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Dear Sirs/Mesdames:

Re: Prokam and Thomas Fresh v BCVMC – Appellant Document Disclosure Application

On March 16, 2018 I issued a decision with respect to the appellants' document disclosure application. While I acknowledged that the Commission did not make an application for non-disclosure pursuant to Rule 12, my decision was to consider the disclosure made by the Commission and determine the necessity for redactions on the basis of relevance.

I gave the parties an opportunity to provide further submissions on the issue of relevance and I received a submission from the Commission dated March 19, 2018 and a brief letter from the Intervener supporting that submission. I also received a reply submission from the appellants March 21, 2018 all of which have been reviewed.

BACKGROUND

Original Commission Disclosure

The Commission initially disclosed a package of 612 documents. These documents include the documents relied upon by the Commission in issuing its Cease and Desist Orders October 10, 2017, in conducting its show-cause process, and making its decision of December 22, 2017 and further communications between the parties associated with these appeals.

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Of significance, this disclosure includes “a bundle of documents” (52 pages) concerning the minimum price issue relating to email communications between Island Vegetable Cooperative Association (IVCA), Prokam and Thomas Fresh in the period August 16 - September 6, 2017 regarding alleged sales of potatoes below minimum price and including IVCA spreadsheets and picking slips. There is an electronic binder of documents (61 pages) prepared following requests by counsel for the appellants and IVCA which in addition to the 2009 and 2017 Minimum Pricing Policy and Minutes from the Commission’s July 5, 2017 meeting includes October 2017 emails from the Commission relating to the alleged non-compliance of IVCA, Prokam and Thomas Fresh. It also attaches a spreadsheet at page 181 prepared by the Commission and “updated as of October 19th from IVCA” setting out the Commission’s alleged evidence supporting 14 occurrences of Prokam selling Prokam potatoes to Thomas Fresh in contravention of the minimum price set by the Commission. Supporting documents include purchase orders, picking slips, Commission minimum price lists for the relevant time periods for the particular type of potato and volume in dispute, and IVCA price lists and customer transaction summaries.

Document 232 is a five page spreadsheet titled Prokam 2017-18 Sales Analysis summarizing the Commission’s minimum price and Prokam’s invoiced price and volume shipped.

Document 338 is an 11 page letter from the Commission in response to requests by Counsel for the appellants and IVCA for further particulars of the allegations against Prokam, Thomas Fresh and IVCA. This document offers the Commission’s explanation of the significance of the documents disclosed above.

Subsequent Process Relating to Document Disclosure Application

In response to the appellant’s March 8, 2018 request for disclosure of documents encompassing 12 separate categories of requests and 12 specific documents referred to in documents already produced by the Commission, the Commission disclosed a further 565 pages of documents.

As detailed in my earlier decision, the appellants take issue with the fact that these documents appear “heavily redacted” for reasons going beyond solicitor-client privilege and in fact many appear to be redactions of pricing information in circumstances where the Commission did not apply to BCFIRB for an order of non-disclosure as contemplated by Rule 12 of the Rules of Practice and Procedure for Appeals. The appellants say these redactions obscure information that directly bears on the issues on appeal and are necessary for a full and fair hearing.

Subsequently, the Commission confirmed that price data had been redacted from the documents provided to the appellants as that data is strictly confidential and available only to the Commission and designated Agencies obliged to abide by the Commission’s minimum prices. It says disclosure of this sensitive information to wholesalers or retailers would erode producer returns and disrupt the orderly marketing system administered by the Commission. The Commission also noted that in the circumstances of this appeal, the obligations with respect to minimum price have direct application only to IVCA, which is no longer an appellant or a party to this proceeding.

