IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND APPEALS FROM COMPLIANCE ORDERS OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

BETWEEN:

PROKAM ENTERPRISES LTD
THOMAS FRESH INC.

APPELLANTS

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BCFRESH INC.

INTERVENER

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Al Sakalauskas, Member Diane Pastoor, Member
For the Appellant:	Claire Hunter, Counsel
For the Respondent:	Robert Hrabinsky, Counsel BC Vegetable Marketing Commission
Intervener:	Robert McDonell, Counsel BCfresh Inc.
Date of Hearing	April 3- 5, May 22 - 24, & June 13, 14, 2018
Place of Hearing	Delta, British Columbia, and by written submissions

INTRODUCTION

1. This is a decision relating to four appeals commenced by vegetable producer, Prokam Enterprises Ltd. (Prokam) and vegetable wholesaler, Thomas Fresh Inc. (Thomas Fresh). These appellants appeal the decision of the British Columbia Vegetable Commission (Commission) on October 10, 2017 to issue cease and desist orders and the subsequent decision of December 22, 2017 (the December decision). The specific orders under appeal as set out in the December decision are as follows:

> 48.1 Effective February 1st, 2018, BCfresh is the designated Agency for Prokam. Prokam is to sign a GMA with BCfresh under the Agency's standard terms.
>
> 48.2 Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.
>
> 48.3 The Class 1 Producer Licence issued to Prokam is to be revoked and replaced with a Class 4 Licence. The Commission may choose to replace this licence with a Class 3 or Class 5 licence on review of the producer's compliance with these orders.
>
> 48.5 The Class 1 Wholesaler Licence issued to Thomas Fresh is to be revoked and replaced with a Class 4 Licence.

2. The appeal was heard by a three member panel. Member Pastoor's appointment to the British Columbia Farm Industry Review Board (BCFIRB) expired on July 31, 2018; her appointment was extended to allow her to continue to exercise powers as a member of BCFIRB in this appeal. On November 15, 2018, the appointment of Chair Les was rescinded. As such, this is the decision of panel members Sakalauskas and Pastoor.

REGULATORY FRAMEWORK

3. The following is a brief summary of the legal framework governing this matter. Relevant sections are set out in more detail in Appendix A and will be discussed further below.

4. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 (*NPMA*) the Lieutenant Governor in Council has the power to establish boards and commissions and to confer upon them certain powers (section 11).

5. Pursuant to this power, the Commission was established as part of the *British Columbia Vegetable Scheme*, B.C. Reg. 96/80 (Scheme). The Scheme vests the Commission with all the powers set out in section 11 of

the *NPMA*, and the power in the Province to regulate production, transportation, packing, storage and marketing of regulated product. Regulated product includes potatoes grown in the Province.

6. The Commission has, in turn, established General Orders which, among other things (and with some limited exceptions) provide that:

   - Producers can only sell regulated product to a designated agency.
   - Agencies must be approved by the Commission.
   - Wholesalers must buy regulated product from agencies (not producers) , but for regulated product that is subject to minimum pricing rules (as is the case with potatoes) those sales must receive Commission prior approval to ensure minimum prices (which are determined from time to time by the Commission) are respected.
   - Determining how much of an agency's supply needs will be met by any one producer is determined using a process referred to as "Delivery Allocation" (DA). Producers must not produce or ship regulated product without a corresponding DA without Commission approval.[1]
   - Agencies cannot market new or additional regulated product without Commission approval.

7. At the federal level, the *Agricultural Products Marketing Act*, RSC 1985, c. A-6 provides that the Governor in Council may make regulations to authorize a body that is empowered under provincial law with regulating marketing within a province to have the same powers in relation to interprovincial and international trade.

8. The Governor in Council has established such a regulation for vegetables produced in BC. It is known as the *British Columbia Vegetable Order*, SOR/81-49. It states that the Commission may "…by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province…" [emphasis added]

9. Finally, the federal *Statutory Instruments Act* sets out rules governing the creation of "regulations". That term is broadly defined in section 2 to mean

[1] Despite the general prohibition in the General Orders against producers producing or shipping regulated product without DA unless otherwise authorized by the Commission, the appellants maintained that there was no prohibition on overplanting. This assertion appeared to be accepted by Commissioner Guichon but we note General Prohibition 12 was not put to him nor was he asked to explain the inter-relationship between General Prohibition 12 and the requirements set out in Part XVII for calculating DA.

"a statutory instrument …made in the exercise of a legislative power conferred by or under an Act of Parliament.." The term statutory instrument is in turn defined to mean "… any order… made or established:

> **…** in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates…

10. The *Statutory Instruments Act* also contains provisions regarding review of such instruments, the obligation of the Clerk of the Privy Council to register them and the requirement for such instruments to be published in the Canada Gazette. Section 9(1) provides, "No regulation shall come into force on a day earlier than the day on which it is registered…" (with certain limited exceptions).

EVIDENCE AND MATERIALS CONSIDERED

11. We have been provided with a very large amount of materials and submissions, which include:

- A 163 page Memorandum of Argument filed by the appellants
- A 63 page Memorandum of Argument filed by the Commission
- A two page reply from the intervener BC Fresh,
- A 21 page Memorandum of Argument filed by the appellants,
- A bound volume of documents entitled" "List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. ",
- A bound volume of documents entitled "Supplemental List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. ",
- A bound volume of documents entitled "Second Supplemental List of Documents of Prokam Enterprises Limited and Thomas Fresh Inc. ",
- A bound volume of documents entitled "Third supplemental list of documents of Prokam Enterprises Limited and Thomas Fresh Inc.",
- Two large binders entitled" "Respondent's brief of documents",
- A smaller binder entitled "Respondent's Mini Book of IVCA Documents",
- A bound volume entitled "Application Record re Affidavit of Documents" ,
- A bound volume entitled "Documents Produced by Commission after May 24, 2018", and
- Approximately 3000 pages of authorities.

12. In addition, an oral hearing – originally scheduled for 2 days – was held over an eight-day period in April, May and June 2018, resulting in approximately 1123 pages of transcripts and some further exhibits.

13. Despite our efforts to keep the hearing focused and efficient, the large amount of evidence tendered and the nature of the cross-examination conducted made the hearing of this matter and the review of materials for

the purposes of drafting this decision more onerous and time-consuming than it would otherwise have been. For this reason, we wish to expressly note that we have carefully considered all of the evidence and submissions referred to above, even though we do not intend to refer to all of it in the course of this decision.

14. In this regard, we adopt as generally applicable here the following words from Madame Justice Newberry in *BC Vegetable Greenhouse I, L.P. et al v. British Columbia Marketing Board,* 2005 BCCA 476 (CanLII):

> We have received very lengthy − perhaps too lengthy − submissions over three days in these appeals from Mr. Justice Drost's orders dated October 1, 2003. His reasons are indexed as 2003 BCSC 1508 and I do not propose to rehearse them since it is doubtful they will be of interest to persons other than the parties and other sophisticated persons in the industry. Nor do I intend to describe the many, many cases and statutes to which we were referred, since I do not view the appeals as turning on law which is in doubt. Rather, it turns on the applicability of clear rules to facts that are not in dispute. I propose simply to state in my words the conclusions I have reached without citing a great deal of law, and without deciding issues that are not required to be decided to dispose of the appeals. Counsel may be disappointed in this, but the upside for them is perhaps that the arguments may be made again another day.

