



BC VEGETABLE MARKETING COMMISSION

DECISION RE:

**IN THE MATTER OF AN APPLICATION MADE BY
CFP MARKETING CORPORATION ("CFP")
FOR AN ORDER DESIGNATING IT AS AN AGENCY**

BEFORE: The British Columbia Vegetable Marketing Commission
Debbie Etsell, Chair
John Newell, Member
Armand Vander Meulen, Member
Blair Lodder, Member

DATE: April 11, 2022

Introduction

"Designated agencies" are a critical component of the regulatory system for vegetables in British Columbia. They are the means by which the Commission achieves its main policy objective of maximizing producer returns through centralized, coordinated marketing of regulated product. The appropriate agency structure for the marketing of regulated vegetables contributes to orderly marketing by ensuring market growth opportunities for producers, and a steady supply of BC product for consumers.

Under the *Natural Products Marketing (BC) Act* (NPMA), the Commission can delegate authority to designated agencies to support the purposes of regulated marketing. Among other things, the Commission is empowered to: (a) regulate the time and place at which and to designate the agency through which a regulated product must be marketed; (b) determine the charges that may be made by a designated agency for its services; (c) set the prices, maximum prices, minimum prices or both maximum and minimum prices at which a regulated product or a grade or class of it may be bought or sold in British Columbia or that must be paid for a regulated product by a designated agency and to set different prices for different parts of British Columbia; and (d) authorize a designated agency to conduct pools for the distribution of all proceeds received from the sale of a regulated product and to require that designated agency to distribute the proceeds of sale, after deducting all necessary and proper disbursements, expenses and charges, so that each person receives a share of the total proceeds in relation to the amount, variety, size, grade and class of a regulated product delivered by the person and to make those

payments until the total net proceeds are distributed. Every designation of an agency must be approved in writing by the BC Farm Industry Review Board (BCFIRB).

As a result of the agency review process that commenced in 2018, it became apparent to the Commission that its current orders regarding the designation of new agencies, and the review of existing agencies, were deficient. In the Commission's view, the orders then in effect did not clearly articulate the Commission's policy objective of promoting the interests of the industry as a whole through coordinated marketing that will maximize the returns of all producers. Furthermore, it was the Commission's view that the orders then in existence contained too many ambiguities. Consequently, On March 15, 2021, the Commission passed Amending Order 54, which implemented comprehensive changes to the Commission's orders regarding the designation of new agencies, and the review of existing agencies.

On June 1, 2021 the Commission received an amended application for a NEW Class 1 designated agency licence (pursuant to Amending Order 54) from CFP for the marketing of regulated vegetables.

On August 20, 2021, September 15, 2021 and September 24, 2021, the BCFIRB made certain orders and directions concerning the composition of the panel that is to address CFP's application. In accordance with those orders and directions, a panel of the Commission was struck to review the application. The panel members consist of Debbie Etsell (Chair), John Newell (Member), Armand Vander Meulen (Member) and Blair Lodder (Member).

On September 27, 2021, the panel met to conduct a preliminary review of CFP's application. The panel met again on November 3, 2021 to conduct a more thorough examination of the application. At that meeting, the panel decided to invite CFP to present its application, and to provide answers to certain questions, on November 16, 2021.

Because of the Sumas Prairie floods, the date for CFP's presentation was adjourned. Ultimately, CFP attended before the panel on December 3, 2021 to present its application.

Following CFP's presentation, the panel met to deliberate on the application on the following dates: January 28, 2022, March 25, 2022, March 28, 2022 and March 29, 2022.

Analysis

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.

In its January 1, 2017 Supervisory Decision, the BCFIRB said:

7. The specific rules governing agencies differ depending on the needs of the particular regulated industry. What is common across all regulated industries, however, is the agencies are licensed entities whose purpose is to market regulated product on behalf of registered producers. **Agencies are licensees whose regulatory role is to harness the collective power of producers to enhance market access for regulated products. They minimize burdens on each producer regarding finding outlets for sales of their delivery allocation (a mechanism for producers to share market access). Agencies also store, ship, and label product for producers. For consumers, they help ensure a steady supply of BC product by contributing to orderly marketing. In all this, one of their key roles is to grow the industry by looking for new markets. As was noted in the March 31, 2016 Workshop Report that was part of the current process, at p. 4: “Agencies competing for the same buyer with the same product do little, if anything, for Producers or Buyers”. Agencies thus play both a key front line role, and a larger strategic role, in assisting the Commission to regulate, manage and grow the industry in an orderly fashion:** see generally January 7, 2013 Supervisory Decision, paras. 34 - 38; see also the Commission’s September 21, 2015 Stakeholder Engagement Discussion Paper, pp. 4 - 6. (emphasis added)

