File Nos. N1715, N1716, N1718, N1719

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT

AND APPEALS FROM CEASE AND DESIST ORDERS ISSUED BY THE
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

AND APPEALS FROM THE DECISION OF THE
BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

BETWEEN:

PROKAM ENTERPRISES LTD. and THOMAS FRESH INC.

APPELLANTS

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BCFRESH INC.

INTERVENER

MEMORANDUM OF ARGUMENT OF THE APPELLANTS THOMAS FRESH INC. AND PROKAM ENTERPRISES LTD.

evidence of Mr. Solymosi, who confirmed that Mr. Guichon participated in the conference call meeting and there is no record of Mr. Guichon recusing himself from this decision.

270. Mr. Guichon testified that the Commission must have been told IVCA did not want to continue to be Prokam's agency; otherwise, he stated, the Commission would never have considered transferring Prokam to BCfresh. There was no explanation as to how a position contrary to the express position taken by IVCA's counsel in its written submission that it wished to continue as Prokam's agency, might have been communicated to the Commission and certainly no suggestion by any witness that Prokam or Thomas Fresh had an opportunity to be heard by the Commission in response to any position taken by IVCA contrary to the position expressed in their letter.

B. The evidence of Mr. Solymosi should be rejected where it is not corroborated

271. Far from exhibiting the impartiality that one might expect from the general manager of the Commission, Mr. Solymosi delivered his evidence in a demonstrably partial manner. His personal animus toward Prokam and Thomas Fresh, who he referred to as a competitor to not only BCfresh but the industry at large, was evident throughout. His demeanour while subject to cross-examination differed greatly from that of Mr. Newell, who testified under cross-examination in a very candid and fair manner.

272. Mr. Solymosi was evasive in cross-examination during lines of questioning he perceived to be most potentially damaging to the Commission's position; most notably, his evidence that he did not necessarily record the events of the Commissioners' December 14, 2017 meeting on paper in the order in which they occurred defies logic and, in the appellants' submission, was contrived in an attempt to suggest that the BCfresh commissioners recused themselves from that meeting earlier than they actually did.

273. Eventually, Mr. Solymosi and Mr. Newell both admitted that the BCfresh commissioners were present for approximately 40 minutes of discussion related to the Thomas Fresh, Prokam, and IVCA issue prior to recusing themselves, [524] rendering their testimony on this point largely consistent with that of Mr. Guichon, who admitted to being present for discussion of some but not all of the items reflected on pages 5 and 6 of Mr. Solymosi's notes.[525]

[524] May 22, 149:38-43; 151:34 – 152:6.
[525] April 5, 104:11-23; 105:24-46; 105:47 – 106:21; 106:30 – 107:4.; 107:15 – 108:25; 109:21-32 and 33-47;111:25 – 112:29.

apprehension of bias means that "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."[650]

368. There are several well-recognized sources of bias, at least two of which are raised by the evidence tendered in this appeal: (1) the decision-maker has an interest in the outcome of the decision; and (2) the decision-maker has prejudged the matters to be decided.[651]

1. Mr. Guichon and the other BCfresh commissioners' involvement in the Commission's decisions to issue and uphold the Cease and Desist Orders gives rise to a reasonable apprehension of bias

369. The evidence is clear that Mr. Guichon was one of only two Commissioners consulted in respect of the decision to issue the Cease & Desist Order, that he and the other BCfresh Commissioners participated in the majority of the discussion leading up to the December 22, 2017 decision – recusing themselves effectively only for the vote on the motion itself – and that all BCfresh Commissioners participated fully in the decision to reject Prokam's reconsideration application in respect of the Commission's decision to direct it to BCfresh.

370. Actual bias may be established by demonstrating that a decision-maker stands to benefit financially from the outcome of the decision.[652] This is also referred to as pecuniary bias.[653] It requires that the decision-maker's interest in the outcome of the decision not be too indirect, remote, or contingent.[654] A pecuniary interest that does not rise to the level of actual bias because it is uncertain, indirect, or contingent may nevertheless meet the test for a reasonable apprehension of bias.[655] For instance, in *Energy Probe*, the Federal Court of Appeal suggested that the fact that the decision-maker "could entertain a reasonable expectation of pecuniary gain as a result of the approval of the subject licenses, the factual situation in this case might well have established a case of reasonable apprehension of bias."[656]

371. At a minimum, Mr. Guichon and the other BCfresh commissioners' participation in the decisions in issue satisfies the test for a reasonable apprehension of bias. That is, "reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information" would think it "more likely than not that [Mr. Guichon

