

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND

MPL BRITISH COLUMBIA DISTRIBUTORS INC. (MPL BC)  
AGENCY DESIGNATION APPROVAL

October 11, 2023

## Introduction

1. Agencies are businesses licenced by the BC Vegetable Marketing Commission (Vegetable Commission) and approved under section 8 of the *Natural Products Marketing (BC) Act Regulations* (NPMA Regulations) by the BC Farm Industry Review Board (BCFIRB). The role of an agency is to market regulated vegetables on behalf of producers to the exclusion of other businesses and to harness the collective power of producers to gain market access. 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. Agencies are delegated certain legislative authorities by the Vegetable Commission, to whom they are directly accountable.
2. Agencies also play a larger, front-line strategic role in assisting the Vegetable Commission to regulate, manage and grow the regulated vegetable sector in an orderly fashion. Agency designation is a privilege. It is non-transferable and is not approved in perpetuity.
3. On January 12, 2022, the Vegetable Commission made its decision recommending that MPL British Columbia Distributors Inc. (MPL BC) be designated an agency to market regulated greenhouse vegetables in British Columbia. It now falls to BCFIRB to consider whether to approve MPL BC as a designated agency.
4. As stated by the Vegetable Commission at paragraph 16 of its January 12, 2022, decision:

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

## Procedural History of Review

5. After receiving the Vegetable Commission’s decision on January 12, 2022<sup>1</sup>, BCFIRB notified the Vegetable Commission and MPL BC on January 24, 2022, that BCFIRB would be appointing a supervisory panel. MPL BC expressed in several letters the importance of a timely decision. BCFIRB acknowledged MPL BC’s concerns and reminded MPL BC of BCFIRB’s sound marketing policy

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<sup>1</sup> MPL BC originally filed its application for an agency licence on September 18, 2020. That application was put in abeyance due to a vegetable industry moratorium on new agency and producer-shipper applications while the Vegetable Commission undertook Strategic Planning and Agency Reviews. The Vegetable Commission ultimately amended the agency application process (Amending Order 54) and MPL BC filed its amended application on May 27, 2021.

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responsibilities and that BCFIRB would also need to consider the impact of the ongoing Allegations of Bad Faith and Unlawful Activity Review<sup>2</sup> (Allegations Review) in which MPL BC was a complainant participant.

6. Between January 18, 2022, and February 11, 2022, BCFIRB received twelve notices of appeal alleging the Vegetable Commission's approval of MPL BC's agency designation was procedurally unfair as it did not provide an opportunity for oral submissions and was based on an incomplete and procedurally flawed record. On March 21, 2022, the presiding member of the BCFIRB appeal panel deferred consideration of these appeals pursuant to section 8(8) of the *Natural Products Marketing (BC) Act (NPMA)* until completion of this supervisory process.
7. On March 31, 2022, following BCFIRB's deferral of appeals, two of the appellants - Greenhouse Grown Foods Inc. and Windset Farm (Canada) Ltd. (GGFI/Windset) - requested that BCFIRB's approval process provide for specific steps and opportunities to be heard, including an oral hearing. On April 26, 2022, BCFIRB acknowledged that it can exercise discretion to establish an "effective, fulsome and procedurally fair procedure for the Prior Approval Process" under both *NPMA* s. 7.1(2) and under Supervisory Rule 5.
8. In June 2022, BCFIRB distributed draft Terms of Reference to the Vegetable Commission, MPL BC and vegetable industry stakeholders including GGFI/Windset to clarify the issues to be decided, determine eligible participants and the form that participation would take. Input on the Terms of Reference was to be received by July 6, 2022.
9. On July 15, 2022, BCFIRB notified the Vegetable Commission, MPL BC and all vegetable sector stakeholders that it would be delaying finalizing the Terms of Reference as a result of the release of the Allegations Review decision on July 14, 2022, and the need to consider its implications on the prior approval process.
10. On July 22, 2022, BCFIRB notified the Vegetable Commission, MPL BC and all vegetable sector stakeholders that the approval process was being suspended due to outstanding issues and questions still to be addressed in the Allegations Review.

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<sup>2</sup> BCFIRB's Allegations Review conducted under s. 7.1 of the *Natural Products Marketing (BC) Act* involved investigation into allegations of bad faith and unlawful activity arising out of civil claims filed by two entities, one of which was MPL BC, which pled misfeasance of public office by certain members and the general manager of the Vegetable Commission.

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11. The Allegations Review proceeded to a second phase. On January 25, 2023, BCFIRB issued its written reasons concluding phase II of the Allegations Review for MPL BC. Chair Donkers made the following ruling at page 5:

...Given BCFIRB's broad supervisory mandate, it was incumbent on me to try to restore effective governance by first assessing the merits of the Commission's allegations regarding the improper basis for the claims, and then determining what direction or assistance could be provided to the Commission in terms of how it should regulate and otherwise deal with Prokam and MPL.

Now, however, MPL has taken steps which I agree will significantly address the impact of its conduct on orderly marketing, the Commission, its members and staff. These steps, taken voluntarily, will go a long way in restoring trust, and in my view eliminate the need for me to pursue Phase II for MPL. With the civil claim being brought to an end, the cloud of the allegations hanging over the Commission has been lifted. The significant cost and disruption to the Commission have been acknowledged and addressed through a significant payment of the Commission's legal costs in the Supervisory Review. Just as importantly, MPL has expressly acknowledged the role it must play in ensuring orderly marketing in the BC regulated vegetable industry, including maintaining a transparent and accountable relationship with the Commission, coupled with heightened reporting requirements, should its agency licence be approved.

