BRITISH COLUMBIA

BC Farm Industry Review Board

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Dear Sirs:

RE: MPL BRITISH COLUMBIA DISTRIBUTORS INC. V BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

The Appeal

On November 24, 2020, MPL British Columbia Distributors Inc. (MPL) filed an appeal of an October 30, 2020 decision of the British Columbia Vegetable Marketing Commission (Commission) denying MPL's request for an extension of the October 31, 2020 deadline for greenhouse vegetable producers to give notice of their intention to transfer from one agency to another which it says, in effect, denied MPL's application for a Class 1 Agency designation for the 2021 growing season.

The Application

On December 14, 2020, the Commission wrote to the British Columbia Farm Industry Review Board (BCFIRB) seeking an order summarily dismissing the appeal pursuant to paragraphs 31(1)(a), (c), and (f) of the *Administrative Tribunals Act* on the grounds that the appeal is not within the jurisdiction of the tribunal; the appeal is frivolous, vexatious or trivial, or gives rise to an abuse of process; and there is no reasonable prospect it will succeed.

Background

For context, in June 2019, the Commission placed a moratorium on all new agency applications. The purpose of the moratorium was to allow the Commission to complete certain strategic work relating to Commission and agency governance. This decision was appealed, but BCFIRB deferred the appeal to allow a BCFIRB Supervisory Panel to carry out a supervisory review of Commission and agency governance related issues.

As part of the supervisory review process, on October 21, 2020, BCFIRB concluded that the Commission's progress on its strategic planning and agency accountability framework projects provided an adequate basis for the Commission to begin considering new agency applications. As such, BCFIRB lifted the moratorium; BCFIRB recognized that the Commission may wish to enhance its current agency application process to reflect some of the concerns identified in the supervisory review by the Commission and sector members. Panels were to be established no later than October 30, 2020 and all current and pending agency applicants were to be made aware that the Commission may request additional information and /or adjust its process as required currently under Part XIV of its Consolidated General Order, as it finalizes the agency accountability framework.

On December 11, 2020, BCFIRB directed the Commission to not issue any orders or amend the Consolidated General Order until it received the Panel's directions and recommendations. The Supervisory Panel released its 2019-20 Vegetable Review Decision on December 22, 2020. The decision makes supervisory directions and recommendations related to managing perception of bias and potential conflict of interest in Commission decision-making, agency accountability and the oversight and management of storage crop Delivery Allocation.

The Positions of the Parties
Commission

The Commission's position is that it is patently obvious the Commission has not yet made any order, decision, or determination to deny MPL's application for a Class 1 agency designation. Less than two weeks before the appeal was filed, the Commission wrote to MPL by email dated November 13, 2020, as follows:

> Please be advised that your application has been forwarded to a panel, but the panel has been asked to defer consideration of the application until the Commission has finalized its additional criteria, considerations and processes for agency applications. This is expected to be completed within four weeks. At that time, any additional criteria, considerations and processes will be communicated to you so that you have an opportunity to address any matters that are not already addressed in your application. Once you have had an opportunity to provide any supplementary materials or submission, the panel will assess your application, together with any such supplementary materials or submissions. MPL's application is still before the Commission and but for this appeal creating a separate forum, the Commission intends to process the application.

The existence of "an order, decision or determination" is an essential prerequisite to an appeal: see *Broatch v. BC Broiler Hatching Egg Commission* (November 2, 2020). It is not enough for a potential Appellant to point to a string of emails and communications and say, "I am aggrieved or dissatisfied with these communications". An order, decision or determination requires some action on the part of the commodity board. In this case, the Appellant's real grievance seems to be that the Commission has not yet made a decision on MPL's application. Issues with respect to the timeliness of commodity board decisions in the context of a supervisory review cannot be made the subject of an appeal to the BCFIRB in the absence of "an order, decision or determination". On the

issue of delay, the Commission points to BCFIRB's December 11, 2020 letter directing that the Commission "not make any orders as individual orders or as amendments to the Consolidated General Order, until it has the benefit of the Panel's directions and recommendations".