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[650] *Roberts v. R*, 2003 SCC 45, at para. 60 [*Roberts*], citing *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 395 (Grandpré J., dissenting) [*Committee for Justice and Liberty*].
[651] See, generally, Brown & Evans, at §§11:2000, 11:4510.
[652] *Committee for Justice & Liberty*, at p. 385.
[653] *Energy Probe v. Atomic Energy Board* (1985) 11 Admin. L.R. 287 (F.C.A.), leave to appeal to SCC ref'd (1985) 15 D.L.R. (4th) 48(n) [*Energy Probe*].
[654] *Energy Probe*, at para. 7 (Carswell), citing *Metro. Properties v. Lannon*, [1969] 1 Q.B. 577, [1968] 3 All E.R. 304(C.A.) (Eng. C.A.), at p. 309.
[655] *Energy Probe*, at para. 9 (Carswell); *Committee for Justice and Liberty*, at p. 385.
[656] *Energy Probe*, at para. 9 (Carswell). However, for procedural reasons the Federal Court of Appeal declined to rule on whether or not a reasonable apprehension of bias was made out.

and the other BCfresh commissioners], whether consciously or unconsciously, would not decide fairly."[657]

372. Mr. Guichon's evidence was that he made the decision to issue the cease and desist orders because of his concern as a BCfresh grower for his ability to sell the potatoes he had in storage:

> Well, I guess -- no, we never -- we didn't talk about any notice, but I think time was of the essence. We had only found out about this 22 cent thing and we didn't -- we couldn't figure out why we couldn't sell potatoes into Alberta at our price, and we realized, "we" being BCfresh realized something that was going on, so.
>
> Q All right. Now, you're -- you're here as a commissioner.
>
> A I'm -- I have been asked questions at every facet, so I talked about -- I identified BCfresh right now as I was talking, so --
>
> Q Yes.
>
> A -- and that -- that's where the urgency came from. Whether we had to issue a notice, I don't know.
>
> Q All right. So -- so, BC--
>
> A I don't know that.
>
> Q -- BCfresh believed there was urgency?
>
> A No, I did.
>
> Q You did?
>
> A Yes, as a grower.
>
> Q As a grower.
>
> A That had a whole bunch of potatoes in storage --
>
> Q All right.
>
> A -- to sell.
>
> Q All right. So -- so, you were considering this issue of the cease and desist order from your perspective as a grower?
>
> A Yeah. As soon as I see a contract for 22 cents a pound and they've been selling all year, I'm not very happy about it.

[657] *Roberts*, at para. 60.

> Q All right. All right. You didn't consider whether your concerns as a grower made it inappropriate for you to be the decision-maker in respect of sending out the cease and desist order to Thomas Fresh, did you?
>
> A I -- I don't -- I don't know if we were the only two that sent that out or -- I mean, whether it was talked about at the -- at the Commission level or not. Probably not, but I -- otherwise, I guess, you'd have a copy of it.[658]

373. Mr. Guichon considered whether to issue the cease and desist orders from the perspective of how it would affect his own personal pain or loss. This is an archetypical example of reasonable apprehension of bias.

374. Mr. Guichon's involvement in the discussion preceding the Commission's deliberations on December 14, 2017 tainted the resultant decision with a reasonable apprehension of bias. Mr. Guichon freely admitted that when a conflict of interest with respect to a decision to be made exists, the proper time for recusal is before the discussion begins:

> Q All right. So -- so, there's discussion on up to a certain point about the potato industry and about other growers that -- that is appropriate. And if it comes to a formal decision, that's the point at which you might recuse yourself?
>
> A No, it's -- it's before the formal decision. Any -- any facts that go into making the decision, you're recused from that, too, or I am anyway.
>
> Q All right. So, you wouldn't provide facts to the Commission that might be used making a decision about a potato grower?
>
> A No.
>
> Q All right. You wouldn't provide your opinion about facts that might be used?
>
> A If I was asked, but I wouldn't be there, so. …[659]

375. Nevertheless, Mr. Guichon admitted that he was present for the part of the discussion regarding the freezing of Prokam's delivery allocation.[660] He is first recorded as expressing support for this course of action at the Commissioners' meeting held July 5, 2017.[661] The freezing of Prokam's delivery allocation is one of the orders the Commission made that is under appeal.

376. After initially denying that he was present for the discussion regarding directing Prokam to BCfresh,[662] Mr. Guichon admitted that he was:

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[658] April 5, 65:35 – 66:29.
[659] April 4, 149:8-23.
[660] April 5, 104:11-23; 105:24-46.
[661] Exhibit 1B, BCVMC-0997; April 4, 150:8-20.
[662] April 5, 109:44-47.

