IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND AN APPEAL FROM AMENDING ORDER 43 MADE BY THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

BETWEEN:

ISLAND VEGETABLE COOPERATIVE ASSOCIATION

APPELLANT

AND:

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

RESPONDENT

AND:

BC FRESH INC. and V. I .P PRODUCE LTD.

INTERVENERS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Diane Fillmore, Presiding Member Daphne Stancil, Member Chris Wendell, Member
For the Appellant:	Thomas Pollock, General Manager Island Vegetable Co-operative Association
For the Respondent:	Robert Hrabinsky, Counsel BC Vegetable Marketing Commission
Interveners:	Maria Morellato, Counsel BC Fresh Inc. Sarah Potter, General Manager V. I .P Produce Inc.
Date of Hearing	May 19 - 20 and 29, 2015
Place of Hearing	Victoria BC Teleconference and written submissions

INTRODUCTION

1. On January 19, 2015, the BC Farm Industry Review Board (BCFIRB) received an appeal filed by the appellant, Island Vegetable Co-operative Association (IVCA), appealing Amending Order 43 (AO 43) passed by the BC Vegetable Marketing Commission (VMC) on November 21, 2014. The appeal was filed out of time but, in a decision dated February 27, 2015, the time limit for filing the appeal was extended.

2. AO 43 amends the *Consolidated General Order* (General Order) provisions relating to the transfer of Delivery Allocations (a form of quota referred to in this decision as DA) and provides, among other things, that only the entirety of a producer's assigned DA for a certain regulated crop for each respective DA period is eligible for transfer (section 14), and that partial transfers are only permitted between a defined "family member" class.

3. IVCA is designated as a marketing agency by VMC. It markets regulated product on Vancouver Island. Its appeal raises process issues relating to the August 2014 consultation meetings with stakeholders, including the claim that assurances were given by VMC that further consultation would take place before changes to the General Order. As to the merits, IVCA says AO 43 creates difficulties for growers exiting the industry and for new growers entering. IVCA also takes issue with VMC allowing mainland growers to grow without quota which appears to reference enforcement concerns and the need for AO 43.

4. V. I. P. Produce Ltd. (VIP) is a marketing agency designated by VMC and was granted intervener status. It agrees with IVCA that AO 43 was not well thought out and raises issues with respect to the conduct of VMC, alleging that AO 43 was targeted at a particular transfer.

5. In response, VMC says that this is an appeal of the enactment of AO 43 and not an appeal of the general operations of VMC. As such, it urges this panel to adopt a narrow and focussed approach, responsive to the subject matter of the appeal. In its view, the appellant's submission went beyond these issues and it cautioned against relying on witnesses' comments not relevant to the issues on appeal.

6. On the procedural issues, VMC argues that there is no common law duty of fairness owed to stakeholders in the exercise of a legislative or policy development process. If there are any procedural obligations imposed on VMC with respect to a purely legislative function, they arise not from the common law but from BCFIRB's higher level principles or "SAFETI" where "I" refers to "Inclusive"[1]. However, VMC cautions that "inclusive" should not be given a

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[1] The "SAFETI" principles have been developed by BCFIRB to support a principles based approach to decision-making by commodity boards to carry out their responsibilities SAFETI stands for "Strategic", "Accountable", "Fair", "Effective", Transparent", and "Inclusive".

meaning that would up-end the common law principle that no duty of procedural fairness is owed when an administrative body exercises a legislative function. To interpret "inclusive" otherwise would oblige commodity boards to grant participatory rights in the law making process such that decision making would grind to a halt and the fundamental advantages of administrative decision making (such as a swift, efficient and expert process) would be lost.

7. VMC also says that although it owed no duty to provide stakeholders with an opportunity to be heard, it provided them such an opportunity, both with respect to various DA issues, the prospect of mandating "all or none" transfers and the restriction of partial transfers. As such, it argues that it consulted appropriately. VMC further argues that any procedural defects (or "transgression" of any of the letters in the SAFETI acronym) are cured by the rehearing on appeal. As for the merits of AO 43, VMC argues that while it is reflective of sound marketing policy, it is not a panacea and is not intended to cure all ills or achieve all objectives.

8. BC Fresh Inc. (BC Fresh) is designated as a marketing agency by VMC and markets regulated product on Vancouver Island and the Lower Mainland. It was granted intervener status. It supports the merit and necessity of AO 43 as an incremental step towards orderly marketing in BC by preventing growers from transferring a portion of their DA in a given growing period and then continuing to grow the same acreage as if the transfer had not occurred. To the extent that the appellant argues that there has been a breach of procedural fairness in enacting AO 43, BC Fresh agrees with VMC that this appeal has cured any such defect.

9. This appeal was initially heard on May 19 - 20, 2015. On May 28, 2015 and prior to the conclusion of the evidence portion of this hearing by teleconference on May 29, 2015, VMC sent a letter to the parties and BCFIRB and after putting in issue the propriety of certain questions of the panel which could be seen as soliciting "evidence" concerning the "law" as opposed to assisting the panel in its understanding of the regulatory system, VMC made the following proposal.

> The text of the *Amending Order*, however, does not expressly provide that the entirety of the DA be transferred to a single transferee.
> In light of the above, the Commission is of the view that the *General Order* should be further revised so that this requirement is explicitly reflected.
>
> **It is important to note that the Commission is not conceding any issue in the appeal. The Commission remains of the view that the *Amending Order* itself is clear and unambiguous; that it is entirely consistent with the Newsletter circulated to industry stakeholders; that it reflects sound marketing policy; and that it was developed after appropriate consultation**. However, the Commission's decision to proceed with further revisions to the *General Order* calls into question the utility of proceeding any further with this appeal.

10. As a result, VMC proposed to amend AO 43 and suggested that a draft of the revised order would be provided to the parties and other affected stakeholders for their further input prior to finalizing the further amendment. In light of this, VMC suggested the appeal should be adjourned pending this revision. The appellant objected to an adjournment and the telephone hearing continued as scheduled. The parties provided their closing arguments by written submission.

11. Before commencing our analysis, the panel observes that there were a number of challenges to hearing this appeal. The unrepresented appellant called many witnesses to testify with respect to matters related to VMC governance issues and not the issue on appeal. Conversely, VMC relied on only one witness, its Vice Chair Peter Guichon (Commissioner Guichon). Given that much of the process leading up to AO 43 was driven by VMC staff, we were left with an incomplete picture of the events. While we have considered all of the evidence and materials filed, we only set out that which is relevant to this decision.

