

January 23, 2022

File No: 3211.002

BY EMAIL

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria, BV B8W 2H1

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

**Re: Supervisory Review re. Allegations of bad faith and unlawful activity:
Reply to non-complainant participant and Hearing Counsel Submissions**

We write in reply to Mr. Hrabinsky's letter of January 20, 2022 and Messrs. Hira's, McDonnell's, Stransky's, and Mitha's letters of January 21, 2022. In Prokam's respectful submission, the diametrically opposed positions the complainant participants and the non-complainant participants (supported by Hearing Counsel) have taken, and the prospect that the hearing will proceed despite the limited investigation conducted by Hearing Counsel, raise concerns going to the ability of the public to have confidence in the legitimacy of this Supervisory Review.

The Public Perception of the Legitimacy of this Supervisory Review is at Risk

Prokam's position is that Hearing Counsel's investigation to date into the subject matter of this Supervisory Review is inadequate and incomplete. On January 17, 2022, Prokam sought the following relief:

1. granting Prokam leave to call additional witnesses at the hearing that Hearing Counsel refuses to interview or call;
2. compelling some of those witnesses who Prokam has attempted unsuccessfully to interview to attend for an interview with or answer questions from Prokam's counsel;
3. requiring production of highly relevant documents that the non-complainant participants refuse to produce, and Hearing Counsel refuses to demand be produced;
4. compelling the Commission to comply with its obligation to properly describe documents over which it claims privilege; and
5. adjourning the hearing to allow time for all of that to occur.

MPL supports Prokam's position, and has also identified a list of material witnesses who Hearing Counsel has not attempted to interview.

The Commission, the Commissioners, Mr. Solymosi, and BCfresh are united in their desire for none of this to occur. Together with Hearing Counsel, the subjects of the allegations under investigation wish for the hearing to proceed in one week's time on the basis of the inadequate investigation and incomplete documentary and *viva voce* evidentiary record as they currently stand.


In response to Prokam's motion, Hearing Counsel concedes – 10 days before the scheduled hearing – that he should now attempt to interview prior to the hearing, two of the witnesses (Mr. Krause and Mr. Michell) that Prokam identified in July.¹ While he had previously attempted to interview Ms. Posch, having received no response to his inquiries he appears deterred from interviewing her, and seems content not to exercise his powers under the Rules of Procedure to compel an interview.² He does not propose to interview any material witnesses on the subject of constructive or actual knowledge that the issuance of the 2017 cease and desist orders were unlawful (including Mr. Collins, Mr. Demma, Mr. Leroux and Mr. Walsh). He has arrived at that position based on a misapprehension that evidence on this subject is unnecessary because “the state of the actual or constructive knowledge of Messrs. Guichon and Solymosi about the requirement to “gazette” and register is admitted”,³ and prior to determination Hearing Counsel has sought from the Review Panel on a preliminary basis of the issue of admissibility of the parliamentary committee document.

One of BCFIRB's two stated purposes of this Supervisory Review is to ensure public confidence in the fairness and integrity of the administration of the BC regulated vegetable sector. If this Supervisory Review proceeds on the basis of an incomplete and inadequate

¹ See Mr. Mitha's letter of January 21, 2021 at paras. 48 and 50. Hearing Counsel's acknowledgment that there are two further witnesses he agrees it is necessary to interview prior to the hearing is a sufficient reason to grant an adjournment. It is worth noting that together with his letter of January 21, 2021, Hearing Counsel provided a copy of a book of documents he intends to rely on at the hearing and asked counsel to provide copies of any additional documents to be relied on at the hearing by Wednesday, January 26. The practicality of interviewing additional witnesses, preparing and producing additional witness summaries and providing a fair opportunity for participants to consider what use should be made of the additional information arising from further interviews only days before the hearing is to commence does not appear to have been considered.

² A witness who Hearing Counsel considered it appropriate to interview should not – in a rigorous inquisitorial process – be permitted to avoid the power of Hearing Counsel to compel answers simply by refusing to respond.