> A As a -- as a commission member and a grower, maybe one day I'll be in the same boat with no agency to sell your product to. I was happy to have Mr. Dhillon be directed to BCfresh if he was or even a discussion about that. So, I don't see why I'm in a conflict while I'm trying to resolve -- resolve an issue in front of the B.C. Vegetable Marketing Commission that involves a grower that wants to be in the industry, does a good job in the industry, and want to get his product sold. I want to make sure Mr. Dhillon's product is sold orderly and I can't think of a better place for him to be other than BCfresh because that's their -- a lot of their business model.
>
> Q And there was discussion about that at the portion of the meeting you attended, whether BCfresh was the best agency for Mr. Dhillon, correct?
>
> A Which meeting?
>
> Q The December 14th meeting we're talking about prior to the point you recused yourself.
>
> A There was discussion about a --
>
> Q There was --
>
> A Obviously it's -- I was -- there was some discussion, but I -- I was -- I guess the reason I didn't recuse myself from that is I -- I thought I had a lot to add to the meeting positive. Positive for Mr. Dhillon, positive for the Commission, and putting a good grower in a house that he doesn't have a house to go to.[663]

The redirection of Prokam to BCfresh is also one of the orders under appeal.

377. There are other references in Mr. Solymosi's notes of the December 14, 2018 meeting that are troubling from the perspective of reasonable apprehension of bias. There is a recording in Mr. Soylmosi's notes of a comment that BCfresh exported to Alberta 52 loads in 2016 and only 1 load in 2017. Mr. Guichon first testified that it could have been discussed while he was present,[664] but he later changed his evidence to say he did not recall discussion of that.[665] Messrs. Newell and Solymosi could not say for which discussion items noted the BCfresh commissioners were present, but both of them testified that the BCfresh commissioners were present for the first 40 minutes of the hour that was spent on the agenda item.[666]

378. Although the January 30, 2018 reconsideration decision is not the subject of the instant appeals, the application was to vary the order transferring Prokam to BCfresh, which followed the first opportunity on Prokam's part to make submissions on this issue, having been unaware prior to the December 22, 2017 that it was under consideration.. Despite his denials, the totality of the evidence[667] reveals that neither Mr. Guichon, the Chair of

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[663] April 5, 111:25 – 112:29.
[664] April 5, 107:1-4.
[665] April 5, 107:34-38.
[666] May 22, 149:38-43; 151:34 – 152:6
[667] Exhibit 1B, BCVMC-1098-1101; April 5, 125:12 – 127:43. May 23, 57:13-16.

BCfresh, nor either of the other two BCfresh commissioners recused himself for this decision either.

379. The test for reasonable apprehension of bias is clearly made out on the evidence of the Commission's own representatives. As submitted above, this is a standalone basis on which the decisions to issue the cease and desist orders and the December 22, 2017 must be set aside.

2. The Commission prejudged the matter of whether to uphold the Cease and Desist Orders in the show-cause hearing

380. Where prejudgment is alleged, the question is whether the decision-maker was "capable of being persuaded", the rationale for this rule being that "[t]he legislature could not have intended to have a hearing before a body who has already made a decision which is reversible."[668] The Supreme Court of Canada has formulated the test for prejudgment as follows:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.[669]

381. As in all matters concerning the duty of procedural fairness, what is required of a decision-maker depends on all of the circumstances, including the nature of the decision and of the decision-maker.[670] It follows that the threshold for prejudgment lies along a spectrum that depends on context. For example, it makes sense that the Supreme Court would have adopted a very stringent test when the decision-maker at issue is a municipal councillor: someone in that position is expected to stake out public positions on issues that they are later called on to decide and, as the Court pointed out, if any sign that a councillor had already formed an opinion on an issue was sufficient to establish prejudgment, most councillors would be disqualified from most decisions. For the Court, this justified setting a high bar for a party trying to establish prejudgment: that party must show that representations would be *futile*.[671] The context of a decision of the Commission is different. The commissioners are not elected public officials, and the matter for adjudication was not an issue of policy but a narrow enforcement proceeding against specific market participants. These distinguishing features mean that the bar for the appellants to establish pre-judgment ought to be lower. As a matter of principle, it should not be necessary to demonstrate that representations would be *futile* – only that views had already been formed that would be difficult to dislodge.

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[668] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at p. 1197 [*Old St. Boniface*].
[669] *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 623, at p. 638 [*Newfoundland Telephone*], citing *Old St. Boniface*, at p. 1197.
[670] *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Green v. Law Society of Manitoba*, 2017 SCC 20, at para. 56.
[671] *Old St. Boniface*, at p. 1197.

382. However, ultimately it does not matter whether this Board applies the high bar of futility or agrees that the circumstances of the decision at hand justify lowering it. The test for prejudgment is met either way.