ISSUES

12. Did the Commission (VMC) err in its November 21, 2014 decision to amend Part XVII of the Consolidated General Order by passing AO 43, specifically section 14?

13. Did the Commission (VMC) follow a proper process in reaching the decision to propose and pass AO 43?

REGULATORY FRAMEWORK

14. VMC is a commodity board established by the *British Columbia Vegetable Scheme,* B.C. Reg. 96/80 (the Scheme) enacted under the *Natural Products Marketing (BC) Act* (*NPMA*).

15. The Scheme vests VMC with the power in the Province to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product. Regulated product means certain vegetables, including potatoes and strawberries for manufacturing grown in the Province. VMC has been given the power to exempt from a determination or order a person or class of persons engaged in the marketing of a regulated product or a class, variety or grade of it and the reality is that only a certain number of vegetables in three Districts are regulated.

16. VMC is required by the regulation to establish a registrar of commercial producers. A producer qualifies to be registered as a commercial producer if the producer grows regulated product in the preceding 12 months of at least a gross value of $5,000 on the farm operated by the producer and marketed as ordered or directed by the commission.

17. VMC has passed the General Order to set the rules for the operation of the regulated vegetables, under the authority given to it in the Scheme. Schedule II of the General Order sets out the Regulated Vegetables under the Scheme.

18. The General Order provides that no person other than an agency shall purchase regulated product from a producer or market regulated product with three exceptions not relevant to this case. The General Order identifies who may act as an agency and be designated by VMC as an agency which requires prior approval from BCFIRB. There are currently eleven marketing agencies with three on Vancouver Island.

19. An Agency is directed in the General Order not to receive or market any regulated product from a producer who does not have a current producer licence or who has violated or not complied with any General Order or directions of the Commission, subject to limited exemptions. Minimum prices are established by VMC and the General Order requires agencies to obtain VMC prior approval to any pricing for crops below listed prices.

20. Producers are not allowed to grow, process or market, regulated product unless licensed by VMC. Licences may be suspended or cancelled if VMC is of the opinion that the licence holder has violated any Order, policy or direction of VMC or has acted to the detriment of the best interests of the industry.

21. VMC may issue Delivery Allocation (DA) to licensed producers, which authorizes those producers to deliver to an agency, or to market as otherwise directed or approved by VMC, a specific amount of regulated product within a specified time period. DA for storage crops is earned using a 5-year rolling average of the quantity of product delivered to an agency.

22. VMC places no monetary value on DA but there it has value in the marketplace. DA can be bought and sold with the approval of VMC.

23. Part XVII of the General Order, section 5, provides that DA in respect of storage crops within a period does not commence until supply exceeds demand. In other words, agencies do not have to match deliveries of product by a grower with DA until supply exceeds demand. Any shipment of product in a period prior to commencement of DA will still count towards the building of DA.

24. Prior to the amendments made to the General Order in 2009, DA was confined to a specific District. Production grown in a District was required to market through an agency located in that District. Now, a producer is able to market through any agency in the province irrespective of the location of their production.

ANALYSIS

25. Despite the order in which the appellant chose to address the issues on appeal, the panel will consider the duty of procedural fairness owed to the appellant before considering its process concerns and whether AO 43 accords with sound marketing policy. The fairness of VMC's process leading to the decision to pass AO 43 informs the subsequent analysis of whether VMC has met its obligations with respect to sound marketing policy and our consideration of SAFETI.

Procedural Fairness

26. In *Baker v. Canada* (Minister of Citizenship and Immigration),1999 CanLII 699 (SCC) at paragraph 22 Madam Justice L'Heureux-Dubé identified five factors, none of which is determinative, to be assessed in determining the content of the duty of procedural fairness:

    (i) the nature of the decision being made and the process followed in making it;
    (ii) the nature of the statutory scheme;
    (iii) the importance of the decision to the individual affected;
    (iv) legitimate expectations; and
    (v) the choices of the procedure made by the administrative agency.

27. However, these factors assume there is a common law duty of procedural fairness. VMC argues that there is no common law duty of procedural fairness owed to stakeholders in the exercise of the legislative or policy development process in enacting AO 43, relying on Guy Régimbauld, Canadian Administrative Law (Markham: LexisNexis Canada, 2008) at pp. 239 -241 where the learned author summarizes the applicable principles as expressed by the Supreme Court of Canada in various cases, a portion of which is excerpted here:

> To be considered a "legislative" decision, the exercise of the power must generally consist of two elements: (1) generality: the power is of a general application and will not be directed at a particular individual; (2) its exercise must be based on broad public policy grounds. Decisions of a legislative nature create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations. The exercise of legislative powers that will not normally give rise to a duty fairness include laws, decisions of cabinet, Crown prerogatives, regulations or other delegated legislation, general policy statements, guidelines, and administrative rules structuring the exercise of statutory discretion. There are, of course, exceptions and, sometimes, it may be very difficult to determine whether a decision is in fact "legislative" rather than administrative or quasi-judicial.
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> There are two reasons why "legislative" decisions have been held exempt from the duty to provide procedural protection. First, where the decision is taken by a Minister or other elected official, they are accountable to Parliament and the electorate. The second reason is practical: bodies may be exempt from the duty of fairness where the potential of adversely affected interests is too diverse or too numerous to permit each individual to participate. … While individuals facing

> decisions based on policy will benefit from the application of rules of procedural fairness, general decisions will not. Arguably, this differentiation may be questionable, since both types deserve to be considered eligible for fairness. However, if that was so, administrative decision-making, particularly broad-based policy decision-making, might grind to a halt, thereby negating some of the fundamental advantages of administrative decision-making, such as a swift, efficient and expert process.

28. VMC's position on this issue is supported by the decision of the Ontario Superior Court in *Dairy Farmers of Ontario v. Denby*, [2009] O.J. No. 4474 (S.C.J.) at paras. 74-85.

29. Not surprisingly, IVCA, which is not represented by counsel in this appeal, does not address this legal submission. It does however, take issue with the suggestion that VMC has sweeping powers and yet no corresponding duty to consult with the very people it was created to serve. It says that the point of this appeal is about growers having a say in their future, their investments and the risks they take every year to keep farming.

30. We do not need to decide whether the AO 43, which affected only a small and defined number of producers, might be an exception to the principle that no duty of procedural fairness applies to legislative or policy decisions. That is because it is our view that while the common law imposes procedural obligations on a commodity board, it does not and could not preclude a policy judgment by BCFIRB, exercising its supervisory authority under section 7.1 of the *NPMA,* that certain procedural standards were appropriate, not as a matter of common law, but rather as a matter of sound marketing policy and having regard to all the circumstances of the vegetable industry as they pertained to the development and approval of this amending order.

