



**BC Farm Industry
Review Board**

March 17, 2025

File: N2502

DELIVERED BY E-MAIL

Kevan Hanowski
McCarthy Tetrault LLP



Robert Hrabinsky
Affleck Hrabinsky Burgoyne LLP



Dear Parties:

**RE: MUCCI INTERNATIONAL MARKETING INC. V BC VEGETABLE MARKETING
COMMISSION**

Introduction and Procedural Background

The British Columbia Farm Industry Review Board (BCFIRB) received a notice of appeal on February 21, 2025 from Mucci International Marketing Inc. (Mucci) with respect to the January 22, 2025 decision of the BC Vegetable Marketing Commission (the Commission) designating Jem-D International Inc. dba Red Sun Farms (Red Sun) as an agency pursuant to sections 8 and 9 of the Commission's Agency Order of June 27, 2024¹, as amended (the Agency Decision). Mucci's appeal is centered on the Commission's requirement that Red Sun must secure certain producers prior to it being designated as an agency (the "Secured Production Condition").

Pursuant to section 8 of the *Natural Products Marketing (BC) Act Regulations*, the Agency Decision requires the approval of BCFIRB exercising its supervisory authority. BCFIRB has initiated a supervisory review process and a separate panel has been appointed for that purpose.

By letter dated February 24, 2025, Mucci requested that it be included in the supervisory review process and that if it was granted standing to participate in the review then its appeal of the Agency Decision should be deferred pending the resolution of the supervisory process.

¹ See <https://www.bcveg.com/mt-content/uploads/2024/06/2024-06-27-agency-order.pdf>

**British Columbia
Farm Industry Review Board**

Mailing Address:
PO Box 9129 Stn Prov Govt
Victoria BC V8W 9B5
Telephone: 250 356-8945
Facsimile: 250 356-5131

Location:
780 Blanshard Street, 1st Floor
Victoria BC V8W 2H1
Email: firb@gov.bc.ca
Web: www.gov.bc.ca/BCFarmIndustryReviewBoard

Summary Dismissal Application

By letter dated February 27, 2025, the Commission applied for a summary dismissal of the appeal. Implicit in that application is the Commission's submission that the appeal should not be deferred pending the resolution of the supervisory process. In fact, in its reply submission, the Commission argued that if the appeal is not summarily dismissed then the appeal should be completed prior to the supervisory review process as the determination of the appeal will materially affect whether the supervisory process is necessary and how it will unfold.

The Commission's application is brought pursuant to section 31(1)(f) of the *Administrative Tribunals Act* (ATA) which allows for the summary dismissal of an appeal in instances in which there is no reasonable prospect that the appeal will succeed. The threshold for the appeal to proceed is low and the appellant must show only that the appeal is out of the realm of conjecture.²

The Commission identifies two grounds for summary dismissal as follows:

1. Insofar as the appeal is premised on Mucci's assertion that certain conditions imposed on Jem-D International dba Red Sun Farms ("Red Sun") amount to an "interpretation" or "application" of the Agency Order that will impact upon "the conditions and criteria that Mucci must satisfy in order to secure designated agency status in British Columbia", there is no reasonable prospect the appeal will succeed. On the contrary, the conditions imposed by the Commission on Red Sun reflect the lawful exercise of the Commission's discretionary authority, having regard to the very unique circumstances of Red Sun's application. There is no plausible basis to assert that the same or similar conditions would necessarily apply to Mucci, or to any other prospective applicant for agency status, as if the conditions imposed in the unique circumstances of Red Sun's application are tantamount to an "interpretation" of, or an implicit amendment to, the Agency Order.
2. Insofar as the appeal is premised on Mucci's assertion that the Commission "has no authority, under the Agency Order or otherwise, to require potential agencies to demonstrate that they have 'secured' production in order to become designated agencies", there is no reasonable prospect the appeal will succeed. First, it is obvious that the Commission does not derive its authority from the Agency Order, or from any other order that may be made by the Commission itself. On the contrary, the Commission derives its authority from the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 and from the British Columbia Vegetable Scheme, (B.C. Reg. 96/80). Second, the Commission is clearly authorized to impose special conditions on Red Sun (or on any other prospective applicant for agency status) pursuant to the powers vested in it "to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of a regulated product", which includes the power "to make orders... considered by the... commission necessary or advisable to promote, control and regulate effectively the marketing of a regulated product." Third, Mucci's assertion that the Commission has an extraordinarily limited authority with respect agency applications cannot be reconciled with the well-

² See *Patton v. British Columbia Farm Industry Review Board*, 2021 BCCA 75 (CanLII) at paragraph 120.

established proposition that a decision to grant agency status is a matter of fundamental marketing policy.

