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Ms. Wanda Gorsuch
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B.C. Farm Industry Review Board
780 Blanshard Street
Victoria, BC V8W 2H1

Dear Ms. Gorsuch:

Re: MPL Prior Approval Process

Introduction

In his letter dated March 27, 2023, Panel Chair, Pawan Joshi, directed the Commission to answer the following questions:

2. What information did the Commission rely on to determine that MPL BCs' market presence as an agency will result in an incremental growth in grower collective returns versus loss of market share of established agencies?

3. Did the Commission identify any deficiencies in MPL's application based on Part XIV - Procedures For Designation of Agencies of the Commission's General Orders? if so, what were the deficiencies?

4. What information did the Commission rely on to support market penetration opportunities for BC producers should MPL BC be designated as an agency?

I am writing to alert the BCFIRB and participants of the Commission's position with respect to these questions so that further submissions can be made by other participants, or directions given by the BCFIRB, if necessary.

Brief Statement of the Commission's Position

It is possible to answer questions 2 and 4 by simply pointing to the complete documentary record that was before the panel when it made its January 12, 2022 decision. Similarly, it is possible to answer question 3, as a point in argument, by expressing a position on whether any part of the panel's January 12, 2022 decision identified "any deficiencies in MPL's application". However, if something more is expected from the Commission by the BCFIRB, these questions could:

1. be seen as a request for information that is protected by deliberative privilege;

2. appear to offend the principle that "s/he who hears must decide", by requiring the Commission to strike a new panel comprised of members that did not participate in the original decision, so that they might attempt to provide additional analysis not reflected in the original panel's reasons; and

3. appear to offend the principle that a decision maker should not "bootstrap" their earlier decision with additional analysis, particularly in a context where the BCFIRB has ruled that it does not intend "to replicate or repeat the full agency designation application process."

Consequently, in the absence of direction to the contrary, the Commission intends to respond to questions 2 and 4 by simply pointing to the complete documentary record that was before the panel when it made its January 12, 2022 decision. Similarly, the Commission intends to respond to question 3, as a point in argument, by expressing a position on whether any part of the panel's January 12, 2022 decision identified "any deficiencies in MPL's application".

Deliberative Privilege

The BCFIRB has consistently recognized that deliberative privilege applies with respect to the deliberations that lead to a commodity board's final decision, i.e., "the end product of the collaborative process, [which] speaks for itself."

In *Hallmark Poultry Processors Ltd. et. al. v. BC Chicken Marketing Board et. al.* (October 23, 2000) the BCFIRB said this:

> 32. In our opinion, ss. 8(4) and 8(5) must be limited by the privilege which we find attaches to the compelling public interest in the confidentiality of deliberations of a statutory authority acting in a legislative capacity. In *Payne v. Ontario Human Rights Commission*, [2000] O.J. No. 2987 (C.A.), the Court described the basis for the "doctrine of deliberative secrecy" in the context of an adjudicative decision:
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> > First is the practical concern that **if no limits were imposed, tribunal members would be exposed to unduly burdensome examinations and "would spend more time testifying about their decisions than making them." A second reason is the need for finality. The decision should rest on the reasons given and not on the success or failure of**

> **a cross examination. Third is the need for a shield to protect the process of debate, discussion and compromise inherent in collegial decision-making**.

33. Citing *Tremblay v. Quebec*, [1992] 1 S.C.R. 952, the Court in Payne recognized deliberative secrecy for adjudicative decisions is not absolute and must yield "when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice".

34. We note here, however, that while the allegation has been made, no valid reasons have yet been given to support a reasonable belief that the Chicken Board breached procedural fairness. It has not even been shown that the Chicken Board had the sort of common law duty of fairness applicable to adjudicative decisions at issue in Payne and Tremblay. The new Regulations under attack in these appeals are legislative in nature. They are a comprehensive legislative code, aimed at the entire industry, not one individual. As the BCMB has noted in previous decisions, legislative decisions do not attract a common law duty of fairness: *Canadian Assn of Regulated Importers v. Canada (Attorney General),* [1994] 2 F.C. 247 (C.A.). Therefore, the interests in deliberative secrecy are even stronger in this context, and clearly pass each element in the four-part test in *R. v. Gruenke*, [1991] 3 S.C.R. 261. 35. Applying the factors in *Gruenke*, we find that communications respecting legislative decisions as between Chicken Board members and their staff originate in confidence. We have no hesitation in concluding that such confidence – which must be based on trust and openness among staff and members – is essential to ensure a board can effectively govern this difficult industry. To breach the confidence as between Chicken Board members and between the Chicken Board and staff would in our view cripple the Chicken Board. Further, little would be served in this appeal by compelling the Chicken Board to produce the individual research of its members, or its deliberations with the support of its staff. (emphasis added)

