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DELIVERED BY E-MAIL

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Dear Sirs:

**APPEALS FROM THE OCTOBER 31, 2013 DECISION OF THE BRITISH COLUMBIA
VEGETABLE MARKETING COMMISSION REGARDING AGENCY STATUS**

Background:

1. On November 27 and 28, 2013, Vancouver Island Produce Ltd. (“VIP”) and Island Vegetable Cooperative Association (“IVCA”) filed their respective appeals regarding a decision of the BC Vegetable Marketing Commission (the “Vegetable Commission”) made on October 31, 2013 in which it recommended granting agency status to Vancouver Island Farm Products Inc. (“VIFP”) and also recommended that it operate in association with BC Fresh Vegetables Inc. (“BC Fresh”).
2. On December 23, 2013, the British Columbia Farm Industry Review Board (BCFIRB) issued a decision entitled, “Follow up to the January 7, 2013 Supervisory Review Decision Concerning the BCVMC Central Vancouver Island Agency Designations.” In the December 23, 2013 decision, the BCFIRB panel approved the Vegetable Commission’s recommendation that VIFP be granted agency status subject to the conditions established by the Vegetable Commission. The Supervisory Review panel also accepted the recommendation of the Vegetable Commission on November 22, 2013 to approve the agency designation of VIP “subject to terms and conditions for agencies set out in the BCVMC’s General Order.”

**British Columbia
Farm Industry Review Board**

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3. Consequently, on January 7, 2014, as the presiding BCFIRB member appointed to hear these appeals, I sent a letter to the appellants and the Vegetable Commission asking them to confirm if the Supervisory Review decision had addressed the issue(s) on appeal and if not, to identify the outstanding issues for determination.
4. Before addressing the responding submission of the parties, it is necessary to provide some background or context to these appeals. There has been a history of dissention among some vegetable marketing agencies and their producers on central Vancouver Island which is set out in greater detail in the Supervisory Review of the BC Vegetable Marketing Commission (the “Vegetable Commission”) Central Vancouver Island Agency Designations undertaken by BCFIRB and issued on January 7, 2013. Consequently I do not propose to reproduce all of those details here.
5. On April 27, 2012, the Vegetable Commission issued an initial decision in which it recommended to BCFIRB that VIFP be designated as an agency to market greenhouse vegetables but excluding it from marketing storage crops. In its decision, the Vegetable Commission also recommended that the agency status of VIP be revoked effective May 5, 2012. Both VIP and VIFP appealed those decisions to BCFIRB. In November of 2012, the appeal panel of BCFIRB decided to put these appeals into abeyance and referred all of the issues on appeal to a supervisory review pursuant to s. 7.1 of the *Natural Products Marketing (BC) Act* (the “NPMA”).
6. In its January 7, 2013 Supervisory Review Decision, the BCFIRB panel noted (at paragraphs 7 and 8) that while the “key issue on review is whether the Vegetable Commission’s decisions concerning the agency designation of VIP and VIFP were made in accordance with sound marketing policy... that decision required consideration of several larger questions.” Consequently, BCFIRB deferred its final decision on this issue and directed the Vegetable Commission to provide by November 30, 2013 information as to the future strategic direction of the Island vegetable industry and recommendations as to the number of agencies that would best serve the Island as well as the regulated products that those agencies would market. It also directed the Vegetable Commission to provide a recommendation as to agency status of VIP and VIFP. BCFIRB also made an interim order granting both VIP and VIFP temporary agency status to market storage and greenhouse crops until December 31, 2013 to help ensure an Island identity was maintained in Central Vancouver Island in the interim.
7. On April 9, 2013, a BCFIRB appeal panel issued a decision dismissing the earlier appeals of VIP (VIFP having earlier withdrawn its appeal), noting that BCFIRB had required “the Vegetable Commission to undertake a broader industry review, with ongoing BCFIRB supervision, before making long term decisions with respect to designation of agencies on Vancouver Island,” see *V.I.P. v. British Columbia Vegetable Marketing Commission*, April 9, 2013.

