

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY:
FINAL RULES OF PRACTICE AND PROCEDURE

July 9, 2021

Introduction

1. On May 26, 2021, the BC Farm Industry Review Board (“BCFIRB”) issued a Notice of Supervisory Review into allegations of bad faith and unlawful activity by members and staff of the BC Vegetable Marketing Commission (“Commission”). On June 14, 2021, I invited written submissions with respect to interim orders restricting the Commission’s activities, and draft Rules of Practice and Procedure (Rules of Procedure). Oral submissions were also made at a prehearing conference on June 30, 2021.
2. This decision addresses the Rules of Procedure.

Rules of Procedure

3. On June 18, 2021, I provided the parties with draft rules of procedure and invited their comments. The written submissions raised a number of issues on which the parties commented at the prehearing conference.

(a) *Timing/Sequencing of participants to produce documents/evidence*

4. MPL British Columbia Distributors Inc. (MPL), who has not yet confirmed whether it will participate in this supervisory review, raised a fundamental concern that the rules of procedure take an adversarial format rather than an inquisitorial or investigative format. It takes the position that the initial onus should not be placed on Complainant Participants to provide their documents and evidence first.
5. The Commission, Commission members and Mr. Solymosi all disagree. Counsel for Commission members stressed that developing a detailed summary of the allegations as a first step accords with best practices in an investigation. This is reflected in the order for production of documents as presently drafted. The Commission members also suggested that the rules should be amended to make it clear that regardless of whether a person making allegations elects to participate, they will be required to produce documents and witnesses. This ensures that the Commission, its members and staff will know the evidence that exists with respect to them and can respond appropriately.
6. I agree with those submissions, and do not accept that this supervisory review is properly seen as an adversarial process. As hearing counsel suggested at the pre-hearing conference, the rules of procedure are designed to balance the investigatory function of a supervisory review against the need for a very high degree of procedural fairness given the nature of the allegations being investigated.
7. This process should begin with background research and information gathering. Obtaining documents and information from individuals connected with the complainants to fully understand the scope of the allegations and concerns is an important initial step. This is particularly so given that the allegations at issue in

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this process are not fully particularized at this stage. Further disclosure of the basis of these very serious allegations to those whose conduct has been impugned is important to ensure an appropriate level of procedural fairness. In turn, obtaining documents and information from the Commission, its members and staff will allow hearing counsel, and ultimately the panel, to get to the truth of the allegations.

8. Importantly, this supervisory review will not be limited to the evidence and documents produced by the parties. Hearing counsel has the power to conduct further investigations and information gathering beyond the evidence provided by participants.
9. MPL suggests that it could face prejudice if it were to participate. That allegation of prejudice was not particularized before me. There was a suggestion that prejudice would follow if there was a requirement to produce privileged documents. However, there was never any intent for the Rules to require the production of privileged documents, and they have now been clarified to set out a process to deal with claims of privilege.
10. Accordingly, I do not see any need to amend the structure and nature of this supervisory review. I have, however, amended the Rules to make it clear that whether or not MPL elects to participate, hearing counsel has the power to seek the production of documents and information he requires to ensure that this is a fair process that provides the Commission, its members and staff with proper notice of the allegations being made against them.

(b) Requirement for the Commission, its staff and its members to provide a statement of position at the outset

11. Prokam Enterprises Ltd. (Prokam) takes the position that the parties whose conduct is the subject of the allegations should be required to articulate an initial position in response to the allegations. This, Prokam says, could narrow the issues to be decided. For example, if counsel for Mr. Solymosi were to admit to having knowledge of certain gazetting requirements, that could obviate the need to canvas those issues in evidence.
12. Hearing counsel suggests that providing a statement of position should be permitted, but not required, as any statement of position could amount to little more than a bare denial that does nothing to narrow the issues. I agree with this submission, and have amended the Rules to permit, but not require, a statement of position.

(c) Procedure for written submissions

13. Prokam suggests that the parties should be permitted to provide written submissions at the conclusion of the hearing. No parties objected to this rule, and the final rules include this amendment.

(d) Scope of production of documents by Complainant Participants

14. Prokam suggests that it should only be required to provide an initial witness list and documents at the first stage of the proceedings, and have an opportunity to provide additional information and name additional witnesses as the proceedings develop.
15. There should not be any doubt that the participants are not only entitled, but required, to produce additional documents as the proceedings develop. Rule 6 specifically confirms the parties' document disclosure obligations are ongoing. If it becomes apparent that additional documents are relevant after an initial list is provided, then the participant must update their list. To make this obligation more clear, we have clarified that only an "initial" list is required at the first step for the Complainant Participants, given that some of the information may be as of yet unknown to them.
16. Prokam also expresses concern that it cannot produce a detailed witness list at this early stage of the proceedings. I agree with hearing counsel that a summary of witness evidence is necessary to provide those responding to allegations with proper notice of them. This allows them to provide documents and information in response. It should be noted that the witness lists will not restrict the evidence that will be provided at the oral hearing; they provide a place for hearing counsel to begin their investigation.
17. Prokam also suggests that there ought to be a process for demanding additional production by hearing counsel or the parties in case classes of documents do not appear to have been produced. The final Rules include this amendment.

