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Sent Via E-mail

British Columbia Farm Industry Review Board
780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Peter Donkers, Chair and Wanda Gorsuch

Dear Sirs/Mesdames:

Re: British Columbia Farm Industry Review Board (“BCFIRB”) 2021 Supervisory Review

We write to provide MPL British Columbia Distributors Inc.’s (“**MPL**”) response to Hearing Counsel’s submissions, dated March 10, 2022, regarding production of certain documents, the relevance of Ms. Glyckherr’s evidence and the continuation of the supervisory review hearing.

Relevance of Moratorium Documents

By way of letter, dated February 18, 2022, MPL requested production of three narrow categories of documents related to the moratorium and the lifting of the moratorium. While MPL had previously requested documents related to the moratorium, MPL’s February 18 requests were much narrower and specifically focused on communications and documents related to the October 21, 2020 lifting of the moratorium.

Throughout Mr. Mastronardi’s evidence, he consistently provided evidence that the Commission’s delay in lifting the moratorium was one of the bases upon which MPL claims the Commission failed in its duties and delayed consideration of MPL’s agency application. It was evident from Mr. Mastronadi’s evidence that the delay in lifting the moratorium was directly related to MPL’s allegations of improper conduct. Thereafter, Mr. Solymosi was cross examined on the timing on the Commission lifting the moratorium and communications between Mr. Solymosi and the Commissioners on this issue. While Mr. Solymosi provided general recollections of timing, he was unable to confirm the precise timing of all communications, including the timing of BCFIRB’s direction to the Commission to lift the moratorium and communications regarding this direction. The specific timing of BCFIRB’s direction and the Commissioners’ responses to that direction are directly relevant to the issue of why and when the Commission lifted the moratorium, and the most reliable basis for this information is from contemporaneous communications or documents. Further, MPL’s narrowed and tailored request for production of specific documents from a narrow window of time addresses Hearing Counsel’s prior objections, as stated in Hearing Counsel’s letter of February 8, 2022, that MPL’s request for production of documents related to the moratorium were too broad and not proportional. Given the seriousness of the allegations raised in this matter, MPL’s request for production of specific documents created over a two week period is not overly onerous and is in proportion to the issues.

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Relevance of Ms. Glyckherr's Evidence

Since at least December 2021, MPL has been seeking production of documents and communications related to or arising from Dawn Glyckherr's strategic review, and for Hearing Counsel to interview Ms. Glyckherr. To date, Hearing Counsel has refused both requests. Hearing Counsel's refusals appear to be primarily based on a very narrow assessment of relevancy limited to the specific particulars of wrong doing set out in MPL's Notice of Civil Claim. However, Hearing Counsel's submissions on this issue ignore the overarching objectives of the Supervisory Review and the iterative nature of Supervisory Reviews.

In setting out the Scope and Focus of this Supervisory Review on June 18, 2021, BCFIRB did not limit the Supervisory Review to just the specific allegations raised in the Notices of Civil Claim. Rather, BCFIRB directed that this review be directed by two objectives: 1) ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and 2) ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector. Further, as Chair Donkers observed in his January 25, 2022 decision regarding certain preliminary matters: "Supervisory reviews are, by their nature, iterative. It is not uncommon for a review panel to undertake some investigation, then, based on the progress of the proceeding, determine more investigative work is necessary and continue on to consider other issues. In my view, this supervisory review is no different."

Mr. Solymosi has provided evidence that Ms. Glyckherr advised him that, as part of her review, she found, among other things, that: the governance structure was suspect; there was an old boys club; people had differing views at meetings but toed the line; decisions were made at a coffee shop not at meetings; and a significant amount of work was needed to restore confidence in the regulatory system. Mr. Solymosi agreed that he did not have any reason to doubt Ms. Glyckherr's findings, he wanted to keep her on to finish her report and he considered her a trustworthy person. He further acknowledged that Ms. Glyckherr had advised him that, in connection with her investigation, she had been called names by Commissioners and that his recollection was that the Commission as a whole was opposed to Ms. Glyckherr continuing to finish her review.

