BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY

PROKAM'S RESPONSE TO BCVMC APPLICATION RE: PARLIAMENTARY PRIVILEGE

INTRODUCTION

1. Prokam and the BC Vegetable Marketing Commission (the "**Commission**") each included in their initial productions of documents to Hearing Counsel a copy of a transcript of proceedings before the Standing Joint Committee for the Scrutiny of Regulations held on March 13, 2008 (the "**Transcript**").[1] On that day, George Leroux and Robert Hrabinsky appeared before the Joint Committee on behalf of the Commission. They gave evidence about the Commission's failure to Gazette and register orders charging levies in respect of interprovincial sales of regulated vegetables. Other documents related to the Joint Committee proceedings, such as Mr. Leroux's draft opening remarks on behalf of the Commission[2], are also included in Prokam's (but not in the Commission's or any other participant's) document productions to Hearing Counsel.

2. The Commission objects to the admission of the Transcript into evidence in the present Supervisory Review on the basis that it is both immaterial and subject to Parliamentary privilege. Prokam's position is that neither basis for the Commission's objection has any merit. The fact of the Joint Committee meeting and the existence of the Transcript is material to, at a minimum, the question of whether Peter Guichon and Andre Solymosi had actual or constructive knowledge that the Commission's export minimum pricing orders were unlawful, an issue engaged by the Terms of Reference.

3. Additionally, Prokam submits it is premature to determine the admissibility of the Transcript at this time. Contrary to the Commission's position, Parliamentary privilege does not preclude any and all uses whatsoever of testimony to which it applies. It only precludes use of that testimony for certain purposes. Thus, it is not possible to render a preliminary ruling regarding the admissibility of the Transcript in the abstract, devoid of the evidentiary context in which, and the purpose for which, the Transcript is sought to be used. Any advance ruling that the Transcript is inadmissible for all purposes would be an error of law.

[1] July 23, 2021 Documents of Prokam Enterprises Ltd., tab 21.
[2] *Ibid*, tab 22.

4. Below, we will begin by addressing the Commission's arguments that the Transcript is both immaterial and inadmissible for any purpose. We will then expound upon Prokam's argument that the ruling the Commission seeks is premature.

THE TRANSCRIPT IS MATERIAL TO THE SUBJECT MATTER OF THE SUPERVISORY REVIEW

5. The Commission's submission that the Transcript is not material to the subject matter of this Supervisory Review should be rejected.

6. BCFIRB made a finding in the 2018 appeal 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".[3]

7. In its submissions, the Commission acknowledges BCFIRB's finding that the Commission knew about the Gazetting requirements for orders depending on federal legislated authority:

> 10. The Commission's acknowledgment of these Gazetting requirements was specifically noted by the BCFIRB at paragraph 48 of its decision (See: BCVMCA-05201):
>
> > 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".
> >
> > [emphasis added by Commission]

8. At para. 5, the Commission argues any use of the Transcript is unnecessary because "the existence of [the] Gazetting requirements, and the knowledge of them, are not (and never were) material issues." It contends:

> 22. … The Commission has at all material times consistently expressed the position that any order made by it which depends on delegated legislative authority will only come into force after the order has been "Gazetted". Further, it was the Commission's position that the minimum export pricing orders were made in furtherance of a purpose within the exclusive constitutional competence of the Province…Consequently, it was the Commission's position that these orders did not require federal legislative authority under the APMA (and indeed, could not be supported under the APMA), and therefore did not need to be "Gazetted".

[3] *Prokam Enterprises Inc. et. al. v. BC Vegetable Marketing Commission* (N1715, N1716, N1718, N1719) at para. 49.

9. In his letter dated January 12, 2022, Hearing Counsel also makes the point that Mr. Solymosi "has acknowledged (in his November 29, 2021 interview) that he was aware of the Registration and Gazetting requirements". As such, he says, "there is no need to establish Mr. Solymosi's knowledge of the requirement for Registration or Gazetting".[4]

10. With respect, the Commission and Hearing Counsel appear to be taking an overly narrow view of the scope of this Supervisory Review not justified by a fair reading of the Terms of Reference. The issue of the actual or constructive knowledge of Messrs. Guichon and Solymosi that the issuance of the interprovincial pricing orders without compliance with the registration and Gazetting requirements was unlawful falls squarely within the Terms of Reference of this Supervisory Review. To the extent that this Supervisory Review is about whether the misfeasance claims against Messrs. Guichon and Solymosi are substantiated, the fact of the Joint Committee meeting and the resulting discussion at the Commission of the Gazetting requirement and legality of the export minimum pricing orders are material.

