

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE NATURAL PRODUCTS MARKETING (BC) ACT AND  
ALLEGATIONS OF BAD FAITH AND UNLAWFUL ACTIVITY

**NOTICE OF APPLICATION OF PROKAM ENTERPRISES LTD.  
RE: WITNESSES, NON-COMPLIANCE WITH RULES and ADJOURNMENT**

1. Prokam applies pursuant to the schedule directed by the Review Panel for leave to call certain witnesses Hearing Counsel has declined to call at the oral hearing, and to provide its submissions in writing on apparent non-compliance with the Rules.
2. Prokam also seeks consequential relief including that it be accorded certain of the investigatory powers that Hearing Counsel has apparently declined to exercise and orders for document production.
3. Given the non-compliance with the rules and the work that will be required to prepare this matter for hearing, Prokam regrettably seeks an adjournment to permit the completion of a thorough investigation, compliance with the rules with respect to document production and witness lists by other parties, and adequate time for the parties to prepare for the oral hearing.

**ORDERS SOUGHT**

**Witnesses**

4. Prokam seeks an order granting it leave to call some or all of the following witnesses in addition to those witnesses Hearing Counsel has advised he intends to call:
  - (a) Jim Collins, former executive director of BCFIRB and current director of IVCA;
  - (b) Tom Demma, former Commission General Manager;
  - (c) Jeavan Hothi, Three Star Farms;
  - (d) Alf Krause, former Commission chair;
  - (e) George Leroux, former Commission chair;
  - (f) Terry Michell, president of IVCA;

- (g) Lillian Posch, general manager of Okanagan Grown Produce Ltd.; and
- (h) John Walsh, Vancouver Island Product Ltd and former Commissioner.

(the “**Witnesses**”)

5. Prokam further seeks an order granting leave to introduce into evidence transcripts of the evidence of Tom Pollock from the prior proceedings before FIRB for the truth of the content of that evidence, or in the alternative that Prokam be granted leave to call Tom Pollock as a witness at the oral hearing.
6. Prokam seeks the following consequential relief with respect to the Witnesses:
  - (a) permitting its counsel to demand answers to written questions or to interview any or all of the above-listed persons prior to the hearing;
  - (b) On the advice of Prokam’s counsel, the Review Panel will issue a summons to any witness on the list set out at paragraph 4 above that Prokam intends to call to give evidence at the oral hearing before he or she testifies.
7. The Commission, Andre Solymosi, Peter Guichon, Cory Gerrard, Mike Reed, Blair Lodder, and John Newell shall produce to Hearing Counsel by January 24, 2022 (or some later date to be set by the Review Panel if the oral hearing scheduled to commence January 31, 2022 is adjourned) the following documents and categories of documents in their possession and control:
  - (a) Board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies and orders requiring the exercise of federal regulatory authority (expected to be in the possession of the Commission and Mr. Guichon, and possibly Mr. Solymosi);
  - (b) BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a “fairly comprehensive chronology of events with supporting documents (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  - (c) Correspondence between Jim Collins and the Commission regarding the Commission’s exercise of federally delegated authority (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  - (d) Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);

- (e) Correspondence between the National Farm Products Council and the BCVMC with respect to the gazetting and registration requirements for interprovincial orders (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
- (f) Communications to which Mr. Guichon and/or Mr. Solymosi is a party about the gazetting and registration requirements (expected to be in the possession of the Commission, Mr. Guichon, and Mr. Solymosi);
- (g) Communications to which Jim Collins or anyone else at BCFIRB is a party about the gazetting and registration requirements (expected to be in the possession of the Commission and Mr. Solymosi);
- (h) Additional documents that may be identified relating to the failure of the Commission to consider the merits of CFP's May 2019 agency application, such as any correspondence to which BCVMC Commissioners and/or Mr. Solymosi and/or Mr. Driediger or anyone else at BCfresh may be a party (expected to be in the possession of the Commission, Messrs. Guichon, Gerrard, Reed, Lodder, Newell, and Solymosi, and BCfresh);
- (i) Email correspondence between agency managers and Mr. Solymosi regarding the drafting and circulation of drafts of the November 10, 2017 agency managers letter (expected to be in the possession of the Commission, Mr. Solymosi, and BCfresh);
- (j) Communications between Mr. Guichon and Mr. Driediger regarding Prokam (expected to be in the possession of the Commission, Mr. Guichon, and BCfresh);
- (k) Communications between Mr. Driediger and BCVMC commissioners about the CFP or Mastronardi agency applications (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and BCfresh);
- (l) Communications between agency managers and Mr. Solymosi regarding the drafting of the November 10, 2017 agency managers letter (expected to be in the possession of the Commission, Mr. Solymosi, and BCfresh);
- (m) Correspondence between Mr. Guichon and other BCFresh Commissioners and/or other BCFresh growers about the decisions involving Prokam between 2017-2021 (expected to be in the possession of the Commission, Messrs. Guichon and Gerrard and BCfresh);
- (n) Agendas and minutes from Commission meetings in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi);
- (o) E-mail correspondence in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission,

Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi, and possibly BCfresh);

- (p) Any communications, minutes, briefing notes, memoranda, notes, or other documents to which any member or employee of the Commission is a party regarding the promulgation of SOR-2020-259, and the process by which and the purpose for which it was promulgated (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi).
8. The Commission shall deliver to Hearing Counsel by January 24, 2022 (or some later date to be set by the Review Panel if the oral hearing scheduled to commence January 31, 2022 is adjourned) an amended list of documents with descriptions of documents over which privilege is claimed that comply with Rule 7.
  9. BCfresh Inc. shall deliver to Hearing Counsel by January 24, 2022 (or some later date to be set by the Review Panel if the oral hearing scheduled to commence January 31, 2022 is adjourned) the documents and other materials required by Rule 4.

### **Adjournment of Oral Hearing**

10. The hearing currently scheduled for January 31 – February 9, 2022 is adjourned to dates to be canvassed with counsel for all participants.

### **BACKGROUND**

11. This application for leave to call witnesses Prokam identified to Hearing Counsel in July 2021 (none of whom he has interviewed or intends to call at the hearing), to compel compliance with the *Rules* with respect to document production by the non-Complainant participants, and a consequent request for adjournment of the oral hearing of this Supervisory Review is brought two weeks prior to the day the hearing is scheduled to begin. The Applicants have been forced to bring this application for an adjournment by Hearing Counsel's omission to diligently exercise his powers and to carry out a comprehensive investigation into the matters raised by the terms of reference, by the delay in production to Prokam and other complainant participants of documents produced by the non-complainant participants, and by the Commission's and BCfresh's non-compliance with the *Rules of Procedure* related to document production.
12. A chronology of events known to Prokam that are relevant to the investigation, and the number of days elapsed since the previous step taken, is attached to this submission as Appendix A.
13. The Review Panel has described the *Rules of Procedure* as an attempt "to balance the investigatory function of a supervisory review against the need for a very high degree of procedural fairness given the nature of the allegations being investigated"<sup>1</sup>

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<sup>1</sup> July 9, 2021 Decision re: Final Rules of Procedure, at para. 6.

14. The first step in the process set out by the *Rules* was for Prokam and the other complainant participants to produce to Hearing Counsel, within 14 days, relevant documents, together with a list of proposed witnesses along with a detailed statement of the evidence that it was anticipated each witness might provide. (Rule 1)
15. On July 23, 2021, Prokam complied with this requirement and provided to Hearing Counsel a list of 18 proposed witnesses together with detailed statements of the evidence it was anticipated each witness might be able to give. Together with Prokam’s witness list and documents, we provided Hearing Counsel with an eleven-page letter in which we indicated we intended to “provide context for the proposed witnesses and to assist in navigating Prokam’s document production”. A copy of our July 23, 2021 cover letter to Hearing Counsel is attached as Appendix B to this letter.
16. In our July 23, 2021 letter to Hearing Counsel we explained that the evidence produced with it and anticipated to be given by the listed witnesses fell into four main topic areas, each of which is engaged by the terms of reference, which were also set out therein:
  - (a) The state of the actual or constructive knowledge of former Messrs Guichon and Solymosi of the requirement that the Commission “gazette” and register orders in order to validly regulate interprovincial trade;
  - (b) Evidence that Mr. Solymosi’s investigation of Prokam was motivated by and carried out with the improper purpose of creating an evidentiary record consistent with his predetermination that Prokam was a ‘rogue producer’;
  - (c) Evidence that Mr. Guichon was motivated by self-interest in seeking to avoid or delay the licensing of a second lower mainland storage crop agency;
  - (d) BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of a second lower mainland storage crop agency.
17. The rules and the process designed by the Review Panel, following submissions from all participants, contemplated that the information provided by the complainant participants would be only the beginning of the investigatory process. That process was supposed to include mandatory production by other parties of witness lists, followed by an independent investigation conducted by Hearing Counsel. As the Review Panel articulated in its July 9, 2021 decision:

Importantly, this supervisory review will not be limited to the evidence and documents produced by the parties. Hearing counsel has the power to conduct further investigations and information gathering beyond the evidence provided by the participants. . . It should be noted that the witness lists will not restrict the evidence that will be provided at the oral hearing; they provide a place for Hearing Counsel to begin their investigation.<sup>2</sup> [Emphasis added.]

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<sup>2</sup> July 9, 2021 Decision, paras. 8 and 16.

18. The *Rules* allocate the information-gathering power and responsibility solely to Hearing Counsel. For example, the *Rules* provide that
- (a) “Hearing counsel has the primary responsibility for collecting and presenting all of the evidence counsel determines is relevant at the oral hearing...”<sup>3</sup>
  - (b) Hearing Counsel is vested with the power to “demand answers to written questions or interview any person who he believes may have information or records that have any bearing upon the subject matter of the Supervisory Review”.<sup>4</sup>
  - (c) A person attending a meeting with Hearing Counsel “may be required by summons issued under s. 7.1(3) of the *Natural Products Marketing Act* to answer questions, either at a meeting with Hearing Counsel or in writing, or produce documents”.<sup>5</sup>
  - (d) On the advice of Hearing Counsel, the Review Panel will issue a summons to a witness before he or she testifies;<sup>6</sup> and
  - (e) Hearing Counsel is primarily responsible for calling evidence at the hearing.<sup>7</sup>

Thus, the ability of this Supervisory Review to achieve its truth-seeking mandate is entirely dependent on Hearing Counsel exercising his investigation powers ardently, and diligently pursuing every avenue of inquiry that presents itself.

19. After the initial hearing dates commencing September 27, 2021 were adjourned, Hearing Counsel provided the participants with an anticipated investigation schedule.<sup>8</sup> That schedule was to culminate in the distribution of documents and interview summaries to the complainant participants during the week of November 15, 2021, in order to provide the parties with “approximately two months” to prepare for the hearing rescheduled to commence January 31, 2022. However, no information about the progress of the investigation was provided to Prokam the week of November 15, or at all, until December 24, 2021 when Hearing Counsel delivered a letter enclosing certain interview summaries.
20. It appears that Hearing Counsel in fact conducted *no* interviews between his letter of September 24, 2021 and the week of November 15, 2021 when the interview summaries were to have been provided to the parties.
21. As set out in more detail in our letter to the Review Panel of January 10, 2022, in correspondence dated September 27, 2021, we raised a concern that it appeared Hearing Counsel did not at that time intend to interview many (if any) of the non-participant

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<sup>3</sup> *Rules of Procedure*, Rule 18.

<sup>4</sup> *Rules of Procedure*, Rule 19.

<sup>5</sup> *Rules of Procedure*, Rule 20.

<sup>6</sup> *Rules of Procedure*, Rule 26.

<sup>7</sup> *Rules of Procedure*, Rules 27-29.

<sup>8</sup> Correspondence from Hearing Counsel to the participants dated September 24, 2021.

witnesses identified in our July 23, 2021 correspondence. By correspondence dated October 15, 2021, Hearing Counsel advised that his “interviews of potential witnesses are ongoing” and that the schedule provided was not an “exhaustive list” of all planned interviews but rather that the scheduling of interviews would be an “iterative process” that would “evolve” as additional interviews were completed.

22. No further advice as to the progress of his investigation was provided by Hearing Counsel to Prokam until December 24, 2021. On that day, Hearing Counsel provided an update on the investigation including a witness list for the hearing and summaries of witness interviews he had conducted. He indicated in his December 24, 2021 letter for the first time that he did not intend to call most of the witnesses identified by Prokam as being in possession of evidence material to the subject matter of this Supervisory Review.
23. The December 24, 2021 letter provided a brief explanation of the decision not to call each witness, with reference to the evidence the witness could give at the hearing, based on which Hearing Counsel had determined that the evidence of the listed witnesses was unnecessary. Hearing Counsel did not include in the December 24, 2021 letter summaries of interviews with any of the witnesses he does not intend to call, nor any information about the basis on which he had determined that these witnesses
  - (a) have no material evidence to give that isn’t available from
    - (i) other witnesses or
    - (ii) other testimony before FIRB in prior proceedings; or
  - (b) cannot be called because the “issue of admissibility of parliamentary proceedings transcript referred to panel chair for determination”.
24. In response to our January 5, 2022 letter requesting production of the information on which those determinations had been based, on January 12, 2022, Hearing Counsel advised for the first time that he had not interviewed any of the witnesses that he had determined not to call. It appears from the January 12, 2022 letter that Hearing Counsel only attempted (unsuccessfully) to contact one of the witnesses (Lillian Posch<sup>9</sup>) from the list of 14 witnesses put forward by Prokam in July 2021 and who he does not intend to call.
25. While the reason given for not calling several of the witnesses provided by Hearing Counsel on December 24, 2021 was “issue of admissibility of parliamentary proceedings transcript referred to panel chair for determination”, it appears that the issue of parliamentary privilege was raised by the Commission for the first time to Hearing Counsel on November 18, 2021 -- *after* all witness interviews were scheduled to be completed according to Hearing Counsel’s September 24, 2021 investigation schedule.