The Commission essentially argues that the Commission's decision to impose the Secured Production Condition is discretionary, and is in accordance with sound marketing, the *Natural Products Marketing (BC) Act*, R.S.B.C. 1996, c. 330 (the NPMA), and the British Columbia Vegetable Marketing Scheme (B.C. Reg. 96/80). Furthermore, the Commission is not limited or bound by the Agency Order, and can impose conditions to account for unique circumstances which may or may not apply in future agency applications.

Response Submission of Mucci

In response, Mucci states that the Secured Production Condition should not have been imposed as follows:

- (a) It unreasonably departs from the terms of the Agency Order. In so doing, it creates uncertainty for prospective agencies with respect to the criteria for agency status. Prospective agencies are entitled to know the criteria that they must satisfy in order to obtain agency status.
- (b) It is inconsistent with sound marketing policy, including because it is blind to the practical dynamics between existing agencies, prospective agencies and producers. Critically, it fails to recognize that neither producers nor agencies are in a position to finalize their marketing agreements until they know whether the applicant will have agency status.
- (c) It is unnecessary and not rationally connected to the issue that it was designed to address, namely the non-disclosure of the identities of "Grower A" and "Grower B". There were other ways to deal with this non-disclosure.

Mucci states that the Agency Decision should be deferred to the conclusion of the supervisory review and that the issues raised on appeal could also be addressed in that review. It notes that appeals to BCFIRB are conducted as *de novo* reviews, and are not limited to legal error, but also involve the assessment of whether the decision represents a proper exercise of discretion and sound marketing policy.

Reply Submission of the Commission

In its reply submission, the Commission asserts that Mucci's claim that the issues are suitable for supervisory review is incorrect in that the regulations do not grant BCFIRB the authority to make the initial decision on agency designation. Instead, the Commission asserts that BCFIRB's role is only to approve the Commission's decision and that as the Secured Production Condition is an integral part of the Agency Decision, BCFIRB can only approve or deny that decision in its entirety.

Decision

Appeals to BCFIRB are governed by section 8 of the NPMA which reads in part as follows:

8(1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination to the Provincial board...

8(8) If, after an appeal is filed, an appeal panel considers that all or part of the subject matter of the appeal is more appropriately dealt with in a supervisory process under its supervisory power, the appeal panel, after giving the appellant and the marketing board or commission an opportunity to be heard, may defer further consideration of the appeal until after the supervisory process is completed.

8(8.4) If an appeal is deferred under subsection (8) and the supervisory process has been completed, the appellant may give notice that it intends to proceed with the appeal, and the Provincial board must proceed with and decide the appeal.

Section 8(8) above provides BCFIRB the option of deferring an appeal to a supervisory process. That process may be one which is ongoing or one which is set in motion by the appeal itself. In this instance, as noted above, a supervisory review has been initiated by BCFIRB essentially concurrently with this appeal, and it is to that process which Mucci has suggested that the appeal could be deferred.

BCFIRB has deferred appeals of agency designations in the past in similar circumstances to those in this appeal. In a decision letter dated November 21, 2012, BCFIRB deferred two appeals of agency designation decisions made by the Commission to a supervisory review and noted in conclusion:

Since the supervisory process will deal with all of the subject matter under appeal, it is likely that most, if not all, issues raised by the appeals will be determined by that process. Accordingly, it would be a duplication of effort to continue at the same time with any of the appeals.³

Summary Dismissal

The Panel notes at the outset that the Secured Production Condition imposed by the Commission on Red Sun arose as a result of Red Sun's repeated failure to abide by disclosure orders that had been made by the Commission. The intent of those disclosure orders was presumably to ensure that Red Sun's application was in accordance with the Agency Order and past practice. The decision made by the Commission to grant Red Sun agency status, conditional on securing those producers

³ Decision letter from Suzanne Wiltshire (BCFIRB Presiding Member) November 21, 2012. See https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/supervisory-reviews/supervisory-review-decisions/bc-vegetable-marketing-commission-decisions/referral_to_supervisory_review_nov21_12.pdf

and demonstrating those producers remained at arm's length, despite having not obtained the disclosure it had previously ordered, was a discretionary decision that involved the Commission's statutory authority as the first instance regulator.

However, whether that exercise of discretion accords with the Commission's statutory authority and sound marketing policy are appropriate grounds for appeal. The issue of whether it is even possible for a prospective agency to 'secure' a producer prior to its designation also supports appellate review. The Panel notes that the Agency Decision does not include details on what the Commission would consider sufficient to meet the Secured Production Condition or where that decision fits in relation to the approval process for agency designation.