Significantly, the BCFIRB’s comments concerning the role of agencies and the undesirability of agencies “competing for the same buyer” reflect an awareness of the natural tension that arises from having multiple agencies. On the one hand, multiple agencies may provide some resiliency and choice for producers. On the other hand, if these agencies are left to their own devices, they might erode producer returns by competing against each other on price in the same market space. In the greenhouse sector, this tension was the subject of certain decisions and directions made by the BCFIRB in the *Global Greenhouse* matter.

In *Global Greenhouse Produce Inc. et. al. v. BCMB et. al.*, 2003 BCSC 1508, Drost, J. quoted from the Commission’s recommendations to the BCFIRB, as follows:

31. BCHH is currently the sole designated marketing agency for regulated greenhouse vegetables in Districts I & II. Hot House and its tomato producers have been going through a difficult financial period of late, largely as a result of the significant preliminary duty impose upon it by the U.S. Department of Commerce....It was clear from the evidence presented to the Panel that at least some growers remain largely dissatisfied with the manner in which BCHH has been operating as a marketing agent, and that these growers wish to have an alternative....Simply put, they do not want to do business with BCHH any longer and they seek the opportunity to market their product more effectively. They may or may not succeed in this regard, but they want to try.

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33. The Panel has also considered the impact of a second agency designation on the industry as a whole at this time. Concerns were expressed to the Panel that

the existence of a second seller of B.C. product would result in price erosion in the market place. The Panel recognizes that Globals (sic) proposed marketing plan will result in additional access to markets and enhanced sales opportunities. The Global application attempts to deal with these issues by committing to market the product outside BCHH's traditional markets of western Canada and the I-5 Corridor. BCHH expressed doubt that any such commitment would be effective.

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35. In the result, the Panel has concluded that, in light of the circumstances in which the hothouse industry is currently operating it is an appropriate time to provide producers with an alternative to marketing product through BCHH.... (emphasis added)

At the time of the *Global Greenhouse* case, the Commission acted to address the detrimental impact of inter-agency competition in the greenhouse sector by imposing strict territorial limitations. The necessity for regulatory mechanisms to protect against price erosion from inter-agency competition is reflected in the BCFIRB's January 1, 2017 Supervisory Decision, as follows:

72. The Commission's reasons noted that these criteria were being applied in a broader context that considered the appropriate marketing options for growers (while it is beneficial to have multiple agencies, too many agencies can lead to market confusion and undermine orderly marketing), the local supply for a proposed agency, an agency's ability to manage its delivery allocation and plan for positive growth as opposed to merely competing in existing markets and the Commission's reliance on the timely market intelligence provided by agencies to the Commission when the Commission establishes minimum price.

85. Despite the criticisms that some, including the agencies, have leveled over the years about the regulatory system, all of them support ongoing regulation as being in the best interests of the industry – as supporting the fundamental goals of regulated marketing, which ensures the equitable and orderly marketing of natural products, which helps mitigate the extreme and sometimes destructive swings in production and price that can take place absent regulation. These extreme swings can be detrimental to producers and the value chain, including consumers. BCFIRB decided, in our June 15, 2016 supervisory decision letter that “regulation of the Vancouver Island vegetable industry continues to represent sound marketing policy”.

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.

These considerations are expressed in more detail in Part XIV of the Commission's General Order. The relevant provisions are as follows:

1. (3) Applications for designated Agency status must include a detailed business plan addressing:
 - (a) the structure of the proposed Agency, including:
 - (i) the identities of the principals of the proposed Agency;
 - (ii) the identities of all shareholders and other Persons with a direct or indirect financial interest in the proposed Agency; and
 - (iii) particulars of the management and staff of the proposed Agency, including their marketing experience and skill level.
 - (b) commencement and operational capacity, including:
 - (i) the date that the applicant proposes to commence operations;
 - (ii) particulars of the facilities from which the proposed Agency will operate;
 - (iii) particulars of any other facilities that may be owned or operated by the proposed Agency including grading, packing, warehouse and storage facilities; and
 - (iv) particulars of the applicant's capacity to market regulated product, the methods by which this is to be achieved, and the applicant's short and long-term objectives in relation thereto;
 - (c) access to regulated product, including:
 - (i) particulars of how the applicant intends to secure arrangements with Producers who will ship regulated product to the proposed Agency, and the dates on which such arrangements are expected to be secured;