31. In this regard, BCFIRB has developed the "SAFETI" principles, in conjunction with commodity boards, to support a principles based approach to decision-making by both BCFIRB and commodity boards to carry out their responsibilities. The SAFETI acronym refers to "Strategic" (identify key opportunities and systemic challenges, and plan for actions to effectively manage risks and take advantage of future opportunities), "Accountable" (maintain legitimacy and integrity through understanding and discharging responsibilities and reporting performance), "Fair" (ensure fair process and decision-making), "Effective" (a clearly defined outcome with appropriate processes and measures), "Transparent" (ensure that processes, practices, procedures & reporting on exercise of mandate are open, accessible and fully informed), and "Inclusive" (ensure that appropriate interests, including the public interest, are considered).

32. We disagree with VMC when it argues that SAFETI should not be given a meaning that would "up-end" the common law principle. This assumes that the common law principle is exhaustive. The common law obligation is just that – a common law duty. The common law does not and could not have the effect of

precluding the application of a consultation requirement, as found by BCFIRB, as a matter of sound governance and sound marketing policy by commodity boards. In short, we find that a commodity board's procedural duties require it to have regard to both the common law and BCFIRB's SAFETI principles.

33. VMC argues that this approach would grind decision-making to a halt and undermine VMC's ability to undertake a swift, efficient and expert rule-making process. We think the opposite is true. Unless there are strong reasons to limit consultation, such as a need for confidentiality or an issue which requires immediate attention, consultation can only improve decisions and legitimize decision-making, particularly in a situation that could have a significant impact on a small number of affected stakeholders. In our view, and having regard to the fact that the SAFETI principles are not to be applied mechanistically and one or more elements may be departed from when there is sound reason to do so, it is entirely appropriate in the regulated marketing context for commodity boards to be accountable for demonstrating why decisions such as AO 43 were made in a fashion that was fair, transparent and inclusive. The discussion below reflects our consideration of the appellant's arguments in light of the SAFETI principles BCFIRB expects commodity boards to apply as a matter of sound marketing policy.

***De Novo* Hearing**

34. On a related issue, the respondent submits that even if there were defects in the process leading to the passage of AO 43, the *NPMA* allows for appeals of the decisions made by VMC to BCFIRB. The appeals are conducted *de novo*, meaning that the appellant is able to lead all relevant evidence and make all relevant submissions with respect to the issues at stake. Given that the statutory framework allows for a hearing *de novo*, VMC and BC Fresh say that procedural deficiencies, if any, in the originating decision are cured by the appeal process.

35. The hearing of this appeal did allow IVCA and VIP to provide extensive oral testimony and submissions on the passage of AO 43 and its alleged deficiencies in light of sound marketing policy. The panel provided significant latitude to both IVCA and VIP with respect to the hearing process, both as a result of those parties attending without counsel and in order to fully address the issues raised on appeal.

36. To the extent that the issue for IVCA or VIP was that their concerns were not fully considered by VMC when it developed and passed AO 43, this appeal may cure that deficiency. However, that "curing" is not a justification for VMC failing to comply with its policy obligations to consult, and even less is it an answer to an appeal where, for the reasons given below, we find that the order must be rescinded.

Process Concerns

37. The appellant, testifying through its General Manager Tom Pollock, argues that VMC did not follow a proper process in enacting AO 43. Consultation meetings were held in the summer, a busy time for producers, which resulted in producer turnout at the three meetings (Vancouver Island, Lower Mainland and Okanagan) being far less than 50% of BC regulated storage crop producers.

38. The appellant says that notice sent to licensed storage crop producers advising them of the consultation meetings set out two primary issues to be discussed. One was the regulatory review of the Vancouver Island regulated vegetable sector and the other related to the issues that have arisen since the removal of Districts from the Scheme in 2009. The appellant's view was that consulting on the two issues at the same meeting meant there was inadequate time to do justice to either issue. He also says that assurances were given at the end of the meeting that further discussions would be held before any action was taken to address the issues discussed. IVCA did provide written feedback on the issues raised at the stakeholder meeting; with respect to changes to the DA system, saying "leave it alone".

39. The appellant indicated concern with the minimal participation of Commissioners at the three meetings. Of nine Commissioners, only one attended the Nanaimo and Kelowna meetings according to the sign-in sheets. Mr. Guichon testified that no minutes were taken of the consultation meetings and, therefore, no minutes were provided to producers following the three consultation meetings.

40. The appellant says that VMC should have sent a draft order to agencies for discussion with their producers and feedback. Following receipt of feedback, VMC would have been in a position to create a final draft reflective of producer concerns.

41. The appellant also appears to rely on a process concern identified in BCFIRB's February 27, 2015 interlocutory decision extending the time for filing this appeal. The decision references IVCA's submission regarding VMC's November 2014 newsletter and conversations with the VMC General Manager as to the interpretation of AO 43.[2] The newsletter provided that "except for those involving a family member, transfers must be for the entirety of a producer's specific regulated crop delivery allocation. Transfers to multiple transferees continues, but the entirety of the delivery allocation must be transferred otherwise it will not be approved."

42. The General Manager also confirmed that transfers to multiple producers continued to be allowed. IVCA says this interpretation is contrary to how VMC interpreted section 14 in denying the request of Hothi Farms Inc. (Hothi) to

[2] The appellant's closing submission references paragraph's 27-37 of the February 27, 2015 interlocutory decision.

transfers its entire DA to Three Star Farms (owned by Hothi's son) and Prokam Enterprises Ltd. (Bob Dhillon) on the basis that AO43 requires the entirety of DA to be transferred to a single transferee (except for transfers between family members).

43. The intervener, VIP testifying through its General Manager Sarah Potter, agreed with IVCA that VMC erred in passing AO 43. It says that there was no discussion of the actual changes ultimately reflected in AO 43 during the consultation meetings. VIP felt there should have been follow-up meetings to explain how the proposed changes would affect producers and suggested that there was a rush to pass AO 43 to prevent the Hothi transfer under the pre-existing rules. VIP also says that in passing AO 43, VMC offered little rationale to support the amendment.