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<sup>9</sup> In his January 12, 2022 letter, Hearing Counsel states “We attempted to contact Ms. Posch several times without success”. He does not explain why he did not seek to compel answers to his questions from Ms. Posch (as the *Rules* permit) given that he apparently did have questions to which he wished to obtain answers.

### **APPLICATION FOR LEAVE TO CALL WITNESSES**

26. Prokam applies pursuant to Rules 28 and 30 for leave to call the Witnesses (listed at paragraph 4 above) at the hearing of this Supervisory Review.

27. Rule 28 provides, in relevant part:

Unless the Review Panel otherwise orders, Hearing Counsel will call and question witnesses who testify at the Oral Hearing.

Rule 30 provides:

If Hearing Counsel elects not to call a witness or to file a document as an exhibit, a party may apply to the Review Panel to do so or to have the Review Panel direct Hearing Counsel to do so where the Review Panel is satisfied that the document or the evidence of the witness is necessary.

28. The evidence of the Witnesses is anticipated to be material to the subject matter of this Supervisory Review as defined by the Terms of Reference, for the reasons set out in Prokam's July 23, 2021 submission to Hearing Counsel and in the will-says. Given that Hearing Counsel has elected not to interview or call the Witnesses, procedural fairness of the hearing process requires that Prokam be given the opportunity to further investigate the evidence of the Witnesses and to have leave to call the Witnesses at the hearing if Prokam wishes to do so.

### **Background**

29. As set out above, on July 23, 2021, Prokam provided a list of 18 proposed witnesses to Hearing Counsel. On December 24, 2021, Hearing Counsel advised that 14 of those 18 witnesses would not be called at the hearing. On January 12, 2022, Hearing Counsel confirmed that he did not interview any of the 14 witnesses from Prokam's list that he is not calling.

30. As set out in Prokam's submission to Hearing Counsel of July 23, 2021, each of the 18 identified witnesses likely has material evidence to give about the subject matter of this Supervisory Review. In our view, a thorough investigation would have included interviews of each of the 18 witnesses identified by Prokam and those interviews would likely have led "directly or indirectly ...to other information that touches on or concerns the subject matter of the Supervisory Review",<sup>10</sup> resulting in additional interviews and the "iterative process" Hearing Counsel contemplated in his October 15 letter. It is disappointing that Hearing Counsel appears not to have followed through on the investigation he described.

31. In the circumstances, and given that the already once-adjourned hearing dates are scheduled to commence in two weeks on January 31, 2022, it is not practical for Prokam to locate, interview and prepare the evidence of each of the 14 witnesses Hearing Counsel

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<sup>10</sup> *Rules of Procedure*, Rule 7.



is declining to call. Prokam seeks leave to call some or all of the eight Witnesses listed above at paragraph 4. If leave is granted, Prokam proposes to give notice at last two business days before the commencement of the hearing of the witnesses it intends to call. In the next section, Prokam identifies five of the Witnesses who may require a direction from the Review Panel in order to agree to answer written questions or attend an interview with Prokam, and we seek orders to facilitate those interviews.

32. The will-says provided to Hearing Counsel in respect of the eight Witnesses are attached as Appendix C to this letter. While we will not repeat the entire will-say in respect of each witness here, we point out that in our July 23, 2021 letter constituting Prokam's submission to Hearing Counsel accompanying the will-say statements and documents, we identified for each issue which Witnesses were anticipated to have evidence relevant to the issue. The eight Witnesses were linked with issues 1, 2 and 4 as follows:

*Issue 1: The state of the actual or constructive knowledge of Messrs Guichon and Solymosi of the requirement that the Commission "gazette" and register orders in order to validly regulate interprovincial trade*

1. Jim Collins, former executive director of BCFIRB and current director of IVCA
2. Tom Demma, former Commission General Manager
3. Alf Krause, former Commission chair
4. George Leroux, former Commission chair
5. John Walsh, Vancouver Island Product Ltd and former Commissioner

*Issue 2: Evidence that Mr. Solymosi's investigation of Prokam was motivated by and carried out with the improper purpose of creating an evidentiary record consistent with his predetermination that Prokam was a "rogue producer"*

1. Terry Michell
2. Lillian Posch
3. John Walsh
4. Alf Krause

*Issue 4: BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of new entrant potato growers and/or a second lower mainland storage crop agency*

1. John Walsh
2. George Leroux
3. Jeaven Hothi

33. The reasons given by Hearing Counsel in his December 24, 2021 letter for not calling (or even taking the initial step of interviewing) the Witnesses are either “issue of admissibility of parliamentary proceedings transcript referred to panel chair for determination” (Jim Collins, Tom Demma, George Leroux and John Walsh) or “Unnecessary duplication of evidence already before BCFIRB and/or interviews completed” (Jeaven Hothi,<sup>11</sup> Alf Krause,<sup>12</sup> Terry Michell, Lillian Posch, John Walsh).
34. With respect to the latter point, it is difficult to understand how Hearing Counsel could have determined that the evidence of a person who he had not interviewed would be unnecessarily duplicative of evidence already before BCFIRB and/or interviews completed. It may be that there is more than one witness who has evidence to give about the same subject matter, but that does not mean that their evidence will be the same or even overlapping. It is not unusual that two witnesses who witnessed the same events have two very different perceptions or recollections of those events. Calling both witnesses to give evidence in that circumstance is necessary for the trier of fact to fairly assess the evidence and make findings of fact and credibility assessments. The fact that the witnesses’ evidence may relate to the same facts or events does not make those witnesses’ evidence duplicative. If Hearing Counsel had interviewed the witnesses and determined that they had the same recollections of the same events, then perhaps there would be a basis to possibly conclude that their evidence is duplicative, but he did not do so. The witnesses Hearing Counsel determined will be unnecessarily duplicative of other evidence have not previously given evidence about the subject matter of this Supervisory Review.
35. Hearing Counsel has not identified the witness or witnesses whose evidence would be duplicated by each of the witnesses he has declined to call. Certain of the witnesses will have evidence to give about events that were attended by others and about which other witnesses may give evidence. For example, Ms. Posch is anticipated to be in a position to give evidence about the November 7, 2017 agency managers’ meeting, which was

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<sup>11</sup> In Hearing Counsel’s letter of January 12, 2022, he provides a different reason for not interviewing or calling Mr. Hothi, writing at p. 3 “The proposed evidence is largely on collateral matters. This proposed evidence does not relate to any of the 4 main topic areas identified by Prokam in its July 23, 2021 letter”. No explanation is given for the inconsistency between the reasons given in the December 24 and January 12 letters. The explanation provided in the January 12 letter appears to overlook that Prokam in its July 23, 2021 letter explained that Mr. Hothi was expected to give evidence relating to issue 4, identified by Prokam as “BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of new entrant potato growers and/or a second lower mainland storage crop agency”.

<sup>12</sup> Hearing Counsel provides a different explanation in his January 12, 2022 letter for his decision not to call (or interview) Mr. Krause: “Mr Krause was appointed to the Commission by an Order in Council. He is not personally involved in the industry. It is noteworthy that he is not a defendant in Prokam’s NOCC. The issues Prokam suggested he may testify are in respect of his communications with Messrs Guichon and Solymosi. Again, I do not see that this evidence is central to Prokam’s main allegations in its NOCC or its July 23, 2021 letter”. Hearing Counsel’s comments in this regard are difficult to understand given that Mr. Krause was chair of the Commission and one of only two Commissioners (together with Mr. Guichon) who made the decision to issue the cease and desist orders, at the heart of Prokam’s misfeasance claim. That he is not a defendant in Prokam’s claim is an indication only of the restraint and care with which Prokam drafted its Notice of Civil Claim and selected the defendants it would name. That Mr. Krause was appointed by Order in Council and is not presently involved in the industry are not reasons not to even *interview* him; on the contrary, they may enhance the reliability of his evidence.

attended by others including Jaymie Collins, Brian Meyer and Murray Driediger (each of whom Hearing Counsel does intend to call). For the reasons set out above, the fact that others attended the same meeting does not necessarily mean Ms. Posch's evidence about the meeting would be duplicative. She may very well have a different perspective on the same events. Ms. Posch's will-say further indicates that she may have evidence about conversations with Mr. Solymosi about Prokam in early 2018<sup>13</sup>, which are not likely to be the subject of the evidence of other witnesses, with the exception potentially of Mr. Solymosi who as a defendant to the Prokam claim is not a disinterested witness.

36. Other witnesses whose evidence was said to be “duplicative” do not have any obvious subject-matter overlap with other witnesses. For example, John Walsh's will-say indicates that he may testify regarding examples of conduct he witnessed – both as a Commissioner from 2008-2012 and since that time – about the Commission and BCfresh working together to protect BCfresh's dominant market position in the storage crop sector.<sup>14</sup> Moreover, there is evidence that John Walsh wrote to the Commission, including Mr. Solymosi and Mr. Guichon, in August 2017 (two months before the issuance of the October 2017 cease and desist orders) raising concerns about the Commission's “authority in initiating a new minimum price set for producer exports”.<sup>15</sup> Communications on this subject during that time period are highly material to the allegations of actual or constructive knowledge of Mr. Solymosi and Mr. Guichon that the issuance of the pricing orders on which the cease & desist order was based was unlawful. There are no other witnesses who appear to have evidence similar to Mr. Walsh's anticipated evidence on this subject.
37. In his January 12, 2022 letter, Hearing Counsel provides a further and different reason for not calling (or attempting to interview Mr. Walsh), writing:
- The main evidence he is purported to be able to give relates to the allegations of BCfresh's dominant market position and other “similar fact” evidence of the Commission allegedly targeting Vancouver Island Produce in the same way it has allegedly targeted Prokam. Again, this evidence is collateral to the main allegations raised by Prokam at the heart of this supervisory review, and the “similar fact” evidence is additionally problematic.<sup>16</sup>
38. Hearing Counsel seems to ignore that Mr. Walsh is anticipated to give direct evidence from the time he served as a Commissioner from 2008-2012 and the period following of his observation of “BCfresh and the Commission working together to protect BCfresh's dominant market position in the storage crop sector”<sup>17</sup> and about efforts of the Commission dating back to 2014 “to block Prokam and its principal, Bob Dhillon, from

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<sup>13</sup> Lillian Posch will-say at para. 5.

<sup>14</sup> John Walsh will-say at para. 2.

<sup>15</sup> John Walsh will-say at para. 6 and footnote 3.

<sup>16</sup> January 12, 2022 letter from Hearing Counsel at p. 4

<sup>17</sup> John Walsh will-say at para. 1-2

acquiring delivery allocation and using the land it had previously leased to BCfresh to grow regulated product for IVCA”.<sup>18</sup>

39. The “similar fact” concern raised by Hearing Counsel is likely a reference to the including in Mr. Walsh’s will-say that he “may also testify to Vancouver Island Produce being targeted and singled out by the Commission in a manner similar to Prokam” but it is clear that if he gave evidence as set out in the will-say, he would have highly material direct evidence to give that cannot be described as “similar fact” evidence. Hearing Counsel’s comment about the “similar fact” evidence being “additionally problematic seems to be a reference to the presumptive inadmissibility in court proceedings of “similar fact” evidence. The rules of evidence as applied to this Supervisory Review are more flexible. Rule 24 provides that:

The Review Panel may receive any evidence considered helpful in fulfilling the Terms of Reference of the Supervisory Review. The strict rules of evidence used in a court of law to determine admissibility of evidence will not apply.

40. Having omitted to interview 14 of the 18 witnesses Prokam identified as having evidence to give that is material to the subject matter of this Supervisory Review, there was no basis for Hearing Counsel to determine that their evidence would be duplicative, and his determination in that regard was entirely unreasonable.
41. Similarly, the fact that the issue of admissibility of the transcript of Parliamentary proceedings has been referred to the Review Panel for determination does not provide a reasonable basis for Hearing Counsel to have determined not to call witnesses who he has not even interviewed. The witnesses who have knowledge of that proceeding and of any discussions before or after that proceeding are competent to give evidence about that subject matter regardless of whether the transcript of Parliamentary proceedings is admissible. Moreover, the Commission’s challenge to admissibility of the transcript does not impact whether these witnesses have material evidence about events or discussions other than the Parliamentary committee meeting, such as Commission board meetings.
42. It is anticipated that Mr. Leroux, for example, would give evidence that well prior to the Parliamentary committee, the issue of the gazetting requirement was discussed at meetings of the Commission at which Mr. Guichon was in attendance, and that it was well-known to all members of the Commission in the 2006-2009 period, including Mr. Guichon, “that the Commission could only regulate interprovincial trade, including by setting prices, through properly gazetted federal orders”.<sup>19</sup>
43. Although there is no witness identified by Prokam whose evidence is anticipated to be restricted to what transpired during the Parliamentary committee meeting, even if such a witness existed, Hearing Counsel’s determination not to call them at the hearing because he has referred a preliminary evidentiary issue to the Review Panel would be illogical and premature. If the Review Panel were to determine the transcript were admissible, then

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<sup>18</sup> John Walsh will-say at para. 3

<sup>19</sup> George Leroux will-say at paras. 8, 10

Hearing Counsel – having chosen not to interview the witnesses – would then be in a position of having to determine only days before the commencement of the hearing whether to call those witnesses. In the circumstance where all witnesses are anticipated to have material evidence beyond the evidence of what happened at the parliamentary committee meeting, there is no reasonable or rational basis for Hearing Counsel’s decision not to call those witnesses.

