

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND  
THE 2019-20 VEGETABLE REVIEW

December 22, 2020

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## Decision Summary

1. The BC Farm Industry Review Board (BCFIRB) established a panel to undertake this Supervisory Review (Review) in September 2019. The panel began considering the Review scope based on a number of appeals arising from BC Vegetable Marketing Commission (Commission) decisions and Commission management projects. The appeals raised questions regarding:
  - a. perception of bias and potential conflict of interest in Commission decision-making;
  - b. the Commission's oversight of agencies, who exercise delegated legislated authorities to fulfill their role in the regulated vegetable marketing system; and,
  - c. certain aspects of the Commission's storage crop Delivery Allocation orders and management.
2. Before finalizing the scope of the Review, the panel issued an Interim Relief decision<sup>1</sup> in January 2020 for Prokam Enterprises Ltd. (Prokam), a commercial vegetable producer. The panel found it was sound marketing policy to ensure Prokam had an avenue to market its regulated products in 2020/21 and to respond to Prokam's 2020/21 Delivery Allocation calculation concerns.
3. In early 2020 the panel, in consultation with the Commission and industry, finalized the Review areas of focus: Commission Structure and Governance, Agency Accountability and Storage Crop Delivery Allocation. The panel invited input from the Commission and industry on these areas of focus, based on a background and consultation document. The panel met with 25 interested industry individuals and groups through a series of virtual or telephone meetings in the summer, as well as the Commission and a Commission Working Group<sup>2</sup> into the fall. Industry and the Commission also had opportunity to make written submissions. To ensure transparency, the process steps, correspondence, decisions, consultation summaries, meeting summaries and other Review documents were posted to the BCFIRB web site.<sup>3</sup> The consultations helped inform the panel's answers to the following questions:
  - a. Vegetable Commission Structure and Governance

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<sup>1</sup> 2020 January 10. BCFIRB. [In the Matter of the \*Natural Products Marketing \(BC\) Act and Interim Relief Sought by Prokam Enterprises Ltd.\*](#)

<sup>2</sup> The Working Group was composed of the Commission Chair, three Commission members representing the storage crop and greenhouse sectors and the Commission General Manager.

<sup>3</sup> The Review process is described in more detail starting at paragraph 32.

- i. Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?
    - ii. Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?
  - b. Agency Accountability
    - i. What should an agency accountability framework include?
    - ii. How should an agency accountability framework be used?
  - c. Storage Crop Delivery Allocation
    - i. Is market access being managed effectively and strategically for storage crop producers through delivery allocation?
    - ii. What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?
4. Prior to issuing this decision, and upon being satisfied with the Commission's progress on the agency accountability framework, the panel directed the Commission in October 2020 to lift its moratorium on accepting new agency and producer-shipper licence applications. The Commission had put the moratorium in place in June 2019 to allow it time to complete an agency accountability project and update its strategic plan.
5. Although not unanimous, the panel heard clear industry support for the provincially regulated vegetable marketing system from many industry members and strong recognition for its value from many producers. Through this Review, the panel identified several areas for improvement to ensure the effectiveness of the Commission in regulating the vegetable industry.
6. For the reasons set out in this decision, the panel makes the following directions and recommendations to the Commission.

***Vegetable Commission Structure and Governance: Directions and Recommendation***

7. The Commission is to:
  - a. Immediately review its member conflict of interest disclosure form to ensure it includes pertinent questions (including those related to pecuniary interests, agency ownership and affiliation and association positions).

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- b. Submit a copy of the Commission's conflict of interest disclosure form to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
  - c. Immediately review its Code of Conduct to ensure the Code of Conduct provides sufficient guidance on conflict of interest considerations, how to manage and enforce them, and that it is understood by Commission members.
  - d. Submit a copy of the Commission's Code of Conduct to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
8. Until Commission composition changes are fully enacted as outlined below in paragraph 11, the Commission is to:
  - a. On a decision-by-decision basis and guided by perception of bias and conflict of interest considerations, continue to use panels comprised of non-sector producer members from the sector which is the subject of decision.
  - b. The panels are to seek input from the relevant advisory committee(s) and or/retain third party expertise as necessary to ensure fully informed, effective, and strategic decisions.
9. The Commission is to revise its Election Rules and receive BCFIRB's prior approval under s.3(6) of British Columbia Vegetable Marketing Scheme (Scheme), prior to the 2021 election, to reflect that producers holding a director position on an agency are not eligible for nomination and election.
10. The Commission is to review its Election Rules, as soon as practical and no later than the 2022 election, in consultation with industry, to assess whether it is necessary and effective to place restrictions on elected Commissioner positions to ensure representation across agencies and avoid concentration of Commissioners in one agency.
11. BCFIRB recommends and will immediately pursue the following changes to the British Columbia Vegetable Marketing Scheme B.C. Reg 96/80:
  - a. The addition of two appointed independent members.
    - i. Members to be appointed by the Commission following a merit-based candidate selection process developed in consultation with, and prior approved by, BCFIRB under s.3(6) of the Scheme.

- b. A corresponding reduction of two elected commercial producer members, so that there can be up to 6 commercial producers, but no less than 4, on the Commission, elected by commercial producers.
  - i. Members to be elected: three from the greenhouse producers; three from the field crop producers, after considering whether there should be a member representing processing production. These changes, as well as any change needed to reduce producer members from six to four while maintaining equal sector representation, must be incorporated in the Commission's Election Rules, and prior approved by BCFIRB.

***Agency Accountability: Directions and Recommendation***

12. The Commission is to:

- a. Make orders as necessary to extend the type of reporting requirements in the November 2019 Interim Order to include greenhouse agencies as appropriate to the sector;
- b. Make an order, which at a minimum, requires agencies to submit a business or marketing plan, or particular elements of a marketing plan, within or by a specified time;
  - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought into force;
- c. Make an order, which at a minimum, requires agencies to submit pool settlement statistics for all regulated vegetable crops, within or by a specified time;
  - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought into force.
- d. Identify any outstanding information submission and timeline requirement needs and make orders as necessary to support the practical goal of agency accountability within the proper exercise of legislated authority.
  - i. Any draft amending orders are to be submitted to BCFIRB for review prior to being brought into force.
- e. Provide BCFIRB a timeline for completing the directions in paragraphs a. through d. inclusive within 30 day of this decision.

13. The Commission is to:
  - a. Develop and implement a rules-based agency compliance reporting template no later than December 31, 2021;
  - b. Develop and implement a public annual agency compliance report by April 2022.
14. The panel recommends the Commission:
  - a. Further develop its information management system to support and align with collecting, storing, analyzing, and auditing agency information on production, transportation, packing, storage and marketing of regulated products.
  - b. Give future consideration to an on-line information reporting system for agencies to aid timely information collection and submission and reduce agency and Commission staff time.

***Storage Crop Delivery Allocation: Directions and Recommendation***

15. The Commission is to implement the following prior to determining if substantive changes are required to its new entrant and growth-related Delivery Allocation orders:
  - a. The panel's directions and recommendation as set out in "Commission Structure and Governance", paragraphs 7 to 11, inclusive; and,
  - b. The panel's directions for collecting comprehensive industry data on a regularly scheduled basis, as set out in "Agency Accountability", paragraphs 12 and 14.
16. Once the Commission has implemented the above directions, the panel expects the Commission to, as it does all BC commodity boards, regularly review its new entrant program. When the Commission does so, the panel recommends it include an assessment of growth and regional opportunities, and consideration of how to calculate Delivery Allocation when it is transferred between producers.

# INTRODUCTION

## **Introduction**

17. This Supervisory Review (Review) arises out of a series of appeals and related BC Vegetable Marketing Commission (Commission) projects. The supervisory panel, in consultation with the Commission and industry, determined the Review would focus on Commission Structure and Governance, Agency Accountability and Storage Crop Delivery Allocation. The review process is described starting at paragraph 32.

## ***Industry Background***

18. Production and marketing in the BC vegetable industry is regulated provincially. The Commission is the first instance regulator of the industry under BCFIRB's supervision (see Legislative Context).
19. According to the Commission's 2020 Public Accountability Reporting Project report, there are 73 commercial storage crop producers, 67 commercial greenhouse producers and 9 commercial processing crop producers in BC (2019). Total farm gate cash receipts for 2019 are estimated at approximately \$368 million.
20. A person qualifies to be commercial producer (producer) if they grew and marketed at least \$5,000 worth (gross) of regulated products the previous year.
21. All producers must market their regulated production through designated agencies except in limited circumstances specified in the Commission's General Orders. Designated agencies are private vegetable produce marketing businesses that are licensed and delegated regulatory authorities by the Commission and prior approved by BCFIRB. Once a business is designated as an agency, it can market regulated BC vegetable products to the exclusion of others.
22. There are presently 10 designated agencies in BC. Five agencies are licensed to market greenhouse crops only: BC Hot House Foods; Country Fresh Produce Inc.; Global Greenhouse Produce Inc.; Greenhouse Grown Foods Inc.; and, Village Farms Operations Canada Inc. Three agencies are licensed to market greenhouse and storage crops: Island Vegetable Co-op Association; Okanagan Grown Produce Ltd.; and Vancouver Island Farm Products Inc. Two agencies are licensed to market storage crops only: BC Fresh Vegetables Inc.; and, Fraserland Organics Inc.
23. BC Fresh Vegetables Inc. (BCfresh) markets the largest volume of storage crops. It markets regulated products for about 60 producers holding approximately 80% of storage crop Delivery Allocation. Okanagan Grown Produce Ltd. markets the second largest volume. It markets regulated product for 6 producers holding approximately 7% of storage crop Delivery Allocation. The remaining 3 agencies licenced to market storage crops have agreements with 2 to 8 producers and hold

approximately 1% to 3% of Delivery Allocation. The one producer-shipper holds approximately 2% of Delivery Allocation.

24. Greenhouse Grown Foods Inc. markets the largest volume of greenhouse crops. It markets regulated product for about 18 producers holding approximately 28% of greenhouse Production Allocation. BC Hot House Foods markets the second largest volume of greenhouse vegetables, with about 8 producers holding approximately 24% of greenhouse Production Allocation. Vancouver Island Farm Products Inc. markets regulated product for about 11 producers holding approximately 15% of Production Allocation. Country Fresh Produce and VF Operations Canada Inc. market product for about 4 producers respectively holding approximately 11% and 12% of Production Allocation respectively. The 1 remaining agency markets for about 4 producers holding approximately 2% of Production Allocation. Three producer-shippers hold approximately 5% of Production Allocation.
25. Unlike storage crop agencies or greenhouse/storage crop agencies, major greenhouse agencies are part of businesses with production enterprises located in the United States and/or Mexico.

### ***Legislative Context***

26. Under the Scheme, enacted under the *Natural Products Marketing (B.C.) Act (NPMA)*, the Commission has the authority to “promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product”. Regulated product is defined as vegetables, and includes a) potatoes, and b) strawberries intended expressly for manufacturing purposes, grown in the Province.
27. The Commission’s powers, duties and obligations are derived from section 11 of the *NPMA*, the *Natural Products Marketing (BC) Act Regulations (NPMA Regulations)* and are established by the Scheme.
28. The Commissions’ General Order sets out the rules it uses when undertaking promotion, control, and regulation of the production, transportation, packing, storing, and marketing of regulated vegetables in BC.
29. The General Order specifies “storage crops”, “processing crops” and “greenhouse crops” as being currently regulated “south of the 53rd parallel north, including Vancouver Island and the Gulf Islands and excluding the Queen Charlotte Islands”:

**"Storage Crops"** (formerly Root Crops) include beets (tops off), green cabbage, white (purple top) turnips, yellow onions, and potatoes (all types and varieties) when the end use is not for seed.

