

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
THE PRIOR APPROVAL OF THE BRITISH COLUMBIA VEGETABLE MARKETING
COMMISSION DECISION OF PROKAM'S DELIVERY ALLOCATION FOR THE
2024/25 SEASON

October 16, 2024

Decision Summary

1. Having conducted its own submission process, the BC Farm Industry Review Board (BCFIRB) prior approves the BC Vegetable Marketing Commission's (Vegetable Commission) July 18, 2024, decision confirming Prokam's Class III licence and delivery allocation (DA) for the 2024/25 season.

Introduction

2. In its Allegations Review Phase II Decision issued on March 15, 2024, BCFIRB directed that "any future consideration of Prokam's DA and licence class must be considered through a transparent process with an opportunity for submission by all stakeholders, and subject to prior approval by BCFIRB"¹.
3. On July 18, 2024, and after completing a submission process, the Vegetable Commission issued its decision setting Prokam's DA for the 2024/25 season based on its calculation of Prokam's 5-year rolling average, and leaving any future consideration of Prokam's licence class to be addressed in the context of Appeal #N1908, which is no longer in abeyance given the resolution of BCFIRB's supervisory processes.
4. On August 23, 2024, BCFIRB established the scope of this prior approval and sought written submissions from stakeholders who participated in the Vegetable Commission's process and wished to take a position in BCFIRB's prior approval process. As a first step, BCFIRB asked the Vegetable Commission to provide clarification around Prokam's licence class, following which stakeholders provided submissions according to the established schedule.

Issues

5. Was the process followed by the Vegetable Commission for determining Prokam's DA transparent and consistent with BCFIRB direction?
6. Was the process followed by the Vegetable Commission for determining Prokam's licence class transparent and consistent with BCFIRB direction?
7. Are there any deficiencies in the Vegetable Commission process that need to be addressed by BCFIRB?

¹ 2024 March 15. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and Allegations of Bad Faith and Unlawful Activity Review Phase II Decision](#) (Phase II Decision), at paragraph 133.

Legal Framework

8. Under section 7.1(1) of the *Natural Products Marketing (BC) Act* (NPMA), BCFIRB has general supervision over all marketing boards or commissions established under this Act.
9. Under section 7.1(2) of the NPMA, BCFIRB may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.

Process

Vegetable Commission Process

10. On April 24, 2024, the Vegetable Commission issued a Bulletin to participants in the regulated vegetable industry, inviting written submissions regarding Prokam's DA by May 8, 2024. The Bulletin advised stakeholders that ongoing issues concerning Prokam's licence class would be addressed in the context of Appeal #N1908, which was no longer in abeyance following the conclusion of the Phase II decision. A total of 12 submissions were received from various stakeholders, including growers and agencies, addressing the issues of process and DA. Reply submissions were originally due by May 17, 2024.
11. On May 14, 2024, BCFresh requested an extension to submit its reply and posed several questions regarding the DA freeze for Prokam in the 2021/22 season. Prokam opposed this extension, emphasizing the urgency of determining its DA. Ultimately, the Vegetable Commission granted the extension and provided the requested information. Following additional submissions, the Vegetable Commission convened a panel and issued a decision on July 18, 2024, setting Prokam's DA for the 2024/25 season, pending approval from BCFIRB.

BCFIRB Prior Approval Process

12. On August 23, 2024, BCFIRB established the scope of this prior approval process to address:
 - a. The process the Vegetable Commission followed;
 - b. The substantive result calculating Prokam's DA for the 2024/25 season;
and
 - c. Prokam's licence class.
13. BCFIRB's prior approval role is to consider these issues, address procedural defects (if any), and to assess whether the Vegetable Commission's rationale and recommendation accords with BCFIRB direction, SAFETI² principles, and sound marketing policy.

² Strategic, Accountable, Fair, Effective, Transparent, and Inclusive.

14. BCFIRB sought written submissions from stakeholders who participated in the Vegetable Commission's process and who wished to take a position in BCFIRB's prior approval process.
15. BCFIRB also sought and received clarification from the Vegetable Commission regarding the deferral of Prokam's licence class decision to Appeal #N1908.
16. BCFIRB then sought input from stakeholders on any concerns regarding the Vegetable Commission's process in making its decision on Prokam's DA. Additionally, BCFIRB requested feedback on whether stakeholders agreed with the Vegetable Commission's calculation of Prokam's DA for the 2024/25 season.
17. BCFIRB received a clarification submission from the Vegetable Commission, and submissions from BCFresh and Prokam. The Vegetable Commission did not provide a reply submission to BCFresh and Prokam's submissions.

