

March 10, 2022

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By Email

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Our file 1041.001

BC Farm Industry Review Board
1st Floor, 780 Blanshard Street
Victoria BC V8W2H1

Attention: Wanda Gorsuch

Dear Sirs and Mesdames:

Re: Supervisory Review: Letter from MPL dated February 18, 2022; Letter from counsel for Prokam and setting of hearing dates.

Please bring this letter to the attention of Chair Donkers.

I write this letter to respond to the above-noted letter from MPL's counsel and to discuss the dates and process for continuing the supervisory review hearing. However, before discussing these matters, it is important to once again set out the nature and scope of this inquiry.

Nature and Scope of this Inquiry

As the Final Terms of Reference note, the BCFIRB convened the current supervisory review pursuant to section 7.1 of the *Natural Products Marketing (BC) Act*. That section provides, in part, as follows:

Supervisory power

- 7.1 (1) The Provincial board
- (a) has general supervision over all marketing boards or commissions established under this Act, and
 - (b) must perform the other duties and functions and exercise the authority the Lieutenant Governor in Council prescribes in order to carry out the purposes of this Act.

- (2) The Provincial board may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances. (emphasis added)
- (3) In the exercise of its powers under this section, the Provincial board may make an order requiring a person to do one or more of the following:
- (a) attend as required;
 - (b) take an oath or affirmation;
 - (c) answer questions;
 - (d) produce records or things in their custody or possession.

This provision entitles the BCFIRB to effectively conduct an inquiry and to be able to do so even without a hearing and in the manner it considers appropriate (although it is not necessary to formally classify this supervisory review as an inquiry for purposes of this analysis). This legislation is similar to powers given to other statutory bodies to administer and ensure compliance with legislation: see for example, s. 231.4(4) of the *Income Tax Act* as described in *Del Zotto v. MNR (CA)*, [2000] 4 FC 321 at para 3.

Where this type of legislation exists, there is a recognition that the administrative bodies are not judicial bodies and therefore are given much more flexibility in terms of the process they follow.

The jurisprudence concerning the nature of this kind of process, and the flexibility provided to statutory bodies is clear. In *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2011 FCA 2017, at paragraph 20, the Federal Court of Appeal made clear that commissioners of inquiry are endowed with wide-ranging investigative powers to fulfil their mandate. The rules of evidence and procedure are considerably less strict than for a court:

[20] There is a world of difference in terms of significant impacts between a commission of inquiry and an adjudicative tribunal. A public inquiry is neither a civil trial nor a criminal trial. This Court stated the following in *Benoit v. Canada*, above, at paragraphs 23 and 24 of that decision:

[23] It is clear from his reasons for judgment that the Judge of first instance assimilated commissioners to judges. Both, in his view, exercise "trial like functions." That is clearly wrong. A public inquiry is not equivalent to a civil or criminal trial (see *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 2 F.C. 36 (C.A.), at paragraphs 36, 73 [hereinafter *Krever*]; *Greyeyes v. British Columbia* (1993), 78 B.C.L.R. (2d) 80 (S.C.), at page 88; *Di Iorio et al. v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, at page 201; *Bortolotti v. Ontario (Ministry of Housing)* (1977), 15 O.R. (2d) 617 (C.A.), at pages 623-624; *Shulman, Re*, [1967] 2 O.R. 375 (C.A.), at page 378)). In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties

alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at page 138). The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" (see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, at page 231; *Greyeyes, supra*, at page 88). Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding by the Somalia Inquiry is that reputations could be tarnished (see *Westray, supra*, at page 163, *per* Cory J.; *Krever, supra* at paragraph 29; *Greyeyes, supra*, at page 87).

[24] It does not follow, however, that the impartiality of commissioners should always be judged by applying the "closed mind" test rather than the "apprehension of bias" test. Rather, whatever the applicable test, in assessing the behaviour of commissioners, the special nature of their functions should be taken into account: *Newfoundland Telephone, supra*, at pages 636, 638; *Irvine, supra*, at pages 230-231; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at page 327. (emphasis original)

These words received Justice Cory's approval in *Canada (P.G.) v. Canada (Krever Comm.)*, [1997] 3 S.C.R. 440, at paragraph 34.