44. VIP also suggested it was improper of VMC to hire a lawyer, at producer expense, to blame producers for not doing enough research into how decisions of VMC would affect them. Its view is that VMC should protect all producers and look out for their best interests. VIP understood that it is the responsibility of producers to keep themselves informed but claimed it was unreasonable to expect them to have a clear understanding of all the implications, written and unwritten, of an amending order that was not clearly explained. In support of this point, VIP points to the evidence of Commissioner Guichon and his confusion on what was included in the definition of "family member" which it says indicates that he did not fully understand AO 43 before voting in favour of it.

45. VIP also points to VMC's letter, written mid appeal, that indicated its intention to amend AO 43 as in its view, based on evidence heard in the hearing, AO 43 did not expressly state that 100% of DA must be transferred to one producer. VIP says this is further evidence that AO 43 was passed without the Commissioners' full understanding.

46. In response, VMC asserts the process it followed prior to making AO 43 was appropriate, given the nature of VMC, its rule-making role, and the objectives of the amendment. It says that the appellant's expectations for process border on the ridiculous. VMC says it gave no assurance that there would be further consultation prior to making any changes to the General Orders as alleged by the appellant. With respect to feedback, while IVCA expressed the view that the DA system be left alone, it claims other stakeholders expressed support not only for the regulatory changes contained in AO 43 but also for the consultative process followed. Commissioner Guichon testified that VMC did in fact consider the feedback from stakeholders before making its decision to pass AO 43.

47. VMC argues that it gave stakeholders an opportunity to be heard and it is not responsible for poor turn outs; it cannot force stakeholders to attend a meeting. Furthermore, it says it is not appropriate for VMC to circulate draft orders and

"regulate by committee". VMC does not regulate by consensus and to do so would be a complete abdication of its regulatory responsibilities.

48. With respect to the allegation that VMC rushed its passing of AO 43, Commissioner Guichon advised that he did not feel rushed to make a decision. VMC had been discussing the issues for at least 6 months; the "major players" had been consulted and given an opportunity to respond through the process. VMC was very aware that the timing of the consultation was not ideal for many producers but felt that it should make a change for better DA management and in Commissioner Guichon's words – "get it done". VMC considered adopting a transition year but decided to make the rule change recognizing that anyone disadvantaged by the change could file an appeal to BCFIRB.

49. With respect to the discrepancy between its newsletter and AO 43, VMC points out that apart from referencing the February 27, 2015 interlocutory decision in its closing submission, the appellant made no attempt to show an objective inconsistency between the newsletter and AO 43. VMC maintains that AO 43 creates an exemption from the "all or nothing" policy of DA transfer for transfers to family members and partial transfers of DA are allowed, leaving some of the DA with the transferor. The multiple registration system particular to families, requires that all parts of the "family" owned DA be shipped to one agency.

50. VMC conceded that the newsletter may not be as precise in its explanation but AO 43 is the law that governs the industry and it should be relied on in the event of the appearance of a discrepancy between the wording of the newsletter and the order. Further, Commissioner Guichon testified that he saw no confusion between the newsletter and AO 43 and had he been confused he would have sought clarification as to their meaning.

51. The intervener, BCFresh testified through its president and chief executive officer, Murray Driediger. He agreed that while the summer was not the best time for consultations, there was a good producer turn-out at the meeting he attended in Surrey and VMC met his expectations for consultation. BCFresh made a submission to VMC after the August meetings which noted that the industry had not fully adjusted to the removal of Districts and associated outcomes. It commented on the current operational state on Vancouver Island pertaining to agencies and producers and associated challenges with transfers of DA.

52. The panel does not find much disagreement on the evidence regarding the island meeting. IVCA and VIP expressed concern about the consultation meeting attempting to cover off the regulatory review of the Vancouver Island agencies and the DA issues that arose following the removal of Districts from the Scheme in 2009. The questions posed by VMC for discussion focused on the DA issues but did not identify specific options on how it intended to proceed to deal with the issues raised. IVCA and VIP expected the discussion to focus on the island issues.

53. Commissioner Guichon's evidence supports this version of events. He recalls the then General Manager presenting slides outlining several quota management issues and VMC presenting four options for producers and agencies to consider. The options ranged from a single action such as "immediately establish a moratorium on the transfer of quota allocation" to allow "further examination of potential excess supply issues" and "time to further examine agency marketing issues" to other options relying on multiple actions. The presentation did not outline the steps VMC intended to take to select or implement an option. Rather, various scenarios were presented and attendees provided their input on what VMC should do in those situations. There was no suggestion that VMC was proposing to pass an amending order.

54. Based on the evidence heard, the panel finds that there were procedural defects in the consultation process. Several witnesses voiced concerns that the Vancouver Island meeting was not focused and there was little substantive discussion regarding changes to the DA system and in particular with respect to the changes that would eventually become AO 43. The reasons for that failure of process are likely multi-faceted given the number of long-standing issues on the agenda for discussion.

55. The panel heard conflicting evidence regarding whether VMC made actual representations during these consultations that further discussions would be held before any action was taken to address the issues discussed at the meeting. Whether or not any specific promise to consult further was made, given the broad ranging and open ended nature of the discussions at the consultation meetings, it is not surprising that the appellant felt that the consultation was unfinished or that it had an expectation that once VMC had finalized its thinking it would return to its stakeholders. As can be seen from the discussion that follows, we see it as a flaw in the VMC process that it did not return to its stakeholders once it had settled on an approach.

56. VMC's process following the August consultation process is not transparent. It appears that after these meetings and a review of written feedback from the agencies, VMC proceeded to amend the DA system without further consultation with the agencies. VMC did not provide options for discussion or draft wording of the order for agency comment. It is also not clear that VMC undertook any analysis of the DA issues and how such issues would be remedied by the enactment of AO 43. If VMC did this analysis, it did not share it with its registered producers, designated agencies or this panel.

57. In light of these deficiencies, VMC's process cannot be said to have reasonably engaged stakeholders, in particular the designated agencies and their producers. The particular objectives of AO 43 and how it would affect change to DA in the province were never reasonably presented to the stakeholders. Given that AO 43 has the potential to significantly affect the rights and obligations of the agencies, the panel is of the view that a process more similar to the one proposed by VMC

recently to amend AO 43 (see paragraph 9 above) would be appropriate. Such a process does not mean that the commodity board is legislating by committee. Rather it demonstrates that the regulator has identified a problem and is recommending a solution but wants feedback to avoid unintended consequences. If a similar process had been undertaken with AO 43, there would have been an opportunity for more meaningful input from producers and agencies. This input would have allowed VMC an opportunity to "test" its wording against its goals and objectives for the change in policy with those affected.

