BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

Reply Submission of Hearing Counsel

MITHALAWGROUP

570 Granville Street, Suite 300
Vancouver, BC V6C 3P1
Tel: 604 283 8559
Email: nmitha@mithalawgroup.ca

Nazeer T. Mitha, KC

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Overview

1. Below, I first summarize my previous submissions and those of the other participants. I then provide my reply and final recommendations.

2. Although the Panel directed that this reply be limited to 10 pages, there were a number of issues raised which require a relatively detailed response and therefore this submission exceeds that limit. Accordingly, I respectfully seek leave to deliver this longer reply.

Initial Submission of Hearing Counsel

3. In my submission dated October 27, 2023, I argued that the Panel can reasonably draw an inference of bad faith on the part of Prokam Enterprises Ltd. ("Prokam") in advancing the allegations against Mr. Guichon and Mr. Solymosi that were the subject matter of this Supervisory Review.

4. I then considered BCFIRB's jurisdiction concerning remedies and submitted that:

    a. BCFIRB has the jurisdiction to step into the shoes of the Commission and a statutory obligation to protect the public interest and ensure public confidence in the orderly marketing of regulated vegetables;

    b. Pursuant to Part IV, s. 17, Part XVII, s. 3, Part XVI, s. 1(3) and Part IV, s. 16 of the General Orders and its supervisory authority, BCFIRB has the jurisdiction to:

        i. impose restrictions on Prokam's license and/or Delivery Allocation ("DA");

        ii. impose restrictions on Mr. Dhillon's ability to act as a principal or director of a designated agency by virtue of imposing terms and conditions on the designated agency;

        iii. place market restrictions on a producer shipper license or deny any applicant altogether if it is not in the best interests of the industry; and

        iv. provide directions or recommendations to the Commission and to other supervisory panels on how to address other processes involving Prokam.

5. I then made specific recommendations which are set out in paragraphs 101-112 of my initial submission.

Submission of the Commission

6. The Commission made the following submission in response:

    a. There is ample evidence from which to infer that Prokam's allegations were made in bad faith and for a strategic or ulterior purpose;

    b. The impact of Prokam's allegations has been significant;

    c. BCFIRB is vested with the authority to impose a charge against Prokam to recover costs in relation to the supervisory review;

    d. It is necessary and advisable to impose a charge against Prokam to recover costs in relation to the supervisory review; and

    e. Payment of the charge should be a condition of any license or regulatory privilege held by Prokam, its principals, or related companies.

Submission of BC Fresh

7. BC Fresh supported my recommendation that the Commission be directed to undertake a transparent process toward a determination of Prokam's DA for crop year 2024/2025, as well as my recommendation requiring quarterly reporting.

8. Finally, BC Fresh supported the Commission's submission as to the jurisdiction of the Panel to levy a charge against Prokam to recover the costs incurred by the Commission and third parties arising from Prokam's conduct.

Submission of Andre Solymosi

9. Mr. Solymosi adopted the submissions of the Commission and in particular submitted that there should be a charge against Prokam to pay 50% of its actual legal fees, expenses and taxes up to January 25, 2023, and 100% of its actual legal fees, expenses and taxes thereafter.

Submission of Peter Guichon

10. Mr. Guichon adopted paragraph 43 of the submissions of the Commission that there should be a charge against Prokam to pay 50% of its actual legal fees, expenses, and taxes up to January 25, 2023, and 100% of its actual legal fees, expenses, and taxes thereafter, with such charge being a condition of any license or regulatory privilege held by Prokam, its principals, or related companies.

Submission of Prokam

11. Prokam submits that the Panel should decline to order any sanctions against Prokam for four main reasons:

    a. Jurisdictionally, punishing Prokam in administrative proceedings for having sought a remedy in judicial proceedings violates s. 96 of the *Constitution Act, 1867,* including the right of access to the courts;

    b. Procedurally, it is unfair to impose penalties on the basis of Phase I's findings, in which Prokam's principals were repeatedly assured that they were not the subject of any allegations of wrongdoing, and in which Prokam lacked notice prior to the Phase I decision of the jeopardy that would ensue from Phase I in the form of Phase II;

    c. Substantively, no inference of Prokam's "bad faith, strategic or ulterior purposes" can properly be drawn from Phase I's findings; and

    d. Remedially, it would be unreasonable for BCFIRB to punish Prokam, whether by reducing its delivery allocation, imposing costs, or otherwise.

