

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND  
THE FUTURE OF REGULATED VEGETABLE PRODUCTION ON VANCOUVER  
ISLAND – AGENCY DESIGNATION

**DECISION**

31 January 2017

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

**Contents**

DIRECTIONS.....	3
INTRODUCTION .....	4
ISSUE .....	4
LEGISLATIVE CONTEXT .....	4
AGENCIES.....	4
BACKGROUND .....	5
THE CURRENT SUPERVISORY PROCESS .....	12
THREE AGENCY APPLICATIONS.....	16
COMMISSION RECOMMENDATIONS .....	17
FINAL SUBMISSIONS .....	18
COMMISSION RATIONALE .....	18
BCFIRB ANALYSIS.....	21
BCFIRB SUPERVISORY ORDER AND DIRECTIONS .....	30
CLOSING OBSERVATIONS.....	31

## **DIRECTIONS**

1. For the reasons set out in this Decision, the BC Farm Industry Review Board (BCFIRB) directs as follows:

### **Island Vegetable Cooperative Association (IVCA)**

That the BC Vegetable Marketing Commission (Commission) issue IVCA an Agency Licence for the 2017-18 Crop Year, which licence shall include regulated storage crops and greenhouse products. In addition to the other terms and conditions generally applicable to agencies, the Commission is directed to ensure that IVCA's Agency Licence includes the following conditions:

- (a) That IVCA, within 90 days from the date of this decision, demonstrate to the satisfaction of the Commission that Island produce is clearly identified as such, and;
- (b) The Commission shall, within 30 days from the date of this decision, communicate to IVCA minimum criteria for Grower Marketing Agreements (GMAs), following which it will require IVCA, within 90 days from the date of this decision, to present to its producers GMAs meeting these minimum criteria. It will be for the Commission to issue appropriate directions or orders to producers and/or IVCA should any impediments arise in establishing such agreements.

### **Vancouver Island Farm Products Inc. (VIFP)**

That the Commission issue VIFP an Agency Licence for the 2017-18 Crop Year, which licence shall include regulated storage crops and greenhouse products. In addition to the other terms and conditions applicable to agencies, the Commission shall delete all those conditions pertaining to BCfresh that were recommended by the Commission in its October 31, 2013 recommendations and approved by BCFIRB on December 23, 2013.

### **Vancouver Island Produce Ltd. (VIP)**

That the Commission shall, as soon as practicable, amend its General Orders as proposed in Appendix "B" of its recommendations in order to create a Producer-Shipper Licence applicable to storage crops, and grant that Licence to VIP for the 2017-18 Crop Year upon expiry of VIP's agency license on March 1, 2017. The Producer-Shipper licence granted to VIP is subject to the terms set out at paragraphs 96-98 of the Commission's recommendations.

## INTRODUCTION

2. This supervisory decision, issued under section 7.1 of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (*NPMA*), is the culmination of a lengthy regulated marketing policy review formally commenced by BCFIRB on October 10, 2014 “to evaluate whether or not vegetable production on Vancouver Island should continue to be regulated and, if continued, what that looks like”.

## ISSUE

3. This supervisory decision is focused on the appropriate agency structure on Vancouver Island for the marketing of regulated vegetables. The key issues to be decided, as a matter of sound marketing policy, are: the appropriate number of Vancouver Island agencies, and the identity of the Vancouver Island agency or agencies.<sup>1</sup>

## LEGISLATIVE CONTEXT

4. In British Columbia, the production and marketing of vegetables is regulated under the *NPMA*, the *NPMA* Regulation (“the Regulation”), and the British Columbia Vegetable Scheme (Scheme). The Scheme (s. 4(2)) grants the Commission the power set out in s. 11(1)(a) of the *NPMA* to “regulate the time and place at which and *designate the agency* through which a regulated product must be marketed”. The Commission has issued General Orders which govern the regulated industry actors, including designated agencies.
5. Under s. 7.1 of the *NPMA*, BCFIRB is responsible for the general supervision of all marketing boards and commissions in the Province, including the Commission. Section 4(1) makes clear that the Commission administers the Scheme “under the supervision of the British Columbia Farm Industry Review Board.”
6. The legislation confers on BCFIRB specific authority in respect of agencies. Section 8 of the Regulation states no agency designation is effective unless approved in writing by the Provincial board. Section 4(1) of the Regulation states that: “The Provincial board shall have a general supervision over the operations of all marketing boards, commissions or their designated agencies constituted or authorized under the Act...”

## AGENCIES

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

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<sup>1</sup> In Appendix “A” of its recommendations, the Commission has identified several issues related to the role of the Commission in respect of agencies, specifically with regard to Delivery Allocation, Grower Marketing Agreements, and Minimum Pricing. Given that the primary focus of this decision concerns who the agencies should be, we will address those issues with the Commission separately.

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.

It follows that how agencies should be structured within a particular industry given their marketing plans and activities, and who those agencies should be, are key marketing policy questions for regulators. These are the questions we now address in this supervisory decision.

## **BACKGROUND**

8. Before turning to discuss the outstanding issues to be decided as part of the current supervisory review, it is important to understand its background and context.

*April 2012 – Commission recommendations regarding VIFP and VIP agency licencing*

9. BCFIRB’s current supervisory attention to the appropriate structure of the Vancouver Island vegetable industry goes back to April 2012, when the Commission recommended to BCFIRB that VIFP be granted agency designation status, while the existing agency licence of VIP should be cancelled.
10. The Commission’s recommendation arose in the wake of a VIP internal dispute. That dispute resulted in several former VIP growers applying to the Commission in December 2011 to form their own agency, VIFP.
11. Upon reviewing VIFP’s agency designation application, the Commission recommended to BCFIRB that VIP’s agency licence be cancelled, and that BCFIRB approve an agency licence for VIFP.
12. While BCFIRB approval was required for the proposed new VIFP agency designation, the Commission’s related recommendation to cancel the VIP agency licence did not specifically require BCFIRB prior approval. However, in the circumstances, it was sensibly framed as part of the same recommendation package given that the two matters were related, and in recognition that BCFIRB has

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

general supervision over all marketing boards and commissions and their designated agencies.

*May – November 2012: appeals by VIFP and VIP – Interim Agreement – Appeals deferred in favour of supervisory process*

13. The Commission’s April 2012 recommendations led both VIP and VIFP to file notices of appeal with BCFIRB under s. 8 of the NPMA.
14. Shortly after the appeals were filed, VIP and VIFP entered into a May 25, 2012 Interim Agreement to allow both agencies to operate on a temporary basis. Under the Interim Agreement, which was without prejudice to “BCFIRB’s final decisions with respect to the permanent status of the agencies”, storage crop producers would “elect to ship regulated product” through either agency.
15. During this interim period BCFIRB initiated a facilitated, without prejudice process through which VIP, VIFP and the Commission could explore options for resolving the agencies status and other outstanding issues between VIP and VIFP. All three parties met with BCFIRB representatives on October 5, 2012 to discuss the issues and how to proceed. An agreement was reached at that meeting and subsequently signed by all three parties. VIP withdrew from the agreement on October 31, 2012 ,
16. In November 2012, VIP wrote to BCFIRB requesting that its appeal proceed.
17. VIP’s request led the appeal panel to consider s. 8(8) of the NPMA, a specialized provision that recognizes our dual mandate and the kinds of issues that come before us. Section 8(8) states:

8(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.
18. Section 8(8) recognizes that, given the nature of BCFIRB’s mandate, some marketing policy questions are more appropriately dealt with in a supervisory process than an appeal process. This is particularly so when the issues involve systemic marketing policy questions affecting an entire industry and numerous interests. Section 8(8) allows BCFIRB to defer an appeal in favour of a supervisory process that is specifically designed to resolve the problem at hand, rather than attempting to fit economic problem-solving within a formal party-driven appeal process. As we have previously noted, the resolution of agency appeals in this context “is not so much about determining ‘rights’ as it is about considering

important systemic and structural economic questions related to the marketing of regulated vegetables....”<sup>2</sup>

19. On November 16, 2012, an appeal panel invited the parties to make submissions on whether it should refer the VIP and VIFP appeals to a supervisory process s. 8(8) stating:

The regulatory and agency structure of the British Columbia vegetable industry has been the subject of several reviews over the past number of years. The VMC also commissioned a January 30, 2012 ‘Opportunities Assessment of British Columbia’s Vegetable Sector’ that reports on marketing, regulatory, governance and other challenges and opportunities going forward. I am not convinced that the status of these two agencies should be decided without taking this broader context into account as part of the decision-making process. (p. 2)

20. On November 21, 2012, after receiving submissions from the parties, the appeal panel decided to defer the appeal in favour of a supervisory process.

