BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

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

WRITTEN SUBMISSIONS OF PROKAM ENTERPRISES LTD.

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I. INTRODUCTION

1. This supervisory review is the second supervisory review and third substantive Farm Industry Review Board ("**BCFIRB**") proceeding to address the events leading to the issuance by the British Columbia Vegetable Marketing Commission (the "**Commission**") of a cease and desist order ("**C&D Order**") against Prokam in October 2017, and to the December 2017 direction, confirmed on January 30, 2018, that Prokam must ship through BCfresh.

2. In February 2019, following an 8-day appeal hearing, BCFIRB found that in making these orders, the Commission had acted unlawfully and in a manner that was procedurally unfair. First, BCFIRB found that the Commission's issuance of the C&D Order was unlawful.

> The Commission did not have the authority to apply its minimum pricing rules to these interprovincial sales, or to issue any related cease and desist orders respecting such sales. We reach this conclusion because the Commission has not complied with the federal *Statutory Instruments Act,* a step that is required for the Commission to be able to avail itself of the interprovincial price setting authority that is provided by the federal *Agricultural Products Marketing Act* and the *British Columbia Vegetable Order*.[1]

3. BCFIRB further found that the Commission could not be "excused for being unaware of" the restrictions on their authority that made the interprovincial minimum pricing rules unlawful:

> The *Statutory Instruments Act* was the subject of considerable discussions before the Standing Joint Committee for Scrutiny of Regulations in late 2007 and early 2008. . . the issue of the requirements of the *Statutory Instruments Act* has been known to the Commission at least since 2008 when similar provisions were subject to considerable attention in the parliamentary committee.[2]

4. Second, BCFIRB found that:

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[1] *Prokam Enterprises Ltd. and Thomas Fresh Inc. v. British Columbia Vegetable Marketing Commission,* BCFIRB decision of February 28, 2019 at para. 35.
[2] February 28, 2019 BCFIRB decision at para. 49.

> [T]he Commission breached principles of administrative fairness when it failed to seek submissions from the parties - before the December 22, 2017 order was issued - on the question of whether Commission members with ties to BCfresh should have recused themselves from consideration of any order to direct Prokam to BCfresh.[3]

5. After noting that Mr. Guichon is not only a BCfresh grower but also the chair of the board and a shareholder, the BCFIRB panel wrote:

> In our view, having recognized the potential for a reasonable apprehension of bias to exist, Mr. Guichon and the Commission should have handled things differently. More specifically, what should have occurred is that as soon as the Commission (including Mr. Guichon and the other two BCfresh commissioners) became aware of a potential conflict of interest in relation to this matter, the Commission should have first determined whether the conflict was clear enough that some or all of the BCfresh commissioners should not participate in the matter. If that were the case, then they should not have participated in any further discussions concerning the matter - it is not sufficient to participate in discussions leading up to - but not including - the actual voting. Conversely, if upon such preliminary consideration they felt that the potential conflict did not clearly meet the test of a reasonable apprehension of bias, the Commission should have nonetheless raised this matter with the parties to allow each party to make representations on the question before reaching a final conclusion.[4]

6. Third, with respect to the IVCA's role, the BCFIRB panel 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".[5]

7. In the result, BCFIRB quashed the C&D Orders and the direction to BCfresh, remitting those matters to the Commission for reconsideration. None of these findings has been challenged on judicial review. While the administrative proceedings arising from the subsequent reconsideration continue (Prokam's appeals from the Commission's November 2019 reconsideration having been

[3] February 28, 2019 BCFIRB decision at para. 54
[4] February 28, 2019 BCFIRB decision at para. 63.
[5] February 28, 2019 BCFIRB decision at para. 82

now twice-deferred in favour of supervisory reviews, including this one), Prokam's misfeasance claim arises from the same events in respect of which BCFIRB in February 2019 found that the Commission acted unlawfully and in a manner that was not procedurally fair.

8. It is well-established that a party may pursue in a provincial superior court a claim for damages arising from an unlawful statutory decision.[6] It is a requirement that in bringing such an action, the individual decision-makers whose conduct is impugned be named as defendants.[7] Prokam framed its misfeasance in public office claim against Mr. Guichon and Mr. Solymosi based on the evidence before the BCFIRB panel in the 2018 hearing and the findings of the BCFIRB panel in the 2019 decision. The defendants to the action and the allegations made are precise and narrow based on evidence known to Prokam at the time it was filed.

9. Since even prior to the outset of this supervisory review, it has been Prokam's position that it had in its possession sufficient evidence to establish its misfeasance claim against Messrs. Guichon and Solymosi. That is why Prokam filed the claim that it filed, against the specific defendants who are named, prior to the potential expiry of limitation periods. The source of that evidence was the record in the 2018 appeal, including the documents the Commission produced and the testimony of Messrs. Guichon and Solymosi and other witnesses in the 2018 appeal. Production in this proceeding of additional documents (many of which ought to have been produced in the 2018 appeal) bolsters the evidentiary foundation for Prokam's misfeasance claim. Hearing Counsel's submission that "there is no cogent evidence to support any of the very serious allegations in the terms of reference"[8] is plainly incorrect and frankly confounding.

10. Prokam agrees with Hearing Counsel's submission that "[i]t is not for the Panel to determine whether the tort of misfeasance in public office has been

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[6] *See, e.g., Myers v. Canada (Attorney General),* 2022 BCCA 160.
[7] *Madadi v. British Columbia*, 2018 BCSC 1891 at para. 70.
[8] Hearing Counsel's submission at para. 6.

established".[9] That question remains within the exclusive jurisdiction of the British Columbia Supreme Court to be determined after a trial process in which the parties are afforded the procedural rights of an adversarial court process.

11. Hearing Counsel was tasked with determining "whether these allegations [against Messrs. Solymosi and Guichon] can be substantiated".[10] The limited scope of Hearing Counsel's investigation, Hearing Counsel's refusals to require non-complainant participants to comply with their document production and other obligations under the *Rules of Procedure*, the "friendly" nature of Hearing Counsel's examinations of the subjects of the allegations, Hearing Counsel's alignment with the positions taking by the non-complainant participants on issues of procedure and substance, and the positions taken in Hearing Counsel's final submission all suggest that he has considered his task to be to attempt to convince the Review Panel that the allegations cannot be substantiated.

12. This supervisory review became increasingly afflicted by a degradation in the procedural fairness accorded to the complainant participants, and particularly Prokam. Breaches of procedural fairness included:

    (a) departures from the *Rules of Procedure* that had the effect of relieving non-complainant participants from their obligations thereunder;

    (b) the decision to press ahead with the hearing on the basis of an incomplete investigation and documentary record;

    (c) shifting interpretations of the Final Terms of Reference ("**FTOR**") depending on whose interests were served; and

    (d) the severe circumscription of Prokam's right provided in the *Rules* of cross-examination of non-complainant participants and other witnesses

[9] Hearing Counsel's submission at para. 21.
[10] 2021-05-26 Notice of Supervisory Review, page 1; 2021-10-07 2021 Review of Allegations of Bad Faith and Unlawful Activities Update #2.

after Messrs. Dhillon and Gill had already been subjected to extensive and unfettered cross-examination by non-complainant counsel.

13. Although one of the two objectives specified in the FTOR is “ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector”, and although the Review Panel has at times referred to the importance of getting to the truth of the allegations,[11] those objectives were increasingly made to yield to the countervailing objective to essentially get this proceeding over with as quickly as possible.[12] In the end, the truth-seeking function of this supervisory review was compromised to such a degree that it is difficult to understand what the point of it all has been.

14. One thing is clear; there is – and has always been – evidence to support each allegation made by Prokam in its misfeasance claim against Messrs. Guichon and Solymosi. If this is the (or a) question at which this review is directed, there can be no doubt that it must be answered affirmatively.

II. PROCEDURAL ISSUES

A. Limitations of this Process

15. In Prokam’s respectful submission, this supervisory was ill-conceived from the start. Throughout this proceeding, it was stated numerous times by the Review Panel,[13] Hearing Counsel,[14] Prokam,[15] and counsel for the Commissioners[16] that this supervisory review is an inquisitorial or investigatory proceeding, and not an

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[11] 2021-06-14 Review Panel Decision on Participation and Interim Orders at para. 31; 2021-07-09 Review Panel Decision on Final Rules of Procedure at para. 7; 2022-02-03 Review Panel Decision on Adjournment Application, p. 2.
[12] 2022-01-26 Review Panel Decision on Preliminary Matters, page 3; 2022-03-10 Letter from Nazeer Mitha to Wanda Gorsuch at p. 6 re circumscribing cross-examination; 2022-03-18 Review Panel Ruling on Cross-examination Limits.
[13] 2021-07-09 Review Panel Decision on Final Rules of Procedure at para. 6; 2022-01-26 Review Panel Decision on Preliminary Matters, pp. 6 and 8-9.
[14] 2022-01-20 letter from Nazeer Mitha to Wanda Gorsuch at para. 60.
[15] 2022-01-23 Letter from Claire Hunter to Wanda Gorsuch at pp. 5-6.
[16] 2021-01-17 Letter from William Stransky to Wanda Gorsuch, p. 2; 2022-01-21 letter from William Stransky to Wanda Gorsuch, pp. 1-2; 2022-03-15 Letter from Kenneth McEwan to Wanda Gorsuch, p. 2.

adversarial proceeding. Notionally that may have been true,[17] but in substance this supervisory review has at its heart Prokam's and MPL's adversarial claims. This most unusual proceeding was initiated by essentially making out of Prokam's and MPL's claims a supervisory review in which neither Prokam nor MPL wished, but in which they were effectively compelled, to participate.[18]

16. The participants in this supervisory review align with one of multiple adverse interests in the actions. Despite the frequent affirmations of the inquisitorial nature of this review, each party advocated, mostly ardently, for the interest with which each is aligned in the litigation. Even the designations of "complainant" and "non-complainant" participants[19] make apparent the adversarial nature of the parties' roles notwithstanding the form of this proceeding.

17. Prokam's civil claim was commenced in British Columbia Supreme Court, the forum in this province that is most appropriate to resolution of adversarial claims. In a judicial proceeding, the party with the greatest interest in prosecuting the claim is responsible for doing so, and is empowered with all of the tools of prosecution of adversarial claims provided for in the *Supreme Court Civil Rules*. Like an inquisitorial proceeding, an adversarial proceeding has as its goal the pursuit of the truth. The theory underlying the adversarial system is that out of the efforts of parties adverse in interest to fervently advocate for their respective positions, the truth will emerge. The efficacy of an adversarial system depends on each party putting its best foot forward and presenting, for the court's consideration, its case at its highest.

18. In this supervisory review, the square pegs of adversarial civil disputes were sought to be fitted into the round hole of an inquisitorial process ill-suited to

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[17] But see *Verdonk v. Brisith Columbia Farm Industry Review Board,* 2010 BCSC 601, in which Hinkson J (as he then was) held that BCFIRB is required to adhere to principles of procedural fairness in conducting supervisory reviews.

[18] And when MPL attempted to decline to participate, the Review Panel nevertheless ordered it to produce documents: 2021-08-13 Review Panel Decision and Document Disclosure Order.

[19] The title of "complainant participant" is misleading, as no complainant participant sought out this supervisory review. Rather, BCFIRB initiated it after receiving a request for supervisory directions from the Commission on May 12, 2021.

addressing them. The responsibility for investigating Prokam's adversarial claim was conferred on Hearing Counsel, who has made no attempt to frame and test the claim in its best possible light. The only parties with a personal interest in exercising the rights to compel production of documents and to determine which *viva voce* and other evidence should be presented to the decision-maker in support of the allegations were deprived of any ability to do so.

19. The shortcomings of an inquisitorial proceeding in handling adversarial claims could have been mitigated if Hearing Counsel had taken on the task of casting Prokam's (and MPL's and Ms. Bajwa's) allegations at their highest, and presenting them to the Review Panel in the strongest possible form. That would have required Hearing Counsel to undertake a comprehensive investigation featuring, at minimum, interviews of the potential witnesses identified by Prokam and identifying and pursuing additional lines of inquiry. It would have required Hearing Counsel to sedulously exercise his powers under the *Rules of Procedure* to compel document production. It would have required Hearing Counsel to attempt to test Prokam's theory through vigorous cross-examination of the subjects of the allegations, rather than simply stating the allegations to them and inviting them to comment.