8. In July of 2013, VIFP and BC Fresh made a joint application to the Vegetable Commission for a recommendation to BCFIRB that VIFP be designated as an agency and that it operate as a sub-agency of BC Fresh. After a hearing on August 29, 2013, the Vegetable Commission issued a decision on October 31, 2013 allowing the agency application with conditions on VIFP's licence making BC Fresh responsible for aspects of VIFP operations, including reporting and governance. The recommendations of the Vegetable Commission were forwarded to BCFIRB for its approval.
9. On November 15, 2013, the executive director of BCFIRB, Jim Collins, issued a letter on behalf of the BCFIRB Supervisory Review panel to the Vegetable Commission and to the four agencies marketing vegetables on Vancouver Island, namely, BC Fresh, VIP, VIFP and Island Vegetable Co-operative Association ("IVCA"). In that letter, Mr. Collins noted that the decision of the Vegetable Commission dated October 31, 2013 "did not address the agency status of VIP, nor the number and type of agencies that would best serve the strategic interests of the regulated vegetable industry on the Island in the longer term." As a result, he asked the four agencies to provide written submissions on the VIFP/BC Fresh proposal and the Vegetable Commission to provide written submissions on the legal and policy appropriateness of a sub-agency structure and a recommendation regarding VIP's agency designation. He also noted that following receipt of the submissions, a BCFIRB panel would "provide the supervisory direction it considers necessary and appropriate in the circumstances."
10. As noted above in paragraph 2, on December 23, 2013, BCFIRB issued its "Follow up to the January 7, 2013 Supervisory Review Decision Concerning the BCVMC Central Vancouver Island Agency Designations." In that decision, the panel noted that in the written submission process, the Vegetable Commission, VIFP and BC Fresh continued to support the recommendation that VIFP operate as an agency under a defined relationship with BC Fresh. It also noted (at paragraph 10) that VIP and IVCA "opposed the recommendation as not being sound marketing policy, including on the ground that the Vegetable Commission had not undertaken and completed its strategic review of the Vancouver Island regulated vegetable industry."
11. In reaching its decision, the Supervisory Review panel noted that it had to determine whether the Vegetable Commission's decision accorded with sound marketing policy in the circumstances, which included the Vegetable Commission's failure to complete its Review of the Vancouver Island vegetable industry directed in the January 7, 2013 Supervisory Review decision. The panel also considered as relevant circumstances, "the lengthy history of the dispute between Central Vancouver Island vegetable producers and agencies, the ongoing disruption to the marketplace from issues relating to those disputes and the prospect of this continuing for some time to come pending the Vegetable Commission's strategic recommendations." The panel further considered it a relevant circumstance that the industry (i.e., VIFP and BC Fresh) had proposed a solution which was supported by the Vegetable Commission as a first instance regulator and that it

addressed some of the governance and marketing issues identified by BCFIRB in its January 7, 2013 decision.

12. As a result, the Supervisory Review panel concluded as follows (at paragraphs 70-73):

Despite not having the full scope of information the panel expected to have to make the final decisions regarding the VIFP and VIP agency designations, it is the panel's responsibility as a supervisory body to ensure that the industry can move forward... Further delay of a decision regarding VIFP and VIP agency designations is not in the best interests of the regulated industry and could not be considered sound marketing policy.

The best outcome for the Vancouver Island regulated industry overall is well-governed agency(s) meeting market needs for the benefit of both producers and the public. The current challenge is the on-going absence of a vision and strategic direction for Vancouver Island....The only reasonable solution at this point is to allow business to move forward.

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

Granting VIP continued agency designation addresses the historical issue of the Vegetable Commission removal of that designation without due process.

13. The Supervisory Review Panel then directed the Vegetable Commission to provide BCFIRB with a plan and schedule for completing their strategic review of the Vancouver Island regulated industry (as outlined in its January 7, 2013 decision) by February 1, 2014 for approval. The panel noted that the Vegetable Commission would then have discretion to reconsider the status of all Vancouver Island agencies should the outcome of its strategic review warrant.

Issues under Appeal:

14. The Notice of Appeal filed by IVCA on November 27, 2013 states that it is an appeal of the "BCVMC decision regarding VIFP / BC Fresh Sub-Agency Licence." The Notice of Appeal filed by VIP on November 28, 2013 also states that it is an appeal of the "BCVMC Decision regarding VIFP/ BC Fresh Sub agency."
15. In its correspondence dated January 10, 2014, IVCA submits that the final Supervisory Review decision did not address the issues on its appeal and that it wishes to pursue its appeal. In particular, IVCA submits that the decision did not provide a solution to the agency/producer issues on the Island and that it is IVCA's position that there is a need for only one agency on the Island. In summary, the IVCA states that,

Until such time as IVCA sees commitment and established timelines for a full review of the BCVMC, its mandate, structure, right down to its General Orders and practices, that is based on 'what is best for the grower' and 'what works today,' IVCA sees no reason to withdraw our appeal and will continue making these points by whatever means are available to us until they are addressed.