FINDINGS OF KEY FACTS

Parties Involved

15. Mr. Dhillon and his wife own and operate Prokam, a registered vegetable producer in Abbotsford, BC. Prokam holds DA for potatoes in the amount of 26 tons purchased in late 2015 which represents production from approximately 60-70 acres. Prokam has early land and with skilled cropping practices has the potential to bring an early crop to market where it can command a premium price.

16. Thomas Fresh is registered as a wholesaler of vegetables in BC with operations in BC, Alberta and Saskatchewan.

17. Island Vegetable Co-operative Association (IVCA) is a designated agency of the Commission with its office on Vancouver Island. It is a cooperative with a board comprised of representatives of four of its approximately 8 growers. Since 2014, Prokam has shipped regulated and unregulated vegetables to IVCA and in 2017, was its largest shipper of potatoes with approximately 80 -90% of IVCA's volume. Mr. Michell is IVCA's president and Mr. Dhillon is its vice-president.

18. BCfresh is also a designated agency with its office in the Lower Mainland. BCfresh is the largest agency in BC and is a private company owned by its

31 grower/shareholders who provide approximately 90% of the regulated volume of vegetables it ships.

19. The Commission is created under the Scheme, a regulation enacted under the authority of the *NPMA*. The Commission has 8 directors and an appointed chair. At the time of the hearing, one director position was vacant, and there were four storage crop directors and three greenhouse directors. Of the four storage crop directors, three ship regulated product to BCfresh and of those three, one director, Mr. Guichon, is Chair of BCfresh.

Relationship of Prokam and IVCA

20. In 2017, Prokam increased its production of potatoes well in excess of its DA to 380 acres in response to IVCA's growth plan to fill the premium early wholesale retail market. In April 2017, Mr. Dhillon's brother-in-law Mr. Gill was hired as IVCA's mainland sales representative primarily to sell Prokam's potatoes.

Relationship of IVCA and Thomas Fresh

21. As early as 2015 IVCA, through its previous general manager and its president, was actively soliciting out-of-province sales with Thomas Fresh in Calgary and Saskatoon. IVCA supplied Prokam potatoes to Thomas Fresh in 2016. In March 2017, Thomas Fresh sent signed 60-day forward contracts to IVCA and in April 2017, Mr. Gill executed these contracts to supply Thomas Fresh with Prokam's potatoes at a set price.

Relationship of IVCA and Commission

22. The Commission was aware of Prokam's decision to plant potatoes in excess of its DA and in late January 2017, initiated a review process to coordinate agency production planning. Despite numerous requests to IVCA to submit a production plan, confirm planting intentions and agency growth expectations, IVCA remained silent on its planned market for Prokam's potatoes and its business relationship with Thomas Fresh, preferring to rely on an earlier submission in the Vancouver Island Agency Review.

23. The Commission made it clear that this earlier application for agency license was not a marketing plan for IVCA's regulated product and issued a warning notice, but IVCA remained non-compliant with Part XV of the General Orders requiring Commission approval where an agency intended to market new product (product not covered by DA). Mr. Dhillon in his role as vice-president of IVCA and Mr. Gill as an IVCA employee participated in these decisions to thwart Commission authority.

Impugned Transactions

24. Paragraph 7 of the Commission's December decision sets out a summary of the impugned transactions, specifically:

    - 7.1 – sales between August 23 - October 4, 2017;
    - 7.2 – 170 short tons of regulated product sold between 2 and 34 cents below minimum price;
    - 7.3 – Thomas Fresh purchase orders show pricing below IVCA product quote sheet;
    - 7.4 – IVCA not permitted to offer product below its product quote sheet which reflect minimum price;
    - 7.5 – Total volume acquired by Thomas Fresh below minimum price – 2.688565 million pounds;
    - 7.6 – IVCA engaged in 125 occurrences of sales below minimum price (July 30 - September 24, 2017 without Commission authorization;
    - 7.7 – each of the 125 occurrences Thomas Fresh invoiced below IVCA price sheet;
    - 7.9 – In weeks 37 and 38, Prokam shipped Kennebec potatoes through IVCA without DA and without permission from the Commission. IVCA remained accountable for allowing product to enter market without regard to DA of other producers.

25. The appellants were critical that the Commission failed to disclose a letter, written by another producer Mr. Hothi dated October 25, 2017 (received by the Commission on November 24, 2017) prior to the show cause process. The Commission relied on this letter to make an adverse finding that Prokam sold Kennebec potatoes without DA at a time when Hothi had product ready to deliver.

26. On the evidence, there is no dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon confirmed that IVCA president Mr. Michell wanted to make sure that if there was a gap in production due to inconsistent quality, IVCA could fill the gap.

27. Mr. Dhillon, either in his role as the principal of Prokam or as a director of IVCA, did not seek approval from the Commission before producing or shipping regulated product not covered by or in excess of Prokam's DA as required by the General Orders.

Commission Process

28. On October 10, 2017, the Commission issued cease and desist orders against Prokam, Thomas Fresh and IVCA alleging that potatoes were being marketed and sold without Commission authorization below minimum price, knowingly permitting IVCA to be put in a position of non-compliance, placing its agency license at risk and without authority to

represent IVCA in marketing and sales of regulated product and shipping Kennebec potatoes in September 2017 without DA. By the time the cease and desist orders were issued, Prokam had sold approximately 348 tons of potatoes to Thomas Fresh.

29. Subsequently, the Commission conducted a written show cause process resulting in the December decision. Significant findings included lack of oversight by IVCA, Prokam's planting far in excess of its DA and selling potatoes "directly" to Thomas Fresh at less than minimum price where the use of "directly" reflects the Commission's view that the impugned transactions were "papered" through IVCA and IVCA was largely unaware of these "backdoor activities".

30. In its December decision, the Commission upheld its cease and desist orders denying the appellants and IVCA the ability to market and sell potatoes below minimum price, revoking and replacing the appellants' class 1 licenses with class 4 licenses and directing Prokam to BCfresh "as it is better equipped to manage the producer and ensure pricing rules are followed".

31. Upon reconsideration, the designation of BCfresh as Prokam's agency was upheld by the Commission in a decision dated January 30, 2018. The reconsideration decision is under appeal but in abeyance pending the results of these appeals.

Dysfunctional Nature of IVCA

32. Much evidence was heard at the hearing of the dysfunctional nature of IVCA. The Commission's view is that Mr. Dhillon, with the assistance of Mr. Gill, essentially co-opted the regulatory authority of IVCA and bypassed agency staff, allowing Prokam to sell potatoes in excess of DA directly to Thomas Fresh at prices below the Commission's minimum pricing. Mr. Dhillon disputed this characterization and downplayed his role within IVCA describing himself as a very busy farmer with little time to spare in the growing season who relied on his agency to meet any regulatory responsibilities. He denied putting undue stress on the agency or creating a toxic environment and distanced himself from Mr. Gill.

