aanchal@bcveg.com>>>
Subject: RE: OGP Delivery Allocation Question

Lillian,

Attached is Prokam's Delivery Allocation (DA) for 2023/24 Crop Year.
As noted in the document foot notes, these delivery allocation units represent tonnage.

Regards,
Andre

[cid:0d5efd75-4bf4-4308-ac82-e0f81bed8e1c@litigationchambers.com]

Andre Solymosi | General Manager
#207, 15252 – 32nd Avenue, Surrey BC V3Z 0R7
toll free: 1.800.663.1461 | direct line: 604.542.9734 Ext.125 | fax: 604.542.9735 | cell: 1.604.388.9578
asolymosi@bcveg.com<<mailto:asolymosi@bcveg.com>> | bcveg.com<<http://www.bcveg.com/>> | Download
vCard<file://bc_veg_server/Shared/Users/Andre/VMC%20Administration/Outlook/Andre%20Solymosi.vcf>

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From: lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>
<lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>>
Sent: Friday, October 6, 2023 9:46 AM
To: BCVMC – Andre Solymosi <asolymosi@bcveg.com<<mailto:asolymosi@bcveg.com>>>
Subject: FW: OGP Delivery Allocation Question

Hi Andre

Hope all is good with you

Please see comments below from Bob

He is uncertain about the amount of DA he has

Aanchal has sent me a note to check to see if what is on file is correct
I have attached for you

Thank you
Lillian

From: prokam prokam@telus net<<mailto:prokam@telus.net>> <prokam@telus.net<<mailto:prokam@telus.net>>>
Sent: Oct 6, 2023 9:25 AM
To: lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>>
Subject: Re: OGP Delivery Allocation Question

Yes we will be growing next year. As far as quota it is still unknown.

Thank you
Bob Dhillon
604-835-9666

On Oct 5, 2023, at 11:30 AM, lillianp@okanagangrown.com<<mailto:lillianp@okanagangrown.com>> wrote:

Hi Bob

Hope all is good with you

Could you please let me know what your DA is on each variety?

Are you planning to grow next year?

Please let me know

Thank you

Lillian

**BC Vegetable Marketing Commission
 Producer Shipments with Delivery Allocation Calculations
 2023/2024 Crop Year**

Prokam Enterprises Ltd.

3219 Tolmie Road
 Abbotsford British Columbia
 V3G 2T9

Report Date: 10/11/2023

Okanagan Grown Produce Ltd. Potatoes (Red)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	40.90	0.00	120.13	0.00	82.91	0.00	27.26	0.00	271.20
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	40.90	0.00	120.13	0.00	82.91	0.00	27.26	0.00	271.20
DA Calc 2023		40.90		120.13		82.91		27.26		271.20

All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

Prokam Enterprises Ltd.

3219 Tolmie Road
Abbotsford British Columbia
V3G 2T9

Report Date: 10/11/2023

Okanagan Grown Produce Ltd. Potatoes (Russets)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	0.00	0.00	6.33	0.00	79.30	0.00	48.83	0.00	134.46
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	0.00	0.00	6.33	0.00	79.30	0.00	48.83	0.00	134.46
DA Calc 2023		0.00		6.33		79.30		48.83		134.46

Okanagan Grown Produce Ltd. Potatoes (White)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	121.66	0.00	159.66	0.00	41.11	0.00	1.16	0.00	323.59
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	121.66	0.00	159.66	0.00	41.11	0.00	1.16	0.00	323.59
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All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

Prokam Enterprises Ltd.

3219 Tolmie Road
 Abbotsford British Columbia
 V3G 2T9

Report Date: 10/11/2023

Okanagan Grown Produce Ltd. Potatoes (Yellow)

	A		B		C		D		Grand Total	
	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.	Ship	Adj.
2016/2017	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2017/2018	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2018/2019	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2019/2020	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2020/2021	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2021/2022	0.00	33.15	0.00	136.35	0.00	116.33	0.00	32.00	0.00	317.83
2022/2023	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2023/2024	NA	0.00	NA	0.00	NA	0.00	NA	0.00	NA	0.00
Total	0.00	33.15	0.00	136.35	0.00	116.33	0.00	32.00	0.00	317.83
DA Calc 2023		33.15		136.35		116.33		32.00		317.83

All units are in tonnes. Shipment totals are the sum of the last 5 years of shipments excluding frozen year. Adjustment totals are the weighted sum of the last 5 years of adjustments excluding frozen years. The calculated result is the sum of the 5 year shipping average and the weighted sum of the last 5 years of adjustments excluding frozen years. Frozen years are indicated with struck out values.

Delivery Allocation for 2024/25 Crop Year
Prokam Enterprises Ltd.

Request for Written Submissions

BCFIRB Orders and Directions

On March 15, 2024, the BCFIRB issued a 134-paragraph decision under the style of cause “*In the Matter of the Natural Products Marketing (BC) Act and Allegations of Bad Faith and Unlawful Activity Review*” using the header “*Phase II Decision*” (the “Phase II Decision”). In the Phase II Decision, the BCFIRB made certain orders and directions including the following:

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

Chronology Relating to Prokam’s DA and Licence Class

The relevant chronology relating to Prokam’s delivery allocation and licence class is as follows:

1. In a decision dated December 22, 2017 (**Appendix A**), the Commission made the following orders (among others):
 - (a) Prokam’s 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year. [par. 48.2]
 - (b) The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer’s compliance with these orders. [par. 48.3]
2. In a decision dated February 28, 2019 (**Appendix B**), the BCFIRB ordered that the Commission reconsider its decision to revoke Prokam’s Class 1 Producer Licence and replace it with a Class 4 Licence. [par. 89]

3. In September 2019, the BCFIRB established a supervisory panel to undertake a supervisory review arising out of a series of appeals from Commission decisions and related Commission management projects.
4. On November 18, 2019, the Commission released its Reconsideration Decision (**Appendix C**) and made the following order (among others):

92. Prokam Enterprises Ltd. Licence Class

Effective immediately, The order to issue a Class IV Licence to Prokam be replaced with an order to issue a Class III License to this producer.

Prokam was not licensed to produce regulated vegetables for the 2018 and 2019 crop years. Prokam will be required to be licensed as a Class III producer when it so chooses to recommence growing regulated vegetables. If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

5. On November 20, 2019, Prokam filed Appeal #N1908 of the Reconsideration Decision. Among other things, Prokam sought reinstatement of its Class 1 licence retroactive to December 22, 2017, and an order freezing its delivery allocation as at October 10, 2017.
6. By letter dated November 29, 2019 (**Appendix D**), the BCFIRB ordered that Appeal #N1908 be deferred until the Vegetable Review was completed (the Deferral Decision).
7. On January 10, 2020, the BCFIRB supervisory panel issued an interim relief decision (**Appendix E**):

- (a) At paragraph 25, the BCFIRB supervisory panel stated:

In this decision, the panel is not considering Prokam's appeal request to have its Class I licence reinstated. Prokam has a valid licence and as such can produce and market vegetables. The issue of what is the appropriate class of licence for Prokam cannot be resolved in this process.

(b) At paragraph 52, the BCFIRB supervisory panel stated:

For the purposes of this decision, the panel finds that the two years of business uncertainty were in part created by the flawed Vegetable Commission process which necessitated the initial appeal and then the reconsideration. In the panel's view, the delay to resolve the process concerns amounts to special circumstances and those years should be excluded from calculation of delivery allocation.

8. By letter dated January 17, 2020 (**Appendix F**), the Commission detailed Prokam's 2020/21 delivery allocation, which was calculated by excluding the 2018 /19 and 2019 / 2020 crop years as directed by the BCFIRB.
9. By letter dated March 18, 2020 (**Appendix G**), Prokam requested that the Commission freeze its delivery allocation for the 2020/21 crop year.
10. On November 17, 2020, the Commission decided to approve Prokam's request for a delivery allocation freeze for the 2020/21 crop year (**Appendix H**). This decision had the effect of freezing Prokam's delivery allocation such that Prokam's allotted future marketing volumes were not impacted by its non-production years.
11. On December 22, 2020, the BCFIRB issued its supervisory decision (**Appendix I**).
12. On December 29, 2020, Prokam sought to reinstate Appeal #N1908, stating that the issue raised by it concerning reinstatement of its Class 1 License retroactive to December 22, 2017 was not addressed in the Supervisory Review Decision, and that remains a live issue in Appeal #N1908.
13. By letter dated March 30, 2021 (**Appendix J**), the BCFIRB agreed that the issues concerning Prokam's licence class remain extant on Appeal #N1908, and directed that the matter be set down for hearing. [par. 22]
14. In April, 2021, the BCFIRB discovered that two civil claims for the tort of misfeasance in public office had been filed - one by Prokam, and another by MPL. Peter Guichon, the former Vice-Chair of the Commission, and Andre Solymosi, the Commission's General Manager, were named as defendants in both claims. MPL's claim also named as defendants four additional members of the Commission, namely, John Newell, Mike Reed, Corry Gerrard, and Blair Lodder.

15. Consequently, on May 26, 2021, the BCFIRB ordered a supervisory review, pursuant to s. 7.1 of the NPMA, with respect to the allegations of bad faith and unlawful activity raised in the Civil Claims.
16. By letter dated July 7, 2021 (**Appendix K**), the BCFIRB again decided to defer the issues concerning Prokam's licence class in Appeal #N1908 pending the outcome of the BCFIRB's supervisory review into allegations of bad faith.
17. By letter dated May 17, 2022 (**Appendix L**), Prokam made a formal request that its delivery allocation be frozen for the 2022/23 crop year on the basis that it was still recovering from the extensive damages incurred from the November 2021 floods and would not have infrastructure in place for the 2022/23 season.
18. By email dated October 5, 2022 (**Appendix M**), the Commission invited all storage crop producers who were affected by the November 2021 Sumas floods to make an application to the Commission to freeze their delivery allocation.
19. In October, 2022, Prokam applied for an order freezing its delivery allocation for the 2021/22 and 2022/23 crop years (**Appendix N**).
20. By letter dated November 24, 2022 (**Appendix O**), the Commission approved Prokam's request for an order freezing its delivery allocation for the 2021/22 and 2022/23 crop years. In that same letter, the Commission provided details of Prokam's revised 2023/24 crop year delivery allocation.
21. The Commission understands that Prokam produced a small crop of potatoes for the 2023/24 season to be marketed by its designated agency, Okanagan Grown Produce Ltd. ("Okanagan"). However, the Commission also understands that no potatoes from that crop were marketed by Okanagan. Also, the Commission's records indicate that Prokam did not apply for a producer licence for the 2023/24 crop year, or for an order freezing its delivery allocation for that season. Prokam was not issued a licence for the 2023/24 crop year, no shipments were reported for the 2023/24 crop year, and no freeze was considered or granted with respect to its delivery allocation for the 2023/24 crop year. The Commission's records indicate that staff emailed Prokam on August 15, 2023 to notify it that its licence renewal was past due, and that in order to maintain its delivery allocation, Prokam would need to be licensed as a producer.
22. By email dated October 17, 2023 (**Appendix P**), the Commission confirmed Prokam's delivery allocation for the 2023/24 crop year.

Current Status and Transparent Processes

Licence Class

As noted above, the Commission's decision dated November 18, 2019 stated:

If Prokam remains compliant to the General Order, after one year of growing regulated vegetables the licence class will revert to a Class II Licence, and at the end of a second year of producing regulated vegetables, Prokam would be entitled to a Class I Licence.

At the present time, any future consideration regarding the extant issues with respect to Prokam's licence class should be addressed in the context of Appeal #N1908, which is no longer held in abeyance given the resolution of the BCFIRB's supervisory processes. Any industry stakeholders who wish to take a position in relation to these extant issues are invited to apply to the BCFIRB for Intervener status.

Delivery Allocation for the 2024/25 Crop Year

Any regulated entity (including Prokam) who wish to take a position in relation to Prokam's 2024/25 Delivery Allocation (DA) must provide the Commission with a written submission on or before Wednesday May 7, 2024.

These written submissions will be circulated among all persons who have provided written submissions, so that each may have an opportunity to address any points raised in the submissions filed by others. The Commission will thereafter make a decision with respect to Prokam's DA for the 2024/25 Crop Year.

Submissions are due Wednesday May 7, 2024, by 5:00 PM and are to be emailed to our Administrative Coordinator Diana Milligan. diana@bcveg.com

If you have any questions, please contact the office for assistance.

Sincerely,
Andre Solymosi
General Manager

Attachment:
Binder of Appendices

[on licensee grower letterhead]

May 7, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

Kindly accept this in response to the VMC's notice inviting submissions advising of positions relating to the Delivery Allocation of Prokam for 2024/25.

Where a grower like Prokam has not shipped potatoes for several years, a DA calculation using a five year rolling average should result in zero. We have seen prior calculations of Prokam's DA in the evidence of the BC FIRB Supervisory Review and have substantial difficulty understanding the calculation, particularly as it relates to periods of time when Prokam decided not to grow or ship potatoes, including following the November 2021 flooding event. There also seems to have been a freezing of DA for coloured potatoes in 2021 and 2022 when the information indicated that Prokam grew only russets in 2021 and grew no coloured potatoes in either 2021, 2022 or 2023. In calculating a 2024/25 DA, that needs to be corrected. During the years when Prokam did not plant or ship potatoes, for some of the subject years we were able to make shipments resulting in an increase in our DA.

Yours truly,



Rod Burr
Burr Farms Ltd.



16185-48th Avenue, Surrey, BC V3Z 1E8 Ph: 604-574-5709 Fax: 604-574-5773

May 7, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

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Yours truly,

Amrik Sihota



4945 184th Street Surrey, BC V3Z 1B5 Ph (604) 576-1727 Fax (604) 574-0553 Email: Admin@heppells.ca

May 7, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

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Yours truly,

A handwritten signature in black ink, appearing to be "D. Milligan", written over a light blue horizontal line.



Blake Lundstrum

2888 Westham Island Road

Delta, B.C. V4K 3N2

Tel 604-946-2582

Fax 604-946-2536

Cell 604-690-9583

blakelundstrumfarms@gmail.com



May 7, 2024

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

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Yours truly,

A handwritten signature in blue ink, appearing to read 'Blake Lundstrum', written over a light blue horizontal line.

Blake Lundstrum

• POTATO



GROWERS •

ROD SWENSON FARMS INC.

2306 Westham Island Road, Delta, BC V4K 3N2

• Tel: 604-946-5957 • Fax: 604-946-0052 • rodswensonfarms@gmail.com

May 7, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

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Yours truly,

Cory Gerrard

Rod Swenson Farms

TRIPLE J POTATO CORP.

5630 ADMIRAL BLVD

DELTA BC

V4K 5B7

May 8, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

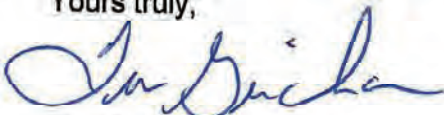
Dear Sir/Madame:

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Yours truly,



Tim Guichon

TSN FARMS LTD.
5617 FRIGATE ROAD
DELTA, BC
V4K 5A7

May 8, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

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Yours truly,



John Guichon

Sprangers Farms Ltd.

May 8, 2024

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

Kindly accept this in response to the VMC's notice inviting submissions advising of positions relating to the Delivery Allocation of Prokam for 2024/25.