³ Letter from Nazeer Mitha of January 21, 2021 at para. 43. Mr. Mitha ignores that Mr. Guichon has made no such admission, and rather expressly denies knowledge of the gazettement and registration requirements. Knowledge at the material time of the existence of the requirement to Gazette and register an order that requires federal legislative authority has been admitted by Mr. Solymosi and the Commission, although not by Mr. Guichon. Knowledge at the material time that Commission orders regulating interprovincial trade – like the Commission's levies order and the export minimum pricing orders – required (and continue to require) the exercise of federal legislative authority is not admitted by any party and is expressly denied.



evidentiary foundation, in which key witnesses are not interviewed and key documents identified by both Prokam and MPL are excluded from the record, the Review Panel's findings will be inherently unreliable. No right-thinking, objective member of the public fully informed of all of the circumstances could have any confidence in the fairness and integrity of that outcome.⁴

Rather, a right-thinking, objective member of the public fully informed of all of the circumstances would question why the Commission, the Commissioners, Mr. Solymosi, and BCfresh seek to conceal highly relevant evidence from the scrutiny of the Review Panel, even going to such lengths as to make a partial admission of a material fact in order to attempt to avoid having to produce several categories of critically relevant documents.⁵ The obvious and natural assumption is that the reason the subjects of the allegations so fervently oppose the Review Panel having access to these documents and witnesses is because there is something they want to hide.

It is less obvious why Hearing Counsel has refused to exercise his powers to compel the subjects of the allegations to produce documents that Prokam and MPL have identified as being highly material to the allegations, or why he has refused to exercise his powers to interview witnesses Prokam and MPL say have evidence to give that is highly material to the allegations. Hearing Counsel is content to accept and repeat the non-complainants' assertions that these documents – which he has apparently never seen before – do not contain anything relevant to the allegations. Similarly, he is content to conclude that material witnesses Prokam and MPL identified to him – with whom he has apparently never spoken – have no

⁴ Mr. Stransky, on behalf of Commissioners including Mr. Guichon, acknowledges that “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.” He goes on to assert that “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”. (January 21, 2021 letter of Mr. Solymosi). In this process, it is Hearing Counsel who was charged with the duty to obtain document disclosure and gather evidence to determine whether Prokam and MPL's allegations were substantiated. In the absence of a thorough discharge of that duty and a full evidentiary record being placed before the Review Panel, this Supervisory Review process will serve only to undermine public confidence in the process, contrary to its stated objective.

⁵ In July 23, 2021, Prokam advised Hearing Counsel of anticipated evidence of Mr. Leroux (a witness who Prokam has interviewed, but who Hearing Counsel has declined to interview) of specific meetings starting in September and October 2006 that Mr. Guichon attended at which the requirement to Gazette and register orders relating to interprovincial trade was discussed. The records of meetings during the 2006 and 2009 period were circulated to Commissioners by email and are presumably in the possession of the Commission (Mr. Hrabinsky does not state in his letter at subparagraph 6(a) that they are not) or in the possession of Mr. Guichon who was a Commissioner during that period. While Hearing Counsel has not pursued production of these documents, they are clearly relevant to the question of Mr. Guichon's actual or constructive knowledge that the cease and desist order was unlawful, and accordingly were nevertheless required to be produced to Hearing Counsel pursuant to *Rules* 4 and 9-11.

relevant evidence to offer the Review Panel. A right-thinking, objective, fully informed member of the public would be forgiven for asking: “How can you know what a document says without looking at it? How can you know what a witness has to say without speaking with them?”.

Hearing Counsel states that, notwithstanding his “inadvertent” reference to an outdated version of the Terms of Reference in his December 24, 2021 report, he has been informed in his investigation by the Terms of Reference as amended as well as the *Rules of Practice and Procedure*.⁶ However, it appears in many respects that Hearing Counsel has misapprehended his role and has ignored the guidance provided by the Review Panel in its July 9, 2021 decision, by which the *Rules of Procedure* were finalized.

By way of one example: with respect to his failure to demand documents relating to the actual or constructive knowledge of Mr. Guichon of the unlawfulness of the cease and desist orders, Hearing Counsel asserts that Mr. Solymosi’s admission renders the documents “not relevant” but suggests that Prokam will have the opportunity to cross-examine Mr. Solymosi and “If it can establish relevance of the documents in the course of cross-examination, the Review Panel can address the need for those documents at that time”.⁷ The procedure proposed by Hearing Counsel limiting the requirement of the Commission, Mr. Guichon, Mr. Solymosi and BCfresh to produce documents unless Prokam can “establish the relevance of the documents” is directly contrary to the procedure required by the *Rules*, and instead reflects a submission of the Commission and Commissioners that has already been considered and rejected by the Review Panel:

I again agree with Prokam. As above, this supervisory review is primarily investigative in nature, flowing from BCFIRB’s supervisory jurisdiction. Unlike previous supervisory reviews, this proceeding is taking the form of an oral hearing, with procedures being put in place to ensure a high degree of procedural fairness in light of the serious nature of the allegations raised. The Commission, its members and staff cannot limit their duty to respond to the investigation based on what another party can or cannot produce to substantiate their allegations, particularly given that they would have possession and control of the preponderance of the relevant documents.⁸

It is not Prokam’s onus to establish that relevant documents are necessary at the hearing in order for the parties to be required to produce them. The *Rules* required that all parties produce relevant documents to Hearing Counsel prior to the hearing. Relevance is expressly defined in the *Rules* based on the issues raised in the Terms of Reference and includes

⁶ January 21, 2021 letter of Mr. Mitha at para. 6.