(e) Scope of production of documents by other participants

18. The Commission, in a submission adopted by the Commission Members, takes the position that the scope of document production required from the Commission, its staff and members is too broad. It suggests that the language used could require Commission members to produce all documents that touch on or concern their legitimate activities as part of a broad class of producers rather than a personal interest.

19. Prokam disagrees, and suggests the Commission's proposed order is unnecessary. It points to the BCFIRB decision in Prokam's 2018 appeal¹, at paras. 57-60, where BCFIRB held that it is possible to differentiate between the general self-interest of commissioners as producers, and more specific interests associated with a Commission member's ties to a particular agency. Prokam says that, in the course of reviewing documents, the Commission should be able to differentiate between commissioners' interests *qua* producers and more specific forms of self-interest.
20. I agree with Prokam that the Commission's proposed order is unnecessary. The participants are required to produce documents and evidence relevant to the allegations raised in the terms of reference, not with respect to their broad interest as a class of producers.
21. The Commission further argues that it should not face document production requirements on the basis of mere allegations unsupported by any factual foundation. It suggests that its document production obligations, as well as those of the Commission members and staff, should be limited to documents responding to allegations that are supported by a factual foundation in the documents produced by the Complainant Participants.
22. Prokam objects, suggesting that it would defeat the purpose of an investigation and discovery process if the Commission were only required to produce documents if the Complainant Participants can substantiate their allegations. This is because the Commission, its members and staff have possession and control of the relevant documents.
23. I again agree with Prokam. As above, this supervisory review is primarily investigative in nature, flowing from BCFIRB's supervisory jurisdiction. Unlike previous supervisory reviews, this proceeding is taking the form of an oral hearing, with procedures being put in place to ensure a high degree of procedural fairness in light of the serious nature of the allegations raised. The Commission, its members and staff cannot limit their duty to respond to the investigation based on what another party can or cannot produce to substantiate their allegations, particularly given that they would have possession and control of the preponderance of the relevant documents.

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.

(f) Process for assertions of privilege

24. The participants all agree with a submission from Commission Members that the rules should make provision for the listing of privileged documents, and provide a process for the consideration of such claims by the Review Panel or its counsel. Prokam suggests that issues of privilege may well arise given knowledge of counsel for the Commission of certain gazetting requirements may be relevant.
25. The final rules of procedure include a process similar to the one proposed by the Commission Members. I have not, however, included a provision allowing the Review Panel to order production of privileged documents so that I may inspect them to determine the claim of privilege. In my view, I would need a clear and unambiguous legislative grant of power to do so: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53. If it becomes necessary for me to decide claims of privilege, the preferable approach is to make that determination on the basis of affidavit evidence that explains the claim of privilege in accordance with the civil standard of proof.

(g) Use of documents not produced

26. The participants all agree with a submission by the Commission that documents not produced to hearing counsel may not be used in cross-examination without leave. The final rules of procedure include this amendment.

(h) Right to counsel in interviews

27. The parties all agree with a submission by Prokam that the Rules should provide clarity that all participants and representatives of corporate or institutional participants are entitled to have counsel present at any interviews conducted by hearing counsel. The final rules of procedure include this amendment.

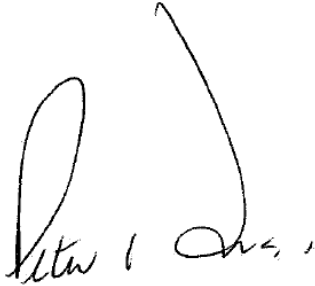
Orders and Timing of the Oral Hearing

28. I am making the following directions or orders:
 - a. The Rules of Procedure for the Supervisory Review will be those attached as Appendix A, and they will be posted on the BCFIRB website.

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29. I am advised by hearing counsel that counsel for the participants are all available in the weeks of September 27 and October 4 for the oral hearing of this matter. Counsel are asked to hold those dates for the hearing.

Dated at Victoria, British Columbia, this 9th day of July 2021.

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is written in a cursive style with a large initial "P" and "D".

