

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**

January 22, 2025

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Introduction

1. “Designated agencies” are a critical component of the regulatory system for vegetables in British Columbia. Agencies are the means by which the Commission achieves its main policy objective of maximizing producer returns through centralized, coordinated marketing of regulated product.
2. In particular, agencies are businesses that are licensed by the Commission to market regulated vegetables. In this way, the collective power of producers is harnessed to gain market access. Agency designation is a privilege that gives the licence holder the ability to market regulated product to the exclusion of others. The licence is non-transferable and is not approved in perpetuity. In addition, the Commission may review existing agencies to assess if an agency status should be maintained, suspended, made subject to terms or conditions, or revoked.
3. Under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330, (the “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.
4. The decision on whether to designate a new agency for the marketing of regulated vegetables is determined in the first instance by the Commission, subject to the approval of the BCFIRB [See: *Natural Products Marketing (BC) Act Regulations*, (B.C. Reg. 328/75), s. 8]. Each application for agency designation is assessed by the Commission on its merits against the considerations set out in the applicable orders made by the Commission. The Commission may exercise discretion to grant an agency designation if it is satisfied that the applicant meets the underlying objectives and principles of the designation, and subject to policy judgements relating to the appropriate number of agencies in a particular industry in particular circumstances.

Agency Designations Require Careful Consideration

5. 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.
6. In its January 31, 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)
7. 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 will erode producer returns by competing against each other on price in the same market space.
8. 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 imposed 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)

9. 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 31, 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.

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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”.

10. In summary, the designation of a new agency should only follow where the Commission 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 Commission 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.

Agency Application and Review Considerations

11. These considerations are expressed in more detail in sections 8 and 9 of the Commission's Agency Order of June 27, 2024, as amended, as follows:

Application for Designation as an Agency

8. (1) An application for designation as an Agency must include a detailed business plan addressing:
 - (a) the structure of the applicant, including:
 - (i) the identities of the principals of the applicant;

- (ii) the identities of all shareholders and other Persons with a direct or indirect financial interest in the applicant; and
 - (iii) particulars of the management and staff of the applicant, 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 applicant will operate;
 - (iii) particulars of any other facilities that may be owned or operated by the applicant 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 applicant, and the dates on which such arrangements are expected to be secured;
 - (ii) a copy of the applicant's proposed Producer Marketing Agreement in a form that complies with the minimum standards established from time to time by the Commission;
 - (iii) copies of letters of commitment obtained from at least two (2) prospective

Producers, who are at arms-length from each other, who wish to market Regulated Product through the applicant; 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 applicant.
- (d) marketing strategy and framework, including;
- (i) particulars of the applicant's target market, including the type and amounts of Regulated Product to be received from each Producer and the target market therefor;
 - (ii) the applicant's assessment of market supply and demand, including an assessment of market supply and demand in areas where the applicant intends to market Regulated Product;
 - (iii) particulars of the applicant's intended utilization of delivery and production allocation by target market category as defined by the Commission;
 - (iv) particulars of the applicant's intended utilization of delivery and production allocation for marketing within British Columbia and for marketing outside of British Columbia;
 - (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 applicant;

- (vii) copies of all letters of commitment obtained from proposed customers of the applicant; and
 - (viii) particulars of any commercial agreements with third parties that may assist with transportation, grading, packaging, storage, or marketing on behalf of the applicant.
- (e) operational procedures, including:
 - (i) particulars of quality assurance procedures relating to:
 - (A) biosecurity programs and trace-back and recall systems;
 - (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 applicant's Producers, including the method by which proceeds from sales will be distributed; and
 - (iii) particulars of the manner in which shipments of regulated storage crops will be monitored in relation to delivery allocation, and the applicant'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 applicant;
 - (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 applicant encounters financial difficulties; and
 - (vii) proof of product, third party, and director liability insurance.
- (g) advancement of Producer and industry interests, including:
- (i) particulars of how the applicant would prioritize the marketing of Regulated Product;
 - (ii) particulars of how the applicant would encourage collaboration in decision-making with their Producers regarding the production, transportation, packaging, storage, and marketing of Regulated Crops; and
 - (iii) an express commitment to comply with all applicable minimum pricing orders made by the Commission from time to time in relation to sales occurring both within and outside of British Columbia.

- (2) Subject to subsection (3), applications for designation as an Agency 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 Order;
- (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 Order 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;
- (f) demonstrate to the satisfaction of the Commission that any arrangements that the applicant may have with third parties:
 - (i) will not impair or undermine the applicant's responsibility to serve as the primary marketer of Regulated Product, or to directly respond to changing market demands;
 - (ii) will not expose the industry to increased food safety risks;
 - (iii) will not be disruptive to orderly marketing;

- (g) identify the extent to which the applicant has previously participated in the British Columbia industry in other capacities, if any;
 - (h) provide examples of the applicant's prior cooperative engagements with existing agencies, if any; and
 - (i) 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 applicant;
 - (ii) how the applicant would benefit producers shipping through it;
 - (iii) how the applicant would benefit the industry as a whole; and
 - (iv) the impact that the applicant would have on existing Agencies.
- (3) The Commission may, in its sole discretion, assign different weights to each of the considerations set out in subsection (2), and may waive any of the requirements set out in subsection (2).

Review of Application for Designation as an Agency

9. (1) The Commission may, in its sole discretion:
- (a) request that an applicant provide any supplementary information or documentation that might facilitate the Commission's review of the application; and/or
 - (b) invite an applicant to present its application to the Commission, and to answer questions from the Commission concerning the application, at such time, and in such a manner, as the Commission may direct.
- (2) The Commission may summarily dismiss the application:

- (a) where the application does not conform with the requirements of this Part to the satisfaction of the Commission; or
 - (b) where the Commission, in its sole discretion, is satisfied that the designation of the applicant as an agency would not benefit the Commission and the British Columbia industry as a whole, having regard to the content of the application, 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.
- (3) Where the Commission has not summarily dismissed an application, the Commission may engage in further consultation with industry stakeholders concerning the application, at such time, and in such a manner, as the Commission may direct.
- (4) Subject to subsections (5) and (6), the Commission may designate the applicant as an Agency, subject to the approval of the BCFIRB, 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 producers marketing through other Agencies;
 - (b) it would not be in the interests of the industry for existing or anticipated 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 at least two (2) 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; and
 - (i) the proposed Agency has the knowledge, capacity, and ability to operate effectively as an Agency.
- (5) The Commission may, in its sole discretion, assign different weights to each of the considerations set out in subsection (4), and may waive any of the requirements set out in subsection (4).
- (6) 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.

12. Similar considerations arise in the context of a review of an existing Agency. These considerations are expressed in more detail in sections 11, 12, 22 and 23 of the Commission's Agency Order of June 27, 2024, as amended, as follows:

Active Engagement in Marketing

11. Every Agency licensed by the Commission must be actively engaged in marketing Regulated Product received from its assigned Producers.

Determination as to Whether an Agency is Actively Engaged in Marketing

12. (1) The Commission will determine, in its sole discretion, whether an Agency is actively engaged in marketing Regulated Product received from its assigned Producers. Without limiting the generality of the foregoing, the Commission will have regard to the following factors:
 - (a) whether the Agency is directly identifying target markets, creating marketing plans, and implementing marketing plans;
 - (b) whether the Agency is dealing directly with purchasers other than Wholesalers;
 - (c) whether the Agency is directly managing all aspects of sales and marketing including the preparation of related documentation, the collection of sales revenues, the distribution of sales revenues and management of payables; and
 - (d) whether the Agency is relying excessively on wholesalers or other third parties to market Regulated Product received from its assigned Producers.
- (2) For the purpose of determining whether an Agency is actively engaged in marketing Regulated Product received from its assigned Producers, the Commission shall have regard to the substance and effect of any arrangement made between the Agency and any other Person, irrespective of the form of that arrangement.
- (3) Where it appears to the Commission that the Agency is primarily relying on others to market Regulated Product received from its assigned Producers, the entrant shall

be deemed not to be actively engaged in marketing Regulated Product received from its assigned Producers.