***Prokam should be permitted to interview the Witnesses***

44. Prokam complied with its obligation under the *Rules* to provide within 14 days a list of proposed witnesses, and made its best efforts, within that very brief period permitted by the *Rules*, to provide the required “detailed statement of the evidence the witness is able to provide at the Oral Hearing”. In many cases, Prokam was unable to interview the proposed witness prior to delivering the witness list to Hearing Counsel, but the subject matter on which each of the 18 listed witnesses was expected to have material evidence was identified with reference to relevant documents, in an effort to “provide a place for Hearing Counsel to begin their investigation”.<sup>20</sup>
45. While there is no requirement in the *Rules* that Hearing Counsel interview all of the witnesses proposed by Prokam, it is most unfortunate that it was not until January 12, 2022 -- almost six months after Prokam produced its witness list and less than 3 weeks before the previously adjourned hearing is scheduled to commence -- that Hearing Counsel advised that he had not interviewed and did not intend to interview most of the witnesses listed by Prokam.
46. If the hearing is to commence January 31, 2022 as scheduled (and in the circumstances, there is a real question as to whether this matter can possibly be ready to proceed on those dates, which we explain in further detail below), it will no longer be possible for all of the witnesses identified by Prokam in July to be interviewed prior to the hearing. Accordingly, from its list of 18 witnesses, Prokam has identified the eight Witnesses who have not been interviewed by Hearing Counsel who Prokam may wish to call. Of that list, Prokam was unable prior to July 23, 2021 to interview five of them (Jim Collins, Tom Demma, Alf Krause, Terry Michell, and Lillian Posch).
47. Given that Hearing Counsel has chosen not to exercise his authority under Rules 19 and 20 to demand answers to written questions or interview these five persons identified by Prokam, Prokam requests that the Review Panel direct that Prokam may demand answers to written questions within 10 days or, by consent of the proposed witness, to conduct an interview.

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<sup>20</sup> June 9, 2021 decision of Review Panel at para. 16.

**NON-COMPLIANCE WITH RULES AND DOCUMENT PRODUCTION APPLICATION**

**Applicable Legislative Provisions and Rules**

48. Prokam brings this application to the Review Panel for document production orders pursuant to paragraph 7.1(3)(d) of the *Natural Products Marketing (BC) Act* (the “*Act*”), Rule 36 and, if necessary, Rule 34.
49. Prokam initially raised its concerns regarding deficiencies in the non-complainant participants’ document production (as well as failure of all non-complainant persons to comply with the requirement to produce a list of witnesses) with Hearing Counsel, pursuant to Rule 15:
15. A party who believes that a participant has not provided copies of relevant documents must bring this to the attention of Hearing Counsel at the earliest opportunity. Hearing counsel will determine if the document is relevant, and make orders for further production of documents as necessary.
50. Prokam sought leave to raise non-compliance with the *Rules* with the Review Panel in a pre-hearing conference and was granted leave to make these written submissions in lieu of an oral conference. Accordingly, in this section, Prokam describes the non-compliance with the *Rules* in respect of document production and seeks consequential document production orders.
51. There is no rule in the *Rules of Procedure* that specifically provides for a participant to apply to the Review Panel for a document production order. However, paragraph 7.1(3)(d) of the *Act* confers upon BCFIRB a power to compel the production of documents or objects:

**Supervisory power**

7.1 (1) ...

(2) The Provincial board may exercise its powers under this section at any time, with or without a hearing, and in the manner it considers appropriate to the circumstances.

(3) In the exercise of its powers under this section, the Provincial board may make an order requiring a person to do one or more of the following:

...

(d) produce records or things in their custody or possession.

52. As set out above, Prokam’s application for document production arises from what it says is the non-compliance of the non-complainant participants with their document

production obligations. Thus, reading Rules 4 and 36 together provides a basis in the *Rules* for this application. They read:

4. Any participant, other than a Complainant Participant, who receives materials from Hearing Counsel pursuant to s. 2 shall, within fourteen (14) days of receiving those materials, provide to Hearing Counsel:

a. the names and addresses of all witnesses they believe ought to be heard, together with a detailed statement of the evidence the witness is able to provide at the Oral Hearing;

b. all relevant documents within the possession, control or power of the participant;

c. if it is claimed that any documents otherwise producible pursuant to s. 4(b) are privileged from production, a list of such documents with a statement

...

36. All participants and their counsel shall adhere to these Rules. Any party may raise any issue of non-compliance with the Review Panel at any time, and any breach of the Rules will be dealt with by the Review Panel as it sees fit.

[Emphasis added.]

53. Finally, in the event the Review Panel considers it necessary to amend the Rules to specifically provide for this application to the Review Panel, Rule 34 provides that ability.

34. These Rules may be amended and new Rules may be added if the Review Panel finds it necessary to do so to fulfill the Review Panel's mandate and to ensure that the process is fair.

Suggested amendments to Rule 15 are underlined below:

15. A party who believes that a participant has not provided copies of relevant documents must bring this to the attention of Hearing Counsel at the earliest opportunity. Hearing counsel will determine if the document is relevant, and make orders for further production of documents as necessary. Any party who disagrees with Hearing Counsel's determination that a document or category of documents is irrelevant may apply to the Review Panel for an order requiring production by any party who is in possession or control of that document or category of documents.

## Relevance for the Purpose of this Supervisory Review

54. The *Rules* provide guidance as to what constitutes a document, and whether a document is relevant. Rules 10 and 11 provide:

10. The terms “document” or “documents” are intended to have a broad meaning and include, without limitation, the following mediums: written, electronic, text, cellular or social media messaging, audiotape, videotape, digital reproductions, photographs, films, slides, maps, graphs, microfiche, metadata, and any data and information recorded or stored by means of any device.

11. The Review Panel considers relevant documents to include anything that touches on or concerns the subject matter of the Supervisory Review or that may directly or indirectly lead to other information that touches on or concerns the subject matter of the Supervisory Review.

55. Thus, the scope of relevance applicable to this supervisory review is exceedingly broad. “Touch[ing] on or concerns the subject matter of the Supervisory Review” is much broader than the test for initial document production in a civil action under Rule 7-1(1) of the *Supreme Court Civil Rules* (“could, if available, be used to prove or disprove a material fact”) and is arguably broader than the test for production under the second tier of document production in a civil action (“relate to any or all matters in question in the action”).

56. The “subject matter of the Supervisory Review” is defined by the Final Terms of Reference, which read:

### Scope and Focus

BCFIRB’s supervisory review is directed by two objectives:

- ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and,
- ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector.

The Supervisory Review will consider the following allegations, which form the terms of reference for the supervisory review:

1. The Commission’s exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self-interest of members of the Commission, including:



- a. Self-interested prevention of new agencies from entering the British Columbia market [*sic*] to further the Commission members' economic interests, by both failing to adjudicate agency licence applications, and preventing the granting of additional production allocation to growers thought to be aligned with applicants;
- b. Collusion by members to "vote swap" on agency applications; and,
- c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest.

2. Commission members and staff exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

57. Importantly, the Terms of Reference as finalized were broader than the Terms of Reference initially proposed by the Review Panel. In particular, paragraph 2 of the Terms of Reference initially read:

2. Prosecuting enforcement proceedings in bad faith and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

In its decision broadening the scope of paragraph 2 from "enforcement proceedings" to "exercising or failing to exercise statutory duties", the Review Panel wrote:

8. I am amending that term to now read: "Exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam." For clarity, this amendment is intended to encompass any decision making by members of the Commission that is grounded in a negative animus toward Prokam and Bob Dhillon, including decision making in respect of persons or entities other than Prokam itself.

58. Hearing Counsel appears to have overlooked the June 18, 2021 amendment to the Terms of Reference; the excerpt in his correspondence to the parties dated December 24, 2021 is from the Terms of Reference as initially proposed, rather than as finalized on June 18. This may in some part explain Hearing Counsel's narrow approach to the scope of the investigation.
59. To the extent Hearing Counsel's view of relevance of documents (or evidence that may be given by witnesses for that matter) is based on his mistaken belief that the Terms of Reference as originally proposed remain in force, his decisions not to demand documents or interview witnesses that are relevant under the final, broader Terms of Reference,

Hearing Counsel's decisions are unreasonable and require intervention by the Review Panel.

#### **Non-complainant Parties' Failure to comply with Rule 4**

60. As set out above, Rule 1 imposed a requirement on Prokam to produce within 14 days relevant documents as well as a witness list of "all witnesses they believe ought to be heard together with a detailed statement of the evidence the witness is able to provide at the Oral Hearing". Rule 4 imposes a parallel requirement on non-Complainant Participants. Both Rule 1 and 4 are mandatory, requiring that the participant "shall" provide the listed items.
61. On December 24, 2021, Hearing Counsel provided to Prokam document production he had received from the non-Complainant participants. As set out below, that document production was clearly incomplete; by way of one example, BCfresh Inc., who sought and was granted participant status in the proceeding, appears not to have produced any documents at all.
62. In the same December 24 letter, Hearing Counsel wrote in respect of witness lists that:

Pursuant to Rules 1 and 4, there was an opportunity for participants to identify witnesses they believed ought to be heard in this process. Only Prokam provided a proposed witness list and will say statements which I will address below.
63. Contrary to Hearing Counsel's characterization of these rules as an "opportunity", what the *Rules* imposed was a requirement, apparently one that only Prokam met.
64. In response to Prokam's raising of the failure of non-Complainant participants to comply with the requirement in Rule 4, Hearing Counsel on January 12, 2022 responded as follows:

With respect to your concerns about the lack of Rule 4 will say statements, it is my understanding that the non-complainant participants do not intend to call any witnesses. To the extent I am calling those participants as witnesses, I have provided my interview reports which outline the evidence which was communicated to me and which I expect them to provide at the hearing.
65. It is not, in the ordinary course under the *Rules*, for participants other than Hearing Counsel to call witnesses at the hearing. The requirement to provide a list of witnesses is not a requirement to provide a list of witnesses the participants intends to call but rather a list of witnesses who "ought to be heard". This requirement was intended to provide a starting point to Hearing Counsel for what was contemplated by the *Rules* to be a robust investigation of the matters described in the Terms of Reference. The non-Complainant participants' failure to comply with the requirement to identify witnesses at all, and the extent of the deficiency of their document production, were not disclosed by Hearing Counsel to Prokam until December 24, 2021.

### **Categories of Documents identified by Prokam as Producible**

66. In our January 5, 2022 letter to Hearing Counsel, we set out a list of documents and categories of documents that Prokam submitted were relevant, in that they “touch on or concern the subject matter of the Supervisory Review”. Many of those categories of documents were first identified to Hearing Counsel in our correspondence of July 23, 2021. The categories consisted of the following:
1. Board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies and orders requiring the exercise of federal regulatory authority (expected to be in the possession of the Commission and Mr. Guichon, and possibly Mr. Solymosi);
  2. BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a “fairly comprehensive chronology of events with supporting documents (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  3. Correspondence between Jim Collins and the Commission regarding the Commission’s exercise of federally delegated authority (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  4. Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  5. Correspondence between the National Farm Products Council and the BCVMC with respect to the gazetting and registration requirements for interprovincial orders (expected to be in the possession of the Commission, its counsel Mr. Hrabinsky, Mr. Guichon, and possibly Mr. Solymosi);
  6. Communications to which Mr. Guichon and/or Mr. Solymosi is a party about the gazetting and registration requirements (expected to be in the possession of the Commission, Mr. Guichon, and Mr. Solymosi);
  7. Communications to which Jim Collins or anyone else at BCFIRB is a party about the gazetting and registration requirements (expected to be in the possession of the Commission and Mr. Solymosi);

8. Additional documents that may be identified relating to the failure of the Commission to consider the merits of CFP's May 2019 agency application, such as any correspondence to which BCVMC Commissioners and/or Mr. Solymosi and/or Mr. Driediger or anyone else at BCfresh may be a party (expected to be in the possession of the Commission, Messrs. Guichon, Gerrard, Reed, Lodder, Newell, and Solymosi, and BCfresh);
9. Email correspondence between agency managers and Mr. Solymosi regarding the drafting and circulation of drafts of the November 10, 2017 agency managers letter (expected to be in the possession of the Commission, Mr. Solymosi, and BCfresh);
10. Communications between Mr. Guichon and Mr. Driediger regarding Prokam (expected to be in the possession of the Commission, Mr. Guichon, and BCfresh);
11. Communications between Mr. Driediger and BCVMC commissioners about the CFP or Mastronardi agency applications (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and BCfresh);
12. Communications between agency managers and Mr. Solymosi regarding the drafting of the November 10, 2017 agency managers letter (expected to be in the possession of the Commission, Mr. Solymosi, and BCfresh);
13. Correspondence between Mr. Guichon and other BCFresh Commissioners and/or other BCFresh growers about the decisions involving Prokam between 2017-2021 (expected to be in the possession of the Commission, Messrs. Guichon and Gerrard and BCfresh);
14. Agendas and minutes from Commission meetings in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi);
15. E-mail correspondence in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi, and possibly BCfresh);
16. Any communications, minutes, briefing notes, memoranda, notes, or other documents to which any member or employee of the Commission is a party regarding the promulgation of SOR-2020-259, and the process by which and the purpose for which it was promulgated (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi).

67. In his January 12, 2022 responding letter, Hearing Counsel conveyed his determination that a few of the categories of documents Prokam identified were relevant (categories 9, 10, and 13), but the remainder of the categories were irrelevant. It is unclear in the January 12, 2022 letter whether in making these relevancy determinations, Hearing Counsel continued to rely on the outdated draft Terms of Reference referred to in his December 24, 2021 letter in determining relevance.
68. It is Prokam’s respectful position that in determining that the categories of documents Prokam enumerated as items 1-8, 11-12, and 14-16 are irrelevant, Hearing Counsel made the following errors:
- (a) He employed the narrower test for relevance set out in Rule 7-1(1) of the *Supreme Court Civil Rules*, rather than the much broader test set out in Rule 11 of the *Rules of Procedure* applicable to this Supervisory Review;
  - (b) He failed to differentiate the issue of whether Messrs. Solymosi and Guichon (and the Commission more generally) knew of the gazetting and registration requirements with the issue of whether those parties knew (or were reckless or wilfully blind to the fact) that they were acting unlawfully in promulgating export minimum price orders in 2017 without fulfilling those gazetting and registration requirements;
  - (c) He incorrectly defined the scope of the subject matter of this Supervisory Review as being delineated by Prokam’s notice of civil claim, rather than by the Terms of Reference as finalized on June 18, 2021; and
  - (d) He incorrectly limited the scope of relevance only to documents he considered admissible,<sup>21</sup> and in doing so applied the wrong test for admissibility of a document in this Supervisory Review.
69. Below, we provide more detailed regarding the errors Hearing Counsel made in respect of the relevance of each category of documents identified by Prokam.

