

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

**IN THE MATTER OF THE *NATURAL PRODUCTS MARKETING (BC) ACT* AND
A REVIEW OF A PROBATIONARY AGENCY DESIGNATION
AND CERTAIN AGENCY APPLICATIONS**

August 14, 2024

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General Background

1. On June 24, 2024, the British Columbia Vegetable Marketing Commission (the “Commission”) gave notice of its intention to conduct a review of the Probationary Agency Designation granted to MPL British Columbia Distributors Inc. (“MPL”) by the British Columbia Farm Industry Review Board (the “BCFIRB”) on October 11, 2023, and to review the new agency applications submitted by Mucci International Marketing Inc. (“Mucci”) on May 31, 2024, and Jem-D International dba Red Sun Farms (“Red Sun”) on May 31, 2024.
2. Among other things, the Commission’s Notice of Proceedings described the anticipated process and next steps, as follows:

The Commission anticipates that its review will proceed as follows:

1. A five-member panel of Commission members will be selected to review MPL’s probationary agency designation, as well as the applications for agency designations made by Red Sun and Mucci. MPL, Red Sun and Mucci will be provided with an opportunity to comment on the composition of the panel.
2. Once established, the panel will commence with preliminary consideration of the applications for agency designations submitted by Red Sun and Mucci. If either or both of those applications are not summarily dismissed by the panel in accordance with section 225 of the General Order of May 29, 2024, the panel will thereupon engage in concurrent consultation with industry stakeholders concerning:
 - (a) the application of Red Sun (provided that it has not been summarily dismissed);
 - (b) the application of Mucci (provided that it has not been summarily dismissed); and
 - (c) the probationary agency designation issued to MPL.

To that end, any materials submitted by Red Sun, Mucci and/or MPL will be circulated to industry stakeholders subject to any redactions as may be necessary to protect information that is confidential, proprietary or that constitutes a trade secret.

3. Following consultation with industry stakeholders, the panel will decide the following issues concurrently:
 - (a) whether to grant agency status to Red Sun, subject to the approval of the BCFIRB;
 - (b) whether to grant agency status to Mucci, subject to the approval of the BCFIRB; and
 - (c) whether to remove the conditions imposed by the BCFIRB against MPL's probationary licence, and whether to grant agency status to MPL for the period following March 1, 2025, subject to the further approval of the BCFIRB.

3. In accordance with the Notice of Proceedings, MPL, Red Sun and Mucci were given an opportunity to comment on the composition of the panel. Having taken those submissions into account, a panel was struck consisting of Derek Sturko (Chair), Craig Evans (Vice-Chair), Paul Guichon (Member), Hugh Reynolds (Member) and Natalie Veles (Member).

4. On June 27, 2024, the Commission passed Amending Order 1 and the Agency Order. Amending Order 1 repealed a substantial number of provisions from the General Order of May 29, 2024. This was done for two reasons. First, there were a number of provisions in the General Order that were not necessary, or that otherwise addressed matters properly expressed outside the General Order. These were permanently removed from the General Order because the Commission concluded that their continued presence could give rise to interpretational issues. Second, Amending Order 1 repealed most of the provisions in the General Order that relate to Agencies. This was done so that the Agency provisions could be redrafted and expressed with greater precision in the new Agency Order.

5. By emails dated July 2, 2024, the Commission wrote to Mucci and Red Sun so that each would have an opportunity to revise and/or supplement their applications as a consequence of Amending Order 1 and the Agency Order.

Submissions Regarding Process

6. On June 28, 2024, the Commission received a letter from MPL's legal counsel expressing various positions with respect to the process described in the Notice of Proceeding. In summary, MPL argued that the BCFIRB's October 11, 2023 decision (as subsequently amended on October 20, 2023) does not require the Commission to determine anew whether MPL should be designated as an agency, or to "re-do" its

previous decision with respect to agency designation or the process undertaken to arrive at that original decision. Consequently, MPL argued that this process should be informed by the following:

- “1. the Commission need not undertake a “re-do” of the agency designation process;
 2. the Commission need only determine the following two issues:
 - a. whether MPL BC has satisfied the concerns outlined in paragraph 75 of the Decision; and
 - b. whether to remove the probationary conditions on MPL BC’s agency licence and recommend to BCFIRB the approval of MPL BC as a designated agency;
 3. to determine the issues identified above, the Commission may exercise its authority under sections 128-129 of the General Orders as it determines appropriate to the circumstances; and
 4. in the circumstances, the Commission should exercise its authority to:
 - a. provide MPL BC an opportunity to be heard to present its current operations under its probationary agency licence and to address the concerns in paragraph 75 of the Decision; and
 - b. issue a decision regarding whether MPL BC has satisfied the concerns outlined in paragraph 75 of the Decision and whether to remove the probationary conditions and recommend the full approval of MPL BC’s agency license.”
7. MPL further submitted that its agency review should proceed in priority, and that the Commission should not engage in a comparative analysis between MPL, Mucci and Red Sun.
 8. On July 3, 2024, the Commission circulated MPL’s submission to industry stakeholders and invited those stakeholders to respond with written submissions on or before July 17, 2024.

9. On July 8, 2024, the Commission received a responding submission from Red Sun, in which it opposed MPL's position that the MPL review take place in priority to consideration of Red Sun's application.
10. On July 11, 2024, the Commission received a written submission from Mucci, as follows:

Additionally, we have been informed that Mastronardi Produce Limited has requested that the review of their agency application take priority over the review of others. It appears that they are claiming this preferential treatment is appropriate as they are currently acting as an agency using a one year temporary license. We disagree with this request. There is no basis in the Agency Order or otherwise for Mastronardi Produce Limited to be afforded this preferential treatment, and it would not be in line with the concepts of administrative fairness to do so. We expect that any applications submitted to the Commission be appraised individually and on their merits, such that the best agencies for the BC market are selected for designation.

11. On July 16, 2024, the Commission received submissions from Windset Farms (Canada) Ltd. and Greenhouse Grown Foods Inc. ("Windset and GGFI"). Windset and GGFI's initial position was that the Commission's review of MPL's probationary Agency licence should be delayed until the BC Supreme Court has issued a decision in the judicial review challenging the BCFIRB's decision to approve MPL's agency designation. In addition, Windset and GGFI argued that a review of MPL's probationary licence should be conducted in accordance with paragraph 23 of the Agency Order. When read in context, Windset and GGFI argue that "all of the enumerated factors must be considered when the Commission is engaged in a review of an Agency licence" and that the Commission should not merely "consider two issues - whether MPL BC has satisfied the concerns outlined in paragraph 75 of the BCFIRB's Decision, and whether to remove the probationary conditions of MPL BC's Agency licence." With respect to sequencing, Windset and GGFI argued that consideration of MPL's probationary licence concurrent with consideration of the Red Sun and Mucci applications "is in line with [subsection 23(3)] of the Agency Order which contemplates that the review can also take into account prospective Agencies.
12. In a reply submission dated July 24, 2024, MPL argued that its review should not be deferred pending the decision of the BC Supreme Court, noting that such a deferral could jeopardize the Commission's ability to conduct the review prior to the expiry of MPL's agency licence on March 1, 2025. With respect to the scope of the review, MPL argued that section 23 of the Agency Order gives the Commission the discretion to consider the factors that are responsive to the circumstance (and not those that

aren't), as well as other things it deems suitable to the circumstances. MPL further argued that the BCFIRB's directions expressly contemplate that the Commission will exercise its discretion to limit the scope of the review in the circumstances and as it deems appropriate. Finally, MPL reiterated its view that its agency review should proceed separately and in priority to the comprehensive review of the Mucci and Red Sun agency applications. It argued that MPL should not also be required to show how its agency designation fares against the applications submitted by Red Sun and Mucci:

Doing so would result in preferential treatment being afforded to the remaining agencies, who are not required to do so and, more importantly, who have been told that comprehensive reviews of their agencies for non-compliance with General Orders will not proceed until after January 1, 2025. The remaining agencies will not be required to demonstrate how their designations fare against these new applicants and the new applicants will not be advantaged by the uncertainty in existing agencies' tenure resulting from their regulatory non-compliance. MPL BC should be afforded this same procedural right.