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Yours truly,



Jim Sprangers

Brent Kelly Farms Inc
4044 96 St
Delta, BC
V4K 3N3

May 7, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Sir/Madame

Re: Prokam Delivery Allocation for 2024/25 Crop Year

Kindly accept this in response to the VMC's notice inviting submissions advising of positions relating to the Delivery Allocation of Prokam for 2024/25

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Yours truly,

Brent Kelly
Brent Kelly Farms Inc



ISLAND VEGETABLE COOPERATIVE ASSOCIATION

May 8, 2024

BC Vegetable Marketing Commission

Unit# 207 – 15252 32nd Ave

Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

RE: Prokam Delivery Allocation & License Class for 2024/25 Crop Year

To: Diana

Kindly accept the following letter in response to the BCVMC's notice inviting Agency submissions advising position relating to Delivery Allocation and License Class for Prokam's 2024/25 season.

Regarding Delivery Allocation

IVCA and its members believe all producers in British Columbia should be rewarded D.A on regulated commodities based on prior growing seasons (the 5-year rolling average) and in Prokam's case if no product was grown then D.A rewarded should be based on no production. All other producers in British Columbia are held to this standard.

General Orders

- Under Granting Delivery Allocation for Storage Crops.

- #56 - Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.

Regarding License Class

If the BCVMC and Representing Agency can ensure that compliance to the updated General Orders are monitored and met, IVCA and its members have no objection to Prokam obtaining a “Probationary” one year Class 1 License status. Control leads to compliance.

Thank you.



Chad Shillito
General Manager
6680 – A Mirah Rd, Saanichton, BC V8M 1Z4
Email: chad@ivca.ca or orders@ivca.ca
Office: (250) 544 – 1242
Fax: (250) 544 - 1237
Cell: (250) 589 - 0983

Reply Attention of: Robert J. McDonell
Direct Dial Number: 604 661 9371
Email Address: rmcdonell@farris.com

FARRIS

File No: 32958-0013

May 8, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

I am counsel to BC Fresh and write, further to your notice inviting regulated entities to take a position in relation to Prokam's 2024/25 Delivery Allocation (DA), to provide the position of BC Fresh on this matter.

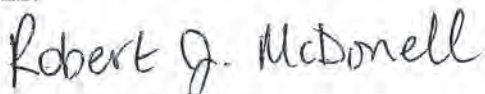
I enclose my letter of August 25, 2023, submitted to the BC FIRB during Phase II of the subject Supervisory Review in regard to Prokam's Delivery Allocation. Kindly accept this letter as adopting the positions stated in the attached letter for the purpose of the VMC's consideration of Prokam's 2024/25 Delivery Allocation.

We look forward to receipt of all submissions delivered to the VMC on this matter so that BC Fresh may have an opportunity to address any points raised in the submissions filed by others.

Thank you for your consideration of the above.

Yours truly,

FARRIS LLP

Per: 

Robert J. McDonell

RJM/lis
Enclosure

FARRIS LLP

25th Floor - 700 W Georgia Street Vancouver, BC Canada V7Y 1B3
Tel 604 684 9151 farris.com

Reply Attention of: Robert J. McDonell
Direct Dial Number: 604 661 9371
Email Address: rmcdonell@farris.com

File No: 32958-0001

August 25, 2023

BY EMAIL

Nazeer T. Mitha, KC
MLG Law Corporation
570 Granville Street, Suite 300
Vancouver, BC
V6C 3P1

Attention: Nazeer T. Mitha, KC

Dear Sir:

Re: Supervisory Review Phase II Investigation

Kindly accept this as the submission of BC Fresh regarding the Phase II Hearing Counsel Investigation. BC Fresh has two objectives in this proceeding, ensuring trust and confidence in orderly marketing in the future if Prokam grows and ships regulated produce and, secondly, cost recovery for BC Fresh's participation in this review that Prokam caused it to incur.

1. The general concern of BC Fresh is that every measure reasonably available must be taken to ensure there is no repetition of the disruption to the industry caused by Prokam, commencing in 2017. In this proceeding, the BC FIRB has the statutory authority of the BC Vegetable Marketing Commission under the Natural Products Marketing (BC) Act, [RSBC 1996], C. 330, to exercise as necessary to avoid repeated market disruption, prevent Prokam from causing undue prejudice and loss to other industry participants and instill confidence in the future regulation of the scheme.

2. The specific concern of BC Fresh at this juncture is that, without orders from the BC FIRB, industry participants, including BC Fresh, other agencies and licensed potato growers will be prejudiced if Prokam, in the future, ships potatoes in excess of its delivery allocation, properly calculated in accordance with the General Orders.

3. The General Orders of the VMC provide at Part XVII as follows:

3. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.

10. Unless there are special circumstances, if a Producer ceases production for two consecutive years, then the Commission shall rescind their Delivery Allocation.

4. Delivery allocation is a producer's earned share of the market. When a producer vacates that market, that producer's share is then filled by other producers. Vacating a market for 6 years and then demanding that other producers, who filled that market, reduce sales is contrary to the principles of orderly marketing and fairness.
5. There are no special circumstances established in regard to the two most recent years, 2022 and 2023, during which Prokam did not ship potatoes. Accordingly, under the General Orders, Prokam's deliver allocation should be zero.
6. The result is the same if the delivery allocation is calculated based on a 5-year rolling average commencing in either 2018 or 2019.
7. As to any suggestions of delivery allocation freezes by the Commission granted to Prokam, these need to be investigated, reviewed and objectively analyzed with transparency, given the history of events over the last 6 years.
8. BC Fresh was aware of some communications, a number of years ago, between the VMC and Prokam in regard to delivery allocation, however, to the knowledge of BC Fresh, the industry has not been consulted by the VMC on the issues arising in regard to Prokam's delivery allocation and the risk of prejudice arising to BC growers.
9. In the circumstances of this Supervisory Review wherein the potential for further industry participation (and disruption) by Prokam is being considered, before any determinations are made as to Prokam's delivery allocation for 2024/2025, further investigation is needed to avoid undue benefits accruing to Prokam and corresponding undue prejudice arising to industry participants. This is especially the case for growers who, adding to years of work and investments, in compliance with the General Orders, have increased their delivery allocations by meeting market demand during the years since 2017 when Prokam has, for its own reasons, not shipped potatoes.
10. The market that IVCA sold to by shipping Prokam potatoes has, since 2017, been absorbed by potatoes produced by other BC growers. Those growers should not now face the prejudice, increased costs and risks of having their market access compromised by Prokam shipping in excess of its delivery allocation, which properly calculated, should be zero.
11. As stated in the General Orders, Part XVI, section 1 (a), an important purpose served by the application of the delivery allocation rules is the preservation of market access for growers who have served the market over time.
12. In its letter dated May 25, 2023, BC Fresh recommended Hearing Counsel conduct interviews of industry participants other than Prokam. This is necessary to both establish the risk of prejudice to other growers if Prokam's delivery allocation is not calculated in accordance with the General Orders and to establish the number of factual issues that arise out of the Interview Notes of Hearing Counsel from his interview with Mr. Dhillon, speaking on behalf of Prokam. BC Fresh is confident that further investigation will establish that there are no special circumstances that warrant Prokam having any delivery allocation at this point in time.

13. Some specific concerns and issues that arise out of the Interview Notes include the following:
- Question 1 – Mr. Dhillon’s evidence is that 10-15 tons of potatoes can be produced from one acre (see the answer to Q. 4 and Mr. Dhillon’s evidence at the Phase 1 Hearing). If Prokam’s Delivery Allocation was 26 tons, this volume could have been produced on 2 acres, not 60-70 acres.
 - Question 3 - Mr. Dhillon’s evidence relating to storage is, at best, inconsistent. He first answers that Prokam did not have storage in the “first year”. Then he states, “Prokam has never been in the position of not having enough storage. It is an easy fix to buy micro-bins and store them. Prokam would have had the storage space back in 2017 and 2018.” The evidence at the Phase I Hearing was that, as of February 2018, Prokam was taking the position that its potatoes had to be sold before the end of October each year “because Prokam does not presently have storage facilities.” (BCVMC, Doc, 0608, Letter from Prokam’s counsel to BC Fresh).
 - Questions 4, 22 and 33 – Mr. Dhillon says that planting 80-100 acres of each type of potato (reds, whites and yellows) is required for economic farming. It may be recalled that he made a similar statement in his evidence at the BC FIRB appeal heard in 2018, resulting in an audible reaction from a number of growers attending the hearing who, for years, have maintained potato farming operations smaller than 100 acres. There are over 25 commercial potato growers in BC and only 3 grow more than 100 acres of each type of potato. Those growers have built up that production level through decades of work and investment, while abiding by the General Orders. Mr. Dhillon says, at Question 33, Prokam rejected BC Fresh’s proposal in the spring of 2018 because little in the way of coloured potatoes was offered. This is false. The offer would have substantially increased Prokam’s delivery allocation for coloured potatoes. In any event, if it is not economic to plant less than 100 acres of each type of potato, why did Prokam plant only 20 acres in 2021? Also, if, to be economic, 100 acres of each type of potato, including coloured potatoes, must be planted, why did Prokam plant only russets in 2021? Mr. Dhillon’s evidence is highly suspect and wholly unreliable.
 - Questions 32 and 33- Mr Dhillon says he grew 20 acres of russets in 2021. At the Phase I Hearing, his evidence was that it was “about 20 some odd...20, 30 acres.” (Cross Examination of Bob Dhillon, page 57, lines 39-41, Feb 4, 2022). The document sent with the Interview Notes relating to Delivery Allocation indicates that, in 2021, Prokam had a delivery allocation of 134 tons for russets. At a yield of 15 tons per acre, 300 tons would be harvested from 20 acres, or 450 tons if 30 acres were planted. (See Cross Examination of Bob Dhillon, page 54, lines 33-44 for evidence regarding yields). Mr Dhillon’s evidence is that this 300 tons was about to be shipped when the November, 2021 flood occurred. This evidence of Prokam intending to ship more than 100% in excess of its delivery allocation in 2021 provides a strong basis for concern as to future compliance of the General Orders by Prokam.
14. The delivery allocation calculation forwarded by Hearing Counsel with the Interview Notes is not in accordance with the General Orders. As stated above, if calculated on the basis of a grower who does

not produce for two years, the delivery allocation would be zero. If calculated on the basis of a 5-year rolling average, the delivery allocation would also be zero.

15. In addition to Prokam planting and intending to ship volumes of russets grossly in excess of its delivery allocation in 2021, also troubling is the calculation of Prokam having a purported delivery allocation for red, whites and yellows. How can Prokam have any delivery allocation for any variety of coloured potatoes given that it has not shipped a coloured potato in over 6 years? Again, in the interests of avoiding future market disruption caused by Prokam and instilling confidence in orderly marketing, these concerns need to be investigated and appropriately addressed in this Supervisory Review. During this 6-year period, other growers have increased BC's potato production and earned their own increases in delivery allocation in accordance with the General Orders. In BC Fresh's experience, there is no regulatory precedent in the Storage Crop industry for the calculation of the delivery allocation as shown in the document attached to the Interview Notes.

16. BC Fresh requests that BC FIRB either apply the General Orders and determine that Prokam's delivery allocation is zero for all types of potatoes or that further investigations be undertaken to fairly determine whether Prokam is entitled to any delivery allocation or whether there are special circumstances necessitating some adjustment.

17. In regard to delivery allocation freezes due to the November 2021 flooding, BC Fresh is confident that investigation will show that growers in the Sumas Prairie in the area of Prokam's land were able to plant and ship potatoes in 2022.

18. BC Fresh observed that other growers in Sumas Prairie were able to plant their regular acreage in the spring of 2022, notwithstanding the November 2021 floods. Prokam's choice to plant other non-regulated crops during all of the last 6 years is not a special circumstance justifying a freeze in its delivery allocation for potatoes.

19. Also, BC Fresh does not accept the evidence of Mr. Dhillon in regard to packing and processing. His description is not consistent with industry packing and grading for customers in the BC industry today.

20. In regard to labour issues, the planting of potatoes is much less labour intensive than planting unregulated vegetables (such as beans, squash, zucchini, peppers etc). which are highly labour intensive compared to potatoes. How is it that Prokam managed to plant and harvest those crops throughout the 6-year period but could not find the labour to plant potatoes?

21. Prokam farms "early land" and is usually able to plant and harvest "early" in the season. However, for greater clarity, Prokam is not the only grower with early land and Prokam's land is not necessarily the "earliest land". Prokam is not the only grower who is able to ship potatoes in the first period of the year, i.e., "Period A" which runs from the beginning of the calendar year to July 31.

22. Mr. Dhillon's evidence in the Investigation Report, like his testimony during the hearing at the Allegations Review, lacks credibility (Allegations Review Decision, July 14, 2022, paras. 83-85).

23. In regard to the "Other Information" described on page 10 of the Hearing Counsel's Interview Notes, they provide a further illustration of Mr. Dhillon's consistent tendency (as found by the Panel in

the Decision on Phase I, para. 85) to attempt to deflect attention away from his own conduct because his own conduct cannot withstand analysis. He complains about price competition in unregulated produce. Is there price competition in unregulated vegetables? Of course there is, hence, the use of the word "unregulated". BC Fresh's experience is that Prokam is one of the first producers to lower prices for the sale of unregulated vegetables. In regard to sales of early potatoes to the US, the BC industry doesn't sell early potatoes to the US as that market is filled by peak season shipments of early produce available from California, Arizona or Oregon, which is available before BC's early potatoes.

24. Mr. Dhillon says Prokam is being singled out because it grew potatoes in 2017 in excess of its delivery allocation and points to the fact that other growers plant in excess of their delivery allocation. The critical difference is that Prokam, in 2017, shipped volumes of potatoes grossly in excess of its delivery allocation (and intended to do the same in 2021) whereas other growers who plant in excess of their delivery allocation take the risk that their agencies may or may not be able to find a market for sales in accordance with the General Orders for that grower's produce. Even where a market may be available, potatoes shipped in excess of a grower's delivery allocation can only be sold after all potatoes produced by growers having delivery allocation during that period have been sold.

25. Acceptance of Mr. Dhillon's answer to Question 60 that he will comply with the VMC's General Orders without further investigation and analysis is wholly insufficient to protect confidence in orderly marketing and the interests of growers and agencies who, year after year, have built their businesses based on compliance with the General Orders.

26. Under the General Orders, Prokam is required to show special circumstances why its delivery allocation should not be zero for all varieties at present. Mr. Dhillon's evidence alone must not be accepted in determining whether special circumstances exist. At this juncture, there is no proof of special circumstances. Accordingly, if Prokam applies for a producer's license under the General Orders in November of this year, it may do so, however, that license would have no delivery allocation for potatoes for any period.

27. In regard to costs, BC Fresh adopts the submission of the VMC in regard to costs or charges payable by Prokam. BC Fresh intervened to respond to the numerous allegations Prokam unnecessarily levied against BC Fresh, none of which were proved by Prokam and, also, to provide industry evidence, contrary to the various unsubstantiated positions taken by Prokam, to assist the Panel in this Supervisory Review.

28. If any party, including Prokam or the VMC, submits further evidence or arguments relevant to BC Fresh's submissions herein, BC Fresh wishes to reserve the right to provide reply submissions. Also, BC Fresh stands ready to assist the Panel or Hearing Counsel in any further investigations the Panel or Hearing Counsel wish to undertake. If there are to be further submissions or investigations, BC Fresh requests that the issue of costs be deferred for consideration until all other Phase II matters are concluded.

Thank you for your consideration of the above

August 25, 2023

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FARRIS

Yours truly,

FARRIS LLP

Per: *RJ McDonell*

Robert J. McDonell

RJM/pm

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May 8, 2024

File No: 3211.003

BY EMAIL (diana@bcveg.com)

BC Vegetable Marketing Commission
#207 - 15252 32nd Avenue
Surrey, BC V3Z 0R7

**Attention: Diana Milligan,
Administrative Coordinator**

Dear Ms. Milligan:

**Re: Delivery Allocation for 2024/25 Crop Year Prokam Enterprises Ltd. - Request
for Written Submissions**

By letter issued April 23, 2024, the BC Vegetable Marketing Commission (BCVMC) requested written submissions on the question of Prokam's Delivery Allocation (DA) for the 2024/25 growing season.