Analysis

18. BCFIRB must first consider whether the Vegetable Commission followed a transparent process. This includes determining if the Vegetable Commission's process in issuing the DA, and new Class III licence for the 2024/25 season, was conducted transparently and allowed for appropriate stakeholder input.
19. For Prokam's DA, BCFIRB observes that the Vegetable Commission provided an opportunity for submissions by all stakeholders on a reasonable schedule. The deadline was also extended after a stakeholder's request, and when a stakeholder asked specific questions of the Vegetable Commission, the Vegetable Commission provided answers which were shared with all stakeholders. Accordingly, and given that no stakeholders have raised or identified any deficiencies in the Vegetable Commission's process, BCFIRB is satisfied that the Vegetable Commission's process was sufficiently transparent for determining Prokam's DA.
20. For Prokam's licence class, the Vegetable Commission has clarified it did not defer the decision on Prokam's licence class to Appeal #N1908 but rather applied its November 18, 2019, decision (Reconsideration Decision)³, which determined that Prokam would receive a Class III licence upon recommencing the growing of regulated vegetables. The Vegetable Commission confirmed that Prokam has not engaged in the growing of regulated vegetables as a licensed producer since the Reconsideration Decision in 2019 and as such, its licence class remains at Class III should it resume producing regulated vegetables. The Vegetable Commission acknowledges that Prokam produced a small crop of potatoes in the 2023/24 season but did not market them through its designated agency or apply

³ November 18, 2019. BC Vegetable Marketing Commission. *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.* (Reconsideration Decision).

for a producer licence. As a result, it did not meet the requirement of growing regulated vegetables as a licensed producer for one year, leading the Vegetable Commission to conclude that Prokam's limited production did not justify any change in licence class.

21. BCFIRB notes that the Phase II Decision directed the Vegetable Commission to follow a transparent process with an opportunity for stakeholders to make submissions in its consideration of Prokam's license class. The process appears to have been that Prokam applied and paid for a Class III licence for the 2024/25 season, which the Vegetable Commission subsequently issued. BCFIRB understands that the issuance of a licence is more of an administrative act which in the normal course does not attract the same need for stakeholder input. BCFIRB's request for clarification from the Vegetable Commission at the outset of the prior approval process allowed all stakeholders, including Prokam, to provide input on the license class decision. Significantly, no one challenged the issuance of a Class III licence to Prokam on the basis clarified by the Vegetable Commission. As stakeholders had an opportunity to provide input to BCFIRB on Prokam's licence class, any deficiency in transparency which may have existed in the Vegetable Commission's process has been rectified and the issuance of a Class III licence to Prokam is accordingly approved. For completeness, it should be noted that the Vegetable Commission's Reconsideration Decision is under appeal and arguments heard in that appeal could result in a change to Prokam's licence class.
22. Turning now to the substantive issue of Prokam's DA, the Vegetable Commission was directed to conduct a transparent process with an opportunity for stakeholders to make submissions. This requirement was established to address the arguments advanced by BCFresh in the Allegations Review. Specifically, BCFresh argued that the interests of those growers who have filled Prokam's DA over the past six years needed to be considered in any decision-making process involving Prokam's DA.

The Vegetable Commission Decision

23. In its decision, the Vegetable Commission addressed BCFresh's argument that in the years Prokam vacated the market, other producers increased production to in-fill that market and increased their respective DA. BCFresh argued it would be contrary to the General Order to simply allow Prokam to step back into the market and require other producers to stand aside and not fully utilize their DA in the 2024/25 season.
24. After noting Prokam's response that BCFresh was wrongly treating DA in a manner akin to quota, the Vegetable Commission concluded as follows:
 - Reading the General Order as a whole, it is clear that DA is not intended to operate as "quota", but rather as a means to ensure that Agencies treat

their growers fairly when there is more product available than can be sold by that Agency in a given period. (para. 27)

- As DA defines a grower's "place in the queue" relative to other growers shipping to the same agency, it is unlikely that one grower's DA could detrimentally affect another Agency, or another Agency's growers, in the way suggested by BCFresh. (para. 28)
- To the extent that BCFresh and its growers express concern that markets serviced by BCFresh might be disrupted by the activities of other agencies, these concerns can be managed by adequate agency oversight and their marketing plans. (para. 30)

25. Having addressed that argument, the Vegetable Commission went on to consider the effect of its decision to "freeze" Prokam's DA and concluded as follows at paragraph 35:

"...where Delivery Allocation is "frozen", the frozen years are excluded from the calculation and the Commission reaches back to past years, to the extent necessary, in order to calculate a rolling 5-year average."

26. The Vegetable Commission addressed BCFresh's argument that the process should have gone further and required Prokam to explain the circumstances surrounding its non-production years to allow the previous freeze decisions to be reconsidered. Presumably, BCFresh was seeking to challenge the appropriateness of past freeze decisions, such that zero production years were not exempted but instead included in the 5-year rolling average which would result in considerably lower DA calculations. The Vegetable Commission rejected this approach.
27. The Vegetable Commission also addressed Prokam's argument that its DA should be calculated as if it had been granted a freeze for the 2023/24 season despite not applying for one, as it made planting decisions on the assumption that there would be no reduction to its DA despite not having shipped any product in the previous season. The Vegetable Commission concluded that the General Order is clear that DA is established on a 5-year rolling average and Prokam did not require guidance on that point. To calculate a 5-year rolling average, the Vegetable Commission counted non-exempted production years back to the 2014/15 season and set Prokam's DA accordingly for the 2024/25 season.