The appellants disagreed with this submission and sought the redacted information on the basis that it is not current and relates to past periods only and as such, the potential negative consequences for orderly marketing of disclosure is greatly exaggerated. They also disagree with the suggestion that obligations with respect to minimum pricing are not in issue on these appeals or that they only have application to IVCA as an agency as the Commission pronounced orders against the appellants on December 22, 2017 specifically on the basis of its finding that each “played a significant role in the marketing of regulated product at below the minimum price established by the Commission”.

The appellants also argue that whether BCfresh itself complied with minimum pricing is an issue on appeal because of the Commission’s findings that “BCfresh is the only Agency that is robust in upholding the principles of orderly marketing”. They say it will be impossible to fully and fairly explore the accuracy and propriety of any of these findings if pricing information is redacted from the relevant documents.

Intervener, BCfresh strongly supports the position of the Commission on the confidentiality of pricing information and the necessity of the redactions, some of which redacted information belongs to BCfresh. BCfresh says that competitors with historical marketing data in hand could easily discern confidential pricing strategies and obtain an undue future advantage.

March 16, 2018 Preliminary Decision

In light of the proximity of the hearing dates and to promote orderliness in this process, I did not require the Commission to meet its disclosure requirements to BCFIRB under s. 8(4) of the *NPMA* by providing documents in an unredacted form and then apply under Rule 12 for redaction of sensitive information. Instead, I decided to consider the disclosure made and determine the issue of the necessity for redactions on the basis of relevance.

The appellants’ views on relevance were summarized in a letter of March 13, 2018 which states:

This appeal revolves around pricing. The issues on appeal include the process by which the Commission sets and disseminates minimum prices, whether the decisions to set minimum prices and the process by which those prices were set and disseminated is in accordance with sound marketing policy and SAFETI principles, whether the minimum prices applied, and were intended and understood to apply, to export sales, whether the appellants and the IVCA complied with the minimum pricing requirements, and whether other actors such as BCfresh complied with the minimum pricing requirements (findings of the Commission the correctness and propriety of which are in issue on appeal include its finding that “BCfresh is the only Agency that is robust in upholding the principles of orderly marketing”). The redactions that the Commission has applied to pricing information throughout the supplementary brief of documents obscure information that directly bears on these issues and which is accordingly necessary for a full and fair appeal hearing.

The Commission's submissions largely focussed on the issue of confidentiality without really addressing the issue of relevance of the redacted information to the issues on appeal which focus on whether the Commission erred in:

- (a) issuing its Cease and Desist orders denying the appellants the ability to market and sell potatoes at pricing below the authorized minimum price,
- (b) issuing its December 22, 2017 decision revoking the appellants Class 1 licenses and replacing them with Class 4 licenses and
- (c) designating BCfresh as Prokam Enterprises Ltd. designated agency?

In light of this, I gave the parties a further opportunity to make submissions on relevance.

Submissions on Relevance

In its submission dated March 19, 2107, the Commission raises issues which go beyond the document disclosure issue. Its central position however, is that "pricing" is only relevant to these appeals as a general contextual background and only to the extent it was material to the findings against IVCA. The Commission's decision expressly acknowledged that the appellants could not be held to account for contravening minimum price (paragraphs 17-19). Though the appellants purport to challenge the Commission's "jurisdiction" to make minimum price orders, the Commission maintains that they only have standing with respect to the orders actually made against them (making BCfresh Prokam's designated agency, not including shipments of Kennebec potatoes and exports in Prokam's delivery allocation for the 2018-2019 crop year, and revoking Class 1 licenses and replacing them with Class 4 licenses). It is only these issues which they might properly be said to be "aggrieved" or "dissatisfied". BCfresh adopted these submissions.

The appellants disagree with the Commission's characterization making three main points. A review of the December 22, 2017 decision shows that the Commission punished the appellants and levied penalties against them on the basis of contraventions of the minimum pricing rules. Prokam is being denied the right to count its potato exports into its delivery allocation. Both appellants have had their Class 1 license revoked and replaced with a Class 4 license on the basis of some involvement in marketing product a below minimum price. They say there is no merit at all to the Commission's suggestion that the orders it made against the appellants are unrelated to alleged violations of minimum pricing rules. Whether the minimum pricing rules were violated and, if so, the extent to which it was appropriate for the Commission to impose punitive orders on the appellants as a result, is at the heart of these appeals.