Summary of the Participant Submissions

12. The submission of all the non-complainant participants accept that the Panel can and should make the inference that Prokam acted in bad faith in advancing its claims against Messrs. Guichon and Solymosi.

13. Although it is not entirely clear, it appears that all the non-complainant participants also adopt the Commission's submission that Prokam's allegations against Messrs. Guichon and Solymosi were made for strategic or ulterior purposes.

14. All the non-complainant participants submit that BCFIRB has the jurisdiction to and should award costs by way of a charge against Prokam.

15. Prokam advances four reasons why sanctions cannot be imposed on Prokam and that BCFIRB has no jurisdiction to order costs by way of a charge against Prokam.

Hearing Counsel Reply

16. My reply will be focused on the following issues:

    a. the jurisdictional argument raised by Prokam;

    b. the procedural fairness arguments raised by Prokam;

    c. the substantive question of whether there can be a finding of bad faith or strategic or ulterior purposes against Prokam;

    d. whether the Panel can and/or should impose the sanctions against Prokam which I recommended in my original submission; and

    e. whether BCFIRB has the jurisdiction to impose costs by way of a charge against Prokam.

Jurisdiction

17. Prokam's submission on the issue of jurisdiction is grounded in the premise that it is being punished for filing a civil claim, and that this Panel is therefore usurping the power of a superior court contrary to s. 96 of the *Constitution Act 1867*.

18. This premise is fundamentally flawed. This Panel made clear from the outset (at the behest of Prokam itself), and has confirmed on multiple occasions, that this Supervisory Review has only been addressing the misfeasance allegations set out in the Final Terms of Reference (FTOR), not the abuse of public office allegations advanced in Prokam's Notice of Civil Claim ("NOCC"). Accordingly, s. 96 of the *Constitution Act 1867* is not engaged and no constitutional issue arises.

19. Prior to issuing the FTOR on June 18, 2021, this Panel received submissions from various participants, including Prokam. In a June 4, 2021 submission welcoming this Supervisory Review, and noting that it had "long been trying" to bring its allegations to the attention of BCFIRB, Prokam

sought confirmation that the Panel would not compromise the integrity of the court process and determine its abuse of public office claim. The Panel expressly confirmed in its June 14, 2021 decision that it had no jurisdiction to determine any civil claim for misfeasance in public office, and that it was not the purpose of this Supervisory Review. Indeed, the FTOR make clear that the objectives of the Supervisory Review were to ensure effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and ensuring public confidence in the integrity of the BC regulated vegetable sector.

20. After the TOR were set, the Rules of Procedure contemplated the complainant participants providing their evidence and names of witnesses they said ought to be heard in the Supervisory Review.

21. Prokam provided its evidence and witnesses with a cover letter dated July 23, 2021, in which it acknowledged that the allegations in the FTOR were different from and went beyond the allegations in its NOCC, and provided evidence it said was relevant to the broader FTOR, including evidence about BC Fresh Commissioners being motivated by self-interest in seeking to avoid or delay the licensing of a second lower mainland storage crop agency.

22. Thus, it has been accepted by everyone, including Prokam, that the Supervisory Review was not designed to be a determination of whether there had been misfeasance in public office based on the allegations made by Prokam in its NOCC. Accordingly, Prokam's repeated references throughout its submissions that this Supervisory Review has been adjudicating the allegations made in the NOCC are misguided and without merit.

23. Moreover, this issue was revisited and confirmed after the Panel's July 14, 2022 Decision ("Phase I Decision"). Prior to engaging in Phase II, the Panel sought submissions from the parties. In a submission dated August 24, 2022, Prokam argued that any inquiry into the motives behind the NOCC fall outside of BCFIRB's supervisory jurisdiction, and punitive measures all the more so. Prokam also argued that imposing adverse regulatory consequences for having filed a NOCC is unconstitutional.

24. In my responding submission of September 9, 2022, I addressed Prokam's arguments, noting that: 1) at no point was the Panel required to or going to determine whether the tort of misfeasance in

public office has been established; and 2) that in paragraph 62 of the Phase I Decision, the Panel expressly acknowledged that it would not adjudicate whether the tort of misfeasance was made out.

25. In its October 21, 2022 decision ("Phase II Procedural Decision"), the Panel confirmed at paragraph 18 that no constitutional issue arose from Phase II, and reiterated that the Panel had "…made no findings about whether that tort [of abuse of public office] has been made out in this Supervisory Review".