11. As Prokam submits in its application for a variety of relief delivered concurrently with this submission, the essence of Prokam's claim that Messrs. Solymosi and Guichon acted unlawfully in respect of the export minimum pricing orders (and issuing the Cease and Desist Orders based on purported violation of those pricing orders) is that those parties knew that the export minimum pricing orders were invalid and unlawful. Knowledge that the orders were unlawful is an essential element of misfeasance in public office, which is at the core of the terms of reference of this Supervisory Review.

12. The basis on which it is alleged that Messrs. Solymosi and Guichon had this knowledge is the allegation that they knew three things:

    (a) that the export minimum pricing orders required the exercise of federally delegated legislative authority;

    (b) that the exercise of federally delegated legislative authority required adherence to the registration and Gazetting requirements; and

    (c) that the registration and Gazetting requirements had not been complied with in respect of the export minimum pricing orders.

13. The Transcript, as well as the documents that relate to Messrs. Leroux's and Hrabinsky's attendance before the Joint Committee, the correspondence between the Joint Committee and BCFIRB or the Commission, and any documents in which this issue was discussed between 2006 and 2009 are relevant to the issues set out at both paragraphs (a) and (b) above. However, Mr. Solymosi's admission only addresses the allegation in paragraph (b) above. It does not address the allegations in paragraph (a). He does not admit that he knew that the export minimum pricing orders required the exercise of federally delegated legislative authority. On the contrary, he says he believed, mistakenly as it turned out, that only provincial legislative authority was required. Mr. Guichon's evidence, although expressed in more general terms, is essentially the same on this point.

[4] Nazeer Mitha Januaray 12, 2022 letter to Claire Hunter at page 2.

14. The Transcript contains exchanges between Mr. Hrabinsky and members of the Joint Committee in which the members stated in no uncertain terms that the Commission was acting unlawfully. Mr. Hrabinsky raised to the Joint Committee the existence of the same arguments the Commission would later unsuccessfully make to BCFIRB in the 2018 appeal; i.e. that the order imposing levies on interprovincial sales did not require the exercise of federal legislative authority:

> **Senator Nolin**: I would like to focus on the letter that we received on March 11. Mr. Hrabinsky, help me to understand. Your argument is based on the fact that there is no federal jurisdiction here. Am I right?
> [English]
>
> **Mr. Hrabinsky**: I would respond by saying "in part". We do present a different characterization of the problem or the issue. Having said that, I want to reiterate that the commission does, indeed, regard this as a very serious problem that needs to be addressed.
>
> However, we characterize it as a vulnerability to challenge. In other words, we do not believe it is a foregone conclusion. We do not believe that the fact that no orders have been made with respect to levies or otherwise under the APMA necessarily means that the commission, since 1981 or over any other time period, has been acting unlawfully or has been illegally collecting levies.
>
> There are two bases upon which we hold that view. The first is that although, as Mr. Leroux has indicated, the market for vegetables is clearly one that we would call undifferentiated in the sense that we know this regulated product trades both within the province and outside the province, in my respectful view, that, in and of itself, is not enough to conclude that delegated federal authority is absolutely necessary.
>
> One also has to look at the constitutional character of the regulatory scheme or the particular order made by the commission. In other words, to put it briefly: There are clearly instances where a provincial body might take steps to regulate a product that trades both within and outside the province but does not need federal authority to do so because of the constitutional character of the regulatory activity.
>
> The second basis for our view that it ought not to be considered a foregone conclusion that the commission has acted in any way unlawfully is the character of the commission itself. We believe there are strong arguments that the commission can properly be regarded as a quasi-judicial body, thereby exempt from the registration and publication requirements under the *Statutory Instruments Act*.
>
> I want to reiterate that having said all of that, it does not mean that we think there is no problem. We clearly understand that there is a significant issue — a

significant vulnerability to challenge — that needs to be addressed. However, we regard it as a vulnerability, not a conclusion of unlawful or illegal activity on the part of the commission.

