



August 29 , 2017

File: 44200-20 QUORUM

DELIVERED BY E-MAIL

To: Executive Directors
All Commodity Boards and Commissions

Re: QUORUM AND CONFLICT OF INTEREST

Introduction

The purpose of this letter is to notify you that BCFIRB intends to consider whether to issue supervisory directions to commodity boards and commissions regarding the requirement to ensure that there is always a proper quorum for the statutory decisions the boards and commissions are required to make. While the nature and scope of any potential supervisory directions on proper quorum have yet to be determined, a few issues have arisen over the last few months with some of the commodity boards indicating that such directions may be timely and useful.

As many of you are aware, managing quorum as part of commodity board decision making is an important aspect of good governance. Without a quorum, commodity board statutory decisions are void.

However, it is not always clear on what constitutes quorum, and, in relation, how to manage conflict of interest. Especially given the inherent conflicts posed by commodity board composition. As you've all experienced, these issues come to the fore most often where a concern arises as to whether one or more board or commission members should recuse themselves from participating in a particular decision based on a potential conflict of interest.

BCFIRB has instructed me to provide you with this detailed letter setting out the background and the issues as BCFIRB staff currently see them. We are aware that your boards and commissions have to address these kinds of issues on an ongoing basis. Your responses to this letter are invited before BCFIRB makes a supervisory decision.

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Farm Industry Review Board**

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The Importance of Quorum

Commodity boards and commissions are created by statute and take their authority from that source. To exercise statutory powers, and to make statutory decisions affecting stakeholders, their decisions must be in accordance with the law.

It is a basic legal principle that a valid statutory decision requires a proper quorum. A leading administrative law textbook describes the law this way:

Where there is more than one decision-maker, the governing legislation will often stipulate the minimum number of persons required to make a decision. And where fewer than the minimum number of persons take part in making the decision, or persons making the decision are not validly appointed, the decision will be set aside.¹

The same textbook states:

...where more persons than are required for a quorum begin to hear a matter, but some leave the hearing before the decision is reached, the decision will nevertheless be validly made by the remaining persons, provided that they constitute a quorum... Of course, if any of the persons constituting a quorum absent themselves from the hearing ... the decision will be set aside for lack of quorum....²

Another author has stated that “the purpose of a quorum is to serve the public interest through the collective wisdom of a minimum number of members.”³ ***The Difference between quorum and majority***

There is a difference between a quorum and a majority.

A quorum is the minimum number of members required to deliberate and decide before a legally valid decision can be made. Without a minimum quorum, there is no jurisdiction to make a decision. A majority, on the other hand, is the “majority rules” principle where there is otherwise a quorum.

Therefore, if a quorum is 3, a majority is 2. However, unless authorized by legislation, this does not mean that 2 people only could be the quorum to make the decision.

How do commodity boards and commissions determine quorum?

Section 3(m) of the *Natural Products Marketing Act Regulations* (the *NPMA Regulation*) explains how quorum is determined for the boards and commissions:

3 Except as otherwise provided in a scheme established by order in council pursuant to the Act, every marketing board or commission shall have the following subsidiary powers, duties and obligations and shall be subject to the following limitations:

¹ Brown and Evans, *Judicial Review of Administrative Action in Canada* (Looseleaf, 2017), p. 12-26.

² Brown and Evans, p. 12-27.

³ Blake in *Administrative Law in Canada* (5th ed, 2011) at p. 87.

(m) a majority of the members of any marketing board or commission shall constitute a quorum and all matters shall be decided by a majority vote of the members present provided that a resolution in writing signed by all members shall be as valid as if passed at a meeting regularly called and properly constituted.

Determining quorum requires a board or commission to ask what is “a majority of the members of any marketing board or commission”? The answer depends on the terms of the *Scheme* creating the board or commission in question. Assuming each board or commission has a full complement of members, the quorum for each of the boards and commissions is as follows:

Broiler Hatching Egg Commission: The Broiler Hatching Egg Commission is established as a five member board, one of whom is appointed by Cabinet, and four being registered producers elected by registered producers.⁴ Quorum = 3.

Chicken Marketing Board: The Chicken Board is established as a five member board, three of whom are appointed by Cabinet, and two of whom are registered producers elected by registered producers.⁵ Quorum = 3.

Egg Marketing Board: The Egg Board is established as a five member board, one of whom is appointed by Cabinet, and four being registered producers elected by registered producers.⁶ Quorum = 3.

Hog Commission: The Hog Commission is established to consist of a Chair appointed by Cabinet and “*up to*” 5 members who are registered producers elected by registered producers.⁷ Quorum depends on how many members have been elected, since the quorum in s. 3(m) is based on “the members”. Quorum = 3 if there are 4 elected members. Quorum = 4 if there are 5 elected members.