Prokam makes two main points:

- (a) This process cannot revisit the BCMVC's past determinations regarding Prokam's DA; and
- (b) Given the parties' communications and the timing of this process — which postdates decisions Prokam had to make regarding planting for the upcoming growing season — Prokam's DA for 2024/25 should be calculated as if it had obtained a freeze for the 2023/24 season.

Since Prokam is unaware of the positions other parties intend to take in this process, it reserves the right to reply to any of submissions made by other parties.

Background

The BCVMC's General Order states:

49. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.



In Prokam’s case, directions were issued every year from the 2018/19 to the 2022/23 growing seasons. Each was issued in response to external and unforeseen shocks:

- The 2018/19 and 2019/20 seasons were excluded from Prokam’s DA calculation under BCFIRB’s January 10, 2020 interim decision, which found that delays in resolving the 2017 allegations of non-compliance had caused it business uncertainty;¹
- The Commission granted Prokam a DA freeze for the 2021/21 season “due to some extenuating circumstances with specific regard to securing labour and seed” in the context of the COVID-19 pandemic;² and
- The Commission granted Prokam a DA freeze for the 2021/22 and 2022/23 seasons against the backdrop of the November 2021 Sumas floods.³

The 2021 floods impeded Prokam’s operations into 2023, as it struggled to replace damaged and destroyed equipment. In October 2022, WaterTec Irrigation Ltd., a contractor, estimated that repairs to Prokam’s washing and packing facility — which were already behind schedule given the extent of the damage and supply shortages — would be completed by January 2023.⁴ In fact those repairs continued well into 2023. While Prokam still expected to grow to its full DA allotment by late February,⁵ as Bob Dhillon explained to Hearing Counsel in an interview that summer, the “difficulties getting parts and equipment to get the potato facility operational” eventually prevented Prokam from growing potatoes at all.⁶ Prokam’s seed order was cancelled and the season was lost.⁷

By letter circulated to all parties on September 1, 2023, Prokam expressed regret for “not communicating th[o]se difficulties — or the result that it was unable to plant in 2023 for the 2023-24 crop year — sooner”. It reiterated its commitment to “maintaining open lines of communication going forward.”⁸

By the fall of 2023, then, Prokam was turning its mind to the 2024/25 season. On October 5, 2023, Lillian Posch of Okanagan Grown emailed Mr. Dhillon to ask whether Prokam would be growing next year and if so, what their DA was for each variety. Mr. Dhillon replied that Prokam would be growing, although its DA was “still unknown”. Ms. Posch forwarded his message to Mr. Solymosi, for the Commission, noting to “see [Mr. Dhillon’s] comments

¹ BCVMC, Binder of Appendices Tab E, para. 52.

² BCVMC, Binder of Appendices, Tab H, p. 5.

³ BCVMC, Binder of Appendices, Tab O.

⁴ BCVMC, Binder of Appendices, Tab N, Sch. E.

⁵ Prokam, Binder of Appendices, Tab A, Sch. 9.

⁶ Prokam, Binder of Appendices, Tab B, para. 47.

⁷ Prokam, Binder of Appendices, Tab C, p. 3.

⁸ Prokam, Binder of Appendices, Tab C, p. 3.

below” and noting Prokam’s uncertainty around its DA. Mr. Solymosi replied on October 17, 2023 with Prokam’s DA for the 2023/24 season.⁹

As timelines for the upcoming season advanced, Prokam made planting decisions for 2024/25 on the strength of that communicated DA, purchasing seed and planting potatoes designed to yield the full amount of the DA. Those potatoes are presently in the ground.

Substantive Submissions

First, this process is not designed to, and should not, revisit BCVMC’s past determinations regarding Prokam’s DA. As the Commission’s April 23, 2024 letter highlights, BCFIRB’s order in its Phase II decision is phrased prospectively (“[a]ny future consideration of Prokam’s delivery allocation...”). This is consistent with the principle of *functus officio* — “once...a tribunal has reached a final decision in respect to the matter...that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.”¹⁰

Nothing in recent events has undermined the soundness of the Commission’s past determinations, which were made in response to specific circumstances. There is no reason to disturb those determinations after the fact, and it would be improper for the Commission to be asked to do so.


Second, given the parties’ communications in October 2023, and the late stage now gained in the potato growing season, Prokam’s 2024/25 DA allocation should be calculated as if it had been granted a freeze for the 2023/24 year. The context of Mr. Dhillon and Ms. Posch’s inquiries in October 2023 makes clear that they were seeking guidance for Prokam’s role in the 2024/25 growing season. The Commission’s communication of October 17, 2023 gave Prokam every reason to believe that Prokam’s DA would be as stated in the attachment, particularly given that by October, the Commission must have known that Prokam had not been able to grow potatoes in the 2023 season.

Prokam in turn relied on its ability to grow consistently with that DA. Being now in the midst of the May planting season, Prokam has already purchased and planted seed potatoes intended to yield the DA communicated by Mr. Solymosi. Prokam would suffer particular harm if the Commission were to reduce its DA *now*, after Prokam has made the requisite plans and outlays to participate fully in potato growing once again. In reliance on Mr. Solymosi’s advice to Ms. Posch, it has expended funds and committed land to potato production that would otherwise have been used to grow unregulated crops.

For those reasons, the Commission should disturb neither its past determinations nor Prokam’s existing DA. The path to Prokam’s continued participation in the industry is

⁹ BCVMC, Binder of Appendices, Tab P.

¹⁰ *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at pp. 861-862.



already clear. With the external shocks that disrupted its operations now — one hopes — behind it, there is no reason Prokam should not reclaim its place as a productive potato grower moving forward.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, K.C.

CEH/DAE
Encl.

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C.	Email to Nazeer Mitha re Allegations Supervisory Review (Abridged)	September 1, 2023

Interview with Bob Dhillon of Prokam Enterprises Ltd.

1. **In 2015, Prokam acquired Delivery Allocation of 26 tons, which represents production of about 60 or 70 acres?**

Prokam's Delivery Allocation was purchased in 2015, and it received the Delivery Allocation in 2016. This was Prokam's first time growing and marketing potatoes.

2. **Did Prokam make significant investments in order to farm potatoes?**

Prokam needed to invest in equipment. It invested \$1 million into its wash line and new tractors and diggers. Everything before was set to 60", but potatoes need 72". Prokam also needed diggers and hillers.

3. **Does Prokam have any long-term storage for potatoes? If yes, how much capacity or capability does Prokam have for long-term storage?**

Initially in the first year, Prokam did not have storage. Prokam now has sufficient storage capacity. It stores potatoes with new processes. The old way to store potatoes was to use a conveyor to bring it in and stockpile it on the ground. However, the way Prokam does it is the new and proper way of storing potatoes, with white micro-totes. This results in longer shelf-life and fewer culls.

Prokam has 50,000 square feet for storage, and can store more potatoes than it can grow. Prokam has never been in the position of not having enough storage. It is an easy fix to buy micro-bins and store them. Prokam would have had the storage space back in 2017 and 2018.

The storage area is being reworked now because of the floods.

4. **In 2017 Prokam increased its production of potatoes to 380 acres or about 5000 tons which were planted, produced and shipped without acquiring any further delivery allocation?**

In 2017, Prokam had 380 acres of potatoes. You can get 10-15 tons of potatoes per acre, or 5 tons per acre for nugget potatoes. 80 acres were nuggets, and then 100 acres of each colour – red, yellow, white.

The sprayer, digger and tractor can do 30 feet at a time. To run the wash line efficiently, you need a ton of potatoes to push the product off the line, as the momentum pushes the product off the line.

If Prokam is not growing 100 acres of a colour, it's too small and inefficient.

5. How much land does Prokam have?

See answer to question #6.

6. Does Prokam regularly lease farmland from others?

Prokam owned approximately 100 acres and leased the rest of the land.

7. In 2017, Prokam also shipped and sold 4000 pounds of Kennebec potatoes without delivery allocation?

Yes.

8. On October 10, 2017, the Commission issued cease and desist orders against Prokam?

Yes.

9. On December 22, 2017, the Commission issued its decision on the show cause hearing. The Commission upheld the cease and desist orders, ordered BC fresh to be the designated agency for Prokam and revoked Prokam's class 1 license and replace it with a class 4 license?

Yes.

10. In January 2018, Prokam appealed the Commission's decision?

Yes and IVCA also appealed the decision.

11. On February 28, 2019, BCFIRB issued its decision on the appeal?

Yes.

12. BCFIRB found the Commission did not have the authority to apply minimum price rules. It upheld the Commission's ruling regarding Prokam's shipping of Kennebec potatoes without delivery allocation. It sent the matter back to the Commission for reconsideration?

Yes.

13. The Commission issued its reconsideration decision on November 18, 2019?

Yes.

14. Does potato production require advance planning?

Yes.

15. These planning decisions are best made in November or December of the year preceding when you plant?

Yes.

16. You have to make decisions to arrange for land, seed and labour in November or December in the year before you plant, correct?

Yes.

17. Prokam uses mostly temporary foreign workers, which requires a lengthy application process each year before workers receive permits to come to Canada?

Yes, they need to obtain visas.

18. After the Commission's decision on the show cause decision in November 2017, Prokam did not grow any potatoes in the 2018-2019 or the 2019-2020 growing seasons?

Yes.

19. After the Commission's show cause decision in December 2017, Prokam could have grown potatoes in the 2018-2019 growing season?

The problem was that Prokam was assigned to BC Fresh, and there was a sense that Prokam was not going to get along with BC Fresh. Murray was arrogant, and never saw eye to eye with Prokam.

It also wasn't feasible. BC Fresh was willing to give Prokam russet potatoes, but not much for the colour potatoes.

Bob Dhillon and Bob Gill reviewed the email presented to them and confirmed that they were offered:

- 34 acres of white potatoes;
- 27 acres of yellow potatoes;
- 25 acres of red potatoes; and
- 51 acres of russet potatoes.

As a result, the majority of what was given to them by BC Fresh was for russets. These numbers added 10 acres per coloured potato to what Prokam already had in DA and approximately 45 acres added to Prokam's DA for russets.

Farming small acreage for each of the types of coloured potatoes is not economically efficient.

20. Similarly, Prokam could have grown potatoes in the 2019-2020 growing season?

Prokam had given up its leased land and other potato farmers picked up the slack. In addition, Prokam was not going to get along with BC Fresh.

21. What did Prokam use its land for in those two growing seasons?

Prokam leased the land it owned to Sam Dhillon to grow other product. Prokam therefore gets a lease payment.

The land that Prokam leased was owned by other farmers, such as dairy farmers. Prokam gave up those leases.

22. On March 5, 2020, BC Fresh made a proposal to Prokam to permit Prokam to grow about 140 acres for 2020, correct?

For potatoes, you have to cut, treat them, and plant them. It's not economically feasible to do all of that for 25-35 acres. The agency and the customer want more, and everyone in the business overgrows.

You have to send the different types of potatoes through the wash line separately. It becomes reasonably feasible to grow at 80-100 acres.

23. At this point in time in March 2020, Prokam had delivery allocation that would support approximately only 65 acres of production, correct?

Yes.

24. Prokam did not participate in the 2020-2021 growing season?

Correct – because of BC Fresh – Prokam could not work with BC Fresh. There was also an issue with Temporary Foreign Workers in this season. It was difficult to get any.

25. You are aware that delivery allocation issued by the Commission is based on a five year rolling average of what a producer grows, correct?

Yes.

26. In December 2020, you requested the Commission to freeze Prokam's 2020-2021 delivery allocation. This meant that the three seasons from 2018-2019, 2019-2020 and 2020-2021 would not affect Prokam's delivery allocation?

Yes.

27. The Commission agreed to freeze Prokam's DA for 2020-2021?

Yes.

28. So Prokam's delivery allocation for 2021 -2022 remained the same. It was unaffected by the fact the Prokam did not grow for three years?

Yes.

29. Sometime in 2021, arrangements had been made that instead of BC Fresh being the agency for Prokam, Okanagan Produce would be the agency for Prokam?

The Commission's panel made that decision.

30. As I understand, in November 2021, Ms. Lillian Posh at Okanagan sent you a copy of a marketing arrangement?

Yes and I signed it – early November 2021.

31. Prokam did grow potatoes in the summer of 2021?

Yes.

32. What types of potatoes were grown by Prokam in 2021?

Prokam grew russet potatoes, as they are easy to sell. Prokam didn't have an agency at the time it planted in about May 2021, but was hoping for an agency. If Prokam was unable to get an agency, it would have stored the potatoes.

33. How many acres were grown?

Prokam grew 20 acres. It was late in the season, and would have gone to storage.

34. What happened to the russet grown in 2021?

They were going to be shipped to Thomas Fresh when the floods hit and the entire crop was destroyed.

35. Prokam did not grow any potatoes in 2022, correct?

Yes, because of the damage caused by the floods in late 2021. The processing facility, the coolers and the compressors were severely damaged by the floods. Prokam's potato storage area was also damaged by the floods – the storage was about 8 feet under water.

36. In May 2022, Prokam again requested the commission to freeze its delivery allocation because of extensive damages incurred from the November 2021 floods, correct?

Yes.

37. The Commission agreed to freeze Prokam's delivery allocation for the 2022-2023 growing season?

Yes.

38. What is Prokam's DA for 2023?

Prokam's counsel will look into this and provide what they can find.

39. If other potato farmers were able to plant in 2022, why was Prokam not able to plant?

The floods affected Prokam's processing facility and coolers, and it lost all of its compressors. Prokam ordered these through Magnum Refrigeration, but with the strike at the docks, Prokam still has not received them. So the wash line and the coolers are still not working.

For other farmers who grow in the same area, their wash lines are in Langley or Delta, so they truck their potatoes to those locations.

Even if Prokam grows, it will be unable to process, wash or store the potatoes.

40. I am showing you a preliminary damage assessment report. Was this a report prepared by Prokam?

Yes.

41. If I turn to the third page, it shows that Prokam lost in storage 288 tons of russet potatoes. Is that accurate?

Yes. Prokam had 40 loads picked and packed, and the truck was supposed to come that morning. The floods destroyed all the loads.

42. When were these 288 tons of potatoes grown?

These were the potatoes planted in mid-May.

43. Where were the 288 tons of potatoes stored?

At Prokam's facility.

44. Prokam also had Okanagan as an agency for the 2022-2023 growing season, correct?

Yes.

45. Did Prokam plant, grow or ship any potatoes in 2023?

No. The facilities were not operational.

46. Has Prokam grown any other crop on its land in 2023?

Prokam continued with the same arrangement with the land (i.e. renting it to Sam Dhillon).

47. Why did Prokam not grow any potatoes in 2023?

The facilities were not operational. There have been difficulties getting parts and equipment to get the potato facility operational.

48. What are Prokam's plans for growing potatoes in 2024?

Prokam intends to grow potatoes in 2024.

49. Through which agency does Prokam expect it will market its potatoes in 2024?

Prokam will work with any agency except BC Fresh.

50. What kinds of potatoes and how many acres does Prokam plan to plant in 2024?

This will depend on discussions with Okanagan and Prokam's Delivery Allocation.

51. If Prokam has storage, when did they build it? Start using it? Can they show it to you?

See answer to question #3.

52. Does Prokam have DA for any other regulated vegetables? Does Prokam plan to grow regulated vegetables other than potatoes in 2024?