33. Having heard all the evidence, we find Mr. Dhillon's role to be a bit more nuanced than found by the Commission. Mr. Dhillon, in his role as IVCA vice-president and director, was a force to be reckoned with. Prokam was a big player in IVCA, in contrast to the other smaller growers; its production in 2017 amounted to 9% of the potato production in BC. This production significantly increased IVCA`s capacity. Mr. Dhillon acknowledged that IVCA needed Prokam as a grower, both financially and for growth. Mr. Dhillon was not beneath threatening to fire staff or pulling his money

from the agency in order to get his way. With respect to Mr. Gill, Mr. Dhillon was instrumental in bringing him into IVCA and supported his employment handling IVCA's "mainland sales" which in fact were the sales of Prokam potatoes to Thomas Fresh. While Mr. Dhillon denied paying part of Mr. Gill's salary, we accept Mr. Gill's evidence that Mr. Dhillon negotiated half his salary to be paid through Mr. Dhillon's father's company, Sam Enterprises.

34. However, it is also clear that IVCA through its previous general manager and its current president actively solicited the Thomas Fresh account over several years. While Mr. Gill may have signed the contracts, he did so in full knowledge that IVCA wanted a long term agreement with Thomas Fresh to access the tonnage fees to address agency cash flow problems. While the current general manager may have been late to a realization that the contracts were signed and the implications of those contracts, the inescapable conclusion is that the management of IVCA (not just Mr. Dhillon) actively participated in obtaining these contracts. All three parties had something to gain. IVCA wanted the tonnage fees, Prokam wanted the early market (periods A and B) for its potatoes to grow DA, Thomas Fresh wanted a cheap supply of premium potatoes to take to the market.

FINDINGS, ORDERS AND REASONS

35. Given the length and complexity of the submissions, we find it useful to set out our findings and orders first, with our supporting reasons set out below.

Finding **The Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, or to issue any related cease and desist orders respecting such sales. We reach this conclusion because the Commission has not complied with the federal *Statutory Instruments Act,* a step that is required for the Commission to be able to avail itself of the interprovincial price setting authority that is provided by the federal *Agricultural Products Marketing Act* and the *British Columbia Vegetable Order*.**

Order 1. **Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.**

36. The appellants provided extensive argument on this point, including a discussion of historic case law regarding the constitutional limits on provincial authority to regulate marketing. The respondents in turn have

argued that notice should have been given to the Attorney General, pursuant to the *Constitutional Question Act*, R.S.B.C., c. 68. Section 8 of that Act requires notice in proceedings where "the constitutional validity or constitutional applicability of any law is challenged, or… an application is made for a constitutional remedy." The appellants reply that they are not seeking any such declaration and are simply referring to historic case law in order to help understand, and interpret, certain provisions in the *NPMA* and the Scheme.

37. We agree with the appellants' position in this regard, and are of the view that it is both possible and appropriate to address the issues arising in this appeal simply as a matter of statutory interpretation.

38. In this regard, we note that, while the Commission's General Orders do not impose specific limitations regarding extra provincial sales, they can only validly regulate such matters if and to the extent they are premised upon authority under the Scheme. Section 4 of the Scheme is relevant here. It states:

Powers

4 (1) The commission is vested with the power **in the Province** to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product.

(2) Without restricting the generality of subsection (1), the commission is vested with the powers described in section 11 of the Act, and with the following additional powers…. [emphasis added]

39. Section 11 of the *NPMA* states:

Powers of marketing boards and commissions

11 (1)Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

(a)to regulate the time and place at which and to designate the agency through which a regulated product must be marketed;

(b)to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be marketed by a person at any time;

(c)to prohibit the marketing of a grade, quality or class of a regulated product;

(d)to determine the charges that may be made by a designated agency for its services;

(e)to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it;

(f)to require persons engaged in the marketing of a regulated product to register with and obtain licences from the marketing board or commission;
(g)to set and collect yearly, half yearly, quarterly or monthly licence fees from persons engaged in the marketing of a regulated product;

(h)for the purposes of paragraph (g) and in respect of the persons affected by a regulation under that paragraph

(i)to classify those persons into groups and set the licence fees payable by the members of the different groups in different amounts,

(ii)to set and collect from those persons fees for services rendered or to be rendered by the marketing board or commission, and

(iii)to recover the licence and other fees by proceedings in a court of competent jurisdiction;

(i)to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;

(j)to require full information relating to the marketing of a regulated product from all persons engaged in marketing activities, to require periodic returns to be made by those persons and to inspect the books and premises of those persons;

(k)to set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia;

(l)to authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those payments until the total net proceeds are distributed;

(m)subject to section 16 (2) (b), to require the person in charge of a vehicle or other form of conveyance in which a regulated product could be transported to permit a member or employee of the marketing board or commission to search the vehicle;

(n)to seize and dispose of any regulated product kept or marketed in violation of an order of the marketing board or commission;

(o) to set and collect levies or charges from designated persons engaged in the marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission

(i) to carry out the purposes of the scheme,

(ii) to pay the expenses of the marketing board or commission,

(iii) to pay costs and losses incurred in marketing a regulated product,
(iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and
(v) to set aside reserves for the purposes referred to in this paragraph;

(p) to delegate its powers to the extent and in the manner the marketing board or commission considers necessary or advisable for the proper operation of the scheme under which the marketing board or commission is constituted, but a power in paragraph (f), (g) (h) or (i) must not be exercised by any person other than the federal board, a marketing board or a commission;

(q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product, and to amend or revoke them;

(r) to purchase a regulated product in relation to which it may exercise its powers and package, process, store, ship, insure, export, sell or otherwise dispose of the product purchased by it;

(s) to inquire into and determine the amount of surplus of a regulated product;

(t) to acquire all or part of a surplus of a regulated product as the marketing board or commission may determine;

(u) to market a surplus of a regulated product that it acquires;

(v) to require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission.

40. Section 4 of the Scheme makes clear that the Commission's power to regulate marketing is limited to activities "in the Province". Further, to the extent that section 4 of the Scheme includes all of the powers of section 11 of the *NPMA*, we note that it contains an express geographic limitation in relation to the establishment of minimum prices. Specifically, section 11(1)(k) provides the power "to set …minimum prices at which a regulated product … may be bought or sold *in British Columbia*" (emphasis added). This is the only provision of section 11 that expressly contains such a limitation.

41. In our view, for the Commission to apply minimum pricing rules to the transactions at issue here would exceed the authority granted to the Commission by the Scheme, for the following reasons.

42. A plain reading of section 11 of the *NPMA* and section 4 of the Scheme make clear that the Legislature and the Lieutenant Governor in Council intended to allow minimum pricing rules only *in British Columbia*. Clearly this qualifying term has to have a purpose – and it only makes sense to interpret this as meaning the Commission cannot set minimum prices at which BC regulated product can be bought or sold outside the province.