### **Argument regarding Items 1-7**

70. Hearing Counsel determined the categories of documents set out in Items 1-7 irrelevant to the Supervisory Review:

Paragraphs 1-7: For the reasons outlined above, these documents are not necessary as they go to the knowledge of Solymosi and Guichon about gazetting and registration requirements.

71. “The reasons outlined above” consist of Hearing Counsel’s explanation earlier in his January 12, 2022 correspondence for his decision not to call the “Proposed Jurisdiction Witnesses”:

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<sup>21</sup> Even in Supreme Court proceedings, inadmissible documents are nevertheless produceable as long as they are relevant: *Chow v Cheung*, 2022 BCSC 26 at para. 25.

In my view, the Proposed Jurisdiction Witnesses will not add anything regarding this issue because Mr. Solymosi has acknowledged (in his November 29, 2021 interview) that he was aware of the Registration and Gazetting requirements. He says in spite of this knowledge, he considered the BC Vegetable Marketing Commission (“Commission”) was entitled to set the Export Minimum Price Orders. He provides an explanation why. His explanation may or may not be accepted. He can be questioned on his explanation. However, there is no need to establish Mr. Solymosi's knowledge of the requirement for Registration and Gazetting.

In his December 8, 2021 interview, Mr. Guichon said he was not aware of the Registration and Gazetting requirements but also said he was of the view that the Commission could regulate crops grown in BC but sold outside of the province. Mr. Guichon states he never attended the Parliamentary Committee meetings. He can be questioned on all of that, but I do not see how any of the Proposed Jurisdiction Witnesses could speak to Mr. Guichon's knowledge.

Since Mr. Solymosi acknowledges that he is aware of the Registration and Gazetting requirements and none of the Proposed Jurisdiction Witnesses can speak to Mr. Guichon's knowledge, they do not add anything to the issue.

72. The first problem with Hearing Counsel’s analysis is that in adopting his rationale for declining to call the Proposed Jurisdiction Witnesses as his rationale for determining that document categories 1-7 are irrelevant, he appears to have overlooked that his rationale for declining to call the Proposed Jurisdiction Witnesses differed in respect of Mr. Solymosi’s knowledge of the gazetting and registration requirements, vs. Mr. Guichon’s. In respect of Mr. Solymosi’s knowledge, his rationale was that testimony on this issue is irrelevant because Mr. Solymosi has admitted knowledge. In respect of Mr. Guichon’s knowledge, his rationale was not that Mr. Guichon’s knowledge was irrelevant; rather, he considered (without interviewing any of the Proposed Jurisdiction Witnesses) that he did not see how any of them could speak to Mr. Guichon’s knowledge of the gazetting and registration requirements.
73. Even if Hearing Counsel’s supposition about the inability of the Proposed Jurisdiction Witnesses to speak to Mr. Guichon’s knowledge of the registration and gazetting requirements is correct, it clearly does not apply to document categories 1-7, which would plainly be expected to bear on this issue.
74. The second problem with Hearing Counsel’s analysis is that it is based on his incorrect view that if a document only goes to a material fact that is admitted, the document is no longer relevant for the purposes of this Supervisory Review. That proposition is not even correct in the context of a court action, where the narrower test for relevance of “could be used to prove or disprove a material fact” applies. An admission of a material fact does

not change the material nature of the fact such that production of documents relevant to that fact can be avoided.<sup>22</sup>

75. Whether Mr. Solymosi has admitted to knowledge of the registration and gazetting requirements does not render documents that go to this issue irrelevant: those documents still “touch upon the subject matter of this Supervisory Review”. They may also “directly or indirectly lead to other information that touches on or concerns the subject matter of the Supervisory Review”, such as whether and to what extent Messrs. Solymosi and Guichon and the Commission knew that orders like the export minimum pricing orders must be registered and gazetted because they require federally delegated legislative authority.
76. The third problem with Hearing Counsel’s analysis is that he fails to differentiate the issue of whether Messrs. Solymosi and Guichon (and the Commission more generally) knew of the gazetting and registration requirements from the issue of whether those parties knew (or were reckless or wilfully blind to the fact) that they were acting unlawfully in promulgating export minimum price orders in 2017 without fulfilling the gazetting and registration requirements.
77. 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. The basis on which it is alleged that they 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.
78. Mr. Solymosi’s admission only addresses the allegation in paragraph (b) above. It does not address the allegations in paragraphs (a) or (c). 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 that 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.
79. The documents that are set out in document categories 1-7 are relevant to whether both individuals knew (or were reckless or wilfully blind to) the fact that the export minimum pricing orders required the exercise of federally delegated legislative authority. This is because the documents in categories 1-7 related to an episode in or around the years 2006-2009 in which the Commission was told by federal government officials that the

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<sup>22</sup> *Aujla v. Yellow Cab Company Ltd.*, 2002 BCSC 88 at paras. 8-9.

levies the Commission was collecting in respect of interprovincial sales required the exercise of federally delegated legislative authority, prompting the Commission to promulgate a properly registered and gazette levies order for interprovincial sales. At the time those events occurred, Mr. Guichon was a Commissioner, and Mr. Solymosi was employed by the Commission as a data analyst.

80. In Prokam's respectful submission, the document categories 1-7 are not only relevant to the subject matter of this Supervisory Review; they are potentially of central materiality to it.

**8. Additional documents that may be identified relating to the failure of the Commission to consider the merits of CFP's May 2019 agency application, such as any correspondence to which BCVMC Commissioners and/or Mr. Solymosi and/or Mr. Driediger or anyone else at BCfresh may be a party (expected to be in the possession of the Commission, Messrs. Guichon, Gerrard, Reed, Lodder, Newell, and Solymosi, and BCfresh); and**

**11. Communications between Mr. Driediger and BCVMC commissioners about the CFP or Mastronardi agency applications (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and BCfresh);**

81. Hearing Counsel's explanation for his determination that document category 8 is not relevant is:

This relates to CFP Marketing Corporation's ("CFP") agency application. This evidence does not form part of the central allegations in Prokam's complaint or NOCC. This is in the nature of similar fact evidence and while admissible, is, in and of itself, marginally relevant at best and in any event relates to collateral issues.

82. Similarly, his explanation for his determination that document category 11 is not relevant is:

Documents concerning CFP's and MPL British Columbia Distributors Inc.'s ("MPL") applications are irrelevant to Prokam's allegations.

83. As a preliminary matter, as set out above in relation to Mr. Walsh's anticipated evidence, Hearing Counsel's reference to "similar fact evidence" is curious – Rule 24 of the *Rules of Procedure* provides that the strict rules of evidence used in a court of law to determine admissibility of evidence will not apply. Moreover, whether a document will ultimately be admissible in the hearing is not a determinative factor on whether it is as an initial matter required to be produced.

84. Apart from that, the main problem with Hearing Counsel's rationale in determining that document categories 8 and 11 are irrelevant is that he assessed and determined relevance with reference to Prokam's complaint or NOCC. As set out above, the question of whether a document or category of documents is relevant to the subject matter of this Supervisory Review must be determined with reference to the Terms of Reference, not Prokam's complaint or NOCC.



85. It is clear that documents in these categories “touch upon” the subject matter of paragraph 1 of the Terms of Reference, particularly subparagraphs 1(a) and 1(b). Accordingly, documents falling in these categories are relevant and must be produced.

**14. Agendas and minutes from Commission meetings in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi); and**

**15. E-mail correspondence in which the Hothi-Prokam-Three Star delivery allocation transfer was discussed (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi, and possibly BCfresh);**

86. Hearing Counsel’s rationale for determining that document categories 14-15 are irrelevant is:

The documents requested are, at best, marginally relevant to collateral issues in this supervisory review.

87. Document categories 14 and 15 reference an event in 2014 in which the Commission attempted to block Prokam from acquiring potato delivery allocation from Mr. Hothi by promulgating Amended Order No. 43. That Amending Order required that any transfers of delivery allocation in respect of a regulated product transfer to the transferee all of the transferor’s delivery allocation for the product for a delivery allocation period. Prokam’s agency at the time, Island Vegetable Cooperative Association (“IVCA”), appealed from Amending Order No. 43, alleging that its only purpose was to create a barrier for new entrants in favour of existing growers, and that it was enacted specifically to target Prokam. In 2015, BCFIRB allowed IVCA’s appeal and overturned Amending Order No. 43. The effect of Amending Order No. 43 and delay associated with the subsequent appeal was that Prokam obtained potato delivery allocation a year later than it otherwise would have.

88. In Prokam’s submission, document categories 14 and 15 related to the Hothi-Prokam-Three Star delivery allocation transfer “touch on” subparagraph 1(a) (“preventing the granting of additional production allocation to growers”) and paragraph 2 of the Terms of Reference. Thus, they are relevant to this Supervisory Review and ought to be ordered produced.

**16. Any communications, minutes, briefing notes, memoranda, notes, or other documents to which any member or employee of the Commission is a party regarding the promulgation of SOR-2020-259, and the process by which and the purpose for which it was promulgated (expected to be in the possession of the Commission, Messrs. Guichon, Reed, Newell, Lodder, Gerrard, and Solymosi).**

89. Hearing Counsel’s rationale for determining that document category 16 is irrelevant is, once again:

The documents requested are, at best, marginally relevant to collateral issues in this supervisory review.

90. *SOR-2020-259*, which came into force on December 23, 2020, amended the federal *British Columbia Vegetable Order* (the source of the Commission’s federally-delegated legislative authority), to eliminate the requirement for the Commission to register and gazette any orders requiring the exercise of its federally delegated legislative authority.
91. Heavily redacted documents Prokam obtained through a “freedom of information” request in 2021 indicate that the project that culminated in the amendments to the *Vegetable Order* was a joint effort between the Commission, BCFIRB, and the Farm Products Council of Canada that began no later, but possibly earlier, than September 2018 (just over one year after the Commission, in August 2017, purported to promulgate the export minimum pricing orders that BCFIRB later ruled were invalid). Mr. Solymosi is a party to some of the correspondence in the heavily redacted package of documents.
92. Documents falling in category 16 “touch on” the extent of the Commission’s and Messrs. Solymosi’s and Guichon’s knowledge that interprovincial regulation required the exercise of federally delegated legislative authority, and by when that knowledge may have been acquired. Accordingly, they are relevant to this Supervisory Review and ought to be ordered produced.

### **Conclusion on Document Production Application**

93. It is unclear and confusing to Prokam that Hearing Counsel would take such a circumscribed approach to the parties’ document production obligations, and such a narrow view of the matters that are relevant to the Supervisory Review according to the Terms of Reference. In Prokam’s submission, such an approach is antithetical to the investigative purpose of this Supervisory Review, which the Review Panel acknowledged in its June 14, 2021 decision on participant status:

29. Both Prokam and MPL have raised a concern that the Supervisory Review not compromise their rights in their Misfeasance Claims, focusing in particular on a lack of discovery rights in the Supervisory Review. Prokam asks the Review Panel to issue terms of reference or an order confirming that any fact finding in the Supervisory Review will be for the narrow purpose of the Supervisory Review and the participants will not be bound by it in the civil action. MPL raises a concern that the Supervisory Review not prejudice its civil claim in light of the Review Panel’s inability to award damages, a lack of discovery rights, and its inability to compel evidence in the Supervisory Review. It has requested a prehearing conference to determine how to best protect its rights and interests.

...

31. Concerns about a lack of discovery rights and the inability of the participants to compel evidence, however, are matters with which I am properly concerned. Indeed, I am mindful of the importance of crafting a fair process that is properly designed to get to the truth of the allegations of wrongdoing by commissioners and staff. To address the concerns raised

by MPL and Prokam, and to ensure the fairest possible process, it is appropriate for the rules of procedure to be designed with input from all participants.

[Emphasis added.]

94. Similarly, in its July 9, 2021 decision finalizing the *Rules of Procedure*, the Review Panel wrote:

6. I... do not accept that this supervisory review is properly seen as an adversarial process. As Hearing Counsel suggested at the pre-hearing conference, the rules of procedure are designed to balance the investigatory function of a supervisory review against the need for a very high degree of procedural fairness given the nature of the allegations being investigated.

7. This process should begin with background research and information gathering. Obtaining documents and information from individuals connected with the complainants to fully understand the scope of the allegations and concerns is an important initial step. This is particularly so given that the allegations at issue in this process are not fully particularized at this stage. Further disclosure of the basis of these very serious allegations to those whose conduct has been impugned is important to ensure an appropriate level of procedural fairness. In turn, obtaining documents and information from the Commission, its members and staff will allow Hearing Counsel, and ultimately the panel, to get to the truth of the allegations.

[Emphasis added.]

95. The manner in which the Review Panel sought to address concerns about the lack of discovery rights and the inability of parties to compel evidence in this Supervisory Review was to include in the *Rules of Procedure* broad powers for Hearing Counsel to compel document production and evidence. However, these measures only result in a fair process that has a chance of achieving its objectives and get at the truth of the matters raised in the Terms of Reference if Hearing Counsel is prepared to diligently and ardently exercise his powers.

#### **FURTHER AND BETTER DESCRIPTIONS OF THE COMMISSION'S DOCUMENTS**

96. It was counsel for the Commissioners who proposed in his June 25, 2021 written submission that any party claiming privilege over producible documents should be required to list and describe those documents in such a manner that would permit assessment of the validity of the privilege claim, similar to the requirement in 7-1(7) of the *Supreme Court Civil Rules*:

With respect to potentially privileged documents, the BCIFRB is best served if it is able to obtain all relevant documents. As a corollary of that principle, however, the rules should ensure that:

(a) Hearing Counsel are aware of all relevant documents, even if a party seeks to avoid their production;

(b) Hearing Counsel is able to assess the basis for any refusal to produce a document, including by requiring participants to (i) provide an explanation as to the basis for the refusal; (ii) provide sufficient detail for such claims to permit Hearing Counsel to make an informed decision as to whether to challenge that position; and/or (iii) produce such documents for inspection to assess any claims.