58. All of this is not to suggest that had VMC provided IVCA with a draft of AO 43 for its review and commentary that IVCA would have agreed with the substance of AO 43 or that VMC would have been bound in any way to accommodate the suggestions or requests of IVCA. However, that does not mean such consultation would have no value. It would have demonstrated a proper degree of inclusivity and recognition of the value of stakeholder involvement, and it might well have provided valuable substantive information that would inform the final content of any amendment. While we accept that there may be occasions where there are appropriate policy or confidentiality reasons not to do so, which we do not find on the facts here, the usefulness of providing a draft order for consultation is to engage stakeholders in a more meaningful way.

59. While we recognize that any appeal provides an opportunity for those affected to express their discontent with the order, it should be readily apparent that the appeal process by its nature is an adversarial process. It is not a substitute for the dialogue and feedback that would have otherwise been possible if the stakeholders had been more effectively engaged in a review of the details of the proposed amending order in the first instance.

60. Before leaving the issue of process concerns, we want to comment on the apparent discrepancy between how VMC interpreted AO 43 in its industry newsletter (which gave the impression that transfers to multiple producers continued), VMC's interpretation applied in Hothi transfer (where a transfer to multiple producers was denied) and the interpretation given at this appeal that the intent of AO 43 was to restrict transfers of DA to multiple producers. While IVCA did not develop this argument before us and relied on the finding of BCFIRB in its interlocutory decision, we cannot simply dismiss this argument as in our view it highlights concerns with VMC process.

61. We heard evidence regarding the understanding of AO 43 from various witnesses for IVCA, VIP, VMC and BCFresh. That evidence was received not to elicit legal opinions as to the proper interpretation of AO 43 but rather to assess the intelligibility of the order for those who work in the industry. From the evidence heard, we conclude that the wording of AO 43 should be clearer (particularly when combined with the wording in the newsletter intended to explain that order). As noted above, although VMC does not concede that AO 43 is unclear, it is now seeking to revise AO 43 to account for the difficulties in interpretation.

62. For the purposes of this appeal, the wording of AO 43 remains the same as originally passed and on its face, we find that it leads to confusion in the industry in terms of the rules currently in place with respect to the transfer of DA. More will be said on this issue below.

Content of AO 43

63. IVCA argues that AO 43 will significantly affect its ability to attract new growers and to assist retiring/exiting producers. Given the fact that there is very little history with AO 43 in the industry, IVCA points to the first transfer that was affected by AO 43 which precluded a young grower (Dhillon) from entering the industry by way of a partial transfer of DA despite the fact that the entirety of the DA was being transferred by way of a sale to another producer and, as such, on its face appeared to comply with AO 43. IVCA says VMC improperly refused this transfer request claiming that it was contrary to AO 43. It says that the only way the transfer would be contrary to AO 43 was if the requirement for a transfer to only one person (the proposed VMC amendment of May 28, 2015) were improperly read into AO 43 by VMC.

64. IVCA alleges that there was a rush to pass AO 43 to prevent this transfer under the existing rules and proper process was not followed. IVCA believes that AO 43, in part, is intended to hinder new growers wishing to enter the industry, relying on the testimony of Commissioner Guichon who said he was in favour of more acres being planted by existing growers rather than new growers. IVCA maintains that it is not sound marketing policy to amend orders based on grower disputes that arise from competition in the marketplace and further suggested that the decision to pass AO 43 was indicative of a bias in VMC which undermined the operations of Vancouver Island producers and agencies.

65. To the extent that similar transfers would be prohibited in the future, IVCA submits that AO 43 is unnecessary and detrimental to its operations generally. It does not support the purposes for DA set out in section 1 of Part XVI of the General Order including the provision of access for new entrants; the desire to create and maintain long-term, sustainable, food safe, farming and greenhouse operations; the provision of opportunity for industry growth and the provision of an orderly marketing system.

66. On these points, IVCA says access for new entrants into storage crops has not been met and VMC new entrant program was not well known and has only resulted in one new entrant since 2009. AO 43 makes it very difficult for someone wanting to enter the industry through the purchase of DA; there may be fewer opportunities to purchase DA, the DA will represent a significant amount of production and it will likely be very costly and will not provide the mix of varieties and periods needed to be viable.

67. IVCA argues that the purpose of creating and maintaining long-term, sustainable, food safe, farming and greenhouse operations is not met as the requirement that a new entrant purchase 100% of a certain period for a certain variety, would not allow for a mix of periods and varieties necessary for a producer to be profitable and have a sustainable operation. It would put a considerable financial demand on a person just entering the industry if 100% of DA of multiple varieties over multiple periods had to be bought when the business was being started.

68. IVCA argues that with respect to the provision of opportunity for industry growth, this is not met as AO 43 makes it difficult for a producer to downsize without selling the entire business. If a producer gradually decreased plantings, the producer would lose DA, thereby decreasing the value of the farm for future sale and limiting the DA to be transferred to a new producer.

69. In summary, IVCA submitted that AO 43 does not promote an orderly marketing system. The main threat to the orderly marketing system is lack of enforcement by VMC of the General Orders which existed prior to AO 43. The disadvantages of AO 43 outweigh its benefits. VMC did not take the time to ensure that the actual of wording of AO 43 reflected the intent of those voting for its passage. IVCA again points to VMC's intention to amend AO 43 to clarify that on transfer 100% of DA must go to one person.

70. The intervener, VIP, also questioned the rush to pass AO 43 given VMC's position is that it was trying solve a problem which has existed since the removal of District boundaries in 2009. VIP speculated that AO 43 was rushed to block the Hothi transfer of DA to two producers and resulted in the first rejection since the removal of District boundaries. It says that VMC did not present any evidence to support the need for AO 43 and instead relied on personal opinion, hypothetical situations and unsupported accusations. In VIP's view, the process to arrive at AO 43 did not display good governance.

71. In response to whether AO 43 accords with sound marketing policy as a matter of its substance, VMC says that it administers a DA system as a means of promoting orderly marketing. As long as this system is employed, it is sound marketing policy for VMC to regulate in a manner that ensures the effectiveness of the DA system. AO 43 introduced changes to the DA system to promote orderly marketing and is consistent with sound marketing policy. Prior to AO 43, a producer could transfer some DA to an arm's length transferee and continue producing under the remaining DA. VMC was concerned that some producers, following a partial transfer, continued to produce at levels far in excess of their remaining DA with the result that excessive product in the system would disrupt orderly marketing.