If there's an opening Prokam might consider it, but currently Prokam has no existing plans for other regulated products.

- 53. Does Prokam bag and ship its potatoes direct to customers as arranged by an agency? Who arranges the shipping? Who does the customer pay? The agency or Prokam?**

Prokam has nothing to do with the customers. Prokam is paid by the agency. While the customer's truck comes directly to the farm, the agency arranges for shipping.

BC Fresh now has their own storage facility. However, BC Fresh is the only agency that does this, and they will only do so where it is efficient to centralize; otherwise they still will ship it from the farm to the customer.

- 54. What information is Prokam required to provide to an agency on shipments? Do agencies conduct on farm audits of planting, harvest and shipments?**

Once the product is ready, Prokam notifies the agency that it's ready. The agency then gives Prokam the orders, saying what it will take.

- 55. How many years has Prokam had potato DA? How many growing seasons has Prokam grown and shipped potatoes?**

See answer to question #1.

- 56. Did Prokam have an agency when it made its planting decisions in 2020 for 2021? How did it decide how many acres to plant and what type of potatoes? Do you have any email or other correspondence with agency(s)?**

See above.

- 57. Normally in a growing season, when would Prokam first have potatoes ready to market?**

The earliest you can plant potatoes is the end of February. If you plant then, you would harvest the May long weekend. This is true for nugget potatoes.

If growing in May, you would expect to harvest the end of September/October. Then, you would harvest and put it in storage.

Potatoes are a 90-day crop and have to wait two to three weeks for the skin to set. This is true of all potatoes except nugget potatoes (which don't have to wait for the skin to set).

- 58. Did Prokam grow early premium potatoes in the past? Why did Prokam chose to grow russets?**

Prokam grew russet potatoes because they are easy to sell.

59. What is Prokam's current class license and what is the impact of the class of license?

Prokam currently has a class 3 license. The fee for a lower class license is higher. For example, you pay \$1,000 per year for a class 1 license and \$15,000 per year for a class 3 license. There is also a reputational effect of the lower class license.

60. If you were to grow and sell potatoes in 2024, would you comply with Commission Rules?

Yes, Prokam would comply.

Other Information

1. Prokam was upset by BC Fresh trying to undermine Prokam with non-regulated products. Prokam grows green beans (an unregulated product). Prokam has been selling green beans in 2023 to its customers for \$53. Recently, BC Fresh called Prokam's customers and offered them green beans at \$43. This resulted in Prokam having to drop its price to its customers. BC Fresh did not have any product yet but offered the lower price. Prokam stated that this conduct by BC Fresh hurt other farmers as well.
2. Prokam feels that the market for BC potatoes can increase. With its early crop, Prokam can sell to the US (California and Washington) and to Alberta. In other words, selling exports can replace outside product that currently comes into the Province. Prokam provided us with a document (see Schedule 1) which shows potato production in Canada for each Province and BC has had the least amount of increase from 2017 to 2021.
3. Prokam feels like it is being singled out. Prokam is of the view that all growers grow more than their DA and do so on speculation or to try to sell in the 'gap' market. However, only Prokam gets punished for doing so.
4. Prokam insists that it is not out to harm other growers. It is not a rogue producer. Prokam has early land which can help to sell potatoes to the US but BC Fresh would not like that because it would replace BC Fresh's purchases from the US which BC Fresh markets as 'BC Best' instead of 'BC Fresh'. Prokam's early crop can replace potatoes coming in from California. But Prokam feels that in the end, BC Fresh would not like that because it would impair BC Fresh's ability to purchase and resell US product.

Interview with Lillian Posch of Okanagan Grown Produce Ltd.

1. Ms. Posch has been the general manager of Okanagan Grown Produce Ltd. (“OGP”) for about 26 years.
2. OGP has been an agency since about 1935.
3. Over the last 5 years, OGP has been an agency under the Commission and services growers who are shareholders growing regulated greenhouse crops and storage crops. The storage crops include onions, beets, cabbages, carrots and potatoes.
4. OGP also sells unregulated crops, including field crops such as apples.
5. OGP currently has four board members.
6. Sometime in the summer of 2021, Ms. Posch was contacted by then acting chair of the Commission, Ms. Etsell, who let Ms. Posch know that Prokam had been directed to OGP to market Prokam’s product.
7. Ms. Posch then had a discussion with Prokam about marketing potatoes and on November 5, 2021, sent Prokam an OGP Producer Marketing Agreement (see Schedule 1).
8. There was a further email on November 5, 2021 between Ms. Posch and Bob Dhillon about levies. Mr. Dhillon also sent the executed OGP Producer Marketing Agreement back to Ms. Posch on November 5, 2021 (see Schedule 2).
9. Although most producers that OGP represents are shareholders, Prokam is not yet a shareholder of OGP, as growers become shareholders based on a 3-year average of what they grow. A grower’s share in OGP is based on their proportional growth. Prokam has not yet had 3 years of growing with OGP.
10. On November 23, 2021, there was an email exchange between Ms. Posch and Mr. Dhillon as to whether a certain load of potatoes grown by Prokam was picked up by Thomas Fresh. Mr. Dhillon responds stating that the product was not picked up as it was under water and the remaining potatoes were no longer available (see Schedule 3).
11. I learned later in talking to Prokam that they grew about 20 acres of russet potatoes on speculation in about May 2021, harvested them in late September/early October and then kept them in storage. It then tried to market them through OGP after it signed the

marketing agreement with OGP, but by the time it tried to market them, the floods hit and Prokam lost the entire crop as its storage facility was 8 feet under water.

12. In mid December 2021, Prokam provided Ms. Posch with a damage assessment report arising from damages Prokam suffered from the flooding of the Somas Valley. Attached as Schedule 4 is the email exchange and a copy of the damage assessment report. As can be seen from the damage assessment report, Prokam notes they lost 288 tons of russet potatoes in storage.
13. In May 2022, Ms. Posch and Mr. Dhillon had an email exchange about whether Prokam would grow any potatoes in 2022 (see Schedule 5). Mr. Dhillon also verbally advised Ms. Posch that Prokam would not be growing in 2022 because of the damage it suffered from the floods in the fall of 2021.
14. Ms. Posch also recalls Mr. Dhillon saying he could not grow in 2022 because his farm and production plant suffered damage and he could not get the replacement equipment.
15. On October 27, 2022, Mr. Dhillon emailed Ms. Posch to discuss the following year's growth of potatoes and stated he expected to be ready the 'next year' (i.e., in 2023) (see Schedule 6).
16. On November 9, 2022, there is an email correspondence between Ms. Posch and Mr. Dhillon where Ms. Posch requests information about what Prokam intends for 2023 and Mr. Dhillon responds asking about his DA from the Commission and mentions that he suffered flood devastation. Ms. Posch responds stating she will contact the Commission to determine Prokam's DA (see Schedule 7).
17. On November 21, 2022, the Commission emailed Ms. Posch to advise that Prokam's freeze request for DA was approved for the 2021/22 and 2022/23 crop years (see Schedule 8).
18. Ms. Posch also recalls having a verbal conversation with Mr. Dhillon where he indicated he wanted to grow whites and she suggested he stay out of whites and grow russets as there is more demand for the latter.
19. Ms. Posch stated she was surprised that Prokam did not grow any potatoes in 2023.
20. In February 2023, there was an email correspondence between Ms. Posch and Mr. Dhillon where Ms. Posch asked about Prokam's planting intentions for that season asking Mr. Dhillon to fill out a planting intentions form. Mr. Dhillon responded:

“We are working on this info you requested. It’s just parts and mechanics are hard to come by nowadays and I’m struggling to get my cut line and washline going. But as far as volumes we will do our quota and what you allow in percentage up and above. Let me know thanks.” (see Schedule 9).

21. On February 22, 2023, Mr. Dhillon does send the volumes he intends to grow. However, Prokam did not grow any potato crop in 2023.
22. In summary, after signing the marketing agreement in November 2021, OGP has not marketed any crop for Prokam.

Schedule 9

From: prokam@telus.net
Sent: Wednesday, February 22, 2023 1:22 PM
To: lillianp@okanagangrown.com
Subject: RE: Planted Acreage Surveys 2023
Attachments: TEMPLATE Plantings - Regulated (all Agencies).xlsx

Hi Lillian

Here you go. Please let me know if it is filled out correct.

Thank you
Bob Dhillon
604-835-9666

From: lillianp@okanagangrown.com <lillianp@okanagangrown.com>
Sent: Wednesday, February 22, 2023 9:55 AM
To: prokam@telus.net
Subject: RE: Planted Acreage Surveys 2023

Hi Bob

The Commission has you listed for the following delivery allocation

Please complete the form based on this information

I do not make the decision on any delivery allocation or percentage increases or decreases

However, in order to figure out marketing of your product I do need to know what you will have for volume

Thank you

From: prokam prokam@telus.net <prokam@telus.net>
Sent: Feb 16, 2023 9:20 AM
To: lillianp@okanagangrown.com
Subject: Re: Planted Acreage Surveys 2023

Morning Lillian.
Does that work?

Thank you
Bob Dhillon
604-835-9666

On Feb 13, 2023, at 7:50 AM, prokam prokam@telus.net <prokam@telus.net> wrote:

Schedule 9

Morning Lillian

We are working on this info you requested. It's just parts and mechanics are hard to come by nowadays and I'm struggling to get my cut line and washline going. But as far as volumes we will do our quota and what you allow in percentage up and above. Let me know thanks.

Thank you
Bob Dhillon
604-835-9666

On Feb 3, 2023, at 8:23 AM, lillianp@okanagangrown.com wrote:

Good morning Bob

Will you please complete the form attached for the planting intentions for the upcoming season.

We are required to submit to the Commission for all our growers

This was due to be sent to them no later than Jan 10th, so we are late, because I forwarded to Bob Gill in error

Thank you
Lillian

<TEMPLATE Plantings - Regulated (all Agencies).xlsx>

Schedule 9

ZONE	Grower Planting Intentions - POTATOES																	Grower Planting Intentions - OTHER CROPS																				
	NEWS	YELLOWS				RUSSETS			WHITES				REDS						SPECIALTY	FS	BEETS	CARROTS	CABBAGE	OTHER ROOT CROPS														
	WARBA	Organic	KUKON GOLD	SATINA	OTHER	Organic	NORWOTAH	PACIFIC	OTHER	Dynamic	WHITNEY	SEFA	HARMONY	OTHER	Organic	CHIEFTAN	ROSEY	NORLAND	OTHER	Organic	PIPER (GEM)	PIPER (SWEET)	ROSEMARY	KENNERLYC	RED	SPECIALTY	WATERBURY TYPE	NAVY	GREEN EARLY	GREEN MID	GREEN LATE	RED	PARSNIPS	RUTABAGA	WHITE TURNIPS	MONK (Yellow)		
3		318				134					324				271																							
	0	0	318	0	0	0	134	0	0	0	324	0	0	0	271	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
	0	0	318	0	0	134	0	0	0	0	324	0	0	0	271	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
											1,047.08																											
											0.00																											
											1,047.08																											

From: Ryan J. Androsoff
Sent: September 1, 2023 4:14 PM
To: Nazeer T. Mitha
Cc: Claire E. Hunter; 'kmcewan@mcewanpartners.com'; 'RHira@hirarowan.com'; Robert P. Hrabinsky; William Stransky; Ashleigh Hall; Mark Underhill; 'Robert McDonell'
Subject: RE: Allegations Supervisory Review- Hearing Counsel's Investigation -Phase II
Attachments: 2023-09-01 LT N. Mitha re process clarification.PDF; 2023-08-25 LT Naz Mitha re Allegations Supervisory Review.PDF; Schedule A - 2016-06-23 - Letter from Commission to Prokam re. Delivery Allocation Transfer.pdf

Dear Naz,

Please find attached our correspondence of today's date, with enclosure.

Best regards,

Ryan J. Androsoff (*he/him*)
[Hunter Litigation Chambers](#)
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1
Direct: 604-647-4560
Fax: 604-647-4554
randrosoff@litigationchambers.com



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From: Robert McDonell <rmcdonell@farris.com>
Sent: August 25, 2023 5:33 PM
To: Nazeer T. Mitha <nmitha@mithalawgroup.ca>
Cc: Claire E. Hunter <chunter@litigationchambers.com>; Ryan J. Androsoff <randrosoff@litigationchambers.com>; 'kmcewan@mcewanpartners.com' <kmcewan@mcewanpartners.com>; 'RHira@hirarowan.com' <RHira@hirarowan.com>; Robert P. Hrabinsky <RHrabinsky@ahb-law.com>; William Stransky <wstransky@mcewanpartners.com>; Ashleigh Hall <AHall@hirarowan.com>; Mark Underhill <munderhill@arvayfinlay.ca>
Subject: Allegations Supervisory Review- Hearing Counsel's Investigation -Phase II

Hi Naz I attach my letter of today's date. Best regards Rob

Robert J. McDonell
Partner



Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3

Tel 604 661 9371
Fax 604 661 9349

www.farris.com

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Thank you.

August 25, 2023

File No: 3211.002

BY E-MAIL

Mitha Law Group
Suite 300 - 570 Granville Street
Vancouver, BC V6C 3P1

Attention: Nazeer Mitha, K.C.

Dear Mr. Mitha:

Re: Allegations Supervisory Review

We write in response to your email of July 31, 2023 inviting Prokam to provide information to supplement the interview summaries.

Summary of Interview with Bob Dhillon of Prokam Enterprises Ltd.

1. In 2015, Prokam acquired Delivery Allocation of 26 tons, which represents about 60 or 70 acres

The DA originally acquired by Prokam from Hothi Farms for each potato category and each period is reflected in the Commission's letter of June 23, 2016 and accompanying DA report dated June 22, 2016, attached as Schedule "A". It is considerably greater than 26 tons, and the Commission has never taken the position that Prokam acquired only 26 tons of delivery allocation in 2015.¹

The "26 tons" error originates in the 2018 BCFIRB appeal decision,² and is replicated in the Phase I Decision.³ "About 60 to 70 acres" does not correspond to 26 tons. A typical potato yield is approximately 15 tons per acre,⁴ so 60 to 70 acres actually corresponds to a DA of roughly 900 - 1050 tons. A DA of 26 tons would represent less than 2 acres of planting.

This was a simple error on the part of the 2018 Appeal panel. Nothing has turned on it before, because it is not in dispute that the potatoes IVCA sold, and Prokam shipped, exceeded its DA

¹ See, for example, Appendix B to the June 14, 2017 letter from Andre Solymosi to Bob Dhillon and Brian Meyer (Exhibit 1, p. 854)

² 2018 Appeal Decision, at para. 15.

³ Phase I Decision, at para. 71.

⁴ See this Statistics Canada [report](#) from October 2022, reporting a national average of 322.4 hundredweight per acre, which converts to 16.4 metric tons per acre. As reflected in your notes, Prokam generally estimates 15 tons per acre.

in the 2016/2017 and 2017/2018 growing seasons. We would like to take the opportunity now to correct the misapprehension that Prokam only acquired 26 tons of DA from Hothi Farms.

22/23. Refusal of BCFresh's March, 2020 offer of 140 acres

The business model that Prokam anticipated implementing involved approximately 80-100 acres, grown as gap-fillers until its DA caught up. Since the offers made by BCfresh would have precluded that approach, Prokam's choice was between operating at economically inefficient levels, or pursuing a different income stream – leasing its land to Sam Enterprises.

That choice was informed by a variety of factors, of which interpersonal conflict and mistrust was only a part.

