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## BC Farm Industry Review Board

April 6, 2023

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### Delivered by email

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Chair  
BC Vegetable Marketing Commission  
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Dear Ms. Camley and Mr. Sturko:

### **MPL BRITISH COLUMBIA DISTRIBUTORS INC. (MPL BC) AGENCY PRIOR APPROVAL PROCESS – NON-DISCLOSURE ORDER APPLICATION DECISION**

Pursuant to section 8 of the Natural Products Marketing (BC) Act Regulations (NPMA Regulations), the BC Farm Industry Review Board (BCFIRB) is undertaking a supervisory process to determine whether to prior approve the designation of MPL British Columbia Distributors Inc. (MPL BC) as an agency to market BC regulated greenhouse vegetables.

Relying in part on BCFIRB's May 22, 2020, "Supervisory Rule - Protection of Privacy and Confidentiality in BCFIRB Supervisory Processes and Reviews" (Confidentiality Rules), BCFIRB established a document disclosure process and posed a number of questions for participants to respond to in advance of an oral supervisory hearing scheduled to commence May 23, 2023.

On March 16, 2023, the British Columbia Vegetable Marketing Commission (Commission) requested a non-disclosure order with respect to the following records:

- i. 2021-05-27 - MPL Amended Agency Application; and,
- ii. 2021-09-27 - Email from Andre Solymosi to Panel with Attachments.

The Commission also requested a deferral of circulation of certain documents until MPL BC had an opportunity to apply for a non-disclosure order. After hearing from Greenhouse Grown Foods Inc./Windset Farms (Canada) Ltd., BCFIRB agreed on March 21, 2023, to defer circulation of the identified documents until March 22, 2023.

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MPL BC supports the Commission's non-disclosure request for portions of its May 27, 2021, Amended Agency Application to be protected and likewise requests a non-disclosure order over portions of its Amended Agency Application. It takes no position on the Commission's request for a non-disclosure order for the Solymosi email with attachments. On March 22, 2023, MPL BC applied for a non-disclosure order over portions of the following additional records and provided redacted versions of:

- i. 2021-10-08 - Agency Application Slide Deck;
- ii. 2021-10-08 - Document Entitled Category Expansion; and
- iii. 2021-11-15 – MPL BC Reply Submission

## **Submissions of Participants**

### **Commission**

In seeking a non-disclosure order over MPL BC's agency application, the Commission submits agencies are business competitors and must protect their sensitive, confidential, and proprietary information from disclosure to other agencies and competitors. While an applicant for an agency licence must disclose to the Commission certain sensitive, confidential, and proprietary information to allow the regulator to assess its application, it is not necessary for industry stakeholders to receive such information in order to express a fulsome position on the policy implications of the application. For that reason, the Commission circulated a redacted version of MPL BC's application to industry stakeholders and seeks an order that those redactions be preserved in this process.

In seeking a non-disclosure order over the Solymosi email with attachments, the Commission submits these documents are an amalgamation of confidential and sensitive market data assembled by the Commission that is shared only with greenhouse managers. Proper regulation often requires applicants and stakeholders to disclose sensitive, confidential, and proprietary information to the Commission and if confidences cannot be maintained, stakeholders may be unwilling to disclose such information to the Commission necessary for the proper functioning of the regulatory system. The Commission submits there is public interest in maintaining confidence over this information and again, it is unnecessary for stakeholders to receive confidential business information to express a view on the policy implications of MPL BC's application.

## **MPL BC**

MPL BC submits that the information it seeks to have redacted is confidential and proprietary which, if disclosed, would reveal its 'book of business' (aggregated client list), standard financial and commercial terms for marketing agreements (template agreements and pricing information) and its financial and operational positioning (financial statements, forecasts and projections, production results, market shares, and pricing). These are all serious commercial interests worthy of protection.

Further, MPL BC submits the information it seeks to redact was supplied to the Commission in confidence on the understanding that it would not be disclosed unless necessary, and only with adequate protective measures in place. In its process, the Commission circulated a redacted version of MPL's agency application to stakeholders. Disclosure of the redacted information in this proceeding compromises future interactions between industry and the Commission as industry members would be unwilling to disclose confidential or proprietary information if there is a risk of broad distribution within the market. The disclosure of redacted information would harm MPL BC's commercial interests, giving those opposing its application a competitive advantage before MPL BC even enters the market.

MPL BC submits the redactions are minimal and only as needed to protect MPL BC's commercial interests. The benefits of the non-disclosure order far outweigh any potential negative impacts as withholding the redacted information does not hinder the ability of participants to provide meaningful feedback on MPL BC's agency application.

