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Dear Ms. Gorsuch:

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

On June 14, 2021, the BCFIRB issued directions inviting the participants to make submissions with respect to: (a) the draft rules of procedure to be issued by the BCFIRB on June 18, 2021; and (b) the proposed interim order.

The Draft Rules

A. Document Production from Non-Complainant Participants

The Commission submits that the scope of document production required from the Commission is too broad. In particular, the Draft Rules would require the Commission to produce documents that are untethered to any allegation of wrongdoing. Indeed, the Draft Rules could effectively oblige the Commission to produce all documents in its possession or control that touch on or concern the legitimate exercise of its statutory mandate.

The relevant provisions of the Draft Rules and Final Terms of Reference are as follows:

1. Section 3(b) of the Draft Rules requires all non-complainant participants to provide all relevant documents within the possession, control or power of the participant.
2. Section 7 of the Draft Rules of Practice and Procedure states:

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.

3. Section 1 defines the scope and focus of the Final Terms of Reference as follows:

The Commission's exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self-interest of members of the Commission, including...

As defined in the Final Terms of Reference, the "self-interest" of members of the Commission would extend to their interests as members of a broad class of producers.

Unlike many other sectors governed by the *Natural Products Marketing (BC) Act*, the vegetable industry is not "supply managed". In supply-managed sectors, orderly marketing is achieved through a quota system designed to match supply with demand. The vegetable industry does not utilize quota to control supply. Instead, the principal objective of the orderly marketing system for vegetables in British Columbia is to maximize the returns of British Columbia producers through coordinated marketing of regulated product by agencies on their behalf (so that British Columbia regulated product may be marketed to retailers and wholesalers on behalf of producers at scale). In this regard, the Commission is more closely analogous to the Wheat Board than it is to the Milk Board. Coordinated marketing through one or more central desks is the essential mechanism used to maximize producer returns. As in the case of the Wheat Board, if individual producers were able to market their production, in competition with one another, and not at scale, there would be no ability to maximize producer returns through coordinated marketing. The BCFIRB itself has recognized these key principles in its January 1, 2017 Supervisory Decision, where it said:

7. ... agencies are licensed entities whose purpose is to market regulated product on behalf of registered producers. Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. ... As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: "Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers".

Thus, the Commission's mandate is, at least in part, to maximize producer returns through coordinated marketing by agencies in a way that can harness the collective power of producers. The maximization of producer returns is an "economic interest", albeit one that is shared by all producers, including those who serve as members of the Commission. The Commission's obligation to produce documents should not be so broad as to include all records that touch on or concern the legitimate exercise of the Commission's statutory mandate.

Furthermore, the Commission submits that a mere allegation of wrongdoing, unsupported by any factual foundation, should not give rise to document production obligations on the part of non-complainant participants. An allegation of bias is serious and should not be made speculatively:

An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

Adams v. British Columbia (Workers' Compensation Board), [1989] B.C.J. No 2478 (C.A.):

Similarly, an allegation of misfeasance in public office must be accompanied by "clear proof commensurate with the seriousness of the wrong". See: *Powder Mountain Resorts Ltd. v British Columbia*, [2001] 11 W.W.R. 488, 94 B.C.L.R. (3d) 14 (C.A.) at para. 8

The Commission therefore submits that the document disclosure obligations of non-complainant participants should be described as follows:

3. 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:
 - (b) all documents within the possession, control or power of the participant that touch on or concern allegations of an exercise of statutory duties in bad faith, for improper purposes, or without procedural fairness, that are supported by a factual foundation commensurate with the seriousness of the wrong alleged, as provided by a Complainant Participant pursuant to sections 1 and 2.

B. Non-Disclosure and Cross-Examination

Section 11 of the Draft Rules may operate as an invitation to withhold production until 48 hours before the cross-examination of a witness. It would be preferable if section 11 provided that a document that is not produced to the Hearing Counsel may not be used in cross without leave.

The Proposed Interim Order

The proposed order is described by the BCFIRB in its June 14, 2021 directions as follows:

- a. Commission members John Newell, Corey Gerrard and Blair Lodder (Mike Reed and Peter Guichon are now former members) are prohibited from participating in any deliberations or decision making with respect to any rights or interests of Prokam, CFP, MPL, or any of their principals or affiliated companies, until the conclusion of the Supervisory Review.
- b. Andre Solymosi is prohibited from substantive participation in any deliberations or decision making with respect to any rights or interests of Prokam, CFP, MPL, or any of their principals or affiliated companies, including but not limited to the making of recommendations to any commissioners or Commission panels, until the conclusion of the Supervisory Review. However, Mr. Solymosi may continue to deal Prokam, CFP, MPL, and any of their principals or affiliated companies in an administrative capacity.

