BC Farm Industry Review Board Dispute Prevention and Resolution Interviews

Notes and Analysis

Results of interviews conducted by
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Summary and recommendations prepared with the assistance of Michael Skinner, DRO
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Introduction

During the fall of 2007, Jim Collins and David Merner met with eleven representatives of various parts of British Columbia’s regulated marketing sector. The purpose of these meetings was to discuss dispute prevention and resolution best practices in the sector in light of Government’s justice reform objectives. The notes from those interviews have been summarized below.

Executive Summary

While the eleven people interviewed had not consulted with each other, we were struck by the degree of consensus regarding the steps that need to be taken in order to anticipate, prevent, and resolve disputes more effectively.

Every single interviewee made suggestions relating to the three themes we have identified: (1) governance, (2) process changes to enhance dispute prevention and resolution, (3) key strategic issues that must be addressed. The main points made can be summarized as follows.

1. Governance

- Boards require well-trained expert members who: (a) understand the growing complexity of their particular agri-foods sector, (b) know how the key players operate, and (c) bring diverse as well as specialized expertise that will advance the mission of their respective organizations.
- Board composition should reflect the critical importance of: (a) bringing the broad public interest into decision-making; and (b) real participation by all components of the industry.
- Boards need to take the long-range view, engage in strategic planning for the future of the industry, and take on the “strategic issues” in a systematic way.
- Commodity boards require strong independent chairs to provide leadership and accountability.

2. Process

- Systematic communication, outreach and informal dispute resolution processes prevent issues from becoming disputes, and prevent the escalation of minor disputes into major ones.
- Education is a big part of dispute prevention. A better understanding of dispute resolution processes and skills would be helpful for many board members and staff.
- Effective peer-to-peer outreach activities by credible, knowledgeable board members and staff - and others - work well.
- Processes should be reviewed to determine whether:
  - appeal filing fees perhaps should be increased to discourage claims that lack merit and run up costs in a way that’s unreasonable; and
  - more aggressive “streaming of cases” can take place so that:
    - frivolous cases are stopped early;
    - cases that can be mediated are mediated early;
    - cases that require a hearing get one quickly; and

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1 Interviewees had experience in production, processing, allied trades and on boards (member and staff).
• cases involving broad “policy” considerations are not “railroaded” into adversarial hearings too quickly.
• “Speedy mediations” should always be available and mandatory mediation should be considered.
• The industry needs effective sanctions and enforcement, with well documented decisions, so that people know BCFIRB can and will take tough decisions.

3. **Strategic Issues**

• The capacity of boards to undertake long-range risk analysis and scenario planning around key strategic issues is crucial.
• Key issues identified by interviewees include: industry competitiveness and development; excessive geographic concentration and biosecurity; the enforcement of standards; compliance; producer education relating to compliance, dispute prevention and strategic issues; allocation of quota; and issues associated with absentee ownership (including product quality and competitiveness issues).

**Comments Specific to BCFIRB:**

*Clear direction:* BCFIRB needs to convey key messages and expectations to boards in a systematic and timely fashion; it must hold boards accountable for meeting those expectations; it needs to involve itself early as an expert neutral before disputes crystallize; it needs to ensure its long-term vision is understood; and it needs an active communications strategy.
Summary of Interview Notes

Governance:

- **Visionary Boards**: Boards need to be driven by strategic planning approach; boards should focus on longer term issues and less on vested interests.

- **Strong, decisive expert boards**: intensive training sessions (administrative law, mediation, BC Council of Administrative Tribunals, Centre for Organizational Governance in Agriculture training) should be a prerequisite, along with inter-board conferences to discuss issues of common interest; indecision encourages disputes; commodity boards lose credibility if overruled by BCFIRB on a regular basis; boards need regulations/orders with some absolute standards and predictable consequences for non-compliance; public interest is now part of the role and responsibility of each board; speedy decisions require expert boards - need to balance expertise with diversity.

- **Diverse, representative boards**: no one should have undue influence; small number of vocal individuals have disproportionate influence on or to a board; specialist boards should represent the industry and not just producers [BCFIRB comment: would require regulatory amendment to accomplish this]; an industry board can dispel festering problems; need mix of sophisticated expertise on boards, experienced staff, and contract experts to respond to increasing legal complexity; board should be broad based.