**"Processing Crops"** includes peas, beans, corn, broccoli, Brussels sprouts, cauliflower, potatoes (all types and varieties) and strawberries when the end use is manufacturing/processing.

**"Greenhouse Crops"** includes cucumbers (all types), tomatoes (all types), peppers (all types), and butter lettuce.

30. 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) of the *NPMA* Regulation confirms BCFIRB has general supervision over the operations of all marketing boards, commissions or their designated agencies constituted or authorized under the Act.
31. Section 8 of the *NPMA* Regulation states no agency designation is effective unless approved in writing by the Provincial board (BCFIRB).

### **Review Process**

32. As noted in the Introduction, this review arises in part from a number of appeals and Commission projects. The following summarizes the key events and the overall Review process from September 2019 to December 2020.
33. On September 10, 2019, a BCFIRB appeal panel, after hearing from the parties, deferred an appeal by CFP Marketing Corporation (CFP) of a Commission decision (June 28, 2019) to dismiss CFP's agency application and place a moratorium on new agency and producer-shipper applications until a supervisory process was completed. CFP alleged that the Commission had conducted itself in a procedurally unfair manner that gave rise to reasonable apprehension of bias.
34. As the Review got underway, on September 20, 2019 Prokam applied to the remaining member of the BCFIRB panel that rendered the appeal decision in *Prokam Enterprises Ltd. et al v. BC Vegetable Marketing Commission* (February 28, 2019). As the appeal panel member was *functus officio*, they forwarded the application to the supervisory panel (October 7, 2019). Given the Commission, as directed by BCFIRB in the February 2019 Prokam appeal decision, was in the process of following those directions and reconsidering a number of matters, including the avenue for Prokam to market its regulated crops for the 2020/21 production year, the Review panel determined it was appropriate to wait until the Commission issued its reconsideration decision before addressing the Prokam application.
35. As part of its scope and process considerations, the panel met with the Commission on October 28, 2019. The panel held a follow-up meeting with the Commission Chair and Executive Director on November 14, 2019. Subsequently,

the Commission formed a Working Group<sup>4</sup> to support the review process. Panel meetings with the Working Group were held March 30, 2020, May 14, 2020, June 15, 2020, September 29, 2020 and October 16, 2020. Meeting summaries and/or related documents were posted to BCFIRB's web site for transparency.

36. Prokam appealed the Commission's November 18, 2019 reconsideration decision<sup>5</sup> made at the direction of a BCFIRB appeal panel in its February 2019 decision. In summary, Prokam does not agree with the Commission's compliance and enforcement-related directions. It takes the position that the Commission's process was procedurally unfair and the reconsideration decision, as related to Prokam, was not sound marketing policy, nor in accord with SAFETI<sup>6</sup>. After consulting with the parties, the presiding BCFIRB appeal member deferred consideration of Prokam's appeal on November 29, 2019 pending the completion of this Review.

#### *Interim decision*

37. On December 4, 2019, in light of the November 29 deferral of Prokam's appeal, this panel established a submission process to address Prokam's on-going requests for relief in advance of the 2020/21 growing season.
38. Prokam sought alternate marketing arrangements to those directed by the Commission in its reconsideration decision, and alternate delivery allocation approvals. The panel interrupted the Review to allow the parties to make submissions and the panel to deal with the matter immediately.
39. This panel issued its Interim Relief decision on January 10, 2020<sup>7</sup> related to the 2020/21 growing season. The panel declined to consider Prokam's request for a Class I licence in place of the more costly Class III licence<sup>8</sup>, as it determined Prokam had a valid licence and could produce and market regulated vegetables. It concluded the Commission took reasonable steps to address the administrative fairness issues identified in the February 2019 appeal decision and noted that Prokam did not raise conflict of interest in its appeal to BCFIRB of the Commission's reconsideration decision. It upheld the Commission's direction that Prokam market through BCfresh unless Prokam chose not to grow regulated vegetables or BCfresh released Prokam given BCfresh's marketing experience and connections, the support of other agencies and Prokam's non-compliance with

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<sup>4</sup> The Working Group was composed of the Commission Chair, three Commission members representing storage crop and greenhouse sectors and the Commission General Manager.

<sup>5</sup> 2019 November 18. BCVMC. Reconsideration of 2017 December 22 Decision on Allegations of Non-Compliance by the Island Vegetable Co-Operative Association, Prokam Enterprises Ltd., and Thomas Fresh Inc.

<sup>6</sup> Strategic, Accountable, Fair, Effective, Transparent, Inclusive

<sup>7</sup> 2020 January 10. BCFIRB. [In the Matter of the Natural Products Marketing \(BC\) Act and Interim Relief Sought by Prokam Enterprises Ltd.](#)

<sup>8</sup> The Commissions' November 2019 reconsideration decision amended the Commission's original decision to issue Prokam a Class IV licence to a decision to issue a Class III licence.

the Commission's Orders as found in the February 2019 appeal decision (2017/18 crop year). The panel found that working with BCfresh would give Prokam an avenue to market its regulated crops in 2020/21 and an opportunity for growth should the market allow. The panel declined to issue Prokam a producer-shipper licence for 2020/21, finding no historical, regional or economic circumstances that warranted granting such a licence. The Commission was directed to meet with BCfresh and Prokam to discuss whether there would be new or expanded market opportunities for Prokam's products. The panel gave Prokam relief on its delivery allocation by ordering that the 2018/19 and 2019/20 crop years (zero production years) were not to be included when calculating Prokam's 2020/21 delivery allocation.

40. On February 11, 2020, following a submission process, the panel prior approved the Commission's calculation of Prokam's delivery allocation for 2020/21 which followed the panel's January 10, 2020 directions.
41. The panel understands that, despite the Interim Relief decision, the granted relief on its delivery allocation and the meeting with BCfresh and the Commission to discuss market opportunities, Prokam chose not to grow regulated crops for the third consecutive year (2020/21 crop year).

*Resumption of supervisory review process*

42. Once the panel resumed the supervisory review in mid-February 2020, all regulated vegetable producers and stakeholder were invited to provide written input on three proposed supervisory review topics (Commission Structure, Agency Accountability and Storage Crop Delivery Allocation) by April 30, 2020. After receiving feedback from eight stakeholders, the panel finalized the review topics (Commission Structure and Governance, Agency Accountability, and Storage Crop Delivery Allocation) and subsequently asked all stakeholders to complete an online engagement survey by May 29, 2020 on how they wanted to be consulted (e.g. in writing, via telephone or video conference meeting). Due to COVID-19, in-person meetings were not considered a safe consultation option.
43. In spring 2020, Mastronardi Produce Ltd. (Mastronardi), a greenhouse operation based out of Ontario, started contacting BCFIRB about the Commission moratorium on new agency licences. Mastronardi was seeking an agency licence in order to market regulated BC greenhouse products.
44. In June 2020, Prokam and CFP filed a petition for judicial review with the Supreme Court of BC, appearing to impugn no less than thirteen (13) decisions made by the Commission and/or BCFIRB in the administration of the provincial regulated vegetable industry going back to October 2017. In addition, the petition sought to restrict or curtail this supervisory review of the regulated vegetable industry. The judicial review proceedings proceeded on a parallel but separate track to the supervisory review.

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45. The panel met by video or teleconference with 25 industry individual and groups who requested a meeting with the panel (July/August 2020). The panel relied on questions and background information provided in a July 10, 2020 Consultation Document sent to participants in advance of the consultation meetings to guide the discussions. Participants included: storage crop producers, greenhouse growers, designated storage agencies, designated storage crop/greenhouse agencies, other supply chain members, producer associations, and two businesses applying to become designated agencies. BCFIRB summarized the comments and published a “What We Heard” summary document on August 14, 2020 which was updated on August 19, 2020.
46. In addition, the panel invited all regulated vegetable producers and stakeholders to provide written submissions on the review topics by August 19, 2020 (subsequently extended to August 26, 2020). The industry submitted 9 written submissions. The panel accepted one submission on August 27, 2020 following an extension request. BCFIRB published all submissions on its web site.
47. The Commission provided a closing submission on September 16, 2020 (extended from September 4, 2020). The panel held a closing video conference meeting with the Commission Working Group on September 29, 2020 to enable the Commission to speak to its submission. A follow-up meeting was held on October 16, 2020 to address specific panel questions on agency accountability. BCFIRB published the questions and answers on its website.
48. On October 21, 2020, the panel directed the Commission to lift the moratorium on new agency and producer-shipper licence applications. In the panel’s view it was not sound marketing policy to put business on hold indefinitely and industry certainty was needed to allow for planning. The panel was satisfied that the Commission’s progress on its strategic planning and accountability framework projects was sufficient to allow the Commission to effectively manage any current and pending applications. The panel recognized and supported that the Commission may need to enhance its agency application process to reflect some of the concerns identified in the supervisory review by the Commission and sector stakeholders.
49. Subsequently, CFP withdrew its appeal of the Commission’s June 28, 2019 decision dismissing its agency application and placing a moratorium on new agency and producer-shipper applications and discontinued its judicial review petition.
50. On October 22-23, 2020, the Supreme Court of BC heard BCFIRB and the Commission’s application to strike certain relief claimed by the petitioners and on December 2, 2020 the Supreme Court of BC dismissed Prokam’s petition for judicial review in its entirety.

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51. Throughout the Review the panel received and responded to correspondence from Prokam, CFP and Mastronardi about the review process, timelines and requests for specific accommodations.

# **VEGETABLE COMMISSION STRUCTURE AND GOVERNANCE**

## Vegetable Commission Structure and Governance

52. The panel considered the following questions:
- a. Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?
  - b. Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?

### *Background*

53. The Commission's structure is set by regulation in the BC Vegetable Marketing Scheme (Scheme). The Scheme states that the Commission must be made up of:

A Chair, appointed by government; and,

Up to eight members who are commercial producers<sup>9</sup>, elected by commercial producers.

54. As the first instance regulator, the Commission sets a strategic vision, establishes rules, makes regulatory decisions and carries out enforcement activities in support of producers, the industry and the public interest. The structure of the Commission is an important factor determining its ability to make informed and balanced regulatory decisions for the benefit of producers, industry and the public. It is also an important factor determining its ability to manage perception of bias and conflict of interest in decision-making.
55. The Commission makes regulatory decisions in a complicated environment. The scope of the Commission's legislated mandate, which extends to both storage and greenhouse crops, contributes to this complexity, as does retailer consolidation, rapidly changing markets and consumer demands, increasingly stringent food safety requirements, and uncontrolled imports.

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<sup>9</sup> "Commercial Producer" means a Producer whose name has been entered and remains registered in one or more of the registers of Commercial Producers referred to in Section 5 of the Scheme. In accordance with Section 7 of the Scheme, a Producer qualifies to be registered as a Commercial Producer in the district register for a district in which he operates a farm if, during the immediately preceding 12 months, Regulated Product of at least a gross value to the Producer of \$5,000 has been grown on the farm and marketed from it through an Agency or licensed processor." BC Vegetable Marketing Commission General Orders.