Accordingly, it is my view that steps have been taken which will lead to the restoration of the trust and confidence which lie at the heart of effective governance and orderly marketing in the industry. I note in that regard that the Commission is supportive of Hearing Counsel's recommendation that Phase II be discontinued for MPL. In all of the circumstances, therefore, I am prepared to make an order that Phase II of the Supervisory Review be concluded for MPL. This order does not impact Phase II for Prokam.

Lastly, I wish to make clear that this ruling only addresses MPL's status in Phase II of the Supervisory Review. Prior to the hearing in Phase I of the Supervisory Review, the Commission recommended that MPL's agency license be approved by BCFIRB. It will be for the supervisory panel presiding over the prior approval process for MPL's agency license to make its own determinations in that process after hearing from all of the relevant parties.

12. Shortly thereafter, on February 7, 2023, BCFIRB lifted the suspension on the approval process, advised that it would be finalizing the prior approval Terms of Reference and provided a final opportunity for input. BCFIRB also requested availability for an in-person hearing to be held before the end of May 2023.
13. BCFIRB finalized the Terms of Reference on March 8, 2023. The process included four phases:
  - a) Phase I: Finalizing the Terms of Reference;

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- b) Phase II: Written submissions, document disclosure and expert witness applications;
  - c) Phase III: Supervisory oral hearing and any further process as determined necessary by BCFIRB; and
  - d) Phase IV: BCFIRB decision.
14. In response to applications for non-disclosure, BCFIRB reviewed the unredacted documents. In decisions dated April 6 and 11, 2023, BCFIRB found most of the redactions were appropriate and necessary to protect confidential or privileged information in the public interest and made only minor modifications to disclose redactions found unnecessary.
15. On March 27, 2023, BCFIRB invited written responses from all eligible participants to specific questions regarding the Vegetable Commission process, rationale and recommendation and on the ramifications of the voluntary reporting requirement agreed to by MPL BC as part of the Allegations Review.
16. BCFIRB received responses from GGFI/Windset, supported by Aljane Farms, CVG Veg Products Ltd., Global Greenhouse Produce Inc., Humble Farmer Ltd., Merom Farms Ltd., Mt Lehman Vegetable Farms Ltd./Mt Lehman Vegetable Farms Inc., Peppertree Farms Ltd., from the Vegetable Commission, from MPL BC and received final replies from the Vegetable Commission and MPL BC. Subsequently, BCFIRB also received several process concerns from the Vegetable Commission and GGFI/Windset.
17. The Vegetable Commission raised concerns that BCFIRB, through its questions, was asking the Vegetable Commission to supplement its original reasons for recommending MPL BC's agency designation.
18. In its April 21, 2023 response, BCFIRB stated:

As the Terms of Reference plainly state, while the Commission will need to demonstrate it followed a SAFETI-based process and reached a sound marketing policy-based recommendation, BCFIRB has to reach its own conclusions based on its supervisory process, meaning it is not bound by the Commission's decision or the record before it. Accordingly, BCFIRB does not agree with the concerns raised in your letter regarding "deliberative privilege", "bootstrapping", or "s/he who hears must decide" arise in this supervisory process. The questions posed are all directed at the Commission's responsibility to demonstrate to BCFIRB that a SAFETI-based process was followed and that it reached a sound marketing policy-based position.

BCFIRB's intent is to bring transparency to the prior approval supervisory process so that all participants have a good understanding of the Commission process and recommendation, and to ensure that any concerns with that process and recommendation were articulated in advance of the oral hearing to allow participants and BCFIRB time to prepare.

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Ultimately it is for the Commission to determine how it will fulfill its responsibilities outlined in the Terms of Reference, including how it will answer any specific questions posed.

However, to be clear, the Commission should be prepared to explain its process for evaluating new agency applications in the oral hearing. If the Commission is of the view that expressing a position on whether its January 12, 2022, decision identified “any deficiencies in MPL’s application” is appropriately addressed in argument, then that is where the Commission should address it.

19. Following BCFIRB’s response, on April 23, 2023, the Vegetable Commission requested clarity on whether the supervisory process was intended to be *de novo* and its intention to rely on the reasoning of the panel (as a collective) with respect to the substantive merit of its decision and not the idiosyncratic perspective of any individual panel member (or other person). GGFI/Windset objected to the Vegetable Commission’s letter as an improper submission.
20. On April 27, 2023, BCFIRB responded:

It is not necessary to determine the merits of Mr. Ferris’ objection, as these matters were in my view fully addressed in the BC Farm Industry Review Board’s (BCFIRB) letter of April 21, 2023. Specifically, I refer to the confirmation that BCFIRB is required to reach its own conclusions under the Terms of Reference, and as such it will not be bound by the Commission’s decision or the record before it. In addition, BCFIRB clarified that at the oral supervisory hearing, where BCFIRB will hear evidence, the Commission should be prepared to demonstrate that it followed a SAFETI-based process, reached a sound marketing policy-based recommendation, and to explain its process for evaluating new agency applications. It is therefore properly understood as a de novo process that will cure any procedural defects before the Commission.

The April 21, 2023 letter also confirmed that it is for the Commission to determine how it will fulfill its responsibilities under the Terms of Reference. In doing so, BCFIRB does not expect the Commission to put forward the “idiosyncratic perspective” of any specific individual, but rather the institutional perspective of the Commission. If it is of the view that Chair Etsell can assist in that regard, then she can be called as a witness. As the supervisory hearing is set for May 23, 24 and 26, 2023 her earliest attendance is preferable so that other participants can respond to the Commission’s evidence in their presentations. [emphasis added]

21. BCFIRB conducted an in-person supervisory hearing on May 23, 24 and 26, 2023, where the Vegetable Commission, MPL BC, and GGFI/Windset had full participatory rights, called witnesses and questioned participants adverse in interest. Village Farms Canada L.P. participated by oral submission received by videoconference at the hearing. Nine other participants provided written submissions. Hearing participants made written closing arguments.
22. On August 22, 2023, and as per the Terms of Reference, BCFIRB invited all eligible participants to make a supplemental written submission on the

implications, if any, of Chair Donkers' January ruling in the Allegations Review on BCFIRB's approval of MPL BC's agency designation, including the implications of the voluntary reporting requirement agreed to by MPL BC in that process. Those supplementary submissions have been reviewed.