*November 26, 2012: First Supervisory Review*

21. On November 26, 2012, BCFIRB issued its first “Notice of Supervisory Review” concerning “Central Vancouver Island Agencies”. That first Notice made clear that while agency designation issues regarding VIP and VIFP had originated from “internal frictions”, issues were broader than that: “As a result of the facilitation, as well as several public reports related to the future of the BC vegetable industry, it became even more apparent to BCFIRB that there is a need to expand the current agency designation considerations beyond the issue of internal frictions”.

*January 7, 2013: First Supervisory Decision*

22. On January 7, 2013, BCFIRB issued its first Supervisory Decision, entitled “Supervisory Review of the British Columbia Vegetable Marketing Commission Central Vancouver Island Agency Designations”. The issue addressed was “whether the Vegetable Commission’s decisions concerning agency designation of VIP and VIFP were made in accordance with sound marketing policy”. BCFIRB noted that while the issue might appear to be straight-forward, “a principles-based decision grounded in sound marketing policy requires a consideration of several larger questions”, including the direction of the Vancouver Island vegetable industry, the regulatory structures for the Island which are most strategic and effective at this time, and the governance of agencies and the Commission.
23. We will not repeat the detailed analysis set out in the January 2013 Supervisory Decision regarding the details of the regulated vegetable industry, its economic

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<sup>2</sup> January 7, 2013 BCFIRB. *In the Matter of the Natural Products Marketing (BC) Act and a Supervisory Review of the British Columbia Vegetable Marketing Commission Central Vancouver Island Agency Designations*. para. 4.

challenges, and the role of the Commission and the agencies. In summary, BCFIRB expressed concern that there were “key areas where the Vegetable Commission processes could have been more strategic and accountable”. At paragraphs 40 and 44, BCFIRB stated:

... a proper regulatory decision regarding agency designation – whether that decision is to authorize a new agency or terminate an existing agency authorization – must be grounded in a clearly communicated vision and strategic direction for the regulated vegetable industry, including the Island....

We are now faced with seeking a solution that best accords with sound marketing policy in the face of what the panel is informed are ‘irreconcilable differences’ built over years between growers, and a lack of an articulated regulatory system vision and strategic direction. This is obviously concerning given the emerging industry realities and challenges we have identified above.

24. BCFIRB held that while it was open to BCFIRB to make final decisions regarding VIP and VIFP, “we decline to do so given that there are significant unanswered questions with regard to the appropriate sound marketing policy framework for the regulated vegetable industry... In absence of a vision and strategic direction, we have chosen to defer our final decision with respect to agency designation pending further review” (par. 69). Based on its view that it was “unrealistic to attempt to force all the previous growers back into one agency structure” (para. 70), the January 7, 2013 Supervisory Decision adopted a “two pronged approach”. First, the decision made short term orders, with conditions, to enable both VIP and VIFP to operate for the balance of 2013 (para. 71). Second, it directed the Commission to “provide BCFIRB a report for review and approval that outlines the vision and strategic direction for the Island regulated vegetable industry in the provincial context” (para. 72).
25. Following the January 7, 2013 Supervisory Decision, VIFP withdrew its appeal. However, VIP advised that it wished to proceed with its appeal, citing s. 8(8.4) of the NPMA: “If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial board must proceed with and decide the appeal”.

*April 9, 2013: VIP’s May 2012 appeal dismissed*

26. On April 9, 2013, a BCFIRB appeal panel dismissed the appeal, holding that the direction in s. 8(8.4) to “proceed with and decide the appeal” ... “does not require BCFIRB to ignore the preceding supervisory process”. It held that where the supervisory process decided an issue, the appeal panel could decide the appeal by considering whether the appeal should be summarily dismissed under s. 31 of the *Administrative Tribunals Act (ATA)*. The panel held that VIP’s 2012 appeal should be summarily dismissed under s. 31(1)(g) because the substance of the appeal had been appropriately dealt with in the supervisory process. The panel held that the



British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

Commission’s recommendation under appeal “has in effect been overtaken and superseded by BCFIRB’s January 2013 decision” (para. 23). The panel held that “the orders under appeal no longer have any force or effect because they have been replaced by orders of the supervisory body” (para. 27).

*July – October 2013: The VIFP-BCfresh Proposal and Commission recommendation*

27. A significant development occurred in July 2013, when VIFP and BCfresh (a mainland agency) submitted a “joint venture” proposal to the Commission for regulatory approval. As part of the agreement, BCfresh and VIFP growers would each own 50% of VIFP and VIFP would operate as a “sub-agency” of BCfresh.
28. On October 31, 2013, the Commission, after holding a hearing, recommended that BCFIRB approve VIFP “as a designated agency of the Commission with certain stipulations and in turn operate as a sub-agency of BC Fresh”. The Commission’s reasons noted that “producers affiliated with VIFP are to enter into enforceable Grower Marketing Agreements (GMAs) with BC Fresh as the lead agency”.

*November 15, 2013: Supervisory directions*

29. On November 15, 2013, BCFIRB issued a supervisory letter to the Commission and the agencies noting that the Commission’s recommendation “did not address the agency status of VIP, nor the number and type of agencies that would best serve the strategic interests of the regulated vegetable industry on the Island in the longer term”. The letter commenced a formal submissions process to address the legal and policy appropriateness of the proposed “sub-agency” structure as well as the issue of VIP’s agency designation.
30. On November 22, 2013, the Commission responded. With respect to the “sub-agency” issue, the Commission submitted as follows:

If there is confusion about what is meant by the term “agency-sub-agency” this may result from the term ‘designated agency’. The term ‘designated agency’ is commonly used in the Act, Scheme and the VMC General Order to refer to and describe those firms that the VMC appoints (subject to FIRB approval) to market regulated products produced by the growers affiliated with a certain agency.

When the substance of the joint BC Fresh & VIFP proposal is examined it is clear that the term “sub-agency” was used to denote the idea that VIFP’s proposed designation as an agency should be conditional on certain terms. These terms include, for example, that VIFP use some of BC Fresh’s resources, and that BC Fresh assist VIFP in meeting its responsibilities set out in the General Order.

Though the term “sub-agency” has been used it is not within the intention to reflect a conditional nature of the proposed designation requiring FIRB’s approval. Rather, the term is meant to denote that VIFP is to operate in a collaborative and

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

cooperative way with BC Fresh so that attaining common interests and goals results. Further, BC Fresh is not sub-delegating VMC powers to VIFP.