56. The Commission's structure reflects government's policy decision that producers play a key role in industry regulation. The regulations under the *NPMA* establishing BC's other seven commodity boards reflect a similar government policy decision.
57. In 2001, the BC government Core Services Review<sup>10</sup> recognized the need to strengthen the structure of BC's commodity boards so the boards could better meet their legislated responsibilities. Achieving the "right mix" of representation on boards was a key recommendation of the Core Services Review. The recommendation resulted in all BC commodity boards receiving Order in Council appointed independent chairs, starting in 2005.
58. Government made other changes to commodity board structures either at the request of a commodity board or on its own initiative, to incorporate a broader range of skills, expertise and knowledge. For example, the BC Cranberry Marketing Commission (Cranberry Commission) has an additional independent member appointed by the Cranberry Commission, the BC Milk Marketing Board has an additional independent member appointed by the Milk Industry Advisory Committee, and the BC Chicken Marketing Board has two additional independent members appointed by Order in Council.
59. The Commissioner positions, as per the Commission's Election Rules, are established as four greenhouse producers, three storage crop producers and one member producing for processing.
60. Commission greenhouse member positions are currently established by crop (tomatoes, peppers, cucumbers, any regulated greenhouse crop). Commission storage crop member positions are currently established by District<sup>11</sup> as follows: District I; District II, III; and District I, II, III. The processor member position is also set by District (District I, II, III).
61. "Governance" is broadly defined and often means different things to different people. For the purposes of this decision, the panel considered the relationship between Commission structure and decision-making and specifically, the role board structure plays in:
  - a. apprehension of bias and conflict of interest; and,

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<sup>10</sup> The provincial government's 2001 Core Services Review assessed the performance of all provincial programs and activities – including all provincial agencies, tribunals, and boards – with the goal of improving service delivery and management of taxpayer's dollars.

<sup>11</sup> "District I" means that part of the Province west of the 121st meridian of west longitude and south of the 50th parallel of north latitude, excluding Vancouver Island and the Gulf Islands" [Lower Mainland]; "District II" means Vancouver Island and the Gulf Islands; "District III" means that part of the Province south of the 53 parallel of north latitude and not in the first or second District [Interior]

- b. it's ability to make balanced decisions considering supply chain and public interests.

*Decision-making and apprehension of bias/conflict of interest*

62. In its February 2019 Prokam appeal decision, BCFIRB concluded the Commission acted in a procedurally unfair manner in failing to address bias and/or conflict of interest in Commission decision-making:

The panel finds that the Commission breached principles of administrative fairness when it failed to seek submissions from the parties – before the December 22, 2017 order was issued - on the question of whether Commission members with ties to BCfresh should have recused themselves from consideration of any order to direct Prokam to BCfresh. This is a step that should have been taken by the Commission before reaching any conclusions as to whether there was or was not a conflict of interest.

63. BCFIRB, in its appellate function, directed the Commission to reconsider its compliance and enforcement decision after "...canvassing the parties' views on the question of whether any members of the Commission must recuse themselves from the discussion and deliberations concerning the reconsideration."
64. The procedural fairness issue arose from the Commission's composition. Currently three of the four storage crop Commissioners<sup>12</sup> ship to and are shareholders in one agency. Three of the four storage crop members also sit as directors on their respective agencies (two on one agency, one on another agency). At this time each of the greenhouse producer members ship to separate agencies, none are directors and one has an ownership interest in the agency they ship to.
65. The Commission acknowledged perceived apprehension of bias and conflict of interest management issues related to Commission structure and composition. Coming out of the reconsideration process, it endeavored to address the importance of retaining producer expertise in decision-making with management of apprehension of bias and conflict of interest through:
  - a. Establishment of panels of Commission members to manage perception of bias and conflict of interest in decision-making on certain questions (e.g. greenhouse members making decisions on storage crop matters, and vice versa);

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<sup>12</sup> Currently, the producer representing the processing vegetable sector is also a storage crop producer.

- b. Establishment of three advisory committees with representatives from storage crops, greenhouses and agencies to provide industry expertise (see the Advisory Committee Terms of References); and,
  - c. Seeking the addition of an independent member.
66. The Commission is applying the tools listed in 65 (a) and (b) discriminately and as necessary dependent on the decisions it is making.

*Industry input*

67. Through the supervisory review consultation process, industry stakeholders provided a variety of input and recommendations on Commission structure and decision-making. While the panel considered all input and recommendations received through consultation meetings and in writing, the following summarizes the input that is directly relevant to the panel's final recommendations.
68. Overall, participants emphasized that trust is a cornerstone for success/good relationships. Some felt there are no trust problems with the Commission while others indicated serious trust issues. Some stated that perception of bias/conflict of interest with Commission members contributes to a lack of trust.
69. Many participants felt the Commission generally makes good decisions and noted that the Commission operates in a tough decision-making environment. However, there were varying degrees of concern, some very strongly articulated, regarding perception of bias and conflict of interest improperly influencing decision-making. Some felt there is both systemic bias (institutional bias) and operational bias (individual bias) in the decisions the Commission makes. A key issue for many participants is the length of time the Commission takes to make decisions – specifically its decisions on new entrant and delivery allocation applications.
70. Some participants felt that the recent use of panels and advisory committees has helped address perception of bias and conflict of interest issues with decision-making and noted this was a return to how the Commission operated in the past. Others were concerned that conflicted members, although they may not directly participate in a decision, may still inappropriately influence Commission decisions – through member roles on the advisory committees or through existing long-standing relationships outside of the Commission. A key concern raised by many participants about reliance on panels was the ability of greenhouse members to make sound storage crop related decisions and vice-versa, due to lack of panel member industry specific knowledge and despite advisory committee supports. One or two participants suggested knowledge deficits could also be addressed by contracting with industry experts.

71. Some participants raised bias-related questions about Commission decision-making arising out of multiple Commissioners marketing through the same agency. They question the fairness of decision-making where power appears overly vested in one agency, not the Commission. There is a risk of systemic bias as Commissioners, without fully considering the effect of their actions on other agencies, may make decisions that are seen to favour that one agency. Other participants said the unfairness arises because members affiliated with an agency pursue outcomes favourable to the agency they supply. The panel heard that actual or perceived unfairness erodes trust.
72. Most participants supported the addition of further independent member(s)<sup>13</sup> to the Commission. Comments included acknowledgement of the importance and value of bringing new ideas, outlooks and skills from other areas of the supply chain, or business and governance in general, to further aid Commission decision-making and assist with managing perception of bias and conflict of interest. Several supported independent members with experience and expertise in areas such as wholesaling, marketing or retailing. Some observed that vegetable industry businesses, including some storage crop agencies, have benefited by adding independent members to their boards.
73. As identified by participants, the main risk to having independent members is a lack of agriculture/industry specific knowledge negatively impacting Commission decision-making. Others noted the risk, if independent members outnumbered producer members, that independent members could “out vote” industry members. Generally, participants preferred industry having a direct role in appointing additional independent members, primarily to ensure usefulness and a good fit. Some supported government appointment, with input or referral from industry.

### *Analysis*

74. The structural and related decision-making challenges faced by the Commission are driven by the context in which it operates. Apprehension of bias and/or actual conflict of interest issues with Commission decision-making arise from the central and necessary role agencies play in marketing regulated vegetables. All producers are required, with some limited exceptions<sup>14</sup>, to market their product through agencies. These same producers have some form of vested interest in the agency that markets their products (e.g. shipping contract, ownership, director). However, only producers are eligible under the Scheme to sit on the Commission, other than the appointed Chair, to make regulatory decisions affecting agencies.

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<sup>13</sup> Some supported the addition of one independent member, others supported two and/or alternative structures involving additional independent members.

<sup>14</sup> The Commission’s General Orders establish the requirement to market through an agency and the limited exceptions.

75. A 2018 Commission agency audit shows that at least eight of the 10 current agencies, whether cooperatives or corporations, are fully or partially owned by producers. The relatively small number of producers in the greenhouse and storage crop sectors respectively also increases the odds of a producer Commissioner having a significant personal or business connection to a Commission decision. This is particularly found in the storage crop sector where the majority of producers ship to one agency.
76. Compounding the producer-agency tie, the Commission is the regulatory body responsible for licensing and overseeing agencies. Agencies compete directly with each other for producers and markets. It is easy to see how a Commissioner's tie to an agency may lead persons to question that Commissioner's independence and whether decisions are biased in favour of the agency that they have a tie with. For more about the Commission's agency oversight role, see Agency Accountability.
77. There is a recognized inherent bias created by the *NPMA* and Scheme requirements that producers sit on BC commodity boards; however, a producer Commissioner voting on Commission decisions does not ordinarily result in a biased or conflicted decision.
78. The duty to be a regulatory decision-maker, taking into consideration the interests of the full industry as well as the public interest, is more easily discharged where members' interests are no different than the interests of other producers.
79. As with all BC commodity boards, conflict of interest can arise where a member has a direct personal interest in a decision being made (e.g. a decision results in a benefit to the Commissioner or a family member), beyond the general benefit to all producers. These types of situations are usually addressed through conflict of interest disclosures, Code of Conduct guidance and recusal where necessary.
80. However, as noted above, commercial vegetable producers rely on agencies to market their product, and in turn, producers, including producer Commissioners, often have some form of vested interest in those same agencies. There is a significant difference between tolerating a bias in decision-making that arises from a member simply being a producer or identifying a conflict due to special circumstances of a benefit to the Commissioner or family member, and a bias/conflict that arises where there is "something more".
81. In this Review, the panel is concerned about the following scenarios which give rise to different degrees of "something more":
  - a. a Commissioner is a director of an agency;

- b. a Commissioner has an ownership interest in an agency<sup>15</sup>, and/or
  - c. a Commissioner ships to an agency.
82. On the farther end of the “something more” scale, the one that is most challenging to appropriately manage is when a Commissioner also serves as an agency director. As a result, they are clearly in a position of both regulating and being regulated.
83. A Commissioner owes a duty to act in the best interest of the Commission’s legislated regulatory responsibilities. The Commission is responsible “to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product” (Scheme (s. 4(1)), on behalf of all producers and in the public interest. The Commission as a whole has a duty to make decisions, in the best interests of the whole industry and in the public interest.
84. An agency director owes a fiduciary duty to act in the best interests of the agency. Where the role of agency director and Commissioner rests in the same person, the legal duties owed to each entity are irreconcilable. The divided legal loyalties create, at a minimum, a reasonable apprehension that the Commissioner’s decisions may be unduly influenced by what is in the best interests of the agency that they serve. There may also be situations where the undue influence of agency interests on a Commissioner’s decision making meets the test for actual conflict of interest. When a Commissioner is part of the “operating mind” of both the regulator (Commission) and regulated (agency), it is as a practical matter beyond comprehension that the Commissioner could compartmentalize the dual functions to avoid the influence of one over the other.
85. Moving down the “something more” scale, a more manageable scenario is where a Commissioner has some degree of ownership interest in an agency but does not sit on the agency’s board of directors. The size or degree of the ownership interest is an important factor in assessing whether a reasonable apprehension of bias or conflict of interest could arise in agency-related decision-making.
86. The current Commission structure involves several Commissioners with some degree of ownership in the same agency. Given the structure of member positions (see paragraph 60) and the fact that District I (Lower Mainland) has the majority of producers and associated production volume (greenhouse and storage crop), there is potential for three of four of the storage crop and processing Commissioners to be shipping to a single agency. With positions reflecting crop type, there is potential for four of four greenhouse Commissioners, and, in the case of storage crop Commissioners, two or three, to be shipping to a single agency. These outcomes may generate concerns about one agency having too much influence over Commission decisions for the respective sectors. Again, the

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<sup>15</sup> E.g. Having an ownership interest as a shareholder in a cooperative or corporation.

context and circumstances relevant to the decision being made will determine if a Commissioner's participation in a decision could result in a reasonable apprehension of bias or actual conflict of interest.