23. In brief, in its September 4, 2023, supplemental submission, Creekside Hothouse Ltd. (Creekside) is supportive of MPL BC and, based on its firsthand experience, believes it has taken the necessary steps to be a constructive member of the BC-regulated vegetable sector, playing an integral role in the continuance of orderly marketing and advancing the BC greenhouse sector nationally. In its September 6, 2023, supplemental submission, the Vegetable Commission reiterated its April 6, 2023, response to BCFIRB's questions to the effect that while there was still consultation underway to develop additional reporting requirements, it did not see the need for any "special" reporting requirements for MPL BC. MPL BC submits that Chair Donker's ruling implies that the actions taken by MPL BC in resolving its civil claim should be taken as a commitment to the regulated greenhouse sector in BC and the specifics of the 18-month reporting requirement are still to be determined.
24. GGFI/Windset submit that MPL BC's commitments were part of a deal made to withdraw its civil claim to advance its agency application; the commitments do not represent a true statement of regret with respect to MPL BC's actions in commencing the bad faith claim. The evidence before BCFIRB is that Mr. Mastronardi still believes he was wrongly treated by the regulated vegetable industry. BCFIRB should have little faith MPL BC intends to follow the enabling legislation and regulations as required by Part XIV of the Vegetable Commission's Consolidated General Orders (General Orders) or that Mr. Mastronardi has changed his view. In its reply submission, MPL BC took issue with this latter aspect as improper, irrelevant and beyond the scope of what the supplemental submissions were intended to address. GGFI/Windset also reiterated their arguments that MPL BC has failed to meet the requirements for agency designation and as such, should not receive its Class 1 licence.
25. Apart from Chair Donkers' ruling, it is important to observe that because of the Allegations Review, BCFIRB's approval process was delayed and followed a lengthier process than usual, including an in-person supervisory hearing. BCFIRB's prior approval function has historically been based on written submissions, following very closely on the Vegetable Commission's recommendation. The unfortunate reality is that in this case, more than a year and a half has passed since the Vegetable Commission recommended that MPL BC receive an agency designation. The implication of this delay and the associated uncertainty is discussed below.

## Issues

26. BCFIRB considered the following questions in this supervisory process:
- a) Did the BC Vegetable Marketing Commission conduct a SAFETI-based<sup>3</sup> process?
  - b) Is the BC Vegetable Commission's decision to designate MPL BC as an agency in the public interest and consistent with sound marketing policy?

## Legal Authorities

27. Under section 8 of the NPMA Regulations, no designation of any agency shall be effective unless approved in writing by BCFIRB.
28. Under section 7.1(2) of the NPMA, BCFIRB may exercise its powers under this section at any time, with or without a hearing, and in the manner, it considers appropriate to the circumstances.

## Analysis

### a) Did the BC Vegetable Marketing Commission conduct a SAFETI-based process?

29. BCFIRB acknowledges the importance of a SAFETI-based process in decision-making. The Vegetable Commission's agency designation application requirements are set out in Part XIV of its General Orders. Applicants are required to submit a detailed package of information meeting the established criteria for agency designation (section 2(6)(a)-(j)). Applications are reviewed by a five-member panel of Vegetable Commission members. Applicants present their application to the panel and, if satisfied that the application should not be summarily dismissed, the panel engages in further consultation with industry stakeholders based on a redacted version of the application. Following the consultation, the panel decides whether to recommend designated agency status based on the established criteria.
30. BCFIRB concludes that the chronology set out in the Vegetable Commission's January 12, 2022 decision is consistent with the process established in its General Orders:
8. On October 8, 2021, MPL BC presented its application to the panel. Following that presentation, the panel decided to engage in further consultation with industry stakeholders through a written submission process. MPL BC was asked to send a redacted version of its application for distribution to stakeholders.

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



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9. On October 13, 2021, the panel circulated MPL BC's redacted application to industry stakeholders. These stakeholders were invited to deliver written submissions by October 25, 2021. Stakeholders were also informed that any written submissions would be provided to MPL BC so that it would have an opportunity to reply to those written submissions by October 29, 2021.

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

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

12. On November 5, 2021, the written submissions from industry stakeholders were provided to MPL BC, which was directed to provide any reply by November 15, 2021.<sup>4</sup>

13. On November 12, 2021, the panel extended the deadline for MPL BC's reply to November 16, 2021. 14. On November 15, 2021, MPL BC submitted its reply to the written submissions received from industry stakeholders.

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

31. Although the Vegetable Commission followed the process set out in its General Orders, procedural fairness concerns were raised in the 12 appeals before BCFIRB and again by GGFI/Windset in a March 31, 2022, letter directed to this supervisory panel. Of particular concern was that the Vegetable Commission's process did not provide an opportunity to make oral submissions nor participate in an oral hearing and that 21 days was insufficient time to make written submissions.
32. Further, in its May 26, 2023 closing submissions to BCFIRB, GGFI/Windset maintained that the Vegetable Commission's timelines did not allow for sufficient participation and further, the Vegetable Commission failed to collect sufficient information.
33. In response to the procedural fairness concerns raised against the Vegetable Commission's process, BCFIRB concludes that the process established in the

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<sup>4</sup> January 12, 2022. BC Vegetable Marketing Commission, "Decision Re: In the Matter of an Application made by MPL British Columbia Distributors Inc. ("MPL BC") for an Order designating it as an Agency", paras. 8-15.

