



BC VEGETABLE MARKETING COMMISSION

DECISION RE:

IN THE MATTER OF A REVIEW OF
AN AGENCY LICENCE ISSUED TO GLOBAL GREENHOUSE PRODUCE INC.

BEFORE: The British Columbia Vegetable Marketing Commission
Derek Sturko, Chair
Craig Evans, Member
Natalie Veles, Member
Kevin Husband, Member
Hugh Reynolds, Member

DATE: May 5, 2023

Background

1. By letter dated July 18, 2022 Merom Holdings Ltd. (“Merom Holdings”) and Merom Farms Ltd. (“Merom Farms”) advised the Commission of their intention to restructure Merom Holdings.
2. Merom Holdings is the sole shareholder of Merom Farms, which in turn owns 50% of the shares of Global Greenhouse Produce Inc. (“Global”), a licenced agency of the Commission.
3. By letter dated July 27, 2022, the Commission advised counsel for Merom Holdings and Merom Farms that the Commission’s approval would be required for the proposed restructuring. In addition, the Commission advised that, because a change in ownership may result in a change in the agency’s business plan, the nature of the Commission’s review would be akin to a review on an application for an agency licence.
4. On September 30, 2022, the Commission issued its decision with respect to approval of the proposed restructuring of Merom Holdings. Following a review of all the materials that were presented to the Commission, the panel was satisfied that there were no concerns arising from the proposed share transfer, and granted approval therefor. However, notwithstanding the panel’s approval of the share transfer, the panel’s review of the business plan gave rise to concerns about the agency licence that has been issued to Global. In particular, the panel had cause to believe that Global may have been derelict in fulfilling its agency duties, insofar as it may have abdicated its responsibilities as an agency to Greenhouse Delight Foods Inc. Consequently, the panel proposed to cancel Global’s agency licence on the basis that it had

entirely abdicated its responsibilities as an agency to Greenhouse Delight Foods Inc., unless Global could show cause as to why its licence should not be cancelled.

5. The show cause hearing was held on December 14, 2022, and the Commission issued its resulting decision on January 10, 2023, as follows:

33. *At this time the panel does not have sufficient information to determine that the designated agency status should be maintained. However, given the twenty-year history of Global as a licensed agency of the Commission, the panel is prepared to give Global one final opportunity to demonstrate to the satisfaction of the Commission that preservation of its designated agency status is warranted having regard to all of the considerations specified in Part XIV of the Commission's General Order, including section 1(4) and the polycentric considerations set out in section 3 (Review of Existing Agencies) thereof. In that regard, it is not the panel's role or responsibility to develop, or to assist with the development of, a business plan for the agency that would promote the Commission's policy objectives. That burden resides with the agency alone. For the reasons that follow, effective immediately, the panel is imposing conditions on Global's agency licence.*

...

Decision

48. *What follows is the panel's decision following the show cause hearing that was held on December 14, 2022.*
49. *Effective immediately, the Commission is imposing the subsequent condition on Global's agency licence:*
50. *On or before **February 28, 2023**, Global is to submit a supplementary business plan,*
 - a) *Addressing in detail each of the factors and considerations set out in Sections 1 (4) (a), (b), (c), (d), (e), (f), and (g) of PART XIV of the Consolidated General Orders.*
 - b) *Providing particulars on the marketing strategy and framework of Section 1 (3) (d) of Part XIV of the Consolidated General Orders regarding the specific group of customers (target market) at which the business focusses its marketing efforts and resources. Identify what proportion (percentage and volume) is sold to retail, wholesale, food service, and what proportion of sales is sold in bulk.*

c) *That includes all signed agreements, including current grower marketing agreements (GMA).*

51. *With respect to this supplementary business plan, the Commission asks that Global provide further commentary regarding the following:*

51.1 *The position expressed by it at the show cause hearing regarding centralized, coordinated, orderly marketing, and the role that agencies play with respect to that objective (if any).*

51.2 *The provisions 3.9 & 3.10 in the shareholder agreement dated August 16, 2007 identified and discussed at the show cause hearing and what steps, if any, that Global proposes to take in relation to those provisions. These provisions are provided below:*

*Agreement dated August 16, 2007
SUNSELECT PRODUCE (HOLDINGS) INC
MEROM FARMS LTD.
GLOBAL GREENHOUSE PRODUCE INC.*

3.9 The Shareholders acknowledge and agree that the Company shall not be responsible for marketing and sale of vegetable product produced by or sold by each of the Shareholders but that each Shareholder shall be wholly responsible for the marketing and sale of vegetable produced by them and all financial matters associated therewith, provided, however, such marketing and sales shall be in compliance with the General Orders and shall utilize the Company as the Agency for the purposes of such sales and marketing as the formal Agency of records for purposes of the General Orders and the Commission.