There was also a structural conflict. As Prokam perceived it, BCFresh's economic interests lay in continuing to supply the market with potatoes that it imported and re-sold under its own label, leveraging its monopoly during the lucrative early period before any BC producers had potatoes to sell. It would have been contrary to BCFresh's economic interests to give Prokam the opportunity to fill that gap with its own potatoes. From Prokam's perspective, there was (and remains) no realistic prospect that accepting BCFresh's proposal would move Prokam towards its intended business model in any meaningful way.

31-33. Prokam's 2021-22 Production

By way of additional context, in November, 2020, Prokam had been granted its third DA freeze, excluding the 2020-21 zero production year from the calculation of its DA. In that letter, Mr. Solymosi explained that the Commission was granting Prokam's DA freeze due to the complications with seed and labour in 2020-21, but emphasized that those were special circumstances, and that it was expected that Prokam take all reasonable steps to produce its delivery allocation in 2021-22. It is also important to understand that Prokam's return to Class 1 licence status was dependent upon producing in consecutive years, and the General Order contemplates that DA may be rescinded on the basis of two consecutive years of non-production. It was therefore important that Prokam do its best to produce potatoes, even if it was going to be unprofitable.

However, the three-year GMA with BCfresh was due to expire on May 31, 2021, so it was not clear that there would be any way to market the potatoes Prokam planted. There was significant uncertainty arising from the fact that Mr. Solymosi appeared to have directed Prokam to enter into a renewed GMA with BC Fresh beginning June 1st, 2021. The uncertainty over whether BCFresh would remain Prokam's agency beyond May 31, 2021, was not resolved until a ruling from BCFIRB on March 30, 2021.

That uncertainty, the resulting delay in planting decisions, the risk that there would be no agency and thus no avenue to market, the importance of producing something to try to meet the Commission's expectations and avoid having Prokam's DA rescinded altogether, the fact

that there is always plenty of demand for russets, and the fact that russet seeds were all Prokam could get owing to the delay – all of that factored into the decision to plant russets in 2021.

At the time, Prokam had no agency with which it could discuss the matter. It expected to be able to address the question of whether the russets could be marketed in due course once it was assigned an agency.

Other Information

With respect to the green beans issue addressed in item 1, the entity that produces and markets green beans is Sam Enterprises, not Prokam.

With respect to paragraphs 2 and 4, the discussion of export markets and selling into the US, the issue is a complicated one that was perhaps not best explained in an interview format. Your references to Prokam selling *into* the US (California and Washington) suggests that the interview may have left some confusion on this point. To be clear, Prokam did not suggest that it would have liked to sell into the US; rather, Mr. Dhillon's point was that any market currently being supplied with potatoes *from* the US – including Alberta, but he also mentioned selling to Quebec and Ontario – could be supplied with BC product instead of California and Washington product.

Summary of Interview with Lillian Posch

Prokam wishes to supplement the summary of your interview with Ms. Posch in four respects.

First, we can advise that Prokam and OGP worked effectively in the lead-up to the November 2021 Sumas flooding, that led to there being two trucks packed and ready for customer pickup when the flood hit. From Prokam's perspective, the relationship with OGP has been nothing but positive.

Second, as of November 2022, Mr. Dhillon and Ms. Posch were working together to communicate with the Commission about Prokam's request for a DA freeze due to its inability to get its infrastructure up and running post-flood in time to plant for the 2022-23 season.

At that time, Prokam believed that it would only take a few more months to complete the work. On that basis, Prokam secured seeds in the fall of 2022. In February 2023, Mr. Dhillon advised Ms. Posch that he was having trouble getting the equipment going, but he was still hopeful at that point that something could be arranged for a planting in the first half of 2023. Only later did it become evident that the parts would not arrive in time, at which point Prokam cancelled its seed order. Prokam regrets not communicating these difficulties – or the result that it was unable to plant in 2023 for the 2023-24 crop year – sooner. Prokam is committed to maintaining open lines of communication going forward.

Third, we note that Mr. Gill was in communication during that period with Ms. Posch on behalf of Sam Enterprises, discussing marketing opportunities and coordinating sales on the unregulated side. From Mr. Gill's perspective, that relationship has been nothing but positive.

Fourth, despite the economic inefficiency of growing less than 80-100 acres of coloured potatoes, Prokam indicated, in the planting intentions chart emailed to Ms. Posch in February, 2023, that it planned to grow only its DA plus whatever percentage OGP allows.⁵

Timing of evidentiary application

In its June 12, 2023 decision, the Panel indicated that Prokam could bring an application to provide additional evidence after its review of the summaries.⁶ However, earlier in its reasons, the Panel implied that such an application would await completion of the investigation⁷ – it is not clear whether you consider the investigation complete. In your closing submissions on the expansion of Phase II, you suggested that “[s]teps should be taken to ensure that Prokam is given the full opportunity to provide further evidence and/or submissions about any new facts or issues before any decision is made by the Review Panel”.⁸ It is not clear, from the interview summaries, what new facts or issues are on the table.

We would ask that you consider providing greater specificity as to the facts and issues on which you propose to invite findings or make recommendations in relation to Prokam's agency going forward, in order to allow us to properly consider the necessity of an evidentiary application. In addition, depending on how the issues unfold, there may be evidence that it is not within Prokam's power to obtain (*e.g.* because it concerns matters within the knowledge of BCFresh or the Commission), and it may be necessary to devise a procedure to deal with that. Alternatively, we would be content to await your submissions, and apply to adduce (or elicit) evidence on that basis, with corresponding modifications to the subsequent procedure.

Please advise if you would prefer that we raise this process issue with the Panel directly.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, K.C.

CEH/apc
Encl.

⁵ See Schedule 7 to Lillian Posch Interview Summary.

⁶ June 12, 2023 letter, at p. 5.

⁷ June 12, 2023 letter, at p. 4.

⁸ Hearing Counsel letter dated June 5, 2023.

From: [Robert McDonell](#)
To: [BCVMC – Diana Milligan](#)
Cc: [Claire E. Hunter \(chunter@litigationchambers.com\)](mailto:chunter@litigationchambers.com); [Robert Hrabinsky](#)
Subject: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 10:35:47 AM

Good Morning I write further to your email of May 9, 2024 providing various submissions and advising of a deadline to respond by Friday, May 17, 2024. Given the number of crop years to be reviewed, the volume of relevant materials and the issues in question, I find I will not be in a position to provide BC Fresh's submission by this Friday and, accordingly, request a one week extension to Friday, May 24, 2024.

In furtherance of the objective of achieving a transparent process, I also request that the VMC provide answers to the following questions:

1. By letter dated November 24, 2022 (Exhibit O to the VMC's Binder of Appendices), the VMC gave Prokam notice of a DA freeze for crop year 2021/2022. The VMC included, with the letter, its calculation of Prokam's DA for 2023/2024. This DA calculation makes positive adjustments for all types of potatoes for the 2021/2022 crop year. By its own admission, Prokam had not planted any red, white or yellow potatoes in 2021. Could you please explain the positive adjustments for coloured potatoes for 2021/2022?
2. Does the VMC have any record of a DA freeze for 2021/2022 for Prokam other than the November 22, 2022 letter?
3. Has the VMC provided any additional DA calculations to Prokam since the letter of November 24, 2022 to date? If so, please provide those calculations.

I look forward to receiving the requested information as soon as possible and, also, would much appreciate you advising me whether the extension requested is allowed.

Thank you for your consideration to the above.

Best regards

Rob

Robert J. McDonell
Partner

FARRIS

Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3
Tel 604 661 9371
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Thank you.

From: [Claire E. Hunter](#)
To: [Robert McDonell](#); [BCVMC – Diana Milligan](#)
Cc: [Robert Hrabinsky](#); [Aubin P. Calvert](#)
Subject: RE: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 1:52:43 PM
Attachments: [image002.png](#)

Please accept this email as Prokam's response to Mr. McDonell's extension request.

Prokam is opposed to the requested extension. Time is of the essence in the determination of Prokam's DA.

In any event, the premise of the request is flawed. There are not a "number of crop years to be reviewed"; for the reasons set out in Prokam's submission of May 8, freeze decisions have already been made by either the BCFIRB or the Commission in respect of all years except 2023/24. Despite being aware of Prokam's position that past DA freezes could not be re-opened and re-argued since the Phase II closing submissions, BC Fresh elected not to direct argument to that point.

In any event, the number and nature of the issues do not require more than a week to respond. That is particularly so given that BC Fresh was initially content to tender the same submission it made to hearing counsel in August, 2023. The only information that post-dates BC Fresh's August 2023 submission concerns the email correspondence in the fall of 2023 (Binder of Appendices, Tab P), and Prokam's letter to Mr. Mitha supplementing the interview notes, which Mr. McDonnell has had since September 1, 2023 (Compilation Binder, pp. 22-27). If BC Fresh wished to do more than reiterate its August 25, 2023 submission, it has had everything it needed for many months. It ought to have done so in its primary submissions, rather than waiting to do so in response – which, absent a right of further reply, risks significant unfairness to Prokam.

Nor should the Commission accede to BC Fresh's request for an explanation for the treatment of coloured potatoes in the Commission's DA Freeze granted in November 2022. BC Fresh has already articulated its concerns about that. BC Fresh has the materials that were before the Commission in respect of that DA freeze (which clearly indicate that Prokam grew only russets) and the result, and it can make its submissions on that basis. The Commission should simply address BC Fresh's specific concerns about coloured potatoes in its reasons. Responding to this query in any other way is certain to complicate the process.

All of which is respectfully submitted,

Claire E. Hunter KC* (she/her)
Hunter Litigation Chambers
Suite 2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1 Canada
Direct Tel: 604 891-2403
chunter@litigationchambers.com

*PRACTICE CONDUCTED THROUGH A LAW CORPORATION

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From: Robert McDonell <rmcdonell@farris.com>
Sent: May 14, 2024 10:36 AM
To: BCVMC – Diana Milligan <diana@bcveg.com>
Cc: Claire E. Hunter <chunter@litigationchambers.com>; Robert P. Hrabinsky <RHrabinsky@ahb-law.com>
Subject: Prokam Delivery Allocation Review

Good Morning I write further to your email of May 9, 2024 providing various submissions and advising of a deadline to respond by Friday, May 17, 2024. Given the number of crop years to be reviewed, the volume of relevant materials and the issues in question, I find I will not be in a position to provide BC Fresh's submission by this Friday and, accordingly, request a one week extension to Friday, May 24, 2024.

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I look forward to receiving the requested information as soon as possible and, also, would much appreciate you advising me whether the extension requested is allowed.

Thank you for your consideration to the above.

Best regards

Rob

Robert J. McDonell
Partner



Farris, Vaughan, Wills & Murphy LLP
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Thank you.

From: [Robert McDonell](#)
To: [BCVMC – Diana Milligan](#)
Cc: [Robert Hrabinsky](#); [Aubin P. Calvert](#); [Claire E. Hunter \(chunter@litigationchambers.com\)](#)
Subject: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 2:52:35 PM
Attachments: [image001.png](#)

Good Afternoon Ms. Milligan

I write to respond to Ms Hunter's email opposing the request for an extension.

Ms. Hunter submits that "time is of the essence in the determination of Prokam's DA" and that the review should not be complicated by requests for information. In his Decision of March 15, 2024, Chair Donkers made it very clear that the purpose of this process by which Prokam's DA would be determined was to assist in restoring trust and confidence in the BC vegetable industry. I encourage a review of paragraphs 86-89 of the Decision. With respect, conducting this process as if time was of the essence, and complications are to be avoided, would be completely contrary to the stated objective and, indeed, is likely to guarantee a failure of the stated objective.

There is no merit to Ms. Hunter's submission that the issue in this review is whether there was a DA freeze in 2023/2024 and that no other decisions or determinations may be reviewed. At paragraph 88 of the Decision, Chair Donkers stated this process must involve submissions from Prokam on why it has not produced regulated product since 2017 and an opportunity for producers who have grown their DA as a result of Prokam's nonproduction to provide input on how DA should be apportioned. It is clear from these reasons that this process is to include a review of events since 2017 when Prokam last shipped potatoes and a review of prior DA calculations, in order to determine Prokam's DA for 2024/2025.

Ms. Hunter's submissions place this review into the context of contested litigation between parties. Again, it is submitted this is contrary to Chair Donkers intent. It is submitted the intent of the order was a review with transparency and with insight into the Commission's determination of Prokam's DA. Only then, is there a prospect of the stated objective to be realized.

Thank you for your consideration of the above.

Regards

Rob

Robert J. McDonell
Partner



Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3
Tel 604 661 9371
Fax 604 661 9349

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Thank you.

From: Claire E. Hunter <chunter@litigationchambers.com>

Sent: May 14, 2024 1:52 PM

To: Robert McDonnell <rmcdonell@farris.com>; BCVMC – Diana Milligan <diana@bcveg.com>

Cc: Robert P. Hrabinsky <Rhrabinsky@ahb-law.com>; Aubin P. Calvert <acalvert@litigationchambers.com>

Subject: [EXT] RE: Prokam Delivery Allocation Review

Please accept this email as Prokam's response to Mr. McDonnell's extension request.

Prokam is opposed to the requested extension. Time is of the essence in the determination of Prokam's DA.

In any event, the premise of the request is flawed. There are not a "number of crop years to be reviewed"; for the reasons set out in Prokam's submission of May 8, freeze decisions have already been made by either the BCFIRB or the Commission in respect of all years except 2023/24. Despite being aware of Prokam's position that past DA freezes could not be re-opened and re-argued since the Phase II closing submissions, BC Fresh elected not to direct argument to that point.

In any event, the number and nature of the issues do not require more than a week to respond. That is particularly so given that BC Fresh was initially content to tender the same submission it made to hearing counsel in August, 2023. The only information that post-dates BC Fresh's August 2023 submission concerns the email correspondence in the fall of 2023 (Binder of Appendices, Tab P), and Prokam's letter to Mr. Mitha supplementing the interview notes, which Mr. McDonnell has had since September 1, 2023 (Compilation Binder, pp. 22-27). If BC Fresh wished to do more than reiterate its August 25, 2023 submission, it has had everything it needed for many months. It ought to have done so in its primary submissions, rather than waiting to do so in response – which, absent a right of further reply, risks significant unfairness to Prokam.

Nor should the Commission accede to BC Fresh's request for an explanation for the treatment of coloured potatoes in the Commission's DA Freeze granted in November 2022. BC Fresh has already articulated its concerns about that. BC Fresh has the materials that were before the Commission in

respect of that DA freeze (which clearly indicate that Prokam grew only russets) and the result, and it can make its submissions on that basis. The Commission should simply address BC Fresh's specific concerns about coloured potatoes in its reasons. Responding to this query in any other way is certain to complicate the process.

All of which is respectfully submitted,

Claire E. Hunter KC* (she/her)
Hunter Litigation Chambers
Suite 2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1 Canada
Direct Tel: 604 891-2403
chunter@litigationchambers.com

*PRACTICE CONDUCTED THROUGH A LAW CORPORATION



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Sent: May 14, 2024 10:36 AM
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Cc: Claire E. Hunter <chunter@litigationchambers.com>; Robert P. Hrabinsky <RHrabinsky@ahb-law.com>
Subject: Prokam Delivery Allocation Review

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In furtherance of the objective of achieving a transparent process, I also request that the VMC provide answers to the following questions:

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VMC gave Prokam notice of a DA freeze for crop year 2021/2022. The VMC included, with the letter, its calculation of Prokam's DA for 2023/2024. This DA calculation makes positive adjustments for all types of potatoes for the 2021/2022 crop year. By its own admission, Prokam had not planted any red, white or yellow potatoes in 2021. Could you please explain the positive adjustments for coloured potatoes for 2021/2022?

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I look forward to receiving the requested information as soon as possible and, also, would much appreciate you advising me whether the extension requested is allowed.