31. With regard to VIP, the Commission's November 22, 2013 submission recommended that if BCFIRB were to approve its VIFP recommendation, then VIP's agency designation should be extended to June 30, 2014 (the end of the storage crop year). In the interim, the Commission would monitor VIP, review its business records and hold a hearing, following which it would make a recommendation to BCFIRB as to whether VIP should continue as an agency.

*December 23, 2013: Second Supervisory Decision*

32. On December 23, 2013, BCFIRB issued a second detailed Supervisory Decision, arising from its January 7, 2013 and November 15, 2013 supervisory directions. The panel expressed concern that BCFIRB "did not receive from the Vegetable Commission (as directed) the vision and strategic direction for the Island regulated vegetable industry, including a final recommendation regarding VIP". BCFIRB recognized that, until this had been provided, it had to make its best assessment of sound marketing policy in the circumstances. With regard to the VIFP/BCfresh proposal, BCFIRB accepted that the Commission had authority to designate VIFP as an agency, with conditions that required use of its own label but which gave BCfresh responsibility for VIFP and its supporting operations:

At this time, granting VIFP's agency designation under the conditions set by the Vegetable Commission in their October 31, 2013 decision breaks the current impasse in the regulated industry on Vancouver Island while maintaining an Island identity, offers the potential of improved agency governance and opportunity for better meeting changing customer demands.

At the time BCFIRB also noted that:

However, while the BCFresh/VIFP proposal may maintain the Vancouver Island identity as it has been known over the last year, and addresses agency governance concerns, the panel observed the solution may not be the most efficient and strategic model in the longer term, from business, industry and regulatory perspectives.

33. With respect to VIP, BCFIRB declined to approve the Commission's recommendation in view of concerns that were raised by VIP about timing:

The panel is not prepared to direct the Vegetable Commission to review the status of VIP separately but notes that the status of all Island agencies remains subject to the outcome of the Vegetable Commission's strategic and governance review required at paragraph 13 of this decision. [emphasis added]

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

34. Paragraph 13 of the December 23, 2013 Supervisory Decision (Executive Summary) set out several supervisory directions to the Commission. Among them was conditions “C” and “D”, which stated:

C. The Vegetable Commission is to provide BCFIRB with a plan and schedule for completing their strategic review of the Vancouver Island regulated vegetable industry as outlined in BCFIRB’s January 7, 2013 supervisory decision. This plan is to include measures by which the Vegetable Commission will assess the continued governance and accountability performance of VIP and VIFP in accordance with paragraph 73 of the supervisory decision. The plan and schedule must be provided to BCFIRB by January 31, 2014 for approval.

D. Notwithstanding A and B [approvals of VIP and VIFP], the Vegetable Commission has the discretion to reconsider the status of all Vancouver Island agencies should the outcome of the strategic review warrant.

*November 2013 – January 22, 2014: VIP and IVCA appeal Commission’s October 31, 2013 recommendations; appeals dismissed*

35. We pause to note here that on November 28, 2013 – in the midst of the supervisory processes that followed the Commission’s October 31, 2013 recommendation, and following BCFIRB’s November 15, 2013 request for submissions – both VIP and IVCA filed appeals from the Commission’s October 31, 2013 recommendation. Once again, this raised the issue of whether the appeals should be deferred under s. 8(8) of the *NPMA*.
36. On January 7, 2014, an appeal panel wrote to the parties advising that the issue as to whether to put the appeals in abeyance under s. 8(8) of the *NPMA* was now moot because BCFIRB had rendered its December 23, 2013 supervisory decision. The appeal panel asked the parties whether the supervisory decision had addressed the issues being appealed or whether it was their intention to proceed with the appeals.
37. On January 22, 2014, after receiving submissions, the appeal panel summarily dismissed the appeals under s. 31(1)(g) of the *ATA* on the basis that the issues that the Appellants sought to raise on their appeals had been appropriately addressed in the supervisory process.

*January – September 2014 – Commission seeks supervisory assistance*

38. Returning to the supervisory process, on January 30, 2014, the Commission submitted a project plan and schedule to BCFIRB for review, as required by the December 23, 2013 Supervisory Decision.
39. As the Commission’s work unfolded between February and September 2014, the Commission came to the conclusion that a more direct and proactive supervisory involvement by BCFIRB would be of assistance. At a September 11, 2014 meeting with BCFIRB, the Commission made a formal request to this effect.

## THE CURRENT SUPERVISORY PROCESS

40. On October 10, 2014, BCFIRB commenced the current supervisory review of Vancouver Island regulated vegetable marketing.

### *October 10, 2014: Notices of Supervisory Review*

41. BCFIRB wrote two letters dated October 10, 2014. The first, addressed to the Commission and posted on BCFIRB's website, stated:

The objective of this review is to evaluate how Vancouver Island vegetable production should continue to be regulated.

#### Review Process

The supervisory review will be led by the Commission. BCFIRB will provide guidance to the Commission in conducting a transparent, consultative process to evaluate whether or not vegetable production on Vancouver Island should continue to be regulated, and, if continued, what that looks like... The overarching goal of the review will be to examine all options to achieve better outcome for the future of the Vancouver Island vegetable industry and the public it serves.

42. BCFIRB's second letter dated October 10, 2014, was addressed to all Vancouver Island agencies (VIP, VIFP, IVCA and BCfresh) and stated:

BCFIRB has committed considerable time and resources in support of a resolution to outstanding issues in the Vancouver Island regulated vegetable sector. That has not been achieved. Therefore, BCFIRB has determined that there should be a focused review, assessment and decision regarding the future of regulated marketing on the Island. In today's letter to the Vegetable Commission, the BCFIRB board said they will be looking at "all options". I would suggest to you that could include asking stakeholders to consider whether continued regulation of the Island is in the best interest of the sector.

Vancouver Island producers, agencies and other stakeholders will be advised in due course of the supervisory review process and opportunities for participation.

### *September 21, 2015: Discussion Paper seeking stakeholder consultation; Schedule for Review Process*

43. On September 21, 2015, the Commission released a Stakeholder Engagement Discussion Paper (Discussion Paper).
44. The Discussion Paper describes the structure of the regulated marketing system, and "Some of the Issues Faced by the Vancouver Island Industry", including the high cost of production and marketing, the changing retail environment and the lack of

industry cohesion, resulting in “fragmentation within the industry [that] works against a sustainable vegetable sector and value chain”.

45. The Discussion Paper asked stakeholders to provide written input on nine key subjects, including their vision for the industry, the major barriers to success, the opportunities to strengthen production and marketing, the predictability and flexibility of the current regulatory system, whether agencies are an effective marketing tool and if so, how many agencies are effective and strategic for the Island for producers and value chain members.
46. Also on September 21, 2015, the Commission issued a document entitled Introduction to the Review Process and Activity Schedule, whose purpose was to advise stakeholders of the key steps the supervisory process would follow:
  - Stage 1: Stakeholder submissions in response to the “vision building” questions posed in the *Discussion Paper*.
  - Stage 2: Facilitator moderated workshops.
  - Stage 3: Evaluation criteria to assess the options and feedback heard in Stage 2, culminating in Commission recommendations to BCFIRB.
  - Stage 4: Provincial board decision.
  - Stage 5: Strategies for Implementation for 2017 Crop Year.

*September – December 2015: Stakeholder comment*

47. Between September 21, 2015 and December 14, 2015, stakeholders submitted written responses to the Discussion Paper. Those responses were compiled by the Commission and summarized in a document, dated January 28, 2016, entitled What We Heard that was distributed to all stakeholders.