Milk Marketing Board: The Milk Marketing Board is established as a 6 member board, consisting of a chair appointed by Cabinet, four members who are licensed producers elected by licensed producers and one member who is not a licensed producer, appointed by the Milk Industry Advisory Committee.⁸ Quorum = 4.

Turkey Marketing Board: The Turkey Marketing Board is established to consist of a Chair appointed by Cabinet, “*must*” include 3 members who are registered growers, elected by the registered growers”, and “*may* include 1 additional member who is a registered grower, elected by registered growers”.⁹ Quorum = 3 (regardless of whether there are 3 or 4 elected members).

⁴ *British Columbia Broiler Hatching Egg Scheme*, B.C. Reg. 432/88, s. 3.

⁵ *British Columbia Chicken Marketing Scheme, 1961*, B.C. Reg. 188/61, s. 3.02.

⁶ *British Columbia Egg Marketing Scheme, 1967*, B.C. Reg. 173/67, s. 18.

⁷ *British Columbia Hog Marketing Scheme*, B.C. Reg. 109/80, s. 4(2).

⁸ *British Columbia Milk Marketing Board Regulation*, B.C. Reg. 167/94, s. 3.

⁹ *British Columbia Turkey Marketing Scheme*, B.C. Reg. 174/66, s. 18.

Vegetable Marketing Commission: The Vegetable Commission is established to consist of a Chair appointed by Cabinet and “up to” 8 members who are commercial producers, elected by the commercial producers.¹⁰ Quorum = 5 if there are 7 or 8 elected members. Quorum = 4 if there are 5 or 6 elected members.

As noted in section 3(m) of the *NPMA Regulation*, if a quorum exists to make a particular statutory decision, then the majority vote rules.

Vacancy and quorum

Situations arise where there is a vacancy in board membership. Section 3(d) of the *NPMA Regulation* makes clear that you can still operate, until a vacancy is filled, where membership consists of 3 or more members:

3 Except as otherwise provided in a scheme established by order in council pursuant to the Act, every marketing board or commission shall have the following subsidiary powers, duties and obligations and shall be subject to the following limitations:

(d) in the event of any vacancy in the membership of any marketing board or commission, where such membership consists of 3 or more members, the remaining members shall constitute the board or commission until the vacancy is filled.

The *NPMA* creates special rules allowing vacancies to be filled depending on whether the remaining members constitute a quorum:

- If the remaining members otherwise constitute a quorum, the commodity board or commission can fill the vacancy with BCFIRB approval:

NPMA Regulation, s. 3(g):

...if any vacancy occurs in the membership of any marketing board or commission by reason of death or through any member ceasing to hold office as aforesaid, the remaining members, if constituting a quorum, may appoint a member to fill the vacancy, the said appointment to be subject to approval by the Provincial board [emphasis added]

- If the remaining members do not otherwise constitute a quorum, only BCFIRB can fill the vacancy:

NPMA Regulation, s. 4(d):

The Provincial board shall have a general supervision over the operations of all marketing boards, commissions or their designated agencies constituted or authorized under the Act and without limiting the generality of the foregoing may

(d) fill any vacancy in the membership of any marketing board or commission when the member or members do not constitute a quorum.

¹⁰ *British Columbia Vegetable Marketing Scheme*, B.C Reg. 96/80, s. 3.

Conflict of interest and quorum

Commodity boards and commissions have always had to be conscious of quorum requirements, because quorum is basic to the authority to decide. In recent years, however, boards and commissions have also become increasingly concerned about avoiding the perception of conflict of interest. Individual members, citing conflict of interest, sometimes remove (or “recuse”) themselves from participating in certain board or commission decisions. In some situations, this can create a very difficult problem where one or more recusals does not leave enough remaining board members to constitute a quorum to make a decision.

With regard to this problem, one board recently suggested that if a board or commission starts out its *meeting* with the proper quorum of members, recusals based on conflict of interest might not affect the legality of a particular *decision* made during the meeting even if the number of board members participating in the actual decision is less than a quorum. On this view, the decision only has to be made by a majority vote of the “members present”, which would exclude members who have recused themselves. However, this suggestion may be difficult to square with the basic idea that quorum is about the minimum number of members required to even to make a lawful decision. It is not entirely apparent how a commodity board or commission’s legal authority to make a decision can vary depending on whether the decision was made at a single meeting that was only about that decision, or at a meeting where numerous other matters were also decided. BCFIRB is not currently aware of any legal authority that would support this view, which could render redundant the opening words of s. 3(m) of the *NPMA Regulation*, which are concerned with the exercise of statutory powers, not the mere holding of a meeting.¹¹ If the commodity boards and commissions are aware of legal authority or analysis to the contrary, they are invited to provide it for BCFIRB’s consideration.

Potential Solutions

Assuming there is not another valid interpretation of what quorum is for each of the boards and commissions, what is the preferred approach to this problem?