Thank you for your consideration to the above.

Best regards

Rob

Robert J. McDonell
Partner

The logo for Farris, Vaughan, Wills & Murphy LLP, featuring the word "FARRIS" in white capital letters on a dark green rectangular background.

Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 W Georgia St
Vancouver, BC V7Y 1B3
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Thank you.

Prokam DA & Licence Class, Submissions

Issued: May, 16, 2024

RE: Response to BCfresh Requests

By email dated May 14, 2024 (a copy of which is attached), counsel for BCfresh requested an extension of the deadline to file a reply submission to Friday, May 24, 2024. In that same email, counsel for BCfresh also requested that the Commission provide answers to the following questions:

1. By letter dated November 24, 2022 (Exhibit O to the VMC's Binder of Appendices), the VMC gave Prokam notice of a DA freeze for crop year 2021/2022. The VMC included, with the letter, its calculation of Prokam's DA for 2023/2024. This DA calculation makes positive adjustments for all types of potatoes for the 2021/2022 crop year. By its own admission, Prokam had not planted any red, white or yellow potatoes in 2021. Could you please explain the positive adjustments for coloured potatoes for 2021/2022?
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3. Has the VMC provided any additional DA calculations to Prokam since the letter of November 24, 2022 to date? If so, please provide those calculations.

Later that afternoon, counsel for Prokam emailed the Commission (copy attached) to express its opposition to the requested extension. Prokam argues that time is of the essence in the determination of Prokam's DA, and that there are not a "number of crop years to be reviewed" as asserted by BCfresh, given that "decisions have already been made by either the BCFIRB or the Commission in respect of all years except 2023/24" (sic). Finally, Prokam asserts that the Commission should not accede to BCfresh's request for an explanation for the treatment of coloured potatoes in the Commission's DA Freeze granted in November 2022. Among other things, Prokam asserts that a response to this query other than in the Commission's reasons would complicate the process.

Counsel for BCfresh replied to Prokam's submission by email dated May 14, 2024 (attached). Among other things, BCfresh challenges Prokam's assertion that past DA freeze decisions are not to be reviewed.

The Commission is prepared to grant the extension sought by BCfresh. While Prokam argues that time is of the essence, it does not identify any specific hardship that would result from an extension of the deadline from May 17 to May 24. In addition, it is the Commission's view that the information and records sought by BCfresh should be provided to all stakeholders (including Prokam) in the interest of promoting a transparent process. For certainty, all stakeholders (including Prokam) will have an opportunity to make submissions in response to the submissions filed by other parties, and with respect to this additional information and documentation, by the May 24 deadline. Any party seeking a right of sur-reply may apply to the Commission following circulation of these submissions.

With respect to the information sought by BCfresh, the Commission responds as follows:

1. The Commission's letter dated November 24, 2022 granted a freeze of Prokam's DA for all classes of potatoes, notwithstanding that Prokam had not planted any red, white or yellow potatoes in 2021.
2. Copies of Commission minutes relating to the November 24, 2022 freeze decision are attached.
3. DA calculations provided to Prokam since the letter of November 24, 2022 to date are set out at Appendix P (already circulated).

Finally, the Commission encourages all parties to focus on Prokam's DA for the current crop year (2024/2025). In its March 15, 2024 decision, the BCFIRB directed that: "Any future consideration of Prokam's delivery allocation (DA) and license class must be considered by the Commission through a transparent process with an opportunity for submission by all stakeholders, and subject to prior approval by BCFIRB." This is not an invitation to revisit past decisions made by the BCFIRB or the Commission regarding Prokam's DA. The chronology of events circulated to stakeholders is intended to provide essential background information only. Consistent with the BCFIRB's direction, the Commission will not engage in a retroactive reconsideration of past DA freeze decisions made by either the BCFIRB or the Commission.

Regards,



Derek Sturko
Chair

Attachments:

2022-06-13 - BCVMC Minutes
2022-11-08 - BCVMC Minutes
2024-05-14A - Email from McDonell
2024-05-14B - Email from Hunter
2024-05-14C - Email from McDonell

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

	<p>[REDACTED]</p> <ul style="list-style-type: none">[REDACTED][REDACTED] <p>[REDACTED]</p>
4. [REDACTED]	<p>[REDACTED]</p> <ul style="list-style-type: none">[REDACTED][REDACTED][REDACTED] <p>[REDACTED]</p> <ul style="list-style-type: none">[REDACTED][REDACTED][REDACTED][REDACTED][REDACTED][REDACTED] <p>[REDACTED]</p> <ul style="list-style-type: none">[REDACTED]

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

<p>5. [REDACTED] [REDACTED] [REDACTED]</p>	<p>[REDACTED] [REDACTED] [REDACTED]</p> <ul style="list-style-type: none">■ [REDACTED] [REDACTED] [REDACTED]■ [REDACTED] [REDACTED] [REDACTED]■ [REDACTED]■ [REDACTED] [REDACTED] [REDACTED] <p>[REDACTED]</p>
<p>6. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p> <ul style="list-style-type: none">■ [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]■ [REDACTED] [REDACTED]■ [REDACTED] [REDACTED] [REDACTED]■ [REDACTED] [REDACTED]■ [REDACTED] [REDACTED] [REDACTED]

MINUTES OF THE
BC VEGETABLE MARKETING COMMISSION

	<p>█ [REDACTED]</p> <p>█ [REDACTED]</p> <p>█ [REDACTED]</p> <p>█ [REDACTED]</p> <p>█ [REDACTED]</p> <p>█ [REDACTED]</p> <p>█ [REDACTED]</p>
<p>7. Prokam Delivery Allocation Freeze Request for 2022/23 Crop Year.</p>	<p>On May 17,2022 the BCVMC Compliance Officer received a letter from Prokam that requests a freeze of their 2022-23 delivery allocation for potatoes. Prokam incurred extensive damage from the November 2021 Sumas Prairie flood and will not have the infrastructure in place for this growing season.</p> <p>It was noted that the GM remains limited in his dealing with Prokam as directed by the panel of the BCFIRB supervisory review into allegations of Bad Faith and Unlawful Activity.</p> <p><u>DISCUSSION</u></p> <p>Tentative thoughts, comments and observations:</p> <ul style="list-style-type: none"> • Strike a panel of the Commission to address Prokam’s request. The Chair is to pull together a panel of available members. • The GM is to be restricted from participating and is only to perform administrative duties related to Prokam as is directed by the Chair. • The BCVMC office is to provide notice to producers who farm in the Sumas Prairie that the Commission is accepting applications for delivery allocation freeze requests from all producers in the region that were impacted by the flood. • Include all storage crop agencies and storage crop / processing producers on the bulletin. • Panel appointments can be finalized by e-mail vote.
<p>ADJOURNMENT</p>	<p>On a motion the meeting adjourned at 11:50 AM</p>



 Debbie Etsell, Chair



 Hugh Reynolds, Secretary

**BC VEGETABLE MARKETING COMMISSION
REGULAR MEETING**

BCVMC OFFICE
November 08, 2022
9:00 – 12:00 AM

Attending:	Debbie Etsell – Chair John Newel – Vice-Chair <i>(zoom call-in@ 9:01PM)</i> Hugh Reynolds – Secretary Armand Vander Meulen – Member <i>(zoom call-in@ 8:59PM. Connection was not stable)</i> Craig Evans – Member <i>(zoom call-in@ 8:55PM)</i> Kevin Husband – Member <i>(zoom call-in@ 9:00PM)</i> Natalie Veles – Member
Guests:	None
Absent:	None
Staff:	Andre Solymosi – General Manager Claudia Trigo – Administrative Assistant
Break:	From 10:15 to 10:21AM

1. CALL TO ORDER	At 9:05 PM Chair Debbie Etsell called the meeting to order.				
2. OPENING BUSINESS					
2.1. In Camera Session	None.				
2.2. Approval of Agenda	M/S/C Approved as presented.				
2.3. Disclosure of possible conflict and bias	Members are to inform the Chair if a conflict becomes apparent as the meeting progresses.				
2.4. Minutes of Previous Meeting(s)	2.4.1 – 2022-09-27 BCVMC Minutes 2.4.2 – 2022-10-21 BCVMC Minutes M/S/C: To Approve the 2.4.1 and 2.4.2 BCVMC Minutes as amended.				
2.5. E-mail Votes Since Prior Meeting	<table border="1"> <thead> <tr> <th>VOTE DESCRIPTION</th> <th>STATUS</th> </tr> </thead> <tbody> <tr> <td>[REDACTED]</td> <td></td> </tr> </tbody> </table> <p>E-mail votes were acknowledged by the Commission.</p>	VOTE DESCRIPTION	STATUS	[REDACTED]	
VOTE DESCRIPTION	STATUS				
[REDACTED]					

<p>2.6. Storage Crop Market Access Administrative Decisions</p>	<p>[REDACTED]</p>
<p>2.7. Business Arising</p>	<p>None</p>
<p>2.8. S.A.F.E.T.I. Documents & Code of Conduct</p>	<p>The Chair reminded Commissioners that S.A.F.E.T.I. based decision making and Code of Conduct are to be followed and that these documents have been made available for reference.</p>
<p>3. OPERATIONS</p>	
<p>3.1. General Manager Report</p>	<p>[REDACTED]</p>
<p>3.2. Panel Chair Reports</p>	<p>[REDACTED]</p>

	<ul style="list-style-type: none"> ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] <p>[REDACTED]</p>
<p>4. FINANCIAL</p>	
<p>4.1. Q3 - 2022</p>	<p>[REDACTED]</p> <p>[REDACTED]</p> <ul style="list-style-type: none"> ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED]
<p>4.2. Q3 - 2022 PVID Financials</p>	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <ul style="list-style-type: none"> ■ [REDACTED] ■ [REDACTED]
<p>5. INDUSTRY INFORMATION & STATISTICS</p>	
<p>5.1. Environmental Scan</p>	<ul style="list-style-type: none"> ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED] ■ [REDACTED]

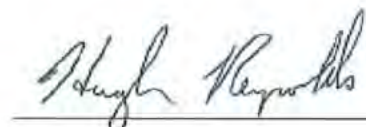
[REDACTED]

6.3. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

8.3. [REDACTED]	[REDACTED]
9. Industry	
9.1. [REDACTED]	[REDACTED]
9.2. [REDACTED]	[REDACTED]
9.3. [REDACTED]	[REDACTED]
10. Organizational Business	
10.1 Key Dates	[REDACTED]
10.2 Next Scheduled Commission Meetings	<p>Next Meetings:</p> <ul style="list-style-type: none"> • Finance Committee to set a meeting date • Nov. 22nd (Tue.) - 1 - 2:45PM - Governance Committee Meeting • Nov. 22nd (Tue.) - 9 -12PM - BCVMC Budget <u>Meeting #7</u> • Dec. 6th (Tue.) - 9 -12PM - BCVMC Regular <u>Meeting #8</u> (in person) • New Chair starts at December 21st
11. ADJOURNMENT	<p>On a motion the meeting adjourned at 12:13 PM.</p> <p>Meeting per-diem declared 3 hours and 13 minutes.</p>


 Debbie Etsell, Chair


 Hugh Reynolds, Secretary

From: [Robert McDonell](#)
To: [BCVMC – Diana Milligan](#)
Cc: [Claire E. Hunter \(chunter@litigationchambers.com\)](mailto:chunter@litigationchambers.com); [Robert Hrabinsky](#)
Subject: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 10:35:47 AM

Good Morning I write further to your email of May 9, 2024 providing various submissions and advising of a deadline to respond by Friday, May 17, 2024. Given the number of crop years to be reviewed, the volume of relevant materials and the issues in question, I find I will not be in a position to provide BC Fresh's submission by this Friday and, accordingly, request a one week extension to Friday, May 24, 2024.

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Robert J. McDonell
Partner

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Thank you.

From: [Claire E. Hunter](#)
To: [Robert McDonell](#); [BCVMC – Diana Milligan](#)
Cc: [Robert Hrabinsky](#); [Aubin P. Calvert](#)
Subject: RE: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 1:52:43 PM
Attachments: [image002.png](#)

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All of which is respectfully submitted,

Claire E. Hunter KC* (she/her)
Hunter Litigation Chambers
Suite 2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1 Canada
Direct Tel: 604 891-2403
chunter@litigationchambers.com

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To: BCVMC – Diana Milligan <diana@bcveg.com>
Cc: Claire E. Hunter <chunter@litigationchambers.com>; Robert P. Hrabinsky <RHrabinsky@ahb-law.com>
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Partner



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From: [Robert McDonell](#)
To: [BCVMC – Diana Milligan](#)
Cc: [Robert Hrabinsky](#); [Aubin P. Calvert](#); [Claire E. Hunter \(chunter@litigationchambers.com\)](#)
Subject: Prokam Delivery Allocation Review
Date: Tuesday, May 14, 2024 2:52:35 PM
Attachments: [image001.png](#)

Good Afternoon Ms. Milligan

I write to respond to Ms Hunter's email opposing the request for an extension.

Ms. Hunter submits that "time is of the essence in the determination of Prokam's DA" and that the review should not be complicated by requests for information. In his Decision of March 15, 2024, Chair Donkers made it very clear that the purpose of this process by which Prokam's DA would be determined was to assist in restoring trust and confidence in the BC vegetable industry. I encourage a review of paragraphs 86-89 of the Decision. With respect, conducting this process as if time was of the essence, and complications are to be avoided, would be completely contrary to the stated objective and, indeed, is likely to guarantee a failure of the stated objective.

There is no merit to Ms. Hunter's submission that the issue in this review is whether there was a DA freeze in 2023/2024 and that no other decisions or determinations may be reviewed. At paragraph 88 of the Decision, Chair Donkers stated this process must involve submissions from Prokam on why it has not produced regulated product since 2017 and an opportunity for producers who have grown their DA as a result of Prokam's nonproduction to provide input on how DA should be apportioned. It is clear from these reasons that this process is to include a review of events since 2017 when Prokam last shipped potatoes and a review of prior DA calculations, in order to determine Prokam's DA for 2024/2025.

Ms. Hunter's submissions place this review into the context of contested litigation between parties. Again, it is submitted this is contrary to Chair Donkers intent. It is submitted the intent of the order was a review with transparency and with insight into the Commission's determination of Prokam's DA. Only then, is there a prospect of the stated objective to be realized.

Thank you for your consideration of the above.

Regards

Rob

Robert J. McDonell
Partner



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Thank you.

From: Claire E. Hunter <chunter@litigationchambers.com>

Sent: May 14, 2024 1:52 PM

To: Robert McDonnell <rmcdonell@farris.com>; BCVMC – Diana Milligan <diana@bcveg.com>

Cc: Robert P. Hrabinsky <Rhrabinsky@ahb-law.com>; Aubin P. Calvert <acalvert@litigationchambers.com>

Subject: [EXT] RE: Prokam Delivery Allocation Review

Please accept this email as Prokam's response to Mr. McDonnell's extension request.

Prokam is opposed to the requested extension. Time is of the essence in the determination of Prokam's DA.

In any event, the premise of the request is flawed. There are not a "number of crop years to be reviewed"; for the reasons set out in Prokam's submission of May 8, freeze decisions have already been made by either the BCFIRB or the Commission in respect of all years except 2023/24. Despite being aware of Prokam's position that past DA freezes could not be re-opened and re-argued since the Phase II closing submissions, BC Fresh elected not to direct argument to that point.

