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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 write on behalf of Messrs. Newell, Reed, Gerrard, Lodder and Guichon in response to Hearing Counsel's letter dated March 10, 2022, and in support of his proposal for the continuation of this hearing.

<u>Jurisdiction to Set and Enforce Schedule for Hearing</u>

As outlined in Hearing Counsel's letter dated March 10, 2022, BCFIRB has the power to structure its proceedings in whatever best accomplishes its supervisory mandate.[1]

Generally, the proper exercise of that power should be to ensure that proceedings are fair, orderly and efficient, and that time and costs are not wasted.[2] To that end, the major problem in administrative law is not agencies exercising arbitrary powers with respect to the conduct of a hearing, but that they too frequently exercise too little control.[3] In such circumstances, hearings can drag on with rambling, irrelevant or repetitive evidence being led, with the agency panel listening politely. Firm chairmanship can expedite proceedings without curtailing anyone's rights in any significant way. To that end, it is generally recommended that agencies keep control over its proceedings and the timetable set therein.

With respect to the direction of cross-examination, it is important to note that there is no common law right to cross-examination in administrative proceedings – particularly for complainants in an investigative inquiry. The degree to which the right to cross-examination is to be recognized is context specific: it considers the right claimed, the importance of the right, the mandate of the board, the nature of the proceedings, the effect of the right claimed on the board's ability to perform its mandate, and the adequacy of the

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[1] *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330, s. 7.1.
[2] Code of Conduct for Members dated March 9, 2017, s. 24; see also Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies* (Ottawa: Department of Justice Canada, 1985).
[3] Law Reform Commission of Canada, *Working Paper 25: Administrative Law, Independent Administrative Agencies* (Ottawa: Department of Justice Canada, 1980).

procedures granted.[4] Those factors reflect that as a general principle, cross-examination must serve a relevant purpose in the proceedings.[5]

Even where cross-examination is warranted, a reasonably instructed tribunal may properly impose reasonable restraints on cross-examination.[6] Every hearing need not permit the extreme latitude appropriate to a murder trial or indulge an "orgy of cross-examination" by counsel.[7] All that is necessary, where an opportunity to cross-examine is adjudged to be appropriate, is that a fair opportunity is given to correct or controvert any relevant prejudicial statement.[8]

Need to Prescribe Limits on Cross-Examination

With respect, the conduct of counsel for the complainants in the hearing of the Supervisory Review to date demonstrates need to set and enforce a timetable for the hearing as proposed by Hearing Counsel.

Since its outset, Prokam and MPL BC have wrongly approached or sought to cast this Supervisory Review as an adversarial proceeding in which they may prove their allegations. As a corollary, they have argued that as a matter of procedural fairness they should be given the opportunity to do so, whether by being delegated powers to compel witness interviews, to apply for or compel the production of documents deemed irrelevant by Hearing Counsel, or to lead the evidence of witnesses at first instance.[9] In advancing those argument, they have stated an equivalency in standing between themselves and the subjects of their allegations in this Supervisory Review. Those positions are properly rejected as (a) the purpose of this Supervisory Review is not to determine the claims of misfeasance in public office; and (b) it is Mr. Solymosi and the Commission members who are the subjects of the allegations and who are entitled to a high degree of procedural fairness.

The complainants' cross-examinations to date (and, we anticipate, the positions adopted in response to Hearing Counsel's proposal), however, reflect a perpetuation of these errors. In particular, the Rules of Practice and Procedure prescribe that Hearing Counsel has the primary responsibility for presenting all relevant.[10] Despite that prescription, the time and manner of the complainant's examinations and cross-examinations – and, in particular, the nearly 15-hour cross-examination of Mr. Solymosi by the complainants –

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[4] *MacInnis v Canada*, [1997] 1 F.C. 115 (C.A.).
[5] *Young v British Columbia (Workers' Compensation Appeal Tribunal)* 2011 BCSC 1209.
[6] *Vanton v. British Columbia Council of Human Rights* [1994] B.C.J. No 497 at para. 35 (S.C.).
[7] Robert F. Reid and Hillel David, Administrative Law and Practice, 2nd ed. (Toronto: Butterworths, 1978) at p. 81.
[8] *Ibid*.
[9] See Letter from Claire Hunter, Q.C. to BCFIRB dated January 10, 2022, and Letter from Emma Irving to BCFIRB dated January 17, 2022
[10] Rules of Practice and Procedure, Rule 18.

shows the continued effort to usurp Hearing Counsel's role. Prescribing and enforcing time limits on all parties is necessary and appropriate to ensure that cross-examinations advance in a focused and proportionate manner without further prejudice and delay to these proceedings. If Prokam and MPL BC otherwise wish to argue that any limit on the scope of their participation in this proceeding impacts their civil claims they can make those arguments in the proper forum; they should not be permitted to pervert this proceeding to advance their private interests.

There can otherwise be no reasonable argument that the complainants have a reasonable expectation to an unlimited cross-examination, at this stage or otherwise. Beyond its lack of support at law (above), R. 34 of the Rules of Practice and Procedure expressly states they may be amended and added to if the board finds it necessary to do so to fulfil its mandate. At the outset of this process, BCFIRB expressly recognized the need to proceed with this matter expeditiously.[11] Hearing Counsel's proposal for the continuation of this hearing is necessary to ensure that the scheduled witnesses are heard in the time permitted and that further costs and delays be avoided – for the sake of the subjects of the allegations and the regulated vegetable industry as a whole.

Comment on Schedule – Ravi Cheema

The Commission members request we be provided 30 minutes to cross-examine Mr. Cheema. The proposed hearing schedule provides:

Witness	**N. Mitha, Q.C.**	**R. Basham, Q.C.**	**J.K. McEwan, Q.C.**
Ravi Cheema	30	60	15

In view of the times provided Hearing Counsel and counsel to MPL BC and the interests in permitting counsel for the Commission members to challenge any adverse evidence Mr. Cheema may provide, providing them 30 minutes to cross-examine is proportional. As neither Mr. Cheema's will-say statement nor his responses to Hearing Counsel's interview questions provide meaningful particulars of what his evidence may be, that time may be necessary to address the evidence raised in his initial examinations.

[11] Notice of Supervisory Review dated May 26, 2021.

Yours truly,

McEwan Partners

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JKM/WES/rp
cc: All Counsel