26. Prokam now expands on its argument, suggesting that "a party who files a civil claim should never foresee, or be exposed to, a risk flowing from the exercise of that right, of punishment in a separate administrative forum, arising from a compulsory regulatory process that is collateral to the court proceeding". However, this iteration of its argument is still grounded entirely in the flawed premise that this Supervisory Review has been addressing the merits of the allegation of abuse of public office in the NOCC. As set out above, this Supervisory Review has been solely concerned with the allegations in the FTOR, an inquiry which Prokam welcomed as long overdue.

27. In summary, there can be no doubt that, pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act*("NMPA"), BCFIRB has the jurisdiction and authority to consider the conduct of Prokam in advancing the allegations which were set out in the FTOR. BCFIRB is not doing so to punish Prokam for commencing a civil proceeding; rather it is engaging in Phase II as part of its mandate to ensure orderly marketing and public confidence in the regulated vegetable industry. Prokam's jurisdictional argument must be rejected.

Procedural Fairness

28. Prokam now advances three arguments concerning procedural fairness. First, it argues that as it and its principals were assured in Phase I that they were not the subject of any allegations of wrongdoing, the Panel cannot now impose consequences on Prokam or its principals on the basis of factual determinations made in the Phase I process. Had Prokam or its principals known they were possibly going to be the subject of allegations of wrongdoing, Prokam says they may have called other evidence, which they cannot now call.

29. Second, Prokam argues that as it is now the focus of the review, it is entitled to a greater degree of procedural fairness. Prokam goes on to argue that the problem with Phase II, however, is that the 'die has been cast' and therefore it cannot receive the necessary degree of procedural fairness.

30. Finally, Prokam argues (at para. 31) that the procedural choices made in Phase I were made on the express basis that Prokam had no "case" against it to meet. As a result, it should not have been denied the chance to lead its witnesses, have had the cross-examination of key witnesses capped, and be twice denied adjournments.

31. There are a number of flaws with Prokam's arguments which will be discussed below. However, the starting point is to appreciate that, as Justice Brongers stated in paragraph 80 of his decision in *Prokam Enterprises Ltd. v. British Columbia (Farm Industry Review Board)*, 2023 BCSC 403 ("*Prokam"),* the duty of procedural fairness is 'eminently variable', inherently flexible, and context specific.

32. The context in the case at hand must be examined within the legislative framework which governs BCFIRB. The *Natural Products Marketing (BC) Act*, R.S.B.C 1996, c. 330 ("NMPA") bestows BCFIRB with broad discretion to shape and control its processes. As stated by the court in *Prokam*, under s. 7.1(2) of the NPMA, BCFIRB may exercise its supervisory powers at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.

33. The second contextual consideration is the nature of what is at issue. The FTOR contained very serious allegations against members and staff of the Vegetable Marketing Commission, which were causing significant disruption in the regulated vegetable sector. Prokam expressly welcomed the Supervisory Review to look into the veracity of those allegations.

34. At the outset of the process, this Panel had no idea whether the allegations were substantiated, and could not prejudge them. This Panel had to assume that the allegations may be true. Therefore, at the outset, this Panel could not have given any notice to Prokam that if the allegations were found to be without merit, it might have concerns about the fact that Prokam made the allegations with no basis. Had the Panel given such notice to Prokam, it might well be accused of prejudging the matter. Prejudging the allegations at the outset of Phase I would, in fact, be a breach of procedural fairness.

35. It was only at the end of the Phase I process that this Panel was able to determine that Prokam made serious allegations with no cogent evidence to support them, and thus could then begin to address the concern that the allegations had been made without a proper basis.

36. This is no different than what usually happens in any civil proceeding. For example, in a civil proceeding if a plaintiff advances a claim of fraud, the trial judge does not warn the plaintiff at the outset of the trial that if there is no foundation for alleging fraud, the plaintiff may suffer negative consequences. It is only after the trial that the judge may conclude that there was no basis for an allegation of fraud and then impose consequences on the plaintiff.

37. It is noteworthy that in the context of a trial, the trial judge does not provide the plaintiff another opportunity at the end of the trial (as this Panel has done for Prokam), to provide further evidence of why the plaintiff advanced the allegations of fraud. The trial judge bases his/her decision on consequences for the plaintiff's failure to substantiate the fraud based only on the evidence the plaintiff introduced at trial.