*January 28, 2016: “What We Heard”*

48. The Commission’s January 28, 2016 What We Heard document organized stakeholder comments, without attribution, around ten themes, including “Industry Vision”, “Vancouver Island Demand”, “Vancouver Island Production”, Vancouver Island Marketing Promotions”, “Orderly Marketing of BC Vegetables” (including whether agencies serve a purpose and how many agencies are required on Vancouver Island), “Pricing”, “Vancouver Island Marketing and Distribution System”, “Working Together to Grow the Industry”, “Restructuring Options for the Commission to Consider” (including deregulation or partial deregulation) and the “Role of FIRB”.

*February, March 2016: Facilitated meetings*

49. In accordance with the established supervisory process, third party facilitated meetings were held in Nanaimo and Delta.

*April 7, 2016: Workshop Report and opportunity to comment*

50. On April 7, 2016, the facilitator produced a Workshop Report, following facilitated meetings in Nanaimo and Delta. The Workshop Report identified concerns arising from the current Vancouver Island agency structure. It stated:

Currently there are 3 camps of producers and 3 sets of Agency staff all with vested interests. After completing audits of Agency performance the VMC should consider requiring each of the 3 Island Agencies to submit a business plan incorporating the criteria set out in Part XIV of the Orders as if they were applying anew for designation. This work should be completed well in advance of the next growing season.

51. The Commission gave stakeholders 14 days to respond to the Workshop Report.

*June 8, 2016: Commission Recommendations regarding regulation and agency application process*

52. On June 8, 2016, the Commission released a 47 page document entitled Decisions and Recommendation.
53. Given the broad scope of the issues under consideration on this review, including whether the industry should even be regulated, this document focused on two key threshold questions: “Do Vancouver Island producers want to be regulated?” “What type of marketing structure supports the strategic needs of the Vancouver Island market?”
54. In order to frame how to address these core questions, the Commission’s Decisions and Recommendations document outlined a vision and strategic direction for regulated vegetable marketing on Vancouver Island. This document is a detailed document, informed by stakeholder input. It includes a very helpful analysis of provincial production, the Commission’s strategic plan and strategic analysis for Vancouver Island, together with a proposed Agency Accountability Framework and consideration of public interest considerations in light of the Commission’s regulatory role.
55. On the first question – “do Vancouver Island producers want to be regulated?” – the Commission’s recommendation to BCFIRB was that industry should continue to be regulated. On the second – addressing the marketing structure that should support the strategic needs of the Vancouver Island market – the Commission sought

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

BCFIRB approval of a process that it would use to answer that question should BCFIRB approve its recommendation that regulation should continue:

127. Our recommendation is that given the changes in the market environment on Vancouver Island and the collective interests of the industry, the agency accountability framework be used to examine each existing Vancouver Island agency. The Commission further recommends that this be accomplished by having each Island agency submit an application requesting agency status for the 2017 Crop Year. Therefore, each agency is to re-apply for an agency licence. The application process should also be made available to any group of producers wishing to submit an application for agency status. This will ensure that the Commission can make an informed determination as to the number and identity of Vancouver Island agencies starting in the 2017 Crop Year.

128. The Commission is committed to a transparent, inclusive and fair application and review process. The process should be developed in consultation with BCFIRB and will support two concurrent decisions:

- 1) Determining the number of agencies (in light of sound marketing policy)
- 2) Determining the identity of those agency(s).

129. Following the application and review process, the Commission's recommendations with respect to the agency structure on Vancouver Island will be submitted to BCFIRB for supervisory approval by October 2016.

56. The "Agency Accountability Framework" referred to by the Commission was described at pp. 38-40 of the Commission's Recommendations, and was the subject of further publications by the Commission in July and August 2016. This framework outlined the criteria by which applications for agency designation would be assessed.

*June and July 2016: BCFIRB approval of the Commission process*

57. On June 15, 2016, BCFIRB accepted the Commission's recommendation that vegetable marketing regulation should continue on Vancouver Island, and directed that the Commission proceed to determine the appropriate number of Vancouver Island agencies and the identity of those agencies:

BCFIRB accepts the Commission's recommendation that regulation of the Vancouver Island vegetable industry continues to represent sound marketing policy, with no further review required.

BCFIRB has determined that a timely and final resolution of the agency structure on Vancouver Island is a matter of sound marketing policy and BCFIRB will address that matter in its supervisory capacity.

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

BCFIRB directs the Commission to conduct a transparent, inclusive, and fair application and review process, for the Commission to determine in the first instance as a matter of sound marketing policy:

- 1) the appropriate number of Vancouver Island agencies;
- 2) the identity of the Vancouver Island agency or agencies; and,
- 3) whether any existing Vancouver Island agency licences should be revoked.

58. Our June 15, 2016 supervisory letter outlined a schedule that was anticipated to allow decisions to be made in time for the start of the 2017 growing season. Our letter stated that BCFIRB would work with the Commission to develop a SAFETI-based<sup>3</sup> review process to evaluate the Vancouver Island agency structure.
59. On July 8, 2016, we formally ratified the Commission document entitled Agency Application Process, designed to set out the procedure and criteria for the agency application review process. As noted above, the Commission sent out a further document on August 4, 2016 responding to questions it had received about the application process.

*August 5 – September 22, 2016: VIP appeals the Agency Application Process – Appeal Dismissed*

60. On August 5, 2016, VIP appealed the BCFIRB Agency Application Process decision. The appeal was summarily dismissed on September 22, 2016 pursuant to s. 31(1)(a) of the ATA on the grounds that the Commission’s decision under appeal was not an “independent” exercise of the Commission’s discretion but rather the implementation of a specific supervisory direction of BCFIRB.

*August 26, 2016: BCFIRB approves application deadline change*

61. On August 26, 2016, BCFIRB approved a Commission request, arising from requests made by the applicants, to extend the agency application deadline from September 2, 2016 to November 4, 2016.

### **THREE AGENCY APPLICATIONS**

62. The Commission received written agency applications from VIP, VIFP, and IVCA by November 4, 2016. All three applicants met the previously established minimum criteria and subsequently attended separate interviews with a Commission panel. A BCFIRB staff person was present to observe.

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<sup>3</sup> Strategic Accountable Fair Effective Transparent Inclusive



## COMMISSION RECOMMENDATIONS

63. The Commission evaluation panel provided its recommendations and rationale to the Commission based on the evaluation criteria set out in the BCFIRB approved agency review process.
64. On December 20, 2016, the Commission advised VIP, IVCA and VIFP of the recommendations it was going to submit to BCFIRB. In summary, the Commission recommended as follows:

### **IVCA**

That IVCA be issued an Agency Licence for the 2017-18 Crop Year, which approval would (a) extend the licence to include regulated storage crops and greenhouse products, (b) require that it implement a branding program on packaging specific to Island grown products that is easily distinct from mainland production, and (c) require IVCA to enter into written Grower Marketing Agreements with producers.

### **VIFP**

That VIFP be issued an Agency Licence for the 2017-18 Crop Year to market regulated storage crops and greenhouse products, which approval would (a) require VIFP to “terminate” the sub-agency arrangement with BCfresh.

### **VIP**

That VIP be granted a Producer-Shipper license in lieu of an agency license, and that the Commission’s General Orders be amended to create this licence category “in light of its long history as a grower and the situation it has evolved from over the past six years (2012).” With regard to VIP, the Commission stated:

The Producer-Shipper Licence allows VIP to continue to market its product independent of an Agency to Retailers and Food Service companies doing business on Vancouver Island. No other growers are allowed to market through a Producer – Shipper.

VIP’s grower retains the option to join another agency as an alternative to accepting a Producer –Shipper licence that will commence with the start of the 2017-18 crop year.