383. When Mr. Newell was asked from where the evidence upon which the Commission relied in making the December 22, 2017 Decision came, he testified that the Commission relied upon Mr. Solymosi's reports of conversations he had with IVCA personnel and Mr. Solymosi's assessments of those conversations.[672] What is clear from the documentary record is that Mr. Solymosi's assessment, as early as September 27, 2017, was that "rogue producer" Prokam and Thomas Fresh were the guilty parties, and IVCA was an innocent victim of their collusion and bullying.

384. It was on September 27, 2017 that Mr. Solymosi instructed Mr. Meyer that Prokam was not to be solicited for any information out of the ordinary.[673] Prokam was the target in Mr. Solymosi's sights from day one. Also on September 27, 2017, an e-mail Mr. Solymosi wrote to Mr. Meyer contained one of Mr. Solymosi's assessments that, presumably, on the evidence of Mr. Newell, was conveyed to the Commission:

> I believe and entrust that your efforts and those of IVCA to take corrective action on the matter are genuine and in the interests of preserving integrity in the orderly marketing system.[674]

385. Mr Solymosi assured Mr. Meyer:

> As long as we are honest and upfront, work together in support of the orderly marketing system and request assistance when needed, your agency license is protected.

386. Although Mr. Solymosi denied that this was a guarantee or assurance, his conduct and the documentary record from that point forward are consistent with the guarantee. Moreover, the evidence demonstrates that the Commission and IVCA collaborated to tailor the evidentiary record that would be put before the Commission in order to achieve an outcome favourable to IVCA and adverse to Prokam and Thomas Fresh:

(a) On October 3, 2017, Messrs. Solymosi and Krause met with IVCA representatives only. The context of the meeting was the next step Mr. Solymosi identified to Mr. Meyer by e-mail on September 29: issuing a cease and desist order to Prokam.[675]

(b) IVCA was a signatory to the November 10, 2017 joint agency managers' letter,[676] which was included in the evidence submitted to the Commission. The letter ensued from an e-mail chain of the same date in which Mr. Driediger wrote:

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[672] May 23, 14:10 – 15:47..
[673] Exhibit 1B, BCVMC-0798-0799.
[674] Exhibit 2B, BCVMC-0797.
[675] Exhibit 2B, BCVMC-0797.
[676] Exhibit 1B, BCVMC-0909.

> I think we were all on the same page with our support for the VMC to bring the Prokam/Thomas Fresh infractions to a satisfactory conclusion.[677]

The e-mail provides strong support for the inference that Mr. Solymosi, who ran the meeting, had made up his mind as to what a "satisfactory conclusion" would be. Although IVCA had also been issued, and appealed from, a cease and desist order, it is telling that there is no mention of IVCA infractions in the e-mail.

(c) At some point before November 9, 2017 – likely at the November 7, 2017 storage crop agency managers meeting, but possibly by telephone[678] – Mr. Meyer and Mr. Solymosi had discussions and evidently decided that it was desirable to gather additional evidence to be submitted to the Commission. The product of those discussions was the November 9, 2017 letter from Mr. Solymosi to IVCA.[679] The November 17, 2017 responding letter from IVCA's counsel[680] provided Mr. Solymosi with the additional evidence adverse to Prokam and Thomas Fresh he desired, as he indicated by e-mail to the Commissioners on November 22, 2017:

> 2. BCVMC Vs Prokam & IVCA – As of Friday I finally have all the information needed from IVCA for the Commission to review and make decision(s) on the cease and desist orders. I have attached a letter I sent to them after the storage crop agency managers meeting held on November 7th. Last Friday they sent the information and confirmed that the stated facts are correct. Note that Prokam (and IVCA – to protect their interests) has already appealed the C&D Orders and the prehearing call is scheduled for 9:30 this morning.
>
> 3. We have now set a schedule for written submissions. We needed IVCA to reply to the letter first before we could set the schedule.681

Mr. Solymosi's evidence was that the Commission "needed IVCA to reply to the letter first" because the Commission wanted all of the evidence so that it could be shared.[682]

(d) IVCA had Hothi prepare a letter dated October 25, 2017, but received by the Commission on November 24, 2017,[683] making an allegation against Prokam that Prokam sold Kennebecs without DA when Hothi had the product ready to deliver. The commission relied on this evidence to make an adverse finding against Prokam with respect to Kennebecs.