It is also settled law that in matters which resemble an inquiry, the commission is entitled to set its own procedure and as long as the procedure is fair, there is no automatic right to cross-examination of witnesses: *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, 2011 FCA 217 (paras. 105 – 108); *Del Zotto v. MNR (CA)*, [2000] 4 FC 321 (paras. 10-12). In *Del Zotto*, the Federal Court of Appeal decided that since the Hearing Officer allowed parties to be represented by counsel who could object to any questioning and re-examine their clients to clarify the testimony given, that was sufficient fairness and that, as a result, the fact that the parties did not have the right to cross-examine was not a breach of procedural fairness or natural justice.

In terms of the scope of the current review, in its decision of January 25, 2022, BCFIRB ruled as follows, commencing on the last paragraph of page 7:

As discussed at the outset, the focus of this supervisory review is on the specific allegations that have been advanced by the complainant participants and the evidence that supports them.

Lastly, this Panel has repeatedly recognized that a greater degree of procedural fairness is required, particularly in respect of those accused of wrongdoing, given the serious nature of the allegations at issue.

Response to February 18, 2022 MPL Letter

In its February 18, 2022 letter, counsel for MPL makes 8 requests for various categories of documents. The first 3 categories relate to documents concerning the moratorium and the lifting of the moratorium. The request for documents concerning the moratorium was dealt with in my letter dated February 8, 2022. Nothing has changed since that letter to make the documents requested in the February 18 letter relevant.

The documents in category number 4 relate to written communications between Mr. Solymosi and any of the Commissioners before and after Mr. Solymosi sent his November 4, 2020 email regarding MPL BC's agency application. There has already been a request made to Mr. Solymosi generally for relevant documents. However, by this letter, I make the request that Mr. Solymosi search for this specific category of documents and produce them if they exist.

The documents requested at categories 5 and 6 and the last paragraph of MPL's letter deal with Ms. Glyckherr. There is a request for documents from Ms. Glyckherr and a further request that Hearing Counsel interview her. I already dealt with a request for documents concerning Ms. Glyckherr and the request to interview her in my letter of February 8, 2022. In my view, nothing has changed. Her evidence is still not relevant. Further, the evidence is that Ms. Glyckherr did not provide any of her notes, or interviews to the Commission; nor did she make any findings. Further, Mr. Hrabinsky has now provided all of the documents that the Commission had in its possession concerning Ms. Glyckherr.

Regarding interviewing Ms. Glyckherr, in December 2021, MPL's counsel suggested that Hearing Council interview Ms. Glyckherr. However, no specific particulars or allegations were provided as to what evidence Ms. Glyckherr may have other than the general view that she may have some relevant evidence arising from various interviews she had conducted of unidentified persons in the industry.

Subsequently, after MPL decided it wanted to participate in the hearing, BCFIRB made an order that MPL provide any will say statements. As a result, by letter dated January 28, 2022 MPL advised that:

MPL understands that when Ms. Glyckherr spoke to the commissioners about her review, some of them responded negatively and called her names, with one referring to her as a hawk or vulture. MPL also understand that Ms. Glyckherr has made statements to the BCGGA regarding her view to the fact that, among other things, the commission is an "old boys club", decisions are made at coffee shops not commission meetings, the governance structure is suspect and there is corruption.

By letter dated January 30, 2022, I responded to this letter stating that it was not necessary to interview Ms. Glyckherr because she did not have evidence directly relevant to the specific matters at issue in the supervisory review. As BCFIRB stated in its decision of January 26, 2022, the focus of this supervisory review is on the specific allegations that have been advanced by the complainant participants and the evidence that supports these allegations.

This supervisory review is not about misfeasance or wrongdoing by the Commission generally. Further, any evidence Ms. Glyckherr may have would be second-hand knowledge based on her interviews. None of the information she can provide would be based on her personal knowledge. There was no evidence in the hearing which has changed the view I expressed in my January 30, 2022 letter, and/or the view I expressed in my February 8, 2022 letter.

The documents in category number 7 pertain to the CFP agency application. There has previously been a request for such documents and in my view, they are not relevant. Nothing has occurred in the hearing to date which would change my conclusion.

MPL requests forms of undertaking regarding conflicts signed by various Commissioners. I will make a request for these specific documents.