43. It is not necessary for us to engage in a complex exercise of finding the "locus" of the contract. There does not appear to be any real dispute that the transactions at issue involved potatoes grown in British Columbia, by a British Columbia producer, being sold by a British Columbia agency to customers in another province, with physical delivery of the potatoes outside the province. Put simply, they involve the sale of regulated product outside of BC.

44. It not necessary for us to rule on whether the General Orders (or any legislation) would fall outside the constitutional competence of the province under section 92 of the *Constitution Act*, 1867 and indeed the appellants have not asked for any such relief. (As such, the *Constitutional Questions Act* has no application.)

45. We do not accept the Commission's argument that "it relies on the plenary powers of section 4 of the Vegetable Scheme and paragraph 11(1)(q) of the Act to establish the minimum price that may be charged by an agency as a means of regulating the returns to producers within the province…" In our view, section 4 of the Scheme includes a clear limitation related to regulation "in the Province". And we do not accept that section 11(1)(q) of the *NPMA* gets the respondent around the clear language in section 11(k) limiting minimum price setting to "in British Columbia". In our view, the power in section 11(1)(q) to make rules and orders necessary or advisable to promote, control and regulate effectively the marketing of a regulated product must be read in concert with section 11(1)(k), which is more specific – and more limiting – in terms of the geographic scope of minimum price setting. If we were to adopt the respondent's arguments in this regard, it would render section 11(1)(k) – and other sections, such as the power to set and collect levies under 11(1)(o) – superfluous.

46. We do not accept the Commission's assertions that the words "within the province" and "in British Columbia" as used in the Scheme and the *NPMA* should be understood to referentially incorporate expansions that may have occurred *in constitutional law cases*. This is particularly true where, as outlined in the written submissions of the appellants, there is a long series of cases going back many decades which have dealt specifically with the complex interrelationship between federal and provincial aspects of regulated marketing, eventually resulting in an elegant constitutional equilibrium involving integrated federal and provincial legislation. In this

regard, we note the following words of the Supreme Court of Canada in a 2005 case dealing specifically with regulated marketing:

> 38. With respect, I see no principled basis for disentangling what has proven to be a successful federal-provincial merger. Because provincial governments lack jurisdiction over extraprovincial trade in agricultural products, Parliament authorized the creation of federal marketing boards and the delegation to provincial marketing boards of regulatory jurisdiction over interprovincial and export trade. Each level of government enacted laws and regulations, based on their respective legislative competencies, to create a unified and coherent regulatory scheme. .. (*Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292)

47. There is no compelling reason to stretch the interpretation of the provincial regime to find for the Commission authority to regulate minimum prices for product sold outside BC on the basis that such authority would be an integral part of an overall effective regime for management *within* BC. This is because the Commission already has the power to regulate minimum price setting for interprovincial transactions under the federal *Agricultural Products Marketing Act* and the supporting *British Columbia Vegetable Order*.

48. But in order to actually avail itself of this authority under the federal legislation, the Commission is required to comply with the Statutory Instruments Act. This is accepted by the Commission, which stated in its submission, "in practical terms, this means that any order made by the Commission which depends on delegated federal legislative authority will only come into force after the order has been "Gazetted". There is no dispute that Commission has not yet done so in respect of any orders related to minimum pricing.

49. These are not minor issues or legal technicalities. Nor are they matters that the Commission can be excused for being unaware of. As the appellants note, the application of, and compliance by the Commission with, the *Statutory Instruments Act* was the subject of considerable discussions before the Standing Joint Committee for Scrutiny of Regulations in late 2007 and early 2008. We pause here to note that the respondent objected to the admissibility of the transcripts of proceedings before this parliamentary committee on the basis of parliamentary privilege. The panel ruled that it was not appropriate to put the documents to the Commission witness and left the broader issues of parliamentary privilege, relevance and weight for closing argument. However, the parties did not raise the issue further in written argument. In the circumstances, the panel has decided that evidence of these proceedings is admissible for the limited purpose of noting that the issue of the requirements of the *Statutory Instruments Act* has been known to the Commission at least since 2008 when similar provisions were subject to considerable attention in the parliamentary committee.

50. Having reached these findings, the panel must consider what is an appropriate remedy in all the circumstances? Section 8(9) of the *NPMA* states:

> (9) On hearing an appeal under subsection (1), the Provincial board may do any of the following:
>
> (a) make an order confirming, reversing or varying the order, decision or determination under appeal;
> (b) refer the matter back to the marketing board or commission with or without directions;
> (c) make another order it considers appropriate in the circumstances.

51. In our view, orders 48.3 and 48.5 of the Commission's December decision relied, to some degree, on the Commission's belief that it had the authority to apply its minimum pricing rules to the transactions at issue. In the circumstances, one option for the panel would be to simply reverse those orders on the basis that the Commission's position on the validity and applicability of its minimum pricing rules to the facts at issue has been rejected by the panel.

52. However, we also note that this case involves a very complex set of facts, interconnected parties, challenging relationships, deficient administrative processes and some remaining findings against Prokam in respect of DA issues (discussed below). We further note that a full review of the materials presented to us makes clear the conduct of Prokam and/or its officers was not beyond reproach.

53. In all the circumstances, we believe the question of whether the appellants' conduct warrants any further action by the Commission (irrespective of the minimum pricing rules in relation to interprovincial sales) is one that must still be answered, and it is one more appropriately considered in the first instance by the Commission – not the panel.

54. As such, we conclude that the most appropriate remedy is to refer orders 48.3 and 48.5 back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

Finding **The panel finds that the Commission breached principles of administrative fairness when it failed to seek submissions from the parties – before the December 22, 2017 order was issued - on the question of whether Commission members with ties to BCfresh should have recused themselves from consideration of any order to direct Prokam to BCfresh. This is a step that should have been taken by the Commission**

before reaching any conclusions as to whether there was or was not a conflict of interest.

Order 2 **The Commission is directed to reconsider its decision to issue order 48.1.**

Order 3 **Prior to undertaking reconsideration pursuant to orders 1, 2 and 4 (discussed below), the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.**

55. The appellants assert that the involvement in this matter (both the issuance of cease and desist orders and the show cause hearing process) by several commissioners with ties to BCfresh gives rise to a reasonable apprehension of bias.

56. In support of its position, the appellants rely upon case law for the proposition that a reasonable apprehension of bias must be considered based on whether a "reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information… would think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." (*Roberts v. R*, 2003 SCC 45 at para 60).

57. The appellants allege that a reasonable apprehension of bias exists due to the fact that Mr. Guichon considered whether to issue the cease and desist orders on the basis of whether it would affect his own personal interests as a producer. The appellants also alleged that BCfresh had an interest in the decision to move Prokam to BCfresh, as presumably BCfresh would stand to benefit in some way from such a decision.