General Orders is consistent with SAFETI principles and sound marketing policy as it provides a reasonable mechanism for the Vegetable Commission to assess a new applicant. While it is open to the Vegetable Commission to conduct an oral hearing, the failure to do so is not procedurally unfair if impacted stakeholders have a meaningful opportunity to be heard. While BCFIRB appreciates timelines were tight, the 21-day response time was not unreasonable in the circumstances. Persons opposed to the designation of MPL BC did make submissions and there was no evidence of any significant prejudice caused by the tight timeline. It could be argued that the tight timelines meant expert evidence could not be obtained, however, no participant tendered expert evidence in BCFIRB's more lengthy process.

34. Even if the Vegetable Commission's process was procedurally unfair, either for failure to conduct an oral hearing, the tight timelines provided, or the failure to collect all necessary information, any such unfairness has been cured by BCFIRB's *de novo* process. Further, BCFIRB responded to the concerns raised in the appeals and in correspondence from the industry stakeholders by committing to a more fulsome process than would otherwise have been held which included additional opportunities for disclosure of documents, oral submissions, written submissions, expert evidence, and cross-examination of witnesses.
  35. As a result of the fulsome process, BCFIRB can make a decision on MPL BC's agency application, and it is unnecessary to remit the application back to the Vegetable Commission for further consideration.
- b) Is the BC Vegetable Commission's decision to designate MPL BC as an agency in the public interest and consistent with sound marketing policy?**
36. As mentioned at the outset, agencies are businesses licenced by the Vegetable Commission to market regulated vegetables and harness the collective power of producers to gain market access. Agencies play a strategic role in assisting the Vegetable Commission to regulate, manage and grow the regulated vegetable sector in an orderly fashion. The decision whether to designate a new agency is a matter of fundamental marketing policy determined in the first instance by the Vegetable Commission and reviewed by BCFIRB.
  37. Currently, there are eight designated agencies licenced to market regulated greenhouse crops in BC. Marketing volumes and operations vary; some agencies primarily service regional markets (such as Vancouver Island) with local production while other larger operations have both domestic and export markets supplied by BC and international production (such as the US and Mexico). The last major greenhouse agency approved was in 2007.
  38. MPL BC's parent company, Mastronardi Produce Ltd. (Mastronardi), is a licenced wholesaler with the Vegetable Commission and has been marketing greenhouse vegetables for BC agencies since 2021. Mastronardi is an Ontario-based business

with a long history in the North American greenhouse industry. In its application at page 9, it states:

...Mastronardi family still operates the largest protected agriculture fresh produce company on the continent, and together with its expanding third party Producer base, grow and sell world-class tomatoes, peppers, cucumbers, lettuce and berries within the domestic Canadian markets and export markets throughout the United States and beyond.

And at page 12:

MPL BC will be able to leverage the entire Mastronardi Produce family affiliates to execute the entire plan from securing the best varieties along with extraordinary distribution capabilities throughout the United States, Canada and abroad.

39. Agency applications are naturally contentious given there are a limited number of licences granted to market BC-regulated greenhouse vegetables. There are several additional factors contributing to the strong positions advanced by participants in this supervisory review. The current major greenhouse agencies have been working together for well over a decade without the prospect of having to develop a cooperative relationship with a newcomer. Further, MPL BC is part of a well-resourced and well-recognized marketing entity in North America, and those opposed raise concerns about its litigious actions to date in BC, including its civil action commenced against the Vegetable Commission and elsewhere.
40. In its decision, the Vegetable Commission summarized the conditions and the threshold an applicant must meet to be granted an agency designation:

In summary, the designation of a new agency should only follow where the panel is satisfied that the presence of an additional agency will not result in price erosion, lead to market confusion or otherwise undermine orderly marketing. Furthermore, the panel must be satisfied that the presence of an additional agency will enhance orderly marketing, promote the development of the industry, and ensure that producer returns are maximized. There is a high threshold that must be satisfied before an application for agency status will be granted.<sup>5</sup>

41. This high threshold is reflected in the ten conditions found in Part XIV of the General Orders which state as follows:

(6) Following consultation with industry stakeholders, the panel will decide whether to grant designated Agency status to the applicant. The panel will grant designated agency status only where it is satisfied that:

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<sup>5</sup> January 12, 2022. BC Vegetable Marketing Commission, "Decision Re: In the Matter of an Application made by MPL British Columbia Distributors Inc. ("MPL BC") for an Order designating it as an Agency", para 21.

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- (a) there is a market requirement for the proposed Agency, and the designation of that Agency would benefit the industry as a whole having regard to the interests of all producers, including those marketing through other Agencies;
  - (b) it would not be in the interests of the industry for the proposed regulated product to be marketed by an existing Agency;
  - (c) the presence of the proposed Agency will not be disruptive to orderly marketing and will not result in increased competition among Agencies on price, which may have a detrimental effect on producer returns;
  - (d) the proposed Agency has demonstrated an understanding of the regulatory system and has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations;
  - (e) there is evidence-based demand for the specific product(s), grouped by end use customer, that are to be marketed by the proposed Agency, which demand is not already satisfied by existing Agencies;
  - (f) there is evidence-based support from multiple licensed Commercial Producers, who are at arms-length from each other, and who intend to market regulated product through the proposed Agency;
  - (g) the primary responsibility for marketing regulated product will rest with the proposed Agency, rather than wholesalers who may market regulated product on behalf of the proposed Agency;
  - (h) the proposed Agency will comply with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province;
  - (i) the proposed Agency will not have a detrimental effect on the delivery allocation and production allocation of existing producers not represented by the proposed Agency; and
  - (j) the proposed Agency has the knowledge, capacity and ability to operate effectively as an Agency.
42. GGFI/Windset advocated for a strict interpretation of section 2(6) of Part XIV of the General Orders, pointing out that its opening words stipulate the "panel will grant designated agency status only where it is satisfied that" all of the factors set out under that subsection are met by an applicant. They argue it would be "inconsistent to read the paragraph as disjunctive, meaning that only one of the ten conditions must be satisfied". To give the provision its proper meaning, GGFI/Windset submitted that "all the factors from (a) to (j) must be met, and there must be sufficient evidence tendered by the applicant proving each condition". GGFI/Windset is critical of the evidence tendered by MPL BC in this process and maintains it falls short of what is necessary to support its application.

