



BC Farm Industry Review Board

March 18, 2022

File: 44200-60\AREV

DELIVERED BY EMAIL

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Dear All:

RULING REGARDING HEARING CONTINUATION

By way of letter dated March 10, 2022, Hearing Counsel provided me with a proposal for the continuation of the supervisory review hearing, and also addressed certain document production and witness requests from MPL British Columbia Distributors Inc. (MPL). On March 11, 2022, I invited submissions from the participants, which were received on March 15 and 16, 2022, followed by a reply from Hearing Counsel on March 17, 2022.

This ruling addresses two matters: (1) Hearing Counsel's proposal for the continuation of the hearing, including time limits for examinations; and (2) the applications by MPL for further production of documents and the calling of one additional witness.

The Continuation of the Hearing

Hearing Counsel is recommending the continuation of the hearing in the weeks of March 28 and April 19, with the evidence being generally focused on Prokam Enterprises Ltd.'s (Prokam) and Bajwa Farms' allegations in the week of March 28, and on MPL's allegations in the week of April 19.

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As I understand it, this proposal to divide the evidence is grounded in large part on the fact that there is no two-week period before the fall of 2022 where all counsel are available, and it is accordingly a compromise solution to allow the evidentiary phase of the hearing to complete in a timely manner. Further, I understand that, subject to the specific issues I address below, there are no overarching objections from the participants to proceeding in this manner.

Accordingly, I am directing that this hearing resume on March 28-30, 2022, and again on April 19-21, 2022, generally following the hearing schedule proposed by Hearing Counsel, recognizing that some flexibility will be required.

Proposed Limits on Examinations

Hearing Counsel suggests that in order to complete the hearing within the time available, it will be necessary to impose time limitations on examinations by counsel.

Position of Hearing Counsel and the Participants

In Hearing Counsel's submission, the scope of evidence and cross-examination pursued by counsel to date has been far broader than the terms of reference contemplate, and limitations are therefore required going forward. In his March 10, 2022 letter, Hearing Counsel emphasizes that this supervisory review is in the nature of an inquiry, which affords me flexibility to set my own process so long as that process is fair. He says that no unfairness arises from the proposed limitations because, in addition to his own examination of the witnesses, all counsel are retaining the ability to conduct at least some cross-examination, and the time allotted is adequate to allow for proper cross-examination on the allegations at the heart of the terms of reference for this review.

The complainant participants all object to the proposed time limits. MPL, Prokam and Bajwa Farms take issue with what they essentially characterize as a change in the rules part-way through the proceeding, giving rise to concerns of unfairness.

Prokam disputes Hearing Counsel's characterization of time limits as the panel "setting" its procedure, and argues that it is actually "changing" its procedure. In Prokam's view, the cross-examinations of Mr. Mastronardi and Mr. Dhillon by non-complainant counsel were particularly lengthy, despite the fact they are not accused of any wrongdoing. Prokam further suggests that it must have the ability to test the evidence of the witnesses accused of wrongdoing to the fullest extent, otherwise the panel will be left with a distorted or incomplete portrait of the evidence. Prokam expresses concern about the ability of this process to determine the truth and restore faith in the regulated marketing sector if such limits are imposed.

For its part, MPL allows that time limits on cross-examination might have been permissible if they had been implemented from the outset. However, it says that the result of implementing time limits on cross-examination at this stage of the hearing

would amount to unequal treatment of the participants, which is contrary to its legitimate expectations, resulting in procedural unfairness. It also notes what it says are the very broad terms of reference for this supervisory review, which contemplate a wide scope of cross-examination. Finally, MPL raises a specific concern about the proposal for Mr. Guichon to be called as a witness in both weeks.

Bajwa Farms submits that they are concerned about having time limits set for cross-examinations midway through the hearing, and take the position the 45 minutes allotted for them to cross-examine Mr. Driediger will not be sufficient.

The non-complainant participants appear to all support Hearing Counsel's proposal.

The BC Vegetable Marketing Commission (Commission) and BCFresh Vegetables Inc. (BCFresh) expressly do so, and I take it from Mr. Solymosi's submission that he does not have any general objections to the limits, subject to his request for some additional cross-examination of specific witnesses.