87. The third scenario where one or more Commissioner(s) have a marketing agreement with the same agency with falls even further down the "something more" scale. Here, as in the previous scenario the context and circumstances relevant to the decision being made will determine if participation in a decision could result in an apprehension of bias or actual conflict of interest.
88. BCFIRB, in its supervisory role, requires all commodity boards to ensure that board members make conflict of interest declarations, records of which are ordinarily kept by board staff and used as necessary. A Code of Conduct is intended to provide self-directing guidance for members. Commissioners need to assess the implications of their specific relationship(s) arising from their ties to an agency as well as other components of the supply chain for bias/conflict concerns on a decision-by-decision basis and have clear rules for recusal to preserve the integrity of the Commission's independent decision-making.
89. BCFIRB evaluates and addresses apprehension of bias and/or conflict issues with commodity board decision-making on a case by case basis under its supervisory or appellate authorities as appropriate. While the common law provides a framework within which to assess reasonable apprehension of bias and conflict of interest, this framework recognizes the inherent bias of BC's commodity boards created by the *NPMA* and Scheme requirements of having producer members on commodity boards.

#### Commission structure and composition

90. The Commission adopted a "panel and advisory committee decision-making model" for the November 2019 reconsideration decision. This model creates a tension with the legislative intent of bringing producer expertise to decision-making. Industry expressed concern about regulatory decisions being made by Commissioners not familiar with the production and sale of specific crops (e.g. greenhouse producer Commissioners making decisions about storage crop delivery allocation and vice versa). Commissioners described finding themselves under pressure to make critical decisions about a sector they are not thoroughly familiar with. This tension is mitigated, in part, by providing panels access to industry advisory committees.
91. Adding independent members (persons with no direct vested industry interest) to the Commission structure is one means of resolving the tension between potentially biased/conflicted decisions and producer expertise for the long-term. As noted earlier, several BC commodity board structures include one to two independent members appointed through various means.

92. A board structure that includes independent members promotes procedurally fair decisions and mitigates concerns that a board as a whole is making decisions based on any member's particular interests. Such a structure could alleviate the Commission's challenges with retaining producer expertise and quorum in decision-making while still managing apprehension of bias and conflict of interest scenarios that may arise due to the close ties between producers and agencies.
93. Independent regulatory board members bring additional benefits for industry and the public. Under the *NPMA*, the Commission is responsible for regulating "marketing". Marketing is broadly defined as the "producing, packing, buying, selling, storing, shipping for sale, offering for sale or storage, and in respect of a natural product includes its transportation in any manner by any person". By extension, Commissioners require a broad range of skills and knowledge to make effective, strategic decisions (e.g. producer expertise, financial management knowledge; experience in other components of the supply chain; business management and/or governance skills; and/or a regulatory background). No one individual Commissioner can bring the full set of important skills and knowledge to the decision-making table.
94. Adding independent members for fixed terms would result in regular infusion of new views and outlooks to decision-making. History shows a lack of regular turnover in Commissioners, and an absence of candidates during elections. Given the challenging environment the Commission operates in, some producers are reluctant to stand for election, while others are simply overburdened with other obligations. The panel heard from industry that there are a limited number of people with time to be involved in organizations in addition to managing their main business of growing vegetables. There are an increasing number of industry-related associations and committees relying on producer participation and competing for the time and expertise of vegetable producers. Commissioner positions are part-time, but the actual time commitment can become significant.
95. Board size is also a consideration when looking at a board structure change.
96. The Commission, with a total of nine members including the Chair, is large compared to other BC commodity boards. Other commodity boards range in size from three to six, with most being five members, including the Chair. The Commission's size is a matter of history and appears to reflect the objective of retaining expertise in diverse regulated vegetable crop types and provincial regions.
97. There are a range of factors related to determining the appropriate size of a commodity board. These include, but are not limited to: the nature of the board's work; the expectation that every member be a contributing working member; having an appropriate range of expertise; having sufficient members available for specialized tasks such as panels and committees (sharing the load); and, whether

individual member participation becomes more honorary than governing as board size increases.

98. Smaller boards can be more economical. Board discussions may be shorter and more focused. There is more opportunity for every member's participation to be meaningful. They may be able to meet more often than larger boards. Smaller boards also mean less risk of positions going unfilled. On the other hand, fewer members may result in burn out from workload and important opinions or views may not be at the table.

### *Conclusions*

99. The close ties that exist between producers and agencies are not contemplated by the legislative framework and create apprehension of bias and potential conflict of interest that jeopardize the Commission's independent decision-making. Compounding this situation is the Commission's regulatory oversight over agencies.
100. The panel considered whether the issues of irreconcilable legal duties owed by a Commissioner/agency director and compartmentalizing the functions of operating minds for both the Commission and agencies, can be managed through appropriate and timely recusals. The conclusion is recusal by member(s) under those circumstances cannot resolve these circumstances. After considering the decisions that the Commission has made pertaining to the production and marketing of storage crops over the last three to four years, it is clear that the Commission cannot effectively compartmentalize the oversight of agencies' functions to ensure independent decision-making free from reasonable apprehension of bias, since those functions are intrinsically tied to the regulation of the industry. It is inescapable that the roles of regulator and the regulated agency will be at odds from time to time and result in an appearance of bias or an actual conflict of interest.
101. Commissioners with a director-level legal fiduciary duty to an agency are in an irreconcilable conflict with their duty to make many regulatory decisions in the best interests of industry and in the public interest. Even where the Commission and agencies' objectives or interests are completely aligned, it would not be surprising for a reasonable person to apprehend or perceive that the mind of that Commissioner would be biased in favour of the agency they direct over the interests of other agencies. These concerns would be magnified when the Commission exercises its compliance and enforcement powers as part of its agency oversight role. In the long-run, recusals are insufficient to address the underlying competing obligations.
102. The panel is satisfied that the Commission's "panel and advisory committee decision-making model" is strategic in that it allows for sufficient management of apprehension of bias and conflict of interest in decision making until short and

long-term structure changes can be made. The Commission cannot simply abdicate its responsibility to regulate the industry in response to perceived apprehension of bias or conflict of interest issues. While biased or conflicted decisions are not in the interests of industry or the public, it is also not sound marketing policy to put decision-making on hold. The use of advisory committees can provide valuable information in support of panel and full Commission decision-making for the short and long-term.

103. As noted above, the panel finds that the “panel and advisory committee decision-making model” is sufficient to manage apprehension of bias and conflict of interest in the short-term. To preserve experience and expertise and limit disruption in decision-making, Commissioners who are currently agency directors need not step down before their term of office expires. The Commission can address this situation through panel composition and recusal as necessary, until the Election Rules are changed to restrict agency director producers’ eligibility.
104. When Commissioner ownership in an agency raises apprehension of bias or conflict of interest concerns, the Commissioner should ordinarily be able to rely on disclosure and appropriate recusal as a means of avoiding any procedural unfairness in decision-making and should do so.
105. A reasonable person may also question agency-related decisions where several Commissioners ship to one agency. Modifying the member position requirements under the Election Rules to ensure all producer Commissioner members ship to separate agencies may be an option. However, how practical this is given the structure of the industry, particularly in the storage crop sector where the majority of producers ship to one agency, requires exploration by the Commission with industry.
106. While the Commission has a conflict of interest form and Code of Conduct document, these need to be “living” documents and a central part of the Commission’s governance culture. The documents must take into account the various producer-agency ties so it is readily apparent to the appointed Chair who is tasked with managing such issues and the Commissioners themselves, when recusal is necessary.
107. Given producer-agency ties are likely to persist in the regulated vegetable industry and will periodically require Commissioners to recuse themselves from decision-making, an effective long-term solution will require a change to the Commission structure by adding independent members to the Commission through a Scheme amendment. This solution has the additional benefits of bringing new skills and knowledge to Commission decision-making for the benefit of the industry and the public.

108. While awaiting a potential permanent structural change, the Commission can amend its Elections Rules, with BCFIRB prior approval, to clarify when producer agency directors are not eligible for election due to irreconcilable conflicts.<sup>16</sup>
109. Any permanent change to the Commission's structure needs to be carefully managed to avoid disruption in the Commission's functions and the industry.
110. In the panel's opinion, the addition of a minimum of two independent members is necessary for effective change. Given the nature and number of ties that producers have with agencies, and the importance of bringing new perspectives and expertise to decision-making, the panel concludes that the addition of one independent member is not sufficient to mitigate concerns about having enough Commissioners for decision-making when potential producer-Commissioner bias or conflict of interest issues result in recusals and to sufficiently broaden the base of decision-making.
111. The panel also finds any permanent structure change should retain producer expertise but not result in an unduly large board.<sup>17</sup> If two independent member positions are added, the panel recommends two elected producer positions be removed. The Commission would remain with nine total members and retain important producer expertise in the storage crops and greenhouse sectors.
112. A Scheme change that establishes the maximum number of Commission members (e.g. one OIC Chair, two independent members, and up to six elected commercial producer members), enables the Commission to make future determinations about further reducing its membership while maintaining producer expertise. This approach is strategic, accountable, effective and supports fair decision-making. It allows the Commission and the industry to adjust to the addition of independent members and a corresponding reduction of producer members. The Commission could then assess over the next three to five years, if a further reduction in producer Commissioners is effective and strategic. Any reduction could be managed through Election Rule amendments and not require a further Scheme amendment if the flexibility recommended above is drafted into the Scheme.
113. Since the BC vegetable processing industry is shrinking and the role of the Commissioners is to regulate not represent sectors, the Commission needs to consider whether having a processing member position filled through election continues to be strategic, accountable or effective.
114. Either an Order in Council or Commission-run appointment process for independent members is effective provided that the required skills and expertise are well understood and achieved by the recruitment process. The panel favours

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<sup>16</sup> British Columbia Vegetable Scheme s. 3(6)

<sup>17</sup> The Commissions operating budget is funded for the most part by producer levies.

the selection and appointment of independent members through a Commission process approved by BCFIRB and documented in the Commission's Election Rules. This would allow the Commission to select for specific skill sets it requires and to establish the maximum term for each independent member to balance expertise, experience and maintenance of a fresh perspective. BCFIRB and the Commission are familiar with the vegetable sector and the Commission's strengths, weaknesses, and needs and can cooperatively identify and recruit candidates with the skills and experience needed to successfully regulate the industry.

115. If Scheme amendments are made as outlined above, a transition plan developed by the Commission, in consultation with BCFIRB, will be needed to allow for continued informed and procedurally fair decision-making in the interim. The plan would address consequential amendments to Election Rules and deal with further reduction in up to two more producer members should the Commission wish to make that reduction.
116. The panel answers the questions pertaining to Commission structure posed by this review in reverse order:

*Does the Commission structure allow it to effectively, fairly and accountably manage potential conflicts of interest and apprehension of bias in its decision-making?*

The current Commission structure does not allow the Commission to effectively, fairly or accountably manage potential conflicts of interest and apprehension of bias in its decision-making.

*Does the Commission structure enable it to make effective and strategic decisions regarding the production and marketing of regulated BC vegetables?*

The current Commission structure and the ties of producer members to agencies results in Commission decisions being perceived as biased or resulting in conflict of interest. Apprehension of bias and conflict of interest results in procedurally unfair decisions which are potentially neither effective nor strategic.