## **Greenhouse Grown Foods Inc. (GGFI) and Windset Farms (Canada) Ltd. (Windset).**

GGFI and Windset submit the general rule is that tribunals must disclose all relevant information in a timely manner, unless it is privileged. In exercising discretion under the Confidentiality Rules, BCFIRB must consider fairness to the applicants and other participants. When assessing whether the harm from disclosure outweighs the interest of affected individuals, the applicant bears the burden of satisfying BCFIRB that the request is appropriate and participants opposing the order bear no burden to prove their position. GGFI and Windset assert a greater interest in the outcome given their status as vegetable producers and existing agencies in British Columbia.

In applying the test for non-disclosure, GGFI and Windset submit this panel should only redact confidential information where supported by evidence. MPL BC and the Commission have failed to provide evidence to support a serious risk to their stated

interests. Instead, both rely on bare assertions that the interests at stake are important; are worthy of non-disclosure orders; and that in the absence of such orders, there may be serious risk to commercial interests, competitors may receive an advantage or regulated participants may fail to comply with the regulator's requests for information. GGFI and Windset suggest the Commission should have held a fair and transparent hearing and issued a decision explaining why requested redactions were confidential, and why the commercial interest in withholding this information outweighed the participants' interest given their interests were being adjudicated. Instead, the Commission has accepted MPL BC's assertions of confidentiality and continues to do so in this hearing process. MPL BC and the Commission rely on bald assertions to support their positions and have failed to substantiate what the impact, or effect, would be of disclosure. The Commission has failed to provide any evidence to support the public interest in maintaining confidentiality. MPL BC and the Commission provided no evidence of engaging with any other participant to find alternate arrangements to protect their commercial interests. Instead, they ask BCFIRB to endorse a sweeping blanket of redactions.

### **Reply of Commission**

In reply, the Commission observes that the chief objection of GGFI and Windset is that the Commission did not provide "evidence" to support its non-disclosure application without articulating what evidence is required on such applications, nor do they directly specify to whom this evidence should be provided.

The Commission submits that as BCFIRB has been provided with both redacted and unredacted versions of the records which are the subject of its application and received submissions with respect to the necessity for the non-disclosure order sought, there is no better "evidence" of the nature of the text sought to be excluded than the unredacted text itself. Further, it is self-evident that the unredacted text cannot be shared with GGFI and Windset without defeating the very purpose of the application.

### **Reply of MPL BC**

MPL BC submits that GGFI and Windset's reliance on the open court principle is misguided as this prior approval proceeding is not akin to a court proceeding; it is not quasi-judicial. BCFIRB is not adjudicating a dispute between parties but is engaging its supervisory function to approve all agency designations. Unlike appeals under section 8 of the *Natural Products Marketing Act*, there is no statutory requirement that agency designation approval supervisory reviews be open to the public.

Even if the open court principle applies, MPL BC submits it does not follow that they were required to produce evidence beyond what was provided in their applications. BCFIRB has been provided with the unredacted text along with the rationale for the proposed exclusions and it is self evident from the nature of the information MPL BC proposes to redact that the information is confidential and that there is a serious risk of harm to MPL BC if that information were disclosed to competitors who are not required to make a similar disclosure.

## **DECISION**

In coming to its decision on the non-disclosure orders, BCFIRB has applied the following Confidentiality Rules for supervisory processes:

3. While BCFIRB strives to ensure that its processes are open and accessible, there will be situations where BCFIRB determines that 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.
4. Where the supervisory panel determines it is appropriate to do so and in accordance with the proper administration of justice, it may order a commodity board to produce certain information on a confidential basis. The supervisory panel may, at its discretion, provide hearing participants with a redacted version of any confidential information it receives.
5. Where a participant in a supervisory hearing determines that it wishes to rely on potentially confidential or sensitive information (either orally or in documentary form), the participant may apply, as early as possible in the proceedings and before the information is disclosed, for a non-disclosure order from the supervisory panel.
6. A supervisory panel, in deciding whether a non-disclosure order is consistent with the proper administration of justice, will weigh the following types of interests, along with any others a panel considers relevant or important:
  - a) What is the importance of the individual's interest at stake?
  - b) Is the order necessary to prevent a serious risk to that important interest, including a commercial interest, grounded in evidence?
  - c) What is the impact on that protected interest by disclosure?
  - d) Is there a public interest in maintaining confidentiality?

e) Are there reasonable alternatives available to such an order or can the order be restricted as much as is reasonably possible while still preserving the commercial interest in question?

7. Where the supervisory panel deems a non-disclosure order is appropriate in the circumstances, it will establish an appropriate in camera or confidential process to receive the information in such a manner to ensure the information is protected both in the supervisory review and in the future.

BCFIRB has reviewed the unredacted documents in their entirety against the proposed redacted documents in order to determine whether the redactions sought are necessary to protect sensitive, confidential, and proprietary information from disclosure in accordance with the proper administration of justice. The panel is mindful that non-disclosure should not be overly broad and must be connected to an important interest that requires protection.

**i. MPL BC Amended Agency Application**

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.