43. In brief, GGFI/Windset says:

- (a) There is no market requirement or gap for MPL BC to fill and the evidence is that BC has a healthy, stable and growing greenhouse vegetable industry. Instead of benefitting the industry, adding MPL BC as an agency risks harm.
- (b) There was no evidence that existing BC agencies are unable to market on behalf of producers. Contrary to MPL BC, existing agencies have focused on regional markets to ensure the best net grower returns. They are doing a good job and the industry is “healthy”.
- (c) The evidence is that MPL BC will not be cooperative as it has routinely sued industry participants in BC and elsewhere. The addition of MPL BC may result in further fracturing of agency representation of producers, increased competition between agencies for retail customers and the lowering of the net grower returns.
- (d) MPL BC’s and its parent company’s past litigious practices in BC and elsewhere raise serious concerns as to whether it will follow the General Orders. Its past actions in filing a civil claim and its conduct in the Allegation Review are clear evidence that it has no understanding of the regulatory system in BC nor is compliant.
- (e) MPL BC’s application and Mr. Mastronardi’s testimony both spoke to a special demand for Sunset branded products but there was no evidentiary foundation that this was the case. There is no evidence that there is a market demand not already satisfied by the existing BC products marketed by existing BC agencies.
- (f) The only documentary evidence of multiple commercial producer support are letters from Fresh4 U Farms and Creekside which must be regarded as a single entity as its owners are not at arm’s length from each other, and Millennium Produce is for sale. The letters of support were not updated, and the only current evidence was from Mr. Mastronardi to the effect that they had support from producers who “did not want to rock any of the industry” which should be viewed as suspect.
- (g) This condition does not appear to be an issue as MPL BC has been operating as a wholesaler and now wants an agency licence.
- (h) Related to (d) above, there is no credible evidence that MPL BC intends to comply with the Vegetable Commission’s orders. Further, there is evidence MPL BC will not be candid and forthright with the regulator as despite statements that Mastronardi was “family-owned

but professionally run,” it no longer owns most of the shares but instead, Temasek Holdings, a Singaporean sovereign-wealth fund, has the majority stake. This shareholding transfer was scrutinized by the Competition Bureau of Canada and not disclosed in the application.

- (i) The evidence was that MPL BC intends to strip growers from existing agencies, with proprietary varieties, customer networks and fixed price contracts which will throw existing BC agencies' marketing plans out of balance and negatively impact returns to producers remaining with those agencies. Unlike the Ontario system that Mr. Mastronardi is used to, in BC, the “quota” for tomatoes, peppers, and cucumbers is specific to the producer to ensure orderly marketing. Growers cannot switch back and forth between agencies whenever they like but instead require the Vegetable Commission’s approval.
  - (j) The evidence does not demonstrate MPL BC’s willingness to cooperate with existing agencies. While it may be a capable marketer, it has not demonstrated an understanding of the role and the responsibilities of agencies to work cooperatively in the regulated environment.
44. GGFI/Windset say a large cross-section of growers, representing half the greenhouse production in BC and half the agencies for that production, oppose this agency application. They argue that this should give BCFIRB significant pause, particularly when industry participants must be able to collaborate and work together.
45. MPL BC maintains that it meets all ten conditions in Part XIV as follows:
- (a) The market penetration opportunities available through MPL BC into the US market with an established brand and an in-demand suite of products are not present with existing BC agencies. This was recognized by the Vegetable Commission as one of the reasons it supported MPL BC’s agency application.
  - (b) MPL BC would fill a market need that is not currently being filled by existing agencies through the export market and import replacement. It is uniquely positioned to provide BC producers with meaningful access to national retailers in the US market to grow the export market. It contrasts with the trend of a declining share of BC imports in the US market, under the current agencies. MPL BC will provide US market access to BC producers that current agencies are not able to provide. Existing BC agencies have not demonstrated how they could service the emerging markets, producer growth and access to proprietary varieties proposed by MPL BC.

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- (c) MPL BC intends to target the US market underserved by the existing BC agencies and provide export opportunities to BC producers with minimal disruption. While MPL BC and GGFI/Windset both buy produce from each other, the fact that MPL BC buys a larger amount from GGFI/Windset is evidence of surplus product available that MPL BC can market without disrupting the market. This buying and selling of produce with other agencies is evidence of MPL BC's track record of co-operating and working with other agencies as is its support of GGFI/Windset's agency application in BC. As to the suggestion that MPL BC is litigious, they point to GGFI/Windset's acknowledgement that legal disputes are part of doing business for large companies.
- (d) MPL BC has expressed its commitment to following the Vegetable Commission orders and the applicable legislation and regulations. Mr. Mastronardi testified that MPL BC understands the responsibilities of agencies. Further, since 2021, MPL BC has operated under a wholesale licence with no compliance issues.
- (e) MPL BC points to evidence of the demand for MPL BC's proprietary products, significant US growth opportunities, stagnation in the BC export market and unparalleled access to top retailers. Further, this demand is currently not served by BC's existing agencies.
- (f) MPL BC has support from Creekside, Fresh4U Farms and Millennium Produce and support from the existing agency Country Fresh. The majority of producers opposing MPL BC's application have an agency relationship with GGFI/Windset. No growers in relationships with the other five agencies opposed the application. Agency applications are not a popularity contest and the opposition to MPL BC's agency application is really being led by GGFI/Windset, the current big player in BC controlling half of BC's greenhouse production.
- (g) There is nothing in MPL BC's application to suggest any need or reliance on wholesalers to market its product.
- (h) MPL BC's conduct as a wholesaler and its commitment to following the rules including its voluntary resolution of the civil claim and undertakings to resolve Phase II of the Allegations Review demonstrates a concerted intention on MPL BC's part to be a good industry member.
- (i) MPL BC intends to focus on producer expansion by displacing existing imported products while promoting and expanding the capacity of its growers. As such, there will be no detrimental impact on existing delivery and production allocation. The growers supporting its agency