⁷ January 21, 2021 letter of Mr. Mitha at para. 58 (underline emphasis added).

⁸ July 9, 2021 Decision of Review Panel at para. 23 (underline emphasis added).

documents that may lead directly or indirectly to other relevant information. The categories of relevant documents required to be produced are very broad; Prokam is not required to “establish” anything for the *Rules* governing document production to be engaged.⁹

It is unclear why Hearing Counsel joins with the subjects of the allegations in opposing Prokam’s application to adjourn the hearing so that serious deficiencies in his investigation of those allegations can be corrected. However, it will not be lost on the right-thinking, objective, fully informed member of the public that Hearing Counsel’s lacklustre approach to his investigation favours the subjects of that investigation – the Commission, the Commissioners, Mr. Solymosi, and BCfresh – whose interests are naturally best-served by the hearing of this Supervisory Review being conducted on the basis of an evidentiary record that is as far from complete and comprehensive as possible.

While Prokam raised some aspects of the allegations in prior appellate and supervisory BCFIRB proceedings, BCFIRB did not squarely address the allegations in those proceedings. Thus, Prokam was initially encouraged by the onset of this Supervisory Review and the opportunity for the allegations to be fully investigated and adjudicated upon. Prokam believes that Hearing Counsel initially set out to conduct a complete, comprehensive, and proper investigation into the allegations. However, he has unfortunately fallen short. Rather than take this opportunity to acknowledge and correct that deficiency, he confusingly joins with the subjects of the allegations in opposing Prokam’s efforts to do so.

An inquisitorial proceeding like this Supervisory Review can only hope to fulfil its truth-seeking function if the Review Panel has access to all of the relevant evidence as a result of a diligent, comprehensive, and complete investigation. The hearing of this Supervisory Review should not proceed unless and until that has been done. And, if Hearing Counsel continues to refuse to do it, the Review Panel should permit Prokam or someone else to do so instead.

The Bases on which the Non-Complainant Participants oppose Prokam’s Application are without Merit

The substance of the bases on which the non-complainant participants oppose Prokam’s application is perplexing. Mr. Solymosi, uniquely, takes the express position that Prokam should not be permitted to call or compel to attend for an interview any of the witnesses on the contradictory bases that, on the one hand, Prokam had “the duty” to interview the witnesses earlier in the Supervisory Review process,¹⁰ and on the other, that granting Prokam

⁹ Rule 11 provides “The Review Panel considers relevant documents “to include anything that touches on or concerns the subject matter of the Supervisory Review or that may directly or indirectly lead to other information that touches on or concerns the subject matter of the Supervisory Review.”

¹⁰ January 21, 2022 letter of Ravi Hira at para. 9.

the right to interview and call witnesses should be rejected as it would give them “effectively...the same authority as Hearing Counsel”.¹¹

Mr. Solymosi’s submission effectively criticizes Prokam for failing to exercise the investigatory powers of Hearing Counsel during the time Hearing Counsel was conducting his investigation. However – and contrary to the position taken by Mr. Solymosi and the Commissioners that Prokam fails to understand the inquisitorial nature of this proceeding – it is because Prokam does understand the inquisitorial nature of this proceeding and the investigatory role accorded to Hearing Counsel under the *Rules*¹² that Prokam left it to Hearing Counsel, who had a duty under the *Rules* to investigate the allegations, to actually conduct the investigation. If Prokam had instead set out to conduct its own parallel investigation before Hearing Counsel completed his “iterative” investigatory process – as Mr. Solymosi suggests Prokam ought to have done – Prokam would have risked potentially interfering with Hearing Counsel’s investigation.

After raising concerns with Hearing Counsel in September 2021 that it “does not appear that there are interviews planned of any of the non-participant witnesses identified by Prokam on its witness list”, Hearing Counsel assured Prokam on October 15, 2021 that additional interviews would be scheduled through an “iterative process”, and that the list would “evolve”. Accordingly, Prokam had every reason to believe that Hearing Counsel would interview the non-participant material witnesses Prokam identified. It was not until January 12, 2021 that Hearing Counsel advised that he had not interviewed the witnesses that Prokam now seeks to call.