The Commission submits that the scope of the proposed order should be expressed with greater precision.

First, the reference to “any rights or interests of Prokam, CFP, MPL, or any of their principals or affiliated companies” may be too broad. Almost any action taken by the Commission could be said to engage the rights or interests of Prokam, CFP, MPL, their principals or affiliated companies, if only as members of a broad class of existing or prospective industry stakeholders. It would be preferable to clarify the scope of the prohibition as follows:

... any rights or interests of Prokam, CFP, MPL, or any of their principals or affiliated companies arising from applications or requests made, or to be made, by them...

Similarly, the permissive language regarding Mr. Solymosi’s ability to act in an administrative capacity should be clarified as follows:

However, Mr. Solymosi may continue to deal Prokam, CFP, MPL, and any of their principals or affiliated companies, in an administrative capacity, with respect to applications or requests made, or to be made, by them.

With these revisions, the Commission agrees that the proposed order is necessary to protect the integrity of the Commission’s decision-making process, as well as the interests of the General Manger and Commission members who have been impugned by the allegations made by MPL and Prokam. However, it should be noted that the order will almost certainly impede the Commission’s ability to address the applications made by Prokam, CFP and MPL.

First, all commodity boards rely extensively on their senior executives to facilitate decision-making. The order will necessarily reduce Mr. Solymosi's role, at least with respect to the outstanding applications, to that of a secretarial function. In ordinary circumstances, a commodity board's senior executive would take steps to ensure that the decision-maker is provided with all information that may be relevant to matter. However, it is not inconceivable that Prokam and MPL could seek to characterize the execution of this function as being in the nature of a "recommendation". With or without the prohibition proposed by the BCFIRB, Mr. Solymosi is likely to be reluctant to take any steps that might be used against him in civil proceedings that have been, or may be, brought by Prokam and MPL. This will impair the Commission's ability to make decisions.

Second, the Commission is unable to constitute a quorum with respect to the applications made by Prokam, CFP and MPL.

Presently, the Commission is composed of the following members:

Debbie Etsell, Chair (Independent)
John Newell, Vice Chair (Greenhouse Cucumbers)
Hugh Reynolds, Secretary (Processing Crops)
Blair Lodder, Member (Storage Crops)
Cory Gerrard, Member (Storage Crops)
Kevin Husband, Member (Storage Crops)
Brent Royal, Member (Greenhouse Tomatoes)
Armand VanderMeulen, Member (Greenhouse Peppers)

There is one vacant position that may be filled following a special election to be held this summer.

Subsection 3(m) of the *Natural Products Marketing Act Regulations* provides that "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." In the case of the Commission, five members are required to constitute a quorum.

Regardless of the prohibition proposed by the BCFIRB, Commission members John Newell and Corey Gerrard have already recused themselves from participating in deliberations or decision-making with respect to the applications made by Prokam, CFP and MPL. In addition, Prokam has objected to Blair Lodder's participation in deliberations with respect to its application, presumably on the basis that Mr. Lodder ships unregulated product to BCfresh. Consequently, Blair Lodder has recused himself from participating in deliberations or decision-making with respect to the applications made by Prokam, CFP and MPL. In addition, on June 17, 2021, members Kevin Husband and Hugh Reynolds announced that they too were recusing themselves from participating in deliberations or decision-making with respect to the applications made by Prokam, CFP and MPL, on the basis that they are each shareholders in BCfresh.

In its December 22, 2020 Supervisory Review, the BCFIRB made the following comments with respect to conflicts arising from an ownership interest in an Agency:

80. ... There is a significant difference between tolerating a bias in decision-making that arises from a member simply being a producer or identifying a conflict due to special circumstances of a benefit to the Commissioner or family member, and a bias/conflict that arises where there is "something more".

81. In this Review, the panel is concerned about the following scenarios which give rise to different degrees of "something more":

- a. a Commissioner is a director of an agency;
- b. a Commissioner has an ownership interest in an agency, and/or
- c. a Commissioner ships to an agency.

