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VIA EMAIL

British Columbia Farm Industry Review Board
1st Floor 2975 Jutland Road
Victoria, BC V8T 5J9

Attention: Wanda Gorsuch,
Manager of Issues & Planning

Dear Ms. Gorsuch:

MPL BC Prior Approval Process – Non-Disclosure Applications

We are counsel to Greenhouse Grown Foods Inc. (**GGFI**) and Windset Farms (Canada) Ltd. (**Windset**).

We write in response to the non-disclosure applications of the BC Vegetable Marketing Commission (**Commission**) and MPL British Columbia Distributors Inc. (**MPL BC**). In brief, we submit that the non-disclosure applications do not provide adequate, or any, evidence to support the requests for the BC Farm Industry Review Board (**Board**) to grant non-disclosure orders. We further submit that any non-disclosure orders granted by the Board ought to be as minimal as possible to allow for participants to address the evidence filed in support of the application. We have included examples of our specific concerns regarding the over-breadth of the current redactions at Schedule "A" to this letter.

In our submission, fairness and transparency require that all participants in this public process be given the opportunity to review and test, to the greatest extent possible, the evidence upon which the Board will rely in making its determinations in these proceedings.

The Board Rules of Procedure for Supervisory Reviews

The Board is entitled to consider whether non-disclosure orders are appropriate in a given matter.

Section 7.1 of the *Natural Products Marketing (BC) Act* (**NPMA**) empowers the Board to make rules governing the procedure for any exercise of its supervisory powers. Pursuant to s. 7.1 of the NPMA, the Board has published general rules entitled "Supervisory Rules", made effective August 9, 2010, and reviewed and confirmed on November 14, 2019 (the **Supervisory Rules**).[1]

[1] The Supervisory Rules are available online.

The Supervisory Rules govern the Board's supervisory process and contain six rules, five of which are in respect of quorum or specific constitution of the panel for a supervisory review. The remaining rule empowers the Board to adopt such procedures that it deems best suit particular circumstances.

The Board has additionally made and published rules specific to confidentiality in a Supervisory Rule entitled "Protection of Privacy and Confidentiality in BCFIRB Supervisory Processes and Reviews", which was made effective May 22, 2020 (the **Confidentiality Rules**).[2] The Confidentiality Rules were made "to address how potentially sensitive and confidential information is managed by the BCFIRB under its supervisory mandate".

Pursuant to s. 5 of the Confidentiality Rules, a participant in a supervisory hearing may apply for a non-disclosure order in order to rely on information that the participant considers confidential or sensitive.

Section 6 of the Confidentiality Rules sets out that the panel must be satisfied that a non-disclosure or confidentiality order is consistent with the administration of justice. The panel must consider the following interests, as well as any interests the panel deems 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?

Principles that Govern Non-Disclosure Orders

The general rule with respect to evidence is, of course, that tribunals "should disclose all information relevant to the conduct of the case, whether it be damaging or supportive of a respondent's position, in a timely manner, unless it is privileged by law".[3]

Whenever a party seeks to protect evidence from disclosure, the party is effectively seeking an exception to the open court principle that is a fundamental aspect of all proceedings in Canada. The duty of fairness generally requires that parties know the case they must meet. This includes parties that may be affected by a decision.

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[2] The Confidentiality Rules are available online.

[3] *Markandey v. Ont Ontario (Board of Ophthalmic Dispensers)*, [1994] OJ No. 484, at para. 43. Although *Markandey* is with respect to an administrative suspension in a regulated profession, principles of disclosure equally apply to all proceedings in Canada.

In exercising its discretion under the Confidentiality Rules, the BCFIRB must consider the fairness of both the applicants, MPL BC and the Commission, as well as affected parties – the participant-intervenors – so that the participant-intervenors' may address the evidence prejudicial to their case and make their own representations. Fairness requires this.[4] In addition, where the interests of affected parties may be more severely impacted, the need to make fuller disclosure – or, in other words, reduce the scope of any confidentiality orders – may be greater.[5] A tribunal must assess whether the harm that could result from the disclosure outweighs the interest of affected individuals.[6]

Finally, the participant seeking the non-disclosure order bears the burden of satisfying a tribunal that the request is appropriate. The parties opposing the non-disclosure order bear no burden to prove their position.[7]

We note that in this proceeding the participants have a greater interest in the outcome than more typical intervenors given their status as vegetable producers and existing agencies in British Columbia. An agency licence is only to be granted where it will benefit the industry as a whole having regard to the interests of all producers. In addition, an agency licence is not to be granted if it will result in increased competition among agencies on price and where it will have a detrimental effect on producer returns[8]. Accordingly, it is the participant-intervenors'' interests that are being adjudicated in this proceeding and this requires a very high degree of fairness to be afforded to them to protect their interests.

