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June 25, 2021 File No: 3211.001

BY EMAIL

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

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

Re: Supervisory Review re. Allegations of bad faith and unlawful activity - Submissions on Draft Rules

We write to deliver the submissions of Prokam Enterprises Ltd. ("**Prokam**") respecting the draft rules of practice and procedure (the "**Draft Rules**").

Draft Rule 1

The draft Rule 1 would impose an obligation on "any participant who is raising allegations falling within the terms of reference for the supervisory review (the 'Complainant Participants')". We understand that Prokam would fall within the definition of Complainant Participants as it is a participant who has filed a Notice of Civil Claim in Vancouver Registry No. 212980 naming Mr. Solymosi and Mr. Guichon as defendants ("Prokam's Misfeasance Claim"). Prokam's Misfeasance Claim is at a very early stage. The Notice of Civil Claim has not even been served. Given that early stage, of course no defenses have been filed and there has been no discovery in that proceeding.

In the particular circumstances of Prokam's prior appeals from decisions of the Vegetable Marketing Commission that relate to the misfeasance claims against Mr. Guichon and Mr. Solymosi, Prokam has received some document production from the Commission and has previously cross-examined Mr. Guichon and Mr. Solymosi, in the context of 2018 appeal hearings before the BC Farm Industry Review Board, of which transcripts are available. However, given that the scope and focus of the 2018 appeal hearing was different than the Prokam Misfeasance Claim or this review, there are areas that will be relevant to the matters under review for which Prokam has had no document production and either did not attempt to or in some cases was not permitted to question witnesses at the hearing.

The draft Rule 1 appears to contemplate that Prokam would deliver to the Hearing counsel its "case" – a witness list, together with witness statements of the evidence the witness is able to provide, and all relevant documents – relating to the liability portion of Prokam's

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PRACTICE CONDUCTED THROUGH A LAW CORPORATION

Misfeasance Claim. As pleadings have not been closed, nor has there been any statement in this review process of the position in respect of the allegations by Mr. Solymosi or Mr. Guichon, there is a lack of clarity at this stage at to what facts are in issue or the scope of relevance. Given the nature of the allegations in the Prokam Misfeasance Claim and the early stage of proceeding, Prokam anticipates that there may be witnesses and documents relevant to the matters under review, of which Prokam is not presently aware, but which it would identify in the ordinary course of the pre-trial discovery process.

Prokam is certainly in a position to provide a list of witnesses of which it is presently aware who may have material evidence about the allegations raised in Prokam's Misfeasance Claim. It will not be in a position to provide a detailed statement of the evidence those witnesses are anticipated to provide beyond providing transcripts of evidence of witnesses from the 2018 appeal hearing as required. Similarly, with respect to documents, Prokam is prepared to produce to Hearing Counsel documents currently in its possession on which it would intend to rely at this stage in respect of the misfeasance allegations (including exhibits from the 2018 BCFIRB appeal), recognizing that the record presently in its possession is not complete in the circumstances.

We would propose that Rule 1 be amended as follows:

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 date of the prehearing conference, 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 an ~~detailed statement of the evidence~~ indication of the subject matter the witness is anticipated to be able to provide evidence at the Oral Hearing; and

b. all ~~relevant~~ documents within the possession, control or power of the Complainant Participant upon which it presently intends to rely.

However, the initial document production obligations of those parties whose conduct is the subject of the investigation should not be similarly limited on the basis of intended reliance. That would exclude any inculpatory documents, and defeat the purpose of an investigation. The complainants can be expected to put their best foot forward; there is no reason to expect that Prokam would leave out any document that would lead to a train of inquiry shedding further light on the allegations. The same is not true of the "defendant" participants. Focusing the complainant participants' initial document production on the evidence which they say supports their allegations is sensible in light of the nature of the allegations and the process.

Draft Rules 3 and 7

We have the Commission's letter of this morning, proposing a narrowing of the Commission's production obligation on the basis that since commissioners are producers, their self-interest is necessarily implicated in all commission decision-making (to paraphrase). This argument does not justify the revised scope of document production proposed by the Commission. The BCFIRB dealt with this argument in Prokam's 2018 appeal, recognizing that it is possible to differentiate between the general self-interest of commissioners as producers, and more specific interests associated with (for example) ties to a particular agency.[1] The Commission can be expected, in the course of reviewing documents, to be able to differentiate between commissioners' interests *qua* producers and more specific forms of self-interest and make production accordingly.

The Commission proposes that its document production obligation be limited based on what the complainant participants have been able to support in their initial production. With respect, this does not make sense. The cases on which the Commission relies on this regard do not support its position. *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No. 2478, stands for the proposition that, in seeking to have a decision quashed on judicial review on the ground of reasonable apprehension of bias, the party alleging bias must prove it. In a civil proceeding in respect of a misfeasance of public office claim, a defendant would not be excused from document production depending on the sufficiency of the plaintiff's initial evidence. As for *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, that was an appeal from a decision *after trial* (*i.e.* after the discovery process had run its course). It stands for the proposition that misfeasance in public office must be proven. That is uncontroversial. *Powder Mountain* certainly does not stand for the proposition that the plaintiff must prove misfeasance *without the defendant having to produce documents*.

BCFIRB has already decided that the allegations are worthy of investigation. The investigatory purpose of the proceeding would be defeated if the Commission, or any other participant whose conduct is under review, was excused from having to produce documents because the complainant participants have not yet made their case. The purpose of document production is discovery, and since BCFIRB has decided that this supervisory review should proceed in parallel with the court process, that must be what the investigatory phase is for as well.