58. The Commission in response asserts that the assessment of reasonable apprehension of bias must be made within the specific context of regulated marketing. It relies on prior findings of BCFIRB including its January 7, 2013 Supervisory Review Decision, where it stated:

> 47. Conflict of interest in Vegetable Commission decision-making was a serious issue raised in submissions. As has noted in the past, conflict of interest cannot be understood in regulated marketing in the same way as it applies in other contexts. The very structure of commodity boards, most of which still require a majority of elected producers, means that the legislation is prepared to accept a significant degree of "conflict" in the larger interests of producer governance in light of industry knowledge and expertise.
>
> 48. Producer governance undoubtedly raises special challenges for commodity board members seeking to identify those situations where there might still be a special or unique conflict that exists over and above the fact that a person is a producer. However, until the legislation or schemes are amended, these are

> challenges that must be met if commodity boards are to function effectively. Unless there is a true disqualifying conflict, commodity Board members must respect the election results and do their jobs to insure, to the best of their ability and in good faith, the proper governance of the industry. BCFIRB recognizes that this can be difficult, and as such is available to assist and advise commodity boards in respect of conflict management.

59. In light of the above, we do not accept the appellants' assertion that Mr. Guichon or any of the other commissioners would be in a conflict of interest simply by virtue of the fact that they are producers whose personal interests may be affected in that capacity.

60. However, the circumstances of the present case are more complex than that. Mr. Guichon is also chair of BCfresh – the agency that the Commission has directed Prokam to use. In addition, he (and perhaps) the other commissioners that use BCfresh as their agency are also shareholders in it. Whether such interests would give rise to a reasonable apprehension of bias on the facts of this particular case is something that needs to be carefully considered and documented.

61. Yet there is very little in the materials to indicate how the Commission and its members approached this question. There is no evidence that the Commission took up the offer of BCFIRB from the January 2013 supervisory decision that it is "available to assist and advise commodity boards in respect of conflict management". There is no evidence that it gave specific consideration to whether the interests of Mr. Guichon and the other commissioners with ties to BCfresh fell – on the facts of this case and the decisions being entertained – within the permissible range for producers as discussed in the supervisory decision, or whether they were of a different nature.

62. What is clear however is that Mr. Guichon and the Commission did realize there was at least some concern in this regard, as Mr. Guichon (as well as the two other commissioners shipping to BCfresh) did not participate in the decision-making deliberations or cast a vote in relation to the December decision. Yet, as the respondent notes in its written argument, "he did make his views known to the Commission members that did deliberate on and decide the matter".

63. In our view, having recognized the potential for a reasonable apprehension of bias to exist, Mr. Guichon and the Commission should have handled the matter differently. More specifically, what should have occurred is that as soon as the Commission (including Mr. Guichon and the other two BCfresh commissioners) became aware of a potential conflict of interest in relation to this matter, the Commission should have first determined whether the conflict was clear enough that some or all of the BCfresh commissioners should not participate in the matter. If that were the case, then they should

not have participated in any further discussions concerning the matter – it is not sufficient to participate in discussions leading up to – but not including – the actual voting. Conversely, if upon such preliminary consideration they felt that the potential conflict did not clearly meet the test of a reasonable apprehension of bias, the Commission should have nonetheless raised this matter with the parties to allow each party to make representations on the question before reaching a final conclusion.

64. As noted in S. Blake, *Administrative Law in Canada* (3rd edition, Butterworths, 2001) at page 106:

> Typically the parties are unaware of any circumstances that may give rise to a reasonable apprehension of bias. A tribunal member who has or had a relationship with a party should mention it at the outset of the hearing and give the parties an opportunity to make submissions as to whether that relationship gives rise to a reasonable apprehension of bias.

65. The respondent notes that even if there had been an error in this regard, it should be considered cured by the *de novo* nature of these proceedings. While this is a possibility, it is only the case where the panel itself is prepared to render a decision on the merits of an issue under appeal that the error can be considered cured.

66. In the present case, we find ourselves with a limited record on the question of consideration of reasonable apprehension of bias by the Commission. Further, despite the length of the submissions by the parties, we do not believe that this issue has yet been fully canvassed, as it is not entirely clear from the appellants' submissions exactly what interests of what party give rise to a reasonable apprehension of bias in relation to which particular issue. These are matters that would be best addressed by the Commission in first instance, employing the process we have discussed above, particularly as it relates to the issue of whether Prokam should be ordered to use BCfresh as its agency.

Finding **The panel does not accept the appellants' submission that there is any basis to vary or rescind Commission order 48.2 and no reconsideration of that order is required.**

67. Order 48.2 states:

> Prokam's 2017-18 Crop Year potato shipments on Kennebec potatoes and all potato exports are not to be included in the calculation of delivery allocation for the 2018-19 crop year.

68. In our view, this is a sound decision that is appropriate in all of the circumstances of this case. We reach that conclusion for the following reasons.

69. The General Orders set out the following General Prohibition on producers.

> 12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.

70. Part XV, XVI and XVII, the General Orders establish rules for DA and the marketing of new or additional regulated product. Part XV of the General Orders contemplates that new or additional regulated product can only be marketed by existing agencies with Commission approval. Section 2 requires an agency wanting to sell additional regulated product to submit a business plan covering the period of time specified by the Commission. Section 3 gives the Commission discretion to hold a hearing concerning the application by the agency to market new or additional regulated product.

71. In this case, IVCA and Prokam made a calculated decision not to provide a business plan satisfactory to the Commission for the new production and did not meet with the Commission to explain their intentions. Instead, they argue that IVCA's agency licence application submitted in November 2016 should have been adequate for the Commission's purposes. However, the Commission clearly and repeatedly articulated that the agency application was not sufficient for its purposes and asked for further information which was never provided.

72. With respect to Prokam's argument that the potatoes it shipped over DA are legitimate "gap fillers", the Commission explained its policy that gap fillers are to be registered and approved by the Commission on an annual basis. It recognized that gap fillers are needed to address shorting of orders by the agency for its established customer base and the agency must prove the market demand is new and not serviced by the industries' existing DA or supplied by another agency.

73. Commission witnesses explained that the purpose of gap filling was to allow growers to produce modest amounts over DA to take advantage of small, transitory, and temporary opportunities to fill market shortages throughout the marketing year. There is no dispute that Mr. Dhillon has early land and may well have had potatoes available for market a week or two before other growers and this would appear to be what the Commission would view as a legitimate "gap". However, in the absence of Commission authorization for producing, shipping and marketing in excess of DA and a determination that the regulated product was indeed a legitimate gap filler, Prokam and IVCA have not met their obligations under the General Orders to obtain Commission authorization.

74. Prokam appears to be arguing that had it applied, the authorization would have been given as these were legitimate gap fillers. But that is not Prokam's decision to make. Furthermore, we are not prepared to accept

that Prokam's marketing of huge volumes (348 tons) of potatoes falls within the concept of legitimate gap fillers as described by the Commission's witnesses. As a result, we agree with the Commission's decision not to include this production in Prokam's five year rolling average to calculate earned DA.