- (ii) a copy of the applicant's proposed GMA in a form that complies with the minimum standards established by the Commission;
 - (iii) copies of all letters of commitment obtained from arms-length Producers who wish to market regulated product through the proposed Agency; and
 - (iv) the amount of existing storage crop delivery allocation (tons) and/or greenhouse production allocation (m2) that is proposed to be transferred to the proposed Agency;
- (d) marketing strategy and framework, including;
- (i) particulars of the applicant's target market, including the type of regulated product intended to be marketed, the total amount of regulated product to be marketed by the applicant, and the total amount of regulated product to be received from each Producer who will market through the proposed Agency;
 - (ii) the applicant's assessment of market supply and demand, including an assessment of market supply and demand in areas where the proposed Agency intends to market regulated product;
 - (iii) particulars of the applicant's intended market placement of delivery and production allocation by target market category as defined by the Commission;
 - (iv) particulars of the applicant's intended application of delivery and production allocation towards the domestic (BC) market and towards the export (external to BC) markets; and
 - (v) particulars of the applicant's intended volumes of sales packed for end use and in bulk for further processing and/or repacking;
 - (vi) the names and contact information of proposed customers of the proposed Agency; and

- (vii) copies of all letters of commitment obtained from proposed customers of the proposed Agency;
 - (viii) particulars of any commercial agreements with third parties that may assist with transportation, grading, packaging, storage or marketing on behalf of the proposed Agency;
- (e) operational procedures, including:
- (i) particulars of quality assurance procedures relating to:
 - A. food safety, including an acceptable trace-back and recall system;
 - B. grade compliance;
 - C. handling and distribution;
 - D. record keeping; and
 - E. any label or product identification system;
 - (ii) particulars of the manner in which shared market access will be managed among the proposed Agency's Producers, including the method by which proceeds from sales would be distributed.
 - (iii) particulars of the manner in which shipments of regulated storage crops will be monitored in relation to delivery allocation, and the proposed Agency's production plan;
- (f) financial viability and risk management, including:
- (i) an asset statement;
 - (ii) a breakdown of all disbursements, expenses and charges to be deducted from sales proceeds on payment to Producers;
 - (iii) forecasts of anticipated earnings, cash flow and sales;

- (iv) copies of all letters of reference obtained from financial institutions supporting the proposed Agency;
 - (v) a copy of a valid business licence;
 - (vi) a copy of a performance bond, letter or credit, or particulars of a contingency plan addressing how Producers will be paid for regulated product in the event that the Agency encounters financial difficulties;
 - (vii) proof of product, third party, and director liability insurance;
- (g) advancement of Producer and industry interests, including:
- (i) particulars of how the proposed Agency would prioritize the marketing of regulated product;
 - (ii) particulars of how the proposed Agency would encourage collaboration in Agency decision-making with their Producers regarding the production, transportation, packaging, storage, and marketing of regulated vegetables; and
 - (iii) details on how the proposed Agency would comply with all applicable minimum pricing orders in relation to sales occurring both within and outside the Province.
- (4) Applications for designated Agency status must also:
- (a) demonstrate to the satisfaction of the Commission that the applicant's primary business objective is the marketing of regulated product in a manner that benefits the Commission and the British Columbia industry as a whole;
 - (b) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the regulatory requirements and limitations imposed on Agencies under the Commission's General Orders;
 - (c) demonstrate to the satisfaction of the Commission that the applicant has knowledge and understanding of the market

access system established under the Commission's General Orders for all applicable regulated products;

- (d) demonstrate to the satisfaction of the Commission that the applicant has sufficient knowledge and ability to service markets in British Columbia and Canada;
- (e) demonstrate to the satisfaction of the Commission that the applicant has the capacity to directly market regulated product without excessive reliance on wholesalers, or third-party grading, packing, warehouse and storage facilities, or that the applicant will otherwise make arrangements with such third parties in a manner that:
 - (i) would retain the proposed Agency's control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user;
 - (ii) would not expose the industry to unnecessary food safety risk;
 - (iii) would not be disruptive to orderly marketing;
- (f) demonstrate to the satisfaction of the Commission that the applicant has taken all reasonable steps to meet with, and seek the cooperation of, existing Agencies, and provide particulars of the result of such initiatives.
- (g) provide a rationale in support of the application with specific reference to the following:
 - (i) existing and anticipated requirements of the market that could be serviced by the proposed Agency;
 - (ii) how the proposed Agency would benefit producers shipping through that Agency;
 - (iii) how the proposed Agency would benefit the industry as a whole; and
 - (iv) the impact that the proposed Agency would have on existing designated Agencies.

