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British Columbia Farm Industry Review Board
1st Floor 2975 Jutland Road
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Attention: Wanda Gorsuch, Manager of Issues &
Planning

Dear Ms. Gorsuch:

**GGFI & Windset Farms Ltd. et al v. BC Vegetable Marketing Commission
Appeal Nos. N2202, N2203, N2204, N2205, N2206, N2207, N2208, N2209, N2210, N2211,
N2212, and N2213 (collectively, the “Appeals”)**

We are counsel to Greenhouse Grown Foods Inc. (“**GGFI**”) and Windset Farms (Canada) Ltd. (“**Windset**”) in respect of appeal no. N2202 (the “**Appeal**”). In the Appeal, GGFI and Windset appeal the January 12, 2022 recommendation of the BC Vegetable Marketing Commission (the “**Commission**”) designating MPL British Columbia Distributors Inc. (“**MPL**”) as an agency (the “**Commission’s Decision**”).

We write in response to the BC Farm Industry Review Board’s (the “**BCFIRB**”) solicitation of submissions for the draft Terms of Reference for the prior approval of the Commission’s Decision. The draft Terms of Reference sets out the procedure that the BCFIRB will follow in conducting in its prior approval of the Commission Recommendation pursuant to section 8 of the *Natural Products Marketing (BC) Act* (the “**NPMA**”) (the “**Supervisory Process**”).

The Process set out in the draft Terms of Reference

The draft Terms of Reference lays out a sparse, five-piece process, where participants will be given an opportunity to make comments and submissions on “relevant matters”. The five-steps are:

1. Comment period on draft Terms of Reference and finalization of Terms of Reference;
2. Written submissions in response to specific panel questions regarding the Commission’s Decision, including the Commission’s process and rationale;
3. In-person Supervisory Hearing;
4. BCFIRB decision-making and release of its decision; and
5. Conduct of outstanding appeals.

GGFI and Windset's Concerns with the draft process

GGFI and Windset's position is that the Supervisory Process, as currently underway, is not an effective, complete or procedurally fair review of the Commission's Decision. The draft Terms of Reference are sparse and limited, and do not assuage these concerns.

First, as submitted in our letter of February 24, 2022 (the "**February Letter**") and in GGFI and Windset's Notice of Appeal dated January 27, 2022, GGFI and Windset submit that the Commission, in reaching the Commission's Decision, breached the duty of procedural fairness owed to GGFI and Windset. This position is based on a number of failures by the Commission including but not limited to the Commission's failure to provide GGFI and Windset an opportunity to make oral submissions, to provide notice of and an opportunity to respond to MPL's oral submissions, and to provide notice of other participants' submissions. As such, GGFI and Windset intend to submit that the Commission made its decision based on an incomplete and procedurally flawed record. GGFI and Windset's position with respect to the Supervisory Process is that the Supervisory Panel cannot conduct an effective, complete and procedurally fair review of the Commission's Decision when the record before the Supervisory Panel is clearly flawed and under direct challenge in the Appeal.

Accordingly, GGFI and Windset make the following recommendation:

Recommendation No. 1: *Revise the scope of the Supervisory Process such that it is limited to a consideration of the procedural fairness issues raised in the Appeals. The substantive issues arising from the Commission's Decision should be considered through the Appeals.*

Second, the lack of detail set out in the draft Terms of Reference raises many questions about the content of participation expected at each Phase. As we stated in our February Letter, stakeholders should be provided full and satisfactory participation rights on the full range of issues arising from the Commission's Decision in a manner that minimizes duplication and regulatory burden.

"Phase 3: Supervisory Hearing", for example, provides no information regarding, *inter alia*:

- The form the in-person Supervisory Hearing will take (e.g. will it be an informal roundtable-style hearing, or a more formal hearing with only designated representatives participating at a main table?);
- What rules of procedure will apply to the Supervisory Hearing;
- If the *BCFIRB Rules of Practice and Procedure for Appeals under the Natural Products Marketing (BC) (the "Rules") Act* apply, what changes to the *Rules* will be made to accommodate for the hearing being a Supervisory Hearing;
- The anticipated date range;
- The anticipated location of the hearing; and
- The process for making motions.

In our letter dated March 31, 2022 (the “**March Letter**”), we requested the BCFIRB include the following procedures in its Terms of Reference:

- An opportunity to put forward and rely on evidence (including documentary evidence, direct evidence, and expert witness evidence);
- The disclosure of evidence to be relied on by participants, both before the BCFIRB and the evidence relied upon by the Commission;
- An opportunity to make written submissions on any questions of fact, law or policy at issue in the Prior Approval Process;
- Disclosure of and an opportunity to respond to the written submissions of other participants;
- An oral hearing which includes the right for participants to:
 - Present evidence (including documentary evidence, direct oral evidence, and expert witness evidence);
 - Cross-examine lay and expert witnesses put forward by other participants; and
 - Make oral submissions on any questions of fact, law or policy at issue in the Prior Approval Process.

The inclusion of these procedures from the March Letter in the Terms of Reference will assist in ensuring a fair and effective consideration by the Board of the Commission’s Decision.

In the absence of this and other similar information, parties will either have to prepare additional submissions on the BCFIRB’s to-be-determined process, causing a duplication of effort and waste of resources, or will be left with no say in respect of the to-be-determined process.