application have the production MPL BC anticipates needing if it were granted an agency licence.

- (j) MPL BC has significant experience, resources, and knowledge base in its senior leadership team. It has the necessary knowledge, capacity, and ability to effectively run an agency right from the start.

46. To summarize, MPL BC says the evidence supports that designating it as an agency will not cause undue disruption to orderly marketing; is in the public interest and is consistent with sound marketing policy. The evidence supports a growing demand and a waning capacity in the Western US that could be met by BC production if it had the capacity, infrastructure, and wherewithal to service that market growth. They argue that MPL BC's agency designation will benefit the regulated vegetable industry in BC by offering new North American-wide opportunities to BC growers that are not currently available to them.
47. The Vegetable Commission did not respond to GGFI/Windset's statutory interpretation argument. Instead, its position is that, as the first instance regulator, it has the authority to assess each application on its merits against the ten conditions in Part XIV and exercise discretion to grant an agency designation if it is satisfied that the applicant meets the underlying objectives and principles of the designation.
48. While the Vegetable Commission did not engage in the condition-by-condition analysis called for by GGFI/Windset, their rationale for recommending MPL BC be designated an agency is reviewed in paragraphs 23-29 of their decision. The Vegetable Commission found MPL BC's status as a well-established, leading marketer with direct access to key customers throughout North America persuasive. It observed that existing agencies sell product to Mastronardi as a wholesaler precisely because it has direct access to these markets. MPL BC has complied with applicable regulatory requirements for wholesalers and has committed to having a liaison to work with the Vegetable Commission and facilitate continued compliance with the regulatory system. While acknowledging the criticisms that growers are well served within the status quo and the potential for an agency licence to cause significant disruption to existing agencies, the Vegetable Commission notes that its primary obligation is to producers. On balance, the Vegetable Commission concluded MPL BC's application satisfies the conditions in Part XIV of the General Order, stating at paragraph 29:

If the interests of producers can be better served through a new agency, with better and more direct access to key customers throughout North America, then the high threshold established under Part XIV of the General Order can be met, despite the disruption to existing agencies. In short, while it is generally undesirable to permit a proliferation of agencies that might simply compete against each other resulting in price erosion, the Commission must be alive to the possibility that a new agency can have better and more direct access to key markets than existing agencies.



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49. As reflected in BCFIRB's Terms of Reference "...it is the Commission's responsibility as the first instance regulator to demonstrate that it reached ...a sound marketing policy-based recommendation". However, in this supervisory process, BCFIRB must reach its own conclusion as to whether the approval of MPL BC's agency designation is in the public interest and consistent with sound marketing policy.
50. BCFIRB disagrees with GGFI/Windset that this is an exercise in statutory interpretation requiring an assessment of the evidence in support of each of the ten conditions and, in the absence of evidence supporting all ten conditions, an application must fail.
51. BCFIRB supports the approach taken by the Vegetable Commission. Part XIV states the panel will grant designated agency status only where that application satisfies a list of ten conditions. Consideration of an agency application is a balancing exercise, and the panel determines the weight it places on any particular condition. The conditions do not need to be equally weighed. Further, while it may be possible to adduce evidence on some of the conditions (such as producer support), other conditions are forward-looking or prospective in nature and require the panel to make an educated guess, based on the materials reviewed and the consultation conducted, whether the applicant has the requisite sophistication, capacity and intention to effectively carry out its business plan and to operate cooperatively within the regulatory structure (including with other agencies) and in accordance with the General Orders. To some degree, this is an exercise in crystal ball gazing where the panel must look at a fairly limited track record and limited actual evidence and, from that, extrapolate and decide whether or not a particular applicant will successfully fulfill a strategic role and assist the Vegetable Commission with regulating, managing and growing the regulated vegetable sector in an orderly fashion. This is at its core a judgment call made on assumptions and is subject to risk and uncertainties.
52. Based on the materials and evidence tendered in this supervisory process, BCFIRB is satisfied that the MPL BC application satisfies many of the conditions in Part XIV. Conditions (a), (b), (e), (g) and (j) have largely been addressed as MPL BC has demonstrated it is a leading marketer, with direct access to large retailers in markets throughout North America not served by existing agencies. It is trying to move from being a wholesaler to an agency through this process and its business model does not contemplate relying on wholesalers. It is a sophisticated entity that is engaged in marketing in many jurisdictions and has the capacity to operate as an agency subject to the concerns identified below.
53. With respect to condition (c), the Vegetable Commission accepted that the addition of a new agency may be disruptive to other agencies, but determined its primary obligation is to producers who would likely be better served when their product is marketed directly to an agency with access to key North American markets. BCFIRB accepts that the addition of a new agency into the marketplace will

increase competition between agencies, but that disruption alone would not be justification to refuse the application. The real question for BCFIRB is whether granting MPL agency status will improve market access and price for producers across expanding markets or whether it will erode producer returns if agencies compete for the same markets. In its decision, the Vegetable Commission was aware of the possibility that MPL BC's forecasts and projections may prove unrealistic but decided that issuing MPL BC's agency licence was strategic and consistent with sound marketing policy as producers would be better served.