The individual Commissioners provided a more detailed submission in support of Hearing Counsel's proposal. They argue that administrative tribunals often do not exercise sufficient control over their proceedings, and that firm direction can lead to a more efficient and expedited hearing without curtailing procedural rights. They also suggest there is no common law right to cross-examination in administrative proceedings, and particularly for complainants in an inquiry of this sort. They say that cross-examination can be limited so long as parties are given a fair opportunity to correct or controvert any relevant prejudicial statement. The Commissioners also argue that the complainant participants have wrongly approached this supervisory review by casting themselves in the same role as the Commissioners who are the subjects of the allegations and thus owed a high degree of procedural fairness. Further, they say that the lengthy cross-examination of Mr. Solymosi amounted to an improper attempt to usurp the role of Hearing Counsel.

In an additional submission provided on March 16, 2022, BCFresh argues that MPL's characterization of the terms of reference for this review is in error, and that properly understood they are limited to more narrow allegations.

In reply, Hearing Counsel submits that the complainants are incorrect to suggest that it is procedurally unfair to limit cross-examinations generally, observing that even in criminal proceedings courts can and will limit cross-examinations where they veer too far from the relevant issues. Hearing Counsel notes that the complainant participants have not specifically identified any unfairness arising out of particular time limits, or what additional time might be needed to properly complete cross-examination. Hearing Counsel further suggests that if such specific concerns do arise, I could potentially address them on a case-by-case basis.

Analysis

In my view, it is both necessary and appropriate to implement time limits on cross-examination. The cross-examinations to date have often strayed far beyond the terms of reference for this supervisory review, which I agree are more limited than the characterization put forward by MPL. Time limits will ensure that the evidence is appropriately focused on those terms of reference.

Importantly, none of the complainant participants have identified any specific prejudice which will arise out of the time limits that Hearing Counsel has proposed, and as a result, I am not persuaded that the imposition of time limits *per se* will result in procedural unfairness. That said, in the event that a participant is able to point me to specific evidence that they have not had an opportunity to canvas within their allotted time, I will retain the discretion to deviate from the time limits to afford counsel more time in cross-examination. I expect, however, that my discretion will be exercised sparingly.

I do not see this decision as being a change to the procedure mid-stream. I am not, for example, moving from an oral to a written hearing, or eliminating cross-examination all together. Rather, I am implementing appropriate limits to keep the hearing focused on the terms of reference and the issues that I have to decide. This is a reasonable step for any administrative tribunal, and particularly in an inquiry of this kind.

I disagree that this is likely to leave me with a distorted view of the evidence. The upcoming witnesses include both those accused of wrongdoing and those who make the accusations. For example, Mr. Cheema, whose evidence I understand to be at the heart of MPL's allegations, will be subjected to cross-examination in the week of April 19. I also note that Mr. Solymosi, a principal non-complaint participant, was subjected to a 15-hour cross examination. As the Commissioners point out, it is not necessarily surprising that there would be lengthy cross-examinations of those making the very serious allegations of wrongdoing given the heightened procedural rights of those who are subject to those allegations. Finally, it is important to emphasize the central role of Hearing Counsel in ensuring that all relevant evidence is elicited from the witnesses who will give evidence during the continuation of this hearing.

I will now address MPL's objection that Mr. Guichon is to be called in the first week to address issues related to Prokam (when its lead counsel is unavailable), and then recalled in the second week to address evidence related to MPL. MPL says there is "a real risk that Mr. Guichon's evidence given in connection with Prokam and Bajwa will relate to the issues raised by MPL and *vice versa*," and therefore says that Mr. Guichon should only be called when counsel for all complainant participants are available.

Leaving aside the lack of availability of all counsel at one time for the foreseeable future, I agree with Hearing Counsel that this concern can be addressed in such a way so that there is no unfairness to MPL. Specifically, a member of MPL's legal team can attend in

the first week when lead counsel is not available to take notes (and a transcript can likely also be made available). MPL will then be allowed to cross-examine Mr. Guichon with respect to issues that were raised in both weeks.

Finally, a number of participants have made requests to cross-examine witnesses for whom they were not afforded time in the schedule initially proposed by Hearing Counsel. In his reply submissions, Hearing Counsel has provided a revised schedule which accommodates those requests. In my view, with those changes, the proposed schedule is reasonable, and consistent with Rule 29, which provides that each participant will “have an opportunity to cross-examine the witness to the extent of their interest”. However, as noted above, I will retain a discretion to extend a time limit where it is necessary to ensure procedural fairness.