Change is required to the Commission structure to address these concerns. Immediate change can be made to the Election Rules to clarify agency directors are not eligible for election due to irreconcilable conflicts. Long-term, effective structural change requires a Scheme amendment to increase the number of independent members and to decrease the number of elected commercial producers

*Directions and Recommendations*

117. The Commission is to:

- a. Immediately review its member conflict of interest disclosure form to ensure it includes pertinent questions (including those related to pecuniary interests, agency ownership and affiliation and association positions).
- b. Submit a copy of the Commission's conflict of interest disclosure form to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.
- c. Immediately review its Code of Conduct to ensure the Code of Conduct provides sufficient guidance on conflict of interest considerations, how to manage and enforce them, and that it is understood by Commission members.
- d. Submit a copy of the Commission's Code of Conduct to BCFIRB, which will have effect for the 2021-22 production year, within 30 days of receipt of this decision.

118. Until Commission composition changes are fully enacted as outlined below in paragraph 121, the Commission is to:

- a. On a decision-by-decision basis and guided by perception of bias and conflict of interest considerations, continue to use panels comprised of non-sector producer members from the sector which is the subject of decision.
- b. The panels are to seek input from the relevant advisory committee(s) and or/retain third party expertise as necessary to ensure fully informed, effective, and strategic decisions.

119. The Commission is to revise its Election Rules and receive BCFIRB's prior approval under s.3(6) of British Columbia Vegetable Marketing Scheme (Scheme), prior to the 2021 election, to reflect that producers holding a director position on an agency are not eligible for nomination and election.

120. The Commission is to review its Election Rules, as soon as practical and no later than the 2022 election, in consultation with industry, to assess whether it is necessary and effective to place restrictions on elected Commissioner positions to ensure representation across agencies and avoid concentration of Commissioners in one agency.

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Vegetable Review  
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121. BCFIRB recommends and will immediately pursue the following changes to the British Columbia Vegetable Marketing Scheme B.C. Reg 96/80:
- a. The addition of two appointed independent members.
    - i. Members to be appointed by the Commission following a merit-based candidate selection process developed in consultation with, and prior approved by, BCFIRB under s.3(6) of the Scheme.
  - b. A corresponding reduction of two elected commercial producer members, so that there can be up to 6 commercial producers, but no less than 4, on the Commission, elected by commercial producers.
    - i. Members to be elected: three from the greenhouse producers; three from the field crop producers, after considering whether there should be a member representing processing production. These changes, as well as any change needed to reduce producer members from six to four while maintaining equal sector representation, must be incorporated in the Commission's Election Rules, and prior approved by BCFIRB.

# **AGENCY ACCOUNTABILITY**

## Agency Accountability

122. The panel considered the following questions:

- a. What should an agency accountability framework include?
- b. How should an agency accountability framework be used?

### *Background*

123. The *NPMA* and Scheme enable the Commission to designate agencies. Designated agencies are intended to market regulated vegetables on behalf of producers and harness the collective power of producers to gain market access for regulated products. Rather than individual producers seeking out markets for their vegetables, agencies take on that job and, by “pooling” production from multiple producers, can sell to larger markets (e.g. grocery chains such as Sobeys). Agencies minimize marketing burdens on each producer by finding sales outlets, securing sales, collecting sales funds and distributing them to producers. Agencies may also store, ship, and label product for producers. They are entitled to collect fees for these services. For consumers, agencies help ensure a steady, safe, high quality supply of BC product by marketing in an orderly manner. As the point in the supply chain where “money changes hands”, agencies deduct Commission levies from sales income and remit it on behalf of producers to the Commission. One of the important functions of agencies is to grow the industry by looking for new markets.
124. Agency designation is a privilege. It is non-transferable and is not approved in perpetuity. The Commission may review its designation of an agency as part of its annual licence renewal process or from time to time and upon any material changes in the conditions giving rise to the initial approval.
125. Key agency responsibilities, including providing information to the Commission, are found in the Commission’s General Orders Part V “Agencies”, Part VII “Agency Responsibilities” and the November 2019 Interim Order.

### *Agency Accountability Framework*

126. As part of the recent Vancouver Island supervisory review<sup>18</sup>, the Commission developed an agency accountability framework (a specialized set of evaluation criteria) to assess the existing Vancouver Island agencies and make recommendations to BCFIRB as to continued agency designations. Following the supervisory review, the Commission started working towards an agency

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<sup>18</sup> 2017 January 31. BCFIRB. In the Matter of the *Natural Products Marketing (BC) Act* and the Future of Regulated Vegetable Production on Vancouver Island – Agency Designation.

accountability framework for all BC agencies to establish a comprehensive, consistent and fair approach to the Commission's oversight.

127. In 2018, the Commission conducted an audit of existing agencies to "...develop an understanding on how each Agency is currently functioning in accordance to its overarching purpose and mandate, and assess opportunities for improvement in monitoring accountability and Agency performance."<sup>19</sup> The Commission released a "Report on Agency Compliance Observations" in July 2020.
128. The audit identified gaps in agency information required by the Commission to effectively and strategically regulate the sector. Agency reporting deficiencies included:
- a. Minimum standards and filing requirements to Commission;
  - b. Quarterly and annual reporting requirements; and,
  - c. Criteria to monitor the wholesaling function of an agency.
129. Other areas of "primary significance" identified through the audit included agency governance and corporate structure; and, criteria for becoming and maintaining an agency.
130. Since 2018, the Commission, in or on:
- a) Spring 2019 assessed agencies against specific General Order Part V and Part VII requirements<sup>20</sup> as part of its annual licence renewal process.
  - b) June 2019 established a moratorium on new agency and producer-shipper applications, in part to allow time to complete the agency accountability project. The panel directed the Commission to lift the moratorium on October 21, 2020 (see paragraph 48).
  - c) November 18, 2019 passed an Interim Order that requires storage crop agencies to provide, or be prepared for inspection of, documents related to production, transportation, packing, storage and marketing information. The Order also requires storage crop agencies to secure the highest net return payable to producers and to obtain Commission prior approval if marketing regulated product that is not packed for end use.

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<sup>19</sup> 2018 July 10. BCVMC. RE: Introduction of Agency Reviews.

<sup>20</sup> Refer to Appendix I

131. In its September 16, 2020 supervisory review submission, the Commission stated it was working with existing agencies on developing its agency accountability framework. The panel summarizes the Commission's framework objectives as follows:

- a. To provide a clear understanding for agencies of the Commission's oversight, expectations, objectives, "risk appetite", and reporting requirements.
- b. To inform and assure agency boards of directors and stakeholders that the agencies are operating in compliance with all relevant rules and are meeting their responsibilities.
- c. Ensure that agencies complete internal audits as part of their obligations outlined in a governance framework.
- d. Create sound governance practices and promotes best practice.
- e. Renew focus on agency and producer ownership as being BC based.
- f. Ensure agencies clearly articulate in their business plans the basis for proposals to expand supply when making submissions for approval to the Commission.
- g. Enable flexibility for producers to move between agencies.
- h. Assign roles and responsibilities to clearly establish a consistent and regular methodology for audits.

132. On October 19, 2020 the Commission held a third party facilitated workshop with its Storage Crop Advisory Committee and Greenhouse Advisory Committee (one session); and, the Agency Advisory Committee (separate session). The topics discussed included: agency governance and corporate structure; and, an agencies requirement framework (criteria for becoming and maintaining an agency designation).

#### *Industry Input*

133. During its consultation with the regulated vegetable sector, the panel heard general agreement that agencies need to be responsible and accountable, and that producer-agency relationships are important to industry. There were differing views on who agencies should be accountable to, and included the Commission, industry, producers and the public. Many recognized the need for checks and balances to be applied consistently across all agencies, so every producer receives fair prices and maximum return on investments through the application of common rules.

134. Generally, producers expect agencies to work with them as markets and consumer demands change. Some observed that agencies are not cooperating with each other. Agency representatives were clear that agencies cooperate to a certain degree with each other but reminded the panel that they are also direct competitors. Each agency is distinct and is able to compete because of the client relationships they develop, and the particular business focus they adopt. There were concerns about a small number of agencies controlling the bulk of production. Views were expressed that agencies should be innovators, developing new products or specialty products capable of displacing imports.
135. The majority of participants reported that an agency's objectives, personnel and bylaws/policies were more important for agency success than any particular business structure the agency may have adopted. Some clearly supported corporate structures, others supported direct producer involvement. Many observed that co-op business structures are becoming uncommon.
136. A few people noted that producers will determine if agencies are accountable by changing their agency if they are not satisfied with the agency's performance. The panel heard there should be a meaningful choice of agencies. The majority of producer participants expressed general satisfaction with the type and frequency of information provided to them by their agencies through regular provision of certain documents (e.g. price reports), phone calls and annual meetings. One grower indicated that the agency communication was inadequate.
137. The panel consistently heard that the Commission lacks sufficient market intelligence on demand, changes in demand, market competition and imports to the detriment of its decision-making.
138. Agency representatives were specifically concerned about reporting becoming onerous or an undue burden, particularly for smaller agencies. In relation, the panel heard about increasing regulatory requirements in all areas of farming and marketing and "regulatory fatigue" setting in amongst producers and agencies.
139. Most participants supported the concept of a Commission agency compliance report (compliance with Commission Orders). There was general support for making a compliance report public, provided it did not include confidential business information. The vegetable markets are highly competitive and there is constant pressure from cross border competitors. Some noted that public reporting should not be required as agencies are private companies who already must meet applicable business laws. Some felt quite strongly that agency accountability should be limited to regulatory compliance and that competition would address agency performance.
140. The panel heard several other ideas from participants. The need for regular communication between the Commission/Commission General Manager and agencies was one theme. Growth, producer returns, review of agency sales

systems, audits of grower payments systems, annual grower contract reviews and annual review of grower sales accounting and costs were all suggested as components for agency accountability reporting.

### *Analysis*

141. BCFIRB has a role in ensuring the Commission is taking a systematic, SAFETI<sup>21</sup>-based approach to agency accountability. BCFIRB has a legislated agency supervisory role (NPMA Regulations s. 4(1)) and prior approval role (NPMA Regulations s.8). For example, BCFIRB exercised its legislated supervisory responsibility to ensure sound marketing policy and orderly marketing in the Vancouver Island agency designations supervisory review. It is again exercising its supervisory responsibilities in this Review.
142. The regular application of an accountability framework should:
- a. provide transparency on agency responsibilities and compliance;
  - b. provide scheduled reporting to the Commission, producers and public as appropriate;
  - c. provide the Commission with current information on the state of the provincial sector, market, production, sales and price;
  - d. set a basis for agency licence renewals; and,
  - e. set a basis for graduated compliance and enforcement actions.

These framework objectives are similar in essence to many of the Commission's September 2020 objectives; however, they are directly focused on, and specific to, the practical goal of agency accountability within the proper exercise of legislated authority.

143. Agencies have a combination of regulatory and business responsibilities. Agencies have certain privileges not normally part of a private business environment. They are delegated certain legislated authorities such as the authority to conduct a price pool. While agencies face significant competition from businesses outside of BC, the number of BC competitors is limited by the fact that not just any interested business can market regulated product. With some limited exceptions, only agencies can market regulated product. Specializing in crop types and/or markets (e.g. regional) enables several agencies to operate successfully even though they may compete directly with each other. The regulated operating environment also enables agencies to cooperate with each other in the best interests of their businesses.