[Translation]

Senator Nolin: Mr. Hrabinsky, this problem has been around since 1981. As I read one of the paragraphs of your letter, it refers to the legal opinion you received from your counsel. The first argument seems to form the basis of the opinion, and it was what constitutional English calls the ``pith and substance'' of regulatory powers. Your lawyers told you that this is not in federal jurisdiction and refers to the 2005 *Pelland* decision. But before *Pelland*, what was your argument based on?

[English]

Mr. Hrabinsky: The *Pelland* decision, in my respectful view, did not establish a new law. It was merely a recognition by the Supreme Court of Canada.

Senator Nolin: Production of agricultural products — food — is definitely provincial.

Mr. Hrabinsky: Yes.

Senator Nolin: You are trying to extract from *Pelland* something that it does not state. Commercialization of a product is different.

Mr. Hrabinsky: We are saying that one must have regard for the constitutional character of the specific regulation involved.

[Translation]

Senator Nolin: We are trying to avoid challenges too; it seems clear that, since 1981 in British Columbia, chaos has been just around the corner and it is this chaos that we are trying to avoid.

Before recommending the few regulations, however friendly they are, we have to come to a mutual agreement on the premises, the guiding principles of this stalemate. I do not even think we can agree on the guiding principles.

Do you see our problem? I understand the answer given by the officials from Agriculture Canada because they do not dare to stick their necks out. I do not think that the Department of Justice has any precise idea where this matter is going. Do you follow our dilemma?

[English]

Mr. Hrabinsky: I think so. I would respond by saying that we clearly understand and appreciate the vulnerability that exists with respect to orders made by the commission since 1981. For the record, I should say that there has been a lot of talk about the imposition and collection of levies. If there is a vulnerability — and we think that there is a vulnerability — it would extend to any orders made by the commission that would rely, in whole or in part, on delegated federal authority since 1981.

The vulnerability is clear and significant. We recognize it and, for that reason, we make the same recommendations that are made by Mr. Collins in his letter such that a new order be promulgated as quickly as possible and that legislation be introduced to retroactively and retrospectively validate what has been done since 1981.

...

Mr. Epp: You are still collecting dues on any production.

Mr. Leroux: That is correct. As I responded to one of the questions, it is in the normal course.

Mr. Epp: Do you feel uneasy that it might be illegal?

Mr. Leroux: With respect, we do not see it as being illegal. We see it as being a potential vulnerability but not illegal.

…

The Joint Chair (Mr. Lee): We thought we were making progress, but perhaps we are not. I want to direct my remarks and questions to Mr. Hrabinsky and Mr. Leroux.

It is clear that a problem has been identified and that you recognize it. I do not agree that there is a statutory amendment fix out there, unless it is years down the road. The problem as the committee sees it is that your organization is not complying with federal legislation.

I will try to say this succinctly: This is a problem that you ought to flag for the reasons alluded to by Mr. Leroux. I am speaking to Mr. Hrabinsky. It has to be dealt with and it has to be fixed.

I do not quite understand why it is not possible for you to comply with the existing legislation by putting in place a proper levy order, one that is registered and published properly. It seems to me that is the simple fix.

There may be other marketing boards across the country and other problems in existence. However, I do not understand why your organization cannot do that. You or someone is bucking that. Can you tell me why you cannot proceed immediately to put in place a properly registered, published levies order under federal legislation?

Mr. Hrabinsky: We have discussed that, obviously. We can and it is our intention to do so.

That begs the question: Why has that not been done —

The Joint Chair (Mr. Lee): I am prepared to treat everything else as secondary if you will please fix the problem of the allegedly illegal infrastructure that is there now. If you do not fix it, one of your very proud producers in British Columbia will take you up on some of this. That person or organization may have deep pockets. You only have $625,000 a year to play with. You want to fix it. Have I made that point?

Mr. Hrabinsky: Absolutely.

…

The Joint Chair (Mr. Lee): You have not been registering properly. That is the problem. Can you now indicate to the committee that you are prepared to embark on that task and complete it? Will you indicate to the committee you will do that forthwith?

Mr. Hrabinsky: Yes, absolutely.

