

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

**IN THE MATTER OF *THE NATURAL PRODUCTS MARKETING (BC) ACT* AND
ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY**

Reply Argument of Hearing Counsel

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Reply Argument of Hearing Counsel

1. In this Reply, I deal with the procedural issues raised by Prokam and MPL, as well as Prokam's submission that the process before the Review Panel is akin to a motion to strike in court proceedings. I also address the costs and legislative reform issues raised by the Commission.

Prokam and MPL's Procedural Issues

2. Prokam and MPL raise the following procedural issues as against Hearing Counsel:
 - a. criticizing Hearing Counsel's submission that there is no cogent evidence to support the serious allegations in the terms of reference (Prokam para. 9);
 - b. complaining that Hearing Counsel made no attempt to frame and test Prokam's claim in the best possible light (Prokam para. 18);
 - c. arguing that Hearing Counsel omitted to advert to the excerpt from Mr. Guichon's evidence at the 2018 hearing where it is alleged that he made a decision based on self-interest (Prokam para. 37);
 - d. arguing that Hearing Counsel engaged in aggressive cross examinations of Messrs. Dhillon and Gill (Prokam para. 20(e));
 - e. alleging that Hearing Counsel's cross examination of the non-complainant participants was "friendly" (Prokam para. 11);
 - f. arguing that Hearing Counsel failed to compel BC Fresh or the Commissioners to produce documents and failed to compel the non-complainant participants to deliver witness statements (Prokam para. 20(b)); and
 - g. arguing that Hearing Counsel failed to interview various witnesses identified by Prokam (Prokam para. 19) (MPL paras. 20, 21 and 27).
3. Prokam and MPL raised complaints against the Review Panel as follows:

- a. the review became afflicted by a degradation of procedural fairness accorded to the complainant participants (Prokam para. 12);
- b. the truth seeking function of the supervisory review was compromised (Prokam para. 13);
- c. the supervisory review was ill-conceived from the start (Prokam para. 15);
- d. the Review Panel's denial of Prokam's adjournment application (Prokam para. 20(c));
- e. the Review Panel's denial of Prokam's application under Rule 28 to lead evidence from Mr. Dhillon and Gill (Prokam para. 20(d));
- f. the Review Panel imposed low time restrictions on cross examinations of all the subjects except Mr. Solymosi (Prokam para. 20(f), MPL para. 10); and
- g. the Review Panel had a paradigm shift when Prokam began invoking procedural fairness (Prokam para. 21).

Criticism of Hearing Counsel

4. Paragraphs 2(a)–(c) are misplaced criticisms. They ignore the role of Hearing Counsel. In the end, Hearing Counsel is required, after all of the investigations, and oral and documentary evidence, to arrive at conclusions to submit to the Review Panel and the parties. While Prokam is entitled to and does disagree with Hearing Counsel's framing of issues and conclusions, that disagreement is not a basis for claiming that there is procedural unfairness.
5. Paragraphs 2(d) and (e) concerning the nature of the cross-examination are also misplaced criticisms. There are many examples where Hearing Counsel asked questions of all participants in a similar manner. In certain cases, direct answers were provided and as a result, no further cross-examination was required. In other cases, where witnesses equivocated, as is appropriate, Hearing Counsel continued cross-examination to seek clear responses. This is the nature of cross-examination. This is not a basis to claim procedural unfairness. Further, and in any event, Prokam's legal

counsel had the full opportunity to cross-examine all witnesses rigorously and thereby bring any inconsistencies to the attention of the Review Panel.

6. Paragraphs 2(f) and (g) were dealt with by the Review Panel in its decision dated January 25, 2022. On numerous occasions, Prokam and MPL made application for additional documents and those applications were largely granted. Prokam and MPL also made application to call additional witnesses. At page 3 of its January 25, 2022 decision, the Review Panel noted that there was no impediment to counsel for any of the participants to interview witnesses they so choose and to present the Review Panel with an evidentiary foundation to establish that there should be further witnesses called. At page 5, the Review Panel stated:

Prokam has not actually spoken to many of the third party witnesses it sought leave to call. As I noted above, I see no impediment to Prokam speaking with those witnesses at any time, and it was open to them to do so since they filed their claim in March of 2021, well before this supervisory review commenced.