BCFIRB Prior Approval Process Submissions

28. In its submission to BCFIRB, BCFresh disagreed with the Vegetable Commission's DA calculation for several reasons. BCFresh argued that to ensure a transparent process, including input from Prokam about its lack of production of regulated product, the Vegetable Commission needed to consider its past decisions made in

relation to Prokam's DA, and the legitimacy of Prokam's reasons for non-production in those years. The Vegetable Commission declined to undertake that exercise on the basis that BCFIRB's direction on "future consideration" was a clear indication that it should not engage in any retroactive or retrospective review of previous decisions related to Prokam's DA. BCFresh also emphasized that DA should not be seen merely as an administrative tool, pointing out that the Vegetable Commission failed to recognize the potential impact of Prokam's DA issuance on other BC growers who grew regulated product for the market when Prokam did not.

29. In its submission, Prokam accepted the Vegetable Commission's DA calculations, despite its prior request for a freeze being rejected. In response to BCFresh's argument, Prokam argued that while BCFIRB directed a transparent process regarding Prokam's DA, it did not require the Vegetable Commission to re-evaluate those previous decisions. Prokam provided explanations for its lack of potato production during the Vegetable Commission's process. Prokam agreed with the Vegetable Commission's interpretation of DA as defined in its General Orders, and rejected BCFresh's claims that a decision related to its DA could harm other producers from other agencies.

Decision

30. In issuing the Phase II Decision, BCFIRB did not direct the process the Vegetable Commission needed to follow beyond the stated expectation that any process be transparent and allow for stakeholder input. The decision noted that neither the Vegetable Commission nor any of the other Phase II participants provided substantive submissions on exactly what that process needed to entail and anticipated that the Vegetable Commission may require further direction from BCFIRB. No such direction was sought.
31. BCFIRB is satisfied that the Vegetable Commission conducted a transparent process which allowed for appropriate stakeholder input. Prokam provided submissions to the Vegetable Commission explaining its reasons for not producing regulated product at various times and the Vegetable Commission considered these reasons in its decision. The Vegetable Commission provided an opportunity for producers and agencies to provide input, opportunity that was also provided within the BCFIRB process.
32. BCFIRB disagrees with BCFresh's argument, advanced both before the Vegetable Commission and in this process, that the Vegetable Commission was required to do more and determine whether previous freeze decisions were made in error. BCFIRB agrees with the Vegetable Commission that reconsidering past "freeze" decisions will not contribute to orderly marketing. At some point, decisions must be final and not open to reconsideration, especially where those decisions were subject to a right of appeal.

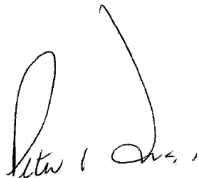
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33. Turning now to a consideration of DA, BCFIRB understands DA to be a regulatory tool used by agencies to ensure orderly marketing. It is not akin to "quota" but instead authorizes a producer to deliver a specific amount of regulated product within a specified time period to an agency, or to market as otherwise directed or approved by the Vegetable Commission. BCFIRB agrees with the Vegetable Commission's interpretation that a grower's DA defines that grower's "place in the queue" relative to other growers shipping to the same agency and that one grower's DA is unlikely to negatively impact another agency or its growers.
34. BCFIRB is also satisfied the Vegetable Commission's process considered the potential disruptive effect of Prokam's DA on other agencies' growers. Significantly, the Vegetable Commission points to the ability of agencies to manage any market disruption through agency oversight and marketing plans and concluded that the concerns raised by BCFresh regarding detrimental impacts resulting from Prokam's DA were not substantiated.
35. BCFIRB observes that the Vegetable Commission used a 5-year rolling average, excluding "frozen" years, to calculate Prokam's DA. While BCFIRB notes that the language regarding DA in the Vegetable Commission's General Order could be clearer, all stakeholders agreed that the effect of a "freeze" of DA obliges the Vegetable Commission to exclude frozen years from a DA calculation. This approach is consistent with the General Order and previous DA decisions made by the Vegetable Commission and on this basis, BCFIRB accepts the Vegetable Commission's calculations of Prokam's DA.
36. BCFIRB concludes the Vegetable Commission conducted a transparent process; its decision-making was thorough and demonstrated a forward-looking approach, consistent with its General Order and SAFETI.
37. Having conducted its own submission process and analysis, BCFIRB prior approves the Vegetable Commission's July 18, 2024, decision confirming Prokam's Class III license and DA for the 2024/35 season.

Dated at Victoria, British Columbia this 16th day of October 2024.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Peter Donkers
BCFIRB Chair