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General

22. The Commission may from time to time review an existing Agency in order to assess whether the Agency's licence and designated status should be maintained, made subject to terms and conditions, suspended, or revoked.

Considerations

23. (1) When conducting a review of an existing agency, the Commission may consider, among other things:
- (a) whether the Agency has been actively engaged in marketing Regulated Product received from its assigned Producers;
 - (b) whether there is a market requirement for the Agency, and whether the Agency benefits the industry as a whole having regard to the interests of all producers, including those producers marketing through other Agencies;
 - (c) whether it would be in the interests of the industry for marketing of Regulated Product to be undertaken by another Agency;
 - (d) whether the presence of the Agency has been disruptive to orderly marketing or has contributed to increased competition among Agencies on price, which may have had a detrimental effect on producer returns;
 - (e) whether the 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;

- (f) whether the market serviced by the Agency for specific product(s), grouped by end use customer, is satisfied by other Agencies;
 - (g) whether there is continued evidence-based support from at least two (2) licensed Commercial Producers, who are at arms-length from each other, and who wish to continue to market Regulated Product through the Agency;
 - (h) whether the primary responsibility for marketing Regulated Product has been discharged by the Agency, rather than by wholesalers who have marketed Regulated Product on behalf of the Agency;
 - (i) whether the Agency has complied with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province; and
 - (j) whether the Agency has demonstrated the knowledge, capacity, and ability to operate effectively as an Agency.
- (2) The Commission may, in its sole discretion, assign different weights to each of the considerations set out in subsection (1).
 - (3) 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.

Procedural History

MPL's Probationary Agency Designation

13. By a decision dated January 12, 2022, the Commission decided that MPL British Columbia Distributors Inc. ("MPL") should be designated as an agency, subject to the approval of the BCFIRB.

14. 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.
15. 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.

16. BCFIRB's "concerns" were articulated in paragraphs 54 to 75 of its October 11, 2023 decision as follows:

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 markets⁶. 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.
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"⁷. [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 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. (emphasis added)

17. 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).

Red Sun's Previous Agency Application

18. On September 9, 2022, Jem-D International dba Red Sun Farms ("Red Sun") submitted an application for an agency designation. On November 6, 2023, the Commission summarily dismissed Red Sun's application.

Red Sun's Current Agency Application

19. On May 31, 2024, Red Sun submitted a new application for agency designation.

Mucci's Current Agency Application

20. On May 31, 2024, Mucci International Marketing Inc. ("Mucci") submitted an application for agency designation.

The Commission's Notice of Proceeding

21. On June 24, 2024, the Commission issued a Notice of Proceeding. Among other things, the Notice of Proceeding described the Commission's 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
- (b) 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.

- 22. 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).

The Agency Order

- 23. 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.

24. 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.

Summary Dismissal of Mucci's Application

25. On August 13, 2024, the agency application submitted by Mucci was summarily dismissed.

Further Directions Regarding Process

26. As a result of various submission received from MPL, Red Sun, Mucci and Windset Farms (Canada) Ltd. and Greenhouse Grown Foods Inc. ("Windset and GGFI"), the Commission issued further directions regarding process in an interim decision dated August 14, 2024.
27. With respect to submissions made concerning an outstanding decision from the BC Supreme Court arising from a judicial review application brought by Windset and GGFI from the BCFIRB's decision to conditionally approve the designation of MPL as an agency, the Commission said this in its August 14, 2024 interim decision:
 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.
28. With respect to the scope of the MPL review, the Commission said this in its August 14, 2024 interim decision:

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 "redo" 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 review. 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.
29. With respect to sequencing, the Commission said this in its August 14, 2024 interim decision:
 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)
 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).

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.”
30. Ultimately, the Commission made the following directions in its August 14, 2024 interim decision:
 26. The Commission directs as follows:
 - (a) MPL’s agency review will proceed contemporaneously with the Commission’s consideration of the Red Sun application.

- (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.

Submissions and Redactions

31. On August 21, 2024, the Commission received the following materials from Red Sun:
 - (a) Email dated August 21, 2024 from Red Sun;
 - (b) Redacted Version of Red Sun's Agency Application dated May 31, 2024;
 - (c) Redacted Version of Red Sun's Appendix A dated July 9, 2024;
 - (d) Redacted Version of Red Sun's Response dated July 25, 2024; and
 - (e) Red Sun's Redaction Summary.
32. On September 13, 2024, the Commission received the following materials:
 - (a) Letter from MPL's counsel dated September 13, 2024;
 - (b) Redacted and unredacted versions of MPL's written submissions;
 - (c) Redacted and unredacted versions of MPL's Book of Documents;
 - (d) Red Sun's Supplementary Submissions.
33. In an interim decision dated September 17, 2024, the Commission said the following about Red Sun's redactions:

Red Sun's proposed redactions are summarized in its Redaction Summary. In general terms, it is the Commission's view that Red Sun's proposed redactions are grossly excessive. The redactions are so broad that they remove necessary context, such that industry participants would not have a reasonable opportunity to comment meaningfully on their substance. Further, the redactions cannot all be justified as being necessary to protect highly sensitive or proprietary information. In particular:

1. Red Sun's redacted application dated May 31, 2024 does not include any of the 24 embedded files in the original, unredacted application. Red Sun is directed to provide a copy of its May 31, 2024 application for distribution to industry stakeholders that includes complete copies of each of the 24 embedded files, bearing only such redactions as are necessary to protect highly sensitive or proprietary information, and then only in accordance with the directions herein.
2. The redactions on page 8 of Red Sun's May 31, 2024 application are not justified, except with respect to the specified percentages.
3. The redactions on page 11 of Red Sun's May 31, 2024 application are not justified.
4. The support letters embedded on page 21 of Red Sun's May 31, 2024 application should be provided for distribution to industry stakeholders, bearing only such redactions as are necessary to protect the identity of the customers.
5. The redactions on page 23 of Red Sun's May 31, 2024 application are not justified. In addition, the support letters embedded on page 23 of Red Sun's May 31, 2024 application should be provided for distribution to industry stakeholders without redactions.
6. The first redaction at the top of page 23 of Red Sun's May 31, 2024 application is not justified.
7. With respect to pages 42 and 43 of Red Sun's May 31, 2024 application, the embedded files are to be provided for distribution to industry stakeholders, bearing only such redactions as are necessary to protect highly sensitive or proprietary information.
8. The redactions on pages 44 and 45 of Red Sun's May 31, 2024 application are not justified. The embedded files on both pages should be provided for distribution to industry stakeholders without redactions.
9. With respect to page 46 of Red Sun's May 31, 2024 application, the embedded file is to be provided for distribution to industry stakeholders without redactions.

10. With respect to pages 47, 48, 49 and 50 of Red Sun's May 31, 2024 application, the embedded files are to be provided for distribution to industry stakeholders, bearing only such redactions as are necessary to protect highly sensitive or proprietary information.
11. None of the redactions made to Red Sun's July 25, 2024 response to the Commission are justifiable. Red Sun is directed to provide an unredacted copy of its July 25, 2024 response for distribution to industry stakeholders.

The Commission is satisfied that the redactions made to Red Sun's Appendix "A" are appropriate.

For greater certainty, Red Sun is directed to comply with the above directions on or before 5:00 pm, September 20, 2024.