The Producer-Shipper licence is only extended to the current grower (multi-farm entity) shipping under VIP. Any change in ownership to the multi-farm entity will trigger a re-evaluation by the Commission of the Producer –Shipper licence.

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

Licensing VIP's grower as a Producer-Shipper will require a re-write of the General Order to accommodate Producer-Shippers of storage crops.

65. On December 23, 2016 the Commission provided its un-redacted rationale and recommendations to BCFIRB.
66. On January 13, 2017, the Commission provided the three agency applicants with a redacted version of the rationale for its recommendations.
67. Consistent with the nature of the application process, the redacted document did not include the specifics of the individual applications that had been made by each agency, as these contained confidential business information. BCFIRB was provided with the un-redacted applications and Commission's un-redacted analysis of those applications.

#### **FINAL SUBMISSIONS**

68. On January 16, 2017, BCFIRB provided VIP, VIFP and IVCA with the opportunity to make any final written submissions the parties deemed appropriate, no later than January 20, 2017, with respect to any legal, factual or policy issue arising out of the Commission's recommendations regarding agency designations. The submissions were to be made directly to BCFIRB.
69. No party applied for an extension of time to make submissions. By January 20, 2016, BCFIRB received final written submissions from IVCA and VIP.
70. A January 18, 2017 appeal filed by VIP from the Commission's December 20, 2016 recommendations is currently before an appeal panel.

#### **COMMISSION RATIONALE**

71. The Commission's reasons document, after summarizing the extensive process undertaken since October 2014, described the criteria it used to assess the applications, under the general headings "Vision & Strategic Direction", "Management Expectations" and "Operational Considerations". Consistent with our process to protect confidential business information in the agency applications, the reasons that follow refer only to the redacted document.
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.

73. Against this backdrop, the Commission evaluated each application by asking whether and how it: (a) Contributes to the vision of regulated vegetable marketing on Vancouver Island, (b) Promotes collaboration among industry members towards achieving sound marketing policy objectives and the vision for Vancouver Island, (c) Demonstrates good governance and ability to and capacity to meet all requirements in the Agency Accountability Framework, (d) Carries out sound business planning and shows opportunities for potential future growth; and, (e) Demonstrates how they meet market demands and strengthen the competitive position in the Vancouver Island region.
74. With respect to IVCA, the Commission concluded that IVCA does contribute to the vision of regulated vegetable marketing on Vancouver Island, but that its growth ambitions need to be monitored to ensure that any such ambitions that extend beyond the Vancouver Island market are not merely seeking to displace existing markets. With respect to promoting collaboration, the Commission noted that IVCA does work with other agencies, but it is not clear how it manages delivery allocation, and it needs to be more transparent in how it manages earned market entitlement between all its producers. With respect to IVCA’s demonstration of good governance, the Commission stated “yes, but needs improvement”. The Commission noted IVCA’s long history as a non-profit co-op, its focus on growth and its new investment in technology and infrastructure. However, the Commission repeated its concern about the need to monitor delivery allocation, and noted that IVCA does not have written GMAs, which does not sufficiently protect the interests of growers. With respect to business planning, the Commission stated that IVCA “appears to have a focused vision and strategic direction for its business. It is committed to working with its growers to identify products that can be grown successfully in local soils”. With respect to market demand, the Commission answered this as a positive, but expressed concern that IVCA’s recent move to uniform packaging did not sufficiently differentiate Vancouver Island grown product. The Commission also noted that IVCA’s agency designation does not currently extend to greenhouse crops and it had requested such an extension. The Commission agreed that “[t]his would strengthen its competitive position in the Vancouver Island market by giving it the ability to represent all types of vegetables”.
75. With respect to VIFP, the Commission concluded that VIFP does contribute to the vision of marketing regulated vegetables on Vancouver Island, noting that its business model is focused on Vancouver Island, and that it exists “to develop the Island grown brand. Management is committed to promoting growth in sustainable local agriculture”. With respect to the promoting of collaboration, the Commission answered “yes, but needs improvement”. The Commission noted that while its grower base works well together and management seeks to minimize inter-agency conflicts, VIFP’s use of delivery allocation needs to be addressed on the same basis as for IVCA. With respect to VIFP’s demonstration of good governance, the Commission stated “yes, but needs improvement” owing to the delivery allocation

issue. Apart from this, however, the Commission noted that all growers have GMAs with the agency, management has extensive experience in the retail grocery business and regulatory environment and “trust and confidence amongst VIFP’s growers, its management and directors is maintained by adopting a transparent approach to corporate governance”. With respect to business planning and future growth, the Commission answered “yes”. With respect to market demand, the Commission also answered yes, noting that VIFP offers a good mix of regulated (greenhouse and storage crops) and unregulated crops, and is committed to growing the business on Vancouver Island.

76. With respect to VIP, the Commission found that VIP does contribute to the vision for marketing regulated vegetables on Vancouver Island, but its contribution is limited to potatoes from one grower family. The Commission recognized VIP is focused on evolving as an agency and maintaining high standards in quality and food safety in the products it brings to market. With respect to the promoting of collaboration the Commission answered this question “no”. It stated that:

The agency is effectively a single grower agency that materialized from circumstances that transpired over five years ago. It exists in the market as an agency with entitlement to market regulated storage and greenhouse crops, yet only markets potatoes from a single multi-registration farm. It competes directly with VIFP (applicant) that is located within the same regional area on Vancouver Island and represents a group of regulated growers offering a mix of products to the market. It also competes indirectly with IVCA (though this may change as IVCA grows its production base on the island). *There are no other regulated producers in the region that are not accounted for and that would have a desire to join the VIP agency.* Any growth in VIP’s producer base on Vancouver Island would need to be acquired through new entrants. All new entrant applications require industry endorsement and final approval by the Commission. [emphasis added]

In consideration of market options for island growers and adequate market access of local supply, VIP’s existence in its current form is destructive in promoting collaboration among industry members. There exists a mismatched level of agency competition for producers relative to the size of the local supply pool of growers on Vancouver Island and in particular in the central island region.

77. With respect to VIP’s demonstration of good governance as an agency, the Commission answered “no”, noting that:

In consideration of adequate market access of local supply, the applicant fails in its ability to fulfil the mandate of an agency to carry out its marketing duties for the benefit of its producers and that of the industry. There is no doubt that the management and the grower are fully committed to orderly marketing, its principles, and agency accountability. However, at this time there is no demonstrated need or justification for VIP to exist as an agency.

With respect to business planning and future growth, the Commission answered “somewhat yes, but limited”, noting that VIP has an intention to grow the business.

With respect to market demand, the Commission also answered “yes, but as a grower not an Agency”. The Commission noted:

Potato production from the VIP grower represented ... delivery allocation in production in 2015 on Vancouver Island. It supplies potatoes to island based retailers, food service companies and wholesalers. The VIP brand is established in the Vancouver Island market place and has recognition dating back over 18 years. Island retailers, food service and consumers associate the brand as island grown produce. Assuming the brand was built on positive attributes and currently enhances the reputation it was built upon, it adds strength to the competitive position of island grown product by attracting demand in the market place.

78. Having concluded that two of the applicants potentially satisfied the requirements for an agency licence, the Commission turned to the difficult issue – one which has been identified as part of this review – as whether only IVCA or VIFP should be the designated agency based on Vancouver Island as a matter of sound marketing policy. The Commission stated:

87. There is limited Island agency competition in the market due to the small volume of island grown product that is produced. The market environment on Vancouver Island can easily sustain two marketing agencies. This may change as each agency grows its supply base. At some point it may make sense to have one agency located on the Island. At this time having two agencies is beneficial at growing supply and the Vancouver Island brand.

