



BC Farm Industry Review Board

February 4, 2022

File: 44200-60\AREV

DELIVERED BY EMAIL

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Dear All:

RULING RE: HEARING COUNSEL APPLICATION BRIAN MEYER AFFIDAVIT

This is my ruling on the application by Hearing Counsel to admit the Affidavit of Brian Meyer, made January 28, 2022 (“Meyer Affidavit”).

Hearing Counsel takes the position that it is appropriate to receive the Meyer Affidavit into evidence. Hearing Counsel advises that Mr. Meyer has advised that he is experiencing serious health issues, including stage 4 metastatic cancer for which he is currently receiving treatment, and that accordingly he is not available to appear as a witness in the hearing. Hearing Counsel takes the position that the Meyer Affidavit should be admitted in light of the fact that the panel is not bound by the strict rules of evidence. In Hearing Counsel’s submission, the lack of an opportunity for cross-examination in the hearing should go to weight.

Counsel for Mr. Solymosi agrees. Mr. Hira submits that the Meyer Affidavit should be admitted on the grounds of necessity and reliability, emphasizing that Mr. Meyer is not a respondent (or non-complainant participant) in the supervisory review, the Meyer Affidavit is consistent with his prior statements in his affidavit to Hearing Counsel, and Mr. Meyer swore his affidavit with the intent the affidavit would be included in evidence at the inquiry.

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Counsel for Prokam Enterprises Ltd. (“Prokam”) says that the Meyer Affidavit should not be admitted as it is unhelpful and unnecessary. With respect to the issue of relevance, Prokam says that the Meyer Affidavit is only tangentially connected to this proceeding. Prokam takes the position that the evidence is unnecessary because it duplicates the evidence of Terry Michell, who is scheduled to testify later in this hearing. In regards to reliability, Prokam points to what it sees as an internal inconsistency between Mr. Meyer’s affidavit and his interview notes, and suggests that Mr. Meyer’s evidence is inconsistent with communications between Mr. Meyer and Prokam’s principals. Prokam further submits that it would be procedurally unfair for me to rely on the Meyer Affidavit without providing an opportunity for cross-examination. Finally, Prokam also suggests in closing that “this is not the first time” that Mr. Meyer has “sought to avoid testifying before BCFIRB” and that he should be required to testify using breaks and taking other steps to reduce the length of his testimony.

I acknowledge that the Meyer Affidavit is an out-of-court statement being tendered without an opportunity for contemporaneous cross-examination, which raises hearsay concerns. However, this is not a court proceeding. This is a supervisory review where I am not bound by the strict rules of evidence, or restricted from receiving hearsay evidence. Importantly, I understand that I do not need to ensure that such evidence meets the common law test of threshold reliability before I admit it.¹

This is a supervisory process conducted under s. 7.1 of *NPMA*, where BCFIRB has broad discretion to exercise its supervisory powers in the manner it considers appropriate. I have exercised those powers to enact Rule 24 of the Rules of Procedure, which provides that I may receive any evidence I consider to be helpful in fulfilling the terms of reference of the Supervisory Review, and that the strict rules of evidence used to determine admissibility will not apply.

I mentioned s. 40 of the *Administrative Tribunals Act* in my opening remarks. While it technically only applies in BCFIRB’s appeal proceedings, I am of the view that in light of the serious allegations at issue in this proceeding, and the corresponding need for a high degree of procedural fairness, I should satisfy myself that the Meyer Affidavit is relevant, necessary and appropriate before I accept it into evidence.

On the issue of relevance, I understand that Hearing Counsel interviewed Mr. Meyer because he was on Prokam’s proposed witness list. While Prokam now says his evidence is only “tangentially relevant”, my initial review of the Meyer Affidavit confirms that its content falls within the Final Terms of Reference. Specifically, it addresses the narrative of the dealings between Prokam, IVCA and the Commission in 2017 and 2018, which is the backdrop to the allegation that the Commissioners and Mr. Solymosi exercised their powers in bad faith and due to a personal animus against Prokam.

¹ *Adams v. British Columbia (Superintendent of Motor Vehicles)*, 2019 BCCA 225, paras. 55-57.

With respect to necessity, Prokam raises a concern that the Meyer Affidavit may duplicate the evidence of Mr. Michell. I do not understand this to be the correct approach to the question of necessity. The question is not whether the evidence is necessary to determine any of the issues in this supervisory review. Rather, the question is whether the affidavit is the only means by which Mr. Meyer's evidence can be put before me.²

In this case, Mr. Meyer's evidence is that he is suffering from a serious and potentially terminal illness and is undergoing treatment, and is therefore unable to provide oral testimony during the hearing. Prokam appears to suggest, however, that Mr. Meyer may be avoiding testifying before BCFIRB, pointing to his conduct in the 2018 appeal proceedings. Prokam's evidence on this application does not appear to support an insinuation of "mischief". Specifically, in an email to Hearing Counsel dated January 28, 2022, Prokam advised that Mr. Meyer was unavailable for one day of the 2018 appeal due to a medical procedure, but "in the end, no party called Mr. Meyer to the witness stand and he observed the final hearing day from the gallery." On the basis of that evidence, I am not prepared to conclude that there is any mischief at play, or that Mr. Meyer's unavailability is anything but genuine.

Taking into account all these circumstances, I consider it appropriate to admit the Meyer Affidavit into evidence. However, I wish to make clear that I am not making any findings about whether I will give the Meyer Affidavit any weight. I will need to hear all of the evidence before determining that question, and will also receive submissions from the participants (including submissions from Prokam concerning internal inconsistencies in the Meyer Affidavit, or its inconsistency with other documents or evidence). While Prokam raises the spectre of procedural unfairness, those concerns are premature until I have determined what, if any, weight is to be given to it.

Lastly, I want to address Prokam's concerns about my direction that this application be dealt with by way of written submissions limited to three pages, and that I did not consult Prokam or the other participants before issuing that direction. I remind all participants that I have the discretion, and indeed the duty, to control the conduct of this proceeding and ensure it proceeds efficiently. That duty is an increasingly important one in that we are substantially behind schedule as we finish the first week of the hearing. In this case, I determined that establishing page limits and directing that matters be addressed by written submissions were appropriate measures to conserve limited hearing time and scarce panel resources, while simultaneously ensuring that

² *R. v. Smith*, [1992] 2 S.C.R. 915 at 933

parties are given a fair opportunity to be heard. I do not see any unfairness arising out of the process that was followed, particularly in light of the relatively detailed submission received from Prokam.

Dated at Vancouver, British Columbia, this 4th day of February, 2022.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

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

Peter Donkers,
Chair

cc: Mark Underhill
Kate Phipps
Nazeer Mitha, Q.C.
BCFIRB web site