It is apparent from Mr. Solymosi's evidence that Ms. Glyckherr has evidence directly related to the stated objectives of this Supervisory Review. Specifically, evidence regarding concerns from producers on the fairness of Commission decisions and overall confidence in the structure and decision making ability of the Commission, as well as the way Commissioners responded to Ms. Glyckherr's investigations. It is difficult to understand how Hearing Counsel has determined that Ms. Glyckherr has no relevant evidence without even speaking to her. Accordingly, MPL seeks an order requiring the production of documents related to Ms. Glyckherr's review and that hearing counsel be directed to call her as a witness.

Proposed Hearing Dates and Continuation Process

Hearing Counsel has proposed that the Supervisory Review hearing proceed in the weeks of March 28 and April 18 on the basis set out in his letter of March 10, 2022. While not ideal, in an effort to facilitate the continuation of the hearing, MPL does not object to the review proceeding the week of March 28 with witnesses solely related to Prokam and Bajwa. However, MPL objects to the calling of any witnesses that week that relate to MPL and time limits on evidence being imposed part way through the hearing. While MPL appreciates the need to proceed with this hearing, witnesses' evidence cannot easily be broken down into water tight compartments and often builds off of previous testimony. Here, there is a real risk that Mr. Guichon's evidence given in connection with Prokam and Bajwa will relate to the issues raised by MPL

and *vise versa*. Accordingly, it would be appropriate and in the interests of fairness for Mr. Guichon to be called as a witness when counsel for MPL, Prokam and Bajwa are all available.

With respect to Hearing Counsel's proposal that going forward witnesses' evidence be time limited, the proposal ignores the fundamental fact that we are not at the start of the hearing, but rather are now two weeks into the hearing. Hearing Counsel has cited in support two Federal Court decisions, but neither case stands for the proposition that parties' cross examination can be curtailed part way through a hearing. Rather, as noted in paragraph 12 of the *Del Zotto* decision, the cases stand for the principle that the requirements of fairness will vary depending on the circumstances and that a "statutory right to be represented by counsel, without further directive, does not necessarily imply a right to cross-examine". Hearing Counsel appears to be relying on the latter statement for the proposition that parties do not necessarily have the right to cross-examine all witnesses, but his submission in this respect again ignores that, here, Rule 29(b) of the Rules of Procedure does give parties the right to cross examine witnesses.

Moreover, Hearing Counsel's proposal would restrict cross examinations for some parties part way through the hearing, as opposed to restricting it for all parties from the start of the hearing or even after the first witness had testified (by which point it should have been apparent that there was a timing issue). The result of this would be the unequal treatment of parties contrary to the rules of fairness and natural justice. As noted by the Court of Appeal, in *C.E.P Union of Canada v. Power Engineers et al*, 2001 BCCA 743 at para. 15: "…natural justice requires at least that the same rules must apply to all parties in this matter. Either all or none should have had the privilege of written submission. To deny this basic equivalency as has been the result of this case is, I consider, to deny a fair hearing."

The restriction on cross examination raises serious issues of procedural fairness in the conduct of this hearing. Had these issues been raised from the outset, this may not be an issue. However, the parties have completed two full weeks of testimony, with the representatives for MPL and Prokam being cross examined at length and without limitation. For example, one counsel was permitted to cross examine MPL's representative for approximately a day. To now restrict the ability of parties to cross examine witnesses is not only procedural unfair; it is also a restriction on the parties' legitimate expectations on how this hearing is conducted: See *Baker v. Canada (Minister of Citizenship & Immigration),* 1999 SCC 699 at para. 26. Further, the only cross-examination conducted by MPL was of Mr. Solymosi in the afternoon of the last hearing date. As a result, it was not MPL's cross examination that led to delays in the proceeding. In essence, Hearing Counsel's proposal would punish MPL for other counsel's cross examination timing. In the circumstances, MPL respectfully submits that, in the interests of fairness, it would be appropriate and just for the FIRB not to grant hearing counsel's request to unilaterally restrict parties' cross examination of witness yet to be called in this matter.

Yours truly,

Dentons Canada LLP

Emma Irving
Partner