Mr. Solymosi’s suggestion that Prokam ought to have employed the procedures in the BC *Supreme Court Civil Rules* for obtaining discovery in its civil action¹³ to investigate and gather evidence for use in this Supervisory Review is entirely without merit.

First and foremost, if Prokam had employed the procedural machinery for compelling discovery in a court action to the collateral purpose of use in this Supervisory Review, that would have constituted a serious abuse of the court’s process and of the implied undertaking of confidentiality afforded to compelled pre-trial discovery.¹⁴ Had counsel for Prokam attempted to do this, it would likely have constituted professional misconduct running afoul of the barristers’ oath proudly framed and displayed on Mr. Hira’s wall, which was exhibited

¹¹ January 21, 2022 letter of Ravi Hira at para. 10.

¹² See Rules 18-21.

¹³ In particular Rule 7-5, which permits an application to BC Supreme Court for an order requiring a non-party witness to attend at a pre-trial examination on oath.

¹⁴ *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2015 BCSC 2169 at paras. 133-136 (abuse of process); *Gurtins v. Panton-Goyert*, 2009 BCSC 679 at paras. 5-6 (implied undertaking); and *Juman v. Doucette*, 2008 SCC 8 at para. 124 (implied undertaking).

during Mr. Hira's submission at the pre-hearing conference in this proceeding on June 30, 2021.

Second, there simply would not have been time after Prokam found out Hearing Counsel was not interviewing the third-party witnesses it identified for Prokam to apply for an order and conduct pre-trial examinations of all of those witnesses. Mr. Hira does not mention that it was not until August 31, 2021 and October 1, 2021 that Mr. Solymosi and Mr. Guichon filed their respective responses to civil claim. By that time, Prokam had long since complied with the requirement in this Supervisory Review to deliver its initial witness list and summary of evidence in this Supervisory Review, and Hearing Counsel's investigation should have been well underway given the original hearing date of September 27, 2021.

Third, this Supervisory Review is an entirely separate process from the BC Supreme Court action commenced by Prokam. It has its own Terms of Reference and its own *Rules of Procedure*. In our letter of June 4, 2021, we raised in the context of this Supervisory Review the importance of ensuring that this supervisory review "will not compromise the integrity of the process of the Court". Just as we cautioned against this supervisory process being used to pre-empt the court process, Hearing Counsel's investigation was to be distinct from the court proceeding. The Review Panel expressly held that it does "not accept that this supervisory review is properly seen as an adversarial process",¹⁵ and that it "will not be limited to the evidence and documents produced by the parties".¹⁶

For all of these reasons, the suggestion that Prokam should be precluded from availing itself of the procedures set out in the *Rules of Procedure* for this Supervisory Review because it failed to obtain orders for pre-trial examination of witnesses in BC Supreme Court should be rejected.

Counsel for other parties join Mr. Hira in his second submission that because this is not an adversarial process, it is not appropriate for Prokam to be granted the powers to compel attendance at interviews or summon or call witnesses in this Supervisory process.¹⁷ It must be remembered that the *Rules* specifically contemplate a process for a party to apply to call a witness or to file a document as an exhibit where Hearing Counsel elects not to do so,¹⁸ and they also must contemplate a process in those circumstances to compel the witness to attend. The *Rules* do not expressly provide to a party (in the circumstance that leave to call a witness under Rule 30 is granted) the powers of Hearing Counsel to provide advice to the Review Panel to issues a summons or to compel answers to questions. It appears that Hearing

¹⁵ July 9, 2021 Review Panel Decision at para. 6

¹⁶ *Ibid.* at para. 8

¹⁷ January 21, 2022 letter of Robert McDonnell at para. 6; January 21, 2021 letter of William Stransky at pages 1-2; January 20, 2022 letter of Robert Hrabinsky at para. 5.

¹⁸ Rule 30.

Counsel himself understands the *Rules* to provide an avenue for Prokam to seek to have witnesses he has elected not to call summoned at the hearing:

You also state that you have been unable to speak with many of the individuals not included in my witness list. I am not sure why Prokam has been unable to speak with those witnesses. If their refusal is the reason, Prokam can seek to have them summoned at the hearing.¹⁹

Hearing Counsel's determination not to interview the additional witnesses Prokam seeks leave to call and interview cannot be a basis on which to reject Prokam's application. Otherwise, Rule 30 has no purpose. Similarly, Prokam cannot be faulted for not attempting to conduct its own interviews until after Hearing Counsel advised very late in the day that he had not done so.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.

CEH/RJA

¹⁹ . January 12, 2022 letter from Mr. Mitha (underline emphasis added).