

March 26, 2018

File No: 2997.001

BY EMAIL

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Gloria Chojnacki

Dear Sirs/Mesdames:

**Re: Thomas Fresh Inc. and Prokam Enterprises Ltd. v. BCVMC;
Appeal – *In Camera*, “Counsel’s Eyes Only” Hearing Order**

We write further to the portion of Friday’s decision on page 10 stating that BCFIRB is prepared to make an order that Mr. Driedger be permitted to give his evidence *in camera* such that members of the public and the appellants, although not appellants’ counsel, would be excluded from the hearing, and that “any procedural details can be addressed at the outset of the hearing”.

The request for an *in camera*, “for counsel’s eyes only” hearing was made by BCfresh by letter dated March 16, 2018. That letter indicated that Mr. Driedger’s evidence “will include highly sensitive confidential and competitive commercial information” and indicated that BCfresh would be prepared to address the matter “more fully at the hearing and as the Panel may find necessary”. No evidence was provided in support of the request.

My email later that day made three requests in relation to BCfresh’s letter:

- (1) as no documents have been produced by BCfresh, it sought confirmation that BCfresh does not intend to rely on any documents other than those produced by other parties to avoid any potential surprise at the hearing;
- (2) it sought confirmation as to the precise form of order BCfresh would be seeking, including whether it sought to exclude counsel; and
- (3) it sought a schedule for submissions on this issue in advance of the hearing.

By letter dated March 20, 2018, BCfresh indicated that it did not seek an order excluding counsel for the Appellants, but did intend that all non-counsel representatives of the Appellants be excluded, and also that counsel for the appellants would agree not to disclose the information in Mr. Driediger's evidence to any persons, including the Appellants.

No response has been provided to the request for confirmation as to whether BCfresh intends to rely on documents other than those produced by the Commission and the appellants. No schedule for submissions was sent and the appellants were not provided with an opportunity to be heard in relation to the order that Mr. Driediger be permitted to give his evidence *in camera* and on a "counsel's eyes only" basis.

While I appreciate that there may be an opportunity to make some submissions at the outset of the hearing in respect of this matter to address the "procedural details" described in Friday's decision, I wish to give notice of my position that permitting Mr. Driediger to give his evidence *in camera* and for "counsel's eyes only", particularly without requiring that BCfresh first establish—on evidence—a need for a protective order of some sort and that no less restrictive order would address that need, risks visiting a procedural unfairness on the Appellants that would amount to reviewable legal error.

The order requested by BCfresh should not be made without consideration of the strength of and evidence for the rationale for the requested exclusion of the parties, and of the prejudice to the Appellants ensuing from being excluded from hearing a portion of the evidence that is to be considered in an appeal of a decision in respect of which they are aggrieved. In considering the appropriate test for an application of section 42 of the ATA in *R. v. Ruskas*, 2009 CanLII 93186, the Chair of the Health Professions Review Board wrote as follows:

[20] Section 42 recognizes every party to a proceeding normally has the right to advance or defend its case based on access to the same relevant information as all other parties. This reflects the common law's strong inclination against "star chamber" proceedings where evidence is considered in private. However, this principle is not absolute. Occasions can arise where the nature of the evidence being considered by a tribunal is so sensitive that an exception to the usual rule must be made, because the risk of damage to the administration of justice caused by its disclosure to one or more parties outweighs the benefits of the usual principle of full disclosure.

[21] However, section 42 does not articulate a lax test. To make an order under s. 42, the tribunal must be of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice. Unless that test is met, the ordinary rule applies – full and equal disclosure of all relevant evidence to all parties.

While there are circumstances in which it may be consistent with the proper administration of justice for very sensitive evidence to be received on a “counsel’s eyes only” basis, courts have held that such circumstances are “very unusual” and that the “onus is on the moving party to establish the need for such a restriction on ordinary disclosure”: *Merck & Co. v. Apotex Inc.*, 2004 FC 567 (“*Merck*”) at para. 11. Even where there is evidence supporting the need for a protective order, it is an error of law to order that evidence be admitted on a “counsel’s eyes only” basis where the evidence does not support interference with the “normal solicitor-client relationship”, including the right of a party to consult with outside experts in respect of the evidence: *Merck* at para. 14.

It is a fundamental aspect of procedural fairness that a party is entitled to be present for the evidence given in proceedings in which they are named. In court proceedings, parties are not subject to witness exclusion orders, nor are they excluded from examinations for discovery, notwithstanding that these are not open to the public and are subject to an implied undertaking of confidentiality. “[A party] or the representative of the corporate [party] has an inherent right to attend all aspects of a proceeding including the examinations for discovery of the defendants subject to a party satisfying the court that an exclusion order is necessary to satisfy the ends of justice”: *Prudential Consulting Inc. v. Correia*, 2008 CanLII 41173 (ONSC) (“*Prudential*”) at para. 11. It would be a truly exceptional circumstance — and would certainly require clear and cogent evidence of such a circumstance — that would disentitle a party to be present for the entirety of proceedings.

In determining whether “an extraordinary measure like a ‘counsel’s eyes only’ order is appropriate” the “potentially deleterious effect on the defendants’ ability to conduct their case” must be considered: *Columbia Pictures Industries Inc. v. Wang*, 2008 SKQB 126 at para. 23. Courts acknowledge that orders to exclude parties interfere with the party’s ability to properly instruct counsel, for example if an order would prevent a party from discussing evidence with their counsel, reviewing hearing transcripts for the purpose of considering appeal or reading parts of the reasons for decision that discuss the evidence received *in camera*: *Murphy Oil Co. Ltd. v. Predator Corp. Ltd.*, 2002 ABQB 992 at para. 10-11. It is a fundamental aspect of the solicitor-client relationship that a lawyer is entitled to take instruction from his or her client in conducting cross examination. It has, accordingly, been held that a “counsel’s eyes only” order in respect of oral evidence which would restrict a party’s ability to attend at or receive information in respect of an examination for discovery would make it “impossible” for the cross-examining lawyer to conduct the examination without input from the “primary person knowledgeable of the factual matrix and who is instructing counsel on behalf of the [party]”: *Prudential* at para. 11.

BCfresh has provided no evidence of the reason the extraordinary order they seek is necessary and no indication as to the nature of the evidence Mr. Driediger intends to give so as to permit the appellants to cogently articulate the challenges that would be imposed on counsel should the appellants be excluded and counsel forced to cross-examine without



instructions. To make such an order without careful consideration of the evidence and law set out above would be in error.

Yours truly,

Hunter Litigation Chambers

Per: *Claire E. Hunter*

Claire E. Hunter

cc: Robert Hrabinsky, counsel for the BC Vegetable Marketing Commission (by email)
Robert McDonnell, counsel for BCfresh Inc. (by e-mail)