

March 15, 2022

File No: 3211.002

BY EMAIL

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

Attention: Wanda Gorsuch

Dear Sirs/Mesdames:

**Re: Allegations Supervisory Review – Response to Hearing Counsel’s
Recommendation to Limit Cross-Examination**

We write further to Hearing Counsel’s letter dated March 10, 2022 and the Review Panel’s direction of March 11 inviting submissions in response. Although Hearing Counsel frames his recommendation in terms of the Review Panel’s flexibility to set its own procedure, his recommendation to curtail the parties’ cross-examination rights actually engages the question of the Review Panel’s ability to change – partway through the hearing – the procedure it already set at the outset of this proceeding in July 2021. It is “well established that fairness may require adherence to certain procedures when prior conduct creates...a legitimate expectation that such procedures will be followed.”¹ As one court put it “[o]ne does not change the rules in the middle of the game.”²

On July 9, 2021, following submissions from the parties, the Review Panel issued Final Rules of Procedure. Rule 29 provides that “[u]nless the Review Panel otherwise orders”, each participant will “have an opportunity to cross-examine the witness to the extent of their interest.” The hearing has proceeded to date consistent with Rule 29. The parties have proceeded to date on the basis that they would have the right to cross-examine each of the witnesses included on the witness list previously circulated and directions have been made by the Review Panel with respect to document production on the basis that “these issues can be addressed in cross-examination”³ of witnesses who have not yet given evidence.

Each representative of the complainant participants has already given evidence and every participant has had a right of cross-examination. The cross-examinations of Mr. Mastronardi and Mr. Dhillon in particular were very lengthy and far exceeded hearing counsel’s time estimates, notwithstanding that neither Mr. Mastronardi nor Mr. Dhillon is the subject of any of the allegations under review in this process, nor could they have been direct witnesses to

¹ *Mega International Commercial Bank (Canada) v. Canada (AG)*, 2012 FC 407 at para. 12

² *Gaw v. Canada (Commissioner of Corrections)* (1986), 2 F.T.R. 122 (Fed. T.D.) at para. 9

³ Review Panel’s Ruling Regarding February 2, 2022 Adjournment Application, February 3, 2022, p. 3

the events central to MPL and Prokam's allegations given the nature of the allegations. Hearing counsel's examination of Mr. Dhillon alone was over three hours, notwithstanding that the principals of Prokam are "not accused of wrongdoing, and there is no issue of them not knowing the case they have to meet".⁴ We note this in contrast to the time hearing counsel proposes for his own examination of witnesses who have not yet given evidence, including all but one of the subjects of the allegations, none of which exceeds one hour.

Prokam has already raised concerns about the fairness of the process to date and in particular the unfairness of proceeding with the hearing and examination of its witnesses when it was apparent that hearing counsel's investigation and document production by the non-complainant parties was incomplete. Indeed, in denying Prokam's and MPL's applications for an adjournment, the Review Panel emphasized the importance to this supervisory review of "rigorous" cross-examination of the non-complainant participants:

It appears from the submissions before me that there is broad agreement between the participants that the initial focus of the supervisory review must be on the allegations raised by Prokam and MPL in their notices of civil claim (along with the allegations made by Bajwa Farms in this review), and in turn the responses of those accused of wrongdoing. As I understand it, considerable work has been done to investigate those allegations. Multiple witnesses have been interviewed, and thousands of pages of documents have been produced and reviewed. Perhaps most importantly, the key participants, being the individuals who have raised the allegations and those who stand accused, will all be testifying in the hearing and subjected to rigorous cross-examination by experienced counsel. The allegations can therefore be fully explored during the hearing on the basis of the investigation done to date....⁵

Many of the witnesses who are scheduled to testify next are subjects of the allegations. Without the ability to fully examine and test the evidence of those witnesses through cross-examination, the Review Panel is likely to be left with a distorted or incomplete version of their evidence. Any findings based on an evidentiary record that is distorted or incomplete, because the parties' ability to cross-examine witnesses was curtailed by arbitrary time limits, will not assist in restoring public confidence in the regulated vegetable sector.

Hearing Counsel's proposal would deny Prokam the right to cross-examine John Newell, Cory Gerrard, and Blair Lodder. Although these witnesses are not the subject of Prokam's allegations in its notice of civil claim, they were present during many of the events central to those allegations and thus are in possession of evidence that is highly material to Prokam's claim (and, thus, the subject matter of this supervisory review). Mr. Newell, in particular, gave evidence as a panel with Mr. Solymosi at the BCFIRB appeal from the cease & desist orders and direction of Prokam to BCfresh in 2018 and Prokam's cross-examination of Mr. Solymosi proceeded on the basis that it would be entitled to cross-examine Mr. Newell. The

⁴ Review Panel's Ruling Regarding February 2, 2022 Adjournment Application, February 3, 2022, p. 3.

⁵ Review Panel's Decision on Preliminary Matters, January 26, 2022, page 2 (emphasis added).

Review Panel should not be deprived of this material evidence, and Prokam should be entitled to elicit that evidence through cross-examination.

Hearing Counsel's application raises the question of whether and to what extent procedural fairness, the truth-seeking function of this supervisory review, and the ability of this review to restore public confidence in the integrity of the regulated vegetable sector should yield to the countervailing value of completing the supervisory review as quickly as possible. Curtailing the parties' ability to cross-examine witnesses risks (further) jeopardizing both the procedural fairness of this supervisory review and the ability of this review to fulfil its truth-seeking function.

Having explicitly recognized the importance to all participants in this supervisory review of the right to cross-examination, and having promulgated "Final Rules of Procedure" recognizing this right, it would be significantly procedurally unfair to change the procedure and limit cross-examination rights half-way through, after the complainant participants have been called and before most of the non-complainant participants have been called. Although the Review Panel had significant discretion to craft its own procedure for this supervisory review at the outset, it would be unfair and inconsistent with the parties' legitimate expectations to change the procedure now in the manner hearing counsel proposes.

Prokam wishes to cross-examine each of the witnesses included on Hearing Counsel's schedule circulated March 10, 2022 with the exception of Ravi Cheema. It had been proposed that "to accommodate counsel availability, the hearing will have to be divided into the Prokam and Bajwa issues in the week of March 28 and the MPL issues in the week of April 18, 2022" and that Mr. Guichon be called twice, once in each week. We are available for all of the proposed hearing dates with the possible exception of April 20 & 21. If it is necessary that witnesses other than Mr. Cheema be scheduled for April 20 & 21, we will attempt to make another lawyer from our office available to represent Prokam on those dates. Prokam should not be denied the right to cross-examine witnesses as contemplated by Rule 29 to the extent of its interest on the basis of counsel availability.

Prokam is prepared to make best efforts to focus its cross-examinations to the matters engaged by the terms of reference or that have already been raised with other witnesses but does not agree that any arbitrary time limits can fairly be imposed on it.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, Q.C.