McEwan
PARTNERS

McEwan Cooper Dennis LLP
900-980 Howe St.,
Vancouver, BC V6Z 0C8

mcewanpartners.com

January 17, 2022

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 are counsel to the Commission Members Messrs. Newell, Reed, Gerrard, Lodder, and Guichon.

We write pursuant to the BC Farm Industry Review Board's letter of January 13, 2021, with respect to the application to lead the evidence in chief of Bob Dhillon and Bob Gill, in opposition to that grant of leave.

A complainant may be given the status of a party at a hearing either as of right, under an express statutory provision or pursuant to the power of a tribunal to add parties.

In general, however, decision makers overseeing administrative investigations should be reluctant to grant a complainant participatory rights equivalent to that of a party at trial. In *Bohnet v. Law Society of Alberta* (1992), 2 Alta. L.R. (3d) 6 (Q.B.), for example, the Court dismissed the argument that a complainant ought to be granted "full participation at the said hearings including presenting all their evidence and countering the evidence of the respondents''. The Court held:

> [17] This seems to imply that the witnesses were entitled to an adversary position before the law society, which I do not believe is the case. It also misconceives the duties and functions of the Benchers Appeal Committee, and of the new Conduct Review Committee under the new Act.

The lack of such an adversarial nature is a key distinction between civil or criminal proceedings and investigatory proceedings like the subject Supervisory Review. As explained by the Court in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, in the context of a commission of inquiry, such procedures are "not synonymous to trials": at para 42. In particular, "unlike trials, commissions of inquiry are inquisitorial in nature rather than adversarial": *ibid*.

With respect to the presentation of evidence, this has been translated to a general practice, as adopted in the Rules of Practice, to have Commission counsel examine all witnesses in the first instance subject to exceptions which may be sought by special application to the commissioner. Such exceptions, however, are necessarily constrained. In particular, John Sopinka, Q.C. wrote, extrajudicially, that such exceptional "are likely, and probably must be, made with respect to a witness against whom some misconduct is alleged (emphasis added.)": John Sopinka, Q.C. "The Role of Commission Counsel in a Public Inquiry" (1990) 12:3 Dal. L.J. 75 at 81. The evidence of other participants is otherwise properly presented by commission counsel, and subject to their duties to ensure relevant evidence is presented in a fair and impartial manner and to ascertain the truth: *ibid* at 77-78 and 82.

The failure of the complainants to recognize the distinction between adversarial and investigative proceedings has been the subject of past comment by the BCFIRB in this supervisory review. In dismissing the position of MPL British Columbia Distributors Inc. that the "rules of procedure take an adversarial format rather than an inquisitorial or investigative format", for example, Chair Peter Donkers held in his decision dated July 9, 2021 regarding the Rules of Procedure:

> [7] I…. 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.

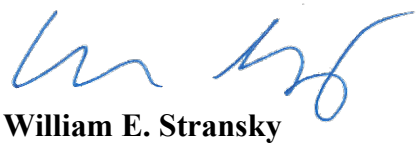
With respect, counsel for Prokam's submission that it is "appropriate and will enhance the fairness" of the hearing to permit them to lead the evidence of Messrs. Dhill and Gill furthers the same error. Contrary to general practice, and contrary to the guidelines on the exceptions to such practice (Sopinka, *supra*), they seek to lead evidence in chief to advance their allegations. They seek to do so unrestrained by hearing counsel's duties and obligations to ascertain truth for the

benefit of the Board. That approach is unprincipled, unnecessary, and likely only to lead to unfairness and inefficiencies in the hearing.

The Commission Members, as the subject of those allegations, oppose any such order.

Yours truly,

McEwan Partners



William E. Stransky
Direct: 604-283-8065
wstransky@mcewanpartners.com

WES/rp

cc: firb@gov.bc.ca
rhrabinsky@ahb-law.com
chunter@litigationchambers.com
randrosoff@litigationchambers.com
acalvert@litigationchambers.com
rmbasham@bashamlaw.ca
emma.wotherspoon@dentons.com
dean.dalke@dlapiper.com
patti.allen@dlapiper.com
rhira@hirarowan.com
ahall@hirarowan.com
rnhira@hirarowan.com
mnicholls@hirarowan.com
rmcdonell@farris.com
munderhill@arvayfinlay.ca
kphipps@arvayfinlay.ca
nmitha@mithalawgroup.ca