54. While BCFIRB is generally in agreement with the Vegetable Commission that there is a sound marketing policy justification to approve MPL BC's agency designation, BCFIRB has three broad areas of concern regarding MPL BC's:
- a) business plan to displace imported production and expand markets via increasing BC greenhouse acreage (related to condition (a));
  - b) support from multiple arms-length commercial producers (condition (f)); and,
  - c) compliance with the General Orders (condition (d))
55. BCFIRB considers each of these concerns below.

### **Production and Markets**

56. MPL BC explained its plans to expand production and market opportunities for BC producers by displacing imports with BC products and creating greater access to domestic and US markets<sup>6</sup>. Given that Mastronardi has been a licenced wholesaler with the Vegetable Commission since 2021 and given its familiarity with the marketplace, BCFIRB accepts that MPL BC may be able to expand market access for producers if granted an agency designation, despite the contrary views of GGFI/Windset.
57. There does, however, remain the question of where production for these expanded market opportunities will come from. MPL BC provided an ambitious plan for expanding greenhouse acreage in BC to supply these markets as opposed to relying on the movement of producers from existing agencies. It is unclear how MPL BC's acreage growth targets can be achieved given the challenges associated with accessing land not already engaged in greenhouse production. As a result, BCFIRB sees a potential for MPL BC's agency designation to result in significant disruption among existing agencies.

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<sup>6</sup> May 26, 2023. Closing Submissions of MPL British Columbia Distributors Inc, p.6.

58. In its decision, the Vegetable Commission accepted that designating MPL BC as an agency could create significant disruption to existing agencies, but felt this risk was outweighed by the anticipated benefits for producers.

### **Producer Support**

59. The purpose of agencies is to harness the collective power of multiple producers to gain market access. Reflecting this purpose, condition (f) requires applicants to demonstrate support from multiple, licensed, arms-length commercial producers that intend to market regulated products through the proposed agency. The Vegetable Commission did not expressly comment on MPL BC's support from commercial producers in its decision. In this process, GGFI/Windset disputes that MPL BC has met condition (f).
60. MPL BC provided letters of support to the Vegetable Commission from Fresh4U Farms, Creekside and Millennium Produce indicating their intention to sell products through MPL BC if it were granted an agency licence.
61. A January 31, 2017, BCFIRB supervisory decision confirmed that "...the very nature of an agency in the regulated marketing system is that it exists to market real production on the behalf of multiple producers – to represent the interest in the marketplace of a group of growers"<sup>7</sup>. [emphasis added]
62. The evidence in the supervisory hearing confirms that the owners of Fresh4U Farms and Creekside are husband and wife. As such, BCFIRB does not consider that these two producers are at arms-length from one another and has treated this as support from one commercial producer for the purposes of this decision. As for Millenium Produce, the evidence was that the company is currently for sale and its future involvement in the regulated greenhouse vegetable sector is unclear.
63. As MPL BC has only demonstrated support from what is essentially one commercial producer, BCFIRB is not satisfied that, if granted an agency licence, MPL BC would be fulfilling the intent of agencies to harness the collective marketing power of multiple commercial producers from the outset.
64. However, we acknowledge that a considerable amount of time has passed between the Vegetable Commission's decision in January 2022 and BCFIRB's oral hearing in May 2023. One participant suggested that MPL BC could have submitted new and updated letters of support to the Vegetable Commission or BCFIRB. Further, the Vegetable Commission could have requested that MPL BC update its application. However, these circumstances are somewhat unique in that MPL BC has been under a cloud of suspicion since the commencement of the Allegations Review. It is understandable why supportive growers may have chosen to stay silent about their intentions until such time as the cloud lifted and there was

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<sup>7</sup> British Columbia Farm Industry Review Board, In the Matter of the Natural Products Marketing (BC) Act and the Future of Regulated Marketing, Agency Designation, January 31, 2017, paras. 91-92.

more certainty around MPL BC's prospects. In these circumstances, BCFIRB concludes that MPL BC's failure to voluntarily update its application should not prejudice their agency application, however, the uncertainty raises concern for BCFIRB as addressed in the following section.

65. While BCFIRB could have directed MPL BC to provide updated letters of support before receiving designated agency status, this would have extended what has already been a long delay and a lengthy process. BCFIRB is satisfied that other mechanisms exist to address any uncertainty.

## **Compliance**

66. The Vegetable Commission decision draws no conclusions on MPL BC's ability to operate in compliance with the General Orders beyond noting that MPL BC has been a compliant licensed wholesaler and it has expressed willingness to appoint a liaison to the Vegetable Commission to facilitate continued compliance.
67. However, MPL BC's history with BC's regulated market system goes well beyond compliant operation as a licensed wholesaler. Further, unlike wholesalers, agencies have a central role to play in orderly marketing and must be accountable for the legislated authorities delegated to them.
68. On August 21, 2023, BCFIRB invited eligible participants to make a supplemental written submission on the implications, if any, of Chair Donkers' ruling on the designation of MPL BC as an agency, including the implications of the voluntary reporting requirement agreed to by MPL BC in that process. In its September 6, 2023, supplemental submission, the Vegetable Commission did not see the need for any "special" reporting requirements while acknowledging that more consultation may produce further reporting requirements for all agencies.
69. MPL BC reiterated its commitment to voluntary quarterly reporting to BCFIRB for an 18-month period and to working with BCFIRB to establish reporting criteria that provide comfort that licensing and regulatory requirements are being complied with. Such reporting should align with existing and future reporting requirements (and avoid duplicity of reporting), be imposed for licensing and regulatory compliance purposes and be confidential. Additional quarterly reporting requirements could identify the growers for whom it is marketing regulated product, the production acreage of regulated product marketed for each grower and confirm compliance with the Vegetable Commission's General Orders and policies relating to delivery allocation and pricing.
70. Creekside believes the 18-month heightened reporting requirement is long but acknowledges MPL BC's excellent reporting and accounting processes. It provides clear, detailed communications and team members are readily available.