3.10 The Shareholders shall cause each of the entities that own greenhouses which utilizes the Company as their agency to provide to the Company, in a timely manner, all of this information required by the Company to meet its reporting obligations to the Commission under the General Orders.

51.3 *Specifics on Global's dealings with an unapproved sub-agency, Greenhouse Delight Foods Inc.*

52. *Global should give careful consideration in its submissions that an agency licence exists so long as it exists to further the policy objectives of the Commission. Agencies are subject to the rules and policy judgements of the regulator. Once the submissions are received, the Commission will make a final determination on the Global agency licence.*
 53. *The agency licence expires annually. The current licence expires on March 31, 2023. Global must submit an agency application to renew its licence as part of the annual administrative process managed by the Commission office. The agency application for renewal is independent of this review process.*
 54. *Given that the Commission released its decision on December 20, 2022, prior to the issuance of these reasons, it is the Commission's position that the limitation period for filing an appeal to the BCFIRB should not commence until these written reasons are provided.*
6. On February 22, 2023 the Commission received Global's submissions, including a revised business plan and supplementary marketing plan.

Analysis

7. Parts of the submission including the signed GMA agreements, and the shareholder agreement were provided in confidence to the Commission. Any concerns with these documents will be addressed in this decision as part of the Commission's conclusions.
8. Global's position with respect centralized, coordinated, orderly marketing was summarized in its submission at the show cause hearing as follows:

"... Global is, and has been for approximately 20 years, contributing to the orderly marketing of vegetables in British Columbia. We note that nowhere in the Natural Products Marketing (BC) Act, its regulations or in any order of the Commission is there a legal obligation for "centralized" marketing of greenhouse vegetables. Nevertheless, Global would support any lawful provision or regulation enacted by the Commission in order to regulate greenhouse vegetables.... "
9. In its more recent submissions tendered in response to the Commission's January 10, 2022 decision, Global now acknowledges that the Commission does promote orderly marketing by managing the promotion, control, and regulation of production, transportation, packaging, storage, and marketing of vegetables. Further, Global now acknowledges that the primary obligation of the Commission is to producers, and that the agency system exists to enhance orderly marketing, promote the development of industry, and ensure that producer returns are maximized. However, Global claims that the obligation to enhance orderly marketing is:

- 6.1. Met through an undefined mechanism (not a legal requirement) of centralized and coordinated marketing;
 - 6.2. Achieved by the Commission's management of "promotion, control, and regulation of production, transportation, packing, storage and marketing of vegetables; and
 - 6.3. To ensure producer returns are maximized.
10. Consequently, Global submits that it will only support and implement any requirement that is expressly set out in the Act, the Scheme, or the Commission's General Order. Global argues that it would not be just for its agency licence to be cancelled because of a failure to meet a requirement that that is not expressly set out in the Act, the regulations, the Scheme, and the Commission's General Order.
 11. The Commission does not agree with Global's narrow description of its obligations. While it is true that Global must comply with all requirements expressly set out in the Act, the Scheme and the Commission's General Order, the Commission is not precluded from exercising its discretion at any time in furtherance of its statutory mandate. In an appropriate case, the Commission could exercise its discretion to cancel a licence even if there is no specific violation of an express provision of the Act, the Scheme or the Commission's General Order. To suggest otherwise is to claim that Global has substantive (as opposed to procedural) rights in relation to its licence, that may be asserted against the regulator. This is not so. Quota and licence are privileges and not rights. As recognized by Mr. Justice Macdonald in *Sanders v. Milk Commission* (1991), 53 B.C.L.R. (2d) 167 at page 178 "[a] quota, a license to produce, which may be issued on prescribed terms and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions". In summary, the situation is "the board giveth and the board taketh away".
 12. In any event, Global argues that it does market regulated product in a manner that is entirely centralized. It asserts that it has grown from being an individual producer to being a designated agency of the Commission in 2002, and that it has worked relentlessly to maximize returns for its producers, and has worked with the industry as a whole for the benefit of producers, consumers, and the public.
 13. The Shareholder Agreement that was the source of some of the Commission's concerns has since been revised. It now states that all marketing and sales shall be done in compliance with the General Orders. Provisions 3.9 & 3.10 were amended to confirm the agency's control over the marketing and sales of the vegetable products produced and sold by its shareholders. Krahnlic Ventures exited the greenhouse industry over 5 years ago and does not directly participate in the greenhouse industry. However, Krahnlic Ventures remains a shareholder in Global.