38. With that context in mind, I respond below to Prokam's procedural fairness arguments.

39. First, Prokam argues that had it known it was the subject of a concern, it might have raised different evidence in Phase I.

40. As a starting point, in the circumstances, procedural fairness does not require an adjudicator to warn a claimant that if there is no basis for their allegations, that they may suffer consequences.

41. Second, even if procedural fairness requires such a step, Prokam's argument still fails. Prokam made a similar argument before Justice Brongers in the judicial review application. Justice Brongers rejected it, stating at paragraph 83:

> First, Prokam's complaint that it was only allotted one hour to cross-examine Mr. Guichon rings hollow. In the absence of a clear explanation of what novel line of questioning Prokam had hoped to pursue if it had been given more time to do so, I am unable to conclude that the time it was afforded to cross-examine was procedurally insufficient.

42. The same flaw exists now. Prokam argues that it would have called different evidence or cross-examined differently in Phase I had it known that it may have a case against it, but provides no explanation of what new evidence it might or would have called. Nor does it provide any explanation of what line of questioning it would have engaged in if it was afforded more time for

cross-examination. There is no explanation offered of how the fairness of Phase I may have been enhanced – it is just a bald allegation.

43. As Justice Brongers stated, in the absence of any supporting explanation, such a bald allegation is hollow. For the same reasons as Justice Brongers rejected this argument, so should this Panel.

44. Second, Prokam fails to appreciate the fact the Supervisory Review process is iterative. At paragraph 84 of his decision, Justice Brongers noted that fact, and that the Board was open to conducting further investigative work if it became apparent that this was needed after the evidence had been presented at the hearing.

45. At paragraph 35 of its Phase II Procedural Decision, this Panel made the same comments when it stated that it did not foresee and could not have foreseen the outcome of Phase I and thus could not have given notice to Prokam at the outset of the Supervisory Review that it may have a 'case' to meet.

46. Prokam argues that because counsel for the Commission argued at the outset that Prokam's claims were made entirely without merit and were filed to harass, that the Panel could and should have given notice at the outset of Phase I that Prokam may have a case to meet.

47. As set out above, this argument ignores that had the Panel given such notice, that would constitute a prejudgment of the evidence available to support Prokam's allegations. Stated simply, the idea that Prokam should have been given notice in Phase I that it and its principals may have a case to meet is not practically or legally sound.

48. Third, this Panel has already addressed Prokam's concerns about procedural fairness.

49. In its August 24, 2022 submission, Prokam raised two concerns about procedural fairness. First, it argued that: "Prokam is entitled to unambiguous notice of precisely what is at stake and precisely what is at issue." Second, it also argued (like it does in its current submission) that the second phase ought not to proceed even with amended terms of reference because Prokam was not provided notice that its conduct might be at issue at the outset of the Supervisory Review.

50. In its Phase II Procedural Decision, the Panel considered both procedural fairness arguments made by Prokam and addressed them by:

a. amending the terms of reference to provide Prokam with specific notice in Phase II of what will be considered and the potential consequences (see para. 39); and

b. providing the opportunity in Phase II for any parties to provide further evidence and written submissions.

51. Notwithstanding that it was provided the opportunity to do so, Prokam chose not to provide any further evidence in Phase II; yet it now argues that it could have provided other evidence and the failure to provide the opportunity to provide that evidence earlier now constitutes a breach of procedural fairness. It cannot have it both ways.

52. Prokam seeks to get around that problem by arguing that the 'die has been cast' and Phase II cannot now be fair because of the findings made in Phase I. However, yet again, Prokam offers no explanation of evidence or steps it could have taken in Phase I that it cannot take now by calling further evidence. Thus this argument is, in the words of Justice Brongers, similarly "hollow" and should be rejected by this Panel.

53. In sum, the duty of procedural fairness is variable, flexible and context specific. Given the statutory framework and powers bestowed on BCFIRB and the context in which the issues in Phase II arose, this Panel has taken all necessary steps to provide Prokam procedural fairness in Phase II to which it is entitled: it has provided specific terms of reference that give Prokam notice of the issues and consequences; it has provided Prokam with the opportunity to call any relevant evidence; and it has provided Prokam the opportunity to make written submissions.

54. Prokam's argument that there has been a breach of procedural fairness should be rejected.

Substantive Issues on Inference of Bad Faith

55. Prokam first argues that I am proposing to improperly expand the scope of Phase II by considering the course of conduct since 2017, and by arguing that the overarching question is whether Prokam acted in bad faith, without limiting the scope of Prokam's conduct.