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2. (4) Following the applicant's presentation, the panel may summarily dismiss the application if it is satisfied that it would not be in the interests of the industry to grant designated Agency status.
- (5) Where the panel has decided that the application should not be summarily dismissed, the panel will engage in further consultation with industry stakeholders concerning the application. The applicant will be given an opportunity to prepare a redacted version of the application for review by industry stakeholders, provided that only information that is confidential, proprietary or constitutes a trade secret may be so redacted from the application reviewed by the panel.
- (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:
 - (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.

The panel has carefully considered CFP's application. However, it is not possible to refer to the substantive content of CFP's application in any detail in these reasons, given the stringent restrictions imposed by CFP regarding disclosure of any information included in its application. In its covering letter dated May 31, 2021, CFP states:

Please understand that the information contained in the application is **CONFIDENTIAL** as it contains business proprietary data and plans and is **explicitly supplied in confidence**. Disclosure of the information contained in the application to third parties would be harmful to the business interests of CFP Marketing Corporation, including the manner contemplated under s.21 of the *BC Freedom of Information and Protection of Privacy Act* ("FIPPA").

Except for the Executive Summary **this application cannot be discussed with or shown to any person who is connected to any other field/storage crop vegetable marketing agency including staff, directors, shareholders or those shipping to that agency.**

If the BC Vegetable Marketing Board at any point in time intends to disclose under *FIPPA* any of the information contained in the application, CFP Marketing Corporation requires that it be provided with advance notice of the intended disclosure in compliance with s.23 of *FIPPA*.

For the reasons that follow, the panel is satisfied that it would not be in the interests of the industry to grant designated Agency status to CFP. However, given the stringent restrictions

against disclosure of any of the substantive content of its application, the panel is essentially precluded from relating these reasons to the specific content of CFP's application.

Lack of Evidence, Clarity and Particulars

It is the panel's view that CFP's application is largely aspirational in nature, and that it is not sufficiently supported by evidence, clarity and particulars.

For example, in its executive summary, CFP states that it "intends to introduce concepts that will benefit growers including new ideas for branding and marketing, working with retailers on in store promotions". This statement is lacking in both substance and particularity. While the panel is constrained from disclosing the substance of CFP's application beyond the scope of its executive summary, it is fair to say that this statement is typical of the kind of amorphous, aspirational statements made throughout the application.

Though it is the panel's view that CFP's application is generally lacking in substance and particularity, some aspects of the application warrant specific comment.

Reliance on Wholesaler

It is useful to note again that paragraph 1(4)(e) of Part XIV of the Commission's General Order provides as follows:

Applications for designated Agency status must also:

- (e) demonstrate to the satisfaction of the Commission that the applicant has the capacity to directly market regulated product without excessive reliance on wholesalers, or third-party grading, packing, warehouse and storage facilities, or that the applicant will otherwise make arrangements with such third parties in a manner that:
 - (i) would retain the proposed Agency's control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user;
 - (ii) would not expose the industry to unnecessary food safety risk;
 - (iii) would not be disruptive to orderly marketing;

It is reasonable to infer from CFP's application that it intends to rely on a wholesaler to market at least some regulated production. However, it is impossible to discern from the application the actual extent to which CFP would rely on a wholesaler to market regulated product. This is critical information, and the applicant's inability to clearly address this point is cause for concern. From a policy perspective, the maximization of producer returns is enhanced by the minimization of

reliance on wholesalers. The Commission expects that the agency should be primarily responsible for marketing regulated product “without excessive reliance on wholesalers”. Whenever an agency relies on a wholesaler to market regulated product, additional costs and inefficiencies are introduced. Further, wholesalers are not subject to the same kind of stringent oversight that is applicable to agencies. When a wholesaler performs the functions that are expected to be performed by an agency, this regulatory oversight is compromised. Finally, there is no detail in the application on how the off-loading of marketing responsibilities to a wholesaler would “would retain the proposed Agency’s control throughout the marketing channel and permit the proposed Agency to be responsive to the changing needs and desires of the end-user”.