Application Response

In our submission, the Board must consider each of the five criteria it sets out in the Confidentiality Rules. Questions of whether the information was provided to the Commission in confidence may be considered by the Board under the "catch-all" language included in s. 6 of the Confidentiality Rules. However, the mandatory language and considerations of s. 6 will supersede any discretionary considerations.

a) What is the importance of the individual's interest at stake?

MPL BC's stated interest in seeking the non-disclosure order is commercial. In protecting a commercial interest, the Board should protect as confidential only the minimum of what has been proffered as evidence to support MPL BC's position. It is incumbent on MPL BC to satisfy the Board of the importance of its interest for each individual aspect of its non-disclosure application.

Without reference to any specific set of redactions or to the general nature of any specific evidence, the Commission nonetheless submits that redactions of the Greenhouse Industry Market Allocation Report require complete redactions because the information contained therein is disclosed confidentially by industry participants. Without any supporting evidence, the

[4] *Ruby v. Canada (Solicitor General),* [2002] SCJ N0. 73 at para. 40
[5] Guy Regimbald, Canada Administrative Law, 4th ed., LexisNexis Canada Inc: Toronto, 2021, pg. 321.
[6] Regimbald at pg. 321.
[7] *Sherman Estate v. Donovan* 2021 SCC 25 at para. 38.
[8] Consolidated General Order, BCVC, Part XIV, section 2(6)(a) and (c)

Commission effectively submits that disclosure of this information will have a chilling effect on industry participants who will be "unwilling to provide [information] to the Commission that is necessary for the proper functioning of the regulatory system".

b) Is the order necessary to prevent a serious risk to that important interest, including a commercial interest, grounded in evidence?

Neither MPL BC nor the Commission provide evidence to support that there would be a serious risk to their stated interests. Rather, they 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, that serious risks may or will take place.

In the case of MPL BC, MPL BC submits that disclosure of the information would harm its commercial interests, and that MPL BC's competitors would gain a competitive advantage over MPL BC. One would expect some evidence to connect the various redactions to minimizing this risk.

The Commission asserts that disclosure of its requested redactions would cause regulated participants to fail to comply with their regulator's requests for information in order to regulate the industry. One would expect some evidence – expert or otherwise – that substantiates the alleged risk that regulated licence holders would fail to comply with a regulator's requests to disclose information necessary to regulate the industry.

As importantly, one would have expected the Commission to have held some form of hearing and issued a decision with respect to why the requested redactions were confidential, and why the commercial interest in withholding this information outweighed the participant-intervenors' interest in a fair and transparent hearing in light of the fact that the participant-intervenors' interests were being adjudicated. There was no such hearing process or decision.[9] We are left with the conclusion that the Commission simply accepted MPL BC's assertions of confidentiality and continues to do so in this hearing process. In our submission, this fact is important to both this application as well as to the fairness and transparency of the process under which the Commission is now operating.

c) What is the impact on that protected interest by disclosure?

MPL BC merely and baldly asserts that its commercial interests would be harmed. The Commission merely and baldly asserts that regulated participants would not disclose information requested by the Commission in order to regulate the industry. In our submission, neither MPL BC nor the Commission substantiate what the impact, or effect, would be of disclosure.

[9] Letter of the Commission to participants to the MPL BC Agency Application, regarding "Concerns of Apprehension of Bias and Procedure regarding MPL BC Ltd. Agency Application", dated November 15th, 2021. Then-Chair Etsell wrote "while the process contemplates redaction of confidential or proprietary business information from MPL's application, the process does not contemplate the receipt of *ex parte* submissions." [Emphasis in original]

d) Is there a public interest in maintaining confidentiality?

The Commission asserts there is a public interest in maintaining confidentiality but does not provide any evidence to support its position.

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?

Neither MPL BC nor the Commission consider any alternatives to their sweeping requests for non-disclosure orders. They have provided no evidence suggesting they have engaged or negotiated with any other participant for potential alternate arrangements that would be sufficient to protect their commercial interests. Instead, they ask the Board to endorse a wide, sweeping blanket of redactions.