56. Prokam misunderstands the Amended Final Terms of Reference ("AFTOR") and my submission.

57. The AFTOR, issued in the Phase II Procedural Decision, state that the issue is whether Prokam advanced allegations of bad faith and unlawful conduct against the Commissioners and Mr.

Solymosi in bad faith or for strategic or ulterior purposes. Properly understood, it is the allegations that were set out in the FTOR at the outset of Phase I of the Supervisory Review that are at issue.

58. I made it clear that this was my focus at paragraph 60 of my initial submissions:

> Here, Prokam continued to maintain its allegations throughout and after the Supervisory Review. BCFIRB found that Prokam advanced allegations principally on speculation without any cogent evidence. In other words, Prokam made very serious allegations without any factual basis to support them and did not make any genuine or objectively reasonable effort to investigate its allegations before advancing them in this Supervisory Review.

59. It is true that at paragraph 50 of my initial submissions, I referenced the findings in the Phase I decision regarding the conduct of Prokam dating back to 2017. But at paragraph 63 of my submission, I made clear that I did so in support of an argument that the advancement of Prokam's very serious allegations without a proper evidentiary foundation should be put in the context of Prokam's continuing course of conduct:

> Additionally, BCFIRB should consider the advancement of the allegations in the context of Prokam's flagrant improper conduct (as outlined in para. 52 [sic] above), which further supports the inference that Prokam acted in bad faith. In other words, Prokam's unfounded allegations are properly seen as part of a continuing course of conduct to undermine the Commission.

60. Accordingly, I have in no way expanded the scope of Phase II – the focus is, as per the AFTOR, Prokam's basis for advancing the allegations that were the subject matter of this Supervisory Review.

61. Prokam next argues that no inference of bad faith can or should be drawn. At paragraph 69 of its argument, Prokam argues that: "Prokam must, as a matter of ordinary decency and law be assumed to act in good faith unless proven otherwise" [emphasis added].

62. This ignores the Supervisory Review process to date. This Supervisory Review was convened to investigate the very serious allegations advanced by Prokam and the other Complainant Participants. The Panel heard from 16 witnesses over 16 days and concluded at paragraph 261:

> …despite the extensive investigation, document production, and the evidence of 16 witnesses, there simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing made by the Complainant Participants. In most cases, I have found that the allegations were based on no more than speculation, rumour and innuendo. [emphasis added]

63. The Panel then gave notice to Prokam that it was going to consider whether Prokam had made its serious allegations in bad faith or for strategic or ulterior purposes. The Panel provided Prokam with the opportunity to call any other relevant evidence to address its motivation for advancing its serious allegations.

64. Thus, Prokam was aware that the Panel had concluded that there was no cogent evidence to substantiate the very serious allegations it made. Prokam was given notice that the Panel would consider whether Prokam had made its allegations in bad faith and Prokam was given the opportunity to call evidence to explain why it advanced the allegations.

65. Prokam chose not to call any further evidence but only to make legal argument. In this context, it is perfectly acceptable for this Panel to conclude, based on the extensive documentary evidence and the evidence of the witnesses at the hearing, that Prokam had no basis to make its allegations, thus giving rise to the inference that the allegations were made in bad faith. This is especially so in light of Prokam's decision to remain silent when given the opportunity to explain why it advanced the allegations.

66. The law supports such inferences. As I argued in my original submission, this Panel can draw inferences from proven facts. Here, the proven facts are that this Panel's findings rejected all of the evidence Prokam proffered to support its allegations of wrongdoing.

67. Prokam was aware that this Panel considered that it had no basis to make and continue with the serious allegations in the Supervisory Review, and Prokam had the opportunity to explain why it advanced those serious allegations. Prokam chose to call no evidence. Accordingly, the only evidence the Panel had regarding the allegations brought by Prokam was the evidence proffered at the Phase I hearing, all of which was resoundingly rejected. In those circumstances, this Panel can draw the inference that the allegations were made in bad faith.

68. Finally, the presumption of good faith that Prokam refers to in paragraph 69 of its argument makes clear that the good faith presumption can be proven otherwise. Here, the Panel reviewed mountains of evidence and heard multiple witnesses. The Panel concluded there was no cogent evidence to substantiate the very serious allegations. Stated simply, there was proof that the good faith presumption did not apply to the case at hand.