20. Unfortunately, none of that occurred. Instead:

    (a) Many of the witnesses identified by Prokam were not interviewed or called as a witness by Hearing Counsel, including John Walsh, a former Commissioner who was expected to have evidence material to, among other issues, the state of understanding at the Commission of its authority to regulating interprovincial pricing.[20] When Prokam applied pursuant to Rule 30 for leave to interview and call these witnesses, the Review Panel declined to override Hearing Counsel's exercise of discretion.[21]

[20] Exhibit 15, pp. 56-60.
[21] 2022-01-26 Review Panel Decision on Preliminary Matters, p. 5.

(b) Hearing Counsel declined to compel BCfresh or the Commissioners to produce documents, and failed to compel any of the non-complainant participants to deliver witness statements, as required by the *Rules*. The Review Panel declined to compel delivery of witness statements on the basis that there was no "substantive non-compliance with the Rules or any unfairness that has compromised this process or the rights of Prokam".[22] The Review Panel also declined to order additional production of documents on the basis that Prokam took "an exceedingly broad reading of the Terms of Reference", and in reliance "on the professional responsibilities of the legal counsel involved to meet their document disclosure obligations".[23]

(c) The Review Panel denied Prokam's application for an adjournment to allow sufficient time for completion of Hearing Counsel's investigation and production of documents by the non-complainant participants on the basis of the "pressing need to move forward to examine these very serious allegations of wrongdoing against members and staff of the Commission" and the Review Panel's view that "this hearing must get underway to avoid the significant delay that would inevitably flow from an adjournment".[24]

(d) When Prokam applied, pursuant to Rule 28, to lead evidence from Mr. Dhillon and Mr. Gill, the Review Panel denied the application as being inconsistent with the inquisitorial nature of the proceeding.[25]

(e) In contrast to Hearing Counsel's aggressive cross-examinations of Messrs. Dhillon and Gill (and Mr. Mastronardi), his cross-examinations of the subjects of the allegations could fairly be described as friendly. Rather than probing these witnesses based on Prokam's theory underlying its

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[22] 2022-01-26 Review Panel Decision on Preliminary Matters, p. 6.
[23] 2022-01-26 Review Panel Decision on Preliminary Matters, pp. 7-8.
[24] 2022-01-26 Review Panel Decision on Preliminary Matters, p. 3.
[25] 2022-01-26 Review Panel Decision on Preliminary Matters, pp. 8-9. It is unclear why Rule 28 was included in the *Rules of Procedure* if the inquisitorial nature of the proceeding precluded any Rule 28 application from succeeding.

allegations, Hearing Counsel's cross-examinations were largely limited to establishing background facts and either inviting comment from the witnesses on the allegations against them or suggesting their responses.[26]

(f) The more probing cross-examinations of the subjects of the allegations were left to the complainant participants' counsel to conduct, but the Review Panel,[27] at Hearing Counsel's invitation,[28] imposed inordinately low time restrictions on cross-examinations of all of the subjects of the allegations except Mr. Solymosi. While the Review Panel did retain and exercise discretion to grant minor extensions of time "on the fly", the inordinate time pressure severely constrained the strategy complainant participant counsel could pursue on cross-examination. This was a burden that counsel for the non-complainant counsel participants did not have to bear during their cross-examinations of Messrs. Dhillon and Gill.

21. In short, this supervisory review's process was ill-suited to fulfilling its truth-seeking function. The objective that featured prominently in rulings and correspondence at the outset of this supervisory review to get at the truth of the allegations[29] was increasingly made to yield to countervailing objectives such as a desire to finish the supervisory review more quickly. Moreover, while at the outset of the supervisory review the procedural fairness rights of all participants were properly recognized,[30] later – when Prokam began invoking procedural fairness in its efforts to apply and enforce the *Rules* – there was a paradigm shift such that the non-complainant participants were thereafter said and considered to be entitled to a greater degree of procedural fairness than the complainant

[26] E.g. 2022-02-09 Cross-examination of Mr. Solymosi, p. 70:44 – p. 71:25; p. 99:15 – p. 106:42 [**PTEB, Tab 1**]; 2022-03-30 Cross-examination of Mr. Guichon, 114:5-46; 115:29 – 116:11; 120:39 – 121:1; 129:8-20; 134:27 – 136:21 [**PTEB, Tab 2**].
[27] 2022-03-10 Review Panel Decision on Cross-examination Limits, p. 4.
[28] 2022-03-10 Letter from Nazeer Mitha to Wanda Gorsuch.
[29] 2021-06-14 Review Panel Decision on Participation and Interim Orders at para. 31; 2021-07-09 Review Panel Decision on Final Rules of Procedure at para. 7.
[30] 2021-05-26 Notice of Supervisory Review, p. 6; 2021-06-14 Review Panel Decision on Participation and Interim Orders, paras. 3 and 31; 2021-07-09 Review Panel Decision on Final Rules of Procedure at paras. 6, 21-23; 2021-09-10 Letter from Nazeer Mitha to Chair Donkers, p. 2; 2021-09-13 letter from Robert Hrabinsky to Wanda Gorsuch

participants.[31] Perhaps nowhere was this procedural fairness paradigmatic shift more apparent than in the Review Panel's imposition of limits on cross-examination partway through the hearing, which disproportionately negatively affected Prokam and other complainant participants whose principal witnesses had already been subjected to exceedingly lengthy cross-examinations by multiple counsel for non-complainant counsel aligned in interest.

22. The structure and procedural fairness limitations of this supervisory review constrain the scope and nature of the issues that the Review Panel can legitimately address. Prokam agrees with Hearing Counsel's submission that the Review Panel cannot properly determine whether the alleged misfeasance occurred. The findings of the 2019 BCFIRB panel that the Commission acted unlawfully have not been challenged. Considering the FTOR, the only question before the Review Panel is whether there is evidence that, if accepted, could support Prokam's misfeasance allegations. There clearly is.

III. THE PURPOSE OF THE SUPERVISORY REVIEW

23. Hearing Counsel submits:

> 21. It is not for the Panel to determine whether the tort of misfeasance in public office has been established; rather its task is to determine whether there is evidence to support the specific allegations in the FTOR….[32]

24. Prokam agrees with Hearing Counsel that this Review Panel's task is not to adjudicate Prokam's misfeasance in public office claim. The Supreme Court of British Columbia retains exclusive jurisdiction over determination of that claim.

25. Similarly, Prokam agrees with Hearing Counsel that the Review Panel's task is limited to determining "whether there is evidence to support the specific allegations in the FTOR".[33] In other words, it is not the Review Panel's task to

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[31] 2022-02-03 Review Panel Decision on Adjournment Application, p. 3; 2022-03-18 Review Panel Ruling on Cross-examination Limits, p. 4; 2022-01-21 letter from William Stransky to Wanda Gorsuch, p. 3; 2022-03-15 Letter from Kenneth McEwan to Wanda Gorsuch, p. 2;
[32] Hearing Counsel's Submission, para. 21.
[33] *Ibid.* (emphasis added).

weigh the evidence and determine the merits of the allegations in Prokam's misfeasance in public office claim. This flows from the plain language of the FTOR and from the inquisitorial nature of this process.

26. The Notice of Supervisory Review reads in relevant part as follows:

> The BC Farm Industry Review Board ("BCFIRB") has ordered a supervisory review process, pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (the "*Act*" or the "*NPMA*"), into allegations of bad faith and unlawful activity raised in court filings alleging misfeasance of public office by members and staff of the BC Vegetable Marketing Commission ("Commission"). The purpose of the supervisory review is for BCFIRB to determine whether these allegations **can be** substantiated and what resulting orders or directions may be required.[34] [Bold and underline emphasis added.]

27. Significantly, the stated purpose of this supervisory review is not to determine whether Prokam's allegations in its misfeasance in public office claim **are** substantiated; otherwise, the Notice of Supervisory Review and FTOR would necessarily have said so. Consistent with this position, Prokam does not move the Review Panel for a finding that any of the allegations are substantiated.

28. Thus, the only task with which the Review Panel is faced is to determine whether the allegations can or cannot be substantiated. To the extent a court analogy is helpful, the standard set out in the FTOR is comparable to a motion to strike in court proceedings. In order for the Review Panel to reach a determination that the allegations cannot be substantiated, this must be plain and obvious. If it is not plain and obvious that the allegations cannot be substantiated (or, to borrow Hearing Counsel's language, that there is not "any evidence to support" the allegations, whether available now or that may be available after a full discovery and trial process), then it must be concluded that the allegations can be substantiated (and of course it is the exclusive jurisdiction of the Supreme Court of British Columbia to determine whether the allegations in Prokam's misfeasance in public office claim **are** substantiated).

[34] 2020-05-26 Notice of Hearing, p. 1; 2021-06-18 FTOR, p. 1; 2021-10-07 2021 Review of Allegations of Bad Faith and Unlawful Activities Update #2.

29. Apart from the plain language of the Notice of Supervisory Review and the FTOR, the shortcomings of this proceeding set out above necessarily require that the Review Panel adopt this view of its function pursuant to the FTOR. It cannot be said whether Prokam's allegations in its civil claim **are** substantiated because Prokam was not permitted to tender in this proceeding all of the evidence on which it intends to rely in prosecuting those allegations in Supreme Court.

IV. ATTEMPT TO REFRAME ALLEGATIONS IN PROKAM'S NOTICE OF CIVIL CLAIM AS ALLEGATIONS OF CORRUPTION

30. There has been a curious fluidity to the interpretation of the scope of the FTOR culminating in Hearing Counsel interchanging the allegations of misfeasance with allegations of corruption.

31. At the outset, the subject matter of the supervisory review was defined broadly and inclusively by the plain language of the FTOR, which were finalized after consultation with and submissions from all participants:

> 7. Item 2 of the initial terms of reference in the Notice of Supervisory Review refers to the Commission "Prosecuting enforcement proceedings in bad faith and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam."
>
> 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.[35]

32. Although there is nothing in the language of paragraph 2 of the FTOR, or the Review Panel's explication of it quoted above, limiting that paragraph's scope either temporally or to the allegations made in Prokam's notice of civil claim, Hearing Counsel and the Review Panel later introduced these narrow constructions of the FTOR in response to Prokam's requests for Hearing Counsel

[35] 2021-06-18 Review Panel Decision on FTOR and Rules, paras. 7-8 (emphasis added).

to conduct further interviews of witnesses and compel further (or any) production of documents from the non-complainant participants.[36]

33. When Hearing Counsel or non-complainant witnesses sought to probe dealings between Prokam and IVCA, over Prokam's objections the scope of the FTOR were construed broadly enough to encompass that issue.[37] However, when Prokam subsequently sought to question witnesses on the relationship and dealings between Prokam and IVCA, Hearing Counsel questioned the relevance of those lines of questioning.[38]

34. Now, in Hearing Counsel's written submission there appears to be an attempt to reframe the scope of the FTOR once again. Having endeavoured all along to confine and define the scope of this supervisory review vis-à-vis Prokam to and by the allegations in Prokam's notice of civil claim, Hearing Counsel now seeks to depart from that framework and characterize the issue as whether Prokam can establish that there is evidence of "corruption" on the part of Messrs. Guichon and Solymosi.[39] Prokam has not alleged that Messrs. Guichon and Solymosi are generally corrupt or are guilty of corruption. Corruption is much broader than misfeasance and connotes a more systemic and wide-ranging issue. The word "corruption" does not appear in either Prokam's notice of civil claim or the FTOR.

35. Prokam's very narrow and specific allegations are that on the particular occasions pleaded in its notice of civil claim, with respect to the particular exercises or purported exercises of statutory powers or performances of statutory duties pleaded, the respective conduct of Messrs. Guichon and Solymosi constituted misfeasance in public office. The Review Panel should reject Hearing Counsel's effort to reframe the allegations as corruption and the continuously "moving target" regarding the scope of paragraphs 1 and 2 of the FTOR.