The Joint Chair (Mr. Lee): I will not ask you why you did not do it a month ago or 15 years ago. There are other legal issues.

…

The Joint Chair (Mr. Lee): …

Mr. Hrabinsky, you have mentioned that you may subscribe to the possibility that your agency might be exempted from these requirements because it is a quasi-judicial agency. I want to tell you right off the bat that neither I nor counsel here buys that argument. It is over-reaching. I appreciate the effort in mitigation, but I am suggesting to you that it will not fly. Do you want comment?

Mr. Hrabinsky: Yes, I do. I want to make it plain that I am not offering that argument up to this committee to suggest that we ought to be inactive on this point. I am merely indicating that in the event there were to be a court challenge,

> we would regard that as a viable argument. However, we have indicated that we will move forthwith to present the levy order for publication.
>
> **The Joint Chair (Mr. Lee)**: That is great.
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> [Emphasis added.]

15. As is clear from the foregoing excerpts, the Transcript bears upon not only the Commission's (and Messrs. Soylmosi's and Guichon's) knowledge of the Gazetting and registration requirements. It also bears upon the question of whether the Commission knew, or was reckless or willfully blind to, the fact that orders applicable to interprovincial trade – like the levies orders with which the Joint Committee was concerned or the 2017 export minimum pricing orders in issue here – require the exercise of federally delegated legislative authority. Based on the summary of Mr. Solymosi's interview, that issue apparently remains very much in controversy.

16. Further, Prokam's misfeasance claims are against Messrs. Guichon and Solymosi, not the Commission. Mr. Guichon's knowledge of the Gazetting requirements is still very much at issue. In his response to Prokam's Notice of Civil Claim,[5] notwithstanding BCFIRB's finding in the February 2019 decision and Mr. Solymosi's admission to Hearing Counsel of the state of his actual knowledge, Mr. Guichon specifically denies that he or the Commission knew about the Gazetting requirements:

> 8. In response to paragraphs 13 and 20, the defendant denies being reckless or willfully blind to the existence of the Registration and Gazetting Requirements.
>
> …
>
> 10. In response to paragraph 18, the Commission at all material times honestly and reasonably believed that:
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> a. the Export Minimum Pricing Orders imposed by the Commission agents were made in furtherance of a purpose within the exclusive constitutional competence of the Province, namely, to prevent unwanted competition among British Columbia agents that would impede the maximization of returns for British Columbia producers;
>
> b. the Commission had the power and authority pursuant to the Act and Scheme to promulgate the Export Minimum Pricing Orders in furtherance of the purpose as described above; and that
>
> c. the Commission did not need federal legislative authority under federal legislation to support the Export Minimum Pricing Orders.

[5] October 1, 2021 Peter Guichon Response to Prokam Enterprise Ltd. Notice of Civil Claim Vancouver No. S212980.

…

22. In further response to paragraph 20, and to the whole of the notice of civil claim, the Commission acted within the lawful scope of its statutory duties and powers in issuing the Export Minimum Pricing Orders. Alternatively, if the Expert Minimum Pricing Orders were not enforceable at law, the Commission issued them in good faith, under honest but reasonable mistake of law.

17. Mr. Guichon also said he was not aware of the Gazetting requirements in his December 8, 2021 interview:

> I was never at the Parliamentary meetings. It was the previous General Manager that may have attended the meetings. I was relying on the Provincial Orders. I thought the Commission had pricing authorization to regulate over anything grown in BC sold in the Province or outside. I have never been on a pricing call. Pricing calls are between agency General Managers and Commission General Manager. I have general knowledge of pricing but not detailed knowledge. Everyone thought that the C&D Orders were within Commission jurisdiction. I don't know if the Commission sought a legal opinion before issuing the C&D Orders.
>
> At the time, I didn't know what gazetting even meant. I had heard about that back in 2012. Since that time, I thought the Commission had jurisdiction over anything grown in BC and sold anywhere.[6]

18. Mr. Guichon was a member of the Commission at the time the Joint Committee meeting took place. We understand from other witnesses that the issue of Gazetting requirements was discussed at Commission meetings during that period. In July 2021, we requested that Hearing Counsel obtain production of Commission meeting minutes at which the issue was discussed in order to determine whether Mr. Guichon attended at meetings where the matter was discussed. No meeting minutes from the 2006-2009 period have been produced.