71. GGFI/Windset maintain that from an objective view of the evidence, Mr. Mastronardi and MPL BC continue to lack trust in both the Vegetable Commission and its staff which cannot be supported in the regulated vegetable industry in BC. BCFIRB should have little faith that MPL BC intends to follow the Vegetable Commission's General Orders, the enabling legislation, or the regulations. It would be inappropriate and contrary to the terms of the General Orders for BCFIRB to impose terms and conditions on MPL BC as a means of enabling it to meet the requirements of Part XIV as an applicant; either it meets the required factors at the time of its application, or it does not. In the case of MPL BC, it does not.

### **Conditional Approval**

72. BCFIRB has identified concerns which could justify a rejection of MPL BC's agency designation. These include the potential for MPL BC's business plan to disrupt markets and production, its limited commercial producer support and its ability to comply with licensing and regulatory requirements.
73. BCFIRB has also reviewed Mr. Mastronardi's letter of January 18, 2023, and heard direct evidence from him during this supervisory review. Notwithstanding the resolution of the Allegations Review for MPL BC, we have a continued concern about MPL BC carrying out the fiduciary obligations of an agency in light of the very serious allegations that were made in its civil claim which Chair Donkers concluded were based largely on rumour, speculation, and innuendo. That concern was not fully addressed by Mr. Mastronardi in his evidence before us.
74. However, BCFIRB agrees with the Vegetable Commission that there is the potential for MPL BC to be a significant benefit to the BC greenhouse industry by creating a direct connection between producer and agency and expanding available markets for premium products throughout North America. Further, concerns related to future performance – e.g., how MPL BC will grow, whether it will strip producers from other agencies, and its willingness to comply with the regulatory requirements cannot be demonstrated by evidence. Such considerations turn on MPL BC's future intentions and future conduct.
75. BCFIRB has concluded that any uncertainty or concerns around how MPL BC will carry out its responsibilities as an agency, or otherwise conduct itself in the BC market, are best addressed by issuing a conditional or probational Class 1 agency licence which requires MPL BC to demonstrate progress on its growth projections as set out in its business plan with actual evidence of displacement of existing imported product and its promotion of and expanding capacity for its growers through expanded markets for BC greenhouse product. MPL BC would also need to show evidence of its continued cooperation with other agencies and the Vegetable Commission and compliance with the General Orders through quarterly reporting. It is only if MPL BC completes its probationary period successfully,

including to the satisfaction of the Vegetable Commission, that BCFIRB will approve its Class 1 agency designation.

76. Accordingly, BCFIRB is prepared to grant MPL BC a probationary agency designation with the conditions set out below.
77. In its January 18, 2023, letter to Chair Donkers, MPL BC committed to quarterly reporting to BCFIRB for an 18-month period should BCFIRB approve its agency designation. No reporting criteria or framework was put forward in that letter, and the Vegetable Commission has provided no further guidance, stating only that MPL BC should be subject to the same reporting requirements that apply to all agencies.
78. Given the nature of BCFIRB's outstanding concerns and that the Vegetable Commission's agency accountability framework remains incomplete<sup>8</sup>, MPL BC must satisfy BCFIRB - through regular reporting for an 18-month period, or until BCFIRB orders otherwise - of its ongoing commitment to orderly marketing within the regulated greenhouse industry on the terms set out below.

## Decision

79. BCFIRB approves the designation of MPL BC as a designated agency as per the Natural Products Marketing (BC) Act Regulations section 8 for a probationary period, that being the 2024-2025 growing season.
80. As a condition of the probationary licence, MPL BC is required to appoint a senior executive as Vegetable Commission liaison within one month of the decision.
81. As a further condition of the probationary licence, MPL BC is required to report to BCFIRB quarterly<sup>9</sup>, copied to the Vegetable Commission, on the following matters:
  - a. identity of all growers for whom it is marketing regulated product and report the production acreage of regulated product marketed for each grower;
  - b. Identify any production referenced above that has displaced imported production and expanded markets for BC growers;
  - c. Identify any production referenced above which has displaced production and markets for BC agencies;

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<sup>8</sup> BCFIRB direction issued from its December 22, 2020, decision "In the matter of the Natural Products Marketing (BC) Act and the 2019-20 Vegetable Review".

<sup>9</sup> The first report to BCFIRB is due December 31, 2023, with subsequent reports due March 31, 2024, June 30, 2024, September 30, 2024, December 31, 2024, and March 31, 2025.

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- d. confirm compliance with the Vegetable Commission's General Orders and policies relating to delivery allocation and pricing and identify any allegations or findings of non-compliance.
82. Failure to report to BCFIRB on the schedule set out above could result in the cancellation of MPL BC's probationary licence.
83. This is in addition to, and does not supplant, the Vegetable Commission conducting a review of MPL BC's agency license in accordance with section 3 of Part XIV of the General Orders and in advance of the 2024-25 growing season.
84. A decision of the Vegetable Commission to approve MPL BC as a designated agency for the 2024-25 growing season must be approved in writing by BCFIRB.

Dated at Victoria, British Columbia, this 11<sup>th</sup> day of October, 2023.



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Pawan Joshi  
**Presiding Member**



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Al Sakalauskas  
**Vice-Chair**



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Wendy Holm  
**Member**