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Via Email (Wanda.Gorsuch@gov.bc.ca)

BC Farm Industry Review Board
2975 Jutland Rd.
Victoria, BC V8T 5J9

Attention: Wanda Gorsuch, Manager, Issues and Planning

Dear Sirs/Madams:

Re: ***BC Farm Industry Review Board: Notice of Supervisory Review – Vegetable Marketing Commission, Allegations of Bad Faith and Unlawful Conduct***

We write on behalf of Messrs. Newell, Reed, Gerrard, Lodder and Guichon regarding the draft rules of practice and procedure dated June 18, 2021.

Draft Rule 1 - Disclosure and Production of Evidence from Complainants

Given MPL's conditional participation in these proceedings, Messrs. Newell, Reed, Gerrard, Lodder and Guichon are concerned that limiting s. 1 of the rules of practice and procedures to "Complainant Participants" (as currently defined in the draft rules) will prejudice the ability of the BCFIRB to effectively complete the supervisory review or their ability to answer the allegations underlying it. If MPL does not commit to participating in this proceeding, s. 1 of the draft rules should nonetheless provide that it and the "Complainant Participants" (as currently defined in the Draft Rules of Practice and Procedure) be subject to the obligations described therein – *e.g.* by amending it as follows:

1. ~~Any participant who is raising allegations falling within the terms of reference for the supervisory review~~ MPL British Columbia Distributors Inc., Prokam Enterprises Ltd., and Bajwa Farms Ltd. (the "Complainants ~~Participants~~") shall….

As a matter of procedural fairness, Messrs. Newell, Reed, Gerrard, Lodder and Guichon, as the subjects of this supervisory review, are entitled to receive adequate information about the basis for the originating complaint.[1]

[1] *Violette v. New Brunswick Dental Society,* 2004 NBCA 1 (CanLII) at pp. 13-16.

The nature of the notice required is informed by the nature of the complaint. Where bias is alleged, strong evidence, not mere accusations, must be presented. As cited in the letter of counsel for the BC Vegetable Marketing Commission dated June 25, 2021:

> 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.[2]

With respect to the tort of misfeasance in public office, claimants must have "clear proof commensurate with the seriousness of the wrong" in order to establish bad faith on the part of a public official.[3]

Developing a detailed summary of the allegations likewise accords with best practices in administrative, oversight or ombudsman investigations.[4] To compile that summary, the investigator generally completes a preliminary investigation (as reflected in ss. 1 and 2 of the draft rules).[5] Where the allegations are serious or complex (as here), that work should include, as a first step, an extensive and in-depth fleshing out of the details of the allegations with the party advancing them and the obtaining of any documentation they have.[6]

Those principles apply with particular force in conflict of interest or public misfeasance investigations. In those circumstances, investigations frequently begin with a preliminary investigation of the sources relied on by the party

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[2] *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.); See also *Vancouver Stock Exchange v. British Columbia (Securities Commission)*, 1990 CanLII 1675 (B.C.C.A.) ("To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said").
[3] *Powder Mountain Resorts Ltd. v British Columbia*, 2001 BCCA 619 at para. 8
[4] Gareth Jones, *Conducting Administrative, Oversight & Ombudsman Investigations* (Aurora, ON: Canada Law Book, 2009) at p. 55.
[5] *Ibid* pp. 55-56.
[6] *Ibid* at p. 56.

making the allegations in doing so, including: (a) any personal knowledge with respect to the allegations made; and (b) any communications or documents in support of them.[7] Likewise, Law Commissions have urged Conflict of Interest Commissioners to adopt a general policy, in line with the seriousness of such allegations, that anonymous complaints and complaints without verifiable sources not receive any attention.[8]

A substantial part of the allegations informing the scope and focus of this proceeding originate exclusively from MPL. Such allegations include (a) the failure of the Commission to adjudicate agency licence applications in bad faith; and (b) collusion and vote-swapping between Commission members.

The ability of the BCFIRB to review those allegations, and complete its terms of reference, should not be constrained by the election of a complainant to not participate. MPL are entitled to seek standing in these proceedings as they see fit and to the extent of their interest. However, and particularly given to their intended participation in the BC market, it is necessary and appropriate for them to be subject to the same requirements for disclosure as the Complainant Participants with respect to the serious allegations they have advanced.

Messrs. Newell, Reed, Gerrard, Lodder and Guichon accordingly submit that the final rules should require all the entities raising the allegations underlying the terms of reference to disclose and produce the evidence relevant thereto under s. 1.

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[7] See e.g. The Honourable Ted Hughes, Q.C., Commissioner Yukon Territory, *Decision Pursuant to Section 17 of the Conflict of Interest (Members and Ministers) Act of a Complaint Brought by Peter Jenkins, MLA, Klondike, against the Honourable Pat Duncan, MLA, Porter Creek South* (2001) at 10-14, online: <https://yukon.ca/sites/yukon.ca/files/eco/eco-forms/ycoic-tabled-report-november-29-2001.pdf>.

[8] Manitoba Law Reform Commission, The Legislative Assembly and Conflict of Interest, Manitoba Law Reform Commission, 2000 CanLIIDocs 183 at pp. 38 and 39, online: <https://canlii.ca/t/2fh1>, citing Alberta, Conflict of Interest Review Panel, *Report on Conflicts of Interests Rules for Cabinet Ministers*, Members of the Legislative Assembly and Senior Public Servants (1990) at p. 96.