13. In a subsequent reply submission dated August 2, 2024 (directed at the submissions of Mucci and Red Sun), MPL reasserted its positions as follows:

As previously noted, the review of MPL BC's probationary licence is not intended to be a "re-do" of its initial licence application. Further, the MPL BC agency licence review should not amount to an exercise in comparison between MPL BC's agency application and the Mucci and Red Sun agency applications. MPL BC is already a part of the existing industry landscape that should be considered as part of the Commission's assessment of Mucci and Red Sun's applications. However, in contrast, the existence of the Mucci and Red Sun's applications should not be a factor in the Commission's review of MPL BC's probationary licence.

It is MPL BC's respectful submission that by submitting that the MPL BC's licence review proceed first, MPL BC is not asking for preferential treatment. MPL BC's probationary licence review is distinct from, or in other words is in a different bucket or stream, from the Mucci and Red Sun's application reviews and, in the circumstances, it would be appropriate for the MPL BC review to proceed first.

14. On August 13, 2024, the Commission summarily dismissed Mucci's application for designated agency status.

Analysis and Dispositions

Deferral of Review

15. Though the panel is aware that the BC Supreme Court's pending ruling could significantly impact upon the process here undertaken by the Commission, it is also possible that it will have no material bearing on the process. Therefore, the Commission is not prepared to defer the review of MPL's probationary status. As noted by MPL, the timing (and impact) of the decision is uncertain. On balance, the panel is of the view that it is preferable to proceed without waiting for that decision, even if the decision may bear upon this process. The panel will adjust its process, if and when it becomes necessary to do so.

Scope of the MPL Review

16. By a decision dated October 11, 2023 (see also Corrigendum dated October 20, 2023), the BCFIRB approved the designation of MPL as a designated agency for a probationary period, commencing immediately and continuing through until the licensing period ending March 1, 2025.
17. The probationary licence was made subject to certain terms and conditions, as follows:
 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 with the first report due December 31, 2023, and quarterly in the 2024 Crop Year, 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;

- d. confirm compliance with the Vegetable Commission's General Orders and policies relating to production 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 designation status in accordance with section 3 of Part XIV of the General Orders and prior to issuing MPL BC a licence for the term March 2, 2025 – March 1, 2026.
84. A decision of the Vegetable Commission to approve MPL BC as a designated agency for the term March 2, 2025 – March 1, 2026, must be approved in writing by BCFIRB. (emphasis added)
18. With respect to the further review to be conducted by the Commission as directed by the BCFIRB, the BCFIRB said this:

The Vegetable Commission also queried whether paragraph 84 is referring to the Vegetable Commission's usual renewal process, or a "re-do" of the Vegetable Commission's January 12, 2022, decision. Paragraph 84 was not intended to ask the Commission to "redo" its decision. Rather, it is intended to require the Vegetable Commission, at some point prior to the end of the MPL BC's probationary licence term on March 1, 2025, to exercise its authority under section 3 of Part XIV, as it determines appropriate to the circumstances, and consider whether to remove the probationary conditions and recommend approval to BCFIRB of MPL BC as a designated agency.

Implicit in this direction is that the Vegetable Commission needs to be satisfied that the concerns outlined in paragraph 75 of the Agency Designation Decision have been adequately addressed by MPL BC. (emphasis added).

19. In the panel's view, it is clear that the BCFIRB did not intend for the Commission to merely enquire into whether MPL has sufficiently discharged its obligations under the probationary terms imposed by the BCFIRB. Rather, the BCFIRB expressly directed that the Commission undertake an agency review. Consequently, the panel has concluded that the review should be conducted in accordance with section 23 of the Agency Order. Consistent with this, the panel may consider, among other things, any of the considerations listed in paragraphs 23(1)(a) through (j). Thus, MPL and

interested stakeholders will be permitted to make submissions with respect to: (a) the extent to which MPL has discharged its obligations under the probationary terms imposed by the BCFIRB; (b) the considerations listed in paragraphs 23(1)(a) through (j); and (c) any other matters that may bear upon the exercise of the Commission's discretion.

20. It is also notable that the BCFIRB's directions require the Commission to again "recommend approval to BCFIRB of MPL BC as a designated agency" (if it is so inclined) following the agency review¹. An agency review is a comprehensive process that is not akin to mere licence renewal. However, agency reviews are not equivalent to an initial application for agency designation. To that extent, at least, MPL's agency review is not a "re-do" of its original application.

