

July 19, 2021

File No.: 8006-029

VIA EMAIL: Wanda.Gorsuch@gov.bc.ca

Ms. Wanda Gorsuch
Manager, Issues and Planning
B.C. Farm Industry Review Board
780 Blanshard Street
Victoria, BC V8W 2H1

Robert P. Hrabinsky
Direct Tel: (604) 800-8026
Direct Fax: (604) 800-9026
Email: rhrabinsky@ahb-law.com

Dear Ms. Gorsuch:

Re: Supervisory Review into Allegations of Bad Faith and Unlawful Activity

On July 9, 2021, the BCFIRB invited submissions as follows:

- a. Prokam, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to Prokam during the period of this Review: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), Lodder (storage crop sector). Prokam is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on the panel. If this panel is not appropriate for any reason, the participants are invited to propose a panel that would be acceptable to them.
- b. CFP, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to CFP during the period of this Review: Chair Etsell and commissioners Newell (greenhouse sector), Royal (greenhouse sector), VanderMeulen (greenhouse sector), Lodder (storage crop sector). CFP is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on the panel. If this panel is not appropriate for

any reason, the participants are invited to propose a panel that would be acceptable to them.

- c. MPL, the Commission, Commission member participants, and Mr. Solymosi are invited to make submissions on the following panel to consider matters related to MPL during the period of this Review: Chair Etsell, and commissioners Reynolds and Husband (all non-greenhouse sector) and VanderMeulen and Royal (greenhouse sector). MPL is invited to confirm that by agreeing to this panel they will waive any and all reasonable apprehension of bias objections to these members participating on its panel. If this panel is not appropriate for any reason, the participants are invited to propose a panel that would be acceptable to them.

The Commission respectfully submits that a waiver of any and all reasonable apprehension of bias objections by Prokam, CFP and MPL (as the case may be) will not be sufficient to address the full import of the extant allegations made by Prokam and MPL.

First, it is important to note that Prokam and MPL do not merely assert a perception or apprehension of bias. They assert actual bias.

Second, the existence of the civil claims may give rise to allegations of bias by other industry stakeholders, who may be aggrieved by or dissatisfied with decisions made by the proposed panels. It is entirely conceivable that other industry stakeholders might assert that any favourable dispositions of the applications were improperly influenced by a fear of reprisal from entities that have already demonstrated a willingness to take civil proceedings against Commission members and staff in their personal capacities. In this respect, one possible solution might be a preemptive ruling by the BCFIRB that it will not entertain bias objections made by any person who subsequently claims to be aggrieved by or dissatisfied with any decision made by the proposed panels.

Third, a waiver of any and all reasonable apprehension of bias objections by Prokam, CFP and MPL will not address concerns identified by the BCFIRB regarding the utility of decisions which may be reversed or rescinded if the allegations of bad faith and misfeasance are subsequently substantiated. At paragraph 16 of its June 14, 2021 Order, the BCFIRB stated:

16. The question of what, if any, interim orders should be issued to restrict the Commission is a difficult one. On the one hand, the allegations that have been raised against the commissioners and Mr. Solymosi are serious, and include that those individuals acted with an intention to harm Prokam and MPL. In the event these allegations are substantiated, it would be inappropriate for the commissioners and Mr. Solymosi to continue participating in decision-making during the Supervisory Review. (emphasis added)

Indeed, consideration of the applications by the panels proposed appears to be inconsistent with the BCFIRB's July 7, 2021 ruling in the matter of *Prokam v. BCVMC* (N1908), in which the BCFIRB deferred its own decision in that appeal pending the outcome of this Supervisory Review:

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.

.....

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.

(emphasis added)

The Commission respectfully submits that it would be incongruous for the BCFIRB to take one approach with respect to the deferral of its own decision, and an entirely inconsistent approach with respect to the deferral of decisions to be made by the Commission.

Finally, the Commission submits that a waiver of any and all reasonable apprehension of bias objections by Prokam, CFP and MPL will not address panel members' legitimate concerns that they may be exposing themselves to personal liability. At a minimum, Prokam, CFP and MPL should be obliged to provide satisfactory releases to all Commission members serving on the panels, and they should expressly acknowledge that such members are serving as a matter of necessity to permit the establishment of a quorum [See: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*;

Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1998] 1 S.C.R. 3 at par. 4 to 8. In the absence of a satisfactory release, Commission members Kevin Husband, Brent Royal, Armand VanderMeulen and Blair Lodder have each advised that they will resign as members of the Commission if directed to serve on the panels proposed by the BCFIRB. The Commission anticipates that the position of Mr. Newell on this point, if any, will be expressed by his counsel.

Yours truly,

AFFLECK HRABINSKY BURGUYNE LLP

Per:


ROBERT P. HRABINSKY

cc. chunter@litigationchambers.com
cc. morgan.camley@dentons.com
cc. david.wotherspoon@dentons.com
cc. matthew.sveinson@dentons.com
cc. rhira@hirarowan.com
cc. rmcdonell@farris.com
cc. kmcewan@mcewanpartners.com
cc. wstransky@mcewanpartners.com
cc. dean.dalke@dlapiper.com