387. In the end, the Commission, despite finding IVCA primarily responsible for the wrongful conduct found to have been committed, left IVCA's agency licence class intact while

[677] Exhibit 1B, BCVMC-1030.
[678] May 23, 164:18 – 165:33.
[679] Exhibit 1A, BCVMC-0237.
[680] Exhibit 1A, BCVMC-0241.
[681] Exhibit 1B, BCVMC-1145.
[682] May 23, 169:12-31.
[683] Exhibit 1B, BCVMC-0909.

downgrading the licences of Thomas Fresh and Prokam. The most likely explanation for this otherwise irrational result is that the Commission gave effect to the guarantee Mr. Solymosi gave Mr. Meyer on September 27, 2017 that IVCA's licence would be protected if IVCA cooperated with the Commission. Indeed, the fact that IVCA came to and was working with the Commission was, according to Mr. Newell, the primary reason for this outcome.[684]

388. Before leaving this subject it is worth noting again that the freezing of Prokam's delivery allocation, which the Commission ultimately ordered, was espoused by Peter Guichon as early as July 5, 2017,[685] and again by an unnamed Commissioner during the portion of the December 14, 2017 meeting for which Mr. Guichon testified he was present.[686]

B. The Appellants were denied a fair opportunity to know and meet the case against them (*audi alteram partem*)

389. The second component of the duty of procedural fairness is known as the *audi alteram partem* rule.[687] This rule, often expressed in terms of the right to be heard, requires that a party know the case against it and be given an opportunity to meet it. A decision-maker cannot possibly fulfill this obligation when it holds *ex parte* meetings in which one party adverse in interest secretly helps to build the case against another. This is particularly the case where, as here, that collusion persists throughout the hearing process that was ostensibly crafted to permit the party whose conduct is under scrutiny to make its case.

390. The breach of the *audi alteram partem* rule in this case stems from the Commission's decision to involve IVCA in its enforcement actions against the appellants. In particular, it stems from (1) the Commission's reliance on IVCA to help build the case against the appellants; (2) the continued cooperation between the Commission and IVCA at the hearings stage; and (3) the fact that the Commission prejudged the issues to be decided in the hearings nullified any procedural benefit to the appellants.

391. The leading Supreme Court of Canada case on governing principles of the *audi alteram partem* rule is *Kane*.[688] It is useful to recall the circumstances of *Kane* because they provide such a clear illustration of those principles. In *Kane*, the Board of Governors of the University of British Columbia upheld a decision of the President to suspend Dr. Kane on appeal. In Dr. Kane's absence, the President answered questions that the Board raised in its deliberation. The only evidence as to the substance of those answers was that the President had supplied the Board "with the necessary facts relating to the Kane

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[684] May 22, 113:5-29.
[685] Exhibit 1B, BCVMC-0997; April 4, 150:8-20.
[686] April 5, 104:11-23; 105:24-46.
[687] *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11, at para. 75 [*Moreau-Bérubé*].
[688] *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1116-1117 [*Kane*]. Decisions of the Supreme Court of Canada dealing with the *audi alteram partem* rule since *Kane* have either simply applied it (*Moreau-Bérubé*) or else have been concerned with creating and applying a specialized exception to it for full board meetings and similar institution-wide consultation processes (*I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Ellis-Don Limited. v. Ontario (Labour Relations Board)*, 2001 SCC 4). That exception is not relevant here.

suspension."[689] The Board breached the rules of procedural fairness by hearing answers that might have worked to Dr. Kane's prejudice and then failing to provide him with a "real and effective" opportunity to respond.[690]

392. The *audi alteram partem* rule can be engaged in a variety of ways. For instance, a party may allege that it did not receive sufficient disclosure of the material the decision-maker intended to consider, or that it ought to have had an oral hearing and was only permitted to make written submissions. These are matters going to the adequacy of the opportunity to respond.

393. BCFIRB need not concern itself with the various manifestations of the *audi alteram partem* rule. This appeal engages its most basic and well-recognized form. When a decision-maker receives material giving rise to a possibility of prejudice – meaning material that could have an effect on the decision adverse to a party's interest – the decision-maker is obliged not to decide the matter (or to issue the order) without disclosing that material and giving the affected party a fair opportunity to respond.[691] Failure to provide that opportunity will put the decision-maker in breach of its procedural fairness obligations and result in an invalid decision.

1. Possibility of prejudice

394. A party seeking to establish a breach of the *audi alteram partem* rule must first identify a possibility of prejudice. This means a *risk* that the decision maker might have considered a statement, evidence, a submission, or information that (a) *could have* affected the decision in a manner (b) *adverse to* that party's interest.[692] Where the possibility of prejudice is said to arise from an *ex parte* statement and the party establishes that the decision-maker heard that statement, the burden shifts to the party seeking to uphold the decision to show that there was *no possibility* of prejudice[693] – for instance, because the problematic statements were not adverse, or because they were irrelevant to the merits.

