FILE NO. 44200-35\MPL

IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT

AND IN THE MATTER OF
A PRIOR APPROVAL APPLICATION
CONCERNING A RECOMMENDATION MADE BY THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION ON JANUARY 12, 2022
THAT MPL BRITISH COLUMBIA DISTRIBUTORS INC.
BE GRANTED AN AGENCY DESIGNATION

REPLY SUBMISSION OF THE BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

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PART I - INTRODUCTION

1. The BCFIRB's Final Terms of Reference dated March 8, 2023 state, in part, as follows:

> **Written Submissions**
>
> Eligible participants in the prior approval process will be given an opportunity to provide written submissions, supported by any documents, in response to BCFIRB's specific questions on the Commission process, rationale and recommendation. A separate letter will be sent to all eligible participants setting out the questions, any page limits, and submission deadlines for all participants.
>
> MPL BC and the Commission will have written final right of reply.
>
> BCFIRB will take into consideration the January 25, 2023 ruling of Chair Peter Donkers made in the Allegations of Bad Faith and Unlawful Activity supervisory review, and will seek written submissions on that ruling, including implications of the voluntary reporting requirement agreed to by MPL BC (Appendix A).

2. On March 27, 2023, the BCFIRB sent a letter to all eligible participants setting out the BCFIRB's questions, as contemplated in the Final Terms of Reference.

3. Responses to the BCFIRB's questions were submitted by eligible participants as follows:

   (a) The Commission submitted its response on April 6, 2023;

   (b) Windset and GGFI (hereafter referred to as "W&G") submitted their response on April 6, 2023; and

   (c) MPL submitted its response on April 7, 2023.

4. In its letter dated March 27, 2023, the BCFIRB directed that final reply from MPL and the Commission would be due by April 18, 2023.

PART II - REPLY SUBMISSIONS

Procedural Fairness

General

5. In their written submissions, W&G argue that "the Commission's process leading to the Decision was procedurally unfair."[1]

6. With a few exceptions, W&G's submissions regarding this alleged procedural unfairness are expressed in terms that are both vague and hyperbolic. For example:

   (a) W&G submit that "[i]ndustry stakeholders were effectively blocked from effective participation at different phases of the process."[2] However, in the entirety of their written submissions, W&G only identify one phase of the process in which this is said to have occurred: namely, on October 8, 2021, when MPL presented its application to the Commission panel, together with a slide deck, a document entitled "Category Expansion", and a "Millennium Letter of Support." There is nothing in W&G's submission identifying any other "phase of the process" that is in issue. Thus, the reference to "different phases of the process" seems to be mere exaggeration.

   (b) W&G submit that "[i]t is not apparent from the reasons that the panel considered any evidence in rendering its conclusions"[3] and that "[i]t is also not clear from the reasons that the panel meaningfully considered the submissions of any industry stakeholder."[4] However, W&G subsequently acknowledge that the decision expressly states, at paragraph 23, that the Commission has "carefully considered MPL BC's application, together with

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1 Submissions of Windset and GGFI dated April 6, 2023, par. 2
2 Submissions of Windset and GGFI dated April 6, 2023, par. 2
3 Submissions of Windset and GGFI dated April 6, 2023, par. 2
4 Submissions of Windset and GGFI dated April 6, 2023, par. 2

the submissions of industry stakeholders, even though it may not refer to every point raised in the application of those submissions."[5] At this point in their written submissions, W&G recast their complaint as a mere failure of the Commission to recite in its decision the "evidence of MPL BC or other stakeholders."[6] This is a substantially more narrow characterization of the complaint. The distinction is significant too, as current jurisprudence on the sufficiency of reasons discourages a "check mark" approach, where reasons simply recite evidence and arguments. As noted by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at par. 102:

> Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment".

(c) At paragraph 3 of their written submission, W&G state that "[t]he Commission did not follow [the BC Council of Administrative Tribunals' *BC Administrative Decision-maker's Manual*] in making decisions with respect to its process and in rendering the Decision." However, W&G make no effort to particularize exactly which provisions of this 88-page manual are said to be engaged, and how. The assertion is so devoid of substance that it is properly regarded as mere hyperbole. In the absence of particulars and substance, it is not possible for either the Commission or the BCFIRB to address this vague assertion.

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5 Submissions of Windset and GGFI dated April 6, 2023, par. 34(d)
6 Submissions of Windset and GGFI dated April 6, 2023, par. 34(d)

"Substantive Rights"

7. At paragraphs 18, 25, 26 and 55 of their written submissions, W&G submit that they have "substantive rights" with respect to the decision to recommend that MPL be granted designated agency status. This is a rather extraordinary proposition that requires a rather detailed reply.