While Mucci is not the subject of the Agency Decision, it has applied for agency status in the past and may apply again in the future and its concerns with respect to the Commission's exercise of its discretion in this instance, and what that may mean for future applications, are not based on mere conjecture. Section 8 of the NPMA only requires an appellant to have been 'aggrieved or dissatisfied' with an order, and the test at this stage is not whether Mucci will ultimately be successful in its appeal. Rather, the test is whether there is no reasonable prospect of success, and the bar for Mucci is low.

The Panel finds that Mucci's Notice of Appeal raises issues that have some reasonable prospect of success. The Commission's summary dismissal application is therefore dismissed.

Deferral

Mucci has submitted that its appeal should be deferred to the supervisory review process. The Commission has submitted that in the event that the summary dismissal application is unsuccessful then the appeal should be heard prior to the supervisory review. That position is predicated on the Commission's assertion that BCFIRB's supervisory authority with respect to the approval of agencies is limited to either approving or denying the Commission's decision.

BCFIRB's supervisory authority with respect to agency designations was recently considered in *Windset Farms (Canada) Ltd. v British Columbia Farm Industry Review Board*, 2025 BCSC 2 (CanLII) at paragraphs 35 - 39 as follows:

[35] The general supervisory, including investigatory, powers of BCFIRB are provided for through the enactment of the *Natural Products Marketing (BC) Act Regulations*, B.C. Reg. 328/75 (the "NPMA Regulations") and specifically by ss. 4 and 4.1 of those regulations. Section 4 of the NPMA Regulations provides that the BCFIRB has general supervisory power over "all marketing boards, commissions or their designated agencies" [emphasis added].

[36] Section 8 of the NPMA Regulations further provides that no designation of any agency shall be effective unless approved in writing by BCFIRB. In other words, the NPMA empowers BCFIRB "... to carry out supervisory functions over the commodity-

specific boards that are created under the regulatory schemes (s. 3)”: *Patton v. British Columbia Farm Industry Review Board*, 2021 BCCA 75 at para. 11 [Patton].

[37] Pursuant to s. 7.1, the NPMA grants BCFIRB “powers of general supervision over all marketing boards and the exercise of duties, functions and authority prescribed to it to fulfill the purposes of the NPMA”: Patton, para. 13.

[38] Subsection 7.1(7) of the NPMA authorizes BCFIRB to “make rules governing its procedure and the quorum in supervisory matters, including its meetings, and may make rules and issue orders governing the procedure for any exercise of its supervisory powers”.

[39] The NPMA also provides BCFIRB with authority to determine appeals from a marketing board or commission order, decision or determination: s. 8, NPMA. Under s. 8(8) of the NPMA, an appeal panel may decide that all or part of the subject matter of appeal is more appropriately dealt with under its supervisory power and it may defer consideration of the appeal until after the supervisory process is completed.

Given the broad powers associated with BCFIRB’s supervisory authority, the Panel does not agree with the Commission’s submission that BCFIRB’s role is limited to accepting or rejecting the Agency Decision in its entirety. The supervisory process by its nature is intended to grant BCFIRB the scope to act as necessary to ensure that sound marketing policy prevails. While it is the Commission’s role to determine whether, and on what conditions, an applicant should be granted agency status in the first instance once that decision has been made, it is up to BCFIRB to review that decision and make its own decision about whether the designation accords with sound marketing policy. BCFIRB may make ancillary orders including requiring some further process be undertaken by the Commission, revisions to the terms of the order itself, or any other measures that BCFIRB considers necessary and appropriate in the circumstances.⁴

The Panel agrees with Mucci that the issues at stake in this appeal will likely be raised and largely resolved in the supervisory review process, and that carrying forward with this appeal would therefore be both premature and duplicative.

⁴ See MPL British Columbia Distributors Inc. (MPL BC) Agency Designation Approval, October 11, 2023 at paragraphs 79-84. https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/boards-commissions-tribunals/bc-farm-industry-review-board/regulated-marketing/supervisory-reviews/2022-mpl-mastronardi-agency-application/2023_oct_11_mpl_bc_agency_approval_decision_revised_20-11-2023.pdf

The Panel orders that this appeal should be deferred to the conclusion of the supervisory review. In the event that the supervisory review does not fully address the issues raised in this appeal then Mucci may give notice that it intends to proceed with its appeal after the conclusion of the supervisory review⁵. The parties should expect that they will be contacted by BCFIRB staff in due course with respect to next steps in the supervisory review process.

Dated at Victoria, British Columbia this 17th day of March 2025.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD

Per:

A handwritten signature in black ink, appearing to read "Wendy Holm". The signature is written in a cursive, flowing style.

Wendy Holm, Presiding Member

⁵ Section 8(8.4) of the NPMA.