72. VMC argues that AO 43 requires producers to transfer all of their DA for a certain regulated crop within each DA period. Multiple transfers are permitted only where all of the DA in a DA period is transferred. Partial transfers are only permitted

where the transferor and transferee are "family members". This exception exists because all "family member" producers operate as "Multiple Registration Farms" with a non-arm's length relationship and are required to ship to only one designated agency. In those particular circumstances, VMC argues there is no reason to expect disruption to orderly marketing from a partial transfer.

73. VMC refers to the new requirement to transfer 100% of a specific category in a related DA period as the "all or none" transfer policy. The objective is to prevent the fragmenting of a particular DA through transfer to assist with "aligning demand and supply of regulated storage crops marketed by designated agencies with each producer's assigned Delivery Allocation" (VMC Delivery Allocation Transfer policy) to attain and maintain orderly marketing.

74. With respect to the specific allegations of the appellant, VMC says AO 43 does not create any difficulties for a producer exiting the system. A producer can downsize through transfers of each storage crop and through sequencing the transfer of the DA periods or marketing periods. Similarly, VMC submitted that nothing in AO 43 interferes with the new entrant policy or acts as a barrier to new entrants to the industry.

75. With respect to the proposals of IVCA to maintain partial transfers, VMC's view is that fragmenting the production of DA could contribute to production inefficiencies and enforcement challenges for VMC. VMC submits that preventing these outcomes is sound marketing policy and in particular the implementation of the order will prevent overproduction, a strong impediment to price stabilization.

76. VMC notes that tracking DA shipments through agencies for the categories and related marketing periods is simplified with the "all or none" DA transfer policy. VMC provided a summary of the transfers of DA since the 2009 marketing year. Of the 44 transfers made and approved prior to VMC enacting AO 43, only three involved transfers of DA to multiple producers. Subsequent to AO 43, VMC refused the Hothi request to transfer to two producers, one of whom was non-family.

77. In considering whether AO 43 accords with sound marketing policy, the panel has considered the appellant's arguments in light of the following:
    - context leading up to the amending order,
    - rationale for the order,
    - existing General Order and whether it contains provisions that could deal with whatever issue AO 43 was intended to solve,
    - normal operation of the DA system and whether the amending order interferes unnecessarily with it, and
    - effectiveness of the amending order.

78. We would note here that IVCA alleged that VMC was biased against Vancouver Island producers. This may be due to the fact that several Commissioners, including Commissioner Guichon, ship to BCFresh. However, these allegations were not substantiated by the evidence at the hearing. Further, concerns with respect to the institutional composition of VMC are beyond the scope of this appeal and would be more properly raised in the supervisory review of the Vancouver Island vegetable industry which is currently underway.

Context

79. Part XVII of VMC's General Order, (as amended by AO 43) sets out the rules pertaining to DA. Section 4 of Part XVII provides that, subject to sections 5 and 6, no Producer shall ship a quantity of Storage Crops in excess of their DA, unless otherwise authorized by VMC. Section 5 provides that DA within a period does not commence until supply exceeds demand. Section 6 is not relevant to this appeal.

80. These provisions mean that in years when supply does not exceed demand, product grown without DA can be marketed and will be included in the five-year average of marketing used to determine DA. This means that product grown without DA can earn DA. Producers wishing to earn DA may target their production and marketing to "gaps" times when the market has traditionally been undersupplied to be able to earn DA more quickly and reliably.

81. When supply exceeds demand, DA comes into effect and producers who grew product without DA take the risk that their product will not be sold as all DA product will be marketed first.

82. IVCA called Harjit Bajwa, a producer with BCFresh. His evidence was that he had purposefully started out growing regulated product without DA. He realized he was taking a chance that his crop would not be sold but he was able to earn DA through the sales he was able to make which complied with VMC's marketing rules.

83. Similarly, producers with DA who plant and subsequently harvest in excess of that DA may earn DA based on those sales. There are no restrictions in the General Order that prevent producers from planting in excess of DA, including producers who sell DA and continue to plant in excess of remaining DA. AO 43 does not change this situation.

84. When DA comes into effect because supply exceeds demand, it is the responsibility of agencies to ensure that all product marketed is backed by DA until all DA product has been sold. From the evidence we heard, it would not seem to matter if it is one producer or multiple producers bringing in product, agencies have to confirm that there is DA to cover all product being marketed. If there is no DA for the product, the agency will either refuse the product or market

it after all DA product is sold. It is a separate issue for VMC to address if designated agencies are not properly exercising their responsibilities.

85. The DA rules do not apply to producers who grow under the direct producer –sale program or manifest sales which are managed by VMC and these sales were not central to the development of AO 43. Witnesses for VMC and BC Fresh expressed frustration with Hothi who they allege grew and marketed product after a transfer of DA as if the transfer had not taken place.

Evidence

86. The evidence presented at the hearing was that complaints about producers operating outside the DA system have been made to VMC since 2009 when the District system was ended. Commissioner Guichon advised of three or four occasions since 2009 when a producer that had transferred DA continued to market product without following the marketing rules for producers. VMC did not, however provide evidence that it investigated these complaints or took action if the complaints were verified.

87. BC Fresh producer Peter Schouten provided evidence of a particular situation where he suspected a licenced producer broke the rules. He advised VMC that he thought product was being sold contrary to VMC marketing rules but VMC did not offer evidence to the panel as to any steps it took to investigate this complaint.

88. Witnesses testified that AO 43 would mean only one producer would need to be monitored rather than multiple producers, making monitoring easier. The panel accepts that monitoring one producer would be easier than monitoring several producers but it is not clear to the panel what these witnesses thought would be monitored and to what end. Also, it is not clear how many additional producers would need to be monitored if there were multiple transferees (fragmented DA) as the evidence indicates most transfers are to existing producers who would be monitored anyway.

Rationale for Amending Order 43

89. One rationale for AO 43 provided by VMC at the hearing was simply that less effort would be required by VMC in monitoring marketing of storage crops if there was less fragmenting of DA per category of product to monitor (as would be the case if the entire category for a product was transferred). However, we observe that if fragments of DA were transferred to existing DA holders, the fragments would become part of a larger whole.

90. No rationale was provided in VMC's minutes about the need for, or purpose of AO 43 or what it was intended to accomplish.

91. The evidence from Commissioner Guichon was that VMC is interested in marketing, not plantings. There is nothing (in the General Orders) which prohibits plantings. Commissioner Guichon, Mr. Driediger and Mr. Schouten, nonetheless expressed their frustration with producers who continue to plant the same amount of acreage after having sold their DA.

