

April 23, 2023

File No.: 8006-031

VIA EMAIL: Wanda.Gorsuch@gov.bc.ca

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Dear Ms. Gorsuch:

Re: MPL Prior Approval Process

Thank you for your letter dated March 21, 2023.

I appreciate your efforts to address my letter of March 29, 2023. Unfortunately, I must respectfully ask for further clarification on two points. Given that the hearing date is fast approaching, I would be grateful to receive such clarification at the earliest possible opportunity.

A. The Nature of the Hearing

You refer to my March 29, 2023 letter and note that I “interpreted [the March 8, 2023, Final Terms of Reference to mean] that BCFIRB will not be engaging in a *de novo* prior approval supervisory process.” Your letter then goes on to state: “the Commission will need to demonstrate it followed a SAFETI-based process and reached a sound marketing policy-based recommendation”, and further, that “BCFIRB has to reach its own conclusions based on its supervisory process, meaning it is not bound by the Commission’s decision or the record before it.”

I did indeed interpret the BCFIRB's statement that "[i]t is not BCFIRB's intent to replicate or repeat the full agency designation application process"¹ to mean that that BCFIRB will not be engaging in a *de novo* prior approval supervisory process. I am now inclined to infer from your letter that the BCFIRB does consider this process to be a *de novo* review of the agency application, though you do not expressly say so. In my respectful view, clarity on this point is essential to a fair proceeding. Whether this process is or is not a *de novo* review will bear upon the import of any deficiencies in the Commission panel's process², and may be determinative when the BCFIRB considers whether there are any issues remaining to be determined in appeals N2202 to N2213, after this process has concluded.

In short, I am not sure if the inference that I am drawing from your letter is accurate. If this process is in fact a *de novo* review of the agency application, I ask that this be clarified expressly. On the other hand, if this process is intended to be a *de novo* review of the agency application in part only, then I respectfully seek further clarification with respect to which parts of the agency designation application process are being addressed on a *de novo* basis, and which are not. Clarity on this point is essential, as the nature of the review process may bear upon the internal standard of review. In particular, to the extent that the BCFIRB is electing not to "replicate or repeat the full agency designation application process", it may be that there should be some deference towards the Commission's decision.³

B. The Commission's Responsibility to Demonstrate that a SAFETI-based Process was Followed and that it Reached a Sound Marketing Policy-based Position

Your letter refers to the Commission's responsibility to demonstrate to BCFIRB that: (a) a SAFETI-based process was followed; and (b) that it reached a sound marketing policy-based position.

The Commission panel's written reasons dated January 12, 2022 embody its effort to discharge that very responsibility. It is by and through the written reasons that the panel attempted to demonstrate that it followed a SAFETI-based process, and that it reached a sound marketing policy-based decision. Specifically, the panel's decision expressly sets out the full extent of the panel's SAFETI analysis, as well as the panel's substantive rationale for its decision. Though your letter states that "it is for the Commission to determine how it will fulfill its responsibilities outlined in the Terms of Reference", your letter seems to suggest that the BCFIRB seeks something more than the presentation of the Commission panel's reasons, supplemented by argument as necessary and appropriate. With respect to what more might be required, it is helpful to address the Commission's "responsibility" into the two elements described by you: (1) substance (i.e., sound marketing policy); and (2) process.

¹ See: March 8, 2023, Final Terms of Reference

² The BCFIRB has held that defects in process may be cured by a *de novo* review. See: *Money's Mushrooms Ltd. and Pacific Fresh Mushrooms Inc. v. BC Mushroom Marketing Board*, (March 9, 1999); See also: *Stewart v. BCMMB* (February 29, 2009).

³ See: *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (CanLII)

Substance

In this review, it is the Commission's position that the panel's decision reflects sound marketing policy for the reasons expressed in the written decision dated January 12, 2022. The written decision is the product of a collective effort of Commission panel members, and it is the only instrument that reflects the analysis of the Commission panel as a collective, and the position of the Commission as whole. Individually, the members who sat on that panel might well have different perspectives on various issues. Consequently, it is the Commission's position that the idiosyncratic perspective of any individual panel member with respect to MPL's application, or the substantive merit of the resulting decision, does not and cannot reflect the position of the panel as a collective, or the position of the Commission as a whole. The purpose of this proceeding is to review the Commission panel's January 12, 2022 decision for the purpose of prior approval. The proceeding should not devolve into a review of the idiosyncratic opinions of individuals, which may or may not be consistent with the decision of the panel as a whole.

For clarity, in this review process, the Commission adopts only the reasoning of the panel (as a collective) with respect to the substantive merit of the decision. The Commission does not envision a circumstance in which it would adopt the idiosyncratic perspective of any individual panel member (or other person) with respect to MPL's application or the substantive merit of the decision. In other words, it is the Commission's position that such idiosyncratic perspectives cannot add to or replace the reasons of the Commission panel as a collective.

Process

The rules with respect to agency designations are set out in Part XIV of the Commission's General Order – *Procedures for Designation of Agencies*, and section 8 of the *Natural Products Marketing (BC) Act Regulations*. To the extent that it is necessary or useful to do so, these enactments can be addressed in argument.

The process that was followed by the panel is described in its decision dated January 12, 2022.

Your letter states: "the Commission should be prepared to explain its process for evaluating new agency applications in the oral hearing." I was originally of the view that it would suffice to draw the BCFIRB's attention to the rules with respect to agency designations and the panel's own description of its process as set out in its reasons. However, I do not wish for my client to be criticized for failing to meet expectations that could be subject to different interpretations.

To the extent that it may be necessary or desirable to call, or make available, a fact witness who could attest to the process followed by the panel, Ms. Debbie Etsell (who was the Chair of the panel and is now a former member of the Commission), has advised that she can attend on May 31st, and possibly on May 24th, 2023. In the interim, it would be useful to learn whether the BCFIRB or any other participant desires Ms. Etsell (or any other person) to be in attendance, so that they may be cross-examined with respect to the process followed by the panel.

Yours truly,

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