88. The two agencies we are recommending are focused on growth and have adopted different strategies to achieve that growth. Each agency also represents the marketing interests of a group of growers within different growing areas located on Vancouver Island. One is located in the South Island region with the other established in the Central Island region.

79. After outlining its specific recommendations, the Commission stated “[i]t is also strongly encouraged and supported by all Commissioners that the two agencies consider any opportunity to work together and consider the option in the near future to unite as one agency.”

## **BCFIRB ANALYSIS**

### *Introduction*

80. As noted in the Background, there is a long, involved and contentious history behind this review process. The intent of the overall supervisory review was to support the Commission, agencies and other stakeholders in stepping back from the immediate and long-standing disputes; and provide space to consider what a sustainable future could look like. This required the Commission to first develop a vision and strategic direction for marketing of regulated vegetables on Vancouver Island in consultation with stakeholders.

81. As is evident from the evaluation process and its rationale, the Commission evaluated the agency applications through multiple lenses. In our view, this regulatory approach, both as a matter of procedure and substance in the development of industry policy, was principled, and accorded with sound marketing policy. It reflected an appropriate regulatory perspective, which systematically examined what agency structure was best for the industry going forward, rather than focusing on agency designation as if it were some sort of “right” or perpetual entitlement. As we stated in our June 15, 2016 directions letter:

The Commission’s Reasons clearly reflect that agencies are an important part of delivering the benefits of the regulated system for producers and consumers. Agencies must be accountable to the Commission for the regulatory authorities and responsibilities delegated to them. BCFIRB agrees with these assessments. Legislation and regulation allow for the creation of agencies to support the BC regulated vegetable sector. With this regulatory benefit comes the responsibility to be accountable to the Commission, and ultimately, BCFIRB.

82. As made clear in our Guidelines for Approving the Appointment of Designated Agencies, agency designation is a privilege:

The conferring of agency designation is a privilege under the *Natural Products Marketing (BC) Act*. It is non-transferable and is not approved in perpetuity. The designation of an agency may be reviewed by a marketing board or commission from time to time and upon any material changes in the conditions giving rise to the initial approval.

83. That fact that agency designation, renewed year to year, is a privilege and not a right, does not mean that regulators can or should take a cavalier attitude in making changes to agency structure. BCFIRB is well aware that agencies are businesses, and that alterations to industry structure have impacts on real people. We are also aware that making changes to the status quo is very different from designing a new system with a blank slate. The design of this supervisory process, which in its present form began in October 2014 but which in effect goes back nearly 5 years – reflects our intention to ensure that all decisions about the future of the industry were made with great care and deliberation in light of the history and realities that prevail in this part of the regulated vegetable industry. Although BCFIRB has been supervising the Commission's decisions regarding agencies on Vancouver Island over the last five years, the work of the Commission and its various reports provided over the course of this supervisory process have provided BCFIRB with information that is contemporary, compelling and the basis for this supervisory decision.

*Should regulation continue?*

84. As noted earlier, the key threshold question we had to consider was whether regulation should even continue, or whether the industry should simply be de-

regulated on Vancouver Island, leaving producers and agencies to their own devices in the free market.

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”.

*How many agencies, and who should they be?*

86. The decision to support regulation has led to a second key threshold question, which is how many agencies should be located on Vancouver Island as a matter of sound marketing policy. This issue has been contentious. We have heard many suggestions over time, including past suggestions from agencies themselves (for example, IVCA and VIP), that there should only be one agency on Vancouver Island. In its rationale (para. 87), the Commission stated:

There is limited Island agency competition in the market due to the small volume of island grown product that is produced. The market environment on Vancouver Island can easily sustain two marketing agencies. This may change as each agency grows its supply base. At some point it may make sense to have one agency located on the Island. At this time having two agencies is beneficial at growing supply and the Vancouver Island brand.

87. This question as to the number of agencies is not free of difficulty. However, we have concluded as matter of sound marketing policy, and taking into account the specifics of the applications and the Commission’s rationale, that the current market environment can sustain and will benefit from designating both IVCA and VIFP as agencies given their producer bases, their marketing and growth plans and their branding. They have different strategies to achieve positive growth, and they represent marketing interests of growers in different geographic regions (South Island and Central Island). While they both have room to improve as agencies, this will be addressed as part of an accountability mandate that is to be exercised by the Commission, and which the Commission itself has recognized in Appendix A of its rationale. Based on current market and industry circumstances these two agencies should being permitted to continue with conditions we will discuss in more detail below and subject to their compliance with those conditions.

*VIP*

88. Before turning to IVCA and VIFP, what of VIP? Should its agency designation be continued as a matter of sound marketing policy? We have given this issue careful attention.
89. The Commission clearly recognized VIP’s important contribution to Vancouver Island potato production, Island brand, building local markets and its long history as an agency (established in 1988). However, it also noted that VIP has been marketing a single product from one multiple-registration farm since 2012. While VIP has noted in the past that it was put in this situation because of improper actions by former shareholders and growers, that issue, as we have previously noted, is for a court of law; we cannot resolve it.
90. Through its legal counsel, VIP exercised its right to make submissions in response to our January 16, 2017 letter, and advanced numerous grounds that take issue with the Commission’s recommendations that it be issued a Producer-Shipper licence in place of a 2017-18 agency licence. VIP argues that the Commission’s recommendations are highly prejudicial to its economic survival and to the viability of its growers; that the Commission’s recommendation relies on a “subjective” analysis “without any empirical support”, and that it “misstates the vision, function and role of VIP in the industry”. VIP argues that its vision is not limited to potatoes from a single multi-registration farm, that it promotes collaboration, and that there is no evidence that VIFP and VIP co-existing is destructive to the market. VIP notes that the Commission has concluded that VIP can meet market demand and that its management and grower are fully committed to orderly marketing. VIP argues that the question whether it is “needed” as an agency is not about whether it has shown good governance, and says that “its licence is not being taken away for any of the reasons an agency’s licence would be taken away”. VIP argues that it is efficient, runs as a pooled agency (which it describes as the most favoured option for growers) and has shown a creative approach to market growth and future growth. VIP argues that it “is the only agency to develop new markets over existing ones”. VIP also argues that “[l]ogically, reducing options does not increase competitive advantages for growers” and argues the new designation would put its growers at a competitive disadvantage.
91. Amid all of these grounds, VIP has not challenged the one key “empirical” fact asserted by the Commission: “there are no other regulated producers in the region that are not accounted for and that would have a desire to join the VIP agency.” Amid VIP’s many grounds objecting to the Commission’s decision, it has not been able to overcome this basic fact. The regulated marketing reality is that VIP has been marketing its own product since 2012. VIP had every opportunity to establish that its marketing operations supported more than one producer. It has not done so. Even if VIP were able to provide concrete evidence of an actual new entrant application, we note that all new entrants require Commission approval.