2. Denial of a fair opportunity to respond

395. A party will by definition not have had *any* opportunity, much less a fair one, to respond to prejudice arising from statements made against it in communications of which it was entirely unaware. It is perhaps for this reason that the obligation on a decision-maker to avoid contact with those involved in a dispute outside of the formal decision-making process is one of the six fundamental principles set down in *Kane* and recently re-affirmed by the British Columbia Court of Appeal:

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[689] *Kane*, at p. 1112, 1116.
[690] *Kane*, at p. 1117.
[691] *Kane*, at p. 1116-1117.
[692] *Kane*, at p. 1116, citing *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322 (P.C.), at p. 337
[693] *Kane*, at p. 1116. The fact that the majority in *Kane* rejected the position of the dissent reinforced the point on burden of proof. Ritchie J., dissenting, would have been prepared simply to infer from the circumstances that the "facts relating to the Kane suspension" were either not prejudicial or had been addressed in Dr. Kane's presence. His logic was that the President would not have withheld prejudicial facts until Dr. Kane had left (*Kane*, at pp. 1119, 1121-22)

> It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses ... or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must... "... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."[694]

3. Application

396. The examples in the evidence before BCFIRB on these appeals of breaches of the *audi alteram partem* rule are legion.

397. From the outset of the investigation on September 27, 2017, Mr. Solymosi made the decision to solicit the cooperation of IVCA and the conceal this fact from Prokam:

> MS. HUNTER: And then over the page you say, "Prokam is not to be solicited for any information that is out of the ordinary." [as read] Do you see that?
>
> MR. SOLYMOSI: Correct.
>
> MS. HUNTER: And that's because you didn't want to alert Prokam --
>
> MR. SOLYMOSI: This is --
>
> MS. HUNTER: -- that you were looking into this issue?
>
> MR. SOLYMOSI: I didn't want to alert anyone. This is a confidential issue at this point between us -- or between the agency and the Commission.[695]

398. While Mr. Solymosi denied that his stated to IVCA that its licence would be protected if IVCA cooperated was an assurance or guarantee, he did admit that the fact that he made the statement was concealed from Prokam and Thomas Fresh until after the December 22, 2017 decision:

> MS. HUNTER: All right. Now, when the cease and desist orders were issued to Prokam, IVCA and Thomas Fresh, this assurance that [was] provided to IVCA was not disclosed to Thomas Fresh or to Prokam, correct?
>
> MR. SOLYMOSI: Correct.
>
> MS. HUNTER: In fact, it wasn't disclosed anytime prior to the December 22nd, 2017 decision?
>
> MR. SOLYMOSI: Correct.

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[694] *Kane*, at p. 1113-1114, as cited in *Hunt*, at para. 87.
[695] May 23, 152:29-40.

> MS. HUNTER: It was disclosed in March of this year, the response to document production requests?
>
> MR. SOLYMOSI: Correct.[696]

399. Having met in person with IVCA on October 3, 2017, *ex parte* to Prokam and Thomas Fresh, for the express purpose of gathering evidence to support issuing cease and desist orders, Mr. Solymosi's evidence was that he intentionally omitted to extend this same opportunity to Prokam and Thomas Fresh.[697]

400. An e-mail that was not put to any witness, but which is admissible pursuant to the document agreement[698] because the Commission did not produce it until after May 24, 2018, reveals that on October 6, 2017, Mr. Solymosi delivered to Mr. Meyer, for his review and comment, draft cease and desist orders.[699]

401. The Commission's expressed intention was originally to provide all of the parties with the opportunity to make oral submissions to the commission. However, in October 2017, Commission counsel advised counsel for Prokam and Thomas Fresh that the Commission had decided on written submissions instead, in order to "best ensure fairness to all concerned".[700] This decision had the opposite effect of exacerbating the breach of the appellants' procedural fairness rights. The result was that only IVCA would be provided with the opportunity to make oral representations to the Commission. Mr. Solymosi's evidence was that it made good on this opportunity on several occasions:

> MR. HRABINSKY: And between October 3rd and November 10, the date of this letter, did you continue to have dealings with Mr. Meyer about this issue?
>
> MR. SOLYMOSI: Well, October 3rd was when we had the -- the meeting with the staff. Alf and I went over there. And then in between that and this time we -- more evidence was brought forward, so we had more detail. I was -- I was working with Brian to have -- to go through the evidence, to have more evidence.
>
> MR. HRABINSKY: And --
>
> MR. SOLYMOSI: So, all that evidence was then pulled together and you have a -- you have a -- an e-mail that was sent out or something, I can't remember, a document that was sent out on November 23rd to all -- all the legal representatives and that summarized -- summarized all the evidence that was brought forward to the Commission.
>
> MR. HRABINSKY: And who was providing that evidence to you?
>
> MR. SOLYMOSI: IVCA, which would be Brian and Jas [*sic*].[701]

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[696] May 23, 154:18 – 155:16..
[697] May 22, 98:31 – 99:11.
[698] Exhibit 9.
[699] Exhibit 10 (Documents Produced by the Commission after May 24, 2018, Tabs 5 and 7.
[700] May 22, 64:8-16.
[701] May 22, 66:24-46.