8. First, it is well established that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[7]

9. It is equally well established that no common law duty of procedural fairness applies to the discharge of a legislative function. In Guy Régimbald, *Canadian Administrative Law* (Markham: LexisNexis Canada, 2008) at pp. 239 – 241, the author summarized the applicable principles, as expressed by the Supreme Court of Canada in various cases, as follows:

> However, there are exceptions to the rule requiring procedural protection when a right, privilege or interest is at stake. The most important restriction applies to decisions of a legislative nature. Absent a statutory provision to the contrary, procedural fairness or the duty to be fair does not generally apply to the exercise of legislative powers. As recently held by the Supreme Court of Canada in *Authorson v. Canada (Attorney General)*:
>
> > Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is complete, legislation within Parliament's competence is unassailable.

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7 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at par. 14

The courts essentially replaced the judicial/quasi-judicial/administrative distinction with a legislative/any other type distinction. In *Cardinal*, Le Dain J. held that:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges and interests of an individual.

In *Knight v. Indian Head School Division No. 19*, L'Heureux-Dubé J. added that:

> [N]ot all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty […] The finality of the decision will also be a factor to consider. A decision of a preliminary nature will not in general trigger the duty to act fairly, whereas a decision of a more final nature may have such an effect.

The Supreme Court recently re-affirmed this principle in *Wells v. Newfoundland*, where Major J., for the Court, opined that:

> [L]egislative decision-making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. The judgment in Reference Re Canada Assistance Plan […] was conclusive on this point in stating that: "the rules governing procedural fairness do not apply to a body exercising purely legislative functions".

10. To be considered a "legislative" decision, the exercise of the power must generally consist of two elements: (1) generality: the power is of a general application and will not be directed at a particular individual; (2) its exercise must be based on broad public policy grounds. Decisions of a legislative nature create norms or

policy, whereas those of an administrative nature merely apply such norms to particular situations. The exercise of legislative powers that will not normally give rise to a duty fairness include laws, decisions of cabinet, Crown prerogatives, regulations or other delegated legislation, general policy statements, guidelines, and administrative rules structuring the exercise of statutory discretion. There are, of course, exceptions and, sometimes, it may be very difficult to determine whether a decision is in fact "legislative" rather than administrative or quasi-judicial.

11. There are two reasons why "legislative" decisions have been held exempt from the duty to provide procedural protection. First, where the decision is taken by a Minister or other elected official, they are accountable to Parliament and the electorate. The second reason is practical: bodies may be exempt from the duty of fairness where the potential of adversely affected interests is too diverse or too numerous to permit each individual to participate. In essence, decisions that are legislative in nature put in place a continuum of discretionary decision-making, ranging from cases where the decision affects just one individual to cases where the decision affects large groups. While individuals facing decisions based on policy will benefit from the application of rules of procedural fairness, general decisions will not. Arguably, this differentiation may be questionable, since both types deserve to be considered eligible for fairness. If so, administrative decision-making - particularly broad-based policy decision-making - might grind to a halt. This will thereby negate some of the fundamental advantages of administrative decision-making, such as a swift, efficient and expert process.

12. Nevertheless, in *IVCA v. BCVMC*, (December 18, 2015), the BCFIRB rejected the above rationales and held that the absence of any common law duty of fairness applicable to decisions of a legislative or policy nature does not preclude the BCFIRB from imposing its own "SAFETI" procedural duties to legislative or policy decisions.

13. For the purposes of this reply, the Commission is <u>not</u> submitting that the common law duty of fairness is inapplicable to the decision in issue. W&G ***<u>do</u>*** have

procedural rights, either at common law (because their interests are engaged by the matter under consideration), or as a result of the procedural rights that arise from the "SAFETI" principles imposed by the BCFRB. However, the Commission respectfully submits that it is beyond question that W&G do not have "*substantive rights*" that can be asserted against either the Commission or the BCFIRB. This has been a bedrock principle in regulated marketing since at least the decision of Mr. Justice Macdonald in *Sanders v. Milk Commission* (1991), 53 B.C.L.R. (2d) 167, where he said, at page 178:

> [a] quota, a license to produce, which may be issued on prescribed terms and conditions may be cancelled, that is annulled or abolished, also on prescribed terms and conditions". In summary, the situation is "the board giveth and the board taketh away.

14. Thus, to the extent that W&G submit that they have "*substantive rights*" that preclude or impede the Commission from recommending that another entity be granted agency status, their position is ill-conceived and unsupported by any authority.