Accordingly, GGFI and Windset make the following recommendation:

Recommendation No. 2: *Revise “Phase 3: Supervisory Hearing” to specify the anticipated process for the Supervisory Hearing including but not limited to anticipated hearing dates, location, format, rules of procedure and a detailed list of procedures to be followed.*

Third, as submitted in our February Letter, GGFI and Windset were and remain concerned that the Supervisory Process will not consider the full scope of issues that GGFI and Windset (and the other appellants) intend to advance for determination in the Appeals. This concern arises in part because the Supervisory Process was commenced prior to the filing of the Appeals and because of the separation between the Supervisory Process and the Appeal.

In our February Letter, GGFI and Windset advised that in the absence of the BCFIRB’s terms of reference for the Supervisory Process, they did not know how the important issue of the Commission’s failure to comply with its duty of procedural fairness would be addressed. Now, having reviewed the draft Terms of Reference, we note that there is no specific provision made

for this issue. Instead, the BCFIRB has proposed that it will provide an opportunity for written submissions on specific panel questions. While this may include panel questions regarding procedural fairness, the draft Terms of Reference certainly do not make that clear.

As noted in Recommendation No. 2, we have asked the BCFIRB to provide for a full hearing process as opposed to a process limited to written questions. In the event a written question process remains in the final Terms of Reference, GGFI and Windset make the following recommendation:

Recommendation No. 3: *Revise “Phase 2: Written Submissions” to clearly set out the panel’s current proposed list of questions on the Commission process, rationale and recommendation.*

Fourth, the draft Terms of Reference does not set out any timelines. The BCFIRB’s last formal step in the within process took place on February 18, 2022. More than four months passed until the BCFIRB’s next substantive step. This process of starting and stopping leaves parties in limbo, with no way to manage their internal scheduling to ensure that it is harmonious with the BCFIRB’s calendar for this review process. The absence of timelines is inadequate and a draft proposed timeline ought to be circulated for the parties’ comment before it is finalized.

Accordingly, GGFI and Windset make the following recommendation:

Recommendation No. 4: *Revise the draft Terms of Reference to incorporate timelines and proposed dates for each phase of the BCFIRB’s review. When exact dates cannot be determined, the time range anticipated for a phase to commence, and for the duration of such phase, should be provided. A draft timeline should be circulated for the parties’ comment prior to it being finalized by the BCFIRB.*

GGFI and Windset’s Procedural Proposal

As stated in our February Letter, GGFI and Windset state that it is imperative that both the procedure and subject matter of the Appeals and Supervisory Process be considered together to ensure that industry stakeholders are provided full and satisfactory participation rights on the full range of issues arising from the Commission’s Decision in a manner that minimizes duplication and regulatory burden.

GGFI and Windset acknowledge that, pursuant to Rule 2 of the *Rules*, the BCFIRB may combine appeals where the appeals involve the same or similar issues. GGFI and Windset support the consolidation of its Appeal with the other Appeals and, for the purpose of this proposal, and will refer to the Appeals collectively (rather than to GGFI and Windset’s Appeal alone).

In the event the BCFIRB does not consolidate the Appeals with the Supervisory Process, GGFI and Windset submit that there needs to be a clear separation of issues to be considered in each process to ensure that there is no duplication of the parties’ effort and no increased regulatory burden. Thus, in addition to the foregoing recommendations to the draft Terms of Reference, GGFI and Windset reiterate their proposal set out in their February Letter that the following procedure be followed in the conduct of the Supervisory Process and the Appeals:

- The Supervisory Process continue but be limited to a consideration of the procedural fairness issues raised in the Appeals (*i.e.*; did the Commission breach the common law duty of procedural fairness owed to GGFI and Windset and/or the Board's SAFETI principles as they related to procedural fairness). The Supervisory Panel will accord those stakeholders who participated in the process leading to the Commission's Decision (including GGFI and Windset) participation rights in the Supervisory Process (*i.e.*; the ability to make submissions on the procedural fairness issues).
- The substantive issues arising from the Commission's Decision (*i.e.*; does the designation of MPL as an agency comply with the *NPMA* and relevant regulatory scheme and/or satisfy the requirements of Part XIV, section 2(6) of the Commission's general order and is that designation consistent with the Board's SAFETI principles) will be considered through the Appeals.

This proposal recognizes and addresses the fact that some but not all of the appellants participated in the process leading to the Commission's Decision. GGFI and Windset anticipate that all of the appellants intend to make submissions on the merits of the Commission's Decision. In order to minimize duplication, submissions on the merits of the Commission's Decision should be limited to one of the two forums: the Supervisory Process or the Appeals. Given that there are several producers appealing the Commission's Decision that were not participants in the process leading to the Commission's Decision, the appropriate venue for submissions on the merits of the Commission's Decision to be heard is through the Appeals. The procedural fairness issues, which primarily concern those appellants who participated in the process leading to the Commission's Decision, can be dealt with separately through the Supervisory Process as outlined above.

GGFI and Windset reiterate their alternative proposal from their February Letter, in which they proposed that the Supervisory Process and the Appeals be joined and proceed in tandem. The Board has the power to exercise its supervisory powers in the manner it considers appropriate to the circumstances.¹ An exercise of the Board's supervisory powers to join the Supervisory Process with the Appeals would ensure that all industry stakeholders with an interest in the Commission's Decision, including those who were not aware of and did not participate in the process leading to the Commission's Decision, are afforded an effective, fulsome and procedurally fair opportunity to be heard on an issue that directly impacts their interests as participants in the greenhouse-grown vegetable industry in British Columbia.

¹ *NMPA*, s. 7.1(2).

We look forward to confirmation on the procedure for the Supervisory Process and the Appeals.

Yours very truly,

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