Support of Retailers

No real detail was provided about CFP’s unique marketing advantage with respect to retailers. Only one letter of support was provided by a small retailer. CFP expresses its intention to maximize direct sales to retail grocers, and states that it anticipates that the majority of its sales will be made directly to retailers. However, this statement is aspirational in nature and was not supported by clear evidence.

Though CFP points to experience marketing unregulated vegetables to certain retailers, there is nothing in the application that would support the notion that it is better positioned in relation to those retailers than existing agencies. In this respect, it is the panel’s view that CFP’s application is premised, at least in part, on the notion that the addition of another designated agency is *inherently beneficial*, because it would provide an additional option for both growers and customers. The panel does not agree. The Commission’s primary function is to facilitate orderly marketing through centralized, coordinated marketing. Centralized marketing, through a limited number of selling desks, is the very means by which grower returns are maximized under the regulatory system administered by the Commission. The decentralization of marketing as an end to itself will not serve that policy objective, and indeed, is counter-productive to it. This is not to suggest that there is no scope for additional agencies. However, there must be evidence showing how the introduction of a new agency would benefit the industry as whole despite further decentralization of marketing. The panel is not satisfied that CFP has met that threshold.

Marketing Plan

CFP’s marketing plan is vague. New packaging, customer education and field technology do not guarantee sales contracts. The application did not identify actual sales channels and customers with sufficient particularity, with the exception of one small retailer as noted above.

CFP’s stated objective is to displace imported product. However, with the notable exception of reliance on a wholesaler (which is problematic for the reasons discussed above), the means by which this objective is to be pursued was not supported by a sufficiently detailed, evidence-based plan.

Support of Producers

CFP's application did not initially identify by name any producers in support of its application (with one exception), and it claimed that producers were unwilling to identify themselves for fear of repercussions from the industry. When asked to supply this information, CFP did provide the names of some of its proposed producers. Nevertheless, it is evident that there would be one main producer. No letters of support from producers were submitted with the application. CFP claims that there are other producers who support the application, but was unwilling to provide evidence, even on a confidential basis.

The panel is also concerned that the main proposed producer is currently licensed as "Class 3". There has been little evidence demonstrating this producer's ability or willingness to follow all applicable regulatory requirements, given that it had elected not to produce regulated storage crops since the issuance of that Class 3 licence, at least until the last season. However, this crop did not make it to market.

Support of Agencies

CFP's application did not provide evidence of any initiatives to contact other agencies in order to solicit support support for its application. Further, CFP did not provide a detailed plan addressing how it would work towards collaborating with other agencies.

Decision

After due consideration, the panel has decided to summarily dismiss CFP's application pursuant to subsection 2(4) of Part XIV of the Commission's General Order. The panel is satisfied that it would not be in the interests of the industry to grant designated Agency status to CFP.

It is the panel's considered view that this decision reflects a principles-based approach to supervision and regulation. This principled approach has been defined by the BCFIRB as six principles collectively referred to as the "SAFETI" principles:

Strategic: The decision reflects the panel's identification of key opportunities as well as systemic challenges. Because centralized marketing is the primary mechanism by which grower returns are maximized, the panel is cognizant that new agencies should not be admitted unless there is evidence showing how the introduction of a new agency would benefit the industry as whole despite further decentralization of marketing. The panel is not satisfied that CFP has met that threshold.

Accountable: The panel has maintaining legitimacy and integrity by discharging its responsibilities according to the detailed criteria for new agency applications published in Part XIV of the General Order.

Fair: The panel has ensured procedural fairness by providing the applicant with an opportunity to craft an application in response to the criteria set out in Part XIV of

the General Order, and by providing an opportunity for CFP to present its application to the panel.

Effective: The high threshold for the grant of an agency designation, as well as the process by which such applications are to be made, are both clearly defined in Part XIV of the General Order. The Commission's expectations are therefore clearly defined for the applicant.


Transparent: The panel has taken all appropriate measures to ensure that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed.

Inclusive: The panel has taken all appropriate steps to ensure that appropriate interests are considered.

Any person aggrieved or dissatisfied with this decision may appeal this decision to the BCFIRB within 30 days from the date of this decision.

DATED AT SURREY, BRITISH COLUMBIA, THIS 11TH DAY OF APRIL 2022

BRITISH COLUMBIA VEGETABLE COMMISSION



Debbie Etsell, chair