34. In its interim decision dated September 17, 2024, the Commission said the following about MPL's redactions:
 1. The redactions appear on the following pages in its Written Submission: 4 (footnote 12), 9 (footnote 17), 13 (paragraph 36), 14 (footnote 22), 22, 23, 24, 29, 31, 35 and 48. In the Commission's view, the redactions are not so broad as to remove all context from the submissions such that industry participants will be afforded an opportunity to comment meaningfully on their substance, and the redactions are justifiable as being necessary to protect highly sensitive or proprietary information.
 2. With respect to MPL's Book of Documents, MPL advises in its counsel's letter dated September 13, 2024 that "the redactions made to MPL BC's agency application follow the redactions that were previously made and accepted by both the Commission itself and the BCFIRB, in the course of BCFIRB's supervisory review for pre-approval of MPL BC's agency designation." The balance of the redactions appear on the following pages: 119, 123, 134, 135, 137, 139, 141, 142, 146, 147, 150 – 167, 251, 253, 254, 255 and 256. Subject to receiving clarification from MPL on one point, it is the Commission's view that the redactions are not so broad as to remove all context from the submissions such that industry participants will be afforded an opportunity to comment meaningfully on their substance, and the redactions are justifiable as being necessary to protect highly

sensitive or proprietary information. However, clarification is sought with respect to page 185 of the Book of Documents, which appears to show a redaction in both versions of the Book of Documents. MPL is asked to advise whether this is a redaction and, if so, what the basis for the redaction is. An unredacted copy of that page should be provided to the Commission. MPL's response on this point should be received by the Commission on or before 5:00 pm, September 20, 2024.

35. In response to the Commission's interim decision dated September 17, 2024, the Commission received a letter from MPL's counsel dated September 20, 2024, together with an unreacted copy of page 185 of MPL's Book of Documents for distribution to stakeholders. In an interim decision dated September 24, 2024, the Commission said this:
 2. With the unredacted version of page 185 now available to stakeholders, the Commission is satisfied that MPL has provided materials for stakeholder review that bear redactions that are justifiable as being necessary to protect highly sensitive or proprietary information, and that are not so broad as to remove all context, such that industry participants will be afforded an opportunity to comment meaningfully on their substance.

36. Also in response to the Commission's interim decision dated September 17, 2024, the Commission received materials from Red Sun including: a letter dated September 20, 2024; (b) a redaction summary dated September 20, 2024; (c) a redacted version of its agency application; (d) copies of the embedded files in the agency application bearing various redactions; and (e) a redacted copy of its document entitled "7/25/2024 Follow-up Questions & Response."

37. In an interim decision dated September 24, 2024, the Commission said this about Red Sun's redactions:
 4. The Commission is satisfied that Red Sun has now provided:
 - (a) The support letters embedded on page 21 of the agency application, bearing only such redactions as are necessary to protect the identity of the customers.
 - (b) The embedded files referenced on pages 42 and 43 of the agency application, bearing only such redactions as are

necessary to protect highly sensitive or proprietary information.

- (c) The embedded files referenced on pages 44 and 45 of the agency application without redactions.
- (d) The embedded file referenced on page 46 of the agency application without redactions.
- (e) The embedded files referenced on pages 47, 48, 49 and 50 of Red Sun's agency application, bearing only such redactions as are necessary to protect highly sensitive or proprietary information.

5. In its Interim Decision dated September 17, 2024, the Commission stated that "The first redaction at the top of page 23 of Red Sun's May 31, 2024 application is not justified." Unfortunately, the Commission's reference to "page 23" was a typographical error, and the Commission's intention was to refer to "page 25." Through no fault of Red Sun, the redacted Agency Application continues to include that first redaction on page 25. Red Sun is therefore directed to forthwith provide a copy of page 25 of its application without the first redaction at the top of the page.

6. However, in other respects, Red Sun did not comply with the Commission's directions issued on September 17, 2024, as follows:

- (a) The Commission directed that "[t]he redactions on page 8 of Red Sun's May 31, 2024 application are not justified, except with respect to the specified percentages." Nevertheless, Red Sun continues to redact the identity of the owners of Red Sun Farms.
- (b) The Commission determined that the redactions on page 23 of Red Sun's May 31, 2024 application are not justified, and directed that the support letters embedded on page 23 of Red Sun's May 31, 2024 application be provided for distribution to industry stakeholders without redactions. Nevertheless, Red Sun continues to redact the identity of supporting growers on page 23 of its application, and it has provided copies of the support letters bearing redactions.

(c) The Commission determined that “[n]one of the redactions made to Red Sun’s July 25, 2024 response to the Commission are justifiable”, and it directed Red Sun to provide an unredacted copy of its July 25, 2024 response for distribution to industry stakeholders. On further reflection, the Commission is now satisfied that the redactions made to pages 2 and 3 of that document are appropriate, notwithstanding its earlier directions. However, the redactions on page 1 remain, and it is still the Commission’s view that these redactions are not justified.

7. Consequently, there are still certain redactions (noted above) made to Red Sun’s materials that, in the Commission’s view, are not appropriate. This is cause for concern, as the withholding of this information could impair the ability of industry stakeholders to provide a full response to the application. The Commission’s ability to make an informed decision on the application depends, at least in part, on its ability to receive meaningful feedback from industry stakeholders.

Directions

8. The Commission will circulate a copy of page 25 of Red Sun’s application, without the first redaction at the top of the page, as soon as that is received from Red Sun. In accordance with the Commission’s Interim Decision dated September 17, 2024:

(a) On or before October 7, 2024, Red Sun and participating industry stakeholders must file any written submissions responsive to MPL’s Written Submission with the Commission. The Commission will circulate all such responding submissions among MPL, Red Sun, and industry stakeholders.

(b) On or before October 7, 2024, MPL and participating industry stakeholders must file any written submissions responsive to Red Sun’s application³ with the Commission. The Commission will circulate all such responding submissions among MPL, Red Sun, and industry stakeholders.

(c) MPL and Red Sun will have until October 22, 2024, to file any written reply submissions.

9. For clarity and greater certainty, in addition to submissions addressing the substance of Red Sun's application, MPL, Red Sun and participating industry stakeholders may also address the following issues that will form part of the panel's consideration of Red Sun's application:
 - (a) The procedural fairness implications, if any, arising from Red Sun's failure or refusal to comply with the Commission's directions concerning redactions, and whether that impacted their ability to consider and comment on Red Sun's application ; and
 - (b) The extent to which, if any, Red Sun's failure or refusal to comply with the Commission's directions concerning redactions bears on its suitability as a prospective Agency.

Comment on Next Steps

10. The Commission will consider Red Sun's approach and inappropriate redaction of information (contrary to the Commission's direction), and industry's response, in determining next steps in this process (e.g.: whether there is any need to adjust timelines) and in its decision-making.

38. On October 7, 2024, the Commission received the following materials:

(a) On behalf of Red Sun:

- (i) Email dated October 7, 2024 from W. Stransky, counsel for Red Sun;
- (ii) Letter dated October 7, 2024 from J.K. McEwan, K.C., counsel for Red Sun; and
- (iii) A copy of page 25 of Red Sun's application without the first redaction at the top of the page.

(b) On behalf of MPL:

- (i) Email from C. Denton dated October 7, 2024;
- (ii) Letter dated October 7, 2024 from M. Camley, counsel for MPL; and

(iii) Redacted and unredacted written submissions of MPL dated October 7, 2024.

(c) On behalf of Windset and GGFI:

(i) Email dated October 7, 2024 from L. Duke, counsel for Windset and GGFI;

(ii) Letter dated October 7, 2024 from C. Ferris, K.C., counsel for Windset and GGFI;

(iii) Written Submissions of Windset and GGFI dated October 7, 2024; and

(iv) Book of Documents bearing redactions of certain identifying information at Tabs 1 and 2.

39. In an interim decision dated October 11, 2024, the Commission said this:

2. The Commission has reviewed the redactions made by MPL in its written submissions and is satisfied that these redactions are appropriate. The redactions made by Windset and GGFI to the records set out at Tabs 1 and 2 of their Book of Documents appear to relate to the identity of certain individuals who sought Production Allocation. The basis for redacting such information is unclear, but the identity of the producers seeking production allocation may not be germane to the issues before the Commission. Any participant who seeks disclosure of the information redacted at Tabs 1 and 2 of the Book of Documents filed by Windset and GGFI may apply to the Commission for an order directing disclosure of the unredacted records. Any such application should be supported by written submissions articulating why that redacted information is necessary for a proper disposition of the issues before the Commission.

.....