The appellants agree that neither of the appellants could be held to account for "contravening" the minimum pricing rules. However, they argue that one of the curiosities of the Commission's decision is that it nevertheless proceeded to levy penalties against the appellants and make other orders directly affecting their legal interests on the basis, wholly or partly, of the finding that applicable minimum pricing rules had been contravened. Further, they say that the Commission's submission that only the IVCA can be found to have contravened the applicable pricing rules

because those rules only apply to agencies like IVCA rings hollow because it is the appellants and not IVCA who was penalized for those violations.

With respect to standing, the appellants say they are “aggrieved” by the orders made by the Commission on the basis of findings that applicable minimum pricing rules have been violated, in that their legal interests relating to delivery allocation, the right market through its chosen agency and licensing have been directly affected. They are “dissatisfied” with the penalties levied and other orders made against them on the basis of findings that applicable minimum pricing rules were violated and have a significant and genuine interest in reversing the penalties levied and vacating the other orders made against them.

DECISION

Based on the submissions of the parties, I am of the view that pricing is a relevant contextual consideration in this appeal as the Commission itself appears to have made a finding that the appellants were complicit in the sale of vegetables below minimum price into the Prairies. On this point, I refer to the Commission’s submission from the stay application (February 13, 2018) which stated:

The circumstances that led to the decisions that are the subject matter of these appeals may be summarized as follows. Due to a lack of oversight by IVCA, Prokam planted potatoes far in excess of its delivery allocation and sold them “directly” to Thomas Fresh at less than the minimum Commission ordered price. This created a significant disruption to orderly marketing. Markets that would otherwise be lawfully serviced by agencies were displaced by Prokam undercutting the minimum price. Though the transactions were technically “papered” through IVCA (the principle of Prokam was then a director of IVCA), the agency was largely unaware of Prokam’s “backdoor” activities.

I am less convinced that the issue of whether BCfresh complied with the minimum pricing requirements is particularly relevant to the issues on this appeal. The appellants’ argument appears to be that evidence that BCfresh sold below minimum price is a direct challenge to the Commission’s finding that “BCfresh is the only Agency that is robust in upholding the principles of orderly marketing”. The determination of the suitability of BCfresh as Prokam’s designated agency will likely turn on many factors (including the ability of other agencies to act in this role, the history of any issues within the prior agency and the ability of BCfresh and/or other agencies to fulfill their regulatory role).

With this context in mind, I turn to consider the issue of the redacted documents and whether it is necessary for the purposes of a fair hearing to order any of those reductions removed on the basis on relevance.

Supplemental Commission Disclosure

As mentioned above, this further disclosure is comprised of 565 pages of documents. They are grouped as follows, Minimum Pricing Emails (pages 612-707), Minimum Pricing Notes

(pages 708-894), Storage Crop Agency Meeting Materials (pages 895-908) and Miscellaneous Documents (pages 923- 1177).

Minimum Pricing Emails (pages 612-707)

The redactions start at page 640 and end at page 692. A review of the redactions show, as the Commission has said, redactions related to price of any regulated vegetable discussed in the Commissions weekly pricing meetings. These redactions include the minimum price for carrots, beets, turnips, rutabagas, red cabbage, green cabbage, and onions. I find no basis in the submissions to order the removal of any redactions related to the minimum price of regulated vegetables other than potatoes. Similarly, there are redactions for ad prices. Ad pricing appears distinct from the minimum price and relates to short term promotions. I find no basis in the submissions to order the removal of redactions related to ad pricing for any regulated vegetable including potatoes.