Final Comments

Windset and GGFI understand that the Board must balance the commercial interests of MPL BC against the participant-intervenors' interest in a fair and transparent proceeding in its consideration of this application. However, we note that the position of the Commission did and does not recognize this weighing process and simply fails to recognize the interests of intervenor-participants at all. In our submission, this was wrong and we submit that the Board should not fall into the same error.

In our submission, any non-disclosure orders must be as limited as possible in order to ensure that the open court principle is harmed as minimally as possible. Further, minimal non-disclosure orders ensure that other affected parties to a matter are able to understand the evidence and to make their own representations. Complete non-disclosure of industry-wide evidence is not acceptable where the crux of participants' opposition is that the industry does not need an additional agency.

For example, non-disclosure of the amount of product MPL BC intends to import into BC, or its sources of product deprives affected parties of an opportunity to understand the effect MPL BC will have as a new agency, both on existing designated agencies and on producers.

An alternative measure to the blanket acceptance of MPL BC's redactions by the Commission may be to anonymize and conglomerate the trends of data that the Commission seeks to fully redact. This will allow information to be disclosed to enable participants to understand the substance of the information without receiving confidential information. No such alternatives appear to have been considered or submitted by either the Commission or by MPL BC.

Windset and GGFI agree that protecting certain limited confidential business information, such as client lists, is important and a valid interest. However, in light of the important interests of producers and other agencies to be considered in this proceeding, the Board must ensure that non-disclosure is as minimal as possible and that any non-disclosure orders are issued based on evidence. We remind the Board, the Commission and MPL BC that the burden to satisfy the Board that a non-disclosure order is appropriate rests fully on the applying parties.

Yours very truly,

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Schedule "A"
Specific Comments and Questions Regarding Proposed Redactions

Document	Comments and/or Questions
Letter from Morgan L. Camley to the Board, 2023-03-22.	This letter submits that standard financial and commercial terms for marketing agreements are a "serious commercial interest worthy of protection". However, Mastronardi Produce Limited has been required to publish its Purchase & Marketing Agreement with AppHarvest Inc. with the US Securities and Exchange Commission with minimal redactions.[10] This minimally-redacted purchase and marketing agreement is publicly available. Any redactions to the marketing agreements in the within matter should redact no more than is redacted in publicly available material. MPL BC should satisfy the Board that such redactions are minimal and no more than is otherwise publicly available.
Schedule A – Agency Application Slide Deck	At least two complete pages have been fully redacted, without even descriptions of what type of information is contained that ought to be protected by a non-disclosure order. This deprives affected participants of any possibility to object to the redactions.
Schedule B – Category Expansion	It is unclear why MPL BC redacted the specific breakdown of its Category Expansion despite providing the total value of its incremental segments within the category.
Schedule C – MPL Letter to Debbie Etsell	It is unclear why MPL BC would need to redact a paragraph in the middle of a section that is otherwise un-redacted.
2021-05-27 – MPL Amended Redacted Agency Application	Generally, many of the redactions set out in the Amended Redacted Agency Application are large swaths of information, rather than precise data or information that one would expect of a redacted application that stands to affect a wide number of intervenors. Affected participants are left simply not knowing whether the redactions are of a category that they wish to object to. Our specific questions and concerns relate to the following: • Index title for section 2.5, and associated information at page 15 are both redacted; redacting the title deprives affected participants of the ability to comment on the appropriateness of redactions. • Page 8: it is unclear why it would not be of interest to participant-intervenor who the shareholders of MPL BC, Mastronardi Produce Limited are. One would think that that the shareholders of a business held out to be a family-owned business would be of interest to affected participants. This information could be redacted by advising the percentage of shareholdings that are family-held and non-family-held.

[10] Purchase & Marketing Agreement between AppHarvest Inc. and Mastronardi Produce Limited.

	• Page 12 – section 2.3: lengthy redaction as opposed to redacting only confidential information. • Pages 28 and 29 - 5.12.3, Opportunities & Demand: Affected participants would want an opportunity to respond to this. Redactions should not be sweeping, but rather should allow the general content to be known while redacting only specific confidential information. • Pages 30 and 31: it is not clear what type of information is being redacted here, depriving affected participants of an opportunity to comment on whether or not they are affected by same. • Page 44 Marketing & Acreage Targets: affected participants would want need this information in order to reply to whether they are impacted by this is redacted. • Page 45, 6.3.4: what attachments have been redacted and why? • Page 64: what attachments have bene redacted and why? • Pages 77-78: what attachments have been redacted and why? • Page 92-107: what attachments have been redacted and why?