BCFIRB has identified a few redactions which it concluded are not necessary to protect a legitimate commercial interest and is ordering those redactions be removed. BCFIRB does not agree it is appropriate to redact headings in the Table of Contents to the Amended Agency Application, however the text referred to by the heading in the body of the application may be properly redacted. Given that the banner or letterhead was disclosed on some of pages of the agency application document and not others, redactions of the banner or letterhead are not appropriate.

In the application document itself, at page 8, the principals of MPL BC are redacted but this information is repeated and disclosed on page 12 and further particulars regarding some but not all of these individuals are further disclosed at page 46. As such, the redaction of principals on page 8 is unnecessary.

At page 45, no basis was articulated to suggest it is appropriate to redact "see Table 5" although the panel agrees it is appropriate to redact the entirety of Table 5 given its

subject matter. Also on page 45, it is unnecessary to redact the heading at 6.3.4. “Agency Customers”. It is appropriate to redact the text under this heading as it is commercially sensitive information.

On page 46, no basis was articulated to remove the heading “See Schedule 6.4 MPL BC Business Plan Financial Statements, Forecasts and Projections” and as such that should not be redacted. However, BCFIRB agrees that the text contained in that schedule is confidential and appropriately redacted. Similarly, on page 62, which again references Table 5, that redaction is unnecessary although the table itself, as stated above, contains confidential, commercially sensitive information and properly redacted. Under Attachments, on page 65, the text title “Schedule 3.7” does not need to be redacted but the schedule description is commercially sensitive and is properly redacted. Similarly, the titles “Schedule 5.12.7 General Marketing Agreement. “GMA” and “Schedule 6.4 MPL Financial Statements, Forecasts and Projection” do not need to be redacted but the contents of those schedules are appropriately redacted.

The balance of the redactions in the amended application are appropriate and necessary to protect MPL BC’s legitimate interest in protecting its commercially sensitive information from its prospective competitors.

**ii. Email from Andre Solymosi to Panel with Attachments.**

The Commission has made a redaction at page 2 of the email string. BCFIRB observes that it has not received an unredacted version of this email and as such is unable to determine whether the redaction is appropriate in the circumstances.

**The Commission is ordered to provide an unredacted version of the email string from Mr. Solymosi including the September 27, 2021, 3:42pm email from Ms. Etsell to BCFIRB forthwith.**

The balance of the information redacted in the attachments is a compilation of confidential and sensitive market data assembled by the Commission and circulated among greenhouse agency managers which was used to analyse the agency application. GGFI as an agency was likely privy to this information. It is not clear that MPL BC received this information as an agency applicant. The redactions are appropriate to protect market sensitive data which the Commission only shares with a limited audience. However, BCFIRB observes that an appropriate in camera or confidential process will need to be established at the supervisory hearing to receive this information such that the information is protected. More will be said on this later.

**iii. Agency Application Slide Deck**

The slide deck used in the agency application process contains commercially sensitive information related to industry and market growth plans. The redactions are appropriate in the circumstances.

**iv. Document Entitled Category Expansion**

The redactions in this document relate to commercially sensitive growth figures and are appropriately redacted.

**v. MPL BC Reply Submission**

The MPL BC's reply submission has two minor redactions at page 10 and page 14 which contain commercially sensitive information appropriately redacted.

**ORDER**

Based on the panel's review of the redacted and unredacted documents, we make the following non-disclosure orders:


- a) MPL BC Amended Agency Application shall be disclosed in redacted form subject to the removal of the following redactions:
  - i. page 2 "2.5 National Retailer"
  - ii. page 3 "6.3.4 Agency Customers"
  - iii. page 8 Principals of MPL BC
  - iv. page 45 "see Table 5"
  - v. page 45 "6.3.4. Agency Customers"
  - vi. page 46 "See, Schedule 6.4 MPL BC Business Plan Financial Statements, Forecasts and Projections"
  - vii. page 62 "as outlined in 6.2.2 Table 5"
  - viii. page 64 "Schedule 5.12.7 General Marketing Agreement" and "Schedule 6.4 MPL Financial Statements and Projections"
- b) the Commission is to provide BCFIRB with an unredacted version of the email string from Mr. Solymosi including the September 27, 2021, 3:42pm email from Ms. Etsell forthwith and BCFIRB will make any necessary further orders regarding disclosure of this document.
- c) the Agency Application slide deck, the Document entitled Category Expansion and the MPL BC reply submission will be disclosed in redacted form.



## **NEXT STEPS**

Having made the above non-disclosure order, the Commission, MPL BC, GGFI and Windset will need consider what in camera or confidential processes needs to be put in place to receive confidential information 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.

Regards,



Pawan Joshi  
Panel Chair

cc: Robert Hrabinsky, Legal Counsel, BC Vegetable Marketing Commission  
Craig Ferris, K.C., Legal Counsel, Greenhouse Grown/Windset  
Agency Applicants and Storage crop Agency Managers  
Greenhouse Agency Managers  
Storage crop/Greenhouse Managers  
Storage crop Producers  
Greenhouse Producers  
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