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<sup>21</sup> Strategic Accountable Fair Effective Transparent Inclusive

144. A requirement for regular, demonstrated public accountability for granted statutory authorities and responsibilities is not a new approach to oversight of BC's regulated marketing system. In 2018, BCFIRB established an annual public accountability report requirement for all BC commodity boards. The Public Accountability and Reporting Project (PARP) includes reporting against commodity board regulatory compliance and governance performance measures. Commodity boards also set and report on performance targets and publish industry data.
145. Given the foregoing, the panel narrowed its focus to two accountability themes to gain insight into what an agency accountability framework should include and how it should be used:
- a. agency compliance with the Commission's General Orders; and,
  - b. agency performance.

#### Agency Compliance

146. Agency compliance with the Commission's General Orders and any interim orders is essential for achieving and maintaining orderly marketing. Systematically tracking, managing and reporting on agency compliance enables the Commission to proactively oversee and manage the industry's regulated system. In turn, it meets BCFIRB's SAFETI-based<sup>22</sup> expectations of transparency and accountability.
147. The Commission's 2018 agency audit focused on three areas: regulatory compliance, results-based management and, governance. The audit questions were guided by the Commission's General Orders and included supplementary questions. Conducting this "environmental scan" of its agencies was an effective starting point for building an agency accountability framework. It gave the Commission insight into the current function and structure of agencies, reminded agencies of their regulatory obligations, and highlighted gaps in the market and management information that the Commission routinely requires from agencies for oversight and regulatory decision-making purposes.
148. The 2019 changes to the Commission's agency licence renewal process included a compliance assessment and follow-up. This type of rules-based activity demonstrates the primary and core purpose of an agency accountability framework.

#### Agency Information

149. General Orders Parts V and VII show that agencies are to: contribute to and respect Commission established prices; collect sale proceeds for producers; track sales against production and delivery allocation/production allocation; and, submit the information to the Commission. Production, pricing and sales tracking and

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<sup>22</sup> Strategic Accountable Faire Effective Transparent Inclusive

management by a regulatory board are key components for regulating any marketing system. The panel agrees with the consultation input and the 2018 audit outcome that the Commission requires full, correct and timely information from agencies to fulfill its functions.

150. Some sections of the General Orders Part V and Part VII “require” agencies to provide specific information, while under others, information is submitted “by request”. For example, agency business or marketing plans (currently by request); and pool settlement statistics (currently by request). See Appendix I.
151. In some cases, it is unclear if information is always required or only required if requested by the Commission. For example, Part VII s. 4 states:

Each Agency shall supply to the Commission *as requested or required* (emphasis added), details in respect to the application of Delivery or Production Allocations and Producer’s individual shipments. These details are required to be supplied to the Commission within 60 days of the close of a pool period or in the case of storage crops within 60 days of the close of a Delivery Allocation period.
152. In other cases, the timing of the request and submission of information is not clear. For example, Part V s.14 (regulated crop prices for prior approval), Part VII s. 8 (business or marketing plan); and, s. 15 (information relevant to agency transactions). See Appendix I.
153. Lack of required period by period agency reporting on producer shipments, application of delivery allocation/production allocation, and marketed volumes is a significant gap in the General Orders. The November 2019 Interim Order addresses this gap for storage crops. See Appendix II.
154. The Interim Order was made as part of the Commission’s reconsideration decision following the 2019 Prokam appeal. Lack of regular and complete information from the agency involved in that appeal contributed to delayed Commission compliance and enforcement actions. As such, orderly marketing was disrupted when a significant volume of potatoes entered the market over and above the producer’s Delivery Allocation, and other potatoes entered the market for which the producer did not hold Delivery Allocation. Producers can only ship above their Delivery Allocation with Commission authorization. In this circumstance, and despite requests for information, the producer or agency did not seek Commission authorization.
155. The panel asked the Commission about collecting import data to help inform decision-making (e.g. decisions on Delivery Allocation applications). The Commission explained that it is close to impossible for it to access sufficiently detailed and reliable data on inter-provincial and out-of-country imports of regulated vegetables because there is no cross-border tracking of these products leading to a data base that the Commission could access. The Commission has

access to some information from US producer organizations and from agencies, but these sources do not provide complete information.

156. Given the Commission is responsible for orderly marketing, including the assignment and management of storage crop Delivery Allocation and greenhouse Production Allocation, the Commission needs sufficient information to meet its oversight and other regulatory responsibilities, effectively and strategically.

#### Agency Performance

157. Producer success is based in part on agencies effectively marketing their products and maximizing the prices they receive. However, directly assessing and reporting on agency performance is not straightforward. Questions immediately arise as to what aspects of an agency's performance the Commission should be overseeing and which metrics to use.
158. The panel heard several times that if an agency is not performing well, producers can and often will move to another agency. Commission reports on agency compliance are one tool producers could use to determine if an alternate agency represents a meaningful option.
159. In the panel's view, if an agency is not complying with the Commission's orders, including submitting information as required, this in and of itself is a signal of deficient agency performance. Producers also have a direct interest in ensuring agencies meet their sales and payment expectations. Producers can also approach the Commission at any time regarding concerns about an agency's actions and request approval to change agencies.
160. The Commission is considering establishing best management/governance practice guidelines, in consultation with its advisory committees, as a proactive tool to mitigate the risk of agencies under-performing or not complying with the Commission's orders. The concept of establishing best management/governance practices is sound. Best management practices are successfully developed, adopted and applied in business areas such as food safety. While this approach has demonstrated success, it requires considerable effort, time and resources to turn the concept into practice. There is risk that this approach, compounded by the potential activities discussed in paragraph 164, may reach into aspects of agency operations that are beyond the Commission's proper regulatory scope.
161. The current operating environment, the need to complete projects (such as strategic planning), and the need to consider new agency applications are placing heavy demands on the Commission's time and resources. In addition, the Commission must deal with ongoing day to day operations; and must respond to critical and often urgent matters such as trade related issues. All of these demands are shared and supported by a small and fairly new team of employees. These

matters raise the need for the Commission to consider how it should apply its limited resources and efforts to meet its core statutory responsibilities.

#### Agency business structure and accountability

162. The panel heard from industry that agency bylaws, policies and staff are more important factors in agency success than any particular business structure. The panel is also aware that there are strong views that agencies will only work in the best interest of producers if they are producer owned. The Commission is questioning if producer ownership should be a condition of agency designation.
163. At least eight of BC's 10 agencies have some form of producer ownership. However, the panel agrees with the Commission that there is sufficient evidence that producer ownership alone is insufficient to ensure agencies are operating in the best interest of producers and the sector as a whole.
164. There is some indication the Commission may be considering establishing specific requirements or guidelines for agency business structures and operations. The Commission's 2018 Agency Audit Guidance Document includes a check list on governance-related business operations (s. 18 e.g. incentive structures, executive management behavior, management and monitoring of performance against business purpose and mandate). The subsequent July 2020 "Report on Agency Compliance Observations" states an expected outcome of the agency accountability work is to "[e]xplore acceptable Operations Management models". It is not clear if this is linked to the stated task of "Develop an Agency Structure Document" in the same document. Overall, the panel is unclear if there is a sufficient marketing-based rationale for the Commission to establish specific agency business structure and operations requirements.

#### *Conclusions*

165. Agencies play a critical role in the regulated marketing system; one they could not play without the authority and business environment derived from the *NPMA*. As a consequence, agencies are subject to Commission and BCFIRB oversight for the aspects of their business that deal with production, transportation, packing, storage and marketing of regulated crops.
166. Establishing an agency accountability framework based on agency compliance with the Commission's orders ("rules-based accountability") as soon as practical is the first step in meeting the following objectives established in paragraph 142:
  - a. providing transparency on agency responsibilities and compliance;
  - b. providing scheduled reporting to the Commission, producers and public as appropriate;

- c. providing the Commission with current information on the state of the provincial sector, market, production, sales and price;
  - d. setting a basis for annual agency licence renewals; and
  - e. setting a basis for graduated compliance and enforcement actions.
167. In the panel's view, the Commission's framework objectives as listed in its September 2020 submission (paragraph 131 of this decision) overlap with these objectives to some extent but are not sufficiently focused on core statutory responsibilities to produce an effective, strategic outcome. Some of the objectives risk the Commission straying outside of its jurisdiction of regulating the production, transportation, packing, storage and marketing of regulated crops and into areas of business structure and governance. The focus of an accountability framework should be the essential elements of sound marketing policy as provided by the *NPMA*, adopted by the Scheme and delegated to agencies as necessary for them to support orderly marketing.
168. The panel is not satisfied that the development and adoption of best management/governance practices for agencies will enable the Commission to achieve its full regulatory responsibilities. The panel also questions the Commission's potential thinking involving business structures/models, as reflected in paragraphs 18 and 19 of the July 2018 Agency Audit Guidance Document and its September 2020 submission objectives summarized in paragraph 10, c, d and e. It is not clear to the panel if the Commission's jurisdiction extends to these matters or would result in a benefit to orderly marketing. It may be that the Commission requires agency structure information to understand how the agency is managing the production, transportation, packing, storage and marketing of regulated crops. The panel questions if regulating agency structure is necessary or consistent with the marketing objectives of the Commission.
169. Rules-based accountability supports orderly marketing for the benefit of producers and can build and maintain trust between the Commission and agencies. Rules should clearly and consistently establish the standards against which agencies will be assessed.
170. A systematic approach to monitoring, assessing and reporting on agency compliance with the rules, must result in the Commission receiving the information it needs to help fulfill its oversight and other regulatory responsibilities. Agencies can plan on scheduled reporting and auditing and build these requirements into their business plans.
171. While agencies are expected to comply with all Commission orders related to agency functions, the panel focuses on the Commission's information provision orders in the following section.

Agency Information

172. Agencies need to provide timely production, transportation, packing, storage and marketing information to the Commission. Provision of this information gives early and regular indication of agency compliance and performance. It is also necessary for Commission decision-making purposes to ensure orderly marketing and sound marketing policy.
173. Before finalizing its agency accountability framework, the Commission must address the immediate gaps in agency information provision (greenhouse sector), provide clarity as to what information is required pertaining to markets, shipments, sales and price, and provide clear expectations for when that information is to be provided for storage crop and greenhouse sectors.
174. The Commission identified a need to undertake a comprehensive review of its General Orders. This review should not forestall establishing and implementing a rules-based accountability framework, based on agency core statutory functions necessary to support orderly marketing. The Commission will in all likelihood need to enact new rules to support this. Once experience is gained from using and reporting on a framework, a review of the General Orders will be more effective and result in iterative improvements to agency compliance reporting and information provision as changes are adopted and incorporated into the Consolidated General Orders.
175. The panel acknowledges the difficulty in accessing comprehensive, reliable import data. Until the Commission has developed an agency accountability framework, including developing the rules to support one, and has applied the framework for several production cycles, the Commission's focus on industry data should be within BC.
176. Collecting and analyzing information is not an effective or strategic use of resources unless:
  - a. the rationale for the collection of the information is clear and supports orderly marketing;
  - b. the appropriate systems/tools are in place for receiving, organizing, storing, analyzing and presenting information collected from agencies; and,
  - c. the Commission can rely on the information to determine if the agencies are complying with regulatory requirements and to determine if production and demand are aligned.