402. The storage crop agency managers' meeting of November 7, 2017 provided a further opportunity for a meeting *ex parte* to Thomas Fresh and Prokam for not only Mr. Meyer, but also the other agency managers, to express their views and positions to Mr. Solymosi. As it turned out, all of the agency managers were "all on the same page with our support for the VMC to bring the Prokam/Thomas Fresh infractions to a satisfactory conclusion"[702] and were permitted to tender a letter into the evidentiary record to be considered by the commission. This letter, along with the October 25, 2017 letter from Hothi regarding Kennebecs, were not provided to either Prokam or Thomas Fresh until well after the December 22, 2017 decision.[703] As a result, Prokam and Thomas Fresh were never provided with an opportunity to meet and be heard with respect to the allegations the letters contain.

403. During another meeting between Messrs. Solymosi and Meyer *ex parte* to Prokam and Thomas Fresh, additional allegations were relayed to Mr. Solymosi as set out in his letter to IVCA of November 9, 2017.[704] IVCA confirmed these allegations by letter dated November 17, 2017.[705] While it is not the appellants' burden to establish that prejudice accrued to them as a result of *ex parte* communications (the burden is on the Commission to establish there is no possibility of prejudice), it is plainly obvious that prejudice to Prokam and Thomas Fresh ensued. The allegations in paragraph 2 of the November 9, 2017 letter, derived from an *ex parte* meeting between Mr. Meyer and Mr. Solymosi, formed the basis of findings of "*prima facie*" fact the Commission made at paras. 7.10-7.14 of the December 22, 2017 Decision.[706]

404. During cross-examination, Mr. Newell expressed discomfort with the fact, which he had learned since the December 22, 2017 was rendered, that Mr. Solymosi had not spoken to representatives of Thomas Fresh or Prokam at all in the investigation leading up to the decision:

> MS. HUNTER: I -- I want -- I just want to be clear on what evidence you had. The Commission has made a -- has made a finding and it has made some very serious orders against Prokam. And so I want to understand -- as a person who was involved in that decision and the only person who has been put up to explain that decision, I want to understand what your -- what evidence you relied on in finding that Prokam had direct involvement in negotiating the transactions with -- with Thomas Fresh or ...
>
> MR. NEWELL: We relied on Andre's assessment of the situation based on his meetings with Prokam and IVCA, et cetera, and managers and farm. And based on -- based on the evidence that he had seen in some of those meetings and -- and then had gathered later, we made a decision based on that.

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[702] Exhibit 1B, BCVMC-1030.
[703] May 23, 45:21-26.
[704] Exhibit 1A, BCVMC-0237 at para. 2.
[705] Exhibit 1A, BCVMC-0241.
[706] Exhibit 1A, BCVMC-0487.

MS. HUNTER: Now, I understood from Mr. Solymosi's evidence yesterday that the only meetings he had were with IVCA representatives, not with Prokam. Do you have a different understanding?

MR. NEWELL: No, I don't have a -- I have a -- I have the same understanding; however, I believe that from a practical point of view the Commission were concerned that -- that Bob Gill being the -- being paid half his salary and being the brother-in-law of the -- of Prokam, of -- of Bob Dhillon, that that might create some issues and so we were concerned about that.

MS. HUNTER: Now -- but I'm just focusing on the evidence that was before you. The evidence, as I understand what you said just now, was Mr. Solymosi reporting on his conversations with representatives of IVCA. Is that -- is that the evidence that you based the decision on?

MR. NEWELL: That's -- that's right.

MS. HUNTER: And -- and you didn't speak directly or hear directly from any representatives of IVCA?

MR. NEWELL: No, not -- not us, no.

MS. HUNTER: And --

MR. NEWELL: Not me personally.

MS. HUNTER: And neither Mr. Solymosi nor any of the commissioners spoke to anyone from Prokam, correct?

MR. NEWELL: I don't know that.

MS. HUNTER: All right. You didn't rely on a report of a conversation with anyone from Prokam?

MR. NEWELL: I don't believe so --

MS. HUNTER: Mr. --

MR. NEWELL: -- but I don't recall.