19. To that end, the fact of the Joint Committee meeting and the resulting discussion at the Commission of the Gazetting requirement, the source or sources of the legislative authority for regulation of interprovincial trade, and the legality of the export minimum pricing orders are material to the matters engaged by the Terms of Reference of this Supervisory Review.

ADMISSIBILITY OF THE TRANSCRIPT DEPENDS ON ITS USE

20. The Commission's written submission on admissibility is largely devoted to arguing that Parliamentary privilege applies to the Transcript. That proposition is not contentious; Prokam agrees that Parliamentary privilege applies to the Transcript. The real question on this application is what use, if any, can be made of the Transcript given that Parliamentary privilege applies to it? The Commission's submission barely addresses this question at all. It concludes its submission by baldly asserting, without any analysis and without reference to

[6] December 8, 2021 Interview Report of Nazeer Mitha with Peter Guichon, respose to question 14.

any authority, that "the record cannot be used in this proceeding".[7] This is an inaccurate statement of the doctrine of Parliamentary privilege. As we set out in more detail below, Parliamentary privilege only precludes certain uses of testimony to which it applies. There are clearly circumstances in which use could properly be made of the Transcript at the Oral Hearing. Procedural fairness requires that the Review Panel consider whether the Transcript is admissible for the use sought to be made of it in the context of the hearing when it is tendered as evidence and objection made.

21. The existence and scope of Parliamentary privilege is uncontroversial, as is the notion that it may render evidence inadmissible in certain circumstances. Parliamentary privilege originates in both the common law and statute. In Canada, it is codified in s. 18 of the *Constitution Act, 1867* and s. 4 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1.

22. Parliamentary privilege is defined as "the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions".[8]

23. One of the privileges of Parliament is the privilege of free speech. Its purpose is to protect the capacity of both Parliamentarians and witnesses to speak freely without fear of being questioned later.[9]

24. Parliamentary privilege prevents a witness's testimony in a Parliamentary proceeding from being used "against them in a civil proceeding".[10] However, Parliamentary privilege does not prohibit any reference to Parliamentary proceedings in a legal proceeding. Whether any Parliamentary privilege applies to restrict admissibility or use of any particular document or record in the circumstances depends on whether the privilege claimed is necessary to the dignity, integrity, or efficient functioning of the legislature.[11]

25. There are both permissible and impermissible ways to use evidence from a Parliamentary proceeding in subsequent legal proceedings. Parliamentary privilege clearly protects persons from being sued (or prosecuted criminally) because of what they said at a Parliamentary proceeding. Such was the case in Ontario *Rothmans*, where the court struck from the plaintiff's pleadings allegations that the defendant tobacco companies misrepresented the risks of smoking in presentations before various Parliamentary committees. Parliamentary privilege also protects witnesses from being cross examined on prior inconsistent statements made during Parliamentary proceedings.[12]

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[7] BCVMC submission at para. 20.
[8] *Canada* (*House of Commons) v. Vaid*, 2005 SCC 30 at subpara. 29(2).
[9] *Gagliano v. Canada (Attorney General)*, 2005 FC 576 at para. 74.
[10] *Ontario v. Rothmans Inc.*, 2014 ONSC 3382 [Ontario *Rothmans*] at para. 32; cited in the Commission's argument at page 20.
[11] *New Brunswick v. Rothmans Inc.*, 2010 NBQB 291 at para. 31.
[12] *Gagliano* at para. 108.

26. On the other hand, courts regularly rely on Hansard to provide a narrative of historical events, for example to ascertain facts and circumstances related to the passage of a new statute or amendment.[13] In *Parliamentary Immunity in Canada*, the author notes:

> There has never been a practice in Canada requiring the permission of either House of Parliament by petition to refer to Hansard in court proceedings and it would probably not be considered a breach of privilege of Parliament to do so, as long as the extract is not "questioned" in a wide sense, or adjudged, in court proceedings.[14]