The October 8, 2021 Presentation by MPL

The In Camera Hearing

15. On October 8, 2021, representatives of MPL attended before the Commission to present their Amended Agency Application in unredacted form. At paragraph 9 of their written submission, W&G argue that the Commission's failure to give them "an opportunity to hear these submissions" constitutes a breach of the duty of procedural fairness owed to them.

16. The Commission respectfully submits that *in camera* submissions with respect to unredacted materials containing sensitive and confidential business information do not, and cannot, constitute a breach of the duty of procedural fairness.

17. In this proceeding, the BCFIRB has already reviewed the unredacted Amended Agency Application that was presented to the Commission on October 8, 2021. In its April 6, 2023 decision, the BCFIRB stated:

> In this case, BCFIRB agrees that commercially sensitive information that discloses MPL BC's private corporate interests, potential customers, growth plans and projections, market opportunities and target markets, pricing and template marketing agreements is confidential in nature and properly the subject of a non-disclosure order. In reviewing the proposed redactions, BCFIRB disagrees with GGFI and Windset that the proposed redactions are overly broad. Most of the redactions to the amended agency application are appropriate and necessary to protect confidential information in the public interest.

18. Significantly, the BCFIRB went on to state:

> Having made the above non-disclosure order, the Commission, MPL BC, GGFI and Windset will need consider <u>what in camera or confidential processes needs to be put in place to receive confidential information</u> at the supervisory hearing such that the information is properly protected. It is premature for BCFIRB to make any rulings as to the appropriate process, but legal counsels are encouraged to discuss how the in-camera processes need to be managed. (emphasis added)

19. Where information must be received in confidence, an in camera proceeding does not constitute a breach of the duty of procedural fairness.

Documents Received by the Commission at the In Camera Proceeding

20. In the course of its presentation on October 8, 2021, MPL provided the Commission with three additional records: (a) an Agency Application Slide Deck; (b) a document entitled "Category Expansion"; and (c) a letter of support from Millennium dated October 7, 2021.

21. The Agency Application Slide Deck and the document entitled "Category Expansion" have been made the subject of a non-disclosure application by MPL.

In its decision dated April 6, 2023, the BCFIRB ruled that the proposed redactions were appropriate, and ordered that these documents be disclosed in redacted form, together with a redacted version of MPL's Reply Submission dated November 15, 2021.

22. It is important to note that none of the additional records provided by MPL and received by the Commission on October 8, 2021 had been provided to W&G or any other eligible participant, in either redacted or unredacted form. Similarly, though the Commission did not contemplate providing W&G or any other eligible participant with a right of sur-reply, the Commission did not provide W&G or any other eligible participant with a copy of MPL's Reply Submission dated November 15, 2021, in either redacted or unredacted form.

23. The Commission concedes that its failure to provide W&G and other eligible participants with appropriately redacted versions of these four records gives rise to a procedural unfairness, or at least a procedural irregularity.

24. The import of this procedural unfairness, or procedural irregularity, will be addressed later in this brief.

<u>No Opportunity to Make Submissions with respect to Redactions</u>

25. At paragraph 10 of its written submission, W&G argue that the failure of the Commission to provide them with an opportunity to make submissions with respect to the redactions made to the Amended Agency Application, constitutes a procedural unfairness.

26. The Commission respectfully rejects this proposition. The specific content of the duty of fairness depends entirely on the context. In some situations, the duty of fairness may call for a procedure that is barely distinguishable from that followed in the courts, including personal service of notice; full disclosure of relevant information and documentation; an oral hearing before the decision-maker, with

the right to call witnesses, to produce evidence, and to cross-examine; and the right to receive reasons for the decision. In other settings, the duty of procedural fairness might be satisfied by an informal and simple procedure that could never be mistaken for a trial, such as an opportunity to make written submissions or to have an interview with an official who will in turn report to the decision-maker.[8]

27. With respect to sensitive and confidential business information, the BCFIRB explicitly recognized in its April 6, 2023 decision that "there will be situations where … certain information should be received in confidence and/or participants wish to rely on confidential or sensitive information (e.g., financial information that could harm the competitive or negotiating position of a third party), which they seek to protect in order to participate in a meaningful and effective manner." Ultimately, it will fall on the decision-maker to review the content of the proposed redactions and determine whether they necessary. In practical terms, there is very little scope for a third party to make meaningful submissions. By necessity, confidential information cannot be disclosed to third parties so that they may make submissions on whether the information should be withheld from them. In these circumstances, the Commission submits that it does not offend principles of fairness for the Commission to assess the propriety of redactions without inviting submissions from third parties. In any event, the import of this will be addressed later in this brief.