A regulatory solution

The ideal solution would be for the *NPMA Regulations* to offer a solution tailored to the regulated marketing context but based on that found in certain municipal statutes. For example, in British Columbia, s. 129(5) of the *Community Charter* allows a municipality to apply to court for an order allowing members disqualified by conflict of interest to participate in a vote if the number of remaining members falls below the quorum for the council.¹² In Ontario, the relevant municipal law statute states that if some members are disqualified by conflict of interest, the

¹¹ The *Interpretation Act* states: “an act or thing done by a majority of the members of the association present at a meeting, *if the members present constitute a quorum*, is deemed to have been done by the association”: s. 18(2)(c). This reiterates that majority rules where there is a quorum. It does not suggest that a meeting can start out with a quorum, after which one or two members can “do” acts or things because others have opted out of those decisions.

¹² Considered in *Re Port Clemens Village*, 2015 BCSC 1675.

remaining members are deemed to be the quorum.¹³ These types of “saving” provisions are necessary because municipal law statutes often contain stringent requirements that councilors recuse themselves where there are specific types of conflicts.

Section 4(d) of the *NPMA Regulation*, quoted above, currently authorizes BCFIRB only to fill any “vacancy in the membership” of any marketing board or commission when the member or members do not constitute a quorum. It does not deal with situations where quorum for a particular decision is lost because existing board or commission members recused themselves due to conflict of interest. BCFIRB intends to explore whether government is willing to amend the *Regulation* to address this problem.

Practical suggestions

Pending any legislative solution, and subject of course to your comments, the following practical suggestions are offered:

1. Commodity boards and commissions should move promptly to fill all vacancies as they arise. This mitigates the risk that a particular member’s recusal might create a quorum problem.
2. Commodity boards and commissions should strive to avoid “easy recusals”. Commodity boards are not like other statutory bodies. The *Schemes* all contemplate industry regulation by boards and commissions that include registered producers. A degree of “conflict” is therefore lawful and accepted as being built into their structure. Reference is made to BCFIRB’s 2013 supervisory decision arising out of the Vegetable Commission’s central Vancouver Island Agency designations:

47. ... As BCFIRB 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 interest 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 election results and must do their jobs to ensure, 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.¹⁴

¹³ Considered in *Ontario Public School Boards Assn. v. Ontario (A.G.)*, [1999] O.J. 2473 (O.S.C.) at para. 34.

¹⁴ http://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/supervisory-reviews/supervisory-review-decisions/bc-vegetable-marketing-commission-decisions/sup_rev_cvi_agencies_decision_jan07_13.pdf

3. Recusals should only be considered where a particular decision affects a particular board or commission member in a unique and significant way - where there is a “truly disqualifying conflict” that the law would recognize as giving rise to a reasonable apprehension of bias. Drawing these lines can be difficult in practice, and commodity boards are encouraged to obtain legal advice on these issues as they arise.
4. Where a conflict has been identified and gives rise to a quorum concern, one possible solution in *some* cases might be for a three person quorum, acting under s. 11(1)(p) of the *NPMA*, to delegate the decision to a smaller panel of the board or commission. This would limit the participation of a “conflicted” member to the preliminary decision to delegate, leaving the remaining “delegates” (unaffected by any conflict) to make the actual regulatory decision. I emphasize however that this mechanism is only possible for powers *other than* those set out in paragraphs 11(1)(f),(g), (h) and (i) of the *NPMA*.
5. Where the choice is between losing a quorum to make a particular decision, or having a “conflicted” member cast a vote to ensure a quorum, the requirement for quorum must prevail as a matter of necessity to avoid the legislation being frustrated: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.) at para. 58. For BCFIRB’s supervisory purposes, it would be important for the meeting minutes to note that conflicted members participated as a matter of necessity. Note also that the *NPMA* offers the safeguard that where an appeal is taken to BCFIRB from the board or commission decision in question, the appeal decision is essentially a new hearing made by an independent panel.
6. There may be highly exceptional circumstances where a commodity board or commission, due to conflict concerns, asks BCFIRB to step in proactively and to either make the decision in the exercise of its supervisory mandate or to issue directions to guide the board or commission process. I note BCFIRB has exercised this power in the past, albeit very sparingly. As BCFIRB stated in its 2013 supervisory decision, it is not generally an effective or strategic approach to industry level decision-making to exclude the commodity board or commission from exercising its responsibility.

As BCFIRB plans to start to address this issue at its October 2017 meetings, your comments with regard to this letter are requested no later than September 27, 2017.

As part of your response, please include a copy of your current conflict of interest policies for reference.

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All Commodity Boards and Commissions
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If you have any questions, please feel free to contact me.

Yours truly,



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Executive Director

Cc: BC Farm Industry Review Board

Jim Collins, Chair, BC Broiler Hatching Egg Commission
Robin Smith, Chair, BC Chicken Marketing Board
Jack Brown, Chair, BC Cranberry Marketing Commission
Brad Bond, Chair, BC Egg Marketing Board
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BCFIRB Website