92. Examples given by VMC at the consultation meetings for discussion involved producers who planted more acreage than required for product to fill their DA. In the consultation meetings, VMC also raised questions regarding transfers of DA and related issues. There was also evidence given that producers normally plant 10 to 20% excess over their DA to account for losses that often occur due to such growing factors as weather and pests. This is to ensure that they can market 100% of DA and not risk losing DA when the five-year average marketing is calculated. If the harvest of these producers exceeds their DA, they will want to market that product, if possible.

93. The panel is unable to distinguish between those excess plantings, the planting done by Mr. Bajwa without DA and the plantings done by a producer who has sold DA but continues to grow in excess of existing DA. The policy basis for considering one type of overplanting as unacceptable while others are considered onside is unclear. It is also not clear how AO 43 would affect excess plantings as the evidence was that VMC was not concerned with plantings, only marketing.

94. Such distinctions can only be made through careful tracking of marketing channels and marketing rules applicable to each situation and source of product. The panel was not provided with the evidence necessary to conclude that VMC – necessarily supported by the designated agencies acting in accordance with their responsibilities – is currently in a position to ensure that orderly marketing is maintained.

<u>Effectiveness of General Order Prior to AO 43 in Preventing Marketing of Product without DA</u>

95. The panel's review of the General Order confirms that there are a number of provisions which could be used in the event of a surplus of product over demand to prevent the marketing of product where the producer does not have DA for that product. These provisions are outlined above and include the requirement of producers in Part XVII, section 4 for producers to not ship in excess of their DA, as well as the restriction on agencies receiving or marketing any regulated product from unlicensed producers or those who have violated or not complied with any General Order. Licences may be suspended or cancelled if VMC is of the opinion that the licence holder has violated any Order, policy or direction of VMC or has acted to the detriment of the best interests of the industry and subsequent licenses may be issued at a higher cost. As well, section 11 of Part XVII allows VMC to suspends a Producer's DA for a period of time.

96. Until these provisions have been shown to be ineffective or likely ineffective, the panel does not understand the need for an amendment, the purpose of which has not been clearly communicated and which affects the transfer of DA. The panel is not convinced that VMC and its designated agencies would enforce its General Orders as amended by AO 43, or otherwise, to ensure that product was being marketed consistently with VMC's rules.

Interference of AO 43 with Producer Intentions and Associated DA

97. The appellant argues that AO 43 makes it difficult for producers to retire or gradually downsize or for new or existing producers to start up or expand.

98. For a producer wanting to gradually exit the industry, BC Fresh suggested that a producer could gradually stop growing product. According to the General Order, this would result in a loss of DA as DA is determined using a five-year average of crop marketed. In the panel's view, it is unreasonable to suggest that the only way a producer can gradually exit the industry is to lose DA and its corresponding value in the marketplace.

99. Despite the arguments made by VMC, the panel does not accept that AO 43 will not interfere with the transfer of DA between producers. Its purpose is to prevent "partial" transfers. The panel concludes, based on the evidence heard, that legitimate questions exist as to whether the requirement for transfers of "whole" production segments of DA makes it more difficult for producers to gradually exit the industry and whether for a new producer to be viable that producer must grow more than one variety in more than one period. Limiting a new producer to purchasing 100% of a variety or 100% of production for a period would appear to make it more difficult for a new producer, or one wishing to expand, to obtain the necessary mixture of varieties and periods without considerable additional expense.

100. Legitimate questions also arise as to the effectiveness of VMC's new entrant program for storage crops and that is a matter for VMC to consider in terms of its overall strategic goals for the industry. The panel also notes that VMC did not suggest the new entrant program to the producer (Dhillon) whose purchase of DA was denied in the Hothi transfer application. The evidence of the witness for VMC was that it is not the business of VMC to give information about the new entrant programs; it is the responsibility of the agency concerned.

101. In the panel's view, VMC has an obligation to not only to establish a new entrant program with rules that are accessible and understandable but to be able to confirm that the new entrant program and its rules are being brought to the attention of interested persons. It also has a continuing oversight role to ensure that agencies are properly identifying opportunities for new entrants. New entrants for other regulated commodities have brought fresh approaches to those industries and have been beneficial to the industry overall.

Effectiveness of Amending Order 43

102. The panel heard that the purpose of Amending Order 43 was to prevent producers from abusing the marketing rules, contributing to downward price pressures.

103. VMC advised that it could better track the marketing of larger amounts of product being delivered to agencies by fewer producers as compared to smaller amounts being delivered to agencies by more producers. No evidence was presented to show the number of current producers and the estimate of additional producers that would result if the partial transfer restriction in AO 43 did not exist (and fragmenting of DA was allowed). VMC could not say how many new producers would in fact enter the industry if fragmenting of DA to multiple transferees were allowed. We would observe however, that the evidence of approved transfers over the past six years shows that partial transfers are the exception, not the rule.[3]

104. BCFresh sees this change to the General Order as a small "tweak" and just one part of the overall approach VMC would take to enforcement. However, without VMC enforcing the current provisions in the General Orders, the panel does not understand the need for this small tweak, the effect of which is uncertain.

105. The panel found that the objectives to be achieved by AO 43 were unclear. The newsletter and written policy supporting or explaining AO 43 and specifically the changes to section 14 to Part XVII support the "all or none" aspect of the new rule being applied to the DA being transferred, not to the number of intended transferees. These documents lead the panel to conclude that, at least initially, VMC intended that DA could transfer to multiple transferees as long as all the DA was transferred.

106. In any event, VMC has now determined that changes are necessary to ensure that in section 14 "all or none" applies to the number of intended transferees and has offered alternate wording to clarify its intention to restrict the transfer of DA to only one transferee.

107. The panel concludes that AO 43 should not have been passed until VMC exhausted existing enforcement provisions and until VCM could provide a rationale for AO 43 and could demonstrate how the need for AO 43 outweighed the interference with the normal process of transferring DA. For these reasons, the panel finds that AO 43 does not accord with sound marketing policy.

108. The panel turns now to a consideration of the SAFETI principles.

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[3] Since 2009, there have been approximately 47 requests for transfers of DA. Some of those involved partial transfers, including one which is described as a transferor semi-retiring. Of the 47 transfers, the only transfer not approved was the Hothi transfer in part to his son and in part to a Mr. Dhillon (denied based on AO 43).