Other Matters

4. In Mr. McEwan's letter dated October 7, 2024, the following submission is made on behalf of Red Sun:

First, and as a threshold matter, Red Sun agrees generally with MPL's position that confidential

and commercially sensitive information are properly redacted from submissions made under the Agency Order of June 27, 2024, and its predecessors and in this process. We note in MPL's current and original applications those redactions include or included:

(a) details of MPL BC's ownership, corporate, and business structure, and in particular with respect to MPL's underlying or indirect shareholders;

5. In support of that position, Red Sun points specifically to Tab 1, pages 8 and 12, from MPL's Book of Documents.
 6. The redaction at page 12 of MPL's Book of Documents does not relate to "MPL BC's ownership, corporate, and business structure." However, the redaction at page 8 of MPL's Book of Documents does appear to relate to "MPL BC's ownership, corporate, and business structure."
 7. Rather than ask that it be provided with an unredacted copy of page 8 of MPL's Book of Documents, Red Sun appears to take the position that it "agrees generally" with those redactions, even if those redactions are inconsistent with the Commission's September 24, 2024 directions concerning disclosure of the identity of persons having an interest in an entity that is seeking agency status.
 8. Though Red Sun has not sought disclosure of an unredacted copy of page 8 of MPL's Book of Documents, it is the panel's view that such disclosure would be consistent with the Commission's directions. MPL is therefore directed to provide an unredacted copy of page 8 of its Book of Documents for circulation to stakeholders. This will be circulated by the Commission as soon as it is received from MPL.
 9. Consistent with the Commission's September 24, 2024 directions, MPL and Red Sun will have until October 22, 2024, to file any written reply submissions.
40. By letter dated October 16, 2024, MPL provided an unredacted copy of page 8 of its Book of Documents to the panel "for compliance purposes only." MPL went on to essentially indicate that it is providing information regarding the ownership interests in MPL under protest, and it asserted, among other things, that "ownership interests

in private corporate entities are generally a confidential matter, and agencies' ownership interests are not a matter of public disclosure in the ordinary course." MPL also asserted that disclosure of this information will prejudice MPL, and it "encourage[d] the Commission to reconsider its direction to both MPL BC and Red Sun on this specific issue, and withhold MPL BC's requested disclosure from public access."

41. In an interim decision dated October 18, 2024, the Commission said:

In its September 24, 2024 Interim Decision, the panel articulated the basis for requiring the disclosure of ownership information as follows:

If a licensing body does not look behind the corporate veil, it may act contrary to its statutory mandate and commit a reviewable error: *Wight v. Canadian Egg Marketing Agency*, [1978] 2 F.C. 260; (1977), 19 N.R. 529 (Federal Court of Appeal); *Syntex Pharmaceuticals International Ltd. v. Medichem Inc.* 1990 CarswellNat 636, [1990] 2 F.C. 499 (Federal Court of Appeal); and *Villetard's Eggs Ltd. v. Canada*, 1995 CarswellNat 669, [1995] 2 FC 581, 181 N.R. 374 (Federal Court of Appeal)

.....

... the withholding of this information could impair the ability of industry stakeholders to provide a full response to the application. The Commission's ability to make an informed decision on the application depends, at least in part, on its ability to receive meaningful feedback from industry stakeholders.

Notwithstanding this direction, Red Sun has refused to disclose ownership information, and MPL has essentially provided this information to the Commission under protest.

In the circumstances, the Commission has decided that it will not circulate the unredacted copy of page 8 MPL's Book of Documents to stakeholders, given that it has essentially been provided to the panel under protest. However, the following issues will form part of the panel's consideration of Red Sun's application and MPL's probationary licence review:

- (a.) The procedural fairness implications, if any, arising from Red Sun's failure or refusal to comply with the Commission's

directions concerning redactions, and whether that has impacted the ability of other industry stakeholders to consider and comment on Red Sun's application;

- (b.) The procedural fairness implications, if any, arising from MPL's decision to provide ownership information to the Commission under protest, and whether that has impacted the ability of other industry stakeholders to consider and comment on MPL's probationary licence;
- (c.) The extent to which, if any, Red Sun's failure or refusal to comply with the Commission's directions concerning redactions bears on its suitability as a prospective Agency; and
- (d.) The extent to which, if any, MPL's decision to provide ownership information to the panel under protest bears on its suitability as an Agency (probationary or otherwise).

42. By letter dated October 21, 2024, MPL stated that it did not "intend to imply that it was providing an unredacted copy of page 8 under protest." In that same letter, MPL re-enclosed an unredacted copy of page 8 of its Book of Documents and expressly stated that "it is agreeable to the Commission disclosing this information to other industry stakeholders."
43. Similarly, in its written submissions dated October 29, 2024, Red Sun enclosed an unredacted copy of page 8 of its agency application, mirroring the information that MPL provided for compliance purposes in its letter dated October 16, 2024. However, Red Sun did not comply with the Commission's direction to reveal the names of the growers supportive of its application for circulation to other participants. Instead, Red Sun made further submissions regarding the withholding of that information from other participants and asked that the Commission reconsider its earlier direction in light of those submissions.
44. Commencing with an email dated October 30, 2024, the Commission proposed to invite stakeholders who had filed written materials to appear before the panel to make brief oral submissions and to answer questions from the panel. However, efforts to schedule a proposed pre-hearing conference were unsuccessful, and on November 21, 2024, the Commission wrote to the parties as follows:

Scheduling a Pre-Hearing Conference and a date for oral submissions is proving to be very difficult and is now giving rise to unanticipated delays. The panel was originally of the view that oral submissions could be useful to it, but that utility is now potentially outweighed by

concerns about delay. I am therefore writing to canvas the participants on their views regarding oral submissions. If no participant is insistent on having an opportunity to make oral submissions before the panel, the matter could continue as a written hearing and the panel could begin to deliberate and formulate its decisions based exclusively on the written submissions filed to date.

45. After receiving and considering submissions from the participants, the Commission issued an interim decision on December 3, 2024, as follows:

It is important to note that the Commission's November 21, 2024, communication did not propose an oral evidentiary phase of the kind contemplated by Windset/GGFI. On the contrary, the Commission sought to determine the availability of the participants "to appear before the panel to make brief oral submissions and to answer questions from the panel." An oral evidentiary process would be inconsistent with the directions made by the Commission at paragraph 26 of its August 14, 2024 Interim Decision. Further, engaging in an oral evidentiary phase at this late stage would significantly disrupt the proceedings undertaken to date, given that all parties have already filed their final written submissions. For all those reasons, the Commission is not prepared to engage in an oral evidentiary phase as proposed by Windset/GGFI.

Finally, the Commission is not persuaded that oral submissions are necessary as an incident of the duty of procedural fairness owed by the Commission to the participants. This process, though conducted as a written hearing, has provided extensive participatory rights to the parties who have an interest in the Commission's policy decision. Prior to the Commission's November 21, 2024 communication, none of the participants made an application for leave to supplement their written submissions with oral submissions. Oral submissions were proposed as a convenience to the Commission, but scheduling delays have overtaken any such convenience.

In the circumstances, the Commission has decided to continue with the process in the manner in which it was conceived – as a written hearing. Therefore, the Commission will engage in deliberations based on the written submissions provided to it. Should the Commission have questions arising from its review of the written submissions, it is inclined to pose those questions in writing unless the circumstances clearly indicate that in-person interactions are necessary.

Written Questions

46. After commencing deliberations on the substantive issues before it, the Commission posed two written questions to MPL. MPL's written response was received by the Commission and circulated among the participants on December 19, 2024.
47. On December 31, 2024, Windset and GGFI circulated a brief response regarding MPL's answers to the Commission's written questions.
48. On January 10, 2025, MPL circulated a brief reply submission regarding the response of Windset and GGFI dated December 31, 2024.