In any event, the number and nature of the issues do not require more than a week to respond. That is particularly so given that BC Fresh was initially content to tender the same submission it made to hearing counsel in August, 2023. The only information that post-dates BC Fresh's August 2023 submission concerns the email correspondence in the fall of 2023 (Binder of Appendices, Tab P), and Prokam's letter to Mr. Mitha supplementing the interview notes, which Mr. McDonnell has had since September 1, 2023 (Compilation Binder, pp. 22-27). If BC Fresh wished to do more than reiterate its August 25, 2023 submission, it has had everything it needed for many months. It ought to have done so in its primary submissions, rather than waiting to do so in response – which, absent a right of further reply, risks significant unfairness to Prokam.

Nor should the Commission accede to BC Fresh's request for an explanation for the treatment of coloured potatoes in the Commission's DA Freeze granted in November 2022. BC Fresh has already articulated its concerns about that. BC Fresh has the materials that were before the Commission in

respect of that DA freeze (which clearly indicate that Prokam grew only russets) and the result, and it can make its submissions on that basis. The Commission should simply address BC Fresh's specific concerns about coloured potatoes in its reasons. Responding to this query in any other way is certain to complicate the process.

All of which is respectfully submitted,

Claire E. Hunter KC* (she/her)
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Suite 2100 - 1040 West Georgia Street
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*PRACTICE CONDUCTED THROUGH A LAW CORPORATION



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From: Robert McDonell <rmcdonell@farris.com>
Sent: May 14, 2024 10:36 AM
To: BCVMC – Diana Milligan <diana@bcveg.com>
Cc: Claire E. Hunter <chunter@litigationchambers.com>; Robert P. Hrabinsky <RHrabinsky@ahb-law.com>
Subject: Prokam Delivery Allocation Review

Good Morning I write further to your email of May 9, 2024 providing various submissions and advising of a deadline to respond by Friday, May 17, 2024. Given the number of crop years to be reviewed, the volume of relevant materials and the issues in question, I find I will not be in a position to provide BC Fresh's submission by this Friday and, accordingly, request a one week extension to Friday, May 24, 2024.

In furtherance of the objective of achieving a transparent process, I also request that the VMC provide answers to the following questions:

1. By letter dated November 24, 2022 (Exhibit O to the VMC's Binder of Appendices), the

VMC gave Prokam notice of a DA freeze for crop year 2021/2022. The VMC included, with the letter, its calculation of Prokam's DA for 2023/2024. This DA calculation makes positive adjustments for all types of potatoes for the 2021/2022 crop year. By its own admission, Prokam had not planted any red, white or yellow potatoes in 2021. Could you please explain the positive adjustments for coloured potatoes for 2021/2022?

2. Does the VMC have any record of a DA freeze for 2021/2022 for Prokam other than the November 22, 2022 letter?
3. Has the VMC provided any additional DA calculations to Prokam since the letter of November 24, 2022 to date? If so, please provide those calculations.

I look forward to receiving the requested information as soon as possible and, also, would much appreciate you advising me whether the extension requested is allowed.

Thank you for your consideration to the above.

Best regards

Rob

Robert J. McDonell
Partner

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Thank you.

May 24, 2024

File No: 3211.002

BY EMAIL (diana@bcveg.com)

BC Vegetable Marketing Commission
#207 - 15252 32nd Avenue
Surrey, BC V3Z 0R7

**Attention: Diana Milligan,
Administrative Coordinator**

Dear Ms. Milligan:

**Re: Delivery Allocation for 2024/25 Crop Year Prokam Enterprises Ltd. - Reply to
Written Submissions**

Further to Ms. Milligan's email of May 9th, 2024, please accept this letter as Prokam's reply to the submissions of the Island Vegetable Cooperative Association, BC Fresh, and the BC Fresh growers who submitted letters regarding the calculation of Prokam's DA.

1. No basis to calculate DA based on 5 zero-production years

BC Fresh and IVCA urge the Commission to calculate Prokam's DA on the basis of 5 zero-production years. This would require the Commission to revisit the January 10, 2020 decision of the BCFIRB (in respect of 2018/19 and 2019/20) and its own past directions (in respect of 2020/21, 2021/22, and 2022/23). For the reasons set out in Prokam's submission of May 8, 2024, and as recognized in the Commission's letter of May 16, 2024, that would not be appropriate.

2. No basis to modify Prokam's DA for coloured potatoes

BC Fresh and its growers submit that it is unclear why Prokam still has DA for coloured potatoes when it only grew russets in 2021. Prokam explained the decision to plant only russets in its August 25, 2023 letter in response to hearing counsel's interview notes.¹

The Commission was aware that Prokam had only grown russets when it granted the 2021/22 and 2022/23 DA freezes.² The Commission was aware of the factors that shaped Prokam's

¹ Letter from Ms. Hunter to Mr. Mitha dated August 25, 2023 (Compilation, pp. 25-26).

² Binder of Appendices, Tab N.

planting decisions that season, including the **Commission's** expectation that it take all reasonable steps to produce its DA, and the fact that, in an effort to meet that expectation, Prokam had to plant without knowing whether it would have an agency to market those potatoes.³ The Commission made a decision to freeze Prokam's DA across all categories. That decision is not to be revisited.

3. No basis to disbelieve Prokam's explanation for non-production in 2023/24

BC Fresh argues that Prokam's explanation – that delays in the repairs to the wash line prevented Prokam from growing in 2023/24 – should not be accepted at face value due to (i) the adverse credibility finding against Mr. Dhillon in the Phase I Decision;⁴ and (ii) perceived inconsistencies in Mr. Dhillon's interview answers, relating to the acreage associated with a 26 ton DA and the decision to plant 20 acres of russets in 2021/22 despite Mr. Dhillon's earlier evidence about the economics of farming less than 80 acres.⁵

The perceived inconsistencies are explained in Prokam's August 25, 2023 letter.⁶ The adverse credibility finding related specifically to Mr. Dhillon's beliefs about the respective regulatory responsibilities of agencies versus growers, and ought not to be taken outside of that context. However, if the Commission has concerns arising from the adverse credibility finding in the Phase I Decision, the explanation can be confirmed by Mr. Gill.

4. No basis to rescind Prokam's DA

Neither the BCFIRB nor the Commission would have granted DA freezes unless they were persuaded that Prokam faced special circumstances in the corresponding crop years. The BCFIRB's freeze decision in respect of 2018/19 and 2019/20 is specifically expressed in terms of "special circumstances".⁷ The Commission's subsequent freeze decisions in 2020/21 (COVID-19), 2021/22 and 2022/23 (Sumas flood) likewise reflect its appreciation of the special circumstances Prokam was facing in each of those years.

The role of "special circumstances" in s. 56 of the General Orders is not a licence to re-open the findings of fact and assessments underpinning the DA freezes. It would be incongruous if circumstances were found to be sufficient to justify a DA freeze, but would not constitute "special circumstances" for the purpose of avoiding rescission of a grower's DA.

³ Binder of Appendices, Tab N - 2022-10-00 Prokam Freeze Request Documents.

⁴ BC Fresh Submission, at paras. 22, 26.

⁵ BC Fresh Submission, at para. 13.

⁶ Compilation, p. 24 (Prokam's DA has never been 26 tons); p. 25 (why Prokam grew russets *despite* it being unprofitable).

⁷ Binder of Appendices, Tab E, para. 52.

2023/24 is the only crop year in respect of which a “special circumstances” determination has not yet been made. Even if the Commission does not accept that Prokam’s difficulty repairing its equipment constitute special circumstances justifying a further DA freeze, that makes for a single year of non-production that is not explained by special circumstances. Section 56 of the General Orders therefore does not require the Commission to rescind Prokam’s DA.

5. No basis for finding prejudice to growers who have increased their DA

BC Fresh says that its growers will be prejudiced if Prokam is permitted to re-enter the market with its pre-2017 DA because many of them have been able to increase their DA over the six years that Prokam has not shipped potatoes. From Prokam’s perspective, the basis for the claim of prejudice to growers who have increased their DA during Prokam’s absence is unclear.

BC Fresh’s submissions on prejudice seem premised on a theory that the potato market is finite and saturated, such that any DA for Prokam will prevent another grower from having their full DA marketed.⁸ However, DA only takes effect when supply exceeds demand.⁹ Unless there is reason to believe that Prokam re-entering the market will result in an excess of supply, all growers will be able to have their full DA marketed. If BC Fresh wished to assert the existence of prejudice, it was incumbent on BC Fresh to provide supporting data – particularly because a large agency like BC Fresh has access to market data that Prokam does not.

BC Fresh in particular would be in a position to speak to the extent to which it currently supplies the market with imported potatoes, such that there is additional room to market its growers’ current DA instead. As BC Fresh explained in its 2019-20 Supervisory Review submissions, it leads with local supply and then “backfill[s]” with imports as needed.¹⁰ If BC Fresh’s growers have increased their DA and planted accordingly, BC Fresh’s need to rely on imports to “backfill” has been correspondingly reduced.

In any event, it is unclear how Prokam marketing its DA through Okanagan Grown would affect the ability of growers to market their DA through BC Fresh. As BC Fresh put it in its 2019-20 Vegetable Supervisory Review submission, “[t]he purpose of the DA system is to provide a mechanism for an Agency to manage supply within their grower group when supply exceeds demand to ensure the best opportunity to maximize producer returns.”¹¹ As the Commission explained in its 2019-20 Vegetable Supervisory Review submissions, “[n]o

⁸ E.g. “Vacating a market for 6 years and then demanding that other producers, who filled that market, reduce sales...”, “growers should not now face the prejudice, increase costs and risks of having their market access compromised by Prokam...” (Compilation, p. 30).

⁹ General Orders, s. 51.

¹⁰ BC Fresh [Submissions in the 2019-20 Vegetable Supervisory Review](#), p. 5.

¹¹ BC Fresh [Submissions in the 2019-20 Vegetable Supervisory Review](#), p. 6 (emphasis added).

agency is permitted to ship in excess of the aggregate delivery allocation held by its producers unless authorized by the Commission.”¹²

It is speculative to suggest that allowing Prokam to resume growing in accordance with its pre-2017 DA would affect the ability of BC Fresh or IVCA growers to have their full DA marketed.

6. Prejudice to Prokam arising from DA reduction or cancellation

Prokam has made – and continues to make – significant capital expenditures into equipment and infrastructure surrounding the potato operation as part of its flood recovery. These investments were made in reliance on the DA freezes. If the assessment of prejudice is to play any role, the significant harm to Prokam of those investments having been wasted weighs heavily against any DA reduction or cancellation.

7. Conclusion: Alleviating the concerns of other industry participants

What has become clear in this process is that there is a lack of understanding of how Prokam’s DA has been calculated over the years, and the basis for the DA freezes it has received.


For instance, some participants may not have been aware that the BCFIRB has already determined that the uncertainty and delay caused by the appeal and reconsideration proceedings constituted “special circumstances” justifying a DA freeze in respect of 2018/19 and 2019/20.

In their letters, BC Fresh growers advert to Prokam having “decided not to grow or ship potatoes, including following the November 2021 flood,”¹³ and BC Fresh observes that other producers were able to grow in 2021/22. This suggests that they may have been unaware that the real issue has been with repairs to Prokam’s infrastructure.

One hopes that the transparency of this process will alleviate that. By setting out the history and supporting documents, industry participants can be reassured that the Commission made its DA freeze decisions based on explanations and evidence, including about the particular impact of the flood on Prokam’s operations.

IVCA, for its part, emphasizes that all growers are subject to the 5-year rolling average standard. But that standard is always subject to modification in accordance with directions of the Commission. That discretion has the potential to benefit any grower who encounters challenging and unforeseen circumstances like the COVID-19 pandemic or the 2021 Sumas flood. It is not correct to suggest that Prokam has been held to a different standard than other growers. Prokam has sought – and been granted – relief from a strict application of the 5-year

¹² Commission [Submission in the 2019-20 Vegetable Supervisory Review](#), p. 6 (emphasis added).



rolling average in response to special circumstances, just as any grower is entitled to do when they face challenges.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, K.C.

CEH/DAE
Encl.

Reply Attention of: Robert J. McDonell
Direct Dial Number: 604 661 9371
Email Address: rmcdonell@farris.com

FARRIS

File No: 32958-0013

May 24, 2024

BY EMAIL

BC Vegetable Marketing Commission
Unit #207 - 15252 32nd Ave
Surrey BC, V3Z 0R7

Attention: Diana Milligan, Administrative Coordinator

Dear Madame:

Re: Prokam Delivery Allocation for 2024/25 Crop Year

INTRODUCTION

Thank you for your email of May 16, 2024 enclosing the Response to BC Fresh Requests from Mr. Sturko. The additional time allowed to prepare this submission has been very useful and, in particular, to respond to Prokam's submission to the effect that the only issue in this review is whether Prokam is entitled to a "DA freeze" for 2023/2024.

BC Fresh understands from the ruling of the Chair that the Commission will not be engaging in a retroactive reconsideration of past DA freeze decisions made by the BC FIRB or the Commission. BC Fresh respectfully disagrees with that decision in part and, to a limited extent, asks that certain crop years be re-considered as described below.

In any event, with or without considering past freezes of Prokam's DA, it is clear from the BC FIRB's direction to conduct this review that Prokam's lack of production since 2017 is to be considered, as well as the reasons for that lack of production. Also to be considered are the interests of other producers who have, through their labour and investments, produced potatoes and have maintained and, indeed, increased their respective DA's since 2017 (Phase II Decision, paras 85-89).

In this submission, BC Fresh does not seek any review of the orders of the BC FIRB that crop years 2018/2019 and 2019/2020 be excluded when calculating Prokam's DA. However, BC Fresh submits that the Commission's decision to exclude crop year 2020/2021 was conditional and issued with an express reservation that the Commission may rescind the exclusion if Prokam failed to plant for its DA in the

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following crop year (Commission Appendices, Tab H, page 5). It is now known that Prokam did not plant for its DA in 2021/2022. In regard to crop year 2021/2022, given that Prokam decided to grow only russets for that crop year, there is no basis for excluding reds, whites and yellows for that crop year. There should be a corrected DA calculation for crop year 2021/2022. In addition, the years in which Prokam decided to grow unregulated crop on its lands, instead of potatoes, should not be excluded in calculating Prokam's DA.

For greater certainty, BC Fresh is not suggesting that any DA calculation provided by the Commission which Prokam subsequently relied upon in making planting decisions in that particular crop year should be reversed. BC Fresh's submission is limited to a review of past years only for the purpose of considering Prokam's DA for 2024/2025. In this context, however, it should be noted that, other than its acreage in russets in 2021, Prokam has not, since 2017, planted any potatoes in reliance upon a DA calculation provided by the Commission.

The issues for determination here are:

- (a) If no prior exclusions are to be revisited, how should the Commission determine Prokam's DA for 2024/2025 as prescribed by the General Orders?
- (b) If, on reconsideration, it is decided there should be some limited review of prior exclusions, how should the Commission determine Prokam's DA for 2024/2025 as prescribed by the General Orders?

THE DELIVERY ALLOCATION SCHEME

In BC Fresh's submission, the Commission has ample authority under the General Orders to undertake a consideration of Prokam's 2024/2025 DA other than by reference to a rolling 5 year average. This will achieve a result in keeping with the prescribed purposes and objectives of the DA scheme. It will also avoid prejudice to other producers in accessing their markets and utilizing their DA for the 2024/2025 crop year. Paragraph 49 of the General Orders provides that DA shall be established on a rolling 5 year average for Storage Crops, unless otherwise directed by the Commission. It is BC Fresh's submission

that the circumstances prevailing over the last 6 years warrant a direction from the Commission that Prokam's DA for 2024/2025 should not be determined based on a rolling 5 year average.