"Independent Expert Advice"

28. At paragraphs 15, 60(c), 67 and 72 of their written submission, W&G submit that the Commission's failure to obtain "independent expert advice" constitutes a breach of the duty of fairness.

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[8] Brown and Evans, Judicial Review of Administrative Action in Canada (Toronto: Canvasback, 1998) at par. 7:1100; See also: Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817

29. Unsurprisingly, no authority is provided for this novel proposition.

30. The Commission respectfully submits that this proposition is entirely without merit. If W&G are of the view that the Commission (or the BCFIRB) would benefit from some expert opinion, it is incumbent on them to provide it.

Sufficiency of Reasons

31. At paragraphs 28 and 29 of their written submissions, W&G summarize the submissions made by stakeholders who were opposed to MPL's application.

32. W&G argue the Commission's reasons were not sufficient, principally because they did not recite, chapter and verse, every fact or discrete argument advanced by the parties opposed to MPL's application (see: W&G submission, par. 58).

33. The Commission's consideration and analysis of those submissions is set out at paragraphs 23 to 29 of its decision, as follows:

> 23. The panel has carefully considered MPL BC's application, together with the submissions of industry stakeholders, even though it may not refer to every point raised in the application or those submissions.
>
> 24. The panel is satisfied that MPL BC is a well-established, leading marketer, with direct access to significant customers. It has exclusive arrangements with some of the largest retailers and has penetrated markets throughout North America. The panel notes that existing agencies regularly sell product to Mastronardi, precisely because it has direct access to these markets.
>
> 25. MPL BC has essentially operated within BC as a licensed wholesaler acquiring product from existing agencies, and the panel is satisfied that it has conducted itself in that capacity in accordance with applicable regulatory requirements. If granted agency status, MPL BC has also expressed its willingness to appoint a person as a liaison to the Commission to facilitate its continued compliance with the regulatory system.

> 26. Stakeholder opposition to MPL BC's application was generally expressed on the basis that the grower community is currently being well served from within the status quo. Another theme that arises from the submissions made by stakeholders opposed to the application is that the grant of agency status to MPL BC will have a detrimental impact on existing BC agencies.
>
> 27. The panel accepts that a grant of agency status to MPL BC could create significant disruption to some existing agencies. However, the Commission's primary obligation is to producers; not to the agencies themselves. As noted, the agency system exists to enhance orderly marketing, promote the development of the industry, and ensure that producer returns are maximized. Agencies are the tools through which these regulatory objectives are pursued, rather than an end to themselves.
>
> 28. On balance, the panel is satisfied that MPL BC's application satisfies the requirements set out in Part XIV of the General Order. There are market penetration opportunities available through this applicant that are not present with existing agencies. Furthermore, the panel believes that the industry will benefit when product can be marketed through an agency that has better and more direct access to key customers throughout North America. While it is possible for existing agencies to sell to Mastronardi, which can then market product to these key customers, this approach is likely to introduce unnecessary costs and inefficiencies that do not benefit producers.
>
> 29. Producers are likely to be better served when their product is marketed by an agency that has better and more direct access to key retailers throughout North America. In this regard, the panel does not think that preservation of the status quo is itself a valid objective. If the interests of producers can be better served through a new agency, with better and more direct access to key customers throughout North America, then the high threshold established under Part XIV of the General Order can be met, despite the disruption to existing agencies. In short, while it is generally undesirable to permit a proliferation of agencies that might simply compete against each other resulting in price erosion, the Commission must be alive to the possibility that a new agency can have better and more direct access to key markets than existing agencies. (emphasis added)

34. The Commission submits that its reasons (and in particular, paragraph 26 of the reasons) fairly summarize the main points of contention advanced by those opposed to MPL's application. The Commission did not engage in a line-by-line recitation of every fact or argument advanced by opponents to MPL's application,

but it is not required to do so. Indeed, current jurisprudence on the sufficiency of reasons discourages a "check mark" approach, where reasons simply recite evidence and arguments. As noted by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at par. 102:

> Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment".