- **Bring broad interests to the board table**: Commodity boards should reflect balance of producers and processors - the whole value chain - funding by only one part of the industry [producers\(^2\)] is not consistent with boards’ responsibility to make decisions affecting the whole industry; industry needs to be able to make decisions subject to key principles communicated by government, but decisions are difficult when there is no framework - independent members are key, as is continuity, expertise and an historical perspective to understand repercussions of events and decisions.

- **Need strong chair**: need to match skills of chair to needs of board or commission; accountability of chair in meeting standards is crucial.

- **Conflict of interest avoidance**: need independent chair; small universe of quota holders requires both continuity and turnover to balance consistency against “same old” syndrome.

- **Education, communication and outreach activities targeted (primarily) to producers**: need regulated marketing/production 101 course for new producers; more outreach and communication over short term for boards.

Process:

- **Quick, informal pre-mediation communication processes**: needed to defuse disputes before they begin; often a simple chat is sufficient to deal with an issue; need “knowledgeable persons” that people can go to before filing an appeal; investment in consultations, risk and opportunity

\(^2\) This also means that producers are bearing the financial burden.
assessment will pay off; peer assessment might prevent some claims; disputes should automatically go to mediation unless they meet specific criteria for adjudication.

- **Speedy, early, effective mediation**: mandatory mediation might be considered as an option; need early and effective compliance evaluation process - early assessment of whether a concern has any merit to it at all, need to “get on it right now”; anything you can do to keep lawyers out of the equation multiplies benefits; process needs to be quick; mediations work; need clearly understood multi-step DR process with emphasis on informality; presence of an arm’s-length dispute resolution expert is critical. [DRO comment: need mediation on-ramps and off-ramps, so you can move disputes quickly to the right kind of resolution process.]

- **Effective sanctions, fairly applied ("teeth")**: demonstrable consequences for flagrant disregard of regulatory requirements; producers operating outside applicable regulations should not be tolerated; producers who do not pay levies should be treated quickly, fairly and with effective enforcement

- **Outreach activities critical**: defuses controversy, communication has been much improved [and dispels suspicion]; consistency in communications is critical; disputes have declined hugely when boards clearly communicate about regulations; proactive outreach is critical; education components needs to target new Board members, young people; need formal, early consultation; need effective Industry Advisory Committees.

- **Fee and costs structure**: to discourage frequent flyers; $100 filing fee is too small; 30 day limit for filing is too short; boards should have authority to award costs where matter clearly should not have been pursued through administrative litigation or is otherwise without merit [BCFIRB comment: costs are difficult issue requiring clear statutory authority and guidelines for application - BCFIRB has statutory authority to award costs in appeals but not within jurisdiction of commodity boards - perhaps an Office of the Information and Privacy Commissioner-style process with an inquiry officer exercising delegated authority to investigate and make recommendations]; small number of individuals responsible for major amount of work.

- **A means for summarily adjudicating or rejecting frivolous or vexatious appeals**: can we develop an intermediate step to create a threshold that must be crossed before BCFIRB will review a case; stupid appeals need to be managed down; create a jury duty system? Need a dissident management system; fast-track to appeal in some cases. [DRO comment: how to define a triable issue?]

- **Documented decisions at every level of the process**: detailed reasons are key to having participants understand and (perhaps) accept the decision; natural justice issues however slow down the process to the extent that people avoid it; need good Board orders based on trusted scientific principles and sound operating practices [knowledge management issues for Boards - need cataloguing and reference tools?]

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3 An interviewee response to a draft of this report commented that a substantial increase to the appeal filing fee might lead to negative perception that system was trying to limit public scrutiny.

4 Interviewee response to draft report was that BCFIRB should be more proactive in awarding costs against parties abusing the appeals process.
**Strategic Issues:**

- **Fair process:** [DRO comment: how to balance speed with magnitude of issue; major issue or precedent may mean that due process must be observed.]

- **Develop board capacity to undertake long-range issues identification and risk management:** board and staff (e.g., general manager) training needed, need scenario planning.