16. In its correspondence dated January 14, 2014, VIP also submits that the final Supervisory Review decision did not address the issues on its appeal and that it wishes to pursue its appeal. VIP submits that the Supervisory Review panel "allowed the Vegetable Commission to ignore its original request of January 7, 2013" (for a strategic plan) and that in doing so, "they have sentenced the growers of VIP to yet another year of uncertainty." VIP requests BCFIRB to grant it full agency status without conditions and to investigate the Vegetable Commission's "structural problems".
17. In its correspondence dated January 13, 2014, the Vegetable Commission submits that the final Supervisory Review decision did address the substantive issues raised in these two appeals and that should the appeals proceed, it is "unlikely that information that is materially different to what is already before it will arise or be of a nature to bring into question the current circumstances established by way of FIRB's December 23, 2013 supervisory review decision."
18. Sections 8(8) and 8(8.4) of the *NPMA* provide as follows:
 - s. 8(8) If, after an appeal is filed, an appeal panel finds that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the commodity board the opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.....
 - s. 8(8.4) If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial Board must proceed with and decide the appeal.
19. In *V.I.P. v. British Columbia Vegetable Marketing Commission, supra* (a decision regarding appeals by VIP of earlier Vegetable Commission decisions in this process), the panel chair noted as follows:

...the obligation [under s. 8(8.4) of the *NPMA*] to "proceed with and decide the appeal" does not require BCFIRB to ignore the outcome of the preceding supervisory process. Where issues have been decided in that process, it would be an abuse of the appellate process to require those issues to be decided all over again, to require the appeal panel to resolve issues or grant remedies that have become academic or unnecessary in all the circumstances. Where, as here, the supervisory process has addressed key issues of substance, the summary dismissal factors set out in s. 31 of the *Administrative Tribunals Act*, which apply to appeals are operative.

Decision:

20. In my view, the substantive issue raised in IVCA's and VIP's respective appeals, namely the Vegetable Commission's October 31, 2013 decision recommending that VIFP be granted conditional agency status based on a defined relationship with BC Fresh, was dealt with in its entirety in BCFIRB's supervisory decision of December 23, 2013 when the Supervisory Review panel approved those recommendations. Although the appellants submit that the decision was made without the benefit of a strategic plan from the Vegetable Commission that it was directed by the Supervisory Review Panel to provide in its January 7, 2013 decision, I find that this circumstance was taken into account by the Supervisory Review panel in making its decision (as set out in paragraph 12 above).
21. The appellants also submit that sound marketing policy would require that there be only one agency acting for producers on Vancouver Island. However, I find that the appellants made submissions regarding this matter during the Supervisory Review and that they were considered by the Supervisory Review Panel in making its decision.
22. I am mindful that the Notices of Appeal allege some procedural defects during the hearing process that gave rise to the October 31, 2013 decision of the Vegetable Commission and that they seek remedies including rectifying alleged 'structural (or governance) problems' with the Vegetable Commission. In my view, however, the alleged procedural defects were cured by virtue of the fact that the Vegetable Commission's decision was super-ceded by BCFIRB's Supervisory Review decision. I am also mindful that the Supervisory Review panel declined to deal with the "structural (or governance) problems" of the Vegetable Commission but do not find this submission persuasive given that the panel turned their mind to this matter and exercised their discretion in deciding that "BCFIRB will address separately issues with respect to the governance and composition of the Vegetable Commission."
23. I do not agree that the issue arising on VIP's and IVCA's appeals was not addressed in the Supervisory Review. In my view, there was only one issue [whether the conditional agency designation of VIFP and its relationship with BC Fresh accorded with sound marketing policy] and that issue was addressed. Having regard to the submissions of the appellants, however, it is apparent that they do not believe the issue was addressed to their satisfaction. If the appellants want to challenge the supervisory decision, their remedy is to apply for judicial review of that decision and not to try to re-litigate the issue through BCFIRB's appeal process.
24. In conclusion, I find pursuant to s. 31(1)(g) of the *Administrative Tribunals Act* (ATA) that the substance of these appeals has been appropriately dealt with in another proceeding and accordingly that it would be an abuse of BCFIRB's appeal process to proceed with the appeals. I find myself in a similar position to the panel in the earlier

appeal of *V.I.P. v. British Columbia Vegetable Marketing Commission*, *supra* where the panel chair held

The BCFIRB supervisory panel has not just “managed” the situation; the orders under appeal no longer have any force or effect because they have been replaced by orders of the supervisory body. In these circumstances, there is no meaningful remedy I can offer in respect of orders that have no effect.

25. Consequently Appeal #13-07 filed by VIP and Appeal #13-08 filed by IVCA are dismissed.
26. In accordance with s. 57 of the ATA, “an application for judicial review of a final decision of the (Provincial board) must be commenced within 60 days of the date the decision is issued”.

Dated at Victoria, British Columbia this 22nd day of January, 2014

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:



Carrie Manarin, Member