In that regard, R. 7-1 of the *Supreme Court Civil Rules* is informative. In particular, R. 7-1 provides that if a party claims that a document is privileged from production, it must state the ground of privilege and describe the document with sufficient detail to permit an assessment that claim. Where privilege is challenged, the court may inspect the document for the purpose of assessing the claim, with parties able to provide evidence to assist that assessment.

Messrs. Newell, Reed, Gerrard, Lodder and Guichon submit that similar provisions should be adopted here – *e.g.*: ...<sup>23</sup>

97. All other participants adopted this submission, and, except for the suggestion that the Review Panel could review a document to assess the claim of privilege over it, the Review Panel accepted this submission in its July 9, 2021 decision:

24. The participants all agree with a submission from Commission Members that the rules should make provision for the listing of privileged documents, and provide a process for the consideration of such claims by the Review Panel or its counsel. Prokam suggests that issues of privilege may well arise given knowledge of counsel for the Commission of certain gazetting requirements may be relevant.

98. The relevant Rules are Rules 4(c), 7, and 8:

4. Any participant, other than a Complainant Participant, who receives materials from Hearing Counsel pursuant to s. 2 shall, within fourteen (14) days of receiving those materials, provide to Hearing Counsel:

...

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<sup>23</sup> Letter from Ken McEwan, Q.C. dated June 25, 2021.

b. all relevant documents within the possession, control or power of the participant;

c. if it is claimed that any documents otherwise producible pursuant to s. 4(b) are privileged from production, a list of such documents with a statement of the grounds of the privilege that will enable Hearing Counsel to assess the validity of the claim of privilege; and

...

...

7. The nature of any record for which privilege from production is claimed must be described in a manner that, without revealing the information that is privileged, will permit a preliminary assessment of the validity of the claim for privilege.

8. Hearing counsel is at liberty to seek an order from the Review Panel that a document over which privilege is claimed must be produced. On such application, the onus is on the participant who claims privilege for a document to show that the circumstances and the nature of the document are such as to require the grant of privilege to them.

99. In our January 5, 2022 correspondence, we raised with Hearing Counsel the fact that the descriptions in the Commission's list of documents (produced to Prokam on December 24, 2021) of documents over which privilege is claimed do not comply with Rule 7. These descriptions include "Bundle of Records", "Bundle of unredacted records"; "Unredacted record"; and "Bundle of unredacted minutes".
100. Hearing Counsel did not address this issue in his response letter to us dated January 13, 2022, so it is unknown whether he intends to exercise his right pursuant to Rule 8 to apply to the Review Panel for an Order compelling production of these documents.
101. In any event, Prokam is raising with the Review Panel, pursuant to Rule 36, the Commission's non-compliance with Rule 7 for the Review Panel to deal with as it sees fit. Prokam makes no submission on whether a sanction is appropriate. However, in Prokam's submission, the limited amount of time remaining between now and the hearing is insufficient to allow for
- (a) the Commission to provided an amended list with proper descriptions of the documents,
  - (b) hearing of an application regarding the Commission's privilege claims,
  - (c) production by the Commission of any documents found not to be privileged,

- (d) the follow-up investigation ensuing from that production by Hearing Counsel that is contemplated by Rule 5, and
- (e) use of those documents and any further fruits of investigation for preparation for the hearing.

Accordingly, the Commission's failure to comply with Rule 7 in a timely manner is part of the basis on which Prokam is seeking an adjournment of the hearing of this Supervisory Review.

### **BCFRESH'S NON-COMPLIANCE WITH ITS DOCUMENT PRODUCTION OBLIGATION**

- 102. BCfresh applied for and was granted full participant status in this Supervisory Review. Together with the rights afforded to participants, come the obligations and responsibilities of non-complainant participants, and BCfresh is required to comply with those obligations.
- 103. On December 24, 2021, Prokam learned that BCfresh has not produced a single document in this Supervisory Review, despite the fact that several documents that are relevant to the subject matter of this Supervisory Review (including those that have been produced by the other parties) are also in the possession of BCfresh.
- 104. A substantial component of the Review Panel's rationale for granting BCfresh participant status was the resultant availability to the Review Panel of BCfresh's documents:

7. 7. ...Many of the allegations at issue in the Supervisory Review relate to the commissioners' alleged intention to benefit themselves and BCFresh, as well as BCFresh's dominant position and influence. Allowing BCFresh participation rights will also ensure that I have access to its evidence and documents, which will assist me in deciding the issues. BCFresh is therefore granted participant status. [Emphasis added.]

BCfresh's complete failure to comply with its document production obligation has undermined the basis on which it was granted participant status, and – with only two weeks until the hearing is scheduled to begin – ha jeopardized the parties' ability to proceed with a procedurally fair hearing on the dates currently scheduled.

- 105. We acknowledge that in his correspondence of January 12, 2022, Hearing Counsel advised he will "request that BC Fresh produce all relevant documents forthwith". However, the letter that Hearing Counsel delivered to counsel for BCfresh on January 13, 2022 did not request that BCfresh produce all relevant documents in its possession. Rather, Hearing Counsel's letter only requested that BCfresh produce documents in its possession falling within document categories 9 and 10 identified by Prokam.
- 106. We are raising BCfresh's non-compliance with its document production obligation with the Review Panel pursuant to Rule 36. Prokam makes no submission on whether a sanction is appropriate. However, in Prokam's submission, the limited amount of time remaining between now and the hearing is insufficient to allow for

- (a) document production by BCfresh,
- (b) any applications for additional document production from BCfresh that other participants might bring,
- (c) the follow-up investigation by Hearing Counsel ensuing from that production that is contemplated by Rule 5, and
- (d) use of those documents and any further fruits of investigation for preparation for the hearing.

Accordingly, BCfresh's failure to produce documents in a timely manner is part of the basis on which Prokam is seeking an adjournment of the hearing of this Supervisory Review.

**ADJOURNMENT APPLICATION**

107. In Prokam's submission, the investigation into the subject matter of this Supervisory Review is far from complete. As is clear from all of the foregoing, there is very little hope of this Supervisory Review being ready for hearing commencing January 31, 2022. There is simply too much that has not yet been done, but needs to be done, between now and the hearing of this Supervisory Review by way of witness interviews, initial document production from BCfresh, additional document production from the other non-complainant participants, any applications ensuing from that document production, and preparation for the hearing on the basis of what will hopefully become a complete record.
108. If the hearing of this Supervisory Review proceeds on the basis of the incomplete investigation conducted to date and the incomplete record based on the deficient document production that has occurred to date, there is very little chance that this Supervisory Review has any hope at fulfilling its truth-seeking purpose with respect to the subject matter as defined in the Terms of Reference, or its objective to "ensur[e] public confidence in the integrity of the regulation of the BC regulated vegetable sector".<sup>24</sup>
109. Accordingly, Prokam reluctantly submits that procedural fairness requires that the hearing scheduled to begin on January 31, 2022 must be adjourned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 17/JAN/2022



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

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<sup>24</sup> Final Terms of Reference dated June 18, 2021.

**APPENDIX A: Chronology of Events Relevant to Investigation**

<b>Event</b>	<b>Date</b>	<b>Time Elapsed since Last Step Taken</b>
2021-05-26	BCFIRB issues notice of supervisory review, inviting applications for leave to participate and submissions on the initial terms of reference and interim orders	-
2021-06-04	Parties submit applications for participant status and submissions on the initial terms of reference and interim orders	9 days
2021-06-14	BCFIRB renders decision on participation in the supervisory review, invites submissions on rules of procedure, and schedules pre-hearing conference	10 days
2021-06-18	BCIFRB renders decision amending and finalizing terms of reference and inviting submissions on draft rules of procedure	4 days
2021-06-25	The participants make written submissions on the proposed interim orders and draft rules of procedure	7 days
2021-06-30	The participants attend at the pre-hearing conference and make oral submissions on the proposed interim orders and draft rules of procedure	5 days



<b>Event</b>	<b>Date</b>	<b>Time Elapsed since Last Step Taken</b>
2021-07-09	BCFIRB renders decisions on interim orders and final rules of procedure. The decision triggers the two-week timeframe within which Prokam and other complainant participants must deliver to Hearing Counsel their witness lists and relevant documents.	9 days
2021-07-23	Prokam delivers list of documents, list of witness with will-says, and cover letter	14 days
2021-08-30	Hearing counsel interviews Bob Dhillon and Bob Gill	38 days
2021-09-10	Hearing counsel writes to BCFIRB recommending that Review Panel seeks submissions on Hearing Counsel's adjournment request	11 days
2021-09-15	The participants make submissions on the adjournment request	5 days
2021-09-16	BCFIRB adjourns hearing to January 31, 2022	1 day
2021-09-24	Hearing counsel writes to the participants regarding the investigation schedule.	8 days
2021-11-29	Hearing counsel interviews Mr. Solymosi	66 days
2021-12-8 to 2021-12-14	Hearing counsel interviews Messrs Meyer, Driediger, Lodder, Guichon, Gerrard, Newell, Reed and Collins	9 days

<b>Event</b>	<b>Date</b>	<b>Time Elapsed since Last Step Taken</b>
2021-12-24	Hearing counsel provides complainant participants with documents produced by the non-complainant participants and summaries of witness interviews	10 days
2022-01-05	BCFIRB writes to parties regarding pre-hearing submission schedule; Prokam writes to Hearing Counsel regarding the conduct of his investigation and document production issues	12 days
2022-01-12	Hearing counsel replies to Prokam's letter regarding the conduct of his investigation and document production issues	7 days

# Hunter Litigation Chambers

KAARDAL/SMART/STEPHENS/OULTON/OLTHUIS/HUNTER

July 23, 2021

File No: 3031.003

**BY EMAIL - nmitha@harrisco.com**

Harris & Company LLP  
14th Floor, 550 Burrard Street  
Vancouver, BC V6C 2B5

**Attention: Nazeer Mitha, Q.C.**

Dear Sirs/Mesdames:

**Re: Vegetable Supervisory Review**

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Pursuant to the Rules of Practice and Procedure, on behalf of Prokam Enterprises Ltd. (“Prokam”), we enclose a list of the names and addresses (if known) of all witnesses we are aware of to date who ought to be heard, together with a statement of the evidence the witness is able to provide at the oral hearing. We also enclose the initial production of relevant documents within the possession, control or power of Prokam.

The purpose of this letter is to provide context for the proposed witnesses and to assist in navigating Prokam’s document production.

The final terms of reference provide as follows:

The Supervisory Review will consider the following allegations, which form the terms of reference for the supervisory review:

1. The Commission’s exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self-interest of members of the Commission, including:
  - a. Self-interested prevention of new agencies from entering the British Columbia market to further the Commission members’ economic interests, by both failing to adjudicate agency licence applications, and preventing the granting of additional production allocation to growers thought to be aligned with applicants;
  - b. Collusion by members to “vote swap” on agency applications; and,
  - c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest.

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PRACTICE CONDUCTED THROUGH A LAW CORPORATION

2. Commission members and staff exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

We understand that, while not identical to allegations made by any party, the terms of reference of the supervisory review were derived with reference to certain of the allegations in the notices of civil claim filed by us on behalf of Prokam in Vancouver Registry No. S-212980 (the “Prokam Claim”) and by Dentons on behalf of MPL British Columbia Distributors Inc. in Vancouver Registry No. S- 214043 (the “Mastronardi Claim”). In gathering evidence and preparing this letter, we have focussed on the general subject matter of the allegations set out in the Prokam Claim that appear to overlap in some part with the terms of reference of the supervisory review. We have also included evidence we are aware relating to the aspects of the terms of reference that appear to overlap to some extent with the allegations in the Mastronardi Claim.

In general, the evidence relates to four main topic areas:

- (i) The state of the actual or constructive knowledge of former Messrs Guichon and Solymosi of the requirement that the Commission “gazette” and register orders in order to validly regulate interprovincial trade;
- (ii) Evidence that Mr. Solymosi’s investigation of Prokam was motivated by and carried out with the improper purpose of creating an evidentiary record consistent with his predetermination that Prokam was a “rogue producer”;
- (iii) Evidence that Mr. Guichon was motivated by personal self-interest or the interests of BCfresh or its growers in participating in decisions adverse to Prokam; and
- (iv) BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of a second lower mainland storage crop agency.

The first three areas relate to the Prokam Claim, while the fourth area relates to the terms of reference and perhaps the Mastronardi Claim, but not the Prokam Claim.

Given the constraints of time to prepare these materials (including the timing coinciding with other court commitments and summer vacation schedules) and the early stage of proceedings in the Prokam Claim<sup>1</sup>, Prokam is still in the process of collecting and reviewing documents and identifying and seeking to interview witnesses who may have relevant evidence to give at

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<sup>1</sup> As of the date of this letter, Prokam has inquired of counsel for Mr. Solymosi and Mr. Guichon as to whether they are authorized to accept service. Mr. Solymosi’s counsel has accepted service as of July 20, 2021. Mr. Guichon’s counsel has not yet advised whether he is instructed to accept service. Neither defendant has filed a response to civil claim, no lists of documents have been exchanged, and no examinations for discovery of any party have been conducted in the Prokam Claim.

the oral hearing. As contemplated by the Rules of Practice and Procedure, we intend to supplement our document production on a rolling basis as additional documents are identified and may supplement the list of witnesses following production of documents by the other participants.

Given the volume of materials, we have attempted below to identify to which of the four topics listed above the documents and each witness' anticipated evidence relates. The book of documents includes an expanded index referencing key documents under each tab, and the witness will-say statements identify key documents in connection with each potential witness. In addition to the transcripts from the 2018 BCFIRB hearing and an earlier BCFIRB hearing relating to Amending Order 43, we have included in our document the lengthy (163 page) memorandum of argument filed by Prokam and Thomas Fresh at the conclusion of the 2018 hearing. The detailed index to that submission is hyperlinked to the submission itself and may be a helpful place to start for a summary of the evidence at that hearing on certain of the topics that overlap with this supervisory committee's terms of reference.