From pages 652- 707, there are redactions related to the minimum price for potatoes. However, I observe that these minimum prices are for January, March, and April 2017. With respect to the appellants' submission that page 654 relates to an occasion in 2017 where BCfresh sold potatoes at below minimum price, that interpretation is certainly not clear on the face of the document and further, I find no basis in the submissions to order the removal of any redactions related to the minimum price of regulated vegetables (potatoes) for the period of time not in dispute in this appeal namely Weeks 31-39 (running from August into October). Based on this review, I am not prepared to order the removal of any redactions in this set of documents.

Minimum Pricing Notes (pages 708-895)

Given that the Commission has already disclosed minimum price information for each shipment in dispute in these appeals, I do not see the basis for the same type of information reflected in these notes to be kept confidential. While it certainly would have been easier for the Commission to review its documents and remove those few redactions that relate to the minimum price already disclosed, I have undertaken that task. It should be noted however, that where I have not ordered redacted information removed, it is open to the parties to renew a request during the course of the hearing should they be able to develop an evidentiary basis for the relevance of particular redacted information to the issues on appeal. Similarly, if the Commission is of the view that I have overstepped in ordering disclosure I am prepared to hear its submission in advance of it making the disclosure required in this decision.

Commencing at page 708 and running to page 728 are notes and emails relating to market calls starting in March 2017 and ending in July 2017. There are redactions in this set of documents for the minimum price of all manner of regulated vegetables including potatoes and ad prices. I am not prepared to order the removal of any redactions in this range of documents that deal with other types of regulated vegetables, ad prices and minimum prices at times not in issue in this appeal. Given that determination, potentially relevant documents are pages 729 -779. Beyond page 779, the documents relate to pricing notes for a time period not in issue in these appeals.

Pages 729-730 are the Minimum Pricing Notes for week 31 which is a relevant time frame for this appeal. The Commission has disclosed its minimum price list for the regulated product (Conventional Yellow and Red) in dispute for Week 31 at page 409 - 410. These notes reflect that potato pricing is good and it will stay as it is, as such the redactions remain.

Pages 731-732 are the Minimum Pricing Notes for week 32. The Commission's minimum price list for the regulated product (Conventional Red, Yellow and White) in dispute for Week 32 is at pages 411 - 412. **As such, I order the removal of the redaction for the Yellow price at the bottom of page 731.**

Pages 733-741 are the Minimum Pricing Notes for week 33. The Commission's minimum price list for the regulated product (Conventional Red and Yellow) in dispute for Week 33 is at pages 413 - 414. With respect to these documents, the appellants say that pages 734-737 appear highly relevant to the issues on appeal but the extensive redactions make the document "almost unintelligible". I do not agree that the document is unintelligible. On page 734, the redactions allow for determination of the product and size discussed. The redactions relate to the landing price of potatoes from Washington and sizes and types of potatoes and other types of regulated vegetables not in issue on this appeal. **On page 735, I order the removal of the redaction in the centre of the page relating to the bulk price of red and yellows.**

The remaining redactions on page 735 appear to refer to a particular customer and not the setting of minimum price. **On page 736, I order the removal of the fourth and eighth and ninth redactions related to the price of red and yellows. On page 737, I order the removal of the first, sixth and seventh redactions as they appear to relate to minimum price matters in dispute in these appeals.**

Pages 742-746 are the Minimum Pricing Notes for week 34. The Commission's minimum price list for the regulated product (Conventional Red, Yellow and White) in dispute for Week 34 are at pages 415 - 416. On page 744, although Yellows are mentioned, prices relate to cartons and creamers and not the size in dispute. **I order the last redaction on page 744 for the price of reds in BC at the bottom of the page removed.**

Pages 747- 748 are the Minimum Pricing Notes for week 35. The Commission has disclosed its minimum price list for the regulated product (Conventional Red, Yellow and White) in dispute for Week 35 (page 417 and 418). The redactions do not appear related to matters in issue in this appeal.