Decisions

Introduction and Summary of Decisions

49. The Commission has carefully considered all of the materials and submissions received from the participants, even though it does not intend to refer to all of it in the course of this decision.
50. In addition, while the Commission has considered the MPL and Red Sun matters contemporaneously, having regard to "the capacity of existing Agencies or other prospective Agencies to market Regulated Product", the Commission will address each matter in turn.
51. For all the reasons that follow, the Commission has decided that:
 - (a) MPL should be designated as an agency, subject to the approval of the BCFIRB; and
 - (b) Red Sun should be designated as an agency, subject to:
 - (i) Red Sun securing production from "Grower A" and "Grower B" (as identified in its application as the producers who have committed to supply Red Sun);
 - (ii) "Grower A" and "Grower B" being and remaining at arm's length from each other; and
 - (iii) the approval of the BCFIRB.

If Red Sun is unable or unwilling to satisfy these conditions, the Commission's decision that Red Sun should be granted agency status will be rescinded without further order.

52. It is important to note that agency designations are not held in perpetuity, and that there is no "right" to maintain an agency designation that may be asserted against the Commission. Pursuant to section 22 of the Agency Order, the Commission may from time to time review an existing agency in order to assess whether the agency's licence and designated status should be maintained, made subject to terms and conditions, suspended, or revoked.

MPL

Issues

53. The issues arising from the Commission's consideration of the probationary agency designation granted by the BCFIRB may be generally summarized as follows:
- (a) Has MPL discharged its obligations under the probationary terms imposed in the BCFIRB Decision?
 - (i) Has MPL appointed a senior executive as Vegetable Commission Liaison?
 - (ii) Has MPL submitted quarterly reports:
 - A. identifying of all growers for whom it is marketing regulated product and reporting the production acreage of regulated product marketed for each grower?
 - B. identifying any production referenced above that has displaced imported production and expanded markets for BC growers?;
 - C. identifying any production referenced above which has displaced production and markets for BC agencies?; and
 - D. confirming 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?

- (iii) Has MPL sufficiently addressed the BCFIRB’s “three broad areas of concern” articulated in paragraphs 54 to 75 of its October 11, 2023 decision concerning:
 - A. MPL’s business plan to displace imported production and expand markets via increasing BC greenhouse acreage?
 - B. support from multiple arms-length commercial producers?; and,
 - C. compliance with the General Orders?
- (b) Having regard to the considerations listed in paragraphs 23(1)(a) through (j) of the Commission’s Agency Order, should the Commission recommend to the BCFIRB that MPL be designated as an agency?
- (c) Having regard to the capacity of existing agencies or other prospective agencies to market regulated product (including Red Sun), should the Commission recommend to the BCFIRB that MPL be designated as an agency?
- (d) Are there any other matters that may bear upon the exercise of the Commission’s discretion?

Compliance with Technical Requirements of Probationary Terms

- 54. The Commission is satisfied that MPL has complied with the technical requirements of the probationary terms imposed by the BCFIRB.
- 55. First, MPL has appointed David Einsteadig, Secretary of MPL and Senior Vice President and General Counsel of Mastronardi Produce Limited (“Mastronardi Produce”) (MPL’s parent company), as the senior executive Commission liaison.
- 56. Second, MPL has submitted quarterly reports as directed by the BCFIRB.

BCFIRB’s “Three Broad Areas of Concern”

- 57. The BCFIRB expressed concern about the extent to which MPL is able to follow through on its business plan to displace imported production and to expand markets via increasing BC greenhouse acreage.

58. Windset and GGFI argue that MPL has not achieved either of those goals during the probationary period. First, Windset and GGFI argue that MPL has been “relying on the movement of producers from existing agencies,” (a concern of the BCFIRB) to fuel its growth. Second, Windset and GGFI argue that MPL has continued to supply the BC market with significant portions of imported produce, despite the fact that its marketing plan was premised on the displacement of imported products with BC produce, and the expansion of the market to a broader range of national retailers. At paragraph 34 of their written submissions dated October 7, 2024, Windset and GGFI state:

34. In sum, the concerns raised by the BCFIRB with respect to MPL BC’s marketing plan are borne out, and the retail opportunities for BC producers MPL BC promised have not been delivered. The evidence is that MPL BC has clearly not addressed this significant area of concern for the BCFIRB.

59. In reply, MPL states that the production allocation it is marketing is displacing imported product, and that it is selling British Columbia product in other markets. It argues that while it has yet to fully achieve the 5-year goals set out in its business plan, it has made progress on those goals, “despite the current cloud of uncertainty over its agency designation.”

60. The Commission fully endorses the BCFIRB’s concern that MPL should be able to demonstrate its ability to follow through on its business plan. However, the Commission also agrees with MPL that it is not reasonable to expect that MPL should be able to demonstrate that it has fully achieved its five-year goals within its first year of operation under a probationary agency designation.

61. In this regard, it is significant to note that MPL is now servicing markets as an agency with regulated product that was previously marketed by it as a wholesaler. This provides comfort that MPL is not disrupting orderly marketing or impairing the ability of other agencies to achieve their own business goals, even if MPL has not yet fully achieved its five-year goals to displace imported production and to expand marketing opportunities. Indeed, the fact that MPL is now directly servicing markets as an agency (rather than as a wholesaler) represents a net benefit. As a general proposition, it is preferable for product to be marketed by an agency rather than by a wholesaler, because agencies have a higher level of accountability to the Commission, and because direct marketing by an agency eliminates the impact that a wholesaler-intermediary can have on producer returns. Creekside, Darvonda, Fresh4Sunset, and Fresh4U, have each confirmed that their net producer returns have increased since they began shipping to MPL, which could reflect the advantage of direct marketing without a wholesaler acting as an intermediary. Of course, the Commission is mindful that that there could be other reasons driving an increase to

net returns, as argued by Windset and GGFI. In any event, it is also notable that other agencies had an opportunity to market directly to customers that were previously serviced by MPL in its capacity as a wholesaler, but that they either failed to do so or were unable to do so.

62. On a long-term basis, it remains incumbent on MPL to demonstrate its ability to achieve the objectives of its marketing plan. However, an inability to demonstrate that it has achieved all of these goals within the first year of its probationary agency designation is not a sufficient basis to recommend against MPL's designation as an agency. Of course, all agencies are subject to periodic reviews pursuant to section 22 of the Agency Order. Agency designations are not held in perpetuity, and there is no "right" to maintain an agency designation that may be asserted against the Commission. The Commission continues to expect that MPL will make progress on its stated business objectives.
63. In addition to continued monitoring to ensure that MPL is able to follow through on its business plan to displace imported production and to expand markets via increasing BC greenhouse acreage, the Commission intends to carefully monitor whether MPL will use its status as a designated agency to import production into BC in a way that will disrupt markets that are already serviced by other, existing agencies. This activity would be disruptive to orderly marketing, and could provide a basis to consider whether MPL's licence and designated status should be maintained, made subject to terms and conditions, suspended, or revoked, in the context of some future review. However, it is notable that Windset and GGFI have not provided specific evidence to support an allegation that their ability to service their existing markets has been disrupted by production imported into BC by MPL. In short, a general concern that such disruption might occur in the future is not a sufficient basis to recommend against MPL's designation as an agency, particularly when it is now servicing markets as an agency with regulated product that was previously marketed by it as a wholesaler.
64. With respect to the BCFIRB's concern about whether MPL has support from multiple arms-length commercial producers, Windset and GGFI argue that Creekside Hothouse Ltd. ("Creekside"), Fresh4U Farms Ltd. ("Fresh4U") and Fresh4Sunset Farms Ltd. ("Fresh4Sunset") are not at arm's length from each other. This proposition does not seem to be seriously contested by MPL, and the Commission is satisfied that these three producers should be regarded as a single producer for the purpose of assessing whether MPL has support from support from multiple arms-length commercial producers.