### ***The Prokam Claim***

The Prokam Claim is brought against Mr. Guichon (long-time former vice chair of the BC Vegetable Marketing Commission ("BCVMC") and current chair of BCfresh Inc ("BCfresh")) and Mr. Solymosi (current general manager of the BCVMC). Prokam's claim alleges misfeasance in public office in the investigation leading to and issuance of the cease and desist orders against Prokam, IVCA and Thomas Fresh in the fall of 2017 and subsequent direction of Prokam to market through BCfresh following a written show cause process. The basis for the cease and desist orders was the interprovincial sale (to Thomas Fresh offices in Alberta and Saskatchewan) of Prokam potatoes at a price below the "export minimum prices" the Commission had purported to set pursuant to their provincially granted authority.<sup>2</sup>

The Commission's decisions in this regard were the subject of an appeal before the BC Farm Industry Review Board ("BCFIRB") in the spring of 2018. On February 28, 2019, Prokam's appeal was allowed and the matter was remitted to the BCVMC for reconsideration, including on the question of whether Mr. Guichon's role as both vice chair of the Commission and chair and a shareholder of BCfresh gave rise to a reasonable apprehension of bias (see para. 60). BCFIRB found that the Commission was not authorized to set minimum price for interprovincial exports pursuant to their provincial authority. While the Commission 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*, "in order to actually avail itself of this authority under the federal legislation, the Commission

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<sup>2</sup> BCFIRB in its Feb. 28, 2019 decision described the December decision under appeal as follows: "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"" (para. 30).

is required to comply with the Statutory Instruments Act”. That would require 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’”, which the Commission had not done in respect of any of the orders relating to minimum pricing which the Commission sought to enforce against Prokam and Thomas Fresh through the cease and desist orders (paras. 47-48). With respect to Mr. Solymosi’s investigation leading to the case and desist orders against Prokam and Thomas Fresh, BCFIRB concluded 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” and remitted to the BCVMC the question of whether any compliance or remedial action was necessary in relation to IVCA.

***Issue 1: The state of the actual or constructive knowledge of Messrs Guichon and Solymosi of the requirement that the Commission “gazette” and register orders in order to validly regulate interprovincial trade***


One aspect of the Prokam Claim against Messrs. Guichon and Solymosi relates to the state of their knowledge of (i) the gazetting and registration requirements with respect to the regulation of interprovincial vegetable sales, including the setting of export prices; and (ii) the consequent lack of any lawful basis for the resulting enforcement action, including the issuance of the 2017 cease and desist orders, and the punitive actions taken towards Prokam, including the direction to BCfresh, that resulted (see e.g. Notice of Civil Claim at paras. 12-13, 54, 65).

The following witnesses on Prokam’s witness list are anticipated to have evidence relevant to this issue:

1. George Leroux (former BCVMC chair)
2. Robert Hrabinsky<sup>3</sup> (BCVMC counsel)
3. Jim Collins (former BCFIRB executive director)
4. Tom Demma (former BCVMC general manager)
5. Alf Krause (former BCVMC chair)
6. David Taylor (former BCVMC chair)

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<sup>3</sup> Mr. Hrabinsky is current counsel for the BCVMC and there will be a preliminary issue relating to whether there was and if so the scope of any privilege waiver by the BCVMC, including arising from Mr. Hrabinsky’s attendance and testimony as a representative of the Commission the Standing Joint Committee for Scrutiny of Regulations in March 2008 [Prokam LOD, Tab 21]. There is also potential for waiver to the extent the Commission has already relied or may in the future rely on Mr. Hrabinsky’s historical advice on this issue as a basis to resist a finding of actual or constructive knowledge of the requirements, including in connection with this Supervisory Review or the Prokam Claim.

- 
7. John Walsh
  8. Peter Guichon
  9. Andre Solymosi

Prokam led evidence at the 2018 BCFIRB hearing that the fact that the Commission was required to comply with the *Statutory Instruments Act* in exercising its authority to regulate interprovincial trade had arisen previously in late 2007 and early 2008 when representatives of the Commission (then-chair of BCVMC, George Leroux and counsel, Robert Hrabinsky) appeared as witnesses and gave evidence before the Standing Joint Committee for the Scrutiny of Regulations. The transcript records that Jim Collins, then general manager of BCFIRB, was also in attendance and had corresponded with the Standing Committee on this issue. In late 2007 and early 2008, Mr. Guichon was a Commissioner and Mr. Solymosi was on staff at the BCVMC.

The transcript records Mr. Leroux having stated that the BCVMC was aware “since April 2006, when we were advised by the National Farm Products Council” that orders must be registered.<sup>4</sup> Mr. Hrabinsky characterized the failure to gazette and register the interprovincial levy orders as a “vulnerability to challenge” and said that although “[w]e 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”. Nonetheless, Mr. Hrabinsky characterized the failure to comply with the gazetting and registration requirements as a “very serious problem that needs to be addressed”.<sup>5</sup>

Mr. Guichon and Mr. Solymosi were both called as witnesses during the 2018 BCFIRB hearing but Prokam was not permitted to question them about their state of knowledge of legal requirements applicable to the Commission, including the gazetting and registration requirements.<sup>6</sup> Documents suggest that in addition to 2006-2008 discussions, the

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<sup>4</sup> Standing Joint Committee for Scrutiny of Regulations, Transcript of March 13, 2008 at p. 14 [Prokam LOD, Tab 21]

<sup>5</sup> Standing Joint Committee for Scrutiny of Regulations, Transcript of March 13, 2008 at p. 17 [Prokam LOD, Tab 21]

<sup>6</sup> On April 4, 2018, during cross examination of Mr. Guichon the BCFIRB panel sustained an objection to Mr. Guichon being asked about his knowledge of the Commission’s statutory authority (April 4, 2018, BCFIRB hearing transcript at p. 82, line 21 - p. 85, line 11 [Prokam LOD, Tab 6]). The Commission subsequently objected to Mr. Guichon being asked about proceedings before the Standing Joint Committee for Scrutiny of Regulations and the BCFIRB panel heard submissions on the issue (April 4, 2018, BCFIRB hearing transcript at p. 85, line 14 - p. 102, line 11 [Prokam LOD, Tab 6]). After reserving overnight, the BCFIRB panel ruled that the parliamentary proceedings could not be put to witnesses but could be the subject of submissions (April 5, 2018 BCFIRB hearing transcript at p. 1, line 6 - .p.2, line 24 [Prokam LOD, Tab 7])

Commissioners and Mr. Solymosi may have been again alerted in August 2017 to concerns about their purported exercise of authority to regulate exports, just a few weeks prior to the issuance of the cease and desist orders in October 2017.<sup>7</sup>

Records obtained through a freedom of information request to BCFIRB indicate that, as of September, 2018, the Commission was already corresponding with the Farm Products Council of Canada to remove language in the federal regulation that required that orders be gazetted; it is not clear from the documents produced by BCFIRB when correspondence between the Commission and the Farm Products Council of Canada on that subject began.<sup>8</sup>

In its February 2019 decision, BCFIRB found that the issue of the gazettement and registration requirements of the *Statutory Instruments Act* “has been known to the Commission at least since 2008 when similar provisions were subject to considerable attention at the parliamentary committee” (para. 49).

Mr. Leroux is anticipated to testify that Mr. Guichon attended meetings of the Commission at which the gazettement and registration requirements were discussed and that it was well known to all members of the Commission and Commission staff that the Commission could only regulate interprovincial trade through properly gazetted federal orders. The will-says and documents disclose a number of clear gaps in the documentary evidence on this issue in Prokam’s possession or control that might be the subject of additional requests for production from other participants in this Supervisory Review, including:

- a. board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies;
- b. BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a “fairly comprehensive chronology of events with supporting documents”;
- c. Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting; and
- d. Correspondence between the National Farm Products Council and the BCVMC with respect to the gazettement and registration requirements for interprovincial orders.

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<sup>7</sup> August 11, 2017 draft letter from John Walsh to the Commissioners and Mr. Solymosi indicating that Mr. Solymosi has been “made aware on August 9, 2017” that Mr. Walsh had contacted BCFIRB with concerns regarding BCVMC’s “authority in initiating a new minimum price set for producer exports” and outlining concerns about BCfresh’s influence over BCVMC [Prokam LOD, Tab 25].

<sup>8</sup> See Prokam LOD, Tab 23.



***Issue 2: Evidence that Mr. Solymosi’s investigation of Prokam was motivated by and carried out with the improper purpose of creating an evidentiary record consistent with his predetermination that Prokam was a “rogue producer”***

The Prokam Claim alleges that in conducting the investigation that led to the issuance of the cease and desist orders, Mr. Solymosi’s object was not to determine in good faith whether there had been a violation of the export minimum pricing orders of the Commission, but rather that “Mr. Solymosi had predetermined at the time he commenced the investigation that [Prokam] was a ‘rogue producer’ that needed to be punished (para. 63). The Prokam Claim also alleges that Mr. Solymosi committed unlawful breaches of procedural fairness by failing to afford Prokam the same right as other industry participants to be heard and to contribute to the evidentiary record in his investigation (para. 64).

Mr. Solymosi gave evidence at the 2018 BCFIRB hearing about his investigation and decision to issue the cease and desist orders, which is summarized in the Memorandum of Argument (see e.g. paras. 164-190). The term “rogue producer” comes from an email that Mr. Solymosi wrote to Brian Meyer (then general manager of IVCA) on September 27, 2017 – the first day of Mr. Solymosi’s investigation – in which he requests documents “to protect IVCA from the actions being taken by a rogue producer under IVCA control” and advises Mr. Meyer that “As long as we are honest and upfront, work together in support of the orderly marketing system and request assistance when needed, your [IVCA’s] agency license is protected”.<sup>9</sup>

Mr. Solymosi’s evidence was clear that at the outset of the investigation he had decided to solicit the cooperation of IVCA and conceal this fact from Prokam.<sup>10</sup> The evidence of Bob Dhillon (the principal of Prokam) was that he in fact was unaware of the investigation until Prokam received the cease and desist order. Mr. Solymosi held meetings with IVCA, *ex parte* to Prokam and Thomas Fresh, for the express purpose of gathering evidence to support issuing the cease and desist orders to Prokam and Thomas Fresh. Mr. Solymosi’s evidence was that he intentionally omitted to extend this same opportunity to Prokam (and Thomas Fresh).<sup>11</sup>

Mr. Solymosi drafted the cease and desist orders to Prokam, Thomas Fresh, and IVCA and issued them after consulting only with then BCVMC chair Alf Krause and Mr. Guichon,<sup>12</sup> and

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<sup>9</sup> Memorandum of Argument at para. 171 and 383, Exhibit 2B from 2018 hearing, BCVMC-0797 [Prokam LOD, Tab 3]

<sup>10</sup> Memorandum of Argument at para. 397, May 23, 2018 Transcript of BCFIRB hearing at p. 152, line 29-40 [Prokam LOD, Tab 9]

<sup>11</sup> Memorandum of Argument at para. 399; May 22, Transcript of BCFIRB hearing at p. 98:31 – p. 99:11 [Prokam LOD, Tab 8].

<sup>12</sup> See e.g. Exhibit 1A, BCVMC-0058 [Prokam LOD Tab 1] and Memorandum of Argument at para. 105

after providing IVCA general manager Brian Meyer with opportunities to review and comment on the cease and desist orders in draft.<sup>13</sup>

There was also evidence at the 2018 BCFIRB hearing about a November 7, 2017 meeting of the storage crop agency managers (Murray Driediger, Brian Meyer, Lillian Posch, Jaymie Collins, and Shelly Harris) at which the cease and desist orders were discussed, after they were issued but prior to the December 2017 show cause hearing. Mr. Solymosi's notes describe Prokam as a "problem grower". From the meeting ensued a joint letter signed by all of the agency managers, including Mr. Meyer. The letter referred to "bad actors seeking to destroy the system for their own personal benefit", which Mr. Solymosi admitted in his evidence he understood to be a reference to Prokam and Thomas Fresh.<sup>14</sup> The November 10, 2017 agency managers letter was provided to the Commission for its consideration, but was not disclosed to Prokam until long after the December 22, 2017 decision and the January 2018 reconsideration decision, denying Prokam the opportunity to meet and be heard with respect to the allegations the letter contains.<sup>15</sup>

The following witnesses are anticipated to have relevant evidence with respect to this topic.

1. Bob Dhillon
2. Brian Meyer
3. Terry Michell
4. Lillian Posch
5. Jaymie Collins
6. Shelly Harris
7. John Walsh
8. Murray Driediger
9. Andre Solymosi
10. Alf Krause

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<sup>13</sup> Documents Produced by the Commission after May 24, 2018, Exhibit 10, Tabs 4 through 7 [Prokam LOD Tab 12]

<sup>14</sup> Memorandum of Argument at para. 183, Exhibit 1B, BCVMC-0910 [Prokam LOD Tab 3]

<sup>15</sup> Memorandum of Argument at para. 402

## 11. Peter Guichon

***Issue 3: Evidence that Mr. Guichon was motivated by personal self-interest or the interests of other BC fresh growers in participating in decisions adverse to Prokam***

The Prokam Claim alleges that in approving the cease and desist orders and participating to various degrees in the subsequent show cause and variation decisions, Mr. Guichon exercised his power in bad faith and for improper purposes - to protect and advance his own economic interests as a BCfresh grower and shareholder and the economic interests of his fellow BCfresh growers, and to harm the economic interests of the plaintiff (see e.g. para. 53, 56, 59).

The issue of Mr. Guichon's potential for conflict as Vice Chair of the Commission, chair of BCfresh, and a BCfresh grower and shareholder was canvassed in Prokam and Thomas Fresh's Memorandum of Argument<sup>16</sup> and BCFIRB's February 28, 2019 decision as noted above.