35. Nevertheless, the Commission generally agrees with MPL's description of "First Principles Regarding a Tribunal's Reasons for Decision", set out at paragraphs 30 to 33 of their submissions, as follows:

> 30. While reasons for decision are not required for all administrative decisions, they are required under various circumstances. Such circumstances include where the decision making process gives the parties participatory rights; where an adverse decision would have a significant impact on an individual; and where there is a right of appeal.
>
> 31. While reasons do not need to be perfect, they must be adequate. The central question regarding the adequacy of reasons is whether or not the reasons provided are sufficient to permit a reviewing or appellate body to fulfill its role.
>
> 32. A Tribunal's reasons must be sufficient to:
>
> a) explain why the Tribunal arrived at its decision by demonstrating a logical connection between the decision and the basis for the decision;
>
> b) provide public accountability; and
>
> c) permit effective appellate review.
>
> 33. The Supreme Court in *Vavilov* affirmed the principle that where reasons are required, they are the primary mechanism by way administrative decision makers show that their decisions are reasonable – both to the affected parties and the reviewing courts. It follows that the provisions of reasons for an administrative decision

> may have implications for its legitimacy, **including in terms of both whether it is procedurally fair** and of whether it is substantively reasonable. [Emphasis added.]

36. However, a closer examination of W&G's submissions reveals that their real complaint lies – not with the sufficiency of the Commission's reasons – but with the substance of the reasons themselves. At paragraph 39 of their written submission, W&G state:

> 36 Based on the reasons, it appears that the Panel ultimately made its decision based on only one actual consideration, which we have bolded in the following excerpt from the Decision, paragraph 29:
>
> > Producers are likely to be better served when their produce is marketed by an agency that has better and more direct access to key retailers throughout North America. In this regard, the panel does not think that preservation of the status quo is itself a valid objective. **If the interests of producers can be better served through a new agency, with better and more direct access to key customers throughout North America, then the high threshold established under Part XIV of the General Order can be met, despite the disruption to existing agencies**. In short, while it is generally undesirable to permit a proliferation of agencies that might simply compete each other resulting in price erosion, the Commission must be **alive to the possibility** that a new agency can have better and more direct access to key markets than existing agencies. [Emphasis added.]

37. While the Commission disputes W&G's assertion that the Commission "made its decision based on only one actual consideration" (that is not a fair or accurate characterization of the reasons as a whole), there can be no doubt that the Commission panel was persuaded by the benefits that would accrue to producers from MPL's "better and more direct access to key customers throughout North America".

38. W&G may not “like” the Commission’s reasoning, but they cannot hide behind an assertion that the reasons are “insufficient” merely because they are in disagreement. If W&G wish to submit before the BCFIRB that MPL does not have “better and more direct access to key customers throughout North America”, or that such “better and more direct access” is not an advantage to producers, they now have an opportunity to address those points before the BCFIRB. Notably, W&G do not seek to persuade the BCFIRB on substantive grounds that prior approval should not be granted.

The Import of Any Procedural Deficiencies

39. As noted above, the Commission concedes that its failure to provide W&G and other eligible participants with appropriately redacted versions of: (a) an Agency Application Slide Deck; (b) a document entitled "Category Expansion"; (c) a letter of support from Millennium dated October 7, 2021; and (d) a redacted version of MPL's Reply Submission dated November 15, 2021, gives rise to a procedural unfairness, or at least a procedural irregularity.

40. However, all of these documents are contained within the Commission’s *Book of Documents Relied on by the Commission in coming to its January 12, 2022 Decision*, that has been distributed to all eligible participants. Consequently, there can be no cause (on that basis, at least) to remit the matter back to Commission for redetermination. There is nothing impeding W&G from making any additional submissions to the BCFIRB that might arise from those records.

41. Similarly, there is no import arising from W&G’s submission that their inability to make submissions before the Commission with respect to the redactions made to the Amended Agency Application. This issue has been addressed and resolved before the BCFIRB in the context of the non-disclosure applications brought by the Commission and MPL.

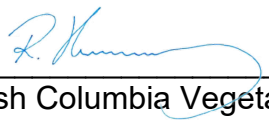
The Relief Sought by W&G

42. Though it is open to W&G to ask that the BCFIRB decline to approve the Commission's recommendation that MPL be granted designated agency status, on the basis of whatever substantive arguments they might advance to support their opposition, it is telling that W&G do not even seek that relief from the BCFIRB. The Commission respectfully submits that this is a clear indication that W&G have no confidence in their ability to articulate a substantive basis for their opposition to the agency application.

43. This matter should not be remitted back to the Commission for redetermination except as a last resort. The BCFIRB must be satisfied that it is *unable* to reach a decision with respect to its prior approval before remitting the matter back for redetermination.

44. In any event, given that W&G do not ask the BCFIRB to decline to prior approve the Commission's recommendation on substantive grounds, it follows that prior approval should be granted if the BCFIRB concludes that the Commission's recommendation is not fatally flawed by any procedural irregularity that is not cured by the prior approval process itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 14th DAY OF APRIL, 2023



Counsel for the British Columbia Vegetable Marketing Commission