65. However, MPL also cites the support of Darvonda Nurseries Ltd. (“Darvonda”), whose product is now marketed by MPL, as well as a letter of support from Millennium Pacific Greenhouses (“Millennium”), although there is no product from Millennium reported in MPL’s quarterly reports.
66. Windset and GGFI argue that the Commission should discount the support of Darvonda, on the basis that its long English cucumbers do not tie into MPL’s marketing plan. Windset and GGFI also argue that the Commission should disregard the support of Millennium, on the basis that it is not shipping product to MPL, and on the basis that it has been and is for sale. Finally, Windset and GGFI argue that there is a commercial relationship between an entity affiliated with Darvonda (1265787 BC), and MPL and Creekside/Fresh4U (through Fresh4Sunset), which should call into question Darvonda’s arms-length status.
67. By letter dated October 29, 2024, Millennium denied that it has been or is for sale.
68. While the Commission is inclined to place little weight on Millennium’s support for MPL on the basis that it is not shipping product through MPL, the Commission is satisfied Darvonda is at arms-length from Creekside, Fresh4U and Fresh4Sunset. In other words, the Commission does not think that a commercial relationship between an entity affiliated with Darvonda (1265787 BC), and MPL and Creekside/Fresh4U (through Fresh4Sunset), should call into question Darvonda’s arms-length status. Consequently, the Commission is satisfied that the support of Creekside, Fresh4U, Fresh4Sunset and Darvonda constitutes sufficient evidence of support from multiple arms-length commercial producers (even if they collectively represent only two arm’s length producers).
69. With respect to the BCFIRB’s concern about MPL’s willingness and ability to comply with the Commission’s orders, Windset and GGFI cite MPL’s reliance on a letter of support from Randy Cox (a former employee of the Commission) as evidence that it continues to display a lack of understanding with respect to appropriate conduct of a participant in a regulated system. At paragraphs 43 and 44 of their written submissions dated October 7, 2024, Windset and GGFI state:
 43. [The letter of support from Randy Cox] should give the Commission pause to consider whether it was written at the request of MPL BC. If so, it is entirely inappropriate that MPL BC would ask a previous compliance officer of the Commission and now member of the BC Public Service (which has its own code of conduct and ethical obligations) to take such a step. This conduct, like its conduct in the Bad Faith Allegations investigated by the BCFIRB, displays a continued lack of understanding with respect to appropriate conduct of a

participant in a regulated system. The Commission's staff and Commissioners have roles to play in the system, which requires decision-making and enforcement. Those roles should be respected.

44. It is the submission of Windset and GGFI that seeking support from a previous compliance officer crossed the line. A submission like that of Mr. Cox results creates a reasonable apprehension among industry participants that Mr. Cox may not have been neutral in his evaluation of MPL BC's compliance, regardless of when he wrote the letter. This action demonstrates that MPL BC either still does not understand the difference between a regulated system in BC and an unregulated system like that of Ontario, or does understand it but may choose seek to undermine BC's system where it benefits it to do so.
70. In the Commission's view, it was entirely inappropriate for Mr. Cox to provide a letter of support to MPL, given that he is a former employee of the Commission. The Commission places no weight whatsoever on the letter of support provided by Mr. Cox.
71. However, the Commission is not satisfied that MPL's reliance on Mr. Cox's letter, or even MPL's solicitation of that letter (if such solicitation occurred), could ground a reasonable concern about MPL's willingness and ability to comply with the Commission's orders.
72. Windset and GGFI also cite Mr. Mastronardi's testimony before the BCFIRB about whether he had reported a change in the corporate ownership of the Mastronardi group as an indication of MPL's inability or unwillingness to comply with the Commission's orders. Again, the Commission is not satisfied that this testimony is sufficient to ground a reasonable concern about MPL's willingness and ability to comply with the Commission's orders.
73. The Commission is satisfied that MPL has sufficiently demonstrated its willingness and ability to comply with the Commission's orders, at least to this date.
74. In summary, the Commission is satisfied that none of the three broad areas of concern identified by the BCFIRB have materialized to the extent that might warrant a recommendation against MPL's status as a designated agency. However, the Commission reiterates that all agencies (including MPL) are subject to periodic reviews, and that there is no right to an agency designation that may be asserted against the Commission. As is the case with every agency, if circumstances suggest

that continuation as an agency is no longer warranted, the Commission may impose appropriate terms and conditions or suspend or revoke the agency designation.

Section 23 Considerations

75. At paragraph 31 of its written submissions dated September 13, 2024, MPL states:

Pursuant to section 23(2), the Commission can assign different weight to the factors under section 23(1), in its sole discretion. As noted above, the Panel may consider any of the factors enumerated, but is not required to be satisfied on each factor. This Panel may assess MPL BC on any of factors as it sees fit; however, it should not require that each and every factor satisfied to proceed with granting full licensure, nor does it require any allocation of equal weight to the factors.

76. The Commission agrees that the statement above reflects a correct interpretation of subsections 23(1) and (2) of the Agency Order.

77. The Commission's assessment of the considerations listed in paragraphs 23(1)(a) through (j) of the Commission's Agency Order is as follows:

(a) With respect to paragraph 23(1)(a), the Commission is satisfied that MPL has been actively engaged in marketing regulated product received from its assigned producers.

(b) With respect to paragraph 23(1)(b) ad (c), and subsection 23(3), Windset and GGFI argue that it is not in the interests of the industry for regulated product to be marketed by MPL, having regard to the capacity of existing agencies to market that regulated product. On the contrary, they argue that the purported benefits in MPL's marketing plan have not been borne out, and that MPL is marketing a large amount of imported product in British Columbia at the national retailers it stated would offer a new market for BC product. Windset and GGFI also note that there is a trend towards consolidation and that a proliferation of agencies is counter-productive to ensuring that producer returns are maximized.

The Commission is mindful of the risks of having too many selling desks. However, MPL is now servicing markets as an agency with regulated product that was previously marketed by it as a wholesaler. For all the reasons discussed earlier, the Commission regards this change as a positive development that is in the interests of the industry.

- (c) With respect to paragraph 23(1)(d), Windset and GGFI argue that the presence of MPL as a probationary agency has been disruptive to orderly marketing, insofar as MPL's growth has largely arisen from stripping producers away from an existing agency (i.e., Country Fresh). However, Windset and GGFI acknowledge that the movement of these producers from Country Fresh to MPL was done by consent. The Commission does not agree that MPL's presence as a designated agency has proven to be disruptive to orderly marketing. On the contrary, it is the Commission's view that direct marketing by MPL of regulated product that was previously marketed by it as a wholesaler promotes orderly marketing. This appears to be supported by evidence from MPL's producers, each of whom state that their net returns have improved, though the Commission is mindful that there could be other reasons driving an increase to net returns, as argued by Windset and GGFI.
- (d) With respect to paragraph 23(1)(e), Windset and GGFI argue that MPL has not demonstrated an understanding of the regulatory system or adequately expressed its intention to follow Commission orders and the enabling legislation. This is premised on the assertion that MPL improperly sought support from a previous enforcement and compliance official of the Commission, and on the basis of MPL's initial reluctance to disclose its ownership structure as directed by the Commission. As noted above, the Commission is not satisfied that MPL's reliance on Mr. Cox's letter, or even MPL's solicitation of that letter (if such solicitation occurred), could ground a reasonable concern about MPL's willingness and ability to comply with the Commission's orders. Further, even if MPL was initially reluctant to disclose its ownership structure as directed by the Commission, it ultimately did so.
- (e) With respect to paragraph 23(1)(f), Windset and GGFI argue that the market is sufficiently satisfied by other agencies. The Commission does not agree that the market serviced by MPL is (or was) satisfied by other agencies. On the contrary, MPL is now servicing markets as an agency with regulated product that was previously marketed by it as a wholesaler. The markets that were serviced by MPL as a wholesaler could have been targeted by other agencies, but it seems that no other agencies were willing or able to service those markets.
- (f) With respect to paragraph 23(1)(g), Windset and GGFI argue that MPL does not have evidence-based support from at least two licensed commercial producers who are at arms-length from each other and who wish to continue to market regulated product through MPL. In particular, Windset and GGFI argue that Creekside, Fresh4U, Fresh4Sunset are not at arm's length from each other, and that the support of Darvonda should be discounted on the basis that it is only shipping long English cucumbers through MPL. As noted

above, the Commission is satisfied that the support of Creekside, Fresh4U, Fresh4Sunset and Darvonda constitutes sufficient evidence of support from multiple arms-length commercial producers (even if they collectively represent only two arm's length producers).