The issue of Mr. Guichon's having been motivated by personal self-interest or the interests of BCfresh growers arose in the context of his evidence at the 2018 BCFIRB hearing. When asked about the reason for the urgency in issuing the October 2017 cease and desist orders, Mr. Guichon volunteered that it was the concerns he had in his capacity as a *BCfresh grower* that drove his decision to approve, as a Commissioner, the cease and desist orders:

A 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.

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<sup>16</sup> See e.g. Memorandum of Argument at para. 105-121

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 -- 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.<sup>17</sup>

BCfresh was involved in the 2018 BCFIRB hearing, but only as an intervener, meaning it did not have a general document production obligation above and beyond documents that it wished to rely on at the BCFIRB appeal. One obvious gap in document production on this issue to date is that there was no document production of correspondence between Mr. Guichon and other BCfresh Commissioners and/or other BCfresh growers about the decisions involving Prokam.

***Issue 4: BCfresh commissioners were motivated by self-interest in seeking to avoid or delay the licensing of new entrant potato growers and/or a second lower mainland storage crop agency***

The final issue is not the subject of the Prokam Claim but is captured by the terms of reference and accordingly Prokam has included documents and witnesses relevant to this issue in this initial production and witness list. The following witnesses are anticipated to have evidence on this topic:

1. Bob Dhillon
2. John Walsh
3. George Leroux
4. Tom Pollock

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<sup>17</sup> April 5, 2018 BCFIRB hearing transcript 65:35 – 66:29 [Prokam LOD, Tab 7].

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5. Jim Shiell
  6. Jeaven Hothi
  7. Bill Zylmans
  8. Andre Solymosi
  9. Peter Guichon
  10. Murray Driediger

The documents and witnesses on this topic relate to the control exerted by BCfresh over the Commission. That includes general resistance – dating back to the break-up of BC Hot House on the greenhouse side – of BCfresh and of the Commission to a second lower mainland storage crop agency, as well as BCfresh and Commission resistance to permitting Prokam to enter the industry as a new entrant potato grower who would grow for IVCA. The latter precipitated a BCFIRB hearing relating to Amending Order 43, which IVCA successfully challenged.

While we are also counsel to CFP, we have not included in this initial production documents or witnesses relating to the failure of the Commission to consider the merits of CFP's agency application.

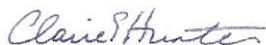
Given that this topic was not the subject of the 2018 BCFIRB appeal and our review of documents is ongoing, it is anticipated that additional documents and/or witnesses may be identified on this topic.

We would be pleased to discuss any of the above with you as appropriate if it would assist in your investigation of this matter.

Yours truly,

Hunter Litigation Chambers

Per:



Claire E. Hunter, QC

CEH/kmm

Encl witness list, will say statements and list of documents.

cc: Wanda Gorsuch- Wanda.Gorsuch@gov.bc.ca

## APPENDIX C: WILL-SAYS OF EIGHT WITNESSES PROKAM SEEKS LEAVE TO CALL

Jim Collins Will-Say

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1. Prokam has been unable to speak with Jim Collins in connection with the evidence he may have to offer to the Supervisory Panel. However we expect he will have the following material evidence.
2. Mr. Collins has a long history of experience in regulated marketing. He was formerly the Executive Director of BCFIRB for many years, retiring from that position in June 2016. He is currently the Chair of the Broiler Egg Hatching Commission and a director of the Island Vegetable Cooperative Association.
3. Mr. Collins evidently submitted a letter to the Standing Joint Committee for the Scrutiny of Regulations in 2008, in relation to the Committee's examination of why the BC Vegetable Marketing Commission was purporting to collect levies in relation to interprovincial transactions without a properly gazetted federal order. Prokam and CFP have not seen this letter.
4. Mr. Collins' letter is indicated by Mr. Leroux to discuss the delegated federal authority pursuant to which the Commission can regulate interprovincial transactions. Mr. Collins' letter is also indicated to recommend that a new federal *British Columbia Vegetable Order* be promulgated that exempts the Commission from the requirements of the *Statutory Instruments Act*, and retroactively validate all orders the Commission has made since 1981 that relied in part on federally delegated authority.
5. Mr. Collins is indicated to have attended the March 13, 2008 session of the Standing Joint Committee and may have evidence to give that is relevant to that.
6. Mr. Collins may have evidence related to the efforts that resulted in the promulgation and registration of the *British Columbia Vegetable Marketing Levies Order* on August 14, 2008. He may also have evidence related to amendments to the *Levies Order* that were registered in 2009 and 2010.
7. Mr. Collins may have evidence based on his experience during his lengthy tenure with BCFIRB related to the market dominance of BCfresh in the storage crop sector, problems with the structure of the Commission, and the close link between BCfresh and the Commission.

8. Mr. Collins was appointed as an independent director of IVCA as part of a consent resolution between the Commission and IVCA of IVCA's appeal from the Commission's November 18, 2019 reconsideration decision. He may have evidence to give that is material to that.

#### Key Documents

- Transcript of March 13, 2008 meeting of the Standing Joint Committee for the Scrutiny of Regulations.<sup>1</sup>

#### Potential additional relevant documents

- Board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies
- BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a "fairly comprehensive chronology of events with supporting documents"
- Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting
- Correspondence between the National Farm Products Council and the BCVMC with respect to the gazetting and registration requirements for interprovincial orders
- Correspondence between Jim Collins and the Commission regarding the Commission's exercise of federally delegated authority

#### Relevant issues

- State of knowledge of Messrs. Guichon and Solymosi of the Registration and Gazetting Requirements (see para. 12-13 of Notice of Civil Claim)

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<sup>1</sup> Prokam LOD Tab 23

## Tom Demma Will-Say

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1. Prokam has been unable to speak with Tom Demma in connection with the evidence he may have to offer to the Supervisory Panel. However, we expect he will have the following material evidence.
2. Mr. Demma became general manager of the Commission in or around 2005 and stayed on in that post for roughly ten years. He took over the position of general manager from Murray Driediger, who would soon become CEO and President of BCfresh.
3. Mr. Demma was the general manager of the Commission at the time in 2008 when Chair George Leroux and Commission counsel Mr. Hrabinsky were asked to appear before the Joint Standing Committee for the Scrutiny of Regulations in March 2008.
4. Mr. Demma may have evidence regarding whether the fact that the Commission could only regulate interprovincial trade, including by setting prices, through properly gazetted federal orders was openly discussed at meetings of the Commission at which Mr. Guichon was in attendance, and whether that fact was known to all members of the Commission, including Mr. Guichon, as well as Commission staff.
5. Mr. Demma may have evidence regarding the degree of cooperation between the Commission and BCfresh to maintain BCfresh's dominant market position.

### Key Documents

- Transcript of March 13, 2008 meeting of the Standing Joint Committee for the Scrutiny of Regulations<sup>1</sup>

### Potential additional relevant documents

- board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies
- BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a "fairly comprehensive chronology of events with supporting documents"

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<sup>1</sup> Prokam LOD Tab 23



- Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting
- Correspondence between the National Farm Products Council and the BCVMC with respect to the gazetting and registration requirements for interprovincial orders

Relevant issues

- State of knowledge of Messrs. Guichon and Solymosi of the Registration and Gazetting Requirements

## Jeaven Hothi Will-Say

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1. Prokam has been unable to speak with Jeaven Hothi in connection with the evidence he may have to offer to the Supervisory Panel. However we expect he will have the following material evidence.
2. Jeaven Hothi is the principal of Three Star Farms, a producer licensee and member of the Island Vegetable Cooperative Association.
3. Mr. Hothi may testify to learning how to farm by working on his father Santokh Hothi's farm since the 1980s. He may testify to some historical problems his father had with his agency, BCfresh, that led to his father transferring to IVCA in 2010 after the abolishment of geographical districts.
4. Mr. Hothi may testify regarding his attempt in 2014 to purchase some of Hothi Farm's potato delivery allocation, which the Commission unsuccessfully attempted to block by amending its general order through Amending Order 43. He may also testify to feeling unfairly targeted by the Commission and BCfresh since entering the regulated vegetable industry in his own right.
5. Mr. Hothi may have evidence regarding the degree of cooperation he witnessed between BCfresh and the Commission in order to maintain BCfresh's dominant market position.

### Key Documents

- Amending Order 43 Appeal Transcripts

### Relevant issues

- BCfresh and Commission cooperation to protect BCfresh market dominance
- BCfresh Commissioners motivated by self-interest to block new entrants

Alf Krause Will-Say

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1. Prokam has been unable to speak with Alf Krause in connection with the evidence he may have to offer to the Supervisory Panel. However we expect he will have the following material evidence.
2. Mr. Krause was the Chair of the Commission at the time the cease and desist orders were issued in October 2017, and at the time the decision of the Commission was made in December 2017.
3. Mr. Krause was one of the two Commissioners (along with Peter Guichon) who made the decision to issue the cease and desist orders.<sup>1</sup> He will have evidence regarding an October 3, 2017 meeting he and Mr. Solymosi had with IVCA representatives for the purpose of gathering evidence against Prokam and Thomas Fresh,<sup>2</sup> and an October 5, 2017 conference call he had with Messrs. Solymosi and Guichon to discuss draft cease and desist orders.<sup>3</sup>
4. Mr. Guichon's evidence in the 2018 appeals was that he asked Mr. Krause whether it was alright for Mr. Guichon to be participating in decisions regarding enforcement against Prokam, IVCA, and Thomas Fresh, and Mr. Krause advised that it was fine.<sup>4</sup> Mr. Krause may therefore be in a position to corroborate this discussion, and may also have evidence relevant to the purpose for which Mr. Guichon authorized the issuance of the cease and desist orders, and any discussion that took place regarding the export minimum pricing orders that underpinned the cease and desist orders.
5. Mr. Krause also participated in the December 22, 2017 decision sanctioning Prokam and Thomas Fresh and directing Prokam to BCfresh,<sup>5</sup> and the January 30, 2018 decision to confirm Prokam's direction to BCfresh, and may have evidence relevant to the discussions with BCfresh Commissioners that preceded the making of those decisions.

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<sup>1</sup> 2018 Appeal, April 5, 56:8-15 (Peter Guichon) [Prokam LOD Tab 7].

<sup>2</sup> 2018 Appeal, May 22, 58:25 – 59:42 (Andre Solymosi)v[Prokam LOD Tab 8].

<sup>3</sup> 2018 Appeal, April 5, 56:8-15 (Peter Guichon) [Prokam LOD Tab 7].

<sup>4</sup> 2018 Appeal, April 5, 54:44 – 55:15 (Peter Guichon) [Prokam LOD Tab 7].

<sup>5</sup> Minutes of December 14, 2017 BCVMC meeting: Respondent's Supplemental Book, Exhibit 1B, BCVMC-1035-1043 [Prokam LOD Tab 3].

Key Documents

- Mr. Solymosi's notes of October 3, 2017 meeting (Respondents' supplemental book, BCVMC-0802)
- 2018 BCFIRB Appeal Transcripts
- July 27, 2017 Memorandum of Argument of Prokam and Thomas Fresh

Relevant issues

- Cease and desist orders
- Mr. Solymosi's 2017 Investigation of Prokam and Thomas Fresh
- December 22, 2017 decision and related deliberations

## George Leroux Will-Say

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1. George Leroux was born in Vancouver and grew up on farms in the Fraser Valley.
2. Mr. Leroux attended UBC, U of S, and Ivey Business School (UWO) in the 1970s and 1980s, focussing on agriculture, ecology, rangeland management, plant genetics, and forestry.
3. Mr. Leroux has been involved in the regulated agricultural commodities sector since the late 1980s when he joined an agri-food business dealing with turkeys, hogs, corn, wheat, soybeans, and grain elevation in Ontario. He became the President and CEO of that company in 1994 and served in that capacity until it was sold in 2003. He also served with the Ontario Farm Products Marketing Commission (Ontario equivalent of FIRB) for six years in the mid-to-late 1990s.
4. In or around 2003 or 2004, Mr. Leroux was approached by Murray Driediger (then General Manager of the BC Vegetable Marketing Commission) to do a Needs Assessment for the Commission. The Needs Assessment was done in January 2004.
5. Mr. Leroux was appointed Chair of the Commission in 2004 and served in that capacity until late 2008 or early 2009. At the beginning of his tenure, Mr. Driediger was General Manager and Andre Solymosi worked at the Commission as a data analyst reporting to Mr. Driediger. At some point during Mr. Leroux's tenure, Mr. Solymosi left the Commission. Peter Guichon was a member of the Commission throughout Mr. Leroux's tenure as Chair. In or about 2005, Mr. Driediger left his role as GM of the Commission and was replaced by Tom Demma.
6. In or around April 2006, the issue of federal orders was brought to the Commission's attention by the National Farm Products Council.
7. In a meeting held in September 2006, Jack Wessel (Assistant GM of the Commission) reported to the Commissioners that federal orders are required in order to implement the Commission's delegated federal authority. The Commission took the matter seriously. Mr. Guichon attended this meeting. It was moved and carried that a submission requesting an exemption from the requirement for further federal orders be prepared. Jack Wessel, in cooperation with Jim Collins, the Executive Director of FIRB, was working on this.

8. In October 2006, at a meeting of the Commission which Mr. Guichon attended, it was noted that Commission staff were working with the federal government to have Commission inter-provincial trade authority validated through the establishment of a federal order, and that one of the avenues being explored was the removal of the term “by Order” in the federal *British Columbia Vegetable Order*, so that the Commission would not have to establish federal orders in the future.
9. Over the course of the next year, little progress was made on the issue between the Commission, FIRB, and the federal government, which led to Mr. Leroux and Commission counsel Mr. Hrabinsky appearing before the Joint Standing Committee for the Scrutiny of Regulations on behalf of the Commission in March 2008. Mr. Collins also attended this session of the Committee. The Committee members expressed concern that the Commission continued to collect levies on interprovincial transactions without a properly gazetted federal levies order. Mr. Leroux and Mr. Hrabinsky committed the Commission to getting a properly gazetted federal levies order in place. The federal levies order was registered in August 2008.
10. Mr. Leroux will testify that the fact that the Commission could only regulate interprovincial trade, including by setting prices, through properly gazetted federal orders was openly discussed at meetings of the Commission at which Mr. Guichon was in attendance, and was known to all members of the Commission, including Mr. Guichon, as well as Commission staff.
11. Mr. Leroux will give evidence regarding the fallout during the beginning of his tenure on the Commission from the breakdown of the monopoly of BC Hot House, which had previously been the only agency in the greenhouse sector. He will also testify regarding the significant degree of concern on part of the storage crop Commissioners in light of removal of districts from the *British Columbia Vegetable Scheme*, about the potential unviability of delivery allocation in a multiple agency environment.