75. Similarly, there does not appear to be any dispute that Prokam grew Kennebec potatoes without DA. Mr. Dhillon said he had a discussion with IVCA president Mr. Michell, who wanted to make sure that if there was a gap in production caused by another grower's inconsistent quality, IVCA could fill the gap. Both Mr. Dhillon and Mr. Gill acknowledged that Prokam shipped Kennebec potatoes without DA (about 4000 lbs) but suggest this was a permissible gap filler as no other grower could supply the product at the time.

76. On this same issue, the appellants took issue with the Commission's reliance on the Hothi letter referred to earlier in which Mr. Hothi advised he had Kennebec potatoes ready for shipment in September 2017. This letter was not disclosed in advance of the show cause process and the Commission relied on it to make an adverse finding which the appellants argue was procedurally unfair.

77. To the extent that the failure to disclose the Hothi letter was procedurally unfair, we conclude that the hearing *de novo* before BCFIRB is sufficient to cure that defect in the Commission's process. However, in our view, the Hothi letter is not the only basis upon which to base an adverse finding against Prokam and IVCA. The evidence of Commission general manager Mr. Solymosi was that if a grower plants regulated product without DA, he must acknowledge the priority of those growers with DA that had served the market over time; growers planting product without DA are not permitted to enter the marketplace <u>without Commission approval</u>.

78. In this case, IVCA had a grower with Kennebec DA. There is no record that IVCA met its obligations under Parts XV, XVI and XVII of the General Orders; it did not contact the Commission to demonstrate that that there was in fact a quality or supply issue with their grower's potatoes nor did it obtain the Commission's authorization for gap filling. In the absence of Commission authorization, there is no basis for this panel to make a finding that Prokam's Kennebec production should have formed part of its five year rolling average to calculate earned DA.

79. In reaching the foregoing two conclusions with respect to DA generally, and Kennebecs specifically, we note that the Commission's order 48.2 was not premised upon the application of the minimum pricing rules to interprovincial sales discussed in Finding 1.

80. Further, in our view this order has the least potential relationship to the reasonable apprehension of bias issue discussed in Finding 2.

81. For those reasons, we do not believe it is necessary or advisable to order the Commission to reconsider this order. Further, even if the reasonable apprehension of bias issues did have some limited potential application to this order, we consider that cured (in respect of this issue) by the panel's hearing process and our resulting decision on the merits of this issue.

Finding **There are unresolved concerns about IVCA's ability to satisfy its obligations as a designated agency.**

Order 4 **The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.**

82. The panel concludes that the Commission placed too much weight on IVCA's cooperation with the Commission's investigation and not enough weight on the regulatory responsibility of IVCA as an agency. The very reason that this compliance issue arose rests with IVCA and its aggressive growth aspirations. It was IVCA that pursued Mr. Dhillon and his early land. It was IVCA that pursued the re-packer/wholesaler business of Thomas Fresh. It was IVCA that failed to meet its obligations under the General Orders as an agency to disclose its business plans to the Commission and actively pushed off the Commission's efforts to plan growth and ensure orderly marketing. These fundamental failings on the part of the designated agency are not in any way rectified or mitigated by the cooperation of IVCA staff in the subsequent compliance investigation.

83. While we observe that the appellants were critical of how the Commission dealt with IVCA, the December decision did not make any orders in relation to IVCA. However, the panel finds that there are many unanswered questions about IVCA's role in the events leading up to these appeals. We have significant concerns about whether IVCA has demonstrated the ability to perform the requisite front line role to ensure that marketing is conducted in an orderly fashion according to the General Orders and provide fair market access to all registered growers. As such, and as a matter of both our appellate and supervisory jurisdiction, we believe this is a matter that requires reconsideration by the Commission.

Finding **It is not clear based on the information submitted to the panel how the Commission's minimum price setting policy is integrated into its General Orders or otherwise given effect under the Scheme.**

Order 5 The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.

84. While the panel heard a great deal about minimum pricing in this appeal, we note that "minimum price" is not a defined term in the General Orders and the General Orders do not specifically establish a minimum pricing regime. Instead, they just contain various provisions which include the words "for crops subject to minimum pricing".

85. The panel was provided with a Commission document called Policy – Procedures for Establishing Weekly Minimum Price for Storage Crops, dated May 14, 2009 and another draft document called Policy – Procedures for Establishing Weekly Minimum Price for Storage Crops, which policy was to be trialed from the week of July 2 to September 2, 2017. Neither of these appears to be an order of the Commission. Neither specifies which regulated product is subject to minimum pricing. The older one is extremely brief and the more recent "trial" version is still stamped draft. It is simply not clear from the information provided to the panel exactly what instrument(s) the Commission is using to regulate this issue and how that ties into the General Orders and its exercise of authority.

86. Given the above, and as a matter of transparency, the Commission should ensure that its minimum pricing policy is properly documented, adopted and integrated, as appropriate, with its General Orders and the Scheme.

Other Issues

87. The appellants argued that under the General Orders, the 60-day forward contracts were not required to be submitted to the Commission for approval. Given our finding above that the Commission lacks authority to apply its minimum pricing rules to the impugned interprovincial sales, it is unnecessary to deal with the 60-day contract issue except to say that whatever happens with 60-day contracts, the obligations on how agencies deal with new production in Part XV remain applicable and Commission approval was required.

88. The appellants made arguments that the Commission made decisions in the absence of any evidence giving two examples, that there was no evidence before the Commission at the time the cease and desist orders were issued that Thomas Fresh had done anything wrong, nor was there evidence before the Commission to support the findings about the adequacy of BCfresh as an agency. Given that these arguments are relevant to Orders 48.1, 48.3, 48.5, which orders we have remitted back to the Commission for reconsideration, there is no need to address them further.

ORDER

89. The following is a summary of the panel's orders:

Order 1. Commission orders 48.3 and 48.5 are referred back to the Commission to reconsider, with directions to consider all relevant facts and all relevant provisions of the General Orders, other than the asserted violation of the minimum pricing requirements in respect of the interprovincial sales.

Order 2 The Commission is directed to reconsider its decision to issue order 48.1.

Order 3 Prior to undertaking reconsideration pursuant to orders 1, 2 and 4, the Commission is directed to canvass the parties' views on the question of whether any members of the Commission must recuse themselves from the discussions and deliberations concerning the reconsideration.

Order 4 The Commission is directed to reconsider the question of whether any compliance or remedial action is necessary in relation to IVCA.

Order 5 The Commission is directed to review its minimum pricing policy documentation to ensure that it is properly documented and integrated as appropriate with its General Orders.

90. There is no order as to costs.

Dated at Victoria, British Columbia this 28th day of February, 2019

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

Al Sakalauskas, Member

Diane Pastoor, Member

Appendix A

REGULATORY FRAMEWORK

A. Provincial

1. *Natural Products Marketing (BC) Act*, R.S.B.C. 1196, c. 30 provides the statutory basis for the creation and powers of the Commission.