Finally, MPL requests that Ms. Delli Santi be interviewed. I interviewed Ms. Delli Santi concerning the allegation about her discussion with Mr. Solymosi. I attach her interview report to this letter. In light of my interview with her, I do not intend to call her as a witness.

Response to February 11, 2022 Prokam Letter

In its letter dated February 11, 2022, Prokam requests that Mr. Solymosi search for any notes he had concerning conversations with Mr. Jaymie Collins in January 2018 and any email or written correspondence between Mr. Solymosi and Collins related to Prokam or the possibility of VIFP becoming Prokam's agency.

This issue was raised in the hearing and is therefore relevant. By this letter I request Mr. Solymosi search for the documents requested and produce them if they exist.

Hearing Dates and Process

Since the hearing concluded, I have been canvassing dates when the hearing can continue. Unfortunately, there are no dates where all counsel is available until this Fall at the earliest. The hearing cannot be delayed that long. Fortunately, there are 2 weeks when most counsel are available being the weeks of March 28 – April 1 (except for March 31) and the week of April 18 – 22. Therefore, I am recommending that the hearing be continued and the evidence be completed in those two weeks. However, to accommodate counsel availability, the hearing will have to be divided into (roughly) the Prokam and Bajwa issues in the week of March 28 and the MPL issues in the week of April 18, 2022. The one overlap will be the evidence of Peter Guichon. To address this overlap I propose that he be called twice. In the week of March 28, he be called to give evidence limited to the Prokam matters and in the week of April 18, he be called to give evidence only on the MPL matters.

To complete the hearing in a timely way, it will be necessary to impose some limitations on the hearing for the evidence to complete within the 2 weeks set out above. To date, it is my respectful view that the evidence and scope of cross-examination pursued by all counsel in this hearing has been far broader than the terms of reference contemplate. To avoid a repeat of that, and a further extended hearing, restrictions will need to be placed on the time for the evidence of each witness, including cross-examination. I attach with this letter a proposed schedule setting out the witnesses to be called, and my recommended time frames for their evidence and cross-examination.

In making the recommendation to follow the attached schedule, I am mindful of the jurisprudence which I described at the beginning of this letter. There are two important principles: first, this review is in the nature of an inquiry and not a judicial hearing. As a result, BCFIRB has the flexibility to set its own process as long as the process is fair. Here, fairness is ensured by the fact that Hearing Counsel calls the evidence from each witness, and each party is given an opportunity to have their legal counsel clarify their witness' evidence. As above, the parties do not necessarily have the right to cross-examine all witnesses. However, I am not proposing that such a limitation be imposed in light of the panel's ruling on the higher degree of procedural fairness that is required; rather the suggestion is that there should be time limits placed on cross-examination. This does not result in unfairness; it instead recognizes and respects the nature and scope of the review. There is in my view sufficient time allotted for thorough cross-examinations on the specific allegations at issue in this supervisory review.

Before making a ruling on these matters, I suggest that all counsel be given an opportunity to make brief written submissions in response to this letter, and I be given a brief right of reply. In the interim, I ask that all counsel hold the weeks of March 28 and April 18, 2022 in their calendars.

Yours very truly,
Mitha Law Group

Per:



Nazeer T. Mitha, QC *
* Law Corporation

NTM/nm

Enclosure

cc Client

Hearing Schedule

Date	Witnesses	Nazeer T. Mitha, Q.C.	Ken McEwan, Q.C.	Claire Hunter, Q.C.	Rob McDonell	Rosemary Basham, Q.C.	Ravi Hira, Q.C.	Dean Dalke	Robert Hrabinsky
March 28, 2022	Peter Guichon	45	30	60	30		30		
	Jaymie Collins	30	15	45	30		30		
March 29, 2022	Alf Krause	45	30	60			30		
	Terry Michell	60	30	60			30		
March 30, 2022	Murray Driediger	45	15	45	30		30	45	
	George Leroux	30	15	60			15		15
April 19, 2022	Mike Reed	30	15			45			
	Blair Lodder	30	15			45			
	John Newell	30	15			60			
April 20, 2022	Corey Gerrard	30	15			45			
	Peter Guichon	30	30			30			
	Ravi Cheema	30	15			60			