Subsequently, in *Fraser Valley Duck and Goose Ltd. v. BC Chicken Marketing Board* (Appeal # 07-19, March 18, 2008), the BCFIRB said this:

> …**disclosure under [subsections 8(4) and 8(5) of the *NPMA*] is limited by what has been termed deliberative privilege - the privilege which attaches to the compelling public interest in the confidentiality of deliberations of a statutory authority acting in a legislative capacity**. The Panel understands deliberative privilege to extend to discussions and documents between board members while carrying out a legislative process. What this means is that there is often a give and take between members of a board as issues of policy are developed. To breach this confidence as between either board members or members and staff would cripple the ability of the board's decision making. Commodity board member deliberations are not, in the usual course, subject to cross examination. Nor is it appropriate that documents reflecting individual board member's private deliberations regarding each submission in a legislative process be

> disclosed. **The reason for this is that the commodity board's final decision, the end product of the collaborative process, speaks for itself.** (emphasis added)

In the circumstances present here, the Commission has issued a comprehensive written decision setting out, in detail, the panel's reasons for its recommendation. Those reasons are "the end product of the [panel's] collaborative process." To inquire further into the panel's deliberations that lead to those reasons would breach deliberative privilege. Furthermore, as noted in *Payne v. Ontario Human Rights Commission*, [2000] O.J. No. 2987 (C.A.), such an inquiry would run counter to the need for finality, and give rise to the possibility that the BCFIRB's prior approval review would not "rest on the reasons given" but rather "on the success or failure of a cross examination." Lastly, the prospect of recreating the Commission's decision-making process before the BCFIRB, in real time, would very likely give rise to errors in which evidence becomes improperly conflated with argument, or otherwise received by the BCFIRB in substitution for the panel's January 12, 2022 decision (which is the true subject of this prior approval process). As noted, the panel's January 12, 2022 decision is "the end product of the collaborative process" and "speaks for itself." If the panel's process or analysis is so deficient that the BCFIRB is unable to reach a decision on prior approval, then the matter should be remitted back to the Commission with directions. To supplement the panel's reasons with additional analysis not present in the original decision, or with evidence that is subject to deliberative privilege, will work a hardship on the Commission and an unfairness on the other participants to this process.

<u>"S/he who hears must decide"</u>

There is a well-known maximum, "s/he who hears must decide", which means that a tribunal is responsible for hearing and deciding a case. In other words, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* ("let the other side be heard as well") rule. This is true to the extent a litigant is not truly "heard" unless he or she is heard by the person who will be deciding the case.

The panel that arrived at the January 12, 2022 decision is spent, and cannot be reconvened to reconsider MPL's application or to address any new matters that might arise from the BCFIRB's questions 2, 3 and 4. One of the members of that panel, Chair Etsell, is no longer a member of the Commission. It is the Commission's respectful submission that it would be improper to constitute a new panel (comprised of members that did not participate in the original process) for the purpose of providing additional analysis not present in the original reasons.

<u>Bootstrapping</u>

The final Terms of Reference dated March 8, 2023 provide as follows:

> BCFIRB will consider the following questions:
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> 1. Did the BC Vegetable Marketing Commission conduct a SAFETI-based1 process?

> 2. Is the BC Vegetable Commission's decision to designate MPL BC as an agency in the public interest and consistent with sound marketing policy?
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> BCFIRB's prior approval role is to consider the above questions, address any procedural defects in the Commission's process if necessary, and to assess whether the Commission's rationale and recommendation accord with sound marketing policy. It is the Commission's responsibility as the first instance regulator to demonstrate that it conducted a SAFETI-based process and reached a sound marketing policy-based recommendation. **It is not BCFIRB's intent to replicate or repeat the full agency designation application process**. However, BCFIRB needs to reach its own conclusion as to whether the approval of MPL BC's agency license is beneficial to the regulated vegetable industry in BC. (emphasis added)

Though not expressly stated, the passage above clearly indicates that the BCFIRB's prior approval process is not a *de novo* rehearing of the full agency designation application process. That being so, it is not appropriate for the Commission to "bootstrap" its January 12, 2022 decision by now providing additional analysis that is not reflected in that "final end product".

In *Ontario (Energy Board) v. Ontario Power Generation Inc.*, [2015] S.C.J. No. 44 (S.C.C.), the Supreme Court of Canada said this:

> 49 **In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself**.
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> . . . . .
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> 63 The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.
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> 64 As the term has been understood by the courts who have considered it in the context of tribunal standing, **a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal**: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

> 65 **The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done**": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that **a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record"**: para. 29.

It is the Commission's respectful view that it would be improper to respond to questions 2, 3 and 4 in a manner that would amount to "bootstrapping", particularly when the prior approval process is not in the nature of a *de novo* rehearing of the full agency designation application process.

Summary

For all the reasons expressed above, and subject to any further directions that might be issued by the BCFIRB, the