MPL’s Applications for Document Production and Witnesses

First, MPL applies for an order requiring the production of documents related to a review of the Commission performed by Ms. Dawn Glyckherr, and that Hearing Counsel be directed to call her as a witness. MPL relies principally on the evidence of Mr. Solymosi, who testified that Ms. Glyckherr advised him of various allegations that she had heard about during her review, including that there was an “old boys club”; decisions were made at a “coffee shop”, and that the governance structure was “suspect”.

First, I understand that the Commission has produced all of the documents it has in its possession related to Ms. Glyckherr, and that she did not provide the Commission with any draft report.

Second, on February 3, 2022, I ruled that it was premature to require Hearing Counsel to interview and call Ms. Glyckherr. I advised at that time that, “[o]nce I have all the evidence before me, I will consider whether there is a need to go farther and explore other matters, including whatever allegations Ms. Glyckherr may be aware of.” The evidence is not yet all before me, and Mr. Solymosi’s evidence does not persuade me that it is necessary to revisit my previous ruling. The general nature of the allegations that Ms. Glyckherr apparently raised with Mr. Solymosi, all of which are based on second-hand information, are well outside the specific terms of reference for this review. Again, I am retaining the discretion to revisit this issue on a proper application brought at the conclusion of the evidence.

MPL also seeks an order for the production of documents related to lifting of the moratorium on considering new agency licenses. MPL notes that Mr. Mastronardi gave evidence and was cross-examined about MPL’s allegations being grounded in part on the Commission’s delay in lifting the moratorium. It therefore seeks documents relevant to that issue, but over a very limited time period.

Hearing Counsel says that this issue was dealt with in the BC Farm Industry Review Board's (BCFIRB's) January 20, 2021 dismissal decision on MPL's appeal of the Commission's order not to grant an extension of the October 31, 2020 deadline for greenhouse vegetable producers to give notice of their intention to transfer from one agency to another.

That decision concerned a preliminary application to dismiss MPL's appeal on the basis it was premature and an abuse of process. MPL had argued that the procedural fairness concerns it had raised had been ignored and the Commission had failed to properly respond when those concerns were raised. In its decision, the BCFIRB panel dismissed MPL's appeal, in part because it was an abuse of process:

MPL makes the serious allegation that the decision to not grant an extension is tainted with bias and conflict of interest due to participation of Commission directors from the greenhouse sector. It says these concerns were recently confirmed by BCFIRB in its supervisory decision which acknowledged that the close ties between producers and agencies was not contemplated in the legislative framework that creates the Commission's governance structure. MPL says the Commission's decision was made without responding, in even a cursory way to its significant procedural fairness concerns.

This submission is difficult to understand in light of my finding above that the Commission has yet to make a decision on MPL's agency application. The Commission now has the benefit of the December 22 supervisory decision and its supporting directions which speak directly to managing apprehension of bias and conflict of interest concerns. The Commission is incorporating the supervisory directions into its processes, but this transition will take time. I agree with the Commission that the procedural fairness concerns advanced by MPL as justification for this appeal proceeding are largely speculative and anticipatory of an agency decision that has yet to be made.

Given the nature of that decision, I do not agree that it conclusively deals with the allegations that MPL now advances, and more specifically its request for documents in the narrow window between October 21, 2020 and November 6, 2020. However, I do note that the decision references the fact that a little over a month later, BCFIRB expressly ordered the Commission not to make any individual orders or amend its Consolidated General Order pending the release of its supervisory decision, which was subsequently issued on December 22, 2020.

In the circumstances, with BCFIRB having intervened in this way, it is difficult to see the relevance of this line of inquiry. While I am prepared to make the document production order given its very limited temporal scope, I may well decide, after hearing from the participants, to limit further cross-examination on this issue when the hearing resumes.

Conclusion

1. The hearing will resume on March 28-30, and again on April 19-21, 2022, generally following the schedule appended to Hearing Counsel's letter of March 17, 2022.
2. MPL's application for production of documents in relation to Ms. Dawn Glyckherr, and for Hearing Counsel to interview her, is dismissed.
3. MPL's application for document production in relation to the lifting of the agency licence moratorium for the two week period October 21, 2020 to November 6, 2020, is granted.

Regards,

A handwritten signature in black ink, appearing to read "Peter Donkers". The signature is written in a cursive style with a large, sweeping initial "P".

Peter Donkers,
Chair

cc: Mark Underhill
Kate Phipps
Nazeer Mitha, Q.C.
BCFIRB web site