With respect to MPL's request for an extension of the October 31, 2020 deadline in its policy on greenhouse vegetable producers transferring from one agency to another, and the Commission's decision that it has no present plans to extend the October 31, 2020 deadline in its grower transfer policy, the Commission submits that this appeal is frivolous, vexatious or trivial, and there is no reasonable prospect it will succeed.

Section 31 of the *Administrative Tribunals Act,* SBC 2004, c.45 (*ATA*) provides:

> **31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> (f) there is no reasonable prospect the application will succeed;

The Commission argues that MPL asked pre-emptively to modify an industry-wide policy because it may be granted a Class 1 agency designation on as yet undetermined terms and conditions. In the circumstances, the Commission argues any consideration of grower transfers is premature as the time to consider the appropriateness of special exemptions to the grower transfer policy is if, and when, an agency designation is granted, and the relevant terms and conditions are established. In short, the Commission argues an appeal to not extend the deadline for producer transfers is premature, frivolous, vexatious, and trivial. It ought to be summarily dismissed as there is no utility in such an appeal and because the time and effort wasted in a such a proceeding detracts from the regulator's ability to address the issues substantively.

MPL

In its response, MPL says the Commission has failed to meet the high burden of showing that the appeal cannot possibly succeed. The appeal raises serious issues given the practical effect of the refusal to extend the October 31 deadline for grower transfers is to deny the application for a licence for the 2021 growing season. This decision impacts the potential profitability of MPL's prospective operation. MPL seeks to enter the BC vegetable market and sought an extension because it was going to be impossible for interested producers to meet the October 31 deadline. MPL alleges other live issues, including breaches of procedural fairness rights in respect of the October 30 decision and the failure of the Commission to give a rationale for denying the request for an extension to the October 31 deadline. Given the seriousness of these issues, MPL says its appeal cannot be characterized as frivolous, vexatious or trivial.

MPL further argues that the Commission's October 30 decision was an "order, decision or determination" that is properly subject to review by BCFIRB pursuant to s. 8(1) of the *NPMA*. While MPL could have requested an exemption from the October 31 deadline as part of its agency application, as suggested by the Commission, it was not practical to

do so. The grower transfer policy requires producers seeking to transfer from their current greenhouse agency to another to provide advance notice to their agency and the Commission by October 31. As the policy is directed at producers, not agencies, it is does not appear possible MPL could be exempted. Further, an exemption would likely be unfair to other agencies. MPL argues extending the October 31 deadline for all stakeholders creates no such unfairness.

MPL argues it was left no option other than to request a change to the policy for all stakeholders. Even if the Commission were to grant a licence for 2021, MPL would not be able to sign any current growers to grower marketing agreements, since the Commission's policy precludes growers from giving notice to transfer agencies for 2021 after the October deadline has passed. As a result, MPL says the agency application has effectively been refused for 2021.

MPL points to the failure of the Commission to provide a rationale for the October 30 decision. and argues the Commission was required to consider the interests of MPL and producers that may want to transfer to MPL in the event its agency application was approved. The decision articulates no reasons for the denial of MPL's agency application. The decision does not articulate how the interests of all market participants were balanced or considered by the Commission in making the decision.

MPL also identifies procedural fairness concerns with the decision. It argues it had a legitimate expectation that the October 31 deadline would be extended given that the Commission previously extended the deadline from September 15 to October 31, 2020. MPL advised the Commission and BCFIRB, on multiple occasions, of its concern that the refusal to process the agency application while the moratorium was in effect, in conjunction with the October 31 deadline, could result in a de facto denial of its application for the 2021 growing season.