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[36] 2022-01-12 Letter from Nazeer Mitha to Claire Hunter, pp. 1, 3-5; 2022-01-20 Letter from Nazeer Mitha to Wanda Gorsuch at paras. 8-10, 24, 32-35, 53-56; 2022-01-26 Review Panel Decision on Preliminary Matters, pp. 2, 7-8;
[37] 2021-10-15 Letter from Nazeer Mitha to Claire Hunter, p. 2; 2022-02-04 Review Panel Decision on Meyer Affidavit, p. 2; all parties' cross-examinations of Messrs. Dhillon and Gill;
[38] See Day 13 Transcript, p. 67:34 – p. 68;10; p. 68:41 – 69:5 [**PTEB, Tab 3**].
[39] Hearing Counsel's submission, paras. 21, 33, 111, 266-269.

V. SUBSTANCE OF PROKAM'S ALLEGATIONS GENERALLY

36. Hearing Counsel submits that the available evidence in support of the complainant participants' allegations "amounted in the main to no more than speculation of the complainant participants, and insufficient evidence emerged to support the inferences of the complainant participants". Respectfully, Hearing Counsel entirely ignores evidence that pre-existed the commencement of this supervisory review and to which Prokam has repeatedly drawn the attention of Hearing Counsel, and the Review Panel.

37. Perhaps the most glaring example is Hearing Counsel's omission to advert to the excerpt from Mr. Guichon's evidence at the 2018 hearing in which he testified that in approving the issuance of the C&D Order against Prokam in October 2017, he considered there to be urgency "as a grower…[t]hat had a whole bunch of potatoes in storage -- to sell".[40] This evidence was drawn to Hearing Counsel's attention in Prokam's July 23, 2021 letter delivered together with its initial document disclosure and will-says (a letter to which Hearing Counsel repeatedly referred during the hearing), and it was put to Mr. Guichon in his evidence before the Review Panel. In concluding that there is no evidence to support the allegations against Mr. Guichon, Hearing Counsel's omission of any mention of Mr. Guichon's evidence admitting that his personal economic interests as a grower with potatoes in storage to sell motivated his exercise of statutory authority casts doubt on the rigour with which Hearing Counsel has approached his review of the evidence and the reliability of arguments based on that review.

VI. LEGAL PRINCIPLES APPLICABLE TO MISFEASANCE CLAIMS

A. General Principles

38. In order to make out a misfeasance claim, a plaintiff must prove either:

(a) that a public official acted with malicious intent (Category A); or

[40] Exhibit 1, p. 2250:35 – p. 2251:29 [**PTEB, Tab 4**].

(b) that a public official conducted themselves unlawfully with knowledge that their conduct was unlawful, and knowledge that their conduct was likely to injure the plaintiff (Category B).[41]

The tort is "based on the premise that public officers must exercise their power only for the public good and not deliberately and unlawfully for ulterior or improper purposes".[42] Deliberate unlawful conduct is a "focal point of the inquiry". It consists of "(i) an intentional illegal act; and (ii) an intent to harm an individual or class of individuals." This requires knowledge of, or subjective recklessness as to, the unlawfulness of the conduct.[43]

39. Categories A and B are not considered separate torts, but rather "two different ways in which a public officer can commit the tort". As a result, these two forms, referred to as Category A and Category B, provide the plaintiff with two ways to prove each of the two elements of the tort. The "plaintiff must prove each of the tort's constituent elements".[44]

B. Public Officer

40. Persons whose office and authority is established by statute and whose decisions are subject to judicial review are public officers for purposes of the tort. This includes members of marketing boards and commissions[45] like Mr. Guichon.

41. Additionally, an individual like Mr. Solymosi who is a Crown servant and is assigned or delegated statutory duties that might potentially affect the public is a public officer for the purposes of the tort.[46]

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[41] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paras. 22-23.
[42] *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 150.
[43] *Odhavji* at para. 25.
[44] *Odhavji* at paras. 22-23.
[45] E.g. *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*, 1976 CarswellMan 47, 69 D.L.R. (3d) 114 (M.B.C.A.) and *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*, 2020 SKQB 100.
[46] Horsman, K. and Morley, G. *Government Liability: Law and Practice*, §7.20.10; *Ontario Racing Commission v. O'Dwyer*, 2008 ONCA 446; *Pedigree Poultry* at para. 188.

C. Examples of Misfeasance

42. Misfeasance in public office is not synonymous with corruption. A broad range of misconduct can ground an action in misfeasance in public office.[47] This includes straightforward breaches of relevant statutory provisions, acting in excess of the powers granted or for an improper purpose, or wilfully choosing not to discharge public obligations.[48] Further, violating administrative procedural requirements or breaching a duty of procedural fairness may qualify as unlawful conduct in this context.[49]

D. Course of Conduct

43. Misfeasance may be established through a single event or a course of conduct over time. In *O'Dwyer v. Ontario Racing Commission*,[50] a Commission official contacted the racetrack where the respondent had raced horses for several years and advised that the respondent would not be approved as a racing official. On that basis the racetrack did not include the respondent in its application to the Commission for approval. The Commission then over a series of communications denied that a decision had been made that would engage the respondent's right to a hearing, and otherwise thwarted the respondent's ability to challenge the decision, with the effect that he was prevented from horseracing for two years:

> [51] The trial judge found that the Commission was "playing games" with the respondent; engaging in "duplicitous conduct"; engaging in "unhelpful and misleading correspondence"; and leaving the respondent to essentially "hang out to dry".

The Court held that the conduct of the Commission's officials, taken altogether, amounted to misfeasance in public office.

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[47] *Odhavji* at para. 20. Hearing Counsel's submission at para. 74 that Mr. Solymosi "does not have the authority to make decisions about issuing any orders" is inconsistent with Mr. Solymosi's own evidence on this point: 2022-02-10 Cross-examination of Mr. Solymosi, p. 87:23 – p. 95:6 [**PTEB, Tab 5**].
[48] *Odhavji* at paras. 24, 26, 30.
[49] *Ontario Racing Commission v O'Dwyer*, 2008 ONCA 446 at paras. 46-49; *Pedigree Poultry* at para. 177.
[50] *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446.

44. *O'Dwyer* was followed in *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*,[51] a claim factually similar to Prokam's. The court found that a series of decisions made by the Board were motivated by the personal animus of two long-time directors of the Board, who were also producers, against the plaintiffs. The conduct of the Board members affected the plaintiff's license and access to expansion quota and also involved a series of failed enforcement actions by the Board against the plaintiffs. The Court broadly characterized the types of activities that, together, can establish a course of conduct amounting to misfeasance. [52]

VII. PROKAM'S CLAIM AGAINST MR. SOLYMOSI

45. In Prokam's submission, there was evidence prior to the commencement of this supervisory review to not only support, but also substantiate, Prokam's allegations against Mr. Solymosi. The additional evidence obtained in this review only serves to enhance that support.

A. Investigation – September-December 2017

46. Prokam's claim is not that Mr. Solymosi's investigation beginning in late September 2017, continuing with the October 10, 2017 C&D Orders, and then leading to the subsequent "show cause" written hearing in December 2017 was "flawed" or "incomplete".[53] Rather, the claim is that when Mr. Meyer presented Mr. Solymosi with information in September 2017 that IVCA was not in compliance with the export minimum prices that had been set, Mr. Solymosi immediately formed the view that as between Prokam and IVCA, Prokam was responsible for the purported non-compliance. Rather than approaching his investigation into the alleged non-compliance with an open mind as to whether there was non-compliance and, if so, which party or parties were responsible, Mr. Solymosi started with the malicious premise that Prokam was a "rogue producer",

[51] *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*, 2020 SKQB 100.
[52] *Pedigree Poultry* at para. 188.
[53] Hearing Counsel's submission, para. 119.

and then conducted an investigation for the purpose of marshaling an evidentiary record that would support that premise and result in the sanctioning of Prokam and not IVCA.

47. Prior to this hearing, Prokam had only documentary evidence to support its allegation that as at September 27, 2017 (the same day as the telephone conversation in which Mr. Meyer informed Mr. Solymosi of IVCA's purported non-compliance),[54] Mr. Solymosi harboured the view that Prokam was a "rogue producer". In this proceeding, as Hearing Counsel observes,[55] Mr. Solymosi confirmed this through his own testimony:

> Q You believed when you sent this email that Prokam was a rogue producer, correct?
>
> A Well, I believe what Brian said, that he had a producer that was not complying with -- with the rules and the authority of IVCA.
>
> Q My question was when you wrote this email you believed that Prokam was a rogue producer, correct?
>
> A Correct.[56]

48. Hearing Counsel attempts to justify Mr. Solymosi coming immediately to the view that Prokam was a "rogue producer" on a number of bases.

49. First, Hearing Counsel highlights the context of the exchange of correspondence between Mr. Solymosi and IVCA and Prokam between April 2017 and August 2017.[57] However, it is clear from that series of correspondence that it was not Prokam's overproduction (which Mr. Guichon agreed was not contrary to the general orders),[58] but rather IVCA's non-compliance with the requirement to submit a marketing plan, that primarily motivated Mr. Solymosi's concern. Mr. Solymosi confirmed this multiple times in his evidence.[59] Thus, all that the context of the April-August 2017 correspondence ought to have communicated to

[54] Exhibit 1, pp. 1098-1099; Exhibit 1, p. 2637:2 – p. 2639:21 [**PTEB, Tab 6**].
[55] Hearing Counsel's submission at para. 103.
[56] 2022-02-11 Cross-examination of Mr. Solymosi, p. 64:6-14 [**PTEB, Tab 7**].
[57] Hearing Counsel's submission at paras. 76-91 and 112-113.
[58] 2022-04-01 Cross-examination of Mr. Guichon, p. 7:1 – p. 9:32 [**PTEB, Tab 8**].
[59] 2022-02-09 Cross-examination of Mr. Solymosi, p. 5:13 – p. 6:23; p. 17:6-29; p. 32:37 – 33:7 [**PTEB, Tab 9**]; 2022-02-10 Cross-examination of Mr. Solymosi, p. 51:20-46 [**PTEB, Tab 10**].

Mr. Solymosi is that **IVCA**, since the previous 2016-2017 growing season, had not been in compliance with the requirement to submit a marketing plan and was taking the position that it had already submitted one. It could have provided no basis for any legitimate belief that **Prokam** was a "rogue producer".

50. Second, Hearing Counsel attempts to justify Mr. Solymosi forming the malicious belief on September 27, 2017 that Prokam was a "rogue producer" by stating that "IVCA also provided various evidence to Mr. Solymosi that Prokam was difficult to control".[60] However, IVCA did not provide this documentary evidence (which Mr. Solymosi acknowledges was selective and designed to implicate Prokam and not IVCA)[61] until October 2, 2017,[62] five days after Mr. Solymosi, according to his own testimony, had already formed the malicious belief that Prokam was a "rogue producer". Thus, this documentary evidence could not have constituted a legitimate basis for Mr. Solymosi's belief on September 27, 2017.

51. Finally, Hearing Counsel suggests that Mr. Solymosi's belief that Prokam was a "rogue producer" was justified because it was based on information from Brian Meyer.[63] Regardless of whether that is true, it is irrelevant to Prokam's misfeasance claim why or on the basis of what information Mr. Solymosi formed this malicious belief on the very first day of his investigation. All that matters is that he formed it and then embarked on a mission to gather, with IVCA's assistance and without notice to Prokam, only evidence consistent with his belief that as between IVCA and Prokam, it was Prokam who was the "rogue".

52. What follows is a description of the features of the investigation Mr. Solymosi conducted based on his malicious belief that Prokam was a "rogue producer".

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[60] Hearing Counsel's submission at para. 115.
[61] 2022-02-11 Cross-examination of Mr. Solymosi, p. 73:17-39 [**PTEB, Tab 11**].
[62] 2022-02-09 Cross-examination of Mr. Solymosi, p. 38:43 – p. 39:2 [**PTEB, Tab 12**].
[63] Hearing Counsel's submission at paras. 114-115.