### Framework Development and Reporting

177. To effectively develop and implement an agency accountability framework, a staged approach is required. An accountability framework should not place an undue burden on agencies. The Commission must also consider its resources and tools. The first step as outlined above, is to ensure the Commission has enacted the necessary information-related rules. The second is to determine how the Commission will assess compliance and how often and finally, how it will report on the outcome of that assessment.
178. The Commission and agencies require appropriate tools for agencies to provide regular, fulsome information and for the Commission to collect, store, analyze and audit agency information. The Commission may need to assess its current tools against its information management needs and seek outside resources as necessary. For example, considering whether a shared on-line reporting tool could potentially reduce the agency reporting burden while increasing Commission staff efficiency.
179. Developing a rules-based accountability report can be as simple as requiring agencies to state if they have provided the required documents and/or information to satisfy the orders and have met any other requirements under the orders (e.g. prior approval for shipping new or additional regulated product). To ease the reporting burden, the Commission could consider providing a reporting template listing the specific orders and providing a place for an agency to indicate what it has done and make any comments. This is similar to BCFIRB's approach to commodity board reporting under PARP.
180. An annual public "report card summary" could be developed from this information and published without concerns of confidential business information being made public. As with BCFIRB's PARP, the Commission would want to consider some form of periodic review and audit process to confirm agency self-reporting.

### Agency Best Management/Governance Practices

181. The panel agrees with the Commission that developing a culture of "good agency performance" through the promotion of best governance/management practices can reduce non-compliance and can enhance agency performance for the benefit of producers. However, the Commission must determine, after it has developed and applied a rules-based framework if this extra effort will deliver sufficient benefits to its oversight role before continuing with it. The Commission's strategic plan will assist the Commission with prioritizing demands on its resources.

### Agency Business Structure and Operations

182. An agency's ownership structure does not pre-determine its accountability and is not a performance or compliance guarantee. How the efforts of the agency are directed, and the outcomes of that direction will determine this.
183. For the reasons in paragraph 163 and 164 and because of the varied ownership structures of existing agencies, the panel cautions the Commission about requiring producer ownership in agencies as a condition of agency designation. The panel also cautions the Commission about exploring specific business structure and government requirements for agencies. Evidence of compliance with the Commission's rules based on agency functions demonstrates an effective, fair and strategic approach to agency oversight without the risk of stepping outside of statutory functions.

### Closing

184. After considering Commission and industry input, and the above analysis and conclusions, the panel answered the review questions as follows:

#### *What should an agency accountability framework include?*

Framework content should be based on agencies demonstrating compliance with Commission-required agency functions, including related information provision, as per the General Orders. Agency functions include, but are not limited to:

- i. Planning for and meeting market demands;
- ii. Identifying, developing and expanding markets;
- iii. Managing shared producer market access;
- iv. Ensuring fair returns for producers;
- v. Contributing to new producer entry;
- vi. Contributing to orderly marketing.

#### *How should an agency accountability framework be used?*

A framework should be used to ensure and annually demonstrate that agencies understand and are meeting their regulatory-based obligations to producers, the Commission and BCFIRB. The framework should meet the following objectives:

- i. provide transparency on agency responsibilities and compliance;

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- ii. provide scheduled reporting to the Commission, producers and public as appropriate;
- iii. provide the Commission with current information on the state of the provincial sector, market, production, sales and price;
- iv. set a basis for annual agency licence renewals; and
- v. set a basis for graduated compliance and enforcement actions.

*Directions and Recommendations*

185. The Commission is to:

- a. Make orders as necessary to extend the type of reporting requirements in the November 2019 Interim Order to include greenhouse agencies as appropriate to the sector;
- b. Make an order, which at a minimum, requires agencies to submit a business or marketing plan, or particular elements of a marketing plan, within or by a specified time;
  - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought in to force;
- c. Make an order, which at a minimum, requires agencies to submit pool settlement statistics for all regulated vegetable crops, within or by a specified time;
  - i. The draft amending order is to be submitted to BCFIRB for review prior to being brought in to force.
- d. Identify any outstanding information submission and timeline requirement needs and make orders as necessary to support the practical goal of agency accountability within the proper exercise of legislated authority.
  - i. Any draft amending orders are to be submitted to BCFIRB for review prior to being brought in to force.
- e. Provide BCFIRB a timeline for completing the directions in paragraphs a. through d. inclusive within 30 day of this decision.

186. The Commission is to:

- a. Develop and implement a rules-based agency compliance reporting template no later than December 31, 2021;

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- b. Develop and implement a public annual agency compliance report by April 2022.
187. The panel recommends the Commission:
- a. Further develop its information management system to support and align with collecting, storing, analyzing, and auditing agency information on production, transportation, packing, storage and marketing of regulated products.
  - b. Give future consideration to an on-line information reporting system for agencies to aid timely information collection and submission and reduce agency and Commission staff time.

# **STORAGE CROP DELIVERY ALLOCATION**

## Storage Crop Delivery Allocation

188. The panel considered the following questions:

- a) Is market access being managed effectively and strategically for storage crop producers through delivery allocation?
- b) What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?

### *Background*

189. Storage crop Delivery Allocation (Delivery Allocation) is a regulatory tool to ensure orderly marketing. It is used by the Commission and agencies to provide shared market access for all producers once supply exceeds demand. It achieves this through rotational market access where producers take turns shipping their product. Delivery Allocation authorizes a producer to deliver specific amount of regulated product within a specified time period to an agency, or to market as otherwise directed or approved by the Commission.

190. As per the Commission's General Orders Part XVI, Delivery Allocation intended to:

- a) Preserve market access for producers who have served the market over time;
- b) Provide market access for new entrants;
- c) Incentivize the creation and maintenance of long-term, sustainable, food safe, farming and greenhouse operations;
- d) Provide opportunity for industry growth; and,
- e) Provide for orderly marketing.

191. Each registered storage crop producer is assigned an amount of Delivery Allocation by the Commission. Delivery Allocation can also be bought and sold between producers at a price negotiated by the parties. Any transfers must be approved by the Commission. Delivery Allocation can be granted by the Commission on application by new entrants or granted through coordination with agencies seeking to market additional or new products.

192. Each year the Commission calculates a producer's individual Delivery Allocation using a five-year rolling average of shipments. If a producer's shipments increase, they receive increased marketing opportunities through an increase in Delivery Allocation for the following crop year. Agencies use Delivery Allocation to help determine, in consultation with their producers, how much of each crop producers

should plant each crop year to meet forecasted market demand. The Commission does not require producers get approval for plantings in excess of their Delivery Allocation. However, producers require Commission authorization for shipping storage crops if the quantity exceeds their Delivery Allocation (Part XVII s.4).

193. The Commission's General Orders Part XVI state that agencies are to use each individual producer's assigned Delivery Allocation for the purpose of determining the producer's delivery opportunity in accordance with the established period. The panel heard that agencies have their own system for managing and applying Delivery Allocation for their producers.
194. Delivery Allocation was sometimes referred to as "quota" during the consultations. Quota is a different regulatory tool. In supply management, quota is a licence to produce a specified quantity of a regulated product for an assured market. Delivery Allocation does not limit how much a producer can grow nor does it guarantee sales. Rather, it is a tool for managing shared market access (crop type, time and volume).

#### *Vegetable Commission Delivery Allocation review*

195. While Delivery Allocation rules have not substantively changed, the regulatory system and the industry context has changed. In the past, producers could only market through an agency located in the geographic District where they farmed. In today's regulatory system, producers can market through any agency in the province, regardless of where they farm. Agencies and wholesalers are facing increasing competition with each other and with lower priced imports. All are competing in an environment where food safety, quality, rapidly changing consumer demands and retailer consolidation are key business factors.
196. Given these changes and the recent compliance and enforcement issues with Delivery Allocation as per the issues raised in the Prokam appeal, the Commission started a review of its Delivery Allocation orders.
197. The Commission's Delivery Allocation vision, according to its September 16, 2020 submission, is to ensure its rules are clear. Its stated intention is to clarify and define agency "aggregate delivery allocation" with the goal of establishing standard costs and losses charges should shipments exceed authorized market access.
198. The Commission is piloting an administrative policy to manage storage crop agency market access (2020) and started initial discussions with its advisory committees (spring 2020).

#### *Industry Input*

199. Through the supervisory review consultation process, industry stakeholders provided input and recommendations on Delivery Allocation orders and management. While the panel considered all information provided through the

consultation meetings and in writing, the following summarizes the input that is directly relevant to the panel's decision.

200. The panel heard general agreement that Delivery Allocation provides stability for producers. For example, it prevents large volumes of regulated product suddenly entering the market and impacting markets and prices. Participants explained Delivery Allocation allows for long-term planning, including cash flow, and in turn, assists with accessing bank loans.
201. While Delivery Allocation is not based on acreage, it acts as a guide for producers on how much to plant. The Commission's rules provide opportunity for producers to increase their Delivery Allocation over time if they take the risk of growing over 100% of their Delivery Allocation.
202. Several participants commented that it is important to have an identified market for a "new" product before Delivery Allocation is granted. Some participants observed that producers must focus on market demands as Delivery Allocation does not guarantee a producer will be able to sell all that they plant.
203. Several participants raised that agencies are responsible for managing Delivery Allocation and for building good relationships with purchasers by providing trusted, quality product. Some spoke to the need for the Commission to have better information and information management so it can effectively manage/regulate provincial production and volumes across the industry.
204. The panel heard from the Commission and some industry stakeholders that the BC regulated storage crop market is mature. There are limited growth and innovation opportunities. The majority of production growth is coming from western markets and some export markets rather than increased BC demand. Other industry stakeholders reported that there are significant BC market opportunities through displacing imports.
205. Specific concerns included:
  - a. The way the rules to grow Delivery Allocation are set out provides more opportunity for larger producers.
  - b. Managing by delivery period can favour larger, established farms and makes it difficult to balance market opportunities across all producers.
  - c. Delivery Allocation removes producer motivation to increase orders.
  - d. The private transfer of Delivery Allocation between producers is not fair to all producers.
  - e. Increasing individual Delivery Allocation holdings using shoulder seasons is not viable as it is a slow process.

- f. Delivery Allocation cannot achieve its purpose unless imports are restricted or tracked.

### New Entrants

206. There was general support for new people entering the sector. Views varied on whether the Commission should grant Delivery Allocation to new entrants. Some felt there are adequate opportunities to start earning Delivery Allocation by filling production and market gaps (e.g. shoulder seasons).
207. Many participants were concerned about the time the Commission takes to make decisions on new entrant and growth Delivery Allocation applications. The industry needs effective, transparent and timely decision-making.
208. Several participants thought that anyone with a good business plan and agency support or proof of a valid new market should be able to grow regulated product. While some indicated that new producers should not be able to grow large quantities and risk displacing those who have worked their way up through the system, others suggested that new growers should receive an incentive in the form of prime season Delivery Allocation.
209. Concerns were raised about the capacity of Delivery Allocation rules and management to adapt to market opportunities and to accommodate new growers. Commission rules favour existing producers and create barriers to entry.
210. The panel heard that building Delivery Allocation through shoulder season markets is not effective for new producers as these seasons are higher risk production, and success requires extensive up-front capital investment in storage and infrastructure. In addition, new producers holding produce to sell in the shoulder-seasons are more likely to suffer storage-related losses. It was also noted that the longer new entrants are restricted from entering the industry in a meaningful way, the more likely people are to turn to appeals and litigation.
211. Various ideas were shared, including:
  - a. Consider regional market demands in Delivery Allocation management, particularly in relation to new producers.
  - b. Establish separate allocations for product intended for out of province sales.
  - c. Establish a rule on what volume is acceptable to plant above Delivery Allocation.
  - d. Establish a "Delivery Allocation bank" for new entrants.

- e. Manage Delivery Allocation on the basis of quality, not “first in time, first in right” and producer size.
- f. Give new entrants delivery priority.
- g. Replace tonnage-based Delivery Allocation with acreage-based or use both.
- h. Require unused Delivery Allocation to revert to the Commission rather than being privately traded or left unused.