- (g) With respect to paragraph 23(1)(h), the Commission is satisfied that the primary responsibility for marketing regulated product has been discharged by MPL, rather than by wholesalers who have marketed regulated product on behalf of MPL.
- (h) With respect to paragraph 23(1)(i), the Commission is satisfied that MPL has complied with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province.
- (i) With respect to paragraph 23(1)(j), the Commission is satisfied that MPL has demonstrated the knowledge, capacity, and ability to operate effectively as an agency.

Other Considerations

- 78. Windset and GGFI argue that MPL has been unable to achieve any significant inroads with BC producers, and that this should be taken as an indication that BC producers would like to continue to grow products they have experience with, rather than switching production to MPL's "proprietary varieties." In addition, Windset and GGFI ask that the Commission demand that MPL produce copies of its correspondence with producers, which may reveal that MPL's intention is to grow by stripping producers from other agencies.
- 79. The Commission has determined that the support of Creekside, Fresh4U, Fresh4Sunset and Darvonda constitutes sufficient evidence of support from multiple arms-length commercial producers (even if they collectively represent only two arm's length producers). The Commission does not think that a failure by MPL to "achieve any significant inroads with BC producers" during its probationary term is cause to reconsider its status as an agency, at least at this time. Further, the Commission is primarily concerned with disruptions to orderly marketing that may negatively affect producer returns. If an agency is able to entice a producer away from another agency because it is able to offer better returns or more favourable terms, there may be disruption to that other agency without giving rise to a disruption to orderly marketing.

80. Finally, in a letter dated October 24, 2024, Windset and GGFI argue that MPL's failure to disclose Temasek's investment in Mastronardi Produce Limited should be taken into account by the Commission:

At the very least, MPL BC's assurances that it is "family owned" do not paint an accurate picture for the industry of those with an interest in MPL BC. In fact, MPL BC is owned by multiple shareholders, including large institutional investment funds, one of whom appears to be a Singaporean state-owned fund.

81. The Commission is not persuaded that ownership interests by "large institutional investment funds" is a reasonable basis to recommend against continued agency status. The Commission is primarily interested in the identity of those who have a direct or indirect financial interest in an agency or a prospective agency so that it can assure itself that corporate entity is not being used as mechanism to hide the identity of "bad actors" who might otherwise be denied agency status on the basis of, for example, a past history of non-compliance or other conduct that could be detrimental to the sector. Here, there is no substantive argument that the corporate identity of MPL is being used in that way.

Summary

82. Having regard to: (a) the probationary terms imposed in the BCFIRB Decision; (b) BCFIRB's "three broad areas of concern"; (c) the considerations listed in paragraphs 23(1)(a) through (j) of the Commission's Agency Order; (d) the capacity of existing agencies or other prospective agencies to market regulated product (including Red Sun); and (e) other matters raised by the participants herein; it remains the Commission's view that MPL should be designated as an agency, subject to the approval of the BCFIRB.
83. If MPL's designation as an agency is approved by the BCFIRB, it should be noted that MPL will be subject to periodic reviews pursuant to section 22 of the Agency Order. Agency designations are not held in perpetuity, and there is no "right" to maintain an agency designation that may be asserted against the Commission. The Commission continues to expect that MPL will make progress on its stated business objectives, and that MPL will not use its status as a designated agency to import production into BC in a way that will disrupt markets that are already serviced by other, existing agencies.

Red Sun

Issues

84. The issues arising from the Commission's consideration of Red Sun's application for agency designation may be generally summarized as follows:
- (a) With respect to Red Sun's failure or refusal to comply with the Commission's directions concerning its redaction of the identity of supporting producers:
 - (i) What procedural fairness implications arise, if any?;
 - (ii) Does this failure or refusal bear on Red Sun's suitability as a prospective agency?
 - (b) Having regard to the considerations listed in paragraphs 9(4)(a) through (i) of the Commission's Agency Order, should the Commission recommend to the BCFIRB that Red Sun be designated as an agency?
 - (c) Having regard to the capacity of existing agencies or other prospective agencies to market regulated product (including MPL), should the Commission recommend to the BCFIRB that Red Sun be designated as an agency?

Redactions

85. The Commission has before it complete and unredacted copies of Red Sun's application materials and submissions.
86. Both Red Sun and MPL were permitted to circulate redacted versions of their materials to other participants, on the basis that the Commission would make determinations with respect to the appropriateness of the redactions. In that regard, the Commission noted that: (a) redactions must not be so broad that they remove necessary context, such that participants would not have a reasonable opportunity to comment meaningfully on their substance; and (b) redactions must be justified as being necessary to protect highly sensitive or proprietary information.
87. In an interim decision dated September 17, 2024, the Commission determined that the redactions on page 23 of Red Sun's May 31, 2024 application are not justified, and it directed that the support letters embedded on page 23 of Red Sun's May 31, 2024 application be provided for distribution to participants without redactions.

88. Notwithstanding these directions, Red Sun continued to redact the identity of supporting growers on page 23 of its application, and it provided copies of the support letters bearing redactions. Thus, the information made available by Red Sun to other participants on page 23 of its application is as follows:

Arms Length Grower Support

- Recognizing our previous Agency application fell short on paper, of the required two BC growers providing arms length support agreements for a new agency
- We are pleased to include 2 letters of support from BC Growers with acreage available for the 2025 crop season.

[Identity of Grower “A” Redacted]

[Identity of Grower “B” Redacted]

- Our application also received conditional support for the 2025 crop season, pending the successful purchase of an existing BC greenhouse facility

[Identity of Grower “C” Redacted]

- The 4th & 5th letters support our application, but do not include intentions for the 2025 crop season.

89. Each of the 5 supporting letters/emails were made available by Red Sun to other participants, but with redactions to remove any information that might identify the authors.

90. In an interim decision dated September 24, 2024, the Commission made the following comments and issued the following directions:

7. Consequently, there are still certain redactions (noted above) made to Red Sun’s materials that, in the Commission’s view, are not appropriate. This is cause for concern, as the withholding of this information could impair the ability of industry stakeholders to provide a full response to the application. The Commission’s ability to make an informed decision on the application depends, at least in part, on its ability to receive meaningful feedback from industry stakeholders.

.....

9. For clarity and greater certainty, in addition to submissions addressing the substance of Red Sun’s application, MPL, Red Sun and participating industry stakeholders may also address the following issues that will form part of the panel’s consideration of Red Sun’s application:
 - (a) The procedural fairness implications, if any, arising from Red Sun’s failure or refusal to comply with the Commission’s directions concerning redactions, and whether that impacted their ability to consider and comment on Red Sun’s application; and
 - (b) The extent to which, if any, Red Sun’s failure or refusal to comply with the Commission’s directions concerning redactions bears on its suitability as a prospective Agency.

91. In their written submissions dated October 7, 2024, Windset and GGFI argue that the identity of the producers supporting Red Sun’s application is critical information for other participants, who may have insights into whether these producers are at arm’s length from each other. Windset and GGFI also argue that Red Sun’s failure or refusal to abide by the Commission’s “speaks to Part II, s. 9(4)(d) of the Agency Order – whether the applicant has adequately expressed its intention to follow the Commission Orders and the enabling legislation and regulations.” Windset and GGFI argue that this “should be fatal to Red Sun’s application.”

92. Similarly, in its October 7, 2024 written submissions, MPL argued extensively that the redactions maintained by Red Sun contrary to the Commission’s directions materially impair MPL’s ability to provide complete feedback on Red Sun’s application, which in turn impairs the Commission’s ability to complete the fairness and inclusivity prongs of its SAFETI-based assessment. MPL also argues that by maintaining these redactions contrary to the Commission’s directions Red Sun has called into question its understanding of, and its intention to comply with, Commission orders and the applicable legislation and regulations.

93. In its reply submission dated October 29, 2024, Red Sun argues that the Commission’s consideration of new agency applications is inquisitorial in nature, and that “industry participants (as opposed to license applicants) ... have a right to procedural fairness at the low-end of the spectrum, if the administrative decision maker owes them any duty of procedural fairness at all.” Further, even with the existing redactions, Red Sun argues that it has provided an ample basis on which industry participants can review and respond to its position.