1. September 27, 2017 e-mails to Brian Meyer

53. After his telephone call with Mr. Meyer on September 27, 2017 in which Mr. Solymosi says Mr. Meyer reported the issue of IVCA's non-compliance with the "prairie prices" set by the Commission in August, Mr. Solymosi sent Mr. Meyer two e-mails. The first requested information from Mr. Meyer regarding the difficulty Mr. Meyer reported IVCA having with Prokam.[64] In this e-mail, Mr. Solymosi instructed Mr. Meyer that "Prokam was not to be solicited for any information that is out of the ordinary". In 2018, Mr. Solymosi initially testified that he made this comment because he did not want to alert "anyone" that he was looking into this issue.[65] Later during that hearing, he admitted that he directed Mr. Meyer to hide from Prokam that the Commission was looking into this point.[66] However, Mr. Solymosi denied this during his testimony in this hearing.[67]

54. The second e-mail Mr. Solymosi sent to Mr. Meyer on September 27, 2017:

(a) first, highlighted the seriousness of selling below minimum price and stated that it put an agency's class 1 license at risk of being revoked;

(b) second, identified Prokam as a "rogue producer"; and

(c) third, stated:

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

55. In 2018, Mr. Solymosi denied that this e-mail amounted to an assurance or guarantee to protect IVCA's agency license as long as IVCA cooperated with Mr. Solymosi's investigation.[68] Mr. Solymosi also denied any *quid pro quo* offer during his cross-examination by Hearing Counsel in this proceeding.[69]

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[64] Exhibit 1, p. 1098.
[65] Exhibit 1, p. 2643:29-40 [**PTEB, Tab 13**].
[66] Exhibit 1, p. 2643:41 – 2644:47 [**PTEB, Tab 14**].
[67] 2022-02-11 Cross-examination of Mr. Solymosi, p. 63:2-20 [**PTEB, Tab 15**].
[68] Exhibit 1, p. 2645:18 – p. 2646:16 [**PTEB, Tab 16**].
[69] 2022-02-09 Cross-examination of Mr. Solymosi, p. 35:11 – 36:6 [**PTEB, Tab 17**].

56. However, it is clear that at the October 16, 2017 meeting of the Commission, Mr. Solymosi reported to the Commissioners (who would eventually be making the show-cause decision) that he had promised IVCA that its licence would be protected as long as IVCA cooperated with the investigation. The minutes of the October 16, 2017 meeting (which were not produced in the 2018 appeal but ought to have been)[70] state:

> Andre issued cease and desist letters to Thomas Fresh, Prokam, and IVCA. Thomas Fresh has a lawyer. Prokam will use the same one. IVCA has been cooperating in an effort to maintain their agency status.[71]

Mr. Reed's testimony regarding the remarks Mr. Solymosi made at this meeting was as follows:

> Q And do you recall Mr. Solymosi making those remarks about Prokam, Thomas Fresh, and IVCA?
>
> A I do after reading this, yes.
>
> Q Mr. Solymosi informed the commissioners at this meeting that he had told IVCA that as long as it cooperated with the commission and its investigation, its agency licence would be protected; right?
>
> A Correct.[72]

57. Thus, there is a conflict between, on the one hand:

(a) A plain reading of Mr. Solymosi's September 27 e-mail to Mr. Meyer; coupled with

(b) Mr. Reed's evidence that Mr. Solymosi reported promising to IVCA that its license would be protected if it cooperated in the investigation; and

on the other hand, Mr. Solymosi's self-serving evidence that he made no such promise to IVCA. This conflict should be resolved by preferring the plain reading of the document coupled with the unbiased evidence of Mr. Reed, but it is not

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[70] *Natural Products Marketing (BC) Act,* R.S.B.C. 1996, c. 330, s. 8(4), required the Commission to produce in the 2018 appeal all documents "touching on the matter under appeal", which these minutes undoubtedly did.
[71] Exhibit 23, page 3.
[72] 2022-04-19 Cross-examination of Michael Reed, p. 17:43 – p. 18:4 [**PTEB, Tab 18**].

necessary for the Review Panel to weigh the evidence in order to determine that there is some evidence to support the allegation that Mr. Solymosi did in fact extend the promise to protect IVCA's license. There is no merit to Hearing Counsel's submission that "the suggestion that Mr. Solymosi promised to protect IVCA's license in exchange for information concerning Prokam is speculation".[73]

2. September 29, 2017 e-mail from Mr. Solymosi to Mr. Meyer

58. In 2018, Mr. Solymosi was taken to an e-mail he wrote to Mr. Meyer on September 29, 2017,[74] in which he advised, "[t]he next step I need to act on will be to issue a cease and desist order to Prokam". However, Mr. Solymosi denied that he had already decided to issue a C&D Order to Prokam at that point, although he did not – as he could not – provide an alternate plausible interpretation for his email.[75] In this hearing, Mr. Solymosi acknowledged that by September 29, 2017 he had not received from IVCA any information he had asked for on September 27, but he neither admitted nor denied that by September 29 Prokam was the primary target of his investigation.[76]

59. In Prokam's submission, Mr. Solymosi's e-mails speak for themselves; it is clear that by September 29, 2017, if not earlier, he was primarily targeting Prokam.

3. October 3, 2017 meeting with IVCA

60. On October 3, 2017, Messrs. Solymosi and Krause attended IVCA's office and met with Messrs. Meyer, Michell, and Wittal and Ms. Solotki.[77] Ms. Solotki testified in 2018 that on October 2, 2017, she sent to Mr. Solymosi a collection of documents that Mr. Meyer had gathered, but to which she applied handwritten annotations.[78] Although Mr. Solymosi's evidence was that IVCA requested the

[73] Hearing Counsel's submission at para. 122.
[74] Exhibit 1, p. 1097.
[75] Exhibit 1, p. 2646:17-36 [**PTEB, Tab 19**].
[76] Exhibit 1, p. 1097; 2022-02-11 Cross-examination of Mr. Solymosi, p. 66:23 – 67:8 [**PTEB, Tab 20**].
[77] Exhibit 1, p. 2394:45 – p. 2395:1 [**PTEB, Tab 21**].
[78] Exhibit 1, p. 3672:23 – p. 3675:30 [**PTEB, Tab 22**].

Commission's help at this meeting,[79] his own notes of the meeting record Mr. Michell stating that IVCA was not requesting the Commission's assistance.[80]

4. October 5 and 6, 2017 Draft C&D Orders

61. The next step in Mr. Solymosi's investigation was his drafting of three C&D Orders, to IVCA, Prokam and Thomas Fresh.[81] On October 6, 2017, Mr. Solymosi provided drafts of the C&D Orders to Mr. Meyer, for his review and comment, but did not speak to anyone at Prokam or Thomas Fresh before taking what Mr. Solymosi agreed was the "drastic" step of issuing the C&D Orders.[82]

62. Mr. Solymosi's explanation for why he took what, in Prokam's submission, was a most unusual step of providing IVCA with the drafts of the three C&D Orders and discussed those drafts with Mr. Meyer was because IVCA was asking for assistance, and Mr. Solymosi wanted to make sure the assistance that the Commission was providing was sufficient.[83]

5. October 10, 2017 C&D Orders

63. Mr. Solymosi then, on October 10, 2017, issued the C&D Orders to Prokam, Thomas Fresh, and IVCA, and reported their issuance to the Commission.[84]

6. October 10, 2017 – November 7, 2017

64. Although the original plan was to have Prokam, Thomas Fresh, and IVCA attend a meeting of the Commission and make verbal representations, that did not happen as the Commission opted for a written process instead.[85]

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[79] 2022-02-09 Cross-examination of Mr. Solymosi, p. 43:1-19 [**PTEB, Tab 23**].
[80] Exhibit 1, p. 1101.
[81] Exhibit 1, pp. 1151-1158.
[82] Exhibit 1, pp. 1160-1169; 2022-02-09 Cross-examination of Mr. Solymosi, p. 45:3 – 47:31 [**PTEB, Tab 24**].
[83] 2022-02-09 Cross-examination of Mr. Solymosi, p. 45:3:13 [**PTEB, Tab 25**].
[84] Exhibit 1, pp. 1146-1158.
[85] Exhibit 1, p. 2399:35-45 [**PTEB, Tab 26**].

65. Mr. Solymosi testified in 2018, however, that during this period he continued to have verbal conversations with IVCA in connection with gathering the evidence from IVCA that Mr. Solymosi considered he needed.[86]

7. November 2017 Agency Managers Meeting and Letter

66. Mr. Solymosi gave evidence about the November 7, 2017 Agency Managers Meeting in both 2018 and 2022. His evidence was that some of the comments recorded in his notes regarding Prokam and Thomas Fresh were made by Mr. Meyer,[87] and others were likely made by Mr. Driediger.[88] Mr. Solymosi admitted that the show-cause hearing process was discussed.[89] Mr. Solymosi agreed that the majority of the discussion at the Agency Managers Meeting was about the Prokam, Thomas Fresh, and IVCA enforcement proceedings.[90]

67. It is apparent that the tenor of the discussion at the Agency Managers Letter was consistent with Mr. Solymosi's own view that as between IVCA and Prokam, the issue was "currently a problem grower".[91] This is reflected in Mr. Driediger's November 10, 2017 e-mail correspondence:

> I think we were all on the same page with our support for the VMC to bring the Prokam/Thomas Fresh infractions to a satisfactory conclusion. Would it help if were to sign a joint letter of some kind to show industry support?[92]

Mr. Solymosi's response (which again was not produced in the 2018 appeal but ought to have been) was: "I think a letter would be great to put in front of the Commission at the next meeting – November 22nd".[93]

68. Mr. Driediger authored the letter[94] and it was circulated to all agency managers, including Mr. Meyer, for signature. In an e-mail that was not produced in the 2018

[86] Exhibit 1, p. 2402:24-46 [**PTEB, Tab 27**].
[87] Exhibit 1, p. 2648:42 – 2649:46 [**PTEB, Tab 28**].
[88] Exhibit 1, p. 2650:13-35 [**PTEB, Tab 29**]
[89] Exhibit 1, p. 2651:20-32 [**PTEB, Tab 30**]; Exhibit 1, p. 2653:7-25 [**PTEB, Tab 31**].
[90] Exhibit 1, p. 2653:35 – p. 2654:30 [**PTEB, Tab 32**].
[91] Exhibit 1, p. 1240.
[92] Exhibit 1, p. 5623.
[93] Exhibit 1, pp. 5622-5623.

appeal, but ought to have been, Mr. Driediger explains that he had a private discussion with Mr. Meyer in which Mr. Meyer agreed to sign the letter.[95]

69. Mr. Solymosi admits that he understood the reference in the letter to "bad actors seeking to destroy the system for their own personal benefit" to be a reference to Prokam and Thomas Fresh.[96]

70. Mr. Solymosi later provided the letter to the Commissioners in conjunction with their deliberations in the show-cause decision, but it was not provided to Prokam until after Prokam had appealed from that decision.[97] There was good reason for Mr. Solymosi to withhold this letter from Prokam prior to the show-cause hearing, as it would have put Prokam on notice of IVCA's cooperation not only with the other agencies, but also with the Commission, in connection with the investigation. Nevertheless, Mr. Solymosi characterized the omission to disclose it to Prokam as inadvertent.[98]

8. November 2017 letters between Mr. Solymosi and IVCA

71. On November 9, 2017, Mr. Solymosi wrote to Mr. Meyer further to discussions in which Mr. Meyer apparently indicated he had more documentation to provide in support of the allegations against Thomas Fresh and Prokam.[99] Mr. Solymosi testified in 2018 that he was not sure whether those discussions took place at the November 7 Agency Managers Meeting or prior to that.[100] IVCA delivered a letter to Mr. Solymosi on November 17, 2017, confirming his statements in his November 9 letter regarding Prokam's and Thomas Fresh's alleged violations.[101]

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[94] Exhibit 1, p. 3821:19-25 [**PTEB, Tab 33**]; Exhibit 1, p. 5622.
[95] Exhibit 1, p. 5622.
[96] Exhibit 1, p. 2401:45 – 2402:4 [**PTEB, Tab 34**].
[97] 2022-02-09 Cross-examination of Mr. Solymosi, p. 60:41 – p. 61:2 [**PTEB, Tab 35**].
[98] *Ibid.*
[99] Exhibit 1, p. 2403:5 – p. 2404:30 [**PTEB, Tab 36**].
[100] Exhibit 1, p. 2655:18 – p. 2656:33 [**PTEB, Tab 37**].
[101] Exhibit 1, p. 2404:31-47 [**PTEB, Tab 38**].