Draft Rule 3 - Disclosure and Production of Evidence from Non-Complainant Participants

Messrs. Newell, Reed, Gerrard, Lodder and Guichon agree with and adopt the submission of the Commission with respect to s. 3(b) of the draft rules.

Draft Rules 1 – 4 - Disclosure of Privileged, Confidential, or Sensitive Materials

Messrs. Newell, Reed, Gerrard, Lodder and Guichon submit that the draft rules should:

(a) with respect to potentially privileged documents,

    (i) make provision for the listing of privileged documents if a participant seeks to avoid disclosure of an otherwise relevant document on that basis; and

    (ii) provide a process for the consideration of such claims by the Review Panel or Review Panel counsel; and

(b) with respect to confidential or sensitive documents, permit hearing counsel or other participants to seek an order from the Review Panel that a particular document not be provided to other participants under ss. 2 and 4 or be redacted to remove information that is privileged or of a sensitive or confidential nature.

The draft rules require participants to provide to hearing counsel all relevant documents within their possession, control or power (ss. 1 and 3). While the draft rules provide that documents, once produced, may be redacted by hearing counsel to remove information that is privileged (presumably, privileged to the BCFIRB) or of a sensitive and confidential nature (ss. 2 and 4), it does not formally afford participants the ability to identify such concerns, to withhold documents from production as a result of such concerns, or to make submissions as to how or whether hearing counsel should exercise that discretion.

With respect to potentially privileged documents, the BCIFRB is best served if it is able to obtain all relevant documents. As a corollary of that principle, however, the rules should ensure that:

(a) hearing counsel are aware of all relevant documents, even if a party seeks to avoid their production;

(b) hearing counsel is able to assess the basis for any refusal to produce a document, including by requiring participants to (i) provide an explanation as to the basis for the refusal; (ii) provide sufficient detail

> for such claims to permit hearing counsel to make an informed decision as to whether to challenge that position; and/or (iii) produce such documents for inspection to assess any claims.

In that regard, R. 7-1 of the *Supreme Court Civil Rules* is informative. In particular, R. 7-1 provides that if a party claims that a document is privileged from production, it must state the ground of privilege and describe the document with sufficient detail to permit an assessment that claim.[9] Where privilege is challenged, the court may inspect the document for the purpose of assessing the claim, [10] with parties able to provide evidence to assist that assessment.[11]

Messrs. Newell, Reed, Gerrard, Lodder and Guichon submit that similar provisions should be adopted here – *e.g.*:

> 1. MPL British Columbia Distributors Inc., Prokam Enterprises Ltd., and Bajwa Farms Ltd. (the "Complainants") shall, within fourteen (14) days after the date of the prehearing conference, provide to hearing counsel:
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> …
>
> (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 …
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> 3. Any participant, other than a Complainant, who receives materials from hearing counsel pursuant to s. 2 shall…. provide to hearing counsel:
>
> …
>
> (c) if it is claimed that any documents otherwise producible pursuant to s. 3(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 …
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> …
>
> 9. 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

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[9] *Supreme Court Civil Rules*, R. 7-1(6) and (7).
[10] *Supreme Court Civil Rules*, R. 7-1(20).
[11] *Steeves v. Rapanos*, [1982] B.C.J. No. 2096, 41 B.C.L.R. 312 (C.A.).

> document to show that the circumstances and the nature of the document are such as to require the grant of privilege to them.
>
> 10. If, on an application for production of a document, production is objected to on the grounds of privilege, the Review Panel may inspect the document for the purpose of deciding the validity of the objection.

Similarly, given the inclusion of industry members and the Commission in this supervisory review, it is likely that relevant documents may include commercial sensitive materials or materials which would otherwise be covered by the principle of deliberative secrecy. While hearing counsel will no doubt be sensitive to such concerns in exercising his discretion under ss. 2 and 4, a procedure to ensure that such concerns can be raised prior to the provision of materials to all participants would be prudent. Such a provision could be addressed by way of the following amendment to s. 12 (as currently drafted):

> 12. Hearing counsel or other participants are at liberty to seek an order from the Review Panel that a particular document not be provided to all of the participants in the supervisory review, in whole or in part, used …

Draft Rule 11 - Non-Disclosure and Cross-Examination

Messrs. Newell, Reed, Gerrard, Lodder and Guichon agree with and adopt the submission of the Commission with respect to s. 11 of the draft rules. For the reference of the BCFIRB, the equivalent provision of the *Supreme Court Civil Rules* provides as follows:

> **Party may not use document**
>
> (21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.[12]

Circumstances that the court may consider in exercising its discretion under R. 7-1(21), and which the BCFIRB may adopt, include the relevance of the document to the issues and the opportunity for the opponent to investigate questions which may be raised by the document.[13]

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[12] *Supreme Court Civil Rules*, R. 7-1(21).
[13] *Robitaille v. Vancouver Hockey Club Ltd.*, [1981] B.C.J. No. 555, 30 B.C.L.R. 286 at paras. 60 and 61 (C.A.).

Yours truly,

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