Pages 749 -750 are the Minimum Pricing Notes for week 36. The Commission has disclosed its minimum price list for the regulated product (Conventional Red and Yellow) in dispute for Week 35 (page 419 and 420). The redactions do not appear related to matters in issue in this appeal.

Pages 751-759 are the Minimum Pricing Notes for week 37. The Commission has disclosed its minimum price list for the regulated product (Conventional Red, Yellow and White) in dispute for Week 37 (page 421-422). The redactions do not appear related to matters in issue in this appeal.

Pages 760- 767 are the Minimum Pricing Notes for week 38. The Commission has disclosed its minimum price list for the regulated product (Conventional Red, Yellow and White) in dispute for Week 38 (page 423-424). **I order the removal of the redaction on page 761 regarding bulk white potatoes. On page 762, I order the removal of the fifth redaction as it relates to minimum practice. On page 764, the letter appears to be from an agency (IVCA) questioning whether the price on bulk white standards is correct. Given that the minimum price of 50 lb cartons of whites are in dispute in this period, I order these redactions removed.**

Pages 768-779 are the Minimum Pricing Notes for week 39. The Commission's minimum price list shows the regulated product (Conventional Red, Russet, Yellow and White) in dispute for Week 39 (page 425-426). The redactions do not appear related to the packing sizes in issue in this appeal.

Pages 780 to 894 are Minimum Pricing Notes for weeks 40 onwards. As the Commission's decision does not extend into these pricing periods, the redactions are not on matters relevant to this appeal.

Storage Crop Agency Meeting Materials (pages 895-908)

The submissions do not touch on the redactions at page 896 but I do not see how the redacted material relates to the issues on appeal and I am not prepared to remove the redaction as it appears price sensitive in nature.

Commission Minutes and Related Materials (pages 909-922)

There are redactions from Commission meeting agenda and minutes of December 14, 2017 which appear to deal with transfer requests, unrelated compliance issues related to the Seasonal Agricultural Worker Program and other matters clearly not related to the issues on appeal. I am not prepared to order the removal of any of these redactions.

Miscellaneous Documents (pages 923- 1177)

From pages 923 to 958 there are hand written notes and Minutes from June 15, 2016 meeting, hand written notes and Minutes of an August 31, 2016 Commission meeting and Minutes of an April 4, 2017 Commission meeting all of which have redactions. However, a review of these documents does not show that any of the redactions relate to matters at issue in this appeal and instead appear to be done to protect personal information or matters.

Pages 986 -1001 are hand written notes and Minutes and Agenda for the July 5, 2017 Commission Meeting. A review of these documents does not show that any of the redactions relate to matters at issue in this appeal and instead appear to be done to protect personal and or confidential information or matters simply unrelated to matters on appeal.

Page 1011 - 1017 are the Minutes and Agenda for the September 6, 2107 Commission Meeting. A review of these documents does not show that any of the redactions relate to matters at issue in this appeal and instead appear to be done to protect personal and or confidential information or matters simply unrelated to matters on appeal.

Page 1026 is the Agenda for the October 16, 2017 Commission meeting and pages 1035 – 1049 are the Minutes and hand written notes of the Commission's December 14, 2017 meeting. These redactions again appear to be done to protect personal and or confidential information or matters simply unrelated to matters on appeal. With respect to page 1049, the appellants say that this document appears to be whited out. That may be the case; it is difficult to tell from photocopies. However it appears from a review of the document itself that it relates to certain Board members recusing themselves before a vote. The Board Minutes at page 1040 record the recusal and the reasons for it.

There are further redactions at page 1058, 1060, and 1069 which appear to relate to communications during the time when the Commission was dealing with the Cease and Desist Orders and determining further process. In the absence of an argument advanced by the appellants on how this information is relevant to the appeals I am not prepared to order it disclosed.