The DA scheme for potatoes, as a storage crop, is prescribed in the General Orders at paragraphs 38-62. DA is a fundamental cornerstone of the storage crop industry in BC. It is a mechanism to ensure the preservation of access to markets for producers who have served that market over time, as stated in the General Orders, paragraph 38 (a). The Commission's records are the best source of information to identify DA now held by other producers and the extent to which other producers have increased their DA since 2017

The Commission also, in the General Orders, paragraph 39, has authority, in circumstances where a producer or other person may realize a benefit or advantage from full utilization of their DA that is not consistent with the object and purpose the General Orders, to deny a producer that benefit or advantage. DA is a privilege granted under a license; it is not a right owned by a producer, General Orders, paragraph 40.

The General Orders, at paragraph 57, also include authority for the Commission to suspend a producer's delivery allocation for a period of time in the event a producer violates a Commission Order, which is defined to include a violation of the General Orders. In the 2019-02-28 BC FIRB decision (paras. 67-81), the BC FIRB confirmed the Commission's findings that Prokam had, in 2017, both shipped in excess of its DA and also shipped a type of potato for which it did not have any DA, in violation of the General Orders. Just as Prokam's conduct in 2017 will likely be reviewed in the appeal before the BC FIRB deciding Prokam's license class, the fact that Prokam violated the General Orders in 2017, the last year in which it shipped potatoes, should be actively considered in this review, notwithstanding the passage of time.

Paragraphs 39 and 57 of the General Orders provide authority to the Commission, whether or not it is determined that Prokam's DA should be considered by reference to a rolling 5 year average, to make orders to preserve market access for producers who have served their market and increased their DA since 2017. Prokam's evidence is that, but for the November 2021 floods, it was in preparation to ship russets in excess of its DA in Period C. (Prokam's Submission, Statement of Mr. Dhillon, page 12.). In the result, for the last two years that Prokam has grown potatoes for market, 2017 and 2021, Prokam has

either shipped (2017) or intended to ship (2021) in excess of its DA. The Commission has ample authority, as identified above, to address these practices of Prokam in determining Prokam's DA for 2024/2025 to achieve a fair result having regard for the interests of all stakeholders.

If Prokam is granted DA for 2024/2025 at the same volumes as for its DA in 2017/18 then, after a 6 year absence from the market, it would enjoy a benefit or advantage to the prejudice of other producers contrary to the purpose of the DA scheme to preserve market access for those producers.

Having not shipped potatoes since 2017, Prokam has vacated the market it was shipping to in 2017. Since that market was vacated by Prokam, other participating producers have increased their production and in-filled that market and by doing so have increased their respective DA. It would be contrary to paragraph 39 of the General Orders to allow Prokam, in 2024/2025, to simply now decide to step back into the market requiring other producers to stand aside and incur the prejudice flowing from not being permitted to fully utilize their hard-earned DA in 2024/2025. This prejudice can be averted by managing Prokam's DA with adjustments or postponements during certain periods of the year when DA is triggered.

The benefit or advantage to be addressed under General Order 39 is not necessarily a benefit or advantage that has accrued to a producer wrongfully. General Orders 38 and 39 recognize that, given the complexity of the scheme and the challenges of agriculture, circumstances may arise where adjustments or postponements to a producer's DA may be necessary with or without misconduct.

An important consideration here are the decisions of Prokam, since 2017, to use its lands, directly or by renting to an associated entity, to grow unregulated crops for various years instead of potatoes. The evidence establishes a practice of Prokam to rent its lands to an associated company, Sam Enterprises Ltd, to grow squash during the period under consideration (See Prokam Submission, Statement of Mr Dhillon, page 12, question 46 where Mr Dhillon confirms that, in 2023, Prokam "continued in the same arrangement with the land, ie. renting it to Sam Dhillon", underlining added.) Prokam also rented its lands to Sam Enterprises Ltd in February of 2020, (Commission Appendices, Ex H, page 2). Again, whether this information is considered in the context of the Commission exercising its supervisory authority over the DA scheme or in the context of a DA freeze, the evidence establishes that Prokam decided not to grow potatoes for a number of years since 2017 and that must be considered in determining the adjustments or postponements necessary to achieve a fair result for all stakeholders for crop year 2024/2025.

A primary excuse of Prokam for deciding not to grow potatoes is that the Commission and the BC FIRB had directed Prokam to ship its regulated produce using BC Fresh as its agency. An obligation to comply with an order of the VMC, confirmed by the BC FIRB on appeal, is not an excuse not to grow potatoes.

General Order 48 provides that it is only recorded shipments through an Agency that shall be used for the calculation of DA levels or adjustments. The DA system is fundamentally based on potatoes shipped during a given period or year. Accordingly, although the word “freeze” is commonly used in regard to a year in which a producer does not ship potatoes, the term is a bit of misnomer. When DA is “frozen” for a year, the producer is not deemed to have shipped a particular volume of potatoes during the year in which the freeze occurs. If shipments were deemed to have occurred at the same level as a previous year, then a producer’s rolling 5 year average may be artificially increased. With respect, the correct description is either as an exemption or the exclusion of a year from the calculation, as described in the BC FIRB decisions excluding crop years 2018/2019 and 2019/2020 when calculating Prokam’s DA. Paragraph 4 of the General Orders vests the Commission with an authority to grant exemptions. Prokam’s DA for 2024/2025 should not be considered in this review using a hypothetical assumption that Prokam continued to produce potatoes from 2017 to 2023.

The records of the Commission reflect very substantial growth in shipped potato volumes since 2017. To avoid undue benefit or advantage accruing to Prokam and unfair prejudice to producers participating over the last five years, it must not be assumed that the market in 2013-2017 is the same as the market in 2018-2024. Such an assumption would operate to the prejudice of participating producers and, in turn, provide Prokam with an undue benefit or advantage. The potato market has not been static since 2017.

The Commission has the necessary tools to address this undue benefit, making adjustments to Prokam’s DA in order to preserve participating producer’s access to their markets. In the periods of the crop year where supply exceeds demand, and after DA has commenced for that period, market access should occur for other producers as prescribed under the standard method in the General Orders, paragraph 52. In particular, full and timely utilization of their DA should be available. During these periods of the crop year, Prokam’s shipments should be managed in a manner similar to the prescribed process for the marketing of new or additional product in General Orders 163-166 which is designed to avoid prejudice to participating producers while allowing for industry growth.

This manner of moving forward is fair and, indeed, is remarkably similar to the requirements in the order of the BC FIRB in paragraph 133(b) of Phase II Decision of March 15, 2024. The order requires Prokam and its agency to confirm, for the next 24 months, that any marketing of Prokam's potatoes is in compliance with Prokam's DA and/or Commission approval. This direction makes it clear that the Commission is to undertake ongoing supervision of Prokam's shipments. It is assumed that the first quarterly reports from Prokam and its agency will have been provided to the Commission by now as ordered by the BC FIRB. Any planting by Prokam and the marketing plan of its agency need to be thoroughly reviewed and subject to adjustment to accord with the objects and purposes of the DA scheme.

The Commission has advised that Prokam was not a licenced producer for the 2023/2024 crop year and has not advised that Prokam is a licensed producer for the 2024/2025 crop year. General Order 25 (b) provides that a producer must obtain a license annually from the Commission. DA is a privilege held under a license, General Orders, paragraph 40. Where a producer is not licensed, it does not enjoy the privileges of a DA. If Prokam is not licenced, the DA in issue in this review should be zero. The failure to be licensed in 2023/2024 is not without consequences given the requirement in the General Orders that licenses are to renewed annually. The General Orders do not anticipate a producer maintaining its DA in a year in which it is not licensed.

General Order 56 provides that where a producer ceases production for two consecutive years, then the Commission shall rescind that producer's DA. Since 2017, Prokam has produced potatoes only in 2021. The operation of General Order 56 is not conditional upon the manner in which a producer's DA is calculated and, in particular, is not conditional on whether or not certain years are excluded from those calculations. In any event, the purpose of General Order 56, anticipating a producers' ongoing participation in the scheme, is a factor for consideration in determining Prokam's DA for 2024/2025. This is particularly important given Prokam's decisions to grow other crops and where Prokam decided not to maintain its producer's license. Both the Commission in its decision granting the 2020 exemption (Commission Appendices, Ex H, page 5) and the BC FIRB told Prokam, in the context of granting exemptions, that a failure to produce in future years could have consequences.

THE CROP YEARS PREVIOUSLY EXCLUDED FROM DA CALCULATION

As stated above, BC Fresh respectfully requests that the Commission reconsider certain past decisions to exclude certain years when calculating Prokam's DA for crop year 2024/2025. It is submitted it is fair to re-consider decisions that were not intended to be final, were conditional, are shown to have been based on incorrect or unverified information, or were made in error.

The decisions of BC FIRB as to crop years 2018/2019 and 2019/2020 are accepted as intended to be final. The decision of the Commission to exclude crop year 2020/2021 was clearly made with intent to reserve the Commission's future jurisdiction depending on Prokam's planting in 2021/2022.

Also, with respect, the calculation of Prokam's DA for 2021/2022 excluding red, white and yellow potatoes from the calculation is not reasonable given that Prokam decided not to plant red, white or yellow potatoes in 2021 but, instead, decided to plant only russets.

There is no prejudice arising for Prokam from a review of the 2020/2021 and 2022/2023 exclusions or the calculation of DA for 2021/2022. Prokam was aware the 2020/2021 exclusion was conditional and that the Commission had reserved the right rescind the exclusion. Prokam never relied on any of the exclusions to plant potatoes at a given acreage for years following the grant of an exclusion.

If the Commission is prepared to reconsider the 2020/2021 and the 2022/2023 exclusions or the 2021/2022 calculation, BC Fresh asks that the following information be considered:

1. Crop year 2020/2021--In his interview with Hearing Counsel in the Allegations Supervisory Review, Phase II, on July 19, 2023, Mr. Dhillon advised that Prokam had not grown potatoes in 2020 because of issues with BC Fresh. The Commission had previously directed Prokam to enter into a GMA with BC Fresh, however, Prokam refused to plant potatoes for shipment and sale with BC Fresh as its agency during the course of that agreement. Mr. Dhillon raised issues regarding labour and seed availability for the 2020/2021 crop year, however, the bulk of the evidence in regard to Prokam's business decisions not to plant potatoes in 2020 (or any year during the three year GMA with BC Fresh) was clearly due to its refusal to deal with BC Fresh. This refusal to

abide by the decision of the Commission as to how Prokam may ship potatoes is not a justification for an exclusion for 2020/2021.

2. Prokam's letter of May 5, 2020 (cited at BCVMC Appendices, Ex. H) to the Commission applying for a 2020/2021 DA freeze makes it clear that Prokam made a business decision not to order seed for planting potatoes until there was a determination of its application for a producer/shipper license. Instead of planting potatoes in 2020, Prokam, through its related company, Sam Enterprises Ltd, planted unregulated crops in its fields. The allegation as to labour shortages for growing potatoes rings hollow as unregulated crops such as squash require more labour effort than potatoes (as noted by the Panel at Ex. H, BCVMC Appendices).
3. The decision of the Commission on November 17, 2020 to approve Prokam's DA freeze for crop year 2020/2021 due to some circumstances relating to securing labor and seed should be reviewed as it was a business decision of Prokam not to order seed and it had the labour required to grow crops in its fields in 2020 that require more labour than potatoes. Since the November 17, 2020 decision of the Panel, Mr. Dhillon has been found by the BC FIRB to be a witness having significant credibility issues and to exhibit many of the characteristics of an evasive and untruthful witness (Paras 83 and 85, Allegations Supervisory Review, Phase I, July 14, 2022.). Accordingly, in considering the evidence in this review, findings should not be based on the evidence of Mr. Dhillon alone, without reliable evidence corroborating his evidence, for all crop years under review.
4. In its decision of November 17, 2020 (Commission Appendices, Ex. H, page 5), the Commission Panel notes that:
 - (a) It was felt a freeze request will not be granted again and if Prokam does not plant this year (ie, crop year 2021/2022) the delivery allocation can be rescinded; and
 - (b) It is expected that Prokam will be taking all reasonable steps to produce their delivery allocation in the 2021/22 Crop Year.

5. Prokam did not take steps to produce its delivery allocation in the 2021/2022 crop year. It planted 20 acres of russets and did not plant any red, yellow or white potatoes. The Commission should consider whether, now that it is known that Prokam did not, in 2021, plant all types of potatoes for which it held DA, the 2020/2021 DA exemption should be rescinded, in whole or in part.
6. Crop Year 2021-2022--Mr. Dhillon's evidence in his interview with Hearing Counsel in Phase II of the Allegations Supervisory Review was that, as of November 2021, Prokam had harvested, and had ready for shipment, 288 tons of russets. Prokam did not plant reds, whites or yellows in crop year 2021/2022 and there is, thus, no reason to exclude Prokam's DA for reds, whites and yellows from the DA calculation for crop year 2021/2022.
7. Prokam's evidence is that 288 tons of russets were ready for shipment to Thomas Fresh the day the November 2021 floods occurred in the Sumas Prairie. Prokam's delivery allocation during this period of the crop year (Period C) was 79.30 tons. Once again, the evidence shows that Prokam was planning to act in violation of the General Orders by making shipments to Thomas Fresh grossly in excess of its DA.
8. Crop year 2022/2023 - there must be an investigation as to whether Prokam's land was used for harvesting non-regulated crops during crop year 2022/2023, as in previous years. Given the credibility findings against Mr. Dhillon, in order to ensure that other growers who comply with the General Orders are not unfairly prejudiced, there should be independent confirmation that potatoes could not be grown on Prokam's land and whether other crops were grown on Prokam's lands. As a consequence of the November 2021 floods, certain growers of BC Fresh applied for exclusions for the 2021/2022 crop year caused by loss of beets in the field and in storage. All BC Fresh producers of potatoes in the Sumas Prairie planted and shipped potatoes for the 2022/2023 crop year. BC Fresh stressed to the Commission the importance of verifying by investigation all information relating to exclusions sought for the 2022/2023 crop year from producers in the Sumas Prairie. In the context of this review, it is necessary for the Commission to verify whether Prokam lands were used for growing unregulated crop during crop year 2022/2023.
9. Crop Year 2023/2024 - In regard to crop year 2023/2024, paragraph 21 of the Commission's Requests for Written Submissions in this matter states that Prokam did not hold a producer's

licence for the 2023/2024 crop year. Only a licenced producer can hold DA. There is no basis or entitlement for any kind of DA exemption for the 2023/2024 crop year.

10. Prokam's evidence is that it advised its agency, Okanagan Grown Produce Ltd. that it intended to grow potatoes in 2023 and provided its intended volumes of potatoes but then decided not to grow potatoes in 2023. (Statement of Liliian Posch, (Prokam Submission, pages 17-18) Even if the licensing issue is overlooked, which it should not be, there is no basis to exclude crop year 2023/2024 from Prokam's DA calculation for crop year 2024/2024.

In conclusion, BC Fresh welcomes this process and sincerely hopes that it results in answering questions and providing resolution of issues that have arisen in the industry regarding the regulation of Prokam as a producer of regulated crop who has not shipped a potato since 2017, a year in which it acted contrary to the General Orders and caused much disturbance in the industry, which continued into the years ahead.

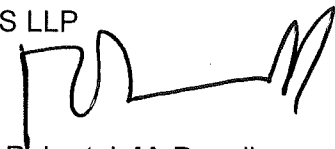
As detailed above, the Commission has ample authority to undertake a consideration of Prokam's DA for crop year 2024/2025 and manage it by making appropriate exclusions or adjustments to achieve a fair result having regard to the facts and circumstances arising over the last 6 years and the interests of all stakeholders.

Thank you for your consideration of the above.

Yours truly,

FARRIS LLP

Per:



Robert J. McDonell

RJM/ls