69. At paragraphs 72 to 74, Prokam sets out all the evidence it says formed the basis of its allegations and argues that given the extensive evidence it cannot reasonably be said that Prokam clearly made its allegations for bad faith purposes. However, this argument ignores the fact that this Panel in the Phase I Decision (at paras. 71-168) extensively considered all of the evidence cited by Prokam (and more), and still concluded at paragraph 166:

> When I consider that evidence in the context of all the evidence adduced in this proceeding, including the extensive cross-examination of Mr. Solymosi and Mr. Guichon, it becomes clear that Prokam's allegations are not substantiated.

70. And at paragraph 261:

> …there simply was no cogent evidence presented to substantiate the very serious allegations of wrongdoing by the Complainant Participants.

71. Accordingly, the fact that Prokam cites evidence which was resoundingly rejected cannot be used to argue that no bad faith can be found.

72. At paragraph 74 of its submission and onwards, Prokam argues that no improper motives can be inferred from the prior context to the civil claim or the existence of a prior, live dispute. This argument once again ignores the fact that Prokam's civil claim is not in issue; rather what is in issue are the allegations it chose to maintain throughout the Supervisory Review, and from which it has not resiled to date.

73. As discussed above, the repeated references to the allegations in the civil claim undermine many of Prokam's arguments.

Remedy

74. Prokam deals with only two of the proposed remedies: 1) the recommendation I made concerning how Prokam's DA should be determined going forward; and 2) whether BCFIRB has the jurisdiction to award costs.

75. It is noteworthy that Prokam does not address the other remedial recommendations I made, which include dealing with Prokam's class of license, quarterly reporting, restriction on Mr. Dhillon's involvement with a designated agency or producer/shipper license. As a result, in this Reply submission, I will not address these issues again and rely on my original submission for these matters. I will, however, address the two remedies that Prokam raised in its submission.

Delivery Allocation

76. Prokam first argues that I invited the Panel to revisit Prokam's DA and license class. This is incorrect. My submission (at paras. 101-107) was only addressing how Prokam's DA and class of license should be dealt with going forward.

77. At paragraph 82 of its submission, Prokam argues that the proposed sanction (how Prokam's DA should be dealt with) bears no relation to the scope of Phase II as defined by the AFTOR.

78. This is also incorrect. The basis on which I proposed how Prokam's DA should be dealt with are set out in paragraph 101 of my original submission. They are derived from the very concerns that this Panel identified in its Phase I Decision, which arise in the context of the evidence Prokam called to try to justify the allegations against Messrs. Solymosi and Guichon, or is evidence that provided the context within which Prokam acted in making its allegations. When put in that context, it is clear that the proposed sanction falls squarely within the scope of Phase II.

Costs

79. In short, I agree with Prokam's submission that BCFIRB does not have the jurisdiction to award costs.

80. On reviewing the submission of the Commission, I agree with paragraphs 8(a) and (b) of the Commission's submission as well as paragraphs 10–19. I have difficulty with paragraphs 20-21 for the reasons set out in my original submission.

81. Concerning the authority to recover costs, I do not agree with the Commission's submission for the following reasons.

82. The Commission argues that the NMPA can be interpreted to mean that the Commission has the authority to impose a charge. As a result, BCFIRB can impose a charge to recover the Commissions costs and to recover costs incurred by other non-complainant participants.

83. While the Commission suggests that a 'charge' can be levied, it is really seeking costs in the traditional legal sense. As acknowledged by the Commission, the NMPA specifically contemplates recovery of costs in the context of an appeal (s. 8.1(1)(b)).

84. In other words, the legislature specifically considered when costs can be recovered and chose not to make costs recoverable in the context of a BCFIRB supervisory process. As a result, in my view, one cannot argue that the legislation permits a charge which can be used for costs. Had the legislature intended for costs recovery in the context of a supervisory review, it could easily have done so, as it did with appeals. The legislature chose not to do so and therefore the implied exclusion rule (*expression unius est exclusion alterius)* applies to exclude the recovery of costs for supervisory reviews.

85. Additionally, as argued by Prokam, BCFIRB cannot do indirectly that which it cannot do directly.

Recommendations

86. I remain of the same view as set out in my original submission and stand by those original recommendations. I have no further or different recommendations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: January 8, 2024

Nazeer T. Mitha, K.C.