*Analysis*

- 212. The panel considered the Delivery Allocation orders in a broader context than order clarity and the Commission’s goal of developing of an “aggregate delivery allocation.”
- 213. Regulated marketing systems restrict entry and manage producer production and/or marketing to ensure orderly marketing for the benefit of producers and in the public interest. The Commission, as the first instance regulator, is responsible for managing entry and production/marketing to ensure orderly marketing. This requires fulsome market, production, pricing and sales information and consideration of multiple and often competing interests.
- 214. Delivery Allocation management by the Commission, agencies and producers is not straight forward. For example, producers can choose to over-plant their Delivery Allocation to try to capture the opportunity to increase their Delivery Allocation through extra shipments authorized by the Commission. At the same time, they also bear the risk of being unable to ship the extra production if there is no market. Part XV of the General Orders allows for the marketing of new or additional regulated products by agencies with Commission approval following an evidence-based process where the Commission determines if there is a market or if the additional production will displace another agency’s sales. Agencies must consider customer specifications (type, quality, volume) when managing shared producer market access under Delivery Allocation. A producer may not have the opportunity to ship if their product doesn’t meet the customer specifications.
- 215. As regulated markets mature, jockeying for entry and market access increases. In this context, Delivery Allocation and its management becomes increasingly important for enabling shared market access and orderly marketing. Unlike supply managed commodities, there are very limited federal trade protections from lower cost, high volume imports entering BC.
- 216. Effectively managing entry and growth opportunities is a common challenge for most BC regulated marketing boards. In the panel’s view, it is the Commission’s job to ensure entry and consider growth opportunities. However, it is not the Commission’s job to guarantee success or guarantee a producer’s particular

growth plan. Rather, the Commission's challenge is to determine what amount of Delivery Allocation to grant a new entrant and/or for growth while respecting marketing shares built by established producers. This can become more complex if there is a number of new entrants.

217. The Commission established a New Entrant Program Policy where new commercial producers can apply for Delivery Allocation, at no cost, from the Commission. The Commission does not pre-determine the amount of Delivery Allocation it grants. Rather, it takes into consideration the amount requested by the new producer, and advice from the agency through which the producer will be marketing their product. It is unclear what other industry data the Commission may consider. Applications can be made at any time. A review of the New Entrant Policy shows it was modeled on BCFIRB's 2005 new entrant policies and directions<sup>23</sup> to BC's supply managed commodity boards.
218. The panel learned during the consultation that there are seven ways for producers to access Delivery Allocation and increase their holdings:
- a. Buy an existing farm, with its associated Delivery Allocation;
  - b. Purchase Delivery Allocation from another producer;
  - c. Apply to the Commission for new entrant Delivery Allocation under the Storage Crop New Entrant Program Policy;
  - d. Work with an agency to identify niche supply shortages and marketing opportunities (e.g. specific variety and volume for specified delivery period);
  - e. Over plant Delivery Allocation, bearing the opportunity and risk that the excess product can be shipped;
  - f. Utilize the Commission's manifest sales program to increase shipments; and/or,
  - g. Work with an agency to apply to the Commission for new or expanded marketing opportunities.

Several of the above options require Commission authorization as per the General Orders. The panel also learned that marketing during certain periods (e.g. storage crops marketed straight from the field) results in the best returns and the least

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<sup>23</sup> 2005 September 1. BCFIRB. [Specialty Market and New Entrant Submissions: Policy, Analysis, Principles and Directions.](#)

costs to producers, making these the most desirable periods for Delivery Allocation.

219. Although there are multiple avenues for producers to acquire and grow Delivery Allocation, some industry members reported that entry opportunities are too restrictive, growth opportunities are inadequate for new and/or smaller producers, and that Delivery Allocation growth rules unduly advantage larger producers.
220. The panel also noted the following consideration regarding entry opportunities and Delivery Allocation in its February 11, 2020 decision prior approving Prokam's Delivery Allocation for 2020/21:<sup>24</sup>

The panel recognizes Prokam's point that there may be a need for the Commission to revisit how it calculates delivery allocation for new producers that enter through transferred quota. Currently producers entering through transferred delivery allocation have their future delivery allocation calculations impacted by the previous producers' shipment volumes.

221. The Commission and industry stakeholders reported a need for the Commission to review its new entrant program and consider whether the entry and growth opportunities for new and smaller producers are effective and strategic.

### *Conclusions*

222. Delivery Allocation, as a tool for managing shared market access, is not unduly restrictive nor are its purposes generally disputed by industry. Although not precise, Delivery Allocation generally provides producers with sufficient guidance about what and how much to plant, usually in consultation with their agencies. Commission orders allow for producers and agencies to fill new and growing markets beyond established Delivery Allocations and for producers to over-ship their Delivery Allocation with authorization. The Commission's orders also allow agencies to manage practical challenges that can arise with shared market access, such as when customers want a specific product and volume at a specified time.
223. Three issues remained for the panel:
- a. Timely Commission decision-making on Delivery Allocation applications;
  - b. Reported inadequate growth opportunities for new entrants/small producers; and,
  - c. Reported inadequate entry or growth opportunities to displace imports.

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<sup>24</sup> 2020 February 11. BC FIRB. [Prokam Enterprises Ltd. \(Prokam\) Delivery Allocation Prior Approval Decision](#).

224. Without the regular provision of production, transportation, packing, storage and marketing information to the Commission as per panel's Agency Accountability directions, it is unlikely to be able to establish and maintain Delivery Allocation application decision-timelines. The Commission will then have the information it needs on hand when prospective producers or agencies apply to access new opportunities for growth to meet, for example, changing product demand or supplying new products. Delivery Allocation applications based on displacing imports will be more challenging to assess given the lack of detailed import data (e.g. volume of specific crop types, source and the importers cost of production).
225. The panel was unable to determine the degree to which the growth opportunities for new entrants and small producers are limited by the Delivery Allocation orders versus operating in a mature market where there are seasonal and storage supply limitations and competition with high volume imports. In a mature market, growth opportunities are limited to increased demand due to population growth, shifts in consumer demand, development of a new product or finding an unfilled niche in a current market.
226. The panel also was not able to determine the degree to which the reported inadequate opportunities to displace imports is due to Commission decision-making and/or its Delivery Allocation orders versus the industry's production capacity to successfully outcompete imports.
227. The panel expects that regular industry data provided to the Commission by agencies over time as per the panel's Agency Accountability directions and recommendations will help inform the Commission as to whether adjustments are needed to its Delivery Allocation orders and New Entrant Policy regarding entry and growth opportunities.
228. The panel also finds that implementation of its directions on Vegetable Commission Structure and Governance will sufficiently address the question of apprehension of bias or conflict of interest with Commission decisions on Delivery Allocation applications.
229. Overall, the panel is satisfied that at this time, and until additional industry data is available, that the Commission's Delivery Allocation orders and New Entrant Policy allow for reasonable entry and growth opportunities. A future review will need to address entry, growth and other related Delivery Allocation questions.

### Closing

230. After considering Commission and industry input, and the above analysis and conclusions, the panel answered the review questions as follows:

*Is market access being managed effectively and strategically for storage crop producers through delivery allocation?*

The panel did not identify immediate Delivery Allocation-related market access issues disrupting orderly marketing.

*What, if any, changes are required to align delivery allocation rules and how it is managed with its intended purposes and meet the current needs of the industry?*

The panel was not able to identify specific changes to Delivery Allocation orders and management at this time required for sound marketing policy.

*Directions and Recommendation*

231. The Commission is to implement the following prior to determining if substantive changes are required to its new entrant and growth-related Delivery Allocation orders
- i. The panel's directions as set out in "Commission Structure and Governance" (see paragraphs 117 to 121 inclusive, of the full decision) and,
  - ii. The panel's directions and recommendations for collecting comprehensive industry data on a regularly scheduled basis, as set out in "Agency Accountability" (see paragraphs 185 and 187 of the full decision),
232. Once the Commission has implemented the above directions, the panel expects the Commission to, as it does all BC commodity boards, regularly review its new entrant program. When the Commission does so, the panel recommends it include an assessment of growth and regional opportunities, and consideration of how to calculate Delivery Allocation when it is transferred between producers.

## Closing

233. Although not unanimous, the panel heard clear industry support for the regulated marketing system from many industry members and strong recognition for its value from many producers. Through this review, the panel has identified several areas for improvements to ensure the effectiveness of the Commission in regulating the vegetable industry. These are discussed in this decision and outlined and summarized in paragraphs 7 to 16, inclusive.

234. In accordance with s. 57 of the *Administrative Tribunals Act*, “an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued.”

Dated at Victoria, British Columbia, this 22nd day of December 2020.



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Daphne Stancil, Panel Chair



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Tamara Leigh, Member



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Dennis Lapierre, Member

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**Appendix I**

**BC Vegetable Marketing Commission General Orders Part V and VII: Agency Information**

<b>General Orders</b>	<b>Information</b>	<b>Function</b>	<b>Required/ By Request</b>	<b>When</b>
<b>Part V</b>				
s. 14	Regulated crop prices for prior approval unless otherwise authorized	Price	Required	Not specified
<b>Part VII</b>				
s. 2	Any price list and particulars of sales at other than listed prices <sup>25</sup>	Price	Required	Not specified
s.4	Application of delivery allocation/production allocation & individual shipments.	Production & marketing	Required & by request	Within 60 days of close of pool period or close of delivery allocation period
s. 5	Pool settlement statistics (quantities, price ranges, final pool prices)	Price	By request	Not specified
s. 6	Any proposed processor or other firm contracts for prior approval	Production & price	Required	Before finalizing contract
s. 8	Business or marketing plan	Marketing	By request	Not specified
s. 9	All signed Grower Marketing Agreements (licenced producers)	Production, price, marketing	Required	June 1 <sup>st</sup> each year
s. 11	Agency staff authorized to issue Transport Orders	Marketing	Required	By April 1 <sup>st</sup> of each year
s. 12	List of fees/charges charged licenced producers for prior approval	Price	Required	Each year
s. 13	Any information relevant to agency or inter-agency transactions	Production, price, marketing	Required & by request	Not specified

<sup>25</sup> Those crops subject to minimum price.

British Columbia Farm Industry Review Board  
Vegetable Review  
December 22, 2020

**Appendix II**

**BC Vegetable Marketing Commission Interim Order November 18, 2020: Agency Information**

<b>Interim Order</b>	<b>Information</b>	<b>Function</b>	<b>Required/ By Request</b>	<b>When</b>
s. 3(2)	All books, records and accounts on all matters related to the production, transportation, packing, storage and marketing of regulated storage crop products shall be available for inspection	As stated	Required	Retain for 3 years
s. 4(1)	Any information or documentation relating to the production, transportation, packing, storage and marketing of storage crops	As stated	By request	Not specified
s.4 (2)	Answers to any questions related to the production, transportation, packing, storage and marketing of regulated storage crops.	As stated	By request	Within 60 days of close of pool period or close of delivery allocation period
s. 5(a)	Name and address of producer whom agency received product from	Production, price & marketing	Required	
s. 5(b)	Volume of regulated storage crop product from each producer	Production	Required	Each marketing period
s. 5(c)	Volume of regulated storage crop product marketed	Production & marketing	Required	Each marketing period
s.5(d)	Volume of regulated storage crop product marketed packaged for end use	Marketing	Required	Each marketing period
s. 5(e)	Volume of regulated storage crop product marketed as other than packed for end use	Marketing	Required	Each marketing period
s. 5(f)	Net return to licenced storage crop producers	Price	Required	Each marketing period