British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

92. The very nature of an agency in the regulated marketing system is that it exists to market real production on behalf of multiple producers – to represent the interests in the marketplace of a group of growers. Agencies receive delegated legislative authority to serve a specific purpose in the regulated marketing system. They exist to harness the marketing power of growers and contribute to sound marketing policy (in this circumstance through providing a mix of products). VIP’s current operations do not meet this determinative factor. In our view, VIP’s plans for growth are insufficiently concrete to justify waiting longer than the five years that have already passed.
93. In this situation, it simply makes no policy sense to continue VIP as an agency. The speculative argument that a producer or new entrant “might” someday materialize and ask VIP to market their product – something that has not materialized in the past five years – is not, as a matter of sound marketing policy, a valid basis for renewing VIP’s agency designation going forward. We therefore agree with the Commission’s decision not to renew VIP’s agency licence.
94. Having concluded that VIP’s agency licence should not be renewed, it was open to the Commission to consider whether sound marketing policy required that VIP’s grower market its production through another agency. The Commission chose instead to focus on the positive points VIP raised regarding its marketing abilities. The Commission acknowledged these in its rationale, and recommended that VIP be given a significant regulatory accommodation, to essentially preserve the practical status quo. That regulatory accommodation is to amend the Commission’s orders to extend its Producer-Shipper license to include storage crops. This would allow VIP to continue to market its potatoes independently and directly to retail and food service.
95. We have considered whether we ought to accept that recommendation or, alternatively, whether we should require VIP’s producer to market through another agency. While Producer-Shipper designations exist elsewhere in regulated vegetable marketing, they are not necessarily required, and need to be assessed with care – too many Producer-Shipper licences can undermine orderly marketing and undermine the very purpose of having agencies.
96. Taking into account the VIP grower’s geographic location, its difficult history and relationship with the VIFP agency located in its geographic location, its long-term investment and its brand recognition on Vancouver Island, we have decided to support the Commission’s decision to grant VIP’s producer a Producer-Shipper licence. The licence will allow VIP’s producer to continue to market its product independently under the VIP name. In practical terms, it allows the VIP grower to carry on just as it has been doing for the past five years – to market its potatoes as a vertically integrated operation.

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

97. We appreciate that VIP’s “vision” is not limited to potatoes. The practical reality, however, is that it has not been able to realize on its vision by acquiring other producers. We also appreciate the positives recognized by the Commission; it is precisely because of this that the Commission has recommended, and we have accepted, the creation of a special licence class to allow it to operate as it has been over the past 5 years. With regard to VIP’s argument that this new designation “indirectly” harms its grower or puts its grower at a competitive disadvantage, VIP has provided no rationale in support of that assertion. In our view, VIP’s grower will be in the same practical position under the Commission’s new licence class as it is today. If that grower finds, in future, that it would prefer an existing agency to market its production, that option remains open.
98. VIP asserts growers are facing irreparable harm and being placed at a competitive disadvantage if its agency licence is not renewed. Again however, VIP provided no rationale to support that assertion. Under a Producer-Shipper licence VIP will be able to maintain a conduit to the market place through independent direct sales to retailers and food service companies doing business on Vancouver Island. We observe that Producer-Shipper licences have been used to manage marketing in the greenhouse sector for several years now with success. As such we disagree with VIP’s assertion.
99. In the future, should VIP be able to demonstrate it meets the agency application criteria in the Commission’s General Orders, including the support of multiple growers and diversity of product it is always free to apply for an agency licence as is any other group of growers meeting the agency requirements.
100. VIP argues that it has always shown good governance, and that “there is no demonstrated justification for VIP not to exist as an agency”.
101. When the Commission answered the governance question “no”, it was not focusing on VIP’s commitment (about which it was positive). Rather, it was focusing on VIP’s ability to actually operate as an agency on behalf of multiple producers, which is what an agency is supposed to do.
102. VIP’s position that there is no justification for it “not” to exist as an agency fails to address the rationale based on the absence of multiple producers. It also misunderstands the nature and purpose of this supervisory process. This is not a fault-based penalty process. We accept that VIP is committed to orderly marketing. However, this process is about how the industry should be structured as a matter of sound marketing policy.
103. As already noted, agency designation is not a perpetual right. Agencies are granted approvals on a yearly basis. It is always open to the regulator to decide not to renew a licence for valid regulatory reasons related to the needs and realities of the industry. That is exactly what has happened here. The regulatory reality is that two

agencies have come forward that satisfy the requirements for agency designation, while VIP, which has held the agency licence, has not for many years been operating based on the fundamental premise of such a licence, which requires multiple producers. Instead, the Commission has recommended, and we agree, that VIP should be granted a special accommodation that allows it to continue to operate as it has been operating. To that end, we will be directing the Commission to amend its Orders to create that licence class.

104. VIP has argued that the Commission’s recommendations have “abrogated” its appeal rights and that it is improper for the agency review process to attempt to “reduce the number of appeals” of Commission decisions regarding Vancouver Island agencies. VIP argues that the appeal right exists to ensure agencies are fairly treated. VIP also argues that “the VMC and BCFIRB have no jurisdiction to interfere with agencies’ legal rights to protect themselves, and usurp the function of the courts”.
105. Once again, these submissions, in our respectful view, misunderstand both the right of appeal and the nature of the supervisory review.
106. The right of appeal exists to ensure any person including members of the industry can appeal to BCFIRB where they are aggrieved or dissatisfied by an order, decision or determination, that right is qualified in s. 8(8) precisely because of BCFIRB’s proactive supervisory power, which we must be allowed to exercise in order to carry out our legislative role. This is not “abrogating” the right of appeal. It is ensuring that a party cannot undermine the supervisory power by dictating to BCFIRB the process it must follow in order to address difficult systemic issues. Section 8(8) allows an appeal panel to consider each situation on its facts, and allows the panel to then decide on the appropriate disposition of the appeal when the supervisory process has concluded.
107. VIP appears to take issue with the fact that the Commission has argued in the past that s. 8(8) should be invoked because the supervisory process could be completed in a very short time. Whatever position the Commission may have taken, it is clear that BCFIRB’s reasons for deferral were not focused on time limits, but rather on the requirements of proper regulatory decision-making. As noted in the very first s. 8(8) decision arising from an appeal filed by VIP:

The regulatory and agency structure of the British Columbia vegetable industry has been the subject of several reviews over the past number of years. The VMC also commissioned a January 30, 2012 ‘Opportunities Assessment of British Columbia’s Vegetable Sector’ that reports on marketing, regulatory, governance and other challenges and opportunities going forward. I am not convinced that the status of these two agencies should be decided without taking this broader context into account as part of the decision-making process. (p. 2)

108. With regard to VIP’s right to protect itself in court, VIP retains its right to take whatever court action it wishes in relation to its former shareholders. VIP’s private

corporate rights against former shareholders, whatever they might be and however long they might take to adjudicate, cannot dictate marketing policy to the Commission and BCFIRB. Agencies play a key role in orderly marketing. As BCFIRB noted in our January 7, 2013 Supervisory Decision:

62. We are not in a position to adjudicate the ‘right or wrong’ of one side or the other on any particular allegation as between current or former VIP shareholders. What we are in a position to do is to state from a regulatory standpoint that if tension and dysfunction has begun to impair orderly marketing, the regulator is obliged to consider alternatives, which is what the Vegetable Commission did here.

