McEwan
PARTNERS

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

mcewanpartners.com

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

We write pursuant to the BC Farm Industry Review Board's letters of January 13, 2021 in response to the submissions of Prokam Enterprises Inc. and MPL British Columbia Distributors Inc. to oppose the relief sought therein.

We adopt the submissions of Mr. Hrabinsky, Mr. Hira, Q.C., and Mr. McDonell.

We make the following additional submissions.

Written Submissions of Prokam

(a) Witnesses - Request to be Delegated Authority to Compel Witness Interviews

In its written submissions, Prokam seeks as "consequential relief" the grant of authority to compel witnesses to answer unidentified questions or to interview witnesses. The request should be categorically rejected.

Prokam's request to usurp the authority of hearing counsel where hearing counsel determines, in its discretion, that the potential evidence of a witnesses is irrelevant or of marginal relevance reflects their continued misunderstanding or deliberate disregard of the nature of these proceedings. A complainant may be given the status

of a party at a hearing. As addressed in part in the Commission members submissions of January 17, however, a complainant's addition as a party does not alter the inquisitorial nature of the proceedings and, in particular, does not provide a basis or justification for powers or rights in order to "prove" their allegations as in an adversarial proceeding. Prokam has otherwise provided no authority or precedent for such exceptional relief.

(b) Documents – Applicable Legislative Provisions and Rules

In its submissions, Prokam seeks an amendment to the Rules of Practice and Procedure to permit parties to apply for the production of documents determined by hearing counsel to be irrelevant.

Beyond that request continuing to reflect Prokam's misunderstanding of these proceedings as adversarial (again seeking a mechanism to override hearing counsel's conduct of the proceeding), the notion of a complainant being owed a duty of disclosure from the subject of the hearing is not supported in law. As outlined in *Law of Administrative Investigations and Prosecutions*:

> It does not appear that the complainant is owed any duty of disclosure from the person who is subject to the hearing. In *All Ontario Transport Ltd. v. Ontario (Highway Transport Board)*, a number of companies object to the granting of a licence for the transport of goods by means of public commercial vehicles by the Ontario Highway Transport Board and applied for and were granted standing at the hearing where the board would determine whether the licence should be granted. Anticipating (apparently with good cause based on prior proceedings) that the applicant for the licence, as part of its case in order to establish "public necessity and convenience", would be calling evidence of deficiencies in the objectors' services to the public, the objectors sought an order from the board compelling prehearing production from the applicant of such evidence… The board refused to order production and the objectors then sought judicial review. The Ontario Divisional Court upheld the boards decision….:
>
> > … By objecting an intervener obtains standing in the proceedings but in no sense places his own rights in jeopardy. No legal consequences can flow, as far as he is concerned, from whatever decision the Board may make on the application before it; no order

> can run against him; none of his legally protected rights is subject to the decision…
>
> … in the instant case, as I have said, neither the licence nor the rights of the objecting carriers are in issue or subject to the decision…
>
> … In my opinion that section was intended to apply to proceedings in which the legal rights of a party might be specifically affected by the decision of a tribunal and not to proceedings in which the allegations cannot result in adverse legal consequences.[1]

Prokam has already made clear its position that the Supervisory Review will in no way bar lines of argument or foreclose certain determinations by the Court in its action.[2] Under that analysis, it cannot argue that a determination arising from this Supervisory Review will run against it or compromise its legal rights. On the same basis, it cannot argue as a matter of procedural fairness that it is owed document disclosure for the purpose of seeking to "prove" its allegations against the Commission members or Mr. Solymosi.

(c) Documents – Categories of Documents Demanded

The Commission members have addressed the documents described in paras. 7(j) and (m) of Prokam's written submissions.

Written Submissions of MPL

(a) Request to Participate in Supervisory Review Following Formal Declination to Participate

As addressed above, the Commission members oppose MPL's request to participate in the Supervisory Review following its formal declination to participate by way of its letter dated July 19, 2021, as well as the supplemental relief sought in its January 17 submission.