27. Parliamentary privilege also does not preclude using testimony from a Parliamentary proceeding to identify witnesses who may have relevant information about the subject matter of that proceeding. In *Royal Canadian Mounted Police Deputy Commissioner v. Canada (Attorney General),*[15] an RCMP Commissioner had launched an internal investigation into an officer as a result of the officer's testimony before a Parliamentary committee. The Federal Court found that Parliamentary privilege did not apply to quash the Commissioner's decision to investigate certain allegations, provided the RCMP was able to conduct its investigation without resorting to the Parliamentary committee testimony:

> 70 … Parliamentary privilege does not extend so far as to preclude all other entities from concurrently investigating matters which are also before the House. Rather it precludes other entities from holding Members of Parliament or witnesses before committees liable for statements made in the discharge of their functions in the House. Therefore, provided the RCMP is able to conduct its investigation without resorting to the Applicant's testimony before the House, parliamentary privilege does not apply and the RCMP is free to do as it pleases within the confines of the law and its constituent statute.
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> 71 Without commenting on how the actual investigation may unfold and what issues may arise between the parties in the future, at this stage I am satisfied that on their face the first and third allegations made against the Applicant by Commissioner Busson do not necessarily concern parliamentary privilege. In other words, I am satisfied that these allegations may be established without having to rely on statements made to the Public Accounts Committee. Moreover, the allegations appear to provide ample justification for the Code of Conduct Investigation and consequent suspension with pay.
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> 72 In light of the foregoing, I find that parliamentary privilege is not a valid reason to quash the decision to investigate the first and third allegations made against the Applicant. Nor is there reason to quash the decision to suspend the Applicant with pay.

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[13] See e.g. *R. v. Morgentaler,* [1993] 3 SCR 463 at 484 ("Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation") and *Hobbs v. Warner,* 2020 BCSC 1180 at para. 94 (Hansard evidence can play a role in clarifying legislative intent).

[14] J.P Joseph Maingot, *Parliamentary Immunity in Canada* (Toronto: LexisNexis Canada, 2016) at page 131.

[15] *Royal Canadian Mounted Police Deputy Commissioner v. Canada (Attorney General),* 2007 FC 564.

[Emphasis added.]

28. By comparison, BCFIRB's investigation into Prokam's allegations against Messrs. Guichon and Solymosi has already been launched. There is no suggestion that the Transcript should be used to investigate the witnesses who gave evidence at the committee (Messrs. Leroux and Hrabinsky), or the Commission generally. None of those parties is a defendant in Prokam's misfeasance claim. However, the authorities make clear that it is permissible to use the Transcript, which is publicly available, to identify witnesses who may have information relevant to BCFIRB's investigation into the allegations against Messrs. Guichon and Solymosi. This does not offend Parliamentary privilege.

29. In the same vein, the Transcript can also properly be used as an investigative tool to identify lines of inquiry and relevant documents. For example, the Transcript references a written brief that the Commission distributed to members of the Joint Committee. The transcript identifies Jim Collins, then executive director of BCFIRB, as having been in attendance and indicates that Mr. Collins had authored correspondence about the levy issue. It was open to Hearing Counsel to follow lines of inquiry raised by the information in the Transcript. Indeed, in Prokam's respectful submission, a thorough investigation by Hearing Counsel should have included the pursuit of such lines of inquiry.

30. Clearly, there is a range of possible reasons why evidence of a Parliamentary proceeding might be relied on in a subsequent legal proceeding. Not every use will raise concerns about protecting the capacity of Parliamentary witnesses to speak freely, or otherwise threaten the integrity of the legislature.

31. Hearing Counsel is the person charged with leading evidence at the Oral Hearing. It is impossible to determine in the abstract what use he might wish to make of the Transcript, the context in which he might wish to make use of the Transcript, or whether that use would be permitted in that context. The uses to which other participants may wish to put the Transcript may flow from Hearing Counsel's use of it, and are similarly unpredictable at this juncture.

32. In his Jan 12, 2022 letter, Hearing Counsel gave some indication of the manner in which he anticipates the general subject matter of knowledge of the Gazetting requirement in respect of interprovincial transactions might arise at the hearing. He indicated that in his view Mr. Solymosi can be questioned on his explanation as to why he believed the Commission was entitled to set the export minimum pricing orders, in spite of his knowledge of the Gazetting requirements. Hearing Counsel indicated in that same letter that Mr. Guichon can be questioned on his statement that he was not aware of the Gazetting requirements.