Powers of marketing boards and commissions

11(1) Without limiting other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

(a) to regulate the time and place at which and to designate the agency through which a regulated product must be marketed;

(b) to determine the manner of distribution, the quantity and quality, grade or class of a regulated product that is to be marketed by a person at any time;

(c) to prohibit the marketing of a grade, quality or class of a regulated product;

(d) to determine the charges that may be made by a designated agency for its services;

(e) to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it;

(f) to require persons engaged in the marketing of a regulated product to register with and obtain licences from the marketing board or commission;

(g) to set and collect yearly, half yearly, quarterly or monthly licence fees from persons engaged in the marketing of a regulated product;

(h) for the purposes of paragraph (g) and in respect of the persons affected by a regulation under that paragraph

(i)to classify those persons into groups and set the licence fees payable by the members of the different groups in different amounts,
(ii)to set and collect from those persons fees for services rendered or to be rendered by the marketing board or commission, and
(iii)to recover the licence and other fees by proceedings in a court of competent jurisdiction;

(i) to cancel a licence for violation of a provision of the scheme or of an order of the marketing board or commission or of the regulations;

(j) to require full information relating to the marketing of a regulated product from all persons engaged in marketing activities, to require periodic returns to be made by those persons and to inspect the books and premises of those persons;

(k) to set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be

bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia;

(l) to authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those payments until the total net proceeds are distributed;

(m) subject to section 16 (2) (b), to require the person in charge of a vehicle or other form of conveyance in which a regulated product could be transported to permit a member or employee of the marketing board or commission to search the vehicle;

(n) to seize and dispose of any regulated product kept or marketed in violation of an order of the marketing board or commission;

(o) to set and collect levies or charges from designated persons engaged in the marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and set the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the marketing board or commission

(i)to carry out the purposes of the scheme,
(ii)to pay the expenses of the marketing board or commission,
(iii)to pay costs and losses incurred in marketing a regulated product,
(iv)to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine, and
(v)to set aside reserves for the purposes referred to in this paragraph;

(p) to delegate its powers to the extent and in the manner the marketing board or commission considers necessary or advisable for the proper operation of the scheme under which the marketing board or commission is constituted, but a power in paragraph (f), (g) (h) or (i) must not be exercised by any person other than the federal board, a marketing board or a commission;

(q) to make orders and rules considered by the marketing board or commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product, and to amend or revoke them;

(r) to purchase a regulated product in relation to which it may exercise its powers and package, process, store, ship, insure, export, sell or otherwise dispose of the product purchased by it;

(s) to inquire into and determine the amount of surplus of a regulated product;

(t) to acquire all or part of a surplus of a regulated product as the marketing board or commission may determine;

(u) to market a surplus of a regulated product that it acquires;

(v) to require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission.

(2) The Provincial board may, at any time, amend, vary or cancel an order or rule made before or after February 11, 1975 by a marketing board or commission under a power vested in it under this section and sections 13 and 14, or under a power exercisable under the federal Act.

(3) An order or rule made under subsection (1) may be limited as to time or place.

2. Pursuant to this provision and related regulation making powers, the province established the British Columbia Vegetable Scheme, B.C. Reg. 96/80 (the Scheme) which vests the Commission with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product. Regulated product includes potatoes grown in the Province.

Powers

4(1)The commission is vested with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product.

(2)Without restricting the generality of subsection (1), the commission is vested with the powers described in section 11 of the Act, and with the following additional powers:

(a) to grant or lend money to assist

(i)in the construction or operation of facilities for preserving, packing, storing or conditioning of the regulated product, and

(ii)in research relating to the marketing of the regulated product;

(b) to hypothecate, assign, draw, make, sign, accept, endorse, discount and issue bills of exchange, cheques and other negotiable and transferable instruments;

(c) for the purposes of the scheme, to borrow money, provided that the aggregate outstanding indebtedness of the commission through borrowing shall not exceed $100 000 at any time, and to secure repayment of the borrowed money in a manner the commission considers fit;

(d) to fix or alter the remuneration of its employees and, subject to the authority of the British Columbia Farm Industry Review Board, to fix or alter the remuneration of the chairman and other members of the commission.

3. Relying on this authority, the Commission has enacted General Orders; key provisions are set out below.

PART IV LICENCING

1. No person other than an Agency shall purchase Regulated Product from a Producer or market Regulated Product, within British Columbia or in interprovincial or export trade, except that:

   (a) Regulated Product may be purchased from a Producer by a Consumer or by a Processor licensed by the Commission as permitted by these General Orders;

   (b) Regulated Product may be marketed by a Producer, Producer-Shipper, Processor, Commission Salesperson or Wholesaler who is licensed in accordance with these General Orders in the manner permitted by the term of the licences, these General Orders, and any other Order of the Commission; and

   (c) A Person who is specifically exempted from the requirements of this section pursuant to these General Orders or otherwise by Order of the Commission may market Regulated Product as permitted by the Commission.

3. No Producer, shall grow, process or market Regulated Product unless that Producer:

   (a) registers with the Commission;

   (b) is qualified to and obtains annually from the Commission one or more of the appropriate licenses herein described; and

   (c) Pays to the Commission annually the fees for such licences as described in Schedule 3 to these General Orders.

PART V AGENCIES

5. No Agency shall receive any Regulated Product from a Producer that was not grown by that Producer unless expressly authorized by the Commission.

14. Prices for all Regulated Crops subject to Commission minimum pricing must be approved by the Commission before coming into force or effect, unless otherwise authorized in writing by the Commission.

PART VII AGENCY RESPONSIBILITIES

1. Each Agency marketing crops subject to Commission minimum pricing shall notify the Commission and obtain approval from the Commission for the establishment of any price or change in price.

2. Each Agency marketing crops subject to Commission minimum pricing shall file with the Commission a copy of any price list, local or export, and particulars of any sales other than at listed prices.

3. No pricing for crops subject to Commission minimum pricing, below listed price can be made without the prior approval of the Commission.

6. Before finalizing a contract each Agency shall provide to the Commission for its prior approval as to form any proposed contracts with Processors or other firms approved by the Commission located in BC that are to receive regulated products regardless of end use.

PART IX GENERAL PROHIBITIONS

2. A Wholesaler shall only buy, accept or receive a Regulated Product from an Agency or Producer-Shipper.

7. No Person shall sell, offer to sell, supply or deliver the Regulated Product to any Person other than an Agency or such other Person as the Commission may expressly direct or authorize.

9. No Producer or Agency shall sell or offer for sale Regulated Crops subject to Commission minimum pricing, and no Person shall buy Regulated Crops subject to Commission minimum pricing, at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.

11. No Producer, shall market or transport any Regulated Product unless the Producer is currently licensed with the Commission, except as expressly authorized by the Commission pursuant to Section 4 of Part IV of the General Order.

12. No Producer shall produce or ship Regulated product without a Delivery or Production Allocation for the product in question, unless otherwise authorized by the Commission.