#### Key Documents

- Transcript of March 13, 2008 meeting of the Standing Joint Committee for the Scrutiny of Regulations.<sup>1</sup>
- Leroux Speaking Notes “Opening Remarks, Standing Joint Committee for the Scrutiny of Regulations, Thursday, March 13, 2008”.<sup>2</sup>
- January 31, 2004 Needs Assessment.<sup>3</sup>

#### Potential additional relevant documents

- Board packages and minutes of BC Vegetable Marketing Commission meetings in September 2006 - 2009 relating to the issue of the legal requirements for imposition of inter-provincial levies

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<sup>1</sup> Prokam LOD Tab 21.

<sup>2</sup> Prokam LOD Tab 22.

<sup>3</sup> Prokam LOD Tab 24.

- BCVMC brief submitted to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting, which is described in the March 13, 2008 transcript as including a “fairly comprehensive chronology of events with supporting documents”
- Letter from Jim Collins (then executive director of BCFIRB) to the Standing Joint Committee for the Scrutiny of Regulations in advance of the March 2008 meeting
- Correspondence between the National Farm Products Council and the BCVMC with respect to the gazetting and registration requirements for interprovincial orders

Relevant issues

- State of knowledge of Messrs. Guichon and Solymosi of the Registration and Gazetting Requirements

Terry Michell Will-Say

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1. Prokam has been unable to speak with Terry Michell in connection with the evidence he may have to offer to the Supervisory Panel. However, we expect he will have the following material evidence.
2. Mr. Michell is the principal of Michell's Farm, a producer licensee and member of the Island Vegetable Cooperative Association. Mr. Michell is also the current President of the IVCA, a position he has held since 2015.
3. Mr. Michell may give evidence regarding the IVCA marketing plan that he and Mr. Pollock submitted to the Commission in December 2016, identifying IVCA's ambitions for growth in the interprovincial market. He may give evidence regarding his role in making such decisions in 2017 as
  - (a) Deciding that IVCA would rely on the December 2016 marketing plan rather than deliver a revised marketing plan to the Commission;<sup>1</sup>
  - (b) the hiring, firing, and re-hiring of IVCA general manager Brian Meyer; and
  - (c) the decision to have Prokam plant Kennebec potatoes to fill any gaps in Three Star Farms' production.<sup>2</sup>
4. Mr. Michell may give evidence regarding Commission general manager Andre Solymosi's fall 2017 investigation of IVCA selling Prokam potatoes to Thomas Fresh Calgary and Saskatoon at below the minimum prices set by the Commission, including:
  - (a) Mr. Solymosi's meeting with IVCA representatives on October 3, 2017;<sup>3</sup>
  - (b) Mr. Solymosi's promise to protect IVCA's license in exchange for cooperation with his investigation into Prokam and Thomas Fresh;<sup>4</sup>

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<sup>1</sup> 2018 Appeal Transcript, April 5, 44:42 – 45:9 (Peter Guichon) [Prokam LOD Tab 7]; E-mail from Terry Michell to Bob Gill dated July 4, 2017 (Exhibit 12 in 2018 Appeal, Tab 74, PRKM-TF-01401) [Prokam LOD Tab 11].

<sup>2</sup> 2018 Appeal Transcript, April 3, 147:27-36 (Bob Dhillon); April 4, 20:18 – 21:13 (Bob Dhillon) [Prokam LOD Tab 5].

<sup>3</sup> 2018 Appeal Transcript, May 22, 58:45 – 59:1 (Andre Solymosi) [Prokam LOD Tab 8].

<sup>4</sup> Respondent's supplement Exhibit 2B, BCVMC-0797-0798 [Prokam LOD Tab 3].



- (c) Mr. Solymosi's request to IVCA to keep the fact of the investigation hidden from Prokam and Bob Dhillon;<sup>5</sup> and
  - (d) The prior warning Mr. Solymosi provided to IVCA of the upcoming delivery of the cease and desist orders, including the opportunity Mr. Solymosi provided to Mr. Meyer to review and comment on drafts of the cease and desist orders.<sup>6</sup>
5. IVCA initially appealed from the October 2017 cease and desist order and the Commission's December 22, 2017 decision but withdrew its appeals on January 8, 2018.<sup>7</sup> Mr. Michell may give evidence regarding the reasons for which and the circumstances in which IVCA withdrew its appeals.
  6. Mr. Michell may also give evidence regarding the consent resolution between the Commission and IVCA of IVCA's appeal from the Commission's November 18, 2019 reconsideration decision.
  7. Mr. Michell may have evidence to give regarding the degree of cooperation he has witnessed between BCfresh and the Commission in order to maintain BCfresh's dominant market position.

#### Key Documents

- Amending Order 43 Transcripts
- Mr. Solymosi's notes of October 3, 2017 meeting between Messrs. Solymosi, Krause, and Meyer and Ms. Solotki<sup>8</sup>
- E-mail from Terry Michell to Bob Gill dated July 4, 2017<sup>9</sup>
- September 27, 2017 e-mail correspondence between Andre Solymosi and Brian Meyer<sup>10</sup>
- 2018 BCFIRB Appeal Transcripts
- July 27, 2018 Memorandum of Argument of Prokam and Thomas Fresh

#### Relevant issues

- Cease and desist orders
- Mr. Solymosi's 2017 Investigation of Prokam and Thomas Fresh
- BCfresh and Commission cooperation to protect BCfresh market dominance

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<sup>5</sup> Respondent's supplement Exhibit 2B, BCVMC-0799 [Prokam LOD Tab 3].

<sup>6</sup> Documents Produced by the Commission after May 24, 2018, Exhibit 10, Tabs 4 through 7 [Prokam LOD Tab 12].

<sup>7</sup> January 8, 2018 letter from Wendy Baker: Appellants' Supplemental Book, Exhibit 2B, Tab 72 [Prokam LOD Tab 4].

<sup>8</sup> Respondents' supplemental book, Exhibit 2B, BCVMC-0802-0803 [Prokam LOD Tab 3].

<sup>9</sup> Exhibit 12 in 2018 Appeal, Tab 74, PRKM-TF-01401 [Prokam LOD Tab 11].

<sup>10</sup> Respondent's supplement Exhibit 2B, BCVMC-0796-0800 [Prokam LOD Tab 3].

Lillian Posch Will-Say

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1. Prokam has been unable to speak with Lillian Posch in connection with the evidence she may have to offer to the Supervisory Panel. However, we expect she will have the following material evidence.
2. Ms. Posch is the general manager of Okanagan Grown Produce Ltd.
3. Ms. Posch may give evidence on the degree to which Murray Driediger directs the weekly pricing calls between Mr. Solymosi and the agency managers.
4. Ms. Posch may have evidence regarding the November 7, 2017 agency managers meeting. In particular, she may testify that she and the other agency managers discussed the Commission's investigation into Prokam and Thomas Fresh at length and how they wished for it to be resolved. Ms. Posch may also give evidence regarding a November 10, 2017 e-mail chain in which the agency managers, led by Mr. Driediger, agreed to write a letter to the Commission supporting enforcement against Prokam and Thomas Fresh.
5. Ms. Posch will be able to testify to the solicitation from Mr. Solymosi in late January 2018<sup>1</sup> of views from agency managers as to whether agencies other than BCfresh were prepared to work with Prokam, and any verbal conversations Ms. Posch may have had with Mr. Solymosi in this regard. She will also be able to testify to the letter she wrote in response to this request.
6. Ms. Posch may have evidence to give regarding the degree of cooperation she has witnessed between BCfresh and the Commission in order to maintain BCfresh's dominant market position.

Key Documents

- Mr. Solymosi's notes of the November 7, 2017 agency managers meeting<sup>2</sup>
- November 10, 2017 e-mail exchange between all agency managers regarding bringing "the Prokam/Thomas Fresh infractions to a satisfactory conclusion"<sup>3</sup>

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<sup>1</sup> Respondent's Book of Documents Exhibit 1A in the 2018 Appeal, BCVMC-0535 [Prokam LOD Tab 1].

<sup>2</sup> Respondent's Supplemental Book of Documents, Exhibit 1B in the 2018 Appeal, BCVMC-0866-0872 [Prokam LOD Tab 3].

<sup>3</sup> Respondent's Supplemental Book of Documents, Exhibit 1B in the 2018 Appeal, BCVMC-1030 [Prokam LOD Tab 3].

- November 10, 2017 joint agency managers letter<sup>4</sup>
- Letter from Okanagan Grown to Andre Solymosi dated January 25, 2018<sup>5</sup>

Potential additional relevant documents

- E-mail correspondence between agency managers and Mr. Solymosi regarding the drafting and circulation of drafts of the November 10, 2017 agency managers letter.

Relevant issues

- Mr. Solymosi's 2017 Investigation of Prokam and Thomas Fresh

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<sup>4</sup> Respondent's Supplemental Book of Documents, Exhibit 1B in the 2018 Appeal, BCVMC-0910 [Prokam LOD Tab 3].

<sup>5</sup> Respondent's Book, Exhibit 1A in the 2018 Appeal, BCVMC 052 [Prokam LOD Tab 1].

John Walsh Will-Say

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1. John Walsh is the principal of Vancouver Island Produce Ltd., a producer-shipper licensee based on Vancouver Island. Mr. Walsh is a former Commissioner, serving in that capacity from 2008 to around 2012.
2. Mr. Walsh may testify regarding examples of conduct he witnessed both while he was a Commissioner and since that time of BCfresh and the Commission working together to protect BCfresh's dominant market position in the storage crop sector, including:
  - (a) Amending Order 43, which was made by Commissioners who were subject to a conflict of interest, at a time when there was a vacancy in the appointed chair position, and which was designed to make it more difficult for new growers to acquire delivery allocation and enter the regulated vegetable industry;
  - (b) Attempts to ensure the majority of Kennebec potato delivery allocation remains with BCfresh;<sup>1</sup>
  - (c) Attempts to block competitors of BCfresh such as Thomas Fresh Inc. from acquiring an agency license, and maintaining a wholesaler's license;
  - (d) Discrimination on the part of BCfresh commissioners against certain non-BCfresh growers;
  - (e) The reliance and dependence of Commission general managers on BCfresh for information and advice.
3. Mr. Walsh may testify that prior to Prokam entering the regulated vegetable industry, Prokam leased land to BCfresh growers including Felix Farms Ltd. (operated by Peter Guichon) and Heppell Farms, who grew potatoes on Prokam's land. Mr. Walsh may give evidence regarding the Commission's attempts, dating back to 2014, to block Prokam and its principal, Bob Dhillon, from acquiring delivery allocation and using the land it had previously leased to BCfresh to grow regulated product for IVCA. Mr. Walsh will testify that BCfresh management wanted Prokam to grow for BCfresh instead.

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<sup>1</sup> RON-0-000565 September 2012 letter from John Walsh "as a grower and commissioner" to David Taylor, chair of BCVMC about a Kennebec directive issued "without prior consultation with our agency or to my knowledge any of the other agencies other than possibly BC Fresh", suggesting that the commission "look more carefully at what BC fresh is importing" and noting that "Many growers have been affected negatively by the actions of BC Fresh marketing practices over the past several years." [Prokam LOD Tab 25].

4. Mr. Walsh may also testify to Vancouver Island Produce being targeted and singled out by the Commission in a manner similar to Prokam, and may testify as to the events that resulted in Vancouver Island Produce's agency license being revoked and replaced with a producer-shipper license.
5. Mr. Walsh may give evidence on the tendency of the structure of the Commission to lend itself to abuse of power and conflicts of interest.<sup>2</sup>
6. Mr. Walsh will give evidence that in August 2017, he informed Andre Solymosi and the Commissioners, including Mr. Guichon that he had contacted BCFIRB with concerns regarding BCVMC's authority to make certain orders, including to set minimum price for exports.<sup>3</sup>

#### Key Documents

- Amending Order No. 43 Transcripts
- 2018 Appeal Transcripts
- October 2012 e-mails between Ron Wittal and John Walsh
- August 10, 2017 e-mail from Wanda Gorsuch to John Walsh, CC Kirsten Pedersen and Andre Solymosi, regarding VMC pricing authority questions<sup>4</sup>
- August 11, 2017 letter from John Walsh to the Commission regarding the source of authority for interprovincial pricing

#### Relevant issues

- Mr. Solymosi's 2017 Investigation of Prokam and Thomas Fresh
- State of knowledge of Messrs. Guichon and Solymosi of the Registration and Gazetting Requirements
- Cooperation between BCfresh and the Commission to protect BCfresh market dominance

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<sup>2</sup> RON-0-000316 - October 12, 2012 email from John Walsh to Ron Wittal, then general manager of IVCA re: BCfresh's power over the Commission by virtue of having three commissioners [Prokam LOD Tab 26].  
RON-0-000573.02 – October 2012 emails between John Walsh and Ron Wittal re: BCfresh's power over the Commission and noting that "Tom [Demma] did not disagree that BC Fresh has to[o] much influence through vice chair" [Prokam LOD Tab 29]

<sup>3</sup> IVC004276 - August 11, 2017 letter from John Walsh to the Commission including Mr. Solymosi noting that Mr. Solymosi has "been made aware" that Mr. Walsh contacted BCFIRB with concerns including regarding BCVMC's "authority in initiating a new minimum price set for producer exports" [Prokam LOD Tab 25]

<sup>4</sup> Documents Produced by the Commission after May 24, 2018, Exhibit 10, Tab 1 [Prokam LOD Tab 12].