Sequencing

21. The panel does not agree with MPL's submission that its review should proceed separately from, and in priority to, consideration of the Red Sun application.
22. The provisions of the Agency Order expressly contemplate that applications for designated agency status should be considered in context. Subsection 9(6) provides as follows:

The Commission may have regard to the circumstances in which the application is brought (including the capacity of existing Agencies or other prospective Agencies to market Regulated Product), or any other factor. (emphasis added)

¹ Presumably, if the Commission decides not to recommend that MPL be designated as agency, no prior approval of the BCFIRB would be required. However, such a decision would be subject to an appeal before the BCFIRB.

23. Similarly, when an agency is reviewed pursuant to section 23, the review is to be considered in context. Subsection 23(3) of the Agency Order states:

The Commission may have regard to the circumstances in existence at the time of the review (including the capacity of existing Agencies or other prospective Agencies to market Regulated Product), or any other fact (sic).²

24. This contextual analysis is entirely in line with the polycentric nature of the decision. As noted in the Commission’s June 24, 2024 Notice of Proceedings: “the decision to grant or refuse agency status is a matter of fundamental marketing policy.” The Commission must be able to exercise its discretion in order to ensure that there are not too many, or too few, agencies. In addition, the Commission must be able to exercise its discretion to ensure that the entities that are best able to maximize producer returns are designated as agencies. These determinations are not static. It is possible that a justification for the designation of an agency can be overcome by the superior performance of another agency, or by the presence of a new applicant who may be better able to maximize producer returns. Therefore, MPL and Red Sun must each be able to advance their positions in context. This includes consideration of “the capacity of existing Agencies or other prospective Agencies to market Regulated Product.” Therefore, it is sensible that the Red Sun and MPL matters proceed contemporaneously.
25. In the panel’s view, proceeding in this manner does not “result in preferential treatment being afforded to the remaining agencies”, as argued by MPL. Any existing agency that is subject to a periodic agency review will be required to address the considerations set out in paragraphs 23(1)(a) to (j), and they will also be required to do so in context, which necessarily includes consideration of “the capacity of existing Agencies or other prospective Agencies to market Regulated Product.”

Directions

26. The Commission directs as follows:
- (a) MPL’s agency review will proceed contemporaneously with the Commission’s consideration of the Red Sun application.

² The full text of subsection 23(3) as intended by the Commission was erroneously truncated in the Agency Order. This has been rectified by Amending Order 2. The full text of section 23(3) now provides as follows: “The Commission may have regard to the circumstances in existence at the time of the review (including the capacity of existing Agencies or other prospective Agencies to market Regulated Product), or any other factor.”

- (b) On or before August 21, 2024, Red Sun must provide the Commission with a proposed, redacted version of its application, that is suitable for circulation by the Commission to industry stakeholders. This proposed, redacted version of the application should be accompanied by an explanation for each proposed redaction.
 - (c) On or before August 28, 2024:
 - (i) MPL shall file written submissions with the Commission addressing: the extent to which MPL has discharged its obligations under the probationary terms imposed by the BCFIRB; the considerations listed in paragraphs 23(1)(a) through (j) of the Agency Order; why MPL should be designated as an agency having regard to “the capacity of existing Agencies or other prospective Agencies to market Regulated Product”; and any other matters that may bear upon the exercise of the Commission’s discretion.
 - (ii) Red Sun shall file any supplementary written submissions with the Commission addressing why its application should be granted, having regard to “the capacity of existing Agencies or other prospective Agencies to market Regulated Product”, and any other matters that may bear upon the exercise of the Commission’s discretion.
 - (d) On August 30, 2024, the Commission will circulate the written submissions and redacted application among MPL, Red Sun, and industry stakeholders.
 - (e) On or before September 13, 2024, MPL, Red Sun and participating industry stakeholders must file any responding written submissions with the Commission. The Commission will circulate all such responding submissions among MPL, Red Sun, and industry stakeholders.
 - (f) MPL and Red Sun will have until September 27, 2024 to file any written reply submissions.
27. Following receipt of all submissions as outlined above, the Commission may, in its discretion, elect to permit oral submissions at a date and time to be determined.



Derek Sturko, Chair