Peter Donkers
Chair

APPENDIX A

FINAL RULES OF PRACTICE AND PROCEDURE

Disclosure and production of evidence

1. Any participant who is raising allegations falling within the terms of reference for the supervisory review (the “Complainant Participants”) shall, within fourteen (14) days after the Rules of Procedure are issued, provide to hearing counsel:
 - a. an initial list of the names and addresses (if known) of all witnesses they believe ought to be heard, together with a detailed statement of the evidence the witness is able to provide at the Oral Hearing;
 - b. initial production of all relevant documents within the possession, control or power of the Complainant Participant;
 - c. if it is claimed that any documents otherwise producible pursuant to s. 1(b) are privileged from production, a list of such documents with a statement of the grounds of the privilege that will enable hearing counsel to assess the validity of the claim of privilege; and
 - d. at the option of the participant, a statement of the participant’s position with respect to the matters at issue in the supervisory review.
2. Without limitation to any other provisions of these Rules, in the event any industry member who has raised allegations falling within the terms of reference of the supervisory review chooses not to participate in the supervisory review, then hearing counsel may, in their sole discretion, make orders pursuant to 7.1(3) of the *Natural Products Marketing Act* requiring the non-participant to:
 - a. produce to hearing counsel all relevant documents within the possession, control or power of the non-participant;

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- b. answer questions with respect to the facts underlying the allegations, including but not limited to the identities of individuals with relevant information and to provide information about what evidence those individuals may provide; and
 - c. if it is claimed that any documents otherwise producible pursuant to s. 2(b) are privileged from production, produce a list of such documents with a statement of the grounds of the privilege that will enable hearing counsel to assess the validity of the claim of privilege.
3. Hearing counsel, upon receiving materials under sections 1 and 2, is entitled to undertake any further investigations, questioning or interviews that he considers appropriate. After completing those tasks, he shall provide all of the relevant and non-privileged materials in his possession to legal counsel for all of the participants in the supervisory review, including, *inter alia*, documents, witness names, and summaries of evidence, investigations and interviews. Documents may be redacted by hearing counsel prior to circulation to remove information that is privileged or of a sensitive or confidential nature.
4. Any participant, other than a Complainant Participant, who receives materials from hearing counsel pursuant to s. 2 shall, within fourteen (14) days of receiving those materials, provide to hearing counsel:
 - a. the names and addresses of all witnesses they believe ought to be heard, together with a detailed statement of the evidence the witness is able to provide at the Oral Hearing;
 - b. all relevant documents within the possession, control or power of the participant;
 - c. if it is claimed that any documents otherwise producible pursuant to s. 4(b) are privileged from production, a list of such documents with a statement

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of the grounds of the privilege that will enable hearing counsel to assess the validity of the claim of privilege; and

- d. at the option of the participant, a statement of the participant's position with respect to the matters at issue in the supervisory review.
5. Hearing counsel, upon receiving materials under section 3, is entitled to undertake any further investigations, questioning or interviews that he considers appropriate. After completing those tasks, he shall provide all of the relevant and non-privileged materials in his possession to legal counsel for all of the participants in the supervisory review, including, *inter alia*, documents, witness names, and summaries of evidence, investigations and interviews. Documents may be redacted by hearing counsel prior to circulation to remove information that is privileged or of a sensitive or confidential nature.
 6. If hearing counsel conducts an interview pursuant to Rules 1, 2 or 4, the interviewee may have their own legal counsel attend any such meeting.
 7. The nature of any record for which privilege from production is claimed must be described in a manner that, without revealing the information that is privileged, will permit a preliminary assessment of the validity of the claim for privilege.
 8. Hearing counsel is at liberty to seek an order from the Review Panel that a document over which privilege is claimed must be produced. On such application, the onus is on the participant who claims privilege for a document to show that the circumstances and the nature of the document are such as to require the grant of privilege to them.
 9. All participants have an ongoing obligation to produce documents and information throughout the course of the Supervisory Review, regardless of whether they have been served with a summons to produce. Hearing counsel will also produce to all participants any relevant and non-privileged documents that may come into his possession at any point during the Supervisory Review.

10. The terms “document” or “documents” are intended to have a broad meaning and include, without limitation, the following mediums: written, electronic, text, cellular or social media messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche, metadata, and any data and information recorded or stored by means of any device.
11. The Review Panel considers relevant documents to include anything that touches on or concerns the subject matter of the Supervisory Review or that may directly or indirectly lead to other information that touches on or concerns the subject matter of the Supervisory Review.
12. Any person or entity served with a summons to produce information or documents shall provide all requested information within that person’s or entity’s possession, control or power in the time indicated in the summons to produce or, if no time is indicated, in a timely manner, and in such a form as directed by the Review Panel.
13. The originals of relevant documents or other things are to be provided to hearing counsel upon request.
14. Legal counsel to participants and witnesses will be provided with documents and information, including witness statements, on the express understanding that they are to be treated as confidential, and can only be shared with clients and their experts or consultants, until such time as the documents or information are made public at the Oral Hearing or the Review Panel otherwise declares. For greater clarity, this does not preclude the Review Panel or hearing counsel from producing a document or other thing to participants, their counsel, or a proposed witness prior to the witness giving his or her testimony or as part of the investigation being conducted. Nor does it preclude the Review Panel from providing a document or information to experts or consultants retained by the Review Panel.