94. With respect to the procedural fairness implications of Red Sun's failure or refusal to comply with the Commission's directions concerning its redaction of the identity of supporting producers, the Commission agrees with Red Sun that the Commission's consideration of new agency applications is inquisitorial in nature, and that the substantive content of the duty of procedural fairness owed to other industry participants is at the low-end of the spectrum. In addition, the Commission is satisfied, for the most part, that MPL, Windset and GGFI have had a fulsome opportunity to respond to Red Sun's application.
95. With respect to the narrow issue of producer support, it is useful to identify why feedback from industry participants regarding the identity of supporting producers could be useful to the Commission. First, it is possible that industry participants may have information touching upon the arms-length status of the supporting producers. Second, industry participants might have information touching upon the *bona fides* of the producers' support. Because the identity of the supporting producers was not made available by Red Sun to industry participants, the Commission cannot benefit from information that industry participants might otherwise have about arms-length status, and *bona fides*. However, any lack of feedback on these matters could be addressed by imposing conditions on any agency designation that might be conferred by the Commission on Red Sun. In particular, the Commission could decide that Red Sun should be granted agency status, subject to it securing production from "Grower A" and "Grower B", and subject further to these producers being at arm's length from each other. If Red Sun is unable or unwilling to satisfy these conditions, the Commission's decision that Red Sun should be granted agency status could be rescinded without further order. Thus, having regard to the options available to the Commission, the Commission is satisfied that the procedural fairness implications, if any, arising from Red Sun's failure or refusal to comply with the Commission's directions concerning its redaction of the identity of supporting producers, do not constitute a sufficient basis in themselves to reject Red Sun's application.
96. The Commission is more troubled by Red Sun's failure or refusal to comply with the Commission's directions. The Commission agrees with MPL that Red Sun's actions are appropriately regarded as a refusal to comply, rather than a mere failure to do so. This is not a good start for a prospective agency, as it is essential that agencies comply with directions given to them by the Commission. Red Sun appears to argue that it was constrained by the fact that the letters of support were provided to it in confidence. The Commission is skeptical that the identity of supporting producers would fall within the parameters of section 21 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, and there does not appear to be any evidence that Red Sun attempted to secure consent from supporting producers after it was directed to disclose that information.

97. Having reflected on the matter carefully, the Commission has decided that Red Sun's failure to comply with the Commission's directions concerning disclosure of the identity of supporting producers should not be fatal to its application. In the future, the Commission could make it clearer to prospective agencies that disclosure of the identity of supporting producers to industry participants is a precondition to its consideration of an application. Here, it is at least arguable that Red Sun sought out and obtained letters of support that were provided to it in confidence, and that it was unable to secure consent to disclosure amid the Commission's process.

Subsection 9(4) Considerations

98. The Commission's assessment of the considerations listed in subsection 9(4) of the Commission's Agency Order is as follows:
- (a) With respect to paragraph 9(4)(a), the Commission is satisfied that there is a market requirement for the proposed agency, and that the designation of Red Sun as an agency would benefit the industry as a whole. Having regard to the identity of the supporting producers, there is a reasonable expectation that if Red Sun is designated as an agency, it would directly market regulated product – much of which is currently being marketed by a wholesaler;
 - (b) With respect to paragraph 9(4)(b), the Commission is satisfied that it would not be in the interests of the industry for the regulated product produced by Red Sun's supporting producers to be marketed by an existing agency. Much of that regulated product is currently being marketed by a wholesaler, and no existing agencies have yet targeted the markets that are serviced by that wholesaler. It is the Commission's view that direct marketing by Red Sun of regulated product that was previously marketed by a wholesaler will promote orderly marketing;
 - (c) With respect to paragraph 9(4)(c), the Commission is satisfied that the presence of Red Sun as an 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. On the contrary, it appears that Red Sun intends to directly market regulated product that is presently being marketed by a wholesaler;
 - (d) With respect to paragraph 9(4)(d), the Commission is satisfied that the Red Sun has demonstrated an understanding of the regulatory system and has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations. As noted above, the Commission has decided that Red Sun's failure to comply with the Commission's directions

concerning disclosure of the identity of supporting producers does not necessarily indicate a predisposition towards non-compliance. In addition, the Commission is not persuaded that Red Sun's failure to register as an extra-provincial company in BC gives rise to concerns about Red Sun's compliance with Commission orders;

- (e) With respect to paragraph 9(4)(e), the Commission is satisfied that there is evidence-based demand for the regulated product sought to be marketed by Red Sun, which demand is not already satisfied by existing agencies. Indeed, it appears that much of the regulated product that would be marketed by Red Sun is presently being marketed by a wholesaler;
- (f) With respect to paragraph 9(4)(f), the Commission is satisfied that there is evidence-based support from at least two licensed commercial producers ("Grower A" and "Grower B"), and that there is no evidence that these two producers are not at arms-length from each other. However, given the inability of industry stakeholders to comment on the *bona fides* and arms-length status of these producers, the designation of Red Sun as an agency will be subject to the condition that it secure commitments from "Grower A" and "Grower B", and that these producers are and will remain at arm's length from each other. If Red Sun is unable or unwilling to satisfy these conditions, the Commission's decision that Red Sun should be granted agency status will be rescinded without further order;
- (g) With respect to paragraph 9(4)(g), the Commission is satisfied that the primary responsibility for marketing regulated product will rest with Red Sun, rather than wholesalers who may market regulated product on behalf of Red Sun;
- (h) With respect to paragraph 9(4)(g), the Commission is satisfied that 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; and
- (i) With respect to paragraph 9(4)(g), the Commission is satisfied that Red Sun has the knowledge, capacity, and ability to operate effectively as an Agency.

Summary

99. Having regard to: (a) the considerations listed in paragraphs 9(4)(a) through (i) of the Commission's Agency Order; (b) the capacity of existing agencies or other prospective agencies to market regulated product (including MPL); and (c) other

matters raised by the participants herein; the Commission has decided that Red Sun should be designated as an agency, subject to:

- (a) Red Sun securing production from "Grower A" and "Grower B" (as identified in its application as the producers who have committed to supply Red Sun);
 - (b) "Grower A" and "Grower B" being and remaining at arm's length from each other; and
 - (c) the approval of the BCFIRB.
100. If Red Sun is unable or unwilling to satisfy these conditions, the Commission's decision that Red Sun should be granted agency status will be rescinded without further order.
101. If Red Sun's designation as an agency is approved by the BCFIRB, it should be noted that Red Sun will be subject to periodic reviews pursuant to section 22 of the Agency Order. Agency designations are not held in perpetuity, and there is no "right" to maintain an agency designation that may be asserted against the Commission. The Commission expects that Red Sun will make progress on its stated business objectives, and that Red Sun will not use its status as a designated agency to disrupt markets that are already serviced by other, existing agencies.

SAFETI

102. It is the Commission's considered view that its decisions 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:
- (a) **Strategic:** The decisions reflect the Commission's identification of key opportunities as well as systemic challenges.
 - (b) **Accountable:** The Commission has maintained legitimacy and integrity by discharging its responsibilities according to the detailed criteria for new agency applications and review of existing agencies as set out in the Agency Order.
 - (c) **Fair:** The Commission has ensured procedural fairness by providing industry stakeholders with a fulsome opportunity to express their positions.

- (d) Effective: The high threshold for the grant of an agency designation, as well as criteria that need to be satisfied to maintain an existing agency designation, are both clearly defined in the Agency Order.
- (e) Transparent: The Commission 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. Though some aspects of the application have been redacted to protect confidential or proprietary information, stakeholders have been provided with a fulsome opportunity to express their positions
- (f) Inclusive: The Commission has taken all appropriate steps to ensure that appropriate interests are considered.

103. Any person aggrieved or dissatisfied with the decisions herein may appeal these decisions to the BCFIRB within 30 days from the date hereof.



Derek Sturko, Chair