



BC VEGETABLE MARKETING COMMISSION

Decision Re:

**IN THE MATTER OF AN APPLICATION MADE BY
MPL BRITISH COLUMBIA DISTRIBUTORS INC. (“MPL BC”)
FOR AN ORDER DESIGNATING IT AS AN AGENCY**

BEFORE: The British Columbia Vegetable Marketing Commission
Debbie Etsell, Chair
Hugh Reynolds, Secretary
Armand Vander Meulen, Member
Kevin Husband, Member

DATE: December 21, 2021

Introduction

1. “Designated agencies” are a critical component of the regulatory system for vegetables in British Columbia. They are the means by which the Commission achieves its main policy objective of maximizing producer returns through centralized, coordinated marketing of regulated product. The appropriate agency structure for the marketing of regulated vegetables contributes to orderly marketing by ensuring market growth opportunities for producers, and a steady supply of BC product for consumers.
2. Under the Natural Products Marketing (BC) Act (NPMA), the Commission can delegate authority to designated agencies to support the purposes of regulated marketing. Among other things, the Commission is empowered to: (a) regulate the time and place at which and to designate the agency through which a regulated product must be marketed; (b) determine the charges that may be made by a designated agency for its services; (c) set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia; and (d) authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a

share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those payments until the total net proceeds are distributed. Every designation of an agency must be approved in writing by the BC Farm Industry Review Board (BCFIRB).

3. As a result of the agency review process that commenced in 2018, it became apparent to the Commission that its current orders regarding the designation of new agencies, and the review of existing agencies, were deficient. In the Commission's view, the orders then in effect did not clearly articulate the Commission's policy objective of promoting the interests of the industry as a whole through coordinated marketing that will maximize the returns of all producers. Furthermore, it was the Commission's view that the orders then in existence contained too many ambiguities. Consequently, On March 15, 2021, the Commission passed Amending Order 54, which implemented comprehensive changes to the Commission's orders regarding the designation of new agencies, and the review of existing agencies.
4. On May 27, 2021 the Commission received an amended application for a NEW Class 1 designated agency licence (pursuant to Amending Order 54) from MPL BC for the marketing of regulated greenhouse vegetables.
5. On August 20, 2021, September 15, 2021 and September 24, 2021, the BCFIRB made certain orders and directions concerning the composition of the panel that is to address MPL BC's application. In accordance with those orders and directions, a panel of the Commission was struck to review the application. The panel members consist of Debbie Etsell (Chair), Hugh Reynolds (Secretary), Armand Vander Meulen (Member) and Kevin Husband (Member).
6. On September 27, 2021, the panel met to address administrative matters concerning the application process. Commission staff was directed to send out a notice to all stakeholders after the timeline was established.
7. On September 30, 2021, the panel reviewed MPL BC's application and deliberated on the review process. A decision was made to receive oral submissions from MPL BC, which was communicated to MPL BC by letter dated October 1, 2021.
8. On October 8, 2021, MPL BC presented its application to the panel. Following that presentation, the panel decided to engage in further consultation with industry stakeholders through a written submission process. MPL BC was asked to send a redacted version of its application for distribution to stakeholders.
9. On October 13, 2021, the panel circulated MPL BC's redacted application to industry stakeholders. These stakeholders were invited to deliver written submissions by October 25, 2021. Stakeholders were also informed that any written submissions would be provided to MPL BC so that it would have an opportunity to reply to those written submissions by October 29, 2021.

10. On October 22, 2021, the deadline for written submissions from industry stakeholders was extended to November 3, 2021.

11. The panel received written submissions from industry stakeholders as follows:

Calais / Gravis Farms Ltd.
Wayne Soo / Aljane Farms
Ravi Cheema / Creekside Hothouses Ltd.
Tanya Rheume / Merom Farms
Randy Andres / IVCA - Island Vegetable Co-operative Association
Loren Taves / Farmer - Taves Family Farm
Bill Brar / CVG Vegetable Products Ltd.
Gurinder Cheema / Fresh4U Farms Ltd.
Jos Moerman / SunnySide Produce Ltd.
Ray VanMarrewyk / Westcoast vegetables Ltd.
Robert J. McDonnell / Farris, Vaughan, Wills & Murphy LLP
Michael Minerva / Village Farms
Steven Newell / Greenhouse Grown Foods Inc.
Steven Newell / Windset Farms

12. On November 5, 2021, the written submissions from industry stakeholders were provided to MPL BC, which was directed to provide any reply by November 15, 2021.