SAFETI - Summary

109. Since 2011, BCFIRB and the commodity boards it supervises have moved towards applying principles to its decision-making, to achieve an outcomes-based approach to governance and regulation. This approach enables decision makers to focus on outcomes that matter. This requires boards to identify the risks, challenges and opportunities they face and then to develop effective strategies to address those risks, challenges and opportunities in a way that promotes orderly marketing for the benefit of the regulated agri-food industry and the public. The SAFETI analysis is a tool that can assist a commodity board in developing, assessing and applying sound marketing policies and rules that support its strategies.

110. BCFIRB expects commodity boards such as VMC to be guided by SAFETI principles in all their processes and outcomes to ensure that their policies are not only supporting their strategic priorities[4] but are also market responsive and meeting public policy objectives. This examination is intended to assist both BCFIRB and the commodity boards in determining whether a particular decision is procedurally fair and accords with sound marketing policy. As noted at paragraph 32 above, the SAFETI principles are not intended to be applied blindly and mechanistically. One or more elements may be departed from or qualified where there is good reason to do so based on the circumstances of the decision. Whether and to what extent industry consultation (or in fact any other element of SAFETI) is required depends in part on the nature of the decision, *Agrifoods International Cooperative Ltd. v BC Milk Marketing Board*, October 30, 2015.

111. Based on the evidence presented, and having regard to the principles stated above, the panel has concluded as follows:

Strategic:
VMC argues that Amending Order 43 ensures the effectiveness of the DA system as it helps prevent excessive product in the system which would disrupt orderly marketing. However, based on our conclusions above, we have found that VMC failed to demonstrate how AO 43 fit into its overall plan for reinforcing confidence in its orderly marketing system; facilitating sustainable and expanding BC vegetable agri-business or strengthening industry relations. More specifically, VMC failed to demonstrate how AO 43 fits into its plans to balance production, delivery of product and track sales and pricing. The lack of evidence of VMC investigations into complaints regarding marketing of vegetables makes it difficult to assess how strategic AO 43 is in dealing with orderly marketing issues.

[4] VMC's Strategic Plan for 2014-16 identifies its four priorities as: "reinforce confidence in an orderly marketing system", "facilitate sustainable and expanding BC vegetable agri-business"; "maintain a food safe standard of excellence"; and, "strengthen industry relations".

We are not satisfied that VMC has given proper consideration to AO 43 in light of its strategic priorities, including the sustainability of the industry and its expansion (e.g., through succession and new entrants). Instead, AO 43 has the appearance of being targeted at a particular transfer without being substantiated by a comprehensive strategic assessment.

Accountable:
VMC's decisions need to be demonstrably accountable to its legislation, any applicable direction from government or BCFIRB and to industry stakeholders such as producers and agencies. However, we have concluded that it is unclear why VMC needs AO 43 and how it will support orderly marketing. Given that VMC's orders place significant responsibility on agencies to provide for orderly marketing, all agencies should have been more involved in the policy discussions leading to this amendment of VMC's General Orders.

Fair:
In considering the fairness of the process followed, given our conclusions above, we have concerns that the process followed to develop AO 43 was not fair to at least some of the agencies that are expected to implement the order or to their producers affected by the order.

Effective:
Here we ask whether AO 43 will be effective in meeting VMC's goals to promote orderly marketing and sustain and expand its industry. While VMC argues that AO 43 makes it easier to identify, and consequently enforce, obvious abuses of the DA system, it does so by limiting transfers and restricting producers. It is unclear how this will improve the DA system. Even if AO 43 might improve the enforcement of rules, such rules and enforcement leave legitimate questions as to whether the restriction against transfers of fragments of DA makes it more difficult for producers to gradually exit the industry and for new producers to enter.

In these circumstances, involving producers and agencies in a discussion of these objectives would have been beneficial to ensure the objectives were consistent with sound marketing policy and that those objectives could be achieved.

The panel also notes that VMC considered whether AO 43 should have an initial "transition" year. This coupled with VMC recognizing that AO 43 could be subject to appeal to BCFIRB is an indication that VMC itself was not completely convinced of the effectiveness of its own order.

Transparent:
VMC began its consultation process in an appropriate manner. It invited the major industry members and provided them with materials to give them

information regarding the current challenges facing VMC. Unfortunately, this transparency did not continue into VMC decision-making process. After the summer consultation meetings, VMC required time to think about what was heard through the consultation process and the further issues this information raised. No minutes were taken at the consultation meetings nor were all Commissioners in attendance. It is not clear how the Commissioners became informed about what was said at the three meetings. We saw no briefing notes that might have been presented to VMC in preparation for its decision. Under s. 8(4) of the NPMA a commodity board must provide BCFIRB with "every bylaw, order, rule and other document touching on the matter under appeal". BCFIRB did not receive anything of this nature. VMC meeting minutes do not assist in this regard. In order for VMC to make its decision to pass AO 43, concepts must have coalesced such that it became clearer to VMC between August and November what its objectives for change were, but there was no mechanism for an affected person to follow this change or comment on it.

A time period for review and implementation of an order can be short or long depending on regulatory requirements. The issue is whether the time allowed was adequate for persons implementing, applying and affected by the order to understand the purpose and intent of the order.

The panel concludes that the process leading to the passage of Amending Order 43 not sufficiently transparent.

Inclusive:
Given the panel's finding above that VMC's process did not reasonably engage direct stakeholders on the particular concepts relevant to and objectives to be achieved through AO 43, we find that the process of enacting AO 43 was not inclusive. When a regulator is contemplating rules that may restrict access to or in an industry – which outcome on its face does not appear to support that regulator's strategic priorities – stakeholders should be consulted specifically about the rules concerned.

ORDER

112. The appeal is granted and AO 43 is rescinded.

113. Before enacting any amendments to its General Orders in respect of transferability of DA, VMC is to :

    i. Identify the issues sought to be remedied by amending the General Orders;
    ii. Propose regulatory options to address these issues;
    iii. Identify how the options address sound marketing policy objectives,
    iv. Engage stakeholders as appropriate, on the issues and the options,
    v. Use expert analysis where appropriate; and,
    vi. Provide a full rationale for any conclusion(s) reached.

114. Any amendment to the General Order resulting from paragraph 111 above will be subject to appeal to BCFIRB.

Dated at Victoria, British Columbia this 18th day of December, 2015.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

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Diane Fillmore, Presiding Member

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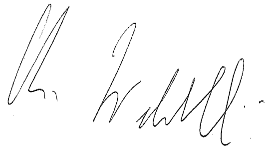
Daphne Stancil, Member



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Chris Wendell, Member