7. Finally, the Review Panel concluded by stating it was not closing the door on additional witnesses being called, and that it was open to any participant to bring an application with the proper evidentiary basis. While Prokam and MPL now complain about certain witnesses not being called, they had the opportunity to speak to any of those witnesses and to bring a proper evidentiary foundation at the end of the hearing (or at anytime) to call further witnesses. They did not do so.

Criticism of the Review Panel

8. Prokam and MPL's various criticisms of the Review Panel are matters which the Review Panel dealt with in its January 25, 2022 and April 29, 2022 decisions. In those decisions, the Review Panel dealt with the following issues raised by Prokam and MPL: adjournment of the oral hearing; leave to call additional witnesses; alleged non-compliance with rules concerning producing witness lists, privileged documents and additional documents; application to lead evidence of their witnesses; and setting time frames for cross examinations.

9. For all of the above issues, detailed submissions were made by all parties, including Prokam and MPL and the Review Panel in turn provided detailed decisions.
10. In its decisions, the Review Panel left open the opportunity for Prokam and MPL to pursue further document production, cross-examination, or calling additional witnesses. For example, as stated above, Prokam and MPL made no effort to bring an application with a proper evidentiary basis to call additional witnesses.
11. Concerning additional cross examinations, it is noteworthy that one of the two respondents named by Prokam was Mr. Solymosi. Prokam was not limited in any manner in its cross-examination of Mr. Solymosi. In fact, that cross-examination lasted more than 6 hours.
12. Concerning the only other respondent named by Prokam, Mr. Guichon, at page 5 of its March 18, 2022 decision, the Review Panel stated that it will retain the discretion to extend time limits for cross-examination where it was necessary to ensure procedural fairness.
13. After cross-examining Mr. Guichon, Ms. Hunter requested the opportunity to take Mr. Guichon to one additional document. The Review Panel granted the request. Ms. Hunter did not seek to cross-examine Mr. Guichon any further, nor did she make any application or provide submissions on further areas on which she wished cross-examine Mr. Guichon (or on which she was unable to cross-examine him).
14. In summary, the procedural issues raised by Prokam and MPL are largely a regurgitation of issues previously raised and on which rulings were made. Prokam and MPL had the opportunity to address the very issues they continue to raise (such as seeking further documents and calling further witnesses) and chose not to do so. As a result, it does not lie in their mouths to now complain that the process was unfair.

Prokam's Argument that this Supervisory Review is Akin to a Motion to Strike Pleadings

15. Prokam argues that the Review Panel is not entitled to weigh the evidence before it to arrive at a conclusion. Rather, the Review Panel is only required to determine whether

the evidence could possibly be substantiated, akin to a motion to strike in the BC Supreme Court. This is incorrect.

16. Prokam focuses on the Notice of the Supervisory Review, and ignores the Final Terms of Reference (“FTOR”), which make clear that the focus of the Review is to determine if the allegations made are accurate. Prokam’s analysis also ignores the Review Panel’s March 18, 2022 decision where the Panel expressly referenced having to decide the issues set out in the FTOR. In an application to strike, a court considers only pleadings. It does not consider evidence. Prokam’s suggestion that the Review should be treated like a motion to strike flies in the face of the significant investigation which has occurred, and the approximately 16 days of hearing where there was significant evidence presented. Were the Review Panel only to consider whether the allegations in the FTOR could be substantiated, this could have been done on the basis of just the bare allegations. Clearly this was never the intent. The intent, known to all parties, was for the Review Panel to determine if the allegations in the FTOR are substantiated.
17. I also adopt the submission of BC Fresh at paragraph 17 of its submission.

Commission’s Submission on Costs and Legislative Reform

18. The Commission seeks an order of costs for the Commissioners, and also says that BCFIRB should advocate for legislative reform around statutory immunity. In my view, it would not be appropriate at this stage of the Review for the Panel to consider whether it can or should issue such orders. These and other similar issues should only be addressed by the Panel after a decision is rendered and all participants have an opportunity to make full submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Date: June 21, 2022

Nazeer T. Mitha, QC