13. On November 12, 2021, the panel extended the deadline for MPL BC's reply to November 16, 2021.

14. On November 15, 2021, MPL BC submitted its reply to the written submissions received from industry stakeholders.

15. The panel met to deliberate on November 18 and 22, 2021, and December 21, 2021.

Analysis

16. The designation of a new agency is not a routine matter akin to the issuance of a producer licence. Unlike some other regulated commodities, the vegetable industry is not supply managed. Centralized, coordinated marketing through agencies is the primary mechanism by which the Commission maintains orderly marketing, promotes the development of the industry, and ensures that producer returns are maximized. Consequently, the decision to grant or refuse agency status is a matter of fundamental marketing policy.

17. In its January 31, 2017 Supervisory Decision, the BCFIRB said:

7. The specific rules governing agencies differ depending on the needs of the particular regulated industry. What is common across all regulated industries, however, is the agencies are licensed entities whose purpose is to market

regulated product on behalf of registered producers. **Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. They minimize burdens on each producer regarding finding outlets for sales of their delivery allocation (a mechanism for producers to share market access). Agencies also store, ship, and label product for producers. For consumers, they help ensure a steady supply of BC product by contributing to orderly marketing. In all this, one of their key roles is to grow the industry by looking for new markets. As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: “Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers”. Agencies thus play both a key front line role, and a larger strategic role, in assisting the Commission to regulate, manage and grow the industry in an orderly fashion:** see generally January 7, 2013 Supervisory Decision, paras. 34 - 38; see also the Commission’s September 21, 2015 Stakeholder Engagement Discussion Paper, pp. 4 - 6. (emphasis added)

18. Significantly, the BCFIRB’s comments concerning the role of agencies and the undesirability of agencies “competing for the same buyer” reflect an awareness of the natural tension that arises from having multiple agencies. On the one hand, multiple agencies may provide some resiliency and choice for producers. On the other hand, if these agencies are left to their own devices, they might erode producer returns by competing against each other on price in the same market space. In the greenhouse sector, this tension was the subject of certain decisions and directions made by the BCFIRB in the *Global Greenhouse* matter.
19. In *Global Greenhouse Produce Inc. et. al. v. BCMB et. al.*, 2003 BCSC 1508, Drost, J. quoted from the Commission’s recommendations to the BCFIRB, as follows:

31. BCHH is currently the sole designated marketing agency for regulated greenhouse vegetables in Districts I & II. Hot House and its tomato producers have been going through a difficult financial period of late, largely as a result of the significant preliminary duty imposed upon it by the U.S. Department of Commerce....It was clear from the evidence presented to the Panel that at least some growers remain largely dissatisfied with the manner in which BCHH has been operating as a marketing agent, and that these growers wish to have an alternative....Simply put, they do not want to do business with BCHH any longer and they seek the opportunity to market their product more effectively. They may or may not succeed in this regard, but they want to try.

.....

33. The Panel has also considered the impact of a second agency designation on the industry as a whole at this time. Concerns were expressed to the Panel that the existence of a second seller of B.C. product would result in price erosion in the market place. The Panel recognizes that Globals (sic) proposed marketing plan will result in additional access to markets and enhanced sales opportunities. The

Global application attempts to deal with these issues by committing to market the product outside BCHH's traditional markets of western Canada and the I-5 Corridor. BCHH expressed doubt that any such commitment would be effective.

.....

35. In the result, the Panel has concluded that, in light of the circumstances in which the hothouse industry is currently operating it is an appropriate time to provide producers with an alternative to marketing product through BCHH... (emphasis added)

20. At the time of the *Global Greenhouse* case, the Commission acted to address the detrimental impact of inter-agency competition in the greenhouse sector by imposing strict territorial limitations. The necessity for regulatory mechanisms to protect against price erosion from inter-agency competition is reflected in the BCFIRB's January 31, 2017 Supervisory Decision, as follows:

72. The Commission's reasons noted that these criteria were being applied in a broader context that considered the appropriate marketing options for growers (while it is beneficial to have multiple agencies, too many agencies can lead to market confusion and undermine orderly marketing), the local supply for a proposed agency, an agency's ability to manage its delivery allocation and plan for positive growth as opposed to merely competing in existing markets and the Commission's reliance on the timely market intelligence provided by agencies to the Commission when the Commission establishes minimum price.