15. A party who believes that a participant has not provided copies of relevant documents must bring this to the attention of hearing counsel at the earliest opportunity. Hearing counsel will determine if the document is relevant, and make orders for further production of documents as necessary.
16. No participant may make use of any documents not produced in the supervisory review without leave of the Review Panel.
17. Hearing counsel or other participants are at liberty to seek an order from the Review Panel that a particular document not be used in cross-examination or otherwise admitted into the record.

Role of Hearing and Review Panel Counsel

18. Hearing counsel has the primary responsibility for collecting and presenting all of the evidence counsel determines is relevant at the oral hearing, ensuring an orderly and fair hearing, and representing the public interest throughout the process.
19. Hearing counsel may demand answers to written questions or interview any person who he believes may have information or records that have any bearing upon the subject matter of the Supervisory Review. If hearing counsel conducts such an interview or demands answers to questions, then hearing counsel shall produce a summary of the interview or answers received and provide a copy to all participants.
20. A person may be required by summons issued under s. 7.1(3) of the *Natural Products Marketing Act* to answer questions, either at a meeting with hearing counsel or in writing, or produce documents. If hearing counsel conducts an interview, the interviewee may have their own legal counsel attend any such meeting.
21. Hearing counsel may meet with and/or interview the same person more than once.

22. Counsel for the Review Panel (panel counsel) may attend all or part of the Oral Hearing, but will not participate in examining witnesses or making submissions.

Oral Hearing

23. An oral hearing shall be held, either by videoconference or in-person, depending on public health restrictions in place at the time.

24. The Review Panel may receive any evidence considered helpful in fulfilling the Terms of Reference of the Supervisory Review. The strict rules of evidence used in a court of law to determine admissibility of evidence will not apply.

25. Witnesses who testify will give their evidence under oath or upon affirmation. However, the Review Panel is entitled to receive relevant evidence at the Oral Hearing even where no oath or affirmation has been given after affording all counsel and participants to make submissions.

26. On the advice of hearing counsel, the Review Panel will issue a summons to every witness before he or she testifies.

27. Witnesses may be called to testify more than once.

28. Unless the Review Panel otherwise orders, hearing counsel will call and question witnesses who testify at the Oral Hearing. Counsel for a party or witness may apply to the Review Panel to lead a particular witness's evidence-in-chief. If leave is granted, the examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Review Panel.

29. Unless the Review Panel otherwise orders, the order of examination will be as follows:

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- a. Hearing counsel will lead the evidence from each witness. Except as otherwise directed by the Review Panel, hearing counsel is entitled to ask both leading and non-leading questions;
 - b. Participants will then have an opportunity to cross-examine the witness to the extent of their interest. The order of cross-examination of each witness will be determined by the participants and, if they are unable to reach agreement, by the Review Panel;
 - c. Counsel for a particular witness will examine last, unless he or she has questioned the witness as examination-in-chief, in which case there will be a right to re-examine the witness; and
 - d. Hearing counsel will have a final opportunity to cross-examine all witnesses.
30. If hearing counsel elects not to call a witness or to file a document as an exhibit, a party may apply to the Review Panel to do so or to have the Review Panel direct hearing counsel to do so where the Review Panel is satisfied that the document or the evidence of the witness is necessary.
31. All participants will have the opportunity to provide oral and written submissions at the conclusion of the oral hearing.
32. The Oral Hearing will be open to the public. However, the Review Panel may exclude the public from any part of the hearing where it determines that such an order is required.
33. Applications from witnesses or participants to hold any part of the Oral Hearing in camera should be made to the Review Panel at the earliest possible opportunity.

General

34. These Rules may be amended and new Rules may be added if the Review Panel finds it necessary to do so to fulfill the Review Panel's mandate and to ensure that the process is fair.
35. The Review Panel may extend or abridge any time prescribed by these Rules.
36. All participants and their counsel shall adhere to these Rules. Any party may raise any issue of non-compliance with the Review Panel at any time, and any breach of the Rules will be dealt with by the Review Panel as it sees fit.
37. Documents may be served on a party, hearing counsel or the Review Panel by email or any other such method as agreed to between legal counsel or as directed by the Review Panel.