33. So, it seems that the lines of questioning Hearing Counsel is contemplating may touch on the general subject matter of the fact that the Joint Committee meeting occurred, and any meetings or discussion the Commission may have had about those requirements at that time. There can be no doubt that a witness may be asked about that general subject matter, and that questions of that nature would be permissible. It is not clear from the Commission's submission whether an objection would be taken by the Commission to questions of this nature. If so, any such objection would be without merit.

34. Parliamentary privilege does not prevent a witness from giving evidence in a legal proceeding about subject matter that was also the topic of a Parliamentary proceeding. In *Gagliano,* the witness in question had testified before a Parliamentary committee that was investigating finances used in the federal sponsorship program. There was no question that the witness could also give evidence about the sponsorship program to a commission of inquiry. The only issue was whether statements the witness made to the Parliamentary committee could be used to impeach him on cross examination during the commission of inquiry. Thus, Parliamentary privilege would not prevent Mr. Leroux from giving evidence at the Oral Hearing, even if his evidence concerns the same subject matter as his testimony before the Joint Committee in March 2008.

ADMISSIBILITY DETERMINATION IS PREMATURE

35. In the ordinary course, an objection as to admissibility of evidence is made at the time a party seeks to tender the evidence. The objection and submission in response are thus addressed in the context of the specific use that is sought to be made of the evidence at issue. The Commission's objection has been made in a factual and procedural vacuum, without reference to the context of the Supervisory Review and the special role accorded to Hearing Counsel by the *Rules of Procedure*.

36. At the Oral Hearing, the types of questions that might engage an analysis of Parliamentary privilege include, for example, whether the Transcript might be put to a witness who cannot recall that a meeting of the Joint Committee on the subject of Gazetting requirements occurred to refresh their recollection, or whether a witness might be cross examined based on information derived from the Transcript without specific reference to the Transcript. If such situations arise, objection may be taken to a question when it is asked. The ruling on the objection must take account of the specific use of the Transcript to be made and the circumstances.

37. We highlighted the scenarios above and in the preceding section of this argument to illustrate that there are multiple permissible uses for which Hearing Counsel or other participants may wish to rely on the Transcript during the Oral Hearing. However, to determine the admissibility of the Transcript now, divorced from the evidentiary context in which it is proposed to be used, would be premature. In our submission, the appropriate use (if any) of the Transcript with a particular witness should be determined on the basis of any objection as it arises during the Oral Hearing.

38. Authorities support this position. Like the Ontario *Rothmans* case, *New Brunswick v. Rothmans Inc*.[16] concerned recovery of tobacco related health care costs. Two defendant tobacco companies sought to strike certain paragraphs of the Province's claim as privileged because they referenced submissions and presentations made in the context of a Parliamentary proceeding. The judge found it was premature to embark on the Parliamentary privilege analysis:

[16] *New Brunswick v. Rothmans Inc*., 2010 NBQB 291.

> 35 In this case, the factual background [giving] rise to the alleged parliamentary privilege is completely absent from the record. Consequently, I am not in a position to embark on the analysis of the existence of the alleged privilege.
>
> 36 Nevertheless, whether the Province will ultimately be permitted at trial to lead evidence of what was said by certain representatives of the defendants during parliamentary proceedings and/or committee hearings will be an evidentiary determination better left for the trial judge.

39. Similarly, in *Guergis v. Hamilton*,[17] the motions judge declined to strike from the plaintiff's pleadings reference to testimony the defendant solicitor gave before a Parliamentary committee. The judge determined that the admissibility of the defendant's testimony required balancing the competing rights afforded by Parliamentary privilege and breach of solicitor client privilege, and that the admissibility of such evidence was an issue for the trial judge to consider.

40. These authorities support the submission that the appropriate time to determine the admissibility of the Transcript is the context of an objection taken to specific use during the Oral Hearing itself.

41. No determination can be made as to admissibility of any evidence in the absence of Hearing Counsel's advice as to whether and how he intends to use the evidence at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 17/JAN/2022

Signature of counsel for the Applicants
Claire E. Hunter, Q.C. / Ryan Androsoff
Hunter Litigation Chambers

[17] *Guergis v. Hamilton*, 2015 ONSC 4915.