.....

85. Despite the criticisms that some, including the agencies, have leveled over the years about the regulatory system, all of them support ongoing regulation as being in the best interests of the industry – as supporting the fundamental goals of regulated marketing, which ensures the equitable and orderly marketing of natural products, which helps mitigate the extreme and sometimes destructive swings in production and price that can take place absent regulation. These extreme swings can be detrimental to producers and the value chain, including consumers. BCFIRB decided, in our June 15, 2016 supervisory decision letter that "regulation of the Vancouver Island vegetable industry continues to represent sound marketing policy".

21. In summary, the designation of a new agency should only follow where the panel is satisfied that the presence of an additional agency will not result in price erosion, lead to market confusion or otherwise undermine orderly marketing. Furthermore, the panel must be satisfied that the presence of an additional agency will enhance orderly marketing, promote the development of the industry, and ensure that producer returns are maximized. There is a high threshold that must be satisfied before an application for agency status will be granted.

22. These considerations are expressed in more detail in Part XIV of the Commission's General Order. The relevant provisions are as follows:

1. (4) Applications for designated Agency status must also:
 - (a) demonstrate to the satisfaction of the Commission that the applicant's primary business objective is the marketing of regulated product in a manner that benefits the Commission and the British Columbia industry as a whole;
 - (b) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the regulatory requirements and limitations imposed on Agencies under the Commission's General Orders;
 - (c) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the market access system established under the Commission's General Orders for all applicable regulated products;
 - (d) demonstrate to the satisfaction of the Commission that the applicant has sufficient knowledge and ability to service markets in British Columbia and Canada;
 - (e) demonstrate to the satisfaction of the Commission that the applicant has the capacity to directly market regulated product without excessive reliance on wholesalers, or third-party grading, packing, warehouse and storage facilities, or that the applicant will otherwise make arrangements with such third parties in a manner that:
 - (i) would retain the proposed Agency's control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user;
 - (ii) would not expose the industry to unnecessary food safety risk;
 - (iii) would not be disruptive to orderly marketing;
 - (f) demonstrate to the satisfaction of the Commission that the applicant has taken all reasonable steps to meet with, and seek the cooperation of, existing Agencies, and provide particulars of the result of such initiatives.

- (g) provide a rationale in support of the application with specific reference to the following:
 - (i) existing and anticipated requirements of the market that could be serviced by the proposed Agency;
 - (ii) how the proposed Agency would benefit producers shipping through that Agency;
 - (iii) how the proposed Agency would benefit the industry as a whole; and
 - (iv) the impact that the proposed Agency would have on existing designated Agencies.

.....

- 2. (5) Where the panel has decided that the application should not be summarily dismissed, the panel will engage in further consultation with industry stakeholders concerning the application. The applicant will be given an opportunity to prepare a redacted version of the application for review by industry stakeholders, provided that only information that is confidential, proprietary or constitutes a trade secret may be so redacted from the application reviewed by the panel.
- (6) Following consultation with industry stakeholders, the panel will decide whether to grant designated Agency status to the applicant. The panel will grant designated agency status only where it is satisfied that:
 - (a) there is a market requirement for the proposed Agency, and the designation of that Agency would benefit the industry as a whole having regard to the interests of all producers, including those marketing through other Agencies;
 - (b) it would not be in the interests of the industry for the proposed regulated product to be marketed by an existing Agency;
 - (c) the presence of the proposed Agency will not be disruptive to orderly marketing and will not result in increased competition among Agencies on price, which may have a detrimental effect on producer returns;

- (d) the proposed Agency has demonstrated an understanding of the regulatory system and has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations;
- (e) there is evidence-based demand for the specific product(s), grouped by end use customer, that are to be marketed by the proposed Agency, which demand is not already satisfied by existing Agencies;
- (f) there is evidence-based support from multiple licensed Commercial Producers, who are at arms-length from each other, and who intend to market regulated product through the proposed Agency;
- (g) the primary responsibility for marketing regulated product will rest with the proposed Agency, rather than wholesalers who may market regulated product on behalf of the proposed Agency;
- (h) the proposed Agency will comply with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province;
- (i) the proposed Agency will not have a detrimental effect on the delivery allocation and production allocation of existing producers not represented by the proposed Agency; and
- (j) the proposed Agency has the knowledge, capacity and ability to operate effectively as an Agency.