82. On the farther end of the "something more" scale, the one that is most challenging to appropriately manage is when a Commissioner also serves as an agency director. As a result, they are clearly in a position of both regulating and being regulated.

83. A Commissioner owes a duty to act in the best interest of the Commission's legislated regulatory responsibilities. The Commission is responsible "to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product" (Scheme (s. 4(1)), on behalf of all producers and in the public interest. The Commission as a whole has a duty to make decisions, in the best interests of the whole industry and in the public interest.

84. An agency director owes a fiduciary duty to act in the best interests of the agency. Where the role of agency director and Commissioner rests in the same person, the legal duties owed to each entity are irreconcilable. The divided legal loyalties create, at a minimum, a reasonable apprehension that the Commissioner's decisions may be unduly influenced by what is in the best interests of the agency that they serve. There may also be situations where the undue influence of agency interests on a Commissioner's decision making meets the test for actual conflict of interest. When a Commissioner is part of the "operating mind" of both the regulator (Commission) and regulated (agency), it is as a practical matter beyond comprehension that the Commissioner could compartmentalize the dual functions to avoid the influence of one over the other.

85. Moving down the "something more" scale, a more manageable scenario is where a Commissioner has some degree of ownership interest in an agency but does not sit on the agency's board of directors. The size or degree of the ownership interest is an

important factor in assessing whether a reasonable apprehension of bias or conflict of interest could arise in agency-related decision-making.

An ownership interest in an agency is lower down on the “something more” scale described by the BCFIRB. Consequently, there may be some circumstances in which this interest would not give rise to a conflict necessitating recusal. However, the present circumstances are extraordinary, and the Commission supports the decision taken by members Husband and Reynolds to recuse themselves from participating in deliberations or decision-making with respect to the applications made by Prokam, CFP and MPL. In this regard, it is worth noting that in its civil claim, MPL has asserted that Commission members had **deliberately committed ... unlawful acts** while acting in their capacity as public officers of the Commission... **[by failing] to recuse themselves** from the decision-making process...”

Commission members are understandably reluctant to expose themselves, in their personal capacity, to the prospect of further civil claims that might be brought by Prokam or MPL. Indeed, it is not difficult to imagine that the claims brought by Prokam and MPL will have a chilling effect on the willingness of industry stakeholders to contribute by providing service as a member on a board or commission.

In the result, there are only three Commission members remaining who are able to address the applications made by Prokam, CFP and MPL:

Debbie Etsell, Chair (Independent)

Brent Royal, Member (Greenhouse Tomatoes)

Armand VanderMeulen, Member (Greenhouse Peppers)

Even if the vacancy on the Commission is filled, the Commission will be without a quorum.

In its letter to all commodity boards and commissions dated August 29, 2017, the BCFIRB noted:

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*.

However, this option is not available to the Commission in these circumstances as it would first require a quorum in order to make a decision to delegate to a smaller panel. All of this is further compounded by the resulting lack of depth and expertise resulting from the diminution of the function of the General Manager, and the inability of knowledgeable Commission members to participate in decision-making.

For all practical purposes, the civil claims brought by Prokam and MPL have made it impossible for the Commission to address the applications made by Prokam, CFP and MPL, at least at the present time.

Further, in its letter to all commodity boards and commissions dated August 29, 2017, the BCFIRB also noted:

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.

Though it is possible for the BCFIRB to address the applications made by Prokam, CFP and MPL in the Commission's place, the Commission submits that this too may not be feasible in the circumstances. First, it is to be noted that in a letter dated April 30, 2020, counsel for Prokam and CFP took the position that the BCFIRB could not "directly decide issues affecting CFP and Prokam":

...our understanding of [the BCFIRB's supervisory] process has changed over the past month with two revelations: (1) the involvement of the Chair of BCfresh on the Commission Working Group, which continues to communicate with the Supervisory Panel, *ex parte* to CFP and Prokam (**something we do not believe can be reconciled with the stringent procedural fairness requirements that must apply if the Supervisory Panel intends to directly decide issues affecting CFP and Prokam** that would otherwise be resolved within the appeal); and (2) that the Supervisory Panel plans to do just that, and views itself as having done so in its interim decision (as opposed to resolving systemic issues with collateral consequences for extant appeals).

Leaving that allegation aside, the inability of the Commission's General Manager and knowledgeable Commission members to facilitate any such "direct" decision-making by the BCFIRB would hinder the BCFIRB's ability to make an informed, "direct" decision.

Yours truly,

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