Page 1095 is the Agenda to the January 26, 2018 Commission conference call. The redaction relates to the compliance issue with Prokam. Similarly, pages 1098, 1099, 1102 involve January 26, 2018 Commission staff communications with members about these appeals. It is unclear how the redaction could be relevant to the issues on appeal.

Pages 1135 and 1147 appears to involve a redaction from a September 28, 2017 email from Commission staff to members related to lettuce and is unrelated to matters on appeal.

Page 1162 appears to involve a redaction from an October 25, 2017 email from Commission staff to members seeking instructions from Commission members on the Prokam/Thomas Fresh/IVCA matter. It is unclear how the redaction could be relevant to the issues on appeal.

Summary of Redactions Ordered Disclosed

Based on the issues raised by these appeals and a review of the documents disclosed, I have directed that the following redactions be removed as they appear to relate to the issues on appeal:

Page 731– redactions yellow price at bottom of page

Page 735 –redactions in the centre of the page relating to the bulk price of red and yellows

Page 736 – fourth and eighth and ninth redactions related to the price of red and yellows

Page 737 – first, sixth and seventh redactions

Page 744 – last redaction for price of reds in BC

Page 764 – all redactions removed

OTHER OUTSTANDING ISSUES

Request for In Camera Hearing

BCfresh has indicated that it will call President and Chief Executive Officer Murray Driediger to testify in these appeals and his evidence will be highly sensitive, confidential and competitive commercial information. As such, BCfresh is requesting that Mr. Driediger's evidence be received *in camera* to the exclusion of the public and other parties (which I understand to mean the appellants). Appellants' counsel would however participate in the *in camera* proceedings and cross examine Mr. Driediger. I am prepared to make that order and any procedural details can be addressed at the outset of the hearing.

There are a number of remaining issues still before the panel.

Fifth Appeal Filed

The appellants have filed a further appeal of the January 30, 2018 decision of the Commission refusing to vary the designation of BCfresh as an agency. There are potential issues whether this appeal was filed in time or whether special circumstances exist to extend the filing of an appeal and if this is a proper appeal, whether it should be heard with the present appeals.

Request for Further Pre-hearing Conference/Adjournment

On March 20, 2018, Counsel for the Commission requested a further pre-hearing conference and raised the possibility of an adjournment as the appellants have produced a significant volume of documents entirely disproportionate to the actual record of proceeding arising from the Commission's written show-cause hearing which is the foundation for the decisions under appeal. The Commission says that although an appeal to the BCFIRB is not limited to the record of proceeding before the first-instance decision-maker, there ought to be compelling reasons to expand the evidentiary burden on the BCFIRB in a manner that seems entirely disproportionate to the record that was actually before the Commission.

The Commission also says that the appellants intend to lead evidence and to make argument on matters they did not put before the Commission, and which may be tangential to (if not entirely disconnected from) the issues, evidence and argument that were before the Commission and led to the actual orders under appeal. The Commission points to the appellants' fifth appeal which they seek to incorporate into the present proceedings without the benefit of the usual pre-hearing conference proceedings to identify what issues are at play. The Commission says that case management is urgently required to prevent the appeals from becoming a springboard into a supervisory review of wide ranging issues that have little to do with the record that was before the Commission, or its decisions.

On March 21, 2018, the Commission again requested directions be issued concerning the scope of the appeal pointing to a substantial risk that the parties will not be joined on the issues and the

possibility that the hearing will veer into areas not substantially related (or entirely disconnected) to the decision under appeal.

Next Steps

The panel agrees that further directions are necessary to ensure these appeals are heard in an orderly and efficient manner. We are also very mindful that we are four business days away from the hearing of these appeals commencing April 3, 2018 after the long weekend. Given that tight time frame it may not be possible to schedule a further pre-hearing conference call. However, I am prepared to issue further directions concerning the scope of this appeal and will do so early next week.

Yours truly,

A handwritten signature in cursive script, appearing to read "John Les".

John Les, Chair and
Presiding Member