14. Global claims that Greenhouse Delight Foods Inc. (Greenhouse Delight) is an independent contractor for the Global agency. Global goes on to inform the Commission that this structure was setup over two decades ago and that Global entered into a Business Services and Distribution Agreement with Greenhouse Delight to perform the following services for the Global agency: business support, selling, marketing, distribution, packing, warehousing, logistical support, and administrative and agency services to the agency's producers. The contractor executes its contractual obligations under the direct control, oversight and supervision of Global. The directors for Greenhouse Delight are also directors of Global and the management of both organizations is the same.
15. Global has also updated its Independent Contractor Agreement with Greenhouse Delight to ensure that the agreement clearly reflects the agency's obligations to enhance orderly marketing. Global argues that orderly marketing can be achieved through the use of independent contractors provided that there is a well drafted contract addressing all of the core contractual requirements, a clear communications plan on the agency's marketing goals and objectives, and the establishment of guidelines and protocols that are set by the agency. By providing the contractor with a concise understanding of these contractual responsibilities and expectations, Global argues that the agency can fulfill its orderly marketing objective.
16. Finally, Global submits that if the Commission concludes that Greenhouse Delight is the true designated agency, then the Commission should approve the designation of Greenhouse Delight as a "sub-agent" of Global.

Commission Conclusions

17. It is the Commission's view that Global's revised business plan and supplementary marketing plan are a significant improvement over what had previously been presented. However, the Commission has identified some deficiencies in the supplementary marketing plan that require further clarity. These parts are as follows:
 - 17.1. Regarding the amended shareholder agreement, the word 'Market' as used in part 3.10 could suggest that shareholders and their affiliates may each market their own greenhouse vegetables under the agency licence granted to Global. What is the intended meaning of the word "Market" in part 3.10?
 - 17.2. Regarding PART XIV 1(3)(d)(iii), further particulars of the market placement of delivery allocation and production allocation are required. Market access is explained as direct and semi-direct. What is the definition of semi-direct retail clients (customers)? Clarification is required on the category and the identity of this customer base. Furthermore, rather than a semi-direct or direct split of retail customers the Commission would like the historical and projected volume breakout by customer, and specifics on how Global plans to pursue direct to retail business that will drive sales through this category.

- 17.3. Regarding PART XIV 1(3)(d)(vi), the names and contact information of proposed customers are required. Additional information on customers and sales performance is needed. The Commission is requesting a list of the top 10 customer volumes and the historical and projected sales performance by customer.
- 17.4. Global's submissions indicate that cash flow from operating activities flows through the agency. However, Global's financial records do not appear to reflect this. The financial records must be consistent with the business structure going forward. All sales need to flow through Global.
18. Regarding the Commission's policy objective of centralized, coordinated marketing, Global has argued that it does comply with marketing that is centralized. It also states that it will support and be compliant with any requirement of the Commission provided that it is expressly set out in the Act, the regulations, the Scheme, or the Commission's General Order. The Commission is not convinced that Global fully accepts that centralized co-ordinated marketing is a valid requirement and policy objective. Nonetheless, the Commission accepts that Global understands the policy objective set by the Commission and is willing to accept policy judgements imposed on them by the regulator.
19. An agency licence exists so long as it exists to further the policy objectives of the Commission. Though the Commission does not accept Global's position that policy needs to be expressly defined in the legislative framework, there is some merit to undertaking the process to affirm these policy objectives in writing. Having said that, Global is reminded that it does not have a substantive right to its agency licence. Agency status is conferred, withheld, or cancelled as a means of furthering the Commission's policy objectives. A breach of some provision of the Act, the regulations or the Commission's General Orders is not necessarily required in order to cancel an agency licence where the agency no longer furthers the Commission's policy objectives having regard to the considerations specified in Part XIV of the General Order. A right to procedural fairness is not a right to a licence.
20. On review of the business plan and the contractual agreement in place with Greenhouse Delight, it is clear Global relies on Greenhouse Delight to carry out the functions of an agency under its oversight. It is also evident that the relationship between the two organizations is very connected with both entities sharing common directorship and management. Though on paper Global may consider Greenhouse Delight as an independent contractor, the connection between the two entities indicates otherwise. The management group is intertwined. With this strong connection, granting an agency licence to Global cannot be considered without Greenhouse Delight. Global's business plan is dependent on Greenhouse Delight to carry out the functions of the agency. Global in essence is doing business as Greenhouse Delight and all agency sales are managed by Greenhouse Delight.
21. The Commission is prepared to maintain the Global agency designation under the current business plan that has been presented, for the time being. However, Global's reliance on Greenhouse Delight raises issues that will need to be addressed and resolved. Designated agencies are not merely industry stakeholders. They are recipients of authority delegated to