9. November 20, 2017 Report to Commissioners

72. On November 20, 2017, Mr. Solymosi sent an e-mail to the Commissioners regarding the procedural status of the enforcement process.[102] The relevant passages, which were read aloud during cross-examination of Mr. Solymosi in 2018, are as follows:

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

73. In the 2018 appeal, Mr. Solymosi denied that he used the phrase "Note that Prokam (and IVCA – to protect their interests) has already appealed the C&D Orders…" because he knew IVCA was cooperating and did not seriously intend to proceed with its appeal; however, he provided no plausible alternate meaning for this phrase.[103] Mr. Reed testified in this proceeding that he understood Mr. Solymosi to be referring to the fact of IVCA's cooperation with the Commission in the investigation and to Mr. Solymosi's promise to IVCA that as long as it cooperated with the investigation, its agency licence would be protected.[104]

74. In Prokam's submission, Mr. Solymosi's comment distinguishing IVCA's appeal from Prokam's as having been brought by IVCA "to protect their interests" reflects his view that IVCA did not intend to pursue its appeal, because it was cooperating with Mr. Solymosi in the expectation that, as promised, its class 1 agency license would be protected. To Prokam, who was unaware of that promise, IVCA's appeal from the C&D Order conveyed the false message that

[102] Exhibit 1, p. 1410.
[103] Exhibit 1, p. 2659:36 – p. 2660:11 [**PTEB, Tab 39**].
[104] 2022-04-19 Cross-examination of Michael Reed, p. 20:26 – 21:36 [**PTEB, Tab 40**].

IVCA remained aligned with Prokam, and perpetuated IVCA's concealment from Prokam, pursuant to Mr. Solymosi's direction, that IVCA was cooperating with the investigation against Prokam.

10. November 24, 2017 delivery of October 25, 2017 Hothi Letter

75. On November 24, 2017, IVCA delivered a letter dated October 25, 2017, ostensibly authored by Santokh Hothi, stating that Prokam shipped Kennebec potatoes without quota, and that Prokam sold them while Hothi Farms had quota and product that was ready to be shipped out.[105] Mr. Solymosi initially testified that he asked IVCA to get this letter from Mr. Hothi;[106] later, he changed his evidence and stated that he couldn't recall if he had asked for it.[107]

76. Had Prokam received disclosure of this letter, it would have conveyed to Prokam that IVCA and the Commission were cooperating in the investigation against Prokam's interests. More specifically, it would have conveyed to Prokam that it had to meet an allegation that it shipped Kennebec potatoes without delivery allocation when Hothi product was available, which would have enabled Prokam to tender evidence at the show-cause hearing that Prokam's production and shipment of Kennebec potatoes was not unilateral, but rather was at the direction and with the knowledge of Messrs. Michell and Meyer.[108] Mr. Michell acknowledged this in his testimony at this hearing.[109]

77. Prokam did not get that opportunity, because Mr. Solymosi did not disclose the Hothi letter to Prokam prior to the show-cause hearing.[110]

[105] Exhibit 1, pp. 1339-1340.
[106] 2022-02-11 Cross-examination of Mr. Solymosi, p. 31:11-17 [**PTEB, Tab 41**].
[107] 2022-02-11 Cross-examination of Mr. Solymosi, p. 32:36-41 [**PTEB, Tab 42**].
[108] Exhibit 1, p. 2007:20-36; p. 2049:7 – p. 2050:17 [**PTEB, Tab 43**]; see also Exhibit 1, p., 3449 (text messages between Brian Meyer and Bob Dhillon).
[109] 2022-03-30 Cross-examination of Mr. Michell, p. 8:26 – p. 10:29; p. 49:43 – p. 50:42 [**PTEB, Tab 44**].
[110] Exhibit 1, p. 2536:4 – p.. 2537:1-24 [**PTEB, Tab 45**].

11. The December 14, 2017 Written Show-Cause Hearing

78. The final element of Mr. Solymosi's investigation was the presentation to the Commission of the information he had gathered. In both 2018 and 2022, Mr. Newell testified that the evidence on which he relied in agreeing to penalize Prokam and Thomas Fresh came from Mr. Solymosi, and in 2018, Mr. Newell testified that he expected Mr. Solymosi to have gathered evidence from both Prokam and Thomas Fresh as well as IVCA.[111]

79. Mr. Reed testified in this hearing that to the best of his recollection, there was no discussion at the December 14 meeting of any suggestion that IVCA ought to be punished in relation to the C&D Orders.[112]

80. Mr. Newell was asked in 2018 to recount the analysis that led to the Commission downgrading Prokam's and Thomas Fresh's licence classes to class four and leaving IVCA's licence at class one, with specific reference to the "fairness" SAFETI principle. Mr. Newell gave evidence that the decision not to adjust IVCA's license was based on IVCA coming to the Commission for help and cooperating with the Commission, and on the Commission's finding that IVCA was essentially being bullied by Prokam.[113] However, Mr. Newell admitted that that decision might not have been fair:

> MS. HUNTER: And so maybe we can just limit it to fairness. Can you take me through your thinking as a commissioner on how it is fair in the circumstances and based on the evidence you reviewed that Prokam and Thomas Fresh's licence classes would be changed and IVCA's would not?
>
> MR. NEWELL: Thinking back to all the discussions six -- six months ago, I don't know actually if it's perfectly fair….[114]

[111] Exhibit 1, p. 2505:10 – p. 2506:47 [**PTEB, Tab 46**].; 2022-04-19 Cross-examination of Mr. Newell, p. 84:26-39; p. 86:6 – p. 87:15 [**PTEB, Tab 47**].
[112] 2022-04-19 Cross-examination of Mr. Reed, p. 27:10-14 [**PTEB, Tab 48**].
[113] Exhibit 1, p. 2449:5-29 [**PTEB, Tab 49**].
[114] Exhibit 1, p. 2447:27-35 [**PTEB, Tab 50**].

81. Mr. Newell also acknowledged in his testimony in this proceeding that he did not think the outcome of the December 22, 2017 show-cause decision sanctioning Prokam but not IVCA was fair.[115]

12. Summary on Allegations related to Mr. Solymosi's Investigation

82. The totality of the evidence indicates that Mr. Solymosi concluded on the very first day of his investigation that Prokam was a "rogue producer" responsible for IVCA's non-compliance. Mr. Solymosi set out to achieve the end of punishing Prokam by soliciting evidence only from IVCA, and only evidence that tended to inculpate Prokam and exculpate IVCA. Mr. Solymosi did instruct IVCA to hide the fact of the investigation from Prokam, and, although Mr. Solymosi denies it, the evidence shows Mr. Solymosi did promise to IVCA that as long as it cooperated with him in his investigation, IVCA's class 1 agency license would be protected.

83. And, that is exactly what happened. The Commissioners who would be making the show-cause decision were informed of Mr. Solymosi's promise to IVCA at the October 16, 2017 meeting of the Commission. At the November 7, 2017, Mr. Solymosi and Mr. Meyer rallied support among the other agency managers for the view that Prokam was a problem grower and IVCA was not to blame for the purported non-compliance. A joint agency managers' letter urging the Commission to come down hard on "bad actors seeking to destroy the system for their own benefit", and a letter from a fellow IVCA grower levelling accusations against Prokam regarding Kennebec potatoes, were provided to the Commissioners but not to Prokam.

84. The evidence indicates that the entire investigation and show-cause process was a sham. Mr. Solymosi did not reach out to Prokam for evidence because, having already made up his mind on the first day of his investigation that Prokam was a "rogue producer", he simply was not interested in any evidence that might undermine that assessment.

[115] 2022-04-19 Cross-examination of Mr. Newell, p. 87:25-44 [**PTEB, Tab 51**].

85. The Commission was unable to find that Prokam and Thomas Fresh knew what the allegedly violated minimum prices were, and concluded that IVCA bore ultimate responsibility for violation of the minimum pricing orders. In the face of those findings, the outcome of the December 22, 2017 show-cause decision downgrading Prokam's and Thomas Fresh's license classes for violation of export minimum pricing orders, but leaving IVCA's class 1 license intact, is absurd. This absurdity is explained by the fact that, right from the beginning of Mr. Solymosi's investigation, the outcome that the "rogue producer" Prokam would be punished, but IVCA would not, was a foregone conclusion. While Mr. Solymosi's provision of the draft C&D Orders to the general manager of one of the intended recipients, for his review and comment, would be shocking and incomprehensible in the ordinary course, it makes perfect sense in light of the extraordinary fact that the C&D Order issued to IVCA and the ensuing enforcement proceeding against IVCA were a sham.

86. Despite outward appearances that IVCA's class 1 license was at risk, the reality was that from the time Mr. Solymosi promised that IVCA's license would be protected as long as IVCA cooperated, IVCA's license was never in any real jeopardy. Mr. Solymosi knew that. Mr. Meyer knew that. The Commissioners who were told of Mr. Solymosi's promise to IVCA, and that IVCA's appeal from the C&D Order was filed "to protect their interests", knew that. The agency managers who engaged in a comprehensive discussion with Messrs. Solymosi and Meyer on November 7, 2017 about the enforcement proceedings, and who were "all on the same page with [their] support for the VMC to bring the Prokam/TF infractions to a satisfactory conclusion", knew that. The only interested parties who did not know that were Prokam and Thomas Fresh.

87. In Prokam's respectful submission, there is more than enough documentary and *viva voce* evidence in support of its allegations of misfeasance in public office against Mr. Solymosi in relation to his fall 2017 investigation.

B. Allegations against Mr. Solymosi related to Unlawfulness of Minimum Pricing Orders

88. The 2019 BCFIRB panel has already found that the minimum pricing orders – and consequently the C&D Orders based upon violation of them – were unlawful. The only question in establishing misfeasance in public office in respect of the C&D Orders is whether at the material times, the knowledge requirement is met in respect of the particular defendants named in Prokam's claim.

89. Hearing Counsel, in discussing the knowledge requirement, appears to overlook that it may be established by proving wilful blindness or recklessness.[116] He consequently appears to ignore the question of whether there is evidence of wilful blindness or recklessness in his analysis. Whether Mr. Solymosi (and Mr. Guichon) knew at the material times that the federal authority required to regulate interprovincial trade had not been validly exercised in relation to the C&D Orders, subjective knowledge is very difficult to prove (and impossible to prove directly).

90. However, there is ample evidence to support Prokam's allegation that, at the material times, Mr. Solymosi (and Mr. Guichon) proceeded with enforcement measures against Prokam for purported violation of export minimum pricing orders knowing that there was <u>a vulnerability as to their lawfulness</u> and being <u>reckless as to whether the export minimum pricing orders were in fact valid</u>.

91. Mr. Solymosi's evidence was that although he did work for the Commission from 2004-2008, he did not become aware of the 2008 discussions between the Commission and the Joint Standing Committee for the Scrutiny of Regulations regarding the lawfulness of the Commission's interprovincial levies orders until October 13, 2017.[117] Taking this as true, the events in 2017 alone (a chronology of which follows) demonstrate that Mr. Solymosi had, at the material times, the requisite subjective awareness regarding the unlawfulness of the minimum

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[116] Hearing Counsel's submission at paras. 139-142, 147, 149.
[117] 2022-02-09 Cross-examination of Mr. Solymosi, p. 71:36 – p. 72:12 [**PTEB, Tab 52**]; 2022-02-10 Cross-examination of Mr. Solymosi, p. 62:9-20 [**PTEB, Tab 53**].

pricing orders he issued in August 2017, and which underlay the C&D Orders he issued in October 2017.