Furthermore, the mechanics of the Commission's proposed "supported by a factual foundation commensurate with the seriousness of the wrong alleged" term are unworkable. Unless the Commission envisions that it will decide for itself whether the allegations are sufficiently well-founded before it undertakes any document production, it would require some sort of interim ruling from the Chair as to sufficiency of evidence, which would

[1] BCFIRB Appeal Decision in Prokam's 2018 appeal, at paras. 57-60, available at this link.

compromise the effectiveness of this review. The Commission is a public body. While it will no doubt place demands on all involved, it is difficult to see what harm there could be in transparency.

Additionally, it is unclear whether the Commission's proposed revised document production obligation would encompass documents tending to show a personal animus on the part of commissioners or staff towards Prokam. In light of the terms of reference, such evidence must remain within the scope of the Commission's document production obligation.

Lastly, Prokam and CFP submit that in determining the scope of the Commission's document production obligation, this Panel can take guidance from subsection 8(4) of the *Natural Products Marketing (BC) Act*, which in the context of appeals to FIRB requires the marketing board that made the decision under appeal to "promptly provide the Provincial board with every bylaw, order, rule and other document touching on the matter under appeal" (a standard similar to that imposed by draft Rules on the Commission and other parties). We note that the document production obligation of the appellant in an appeal is much more circumscribed, limited to documents on which the appellant intends to rely in the appeal.

Placing a broader document production obligation on the marketing board whose decision is under appeal makes sense. Even though it is the appellant who challenges the decision, it is the marketing board who is in possession and control of the documents that bear upon its decision-making process and its related conduct. The context giving rise to this supervisory review is analogous, in that although it is the Complainant Participants who have raised allegations related to the conduct of certain Commissioners, former Commissioners, and the General Manager, it is those parties – and not the Complainant Participants – who will be in possession and control of the majority of the documents that bear upon their own conduct.

Draft Rules 2, 4, 14

We wish to have it clarified in the Rules that all participants and representatives of corporate or institutional participants are entitled to have counsel present at any interviews conducted by hearing counsel pursuant to Rules 2, 4, and 14 of the Rules. Currently, the Rules specify that only an interviewee who attends an interview pursuant to a summons issued under s. 7.1(3) of the *Natural Products Marketing (BC) Act* is entitled to have counsel present.

Draft Rule 11

In light of the Commission's letter of this morning, it appears that Rule 11 is in need of clarification as well. We understood it to mean that if a participant produces a document *to Hearing Counsel* and Hearing Counsel does not provide it to the other participants (presumably because he does not consider it relevant), the party who produced it must point that out. We did not take it to mean that a party could withhold a document *from Hearing Counsel* and rely on it later, which is how the Commission appears to have understood it. In

the former scenario, the current rule makes sense. In the latter scenario, the rule proposed by the Commission makes sense.

Draft Rule 25

As a general observation, the proposed hearing process does not appear to contemplate the parties whose conduct is the subject of the allegations in the misfeasance claims being required to state a position in response to the allegations. The positions of the parties in respect of the allegations under review ought to be stated at some point prior to the oral hearing to guide determinations of relevance and the scope of cross-examinations. In the absence of any requirement of the parties other than the Complainant Participants to articulate a position prior to the hearing, certain rules as drafted appear difficult to apply. An example is Rule 25 which contemplates a process by which a party may apply to the Review Panel to call a witness or file a document "where the Review Panel is satisfied that the document or evidence of the witness is necessary". Without knowing what facts alleged are in issue, it would seem difficult, if not impossible, to determine whether evidence is necessary.

We would propose as an initial step in the proceedings that the parties other than the Complainant Parties be required to provide a brief statement of position in response to the allegations that have been raised.

General Comments

As a general matter, the Draft Rules do not contemplate the exchange of written or oral submissions. We wish to raise the question of whether it would be helpful to hearing counsel or to the panel to receive brief written submissions from each party, perhaps as a cover letter to the initial witness lists and document production explaining the connection between the evidence and the allegations or alternatively as written or oral submissions at the conclusion of the hearing.

Finally, in the event it may impact the formulation of the draft rules and process, we wish to raise at the earliest opportunity our expectation that the evidence canvassed at the hearing of this Supervisory Review will include the March 13, 2008 proceedings before the Standing Joint Committee for the Scrutiny of Regulations, at which counsel for the Commission (together with then-Chair of the Commission George Leroux) appeared and testified. A copy of the transcript of those proceedings is enclosed.

Members of the Standing Joint Committee asserted that the Commission was acting unlawfully in collecting levies related to interprovincial trade without a properly *Gazetted* federal order. (This is the same basis on which FIRB held in the 2018 Prokam / Thomas Fresh appeals that the interprovincial minimum pricing orders underlying the October 2017 cease and desist orders issued to Prokam and Thomas Fresh were unlawful.) Messrs. Leroux

and Hrabinsky did not concede before the Standing Joint Committee that the Commission's conduct was unlawful, but acknowledged that the Commission knew of the possibility that it was conducting itself unlawfully.

The reason we raise this is to flag for the Panel and the other participants the possibility that counsel for the Commission may have evidence to give that is highly material to the subject matter of this Review, and may be in possession and control of documents of similarly high materiality. It may accordingly be prudent to add a provision in the Rules setting out the process by which the Panel may hear and determine questions relating to claims of privilege. This may also require further consideration of the Panel's statutory authority under the *Natural Products Marketing (BC) Act* and the *Administrative Tribunals Act* to hear and determine such questions.

Yours truly,

Hunter Litigation Chambers

Per: Claire S Hunter

Claire E. Hunter, Q.C.

CEH/RJA/APC
Encl: 2008-03-13 Meeting of Standing Joint Committee for the Scrutiny of Regulations - Evidence