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[1] William J. Manuel and Christina Donszelmann, *Law of Administrative Investigations and Prosecutions* (Aurora: Canada Law Book, 1999) at 185-186, citing *All Ontario Transport Ltd. v. Ontario (Highway Transport Board)* (1979), 26 O.R. (2d) 202 (Div. Ct.).

[2] Letter of Claire Hunter, Q.C. to BCFIRB dated June 4, 2021 at p. 2.

The Rules of Practice and Procedure were drafted to ensure that the subjects of the Supervisory Review were provided a detailed summary of the allegations as a first step in the proceeding.[3] It was in the face of those rules that MPL refused to participate in the supervisory review.[4] It is only on the eve of the hearing, and after MPL has fought or avoided obligations and deadlines it would otherwise have been subject to (e.g. to provide an initial list of the names of all witnesses they believe ought to be heard, together with a detailed will-say statement) that it seeks to reverse course. These requirements were adopted in recognition of the need of complainant participants to fully disclose the basis of their allegations. Permitting MPL to participate now, even if it fulfills these obligations at the last minute following the disclosure of documents and the interviews of the Commission members and Mr. Solymosi, is inherently prejudicial to them. The Board should not allow it.

The developments that MPL otherwise cites in explaining its decision to now participate in the hearing (to the extent that it has not baldly refused to explain them on the basis of privilege) are not otherwise compelling.

First, the primary basis on which MPL argues that it is appropriately permitted to participate in the hearing – that it "will have no way of presenting evidence or seeking to have evidence put before the BCFIRB that MPL considers relevant"[5] – was an obvious consequence of its decision not to participate at first instance. The Rules of Practice and Procedure clearly provide for leave of hearing participants to seek leave to call further witnesses or present further evidence above and beyond what hearing counsel proposes. It cannot say that hearing counsel's determination not to call potential witnesses is properly a basis to permit it to reverse course and require the extension of long-passed deadlines and/or the adjournment of the hearing.

Second, the situation is not analogous to where new counsel is appointed and seeks an adjournment of a hearing.[6] Outside the questions raised by the Commission with respect to the precise nature of the relationship between Ms. Basham, Q.C. and

[3] Decision – Final Rules of Practice and Procedure dated July 8, 2021, at paras. 5-6.
[4] Letter of David Wotherspoon to BCFIRB dated July 19, 2021.
[5] Letter of Emma Irving to BCFIRB dated January 17, 2022, at pp. 1-2.
[6] Letter of Emma Irving to BCFIRB dated January 17, 2022, at pp. 2-3.

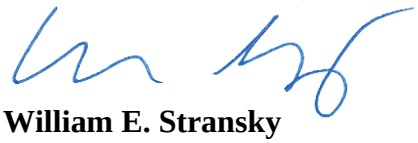
Dentons Canada LLP,[7] it is clear that Dentons remains retained, though it has assigned yet another lawyer to the file (the sixth Dentons lawyer involved in this matter to date, after Ms. Morgan Camley, Mr. David Wotherspoon, Ms. Christy Lee, Mr. Matthew Sveinson, Mr. David Konkin). The consequences of MPL's decision to retain further counsel, if it is accepted as more than a tactical decision meant to delay the hearing of this matter, is ameliorated by that continuity.

(b) Leave to Lead the Evidence of Paul Mastronardi

The Commission Members oppose MPL's request for leave to lead the evidence of Paul Mastronardi for the reasons outlined in their letter of January 17, 2021.

All of which is respectfully submitted

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

[7] Dentons Canada LLP describes Ms. Basham's connection to the firm as "strategic relationship" wherein Ms. Basham will have "access to the multi-jurisdictional expertise of Denton's lawyers" for the purpose of "achieving our clients' desired results" (emphasis added): Dentons Canada LLP, "Dentons Canada takes step to strengthen its Vancouver Litigation team" (27 October 2021), online: https://www.dentons.com/en/about-dentons/news-events-and-awards/news/2021/october/dentons-canada-takes-step-to-strengthen-its-vancouver-litigation-team. Ms. Basham states that "Basham Law is supported by a team of lawyers in Dentons' Vancouver office…": Basham Law Homepage accessed at 21 January 2021, online: https://bashamlaw.ca/.

emma.irving@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