- **Fair allocation of quotas:** to encourage industry growth and efficient production; how to divide growth benefits going forward.

- **Industry development and location:** alleviate Fraser Valley concentration for certain lines of production; a potential biosecurity disaster looms; land use and competition are immediate concerns; plant consolidation is huge threat to milk industry - plants need to take some responsibility for fixing this problem. [BCFIRB comment: resolving this issue would require a significant, highly coordinated effort by governments, BCFIRB, boards and industry.]

- **The farmer v. owner debate:** are we engaged in farming or other businesses? Need to balance needs of entrepreneur (who doesn’t rely solely on agriculture) against needs of a viable agriculture industry.

- **BCFIRB’s role:** what is its responsibility in terms of highlighting long-term interests of industry? Need to narrow gap between BCFIRB vision and those of the commodity boards.

- **Producer education to encourage regulatory compliance and avoid disputes:** peer review and assessment (by retired farmers?); need education inside the industry and outside; kids coming on board need overview of industry; quota exchange and other transfer issues need BCFIRB leadership and lots of communication from trusted individuals.

- **Training and education:** essential for inspectors in biosecurity program; broad skill set may be required; strategic plan needs to be created - but need leadership to do it right.

**Comments re BCFIRB:**

- **Clear direction:** BCFIRB needs to convey Government’s overall policy objectives and its own key policy objectives and expectations for the regulated marketing system to boards in timely fashion, and hold boards accountable for meeting those expectations; boards need clear direction from government and then need to play leadership role in preventing disputes.

- **BCFIRB’s role:** what is BCFIRB’s responsibility in terms of highlighting long-term interests of industry? Need to narrow gap between BCFIRB policy vision for the regulated marketing sector and those of the commodity boards; BCFIRB needs to be involved in issues early and less as a legal entity; may present bias problem if BCFIRB subsequently has to rule on issue. [BCFIRB comment: as is the case in other dual role supervisory boards, including most other provincial supervisory boards and the Securities Commission here in BC, BCFIRB’s dual role is managed
by processes that control the information that passes back and forth between the various components of BCFIRB. A major responsibility of staff is to ensure that BCFIRB maintains its ability to act appropriately in all its functions.

- **Communications**: BCFIRB needs to communicate - 90% of people don’t know what BCFIRB is about, while the other 10% exploit BCFIRB processes to their advantage; with lack of knowledge of BCFIRB, individuals can spread disinformation.
“Brainstorming” List of Possible Recommendations

(1) Governance

- Review member appointment regulations and practices for consistency with boards’ needs. [BCFIRB comment: an evaluation process for sitting chairs has been established which will assist in determining skill sets required by each board.]
- DRO consult with BCFIRB and boards re training program design and content.
- Examine knowledge management issues for maintenance of expertise and continuity to counter effects of turnover in board membership.
- Review Crown Agency Secretariat expectations and accountability model re application to boards under BCFIRB, and to government policy framework for BCFIRB. [BCFIRB comment: presently conducting internal ‘governance’ reviews of BCFIRB and later will bring Boards into a discussion re external (Boards/sector) governance. Some of the Boards, notably chicken and egg, are also doing reviews and consultation between BCFIRB and those Boards is taking place.]

(2) Process

- Review fee issue, perhaps in the context of a review of legislation with a “case management” lens.
- Review BCFIRB and Board policies for support for other alternatives to appeal process.
- Consider industry consultation re fees, sanctions, enforcement and general reforms.
- Review administrative law concerns with fair process and expedited decision-making.
- Consider OIPC model: inquiry officer (“trusted person”) to expedite investigation & make recommendation, with recourse to back to Board or BCFIRB (as appropriate) if recommendation rejected

(3) Strategic issues:

- Consultations between Boards and BCFIRB re development of training programs for BCFIRB members and members of subordinate Boards.
- Joint periodic state of the industry conference, with “state of the art” sub-conference on mediation and dispute resolution issues.
- Analysis of Board composition: adequate to support diverse missions of industry development, fiduciary responsibility, public/producer education and outreach?
- Feedback to BCFIRB: what do Boards want and need and can BCFIRB deliver?