them by the Commission, and they serve as the instruments through which the Commission implements its policies with respect to orderly marketing. Pursuant to paragraph 11(1)(p) of the NPMA, the Commission is authorized to delegate its powers to the extent and in the manner the Commission considers necessary or advisable for the proper operation of the *Scheme*. However, the rule against sub-delegation holds that, without express authority, a delegate of legislative powers may not further sub-delegate those powers to another. In *Trinity Western University v. Law Society of British Columbia*, [2016] B.C.J. No. 2252, the British Columbia Court of Appeal expressed the rule as follows:

62 The rule against sub-delegation is easily stated: where an enactment delegates rule-making or decision-making authority to a particular person, that person is entitled to exercise the power directly, but is generally not entitled to delegate its exercise to another. The maxim that a delegate is not entitled to re-delegate is a basic principle of administrative law. While there are exceptions (see the classic article by John Willis, "Delegatus non potest delegare" (1943) 21 Can. Bar Rev. 257), sub-delegation is generally permitted only where a statute authorizes it expressly or by necessary implication (Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2013) (loose-leaf) s.s. 13-15 and 13-16).

22. In the near future, the Commission will be engaging in consultation with agencies concerning the use of sub-delegates (sub-agencies) to fulfill the responsibilities of designated agencies, pursuant to the authority delegated to the designated agency by the Commission.
23. Global is therefore put on notice that it may wish to consider whether it is able to exercise the function of a designated agency without relying on a sub-agency, or alternatively, whether Greenhouse Delight should be recognized by the Commission as the designated agency.

Decision

24. Global Greenhouse Produce Inc.'s designated agency status is to be maintained for the 2023-24 licensing period subject to any further directions that might be issued by the Commission concerning the use of sub-agencies to fulfill agency responsibilities. In addition, Global must submit additional information to the Commission by July 31, 2023 as follows:
 - a) Clarification is needed on the use of the word "Market" in part 3.10 of the amended shareholder agreement. (Refer to 17.1 for further explanation)
 - b) With specific regard to the information provided in PART XIV 1(3)(d)(iii) particulars are to be provided of the intended market placement of delivery and production allocation by target market category as defined by the Commission. The Commission seeks additional information on:

- i) The definition of direct and semi-direct customers. Clarification on which customers fit under each definition, and a breakdown of volume by customer along with an analysis of the historical 2-Yr and projected 1-Yr sales volumes. (Refer to 17.2 and 17.3 for further explanation)
- ii) Specifics on how Global plans to pursue and secure direct to retail business and drive sales through this category and achieve its objectives and goals.

25. The S.A.F.E.T.I. analysis of this decision:

STRATEGIC	<ul style="list-style-type: none"> • The decision reflects the mandate of the Commission with respect to maximizing producer returns and orderly marketing. • The Commission will consider whether the use of sub-agencies to fulfill agency responsibilities is permissible. • The use of sub-agencies to fulfill agency responsibilities needs to be considered from an industry perspective with stakeholders.
ACCOUNTABLE	<ul style="list-style-type: none"> • Builds accountability in the system by bringing attention to and addressing a compliance matter on the use of sub-delegates to fulfill the responsibilities of designated agencies. • Requests additional information from Global that is deficient in the business plan and needs to be clarified to meet expectations.
FAIR	<ul style="list-style-type: none"> • Global can continue to operate as an agency for the 2023-24 licensing period subject to any further direction that may be issued. Any direction issued on the use of sub-delegates to fulfill agency responsibilities will apply to all agencies.
EFFECTIVE	<ul style="list-style-type: none"> • Clarifies the legal obligation of authority that is delegated to a licensed agency by the Commission and provides for engagement of all agencies on the use of sub-delegates.
TRANSPARENT	<ul style="list-style-type: none"> • Communicates the Commissions concerns that are to be addressed.
INCLUSIVE	<ul style="list-style-type: none"> • Delegation of authority needs to be addressed at an industry level and the discussion appropriately engages all licensed agencies, not just Global, in consultation on the issue.



Derek Sturko, Chair