MS. HUNTER: You -- you didn't rely on a report of a conversation with Mr. Gill?

MR. NEWELL: I personally assumed myself that some of those conversations had happened. I know that based on Mr. Solymosi actually trying to get a hold of Prokam, that -- that that was something that was never -- there was no reply. So, I -- based on verbal conversations, however ...

MS. HUNTER: So, your -- your understanding was Mr. Solymosi had -- had attempted to contact Prokam and was unable to, and that's why there was no report from Prokam?

> MR. NEWELL: I believe he did, but I don't recall exactly, but I believe he did.
>
> MS. HUNTER: All right. You --
>
> MR. NEWELL: But he -- he would have and should have.
>
> MS. HUNTER: He would have and should have?
>
> MR. NEWELL: Mm-hm.
>
> MS. HUNTER: All right. And what about Thomas Fresh? Did you rely on any information that came through Mr. Solymosi from Thomas Fresh? Were you aware of any discussions with Thomas Fresh?
>
> MR. NEWELL: I don't recall. I don't recall.
>
> MS. HUNTER: All right. So, the evidence that you relied on was a second-hand report of a -- of a conversation or conversations with various representatives from IVCA?
>
> MR. NEWELL: I believe so.
>
> MS. HUNTER: And no attempt so far as you know was made to confirm the information received from IVCA with either Prokam or Thomas Fresh?
>
> MR. NEWELL: By the Commission?
>
> MS. HUNTER: Yes.
>
> MR. NEWELL: I don't believe so.[707]
>
> [Emphasis added.]

405. Mr. Dhillon's evidence was that he was given no notice that the Commission was considering transferring Prokam to BCfresh, and had no opportunity to make submissions on the issue.[708] Although the reconsideration decision had the potential to rectify this breach of the *audi alteram partem* principle, Mr. Dhillon did not know that the managers of the two agencies to which Prokam applied to be transferred had signed the November 10, 2017 letter condemning "bad actors" like Prokam, because that letter was not disclosed to Mr. Dhillon until March 2018. Mr. Dhillon's evidence with respect to the joint agency managers' letter speaks volumes:

> I feel like, you know, all these allegations are directed at us. And IVCA being my agency and to be signing this without even asking me what's going on and just colluding behind my back like that, I find that very hard to swallow..... Now, if there's straight transparency, to make up a letter like this about me and

[707] May 23, 14:10 – 15:47.
[708] April 3, 147:7-15.

> my own agency signed it behind my back and at the same time they're still conducting business with me, I don't get it…[709]

406. In *Kane*, the Supreme Court of Canada stated,"[w]hoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other".[710] That is precisely what happened at every stage of the process leading to the decisions from which these appeals arise.

407. It is clear, in the appellants' submission, that this ground provides a freestanding basis on which the appeals must be allowed.

IX. SOUND MARKETING POLICY

A. The Commission was required to apply SAFETI Principles

408. The requirement for the Commission to consider and apply SAFETI principles in making enforcement decisions is well-established in BCFIRB jurisprudence as an aspect of sound marketing policy. The SAFETI principles have been developed by BCFIRB in consultation with the commodity boards it supervises to support a principles based approach to decision-making by commodity boards carrying out their responsibilities. SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", "Transparent" and "Inclusive"[711].

409. In the Amending Order 43 decision and again in *Skye Hi v. BCBHEC*, BCFIRB considered and rejected arguments by the Commission and BCBHEC respectively that they were not required to comply with SAFETI principles in their decision making. BCFIRB's analysis in the Amending Order 43 decision which was adopted in *Skye Hi v. BCBHEC,* was as follows:

> 29. We do not need to decide whether (amending Order) 43, which affected only a small and defined number of producers, might be an exception to the principle that no duty of procedural fairness applies to legislative or policy decisions. That is because it is our view that while the common law imposes procedural obligations on a commodity board, it does not and could not preclude a policy judgment by BCFIRB, exercising its supervisory authority under section 7.1 of the *NPMA*, that certain procedural standards were appropriate, not as a matter of common law, but rather as a matter of sound marketing policy and having regard to all the circumstances of the vegetable industry as they pertained to the development and approval of this amending order.
>
> 30. In this regard, BCFIRB has developed the "SAFETI" principles, in conjunction with commodity boards, to support a principles based approach to

[709] April 4, 18:17-21.
[710] *Kane*, at p. 1113-1114, as cited in *Hunt*, at para. 87.
[711] *Skye Hi Farms Inc, et al v. BC Hatching Egg Commission,* Decision dated 29 March 2016, at fn 3 ["*Skye Hi v. BCBHEC"*]