4. Parts XV, XVI and XVII of the General Orders establish rules for Delivery Allocation.

PART XV MARKETING OF "NEW" OR ADDITIONAL REGULATED PRODUCT BY EXISTING AGENCIES & PRODUCER-SHIPPERS

1. No new or additional Regulated Product shall be marketed by existing Agencies or Producer-Shippers without Commission approval.

2. An Agency or Producer-Shipper seeking to market new or additional Regulated Product shall submit a Business Plan covering a period of time specified by the Commission which addresses matters relating to promotion, market development and planned expansion. In the case of agencies marketing regulated greenhouse crops, this requirement will occur within the Procedures outlined under General Orders Part XVI and XVIII.

3. At its discretion, the Commission may determine whether a hearing will be held, in either oral or written form, concerning the application by an existing Agency or Producer-Shipper to market new or additional Regulated Product. In exercising its discretion, the Commission shall consider:
   (a) if and how other existing Agencies / Producer-Shippers, if any, will be affected;
   (b) how the Commission will notify interested parties of the application and its decision to approve or dismiss the application.

4. The Commission shall consider:

   (a) what benefits, if any, not currently available to Producers will accrue to them if new or additional Regulated Product is marketed by the Agency / *Producer-Shipper*;

   (b) whether the Agency / *Producer-Shipper* has sufficient staff with the necessary experience to market the new or additional Regulated Product;

   (c) whether a market exists for the new or additional Regulated Product; and

   (d) whether the new or additional Regulated Product would enhance orderly Marketing

PART XVI PRODUCTION AND DELIVERY ALLOCATIONS – GENERAL

1. The purposes of the Delivery and Production Allocation Procedures contained in Part XVII and Part XVIII are to identify the principles and guidelines by which the Commission will support and enhance a regulated marketing system for the intraprovincial, interprovincial and export trade of regulated crops.

   These purposes include:
   (a) The preservation of market access for Producers who have served the market over time.
   (b) The provision of access for new entrants.
   (c) The desire to create and maintain long-term, sustainable, food safe, farming and greenhouse operations.
   (d) The provision of opportunity for industry growth.
   (e) The provision of an orderly marketing system…..

PART XVII PROCEDURE FOR DETERMINING DELIVERY ALLOCATION FOR STORAGE CROPS

1. This Part covers Storage Crops as defined in Part I (5), *as follows*:

   "**Storage Crops**" mean potatoes, onions, parsnips, cabbage, carrots, beets, rutabagas, white turnips and any other crop designatedby the Commission**.**

2. Only Regulated Product shipped through an Agency or Producer-Shipper of the Commission shall be used for the calculation of Delivery Allocation levels or adjustments for Crops under this Part.

3. Delivery Allocations shall be established on a rolling 5-year average for Storage Crops, unless otherwise directed by the Commission.

4. Subject to section 5 and 6 in this Part, no Producer shall ship a quantity of Storage Crops in excess of their Delivery Allocation, unless otherwise authorized by the Commission.

5. Delivery Allocation within a period does not commence until supply exceeds demand. Any shipments made within a Delivery Allocation period prior to commencement of Delivery Allocation will count towards the building of Delivery Allocation.

6. After one round (100 percent) of all Delivery Allocations has been shipped for any Storage Crop in any Delivery Allocation period, Delivery Allocations shall be awarded equally to each registered

producer. For the purposes of this section registered Producers operating as a Family Unit may be grouped together and in those instances the Family Unit will receive the Delivery Allocation of only one registered Producer. …

11. If a Producer is found guilty of violating a Commission Order, the Commission shall have the authority, in addition to any other measures set out in these orders, to suspend a Producer's Delivery Allocation for a period of time. Sales made during the period of violation will not be allowed to build Delivery Allocation.

B. Federal

5. The *Agricultural Products Marketing Act*, RSC 1985, c A-6 states, in part:

Governor in Council may grant authority to provincial boards

2 (1) The Governor in Council may, by order, grant authority to any board or agency authorized under the law of any province to exercise powers of regulation in relation to the marketing of any agricultural product locally within the province, to regulate the marketing of that agricultural product in interprovincial and export trade and for those purposes to exercise all or any powers like the powers exercisable by the board or agency in relation to the marketing of that agricultural product locally within the province.

REGULATIONS

3 The Governor in Council may make regulations prescribing the terms and conditions governing the granting and revocation of authority under section 2and generally may make regulations for carrying the purposes and provisions of this Act into effect.

6. Pursuant to this authority, the British Columbia Vegetable Order, SOR/81-49 was created which states in part:

2 In this Order,

Act means the *Natural Products Marketing (British Columbia) Act* of British Columbia; (*Loi*)

Commodity Board means the British Columbia Vegetable Marketing Commission, established pursuant to the Act; (*Office*)

Plan means the *British Columbia Vegetable Scheme,* B.C. Reg. 96/80, as amended from time to time, and any regulations made under the Act to give effect to the Scheme; (*Plan*)…

3 The Commodity Board is authorized to regulate the marketing of vegetables in interprovincial and export trade and for such purposes

may, by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province under the Act and the Plan.

7. The *Statutory Instruments Act* states in part:

Definitions

2 (1) In this Act,

…

regulation means a statutory instrument

(a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;…

regulation-making authority means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; …

statutory instrument

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but

(b) does not include

(i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(iii) any instrument referred to in paragraph (a) and in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(iv) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, a rule made by the Legislative Assembly of Yukon under section 16 of the *Yukon Act*, of the Northwest Territories under section16 of the *Northwest Territories Act* or of Nunavut under section 21 of the *Nunavut Act* or any instrument issued, made or established under any such law or rule….

EXAMINATION OF PROPOSED REGULATIONS

Proposed regulations sent to Clerk of Privy Council

3 (1) Subject to any regulations made pursuant to paragraph 20(a), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

Examination

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Advise regulation-making authority

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

Application

(4) Paragraph (2)(d) does not apply to any proposed rule, order or regulation governing the practice or procedure in proceedings before the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada or the Court Martial Appeal Court….

Doubt as to nature of proposed statutory instrument

4 Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether a proposed statutory instrument would be a regulation if it were issued, made or established by that authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

TRANSMISSION AND REGISTRATION

Transmission of regulations to Clerk of Privy Council

5 (1) Subject to any regulations made pursuant to paragraph 20(b), every regulation-making authority shall, within seven days after making a regulation, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

Copies to be certified

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

Registration of statutory instruments

6 Subject to subsection 7(1), the Clerk of the Privy Council shall register

(a) every regulation transmitted to him pursuant to subsection 5(1);

(b) every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published; and

(c) every statutory instrument or other document that, pursuant to any regulation made under paragraph 20(g), is directed or authorized by the Clerk of the Privy Council to be published in the *Canada Gazette*.

Coming into force

9 (1) No regulation shall come into force on a day earlier than the day on which it is registered unless

(a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or

(b) it is a regulation of a class that, pursuant to paragraph 20(b), is exempted from the application of subsection 5(1),

in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day on which it is made or on such later day as may be stated in the regulation.

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