MPL also argues the decision is tainted by bias and conflict of interest. These specific concerns were recently confirmed by BCFIRB in its December 22, 2020 supervisory decision which concluded that the close ties that exist between producers and agencies are not contemplated by the legislative framework and create an apprehension of bias and potential conflict of interest that jeopardize the Commission's independent decision-making. The October 30 decision does not identify which Commission members were involved in the decision and does not disclose whether this decision was made by non-sector producer members. The decision was made without any hearings or formal input from MPL, and at a meeting to which MPL was not invited, in further breach of MPL's procedural fairness rights. MPL has no knowledge of whether any steps at all were taken to address its bias concerns in respect of these meetings and in respect of the decision-making process and decision that resulted in the October 30 decision and de facto denial of its agency application for 2021.

Decision

MPL is appealing the decision of the Commission to deny its request to extend the deadline on producers to give notice to their agency of their intention to move to another agency. More importantly, MPL says that by denying its request for an extension, the Commission has, in effect, denied its request for an agency licence for 2021, as producers will not be able to move from their existing agency should MPL be granted an agency licence.

Review of the notice of appeal confirms that, at its heart, this appeal is really that it has taken too long to process MPL's agency application for 2021, and it wants BCFIRB to order the Commission to immediately grant a Class 1 agency licence. In its Notice of Appeal, MPL states:

(i) The delay to date has been unreasonable. The Supervisory Review process has been ongoing for over a year. The moratorium prevent (sic) any progress on the Agency Application. MPL BC has worker (sic) to entered (sic) the industry in BC for the 2021 growing season, and the Decision denies that possibility.

(ii) The delay has created uncertainty for MPL BC and growers that may have considered entering grower agreements.

(iii) The delay has prejudiced MPL BC, and it is almost certain that MPL BC will be prevented from participation in the BC market for the 2021 crop year.

In its appeal filed on November 24, 2020, MPL asked BCFIRB to set aside the decision not to grant an extension for producers to give notice and, amongst other orders, require the Commission to immediately grant MPL's Class 1 agency licence or in the alternative, make its determination on the application no later than December 14, 2020; and extend the October 31 deadline to two weeks after the determination of MPL's application.

I note that MPL tried to have its agency application considered during the moratorium; it advised the Commission and BCFIRB that the effect of the moratorium and October 31 deadline could result in a *de facto* denial of its agency application for the 2021 growing season. But significantly, the delay in processing MPL's agency licence does not result from an "order, decision or determination" of the Commission so as to create a right of appeal.

The Commission, as first instance regulator, is entitled to regulate the vegetable industry. The Commission originally issued the moratorium in June 2019. Subsequently, BCFIRB established a supervisory review process. Agency applications were put on hold until BCFIRB and the Commission agreed it was appropriate, in the circumstances, for those applications to resume. While it is regrettable that these processes took as long as they did, and they did not occur within a timeline that suited MPL, that is the reality of operating within a regulated industry. As part of that regulation, the Commission must consider whether it accords with sound marketing policy to issue MPL an agency licence and if so, on what terms and conditions. If MPL is aggrieved by that decision, it can file an appeal.

MPL is not yet a designated agency. The General Orders, coupled with the recent supervisory review decision, contemplate a process by which agency licences may be granted. This is not a purely administrative function where a party asks the Commission for a licence and a licence issues in a matter of days. Rather, the Commission strikes a panel to consider the merits of an application against established criteria, many of which relate to an assessment of the intended market and the impact a new agency may have on the market. The application is reviewed, further information may be sought, and there is a public hearing where interested parties can make their positions on the application known. It is an involved and extensive process.

BCFIRB lifted the moratorium on new agency applications in late October as part of its supervisory review. Additionally, the December 22 supervisory decision gave directions to the Commission which must now be incorporated into Commission processes, relating to governance changes to manage potential bias and conflict of interest concerns and agency accountability. The agency accountability directions will likely result in applications being more involved, at least in the short term, as the transition to a new decision-making model is developed.