109. The VIP “internal dispute” originating in 2011 gave rise to conflict, instability, an agency application to the Commission by the producers involved and subsequent Commission recommendations. This was by itself enough to warrant BCFIRB’s supervisory attention – which was also required by law given BCFIRB’s role in prior approving proposed new agencies.
110. BCFIRB determined as early as November 2012 that to properly exercise its mandate, the marketing policy questions that needed to be answered flowing from the Commission’s recommendations regarding VIP and VIFP transcended the issue of internal frictions and required consideration of the appropriate structure of the Vancouver Island regulated vegetable industry within a supervisory process. That this process has taken a long time is beyond doubt. It has taken a long time precisely because BCFIRB, at every turn, wished to ensure that this decision was made with appropriate care, vision and regulatory analysis. It is readily apparent, from the history above, that the resolution of these issues, given industry dynamics, required a more proactive supervisory role by BCFIRB than determined in our decisions of January and December 2013.
111. With regard to the process, VIP asserts that the Commission’s determination was “unfair”, “biased”, “subjective” and “predetermined”. With regard to the latter, VIP suggests that because the Commission issued its decision on December 20, 2016 without reasons, which were only released later, it appears that “the VMC came up with its justification after having already made its findings”.
112. In our view, there is no merit to allegations of bias and predetermination. It is commonplace for decision-makers to issue decisions with reasons to follow, particularly where, as here, the reason must be edited to remove confidential business information (including the protection of VIP’s information). There is also no basis for the allegation that the process was unfair. Leaving aside the legal question whether procedural fairness applies to a policy process like this<sup>4</sup>, the fact is that VIP was, over many years in this supervisory process, given numerous opportunities to advance its point of view and make submissions. BCFIRB

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<sup>4</sup> *Dairy Farmers of Ontario v. Denby*, [2009] O.J. No. 4474 (S.C.J.)

specifically afforded VIP a final opportunity to comment on the Commission’s recommendations. VIP, which was represented by experienced counsel throughout this process, took that opportunity and did not seek an extension of time to make further submissions.

113. The allegation that the Commission’s recommendations were “subjective” is vague and non-specific. We will note only that the Commission is comprised of industry specialists whose very purpose is to make the difficult policy judgments that are required in regulated marketing, subject to the supervision of BCFIRB. We are satisfied that those judgments have now been made in a thorough, deliberate and principled fashion, as a matter of sound marketing policy and based on an understanding of the realities of the industry.
114. We note that VIP has also argued, in connection with its good governance submission, that the Commission looked favourably on VIFP’s governance relative to VIP’s despite the fact that VIFP was placed under the control and direction of BCfresh. As noted above, VIP’s submission misunderstood why the Commission was concerned about VIP’s governance, which had to do with it being supplied by a single producer. The decision to recommend that VIFP be granted agency status was based on a consideration of all of the factors, already described.
115. Finally, we note that in the past, the Commission has twice determined that VIP’s agency licence should be cancelled as VIP did not fulfill the agency intent of harnessing the collective power of growers for overall industry and public benefit. In both cases an alternative solution was not provided by the Commission. In both cases BCFIRB determined that VIP’s agency licence would continue on a temporary basis until a proper review took place.<sup>5,6</sup> This proper review has now happened. In our view the alternative solution proposed by the Commission that VIP be granted a Producer-Shipper licence, satisfies sound marketing policy.

#### *VIFP*

116. As noted above, we have decided to approve the Commission’s recommendation that VIFP be designated as an agency for the 2017-18 Crop Year.
117. The only specific recommendation made by the Commission with regard to VIFP was that “the sub-agency arrangement between VIFP and BCFresh be terminated”. VIFP submitted no submission in response to the Commission’s recommendation.

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<sup>5</sup> 2013 January 7. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and a Supervisory Review of the British Columbia Vegetable Marketing Commission Central Vancouver Island Agency Designations.](#)

<sup>6</sup> 2013 December 23. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and Follow Up to the January 7, 2013 Supervisory Decision Concerning the British Columbia Vegetable Marketing Commission Central Vancouver Island Agency Designations.](#)

118. Without disclosing confidential business information contained in the applications, we are satisfied that insofar as VIFP’s existing agency designation contains conditions that are tied to BCfresh, those conditions can and should be removed and VIFP should be designated an agency without any reference to BCfresh.

*IVCA*

119. As noted above, we have decided to approve the Commission’s recommendation that IVCA be designated as an agency for the 2017-18 Crop Year, and that its licence be extended to include regulated storage crops and greenhouse products.
120. In its final submission IVCA reported that it always separates its Island and mainland product both by branding and offers to its customers and suggests the recommendation be removed. It also argues that its membership fees and “General Orders” covers the relationship between growers and the agency hence the requirement for written grower agreements be removed.
121. With regard to branding, BCFIRB directs the Commission to ensure that IVCA’s agency designation includes a condition that requires IVCA to demonstrate to the Commission and the public that Island produce is clearly identified as such. This supports appropriate accountability between agencies and the Commission, helps maintain the integrity of the regulated system and builds the Commission’s vision for Vancouver Island.
122. With regard to written grower marketing agreements BCFIRB sees written grower marketing agreements as a basic good business practice which also supports accountability between growers, agencies and the Commission. BCFIRB agrees with the Commission some form of written agreement should be in place.

**BCFIRB SUPERVISORY ORDER AND DIRECTIONS**

123. For the reasons outlined in this supervisory decision, and as noted at the outset of this decision, BCFIRB directs as follows:

**Island Vegetable Cooperative Association (IVCA)**

That the BC Vegetable Marketing Commission (Commission) issue IVCA an Agency Licence for the 2017-18 Crop Year, which licence shall include regulated storage crops and greenhouse products. In addition to the other terms and conditions generally applicable to agencies, the Commission is directed to ensure that IVCA’s Agency Licence includes the following conditions:

- (a) That IVCA, within 90 days from the date of this decision, demonstrate to the satisfaction of the Commission that Island produce is clearly identified as such; and,

- (b) The Commission shall, within 30 days from the date of this decision, communicate to IVCA minimum criteria for Grower Marketing Agreements (GMAs), following which it will require IVCA, within 90 days from the date of this decision, to present to its producers GMAs meeting these minimum criteria. It will be for the Commission to issue appropriate directions or orders to producers and/or IVCA should any impediments arise in establishing such agreements.

**Vancouver Island Farm Products Inc. (VIFP)**

That the Commission issue VIFP an Agency Licence for the 2017-18 Crop Year, which licence shall include regulated storage crops and greenhouse products. In addition to the other terms and conditions applicable to agencies, the Commission shall delete all those conditions pertaining to BCFresh that were recommended by the Commission in its October 31, 2013 recommendations and approved by BCFIRB on December 23, 2013.

**Vancouver Island Produce Ltd. (VIP)**

That the Commission shall, as soon as practicable, amend its General Orders as proposed in Appendix “B” of its recommendations in order to create a Producer-Shipper Licence applicable to storage crops, and grant that Licence to VIP for the 2017-18 Crop Year upon expiry of VIP’s agency license on March 1, 2017. The Producer-Shipper licence granted to VIP is subject to the terms set out at paragraphs 96-98 of the Commission’s recommendations.

**CLOSING OBSERVATIONS**

124. Given the long and contentious history, BCFIRB would like to acknowledge the Commission and all the parties involved in their willingness to work at putting aside past differences, and at times, inherently competitive positions, to work together for the future of regulated marketing on Vancouver Island. This is a positive move for the Commission, producers and the public who benefit from access to locally grown vegetables. BCFIRB hopes to see this positive trend continue.
125. It is incumbent on the Commission to provide producers and agencies with a vision and overall industry strategic direction as well as to ensure accountability for the regulatory authorities delegated to agencies. Without agencies, growers would be left to market independently, which would be contrary to their interests and the interests of the regulated industry. It follows that, to achieve their intended purposes, agencies must obviously operate strategically, effectively and inclusively in a transparent and accountable manner.

British Columbia Farm Industry Review Board  
Future of Regulated Marketing – Agency Designation  
January 31, 2017

126. Future success for producers and the value chain will, in part, depend on producers, agencies and the Commission operating together efficiently, strategically and accountably through sound processes.

Dated at Victoria, British Columbia, this 31<sup>st</sup> day of January, 2017.

**BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD**

**Per:**

A handwritten signature in black ink, appearing to read 'John Les', written in a cursive style. The signature is positioned above a horizontal line.

John Les, Chair