1. January– April 2017 Amendment to Federal Levies Order

92. Mr. Solymosi testified that he was the person charged with ensuring that levies orders with respect to interprovincial trade were properly gazetted during his time as general manager.[118] His evidence was that in January of 2017, a process was initiated which concluded with the amendment of the federal levies order on September 6, 2017.[119] He was taken to an e-mail he wrote to Wanda Gorsuch regarding the need to Gazette levies amended in June 2015.[120] He testified to learning from Ms. Gorsuch around this time of the need to Gazette orders for levies on sales of product outside of BC.[121] Ms. Gorsuch put Mr. Solymosi in touch with Pierre Bigras at the Natural Farm Products Council of Canada.[122]

93. On January 24, 2017, Mr. Solymosi received a draft amended levies order from Mr. Bigras, and Mr. Bigras followed up with Mr. Solymosi on April 11, 2017.[123]

2. August 2017 – Setting of Export Minimum Price and Subsequent Communications

94. The export minimum prices in issue were set by Mr. Solymosi on August 8, 2017 after two pricing calls took place.[124] He described the export price as an "export minimum price for B.C. production marketed by B.C. agencies into Alberta".[125]

95. Two days later, on August 10, 2017, Ms. Gorsuch wrote to John Walsh, copying Mr. Solymosi. Her e-mail reads, in relevant part:

> Dear Mr. Walsh,

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[118] 2022-02-10 Cross-examination of Mr. Solymosi, p. 72:45 – p. 73:2 [**PTEB, Tab 54**].
[119] 2022-02-10 Cross-examination of Mr. Solymosi, p. 73:3-15 [**PTEB, Tab 55**].
[120] Exhibit 5, p. 206.
[121] 2022-02-10 Cross-examination of Mr. Solymosi, p. 74:38 – p. 76:2 [**PTEB, Tab 56**].
[122] Exhibit 5, p. 209.
[123] Exhibit 5, pp. 218-219.
[124] Exhibit 1, pp. 917-920.
[125] 2022-02-10 Cross-examination of Mr. Solymosi, p. 118:1-15 [**PTEB, Tab 57**].

> You phoned BCFIRB on August 9, 2017 with two specific questions based on a recent price sheet you received from the Vegetable Commission. You asked if the Vegetable Commission has the authority to set a producer price that includes freight. **You also asked if the Vegetable Commission has the authority to set a producer price for exports**.[126]
>
> …
>
> **Export price question**
>
> **Your export price question brings in the federal *Agricultural Products Marketing Act* (APMA)**. Under *APMA*, there is a "British Columbia Vegetable Order". S. 3 of this order authorizes the Vegetable Commission to use its *NPMA* authorities in relation to interprovincial and export trade. **This includes the Commission's pricing authority.** Specific questions on how the export price was determined is best addressed with the Commission in the first instance.
>
> *s. 3 The Commodity Board is authorized to regulate the marketing of vegetables in interprovincial and export trade and for such purposes may, by order or regulation, with respect to persons and property situated within the Province of British Columbia, exercise all or any powers like the powers exercisable by it in relation to the marketing of vegetables locally within that province under the Act and the Plan.*[127]

96. Mr. Solymosi's evidence, in respect of this statement from a representative of his regulator that his authority to set minimum prices for interprovincial and export trade "brings in the federal *Agricultural Products Marketing Act*", was that the Commission was not relying on that federal authority to set export minimum pricing orders because the purpose for implementing the pricing orders was not to regulate interprovincial commerce and trade.[128]

97. However, on August 28, 2017, Mr. Solymosi sent Mr. Meyer an e-mail copying and pasting Ms. Gorsuch's explanation of the Commission's authority to set export prices.[129] It was put to Mr. Solymosi that the reason he copied and pasted

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[126] Mr. Walsh also filed a notice of appeal to BCFIRB from the August 2017 pricing orders, a copy of which Mr. Solymosi received and reviewed. Mr. Walsh did not pay the filing fee and accordingly the appeal did not proceed. See Exhibit 15, pp. 46-55 and 2022-02-10 Cross-examination of Mr. Solymosi, p. 134:31 – p. 136-27 [**PTEB, Tab 58**]

[127] Exhibit 1, p. 924.

[128] 2022-02-10 Cross-examination of Mr. Solymosi, p. 132:21-35; p. 133:4-11; 137:7-16 [**PTEB, Tab 59**].

[129] Exhibit 1, p. 977.

Ms. Gorsuch's explanation is because he believed it was correct; he denied this but could give no other plausible explanation.[130]

98. It was put to Mr. Solymosi that, after receiving Ms. Gorsuch's August 10, 2017 e-mail setting out the Commission's authority to set export minimum prices, he could have delayed the export minimum prices set on August 8 coming into effect in order to look into the question of the Commission's authority to set export prices. Mr. Solymosi's response was that he never doubted the purpose for which the prices were set.[131]

3. September 2017 Correspondence with Natural Farm Products Counsel

99. The amended federal levies order was signed by the Chair of the Commission on September 6, 2017, and came into force on September 8, 2017.[132] On September 20, 2017, Mr. Bigras forwarded to Mr. Solymosi a link to the Gazetted amended federal levies order.[133]

4. October 2017 C&D Orders and Subsequent events

100. On October 10, 2017, Mr. Solymosi issued the C&D Orders to IVCA, Prokam and Thomas Fresh. He forwarded those C&D Orders to Ms. Gorsuch at BCFIRB that same day.[134]

101. Mr. Solymosi testified that on October 13, 2017, he learned for the first time about the possibility of a legal challenge to the export minimum pricing orders.[135]

102. On October 16, 2017, Mr. Solymosi e-mailed Ms. Gorsuch to ask for her thoughts about his authority to set export minimum prices:

> Wanda,

[130] 2022-02-10 Cross-examination of Mr. Solymosi, p. 133:23 – 134:30 [**PTEB, Tab 60**].
[131] 2022-02-11 Cross-examination of Mr. Solymosi, p. 2:41 – p. 3:18 [**PTEB, Tab 61**].
[132] Exhibit 1, pp. 1044-1046; 2022-02-10 Cross-examination of Mr. Solymosi, p. 73:42 – p. 74:8 [**PTEB, Tab 62**].
[133] Exhibit 1, pp. 1086-1087.
[134] Exhibit 1, p. 1196.
[135] 2022-02-10 Cross-examination of Mr. Solymosi, p. 66:16-41 [**PTEB, Tab 63**].

> [Redacted] Each week we set a minimum price for storage crops. In the past we did not have the need to set a specific export price because BC fresh was the only agency exporting and the min price posted on the pricing sheet accounted for this price. Now we specifically state an export min price on the pricing sheet.
>
> Setting minimum price falls under my authority as a general manager regardless on if the product is for consumption for bc-local or export to out of province. I report to the commission on any issues or non-compliance matters.
>
> Your thoughts?
>
> Andre[136]

103. The next day, October 17, 2017, Mr. Solymosi wrote to Ms. Gorsuch asking whether BCFIRB would have "historical records of all orders issued by the Commission that would draw from our federal authority and require publication in the Canada Gazette", adding "[t]he question has come up as to if we ever Gazetted our authority to set an export or inter-provincial minimum price".[137] It was put to Mr. Solymosi that he was hoping to find that someone had already Gazetted the Commission's authority to set export minimum prices; Mr. Solymosi denied this and testified that his question was "inquisitive", adding:

> … it would be a shock if we ever found any price that was gazetted. It's not expected that we would have found something because it was inconceivable that this would have ever occurred in the past and I say that because of what I've been telling you for the last how many hours that the purpose is to regulate B.C. production marketed by B.C. agencies and we do that -- we regulate B.C. agencies to get the best price for B.C. producers and that's the reason why we set minimum pricing.[138]

104. That same day, October 17, 2017, Mr. Solymosi e-mailed Mr. Bigras, asking for a copy of any archived orders Gazetted by the Commission.[139] Still later on October 17, 2017, Mr. Solymosi e-mailed Ms. Gorsuch advising "I believe I found what I needed. See attached".[140] The attachments to Mr. Solymosi's e-mail, which he testified he found in a file in the Commission office, were a copy of the

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136 Exhibit 1, pp. 1195-1196.
137 Exhibit 1, p. 1195.
138 2022-02-10 Cross-examination of Mr. Solymosi, p. 123:15-26 [**PTEB, Tab 64**].
139 Exhibit 1, p., 1205.
140 Exhibit 1, p. 1197.

British Columbia Vegetable Order and the cover page for a "leave to appeal" application to the Supreme Court of Canada in relation to the "I-5 decision".[141]

105. On October 18, 2017, Ms. Gorsuch replied to Mr. Solymosi, forwarding links to federal legislation and the Supreme Court of British Columbia decision in *Global Greenhouse Produce et al v. B.C. Marketing Board & B.C. Hothouse Foods v. B.C. Vegetable Greenhouse et al*.[142]

106. On October 19, 2017, Mr. Solymosi wrote to the full Commission attempting to set up a meeting to consider the C&D Orders.[143] Mr. Solymosi included a download link to documents including the two he had found related to, in his words, "pricing authority on inter-provincial and exports [redacted]".

107. Mr. Reed and Mr. Newell both testified that they understood Mr. Solymosi was sending these documents because there had been discussion of a concern that the export minimum pricing orders might have required federal regulatory authority and that the Commission had not validly exercised this authority.[144] However, Mr. Solymosi denied that he sent these documents because of his awareness of a risk that the export minimum prices were not valid.[145]

108. Later on October 19, 2017, Mr. Hrabinsky wrote to Ms. Hunter advising, "[w]ith respect to pricing, I'm instructed that the Commission is here concerned only with the minimum price for regulated product marketed within the province".[146]

109. On October 24, 2017, Mr. Hrabinsky wrote to Ms. Hunter to provide a different definition for export pricing:

> I am instructed that the Commission's price list does indeed specify prices for "export", but that this should be understood as the minimum price for regulated product purchased in B.C. for further

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[141] Exhibit 1, pp. 1200-1204; 2022-02-11 Cross-examination of Mr. Solymosi, p. 11:6 – 12:18 [**PTEB, Tab 65**].
[142] Exhibit 1, p. 1207
[143] Exhibit 1, p. 1213.
[144] 2022-04-19 Cross-examination of Michael Reed, p. 19:8-47 [**PTEB, Tab 66**]; 2022-04-19 Cross-examination of John Newell, p. 79:34 – 80:6 [**PTEB, Tab 67**].
[145] 2022-02-11 Cross-examination of Mr. Solymosi, p. 14:25 – p. 16:1 [**PTEB, Tab 68**].
[146] 2022-02-11 Cross-examination of Mr. Solymosi, p. 16:2 – p. 18:39 [**PTEB, Tab 69**].

> marketing outside of B.C., but not the price of which regulated product may be resold outside of B.C.[147]

Mr. Solymosi admitted that this definition was not the definition he had in mind when he began setting export minimum prices in August 2017.[148]

110. On October 30, 2017, Mr. Solymosi wrote to Ms. Babcock, a Commission employee, instructing her to add “minimum price for White Potatoes purchased in BC for further marketing outside of BC” as the definition of export price on the price sheet.[149] It was put to Mr. Solymosi that the reason he gave this instruction to Ms. Babcock is because by this time he was “concerned that setting prices for interprovincial or export sales require the prices to be registered and gazetted”.[150] Mr. Solymosi’s evidence in reply was that he knew there would be legal challenge advancing the argument that the Commission was relying on federal authority, and he gave this instruction to Ms. Babcock “out of an abundance of caution”.[151]

5. December 14, 2017 Show-Cause Decision

111. Messrs. Solymosi, Reed, and Newell all confirmed that the issue of the Commission’s authority to set minimum prices for export and interprovincial sales was discussed at the December 14 meeting. Mr. Solymosi testified that he did not discuss with the Commissioners the change to the definition of “export price” he placed on the pricing list.[152]

112. Mr. Reed agreed during cross-examination that there was a discussion at this meeting about the concern as to whether the Commission had validly exercised its authority to set interprovincial prices, and about the risk that the Commission and Mr. Solymosi in particular had not validly exercised this authority.[153]

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147 2022-02-11 Cross-examination of Mr. Solymosi, p. 19:9-27 [**PTEB, Tab 70**].
148 2022-02-11 Cross-examination of Mr. Solymosi, p. 20:11-32 [**PTEB, Tab 71**].
149 Exhibit 1, p. 1224.
150 2022-02-11 Cross-examination of Mr. Solymosi, p. 23:27-31 [**PTEB, Tab 72**].
151 2022-02-11 Cross-examination of Mr. Solymosi, p. 23:32 – p. 24:11 [**PTEB, Tab 73**].
152 2022-02-11 Cross-examination of Mr. Solymosi, p. 38:45 – p. 39:10 [**PTEB, Tab 74**].
153 2022-04-19 Cross-examination of Michael Reed, p. 23:3-25 [**PTEB, Tab 75**].