In response to MPL's procedural fairness concerns related to the composition of decision-making panels, I observe, the Commission has struck non-sector panels to address the agency applications before it. The reality is, even in the absence of an appeal being filed, any decision by these panels will likely be weeks, if not months, away and will occur well into the 2021 growing season. Given that MPL filed this appeal, its agency application has likely been delayed further as the Commission takes the position that it cannot process MPL's agency application at the same time it defends the allegation that a decision has already been made to deny that application.

As the Commission has not made a "decision, order or determination" on the merits of the agency application, it would be premature for this Appeal Panel to consider whether the Commission ought to issue a Class 1 agency licence to MPL. Similarly, it is inappropriate, in these circumstances, for the Panel to issue an order in the nature of mandamus requiring the Commission to either issue a Class 1 agency licence or impose timelines on when the Commission's decision should be made. To the extent the appeal is trying to achieve these ends, I would dismiss the appeal as being both premature and an abuse of process.

I turn now to consider the actual decision under appeal. In anticipation of a delay in processing its agency application, MPL sought an extension from the Commission in the deadline for growers to give notice to their agency of an intension to transfer to MPL should it receive an agency license. The Commission denied this request, giving limited reasons, and MPL appealed.

I agree that the October 30 decision is an "order, decision or determination" and as such is appealable. However, as MPL's agency application may or may not be successful, I agree that an appeal of the October 30 decision is premature.

Further, when the decision to not extend the producer notice deadline is put into the context of a regulated industry, I conclude that the appeal has little prospect of success. Even in the absence of a stated rationale for its decision, to grant an industry-wide extension in the deadline for grower transfers at the request of a prospective agency applicant pending its application would be extremely disruptive. Existing relationships between producers and their agencies would be destabilized if producers sought to transfer late into 2020 and there would be negative financial impacts on existing agencies should they lose planned production for 2021. The planning which has already taken place for the 2021 crop season could be seriously undermined or negated if agencies could not rely on prior commitments with producers. In such circumstances, the balancing of industry interests favour preserving existing producer-agency relationships over ensuring a prospective applicant's access to a stable of producers.

MPL says it had a legitimate expectation that having extended the deadline once, the Commission would extend it again. I disagree. The reality is that a decision about industry-wide deadlines for producer transfers must be made sufficiently in advance of the crop year to allow for agencies and producers to plan production to fill markets in support of orderly marketing.

Further, I find that the appeal has little practical utility and is frivolous; to hear it would be an abuse of process. The appeal has no bearing on whether MPL will be successful in obtaining an agency licence. If MPL does not obtain a licence, the appeal related to transfer of producers between agencies becomes moot. If MPL is successful in obtaining a licence, the timing of when the licence is granted in relation to the crop year and the possibility of producers transferring are factors the Commission would need to consider in its decision.

MPL makes the serious allegation that the decision to not grant an extension is tainted with bias and conflict of interest due to participation of Commission directors from the greenhouse sector. It says these concerns were recently confirmed by BCFIRB in its supervisory decision which acknowledged that the close ties between producers and agencies was not contemplated in the legislative framework that creates the Commission's governance structure. MPL says the Commission's decision was made without responding, in even a cursory way to its significant procedural fairness concerns.

This submission is difficult to understand in light of my finding above that the Commission has yet to make a decision on MPL's agency application. The Commission now has the benefit of the December 22 supervisory decision and its supporting directions which speak directly to managing apprehension of bias and conflict of interest concerns. The Commission is incorporating the supervisory directions into its processes, but this transition will take time. I agree with the Commission that the procedural fairness concerns advanced by MPL as justification for this appeal proceeding are largely speculative and anticipatory of an agency decision that has yet to be made.

In light of my conclusions above, I find the allegations of procedural fairness are insufficient grounds upon which to hear this appeal. I dismiss this appeal pursuant to section 31(1)(c) and (f) as in my view it is frivolous, has no reasonable prospect of success and would give rise to an abuse of process.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per:

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Al Sakalauskas, Vice Chair and Presiding Member