23. The panel has carefully considered MPL BC's application, together with the submissions of industry stakeholders, even though it may not refer to every point raised in the application or those submissions.

24. The panel is satisfied that MPL BC is a well-established, leading marketer, with direct access to significant customers. It has exclusive arrangements with some of the largest retailers and has penetrated markets throughout North America. The panel notes that existing agencies regularly sell product to Mastronardi, precisely because it has direct access to these markets.

25. MPL BC has essentially operated within BC as a licensed wholesaler acquiring product from existing agencies, and the panel is satisfied that it has conducted itself in that capacity in accordance with applicable regulatory requirements. If granted agency status, MPL BC has

also expressed its willingness to appoint a person as a liaison to the Commission to facilitate its continued compliance with the regulatory system.

26. Stakeholder opposition to MPL BC's application was generally expressed on the basis that the grower community is currently being well served from within the status quo. Another theme that arises from the submissions made by stakeholders opposed to the application is that the grant of agency status to MPL BC will have a detrimental impact on existing BC agencies.
27. The panel accepts that a grant of agency status to MPL BC could create significant disruption to some existing agencies. However, the Commission's primary obligation is to producers; not to the agencies themselves. As noted, the agency system exists to enhance orderly marketing, promote the development of the industry, and ensure that producer returns are maximized. Agencies are the tools through which these regulatory objectives are pursued, rather than an end to themselves.
28. On balance, the panel is satisfied that MPL BC's application satisfies the requirements set out in Part XIV of the General Order. There are market penetration opportunities available through this applicant that are not present with existing agencies. Furthermore, the panel believes that the industry will benefit when product can be marketed through an agency that has better and more direct access to key customers throughout North America. While it is possible for existing agencies to sell to Mastronardi, which can then market product to these key customers, this approach is likely to introduce unnecessary costs and inefficiencies that do not benefit producers.
29. Producers are likely to be better served when their product is marketed by an agency that has better and more direct access to key retailers throughout North America. In this regard, the panel does not think that preservation of the status quo is itself a valid objective. If the interests of producers can be better served through a new agency, with better and more direct access to key customers throughout North America, then the high threshold established under Part XIV of the General Order can be met, despite the disruption to existing agencies. In short, while it is generally undesirable to permit a proliferation of agencies that might simply compete against each other resulting in price erosion, the Commission must be alive to the possibility that a new agency can have better and more direct access to key markets than existing agencies.

Decision

30. After due consideration, the panel has decided that MPL BC should be designated as an agency, subject to the approval of the BCFIRB. It is the panel's considered view that this decision reflects a principles-based approach to supervision and regulation. This principled approach has been defined by the BCFIRB as six principles collectively referred to as the "SAFETI" principles:

Strategic: The decision reflects the panel’s identification of key opportunities as well as systemic challenges. While the panel recognizes that a decision to grant agency status to MPL BC is likely to cause disruption to existing agencies, it is also cognizant that its main obligation is to producers, rather than to the agencies themselves. The panel believes that producers will be better served when they have the opportunity to market through an agency that has better and more direct access to key customers throughout North America.

Accountable: The panel has maintaining legitimacy and integrity by discharging its responsibilities according to the detailed criteria for new agency applications published in Part XIV of the General Order.

Fair: The panel has ensured procedural fairness by providing industry stakeholders with a fulsome opportunity to express their positions with respect to MPL BC’s application.

Effective: The high threshold for the grant of an agency designation, as well as the process by which such applications are to be made, are both clearly defined in Part XIV of the General Order. The Commission’s expectations are therefore clearly defined for both the applicant and for industry stakeholders.

Transparent: The panel has taken all appropriate measures to ensure that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed. Though some aspects of the application have been redacted to protect confidential or proprietary information, stakeholders have been provided with a fulsome opportunity to express their positions

Inclusive: The panel has taken all appropriate steps to ensure that appropriate interests are considered.

Any person aggrieved or dissatisfied with this decision may appeal this decision to the BCFIRB within 30 days from the date of this decision.

DATED AT SURREY, BRITISH COLUMBIA, THIS 12th DAY OF JANUARY 2022

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION



Debbie Etsell, Chair