6. Summary on Allegations related to Unlawfulness of the Export Minimum Pricing Orders

113. The chronology of relevant events recounted above demonstrates the following:

(a) As of January 2017, Mr. Solymosi knew that the implementation of levies on interprovincial or export transactions required the exercise of the Commission's federal regulatory authority.

(b) As of January 2017, Mr. Solymosi knew that exercises of the Commission's federal regulatory authority were required to be Gazetted and registered.

(c) On August 10, 2017, Mr. Solymosi received an e-mail from his regulator, BCFIRB, through Ms. Gorsuch, that stated in plain language that the Commission's authority to regulate price on interprovincial and export transactions was derived from the federal legislation. Accordingly, by August 10, 2017, Mr. Solymosi either knew that the Commission's authority to regulate price on interprovincial and export transactions was derived from the federal legislation or was willfully blind to that fact.

In the alternative, if, in the face of the August 10, 2017 e-mail from a representative of his regulator stating in plain language that the Commission's authority to regulate price on interprovincial and export transactions was derived from the federal legislation, Mr. Solymosi nevertheless continued to believe without asking his regulator for further confirmation that the source of the Commission's authority to regulate price on interprovincial and export transactions was provincial legislation, he was reckless in holding and operating upon that belief.

(d) The fact that Mr. Solymosi copied and pasted Ms. Gorsuch's advice that the Commission's authority to regulate price on interprovincial and export transactions was derived from the federal legislation in an e-mail to Mr. Meyer on August 28, 2017 means either that:

(i) Mr. Solymosi believed that Ms. Gorsuch's advice was correct; or

(ii) Mr. Solymosi intentionally disseminated information to an agency representative, Mr. Meyer, about the source of the Commission's authority to regulate price on interprovincial and export transactions that he believed was inaccurate or incomplete.

It defies logic and common sense that Mr. Solymosi would provide Mr. Meyer with information about the Commission's regulatory authority that he believed to be inaccurate or incomplete. The only logical inference is that he disseminated Ms. Gorsuch's advice that the Commission's authority to regulate price on interprovincial and export transactions was derived from the federal legislation because he believed this advice to be accurate and complete. Mr. Solymosi was unable to provide any other cogent explanation for the content of his e-mail to Mr. Meyer.

(e) At the time Mr. Solymosi issued the October 10, 2017 C&D Orders alleging violations of the export minimum pricing orders, he:

(i) either:

(A) knew that the export minimum pricing orders required the exercise of federal regulatory authority or was wilfully blind to that fact; or

(B) recklessly maintained and operated upon the belief that the export minimum pricing orders did not require the exercise of federal regulatory authority;

(ii) by his own admission, knew that exercises of federal regulatory authority required Gazetting and registration;

(iii) by his own admission, knew that he was the person responsible for ensuring that Commission orders requiring the exercise of federal legislative authority were properly registered and Gazetted; and

(iv) by his own admission, knew that he had failed to properly register and Gazette the export minimum pricing orders on which the C&D Orders were based.

(f) By his own admission, Mr. Solymosi knew from October 13, 2017 onward, that the validity of the export minimum pricing orders was likely to be legally challenged on the basis that they required the exercise of federal legislative authority that had not been properly exercised, and with that knowledge he:

(i) made inquiries with Ms. Gorsuch and Mr. Bigras on October 16 and 17, 2017 regarding whether export pricing orders had ever been Gazetted and registered before;

(ii) on October 17, 2017, searched physical records at the Commission's office bearing on the source of the Commission's authority to set export prices;

(iii) on October 19, 2017, forwarded documents he found to the Commissioners for the purpose of discussing a concern that there was a risk the export minimum pricing orders underlying the C&D Orders were invalid;

(iv) on October 19 and 24, 2017 caused Commission counsel to deliver correspondence to Prokam's counsel advising that he had been instructed that the Commission firstly was only concerned with regulated product marketed within BC, and then subsequently that "export sales" mean product purchased in BC for further marketing outside of BC, but not the price of which regulated product may be resold outside of BC;

(v) on October 30, 2017, instructed Ms. Babcock to change the definition of "export" on the pricing sheet; and

(vi) on December 14, 2017, conveyed to the Commissioners the view that the export minimum pricing orders were valid exercises of provincial regulatory authority.

Mr. Solymosi did all of these things with the knowledge that the export minimum pricing orders were likely to be challenged as invalid, and with recklessness as to whether that challenge would succeed and the export minimum pricing orders were in fact invalid. The purpose for Mr. Solymosi doing all of these things was to attempt to insulate the export minimum pricing orders (and resulting C&D Orders) from a challenge to their validity on the basis that they had not been properly registered and Gazetted.

114. Mr. Solymosi knew by September 2017 that the amendment to the federal levies order had been registered and Gazetted and came into force on September 8, 2017 – two days after Mr. Krause signed it on September 6, 2017. Pricing orders made on Tuesdays did not take effect until the following week. It was open to Mr. Solymosi as early as August 10, 2017, when he received Ms. Gorsuch's e-mail, and certainly by September 2017, to simply start causing the export minimum pricing orders to be properly registered and Gazetted. Mr. Solymosi was reckless in failing to do so. Knowing that had not occurred, he was reckless in issuing the C&D Orders in reliance on the validity of the export minimum pricing orders.

115. For all of these reasons, it is Prokam's respectful submission that there is ample evidentiary support for Prokam's claim that Mr. Solymosi issued the C&D Order to Prokam alleging violations of the export minimum pricing orders knowing that those export minimum pricing orders were unlawful, being willfully blind to their unlawfulness, or with recklessness as to whether they were unlawful.

VIII. PROKAM'S CLAIM AGAINST MR. GUICHON

A. Issuing the C&D Orders for an Ulterior, Improper Purpose

116. Hearing Counsel glaringly ignores[154] the evidentiary lynchpin on which this particular claim is based: Mr. Guichon's own testimony from 2018.[155] He does so despite the fact that Prokam pointed out the specific transcript excerpt on which it relies in its counsel's July 23, 2021 letter to Hearing Counsel. Mr. Guichon affirmed in this proceeding that he had given that evidence in 2018 and that it was true.[156] This was evidence given by Mr. Guichon spontaneously, only six months after the events in question, and at a time when – unlike now – his evidence was unaffected by any perception of exposure to a current or potential misfeasance claim.

117. Hearing Counsel attempts to downplay Mr. Guichon's role in approving the C&D Orders, arguing that "there was no evidence that Mr. Guichon had an independent view or that he was involved in the substantial determination that the C&D Orders should be served".[157] With respect, that is directly contrary to Mr. Guichon's evidence. He clearly did have an independent view, in his capacity as a grower, and that view caused him to approve the C&D Orders. When it was put to Mr. Guichon in 2018 that he did not consider whether his concerns as a grower made it inappropriate for him to be the decision-maker in respect of sending out the ceased and desist orders, he did not disagree with the characterization that he was a decision-maker.[158]

118. Mr. Guichon, too, attempted in his evidence to downplay his role, testifying that he "consented to", rather than "approved", the C&D Orders being sent out.[159] This is a distinction without a difference. The only reason that Mr. Guichon was in

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[154] Hearing Counsel's submission, paras. 164, 168.
[155] Exhibit 1, p. 2250:35 – p. 2251:29 [**PTEB, Tab 76**].
[156] 2022-04-01 Cross-examination of Mr. Guichon, p. 5:11-22; p. 20:11 – p. 21:44 [**PTEB, Tab 77**].
[157] Hearing Counsel's submission, paras. 164-165.
[158] Exhibit 1, p. 2251:20-37; p. 2256:20-42 [**PTEB, Tab 78**].
[159] 2022-03-30 Cross-examination of Mr. Guichon, p. 111:23-38 [**PTEB, Tab 79**]; 2022-04-01 Cross-examination of Mr. Guichon, p. 22:7-14 [**PTEB, Tab 80**].

a position to either consent to or approve the issuance of the C&D Orders is because of the statutory authority vested in him as a Commissioner.

119. Hearing Counsel argues that there is no evidence that, in approving the C&D Orders, Mr. Guichon acted with malice towards Prokam.[160] It is clear on Mr. Guichon's own evidence – which Hearing Counsel inexplicably ignores – that his anger as a grower about the 60-day forward contracts motivated his decision to issue the C&D Orders: "[a]s 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".

120. Regardless, Hearing Counsel erroneously conflates malice with improper purpose (self-interest). Whether or not Mr. Guichon was motivated by malice toward Prokam in approving the C&D Orders, it is sufficient that he was motivated by an improper or ulterior purpose – his own self-interest and the interests of his fellow BCfresh growers who could not sell into Alberta – and that he knew that his exercise of his power in that way for that purpose would cause harm to Prokam.[161] Having read at the time a draft of the C&D Order against Prokam, as Mr. Guichon testified in 2022 that he did,[162] and understanding that a C&D Order is an enforcement mechanism, as Mr. Guichon testified in 2018 that he did,[163] there is no doubt he knew that Prokam would be harmed by receipt of a C&D Order and the enforcement proceedings that would ensue.

121. There is a discrepancy in Mr. Guichon's evidence in 2018 and 2022 as to whether the contracts between IVCA and Thomas Fresh Calgary and Saskatoon to sell Prokam-grown potatoes at 22 cents per pound affected BCfresh sales. In his interview summary, Mr. Guichon stated that "the export for BCfresh was in no worse position because of Prokam." Mr. Guichon adopted this statement as his

[160] Hearing Counsel's submission, para. 168.
[161] *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 150.
[162] 2022-03-30 Cross-examination of Mr. Guichon, p. 111:25-38 [**PTEB, Tab 81**].
[163] Exhibit 1, p. 2152:4-15; p. 2174:4-36; p. 2245:24-28 [**PTEB, Tab 82**].

evidence in this proceeding.[164] By contrast, in 2018, Mr. Guichon testified that the pricing on Prokam's potatoes did negatively affect BCfresh.[165]

122. The question of whether BCfresh export sales were in fact negatively affected is immaterial. What matters is that at the material time, Mr. Guichon believed that they were, and was exercising his statutory authority in relation to the C&D Orders based on this belief and on his interest as a BCfresh grower "with a whole bunch of potatoes in storage to sell".

123. Nothing in Mr. Guichon's testimony in this supervisory review had the effect of neutralizing the portion of his 2018 evidence on which this aspect of Prokam's claim is based. Although Mr. Guichon explained in attempted mitigation that one cannot be a commissioner without being a grower,[166] it is not the fact that Mr. Guichon wore these two hats at the time he approved or consented to the C&D Orders that underlies this aspect of Prokam's claim. Rather, it is the fact that Mr. Guichon on his own admission exercised his powers as a commissioner to approve or consent to the C&D Orders based on his personal interests as a grower "with a whole bunch of potatoes in storage to sell". The 2018 testimony alone provides ample evidentiary support for this aspect of Prokam's claim.

B. Involvement in discussions and deliberations related to Prokam

124. It is clear that Mr. Guichon participated in discussions and deliberations related to Prokam, including in relation to the C&D Orders. There are two meetings relevant to Prokam's allegation that Mr. Guichon participated in discussions and deliberations regarding the C&D Orders knowing that he was in a conflict: the December 14, 2017 meeting and the January 26, 2018 teleconference meeting (and subsequent e-mail chain).

[164] 2022-03-30 Cross-examination of Mr. Guichon, p. 114:20-46 [**PTEB, Tab 83**].
[165] Exhibit 1, p. 2291:30 – p. 2292:14 [**PTEB, Tab 84**].
[166] 2022-04-01 Cross-examination of Mr. Guichon, p. 22:16-25 [**PTEB, Tab 85**].

1. December 14, 2017 Meeting

125. The evidence with respect to Mr. Guichon's participation in the December 14, 2017 meeting was as follows:

(a) In 2018, Mr. Guichon testified that he was present for the part of the meeting during which the evidence regarding IVCA, Prokam, and Thomas Fresh was reviewed, and recused himself on completion of the review of the evidence.[167] In 2022, Mr, Guichon's testimony was to the same effect.[168]

(b) In 2018, Mr. Guichon agreed that he recused himself at 11:55am, 20 minutes before the meeting was indicated to have ended.[169]

(c) With reference to the notes of the meeting, Mr. Guichon agreed in 2018 that he was present for the part of the discussion touching upon freezing Prokam's delivery allocation,[170] and the part of the discussion regarding the Commission's right to redirect a grower to another agency.[171] Initially Mr. Guichon testified that BCfresh's reduced export sales to Alberta in 2017 could have been discussed while he was present at the meeting,[172] but he later changed his evidence to say that he did not recall that issue being discussed in his presence at the meeting.[173] He recalled discussion about Sam Enterprises entering into a contract but not being a registered grower.[174]

(d) Mr. Guichon testified in 2018 that he did not recuse himself from and participated in the discussion regarding directing Prokam to BCfresh,

[167] Exhibit 1, p. 2281:43 – p. 2283:11 [**PTEB, Tab 86**].
[168] 2022-03-30 Cross-examination of Mr. Guichon, p. 117:43 – p. 118:25 [**PTEB, Tab 87**]:
[169] Exhibit 1, p. 1372; Exhibit 1, p. 2287:30 – p. 2288:20 [**PTEB, Tab 88**].
[170] Exhibit 1, p. 2289:5-23; p. 2290:24-46 [**PTEB, Tab 89**].
[171] Exhibit 1, p. 2290:47 – p. 2291:21 [**PTEB, Tab 90**].
[172] Exhibit 1, p. 2291:30 – p. 2292:4 [**PTEB, Tab 91**].
[173] Exhibit 1, p. 2292:15 – p. 2293:25 [**PTEB, Tab 92**].
[174] Exhibit 1, p. 2294:33-43 [**PTEB, Tab 93**].

explaining that he had a lot to add that he felt was positive for Mr. Dhillon as a good grower.[175]

(e) By contrast, Mr. Guichon testified in 2022 that he was only present to answer questions, but he was asked none, and he "didn't say a word".[176] He specifically denied participating in the discussion about whether BCfresh was an appropriate agency to which to direct Prokam.[177] However, when taken to his 2018 evidence that he did participate in this part of the discussion, Mr. Guichon admitted the truth of that evidence.[178]

(f) Mr. Newell testified in 2018 that the only evidence before the panel about the suitability of BCfresh for Prokam came from the BCfresh Commissioners.[179] He testified that BCfresh commissioners participated in the discussion about the suitability of BCfresh for Prokam before recusing themselves.[180] Both Mr. Newell and Mr. Solymosi testified that the IVCA/Prokam/Thomas Fresh issues were discussed during approximately the last hour of the December 14 meeting,[181] and the BCfresh commissioners were present for the first 40 minutes of that discussion.[182]

126. It is clear from this evidence that Mr. Guichon attended and participated in the discussion at the December 14, 2017 meeting, including offering his views on the direction of Prokam to BCfresh. While Mr. Guichon initially denied this, he had to change his evidence and admit it when taken to his 2018 evidence.

2. January 26, 2018 Meeting and January 30, 2018 Decision

127. The evidence regarding the January 26, 2018 telephone meeting was as follows:

[175] Exhibit 1, p. 2296:20 – p. 2297:47 [**PTEB, Tab 94**].
[176] 2022-03-30 Cross-examination of Mr. Guichon, p. 118:36 – p. 119:1 [**PTEB, Tab 95**].
[177] 2022-04-01 Cross-examination of Mr. Guichon, p. 27:34 – p. 28:14 [**PTEB, Tab 96**].
[178] 2022-04-01 Cross-examination of Mr. Guichon, p. 28:15 – p. 29:40 [**PTEB, Tab 97**].
[179] Exhibit 1, p. 2474:2-44 [**PTEB, Tab 98**].
[180] *Ibid*.
[181] Exhibit 1, p. 2485:3-18 [**PTEB, Tab 99**].
[182] Exhibit 1, p. 2485:38-45; p. 2487:14 – p. 2488:6 [**PTEB, Tab 100**].

(a) The January 26, 2018 meeting minutes do not show any recusals.[183]

(b) Mr. Solymosi initially testified in 2018 that the BCfresh commissioners did not participate in the variation decision and did not receive any information about Prokam's application.[184] However, Mr. Solymosi was then taken to the e-mail chain between himself and the entire board regarding the variation decision,[185] and Mr. Solymosi admitted that he had been mistaken,[186] and agreed that the full Commission participated in the January 26, 2018 conference call.[187] Mr. Solymosi testified in 2018 that although he could not recall whether any Commissioners recused themselves from the decision, he would have made a written note of that if it had occurred.[188] He admitted that Mr. Guichon participated in the variation decision.[189] In 2022, Mr, Solymosi testified that Mr. Guichon and all other Commissioners participated in the January 30, 2018 decision by e-mail.[190]

(c) Mr. Newell agreed during his testimony in 2022 that the January 30, 2018 decision was by e-mail vote in which Mr. Guichon participated.[191]

(d) Mr. Guichon testified in 2018 that he recused himself from the January 26, 2018 meeting.[192] He agreed in his 2022 testimony that he ought to have recused himself and maintained that he did recuse himself and did not participate in the variation decision.[193]

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183 Exhibit 23, p. 11. Mr. Guichon attended and voted to approve these minutes at the Commission's March 7, 2018 meeting without requesting that any recusal be noted: Exhibit 2, p. 8, item 1.3.
184 Exhibit 1, p. 2545:16-38 [**PTEB, Tab 101**].
185 Exhibit 1, pp. 1516-1521.
186 Exhibit 1, p. 2545:39 – p. 2546:17 [**PTEB, Tab 102**].
187 Exhibit 1, 2547:16 – p. 2548:7 [**PTEB, Tab 103**].
188 *Ibid.*
189 Exhibit 1, p. 2548:13-16 [**PTEB, Tab 104**].
190 2022-02-11 Cross-examination of Mr. Solymosi, p. 49:14 – p. 53:9 [**PTEB, Tab 105**].
191 2022-04-19 Cross-examination of Mr. Newell, p. 88:6 – p. 89:12 [**PTEB, Tab 106**].
192 Exhibit 1, p. 2305:25 – p. 2306:8 [**PTEB, Tab 107**].
193 2022-04-01 Cross-examination of Mr. Guichon, p. 35:9-18 [**PTEB, Tab 108**].

(e) Mr. Guichon in 2022 attempted to explain that his recusal may not have been noted in the January 26, 2018 meeting minutes because it was a noisy telephone line and his recusal and the recusals of the other BCfresh commissioners may not have been heard.[194] However, Mr, Guichon testified that the noisy line did not prevent him from hearing Mr Gerrard recuse himself (which also is not recorded in the meeting minutes).[195]

(f) Mr. Solymosi asked all Commissioners for comments on the draft January 30, 2018 variation decision, and Mr. Guichon provided some substantive comments by e-mail on January 29, 2018.[196]

128. There is clearly ample evidentiary support for the allegation that Mr. Guichon participated in the January 30, 2018 variation decision by e-mail, if not also by phone, despite knowing that he ought to be recusing himself.

C. Unlawfulness of export minimum prices

129. Finally, there is evidence to support the allegation that Mr. Guichon either knew of, or was willfully blind to, the unlawfulness of the export minimum pricing orders, or was reckless as to whether they were lawful or unlawful.

130. Mr. Guichon became a member of the Commission in 1993.[197] At the time that the events material to the 2008 proceedings before the Standing Joint Committee for the Scrutiny of Regulations were taking place, Mr. Guichon had been a Commissioner for 15 years. At the time that the C&D Orders were issued, he had been a Commissioner for about 24 years.

131. Mr. Guichon gave evidence that he believed for some period prior to October 2017 that "the Commission had jurisdiction over anything grown in BC and sold anywhere".[198] However, he also testified that he recalled in 2006 understanding

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[194] 2022-03-30 Cross-examination of Mr. Guichon, p. 143:3-10 [**PTEB, Tab 109**].
[195] 2022-04-01 Cross-examination of Mr. Guichon, p. 35:27-46 [**PTEB, Tab 110**].
[196] Exhibit 1, pp. 1516-1523.
[197] 2022-03-30 Cross-examination of Mr. Guichon, p. 104:24-26 [**PTEB, Tab 111**].
[198] 2022-04-01 Cross-examination of Mr. Guichon p. 40:37-p. 43:3 [**PTEB, Tab 112**].

from attending a meeting of the Commission that the Commission's setting of extraprovincial levies was vulnerable to challenge.[199] He testified that he was aware that Messrs. Leroux and Hrabinsky went to Ottawa in 2008 to give evidence at a joint parliamentary committee, and he would have been aware of whatever was in the Commission's meeting minutes at the time.[200]

132. Mr. Guichon was indicated to have been present at the Commission meeting of October 18, 2006, the minutes of which indicate:

> Commission staff is currently working with the federal government to have Commission intra-provincial [*sic*] trade authority validated through the establishment of a federal order.
>
> One of the objectives is to have the term "by Order" removed from the Commission Regulations, which will preclude the requirement to establish federal orders in the future.[201]

133. Mr. Guichon was also present for a meeting held on September 5, 2007 in which a new federal order was mentioned, and the commissioners voted to repeal the *British Columbia Interior Vegetable Marketing Board (Interprovincial and Export) Regulations*.[202] At a meeting held on November 17, 2009, Mr. Guichon was present and voted on a motion to approve the BCVMC Federal Levies Order. The minutes note that "by enacting the order and once set out in the Federal Gazette this will serve to perfect concurrent provincial and federal levy authority regarding the marketing of regulated products in inter-provincial and export trade".[203]

134. Significantly, when Mr. Leroux was asked whether it was discussed in meetings around 2006 and 2008 that the commission was not gazetting or registering interprovincial levies, Mr. Leroux responded by saying: "I don't know whether that would have been in the common understanding of the Commissioners at that time. <u>They would have understood there is a vulnerability and that the orders</u>

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[199] 2022-03-30 Cross-examination of Mr. Guichon, p. 131:6-24 [**PTEB, Tab 113**].
[200] 2022-04-01 Cross-examination of Mr. Guichon, p. 43:4-23 [**PTEB, Tab 114**].
[201] Exhibit 5, p. 17.
[202] Exhibit 5, p. 34.
[203] Exhibit 5, p. 204.

might not be valid and could be challenged. Whether they knew the specifics of that, I can't speak to".[204] Mr. Leroux agreed that there was a concern at the Commission that it was acting in a manner not consistent with the regulations.[205]

135. Only a few weeks before Mr. Guichon consented to or approved the C&D Orders, on September 6, 2017, Mr. Guichon attended the Commission meeting at which the Federal Levies order was again discussed.[206] When it was put to Mr. Guichon that there was a discussion as a Commission in October 2017 on the question of pricing authority on interprovincial and exports, his evidence was that he did not recall any such discussion.[207] However, both Messrs. Reed and Newell recalled such discussions among the Commissioners taking place, with Mr. Newell testifying that he recalled Mr. Guichon was present for those discussions.[208]

136. This evidence supports the allegation that in or around October 2017, when he approved or consented to the C&D Orders, from his service as a Commissioner during the 2006-2009 period and continuing through the September 2017 Federal Levies discussion, Mr. Guichon either knew, or was willfully blind to the fact that the Commission's regulation of interprovincial and export trade required the exercise of federally delegated authority, or was reckless as to whether federally delegated authority was required.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 30, 2022

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Hunter Litigation Chambers

[204] Hearing Counsel Transcript Extract Book, Tab 24.
[205] Hearing Counsel Transcript Extract Book, Tab 26.
[206] Exhibit 32, p. 5, Item 9.1
[207] 2022-04-01 Cross-examination of Mr. Guichon, p. 47:13-34 [**PTEB, Tab 115**].
[208] 2022-04-19 Cross-examination of Michael Reed, p. 19:8-47 [**PTEB, Tab 116**]; 2022-04-19 Cross-examination of John Newell, p. 79:34 – 80:6 [**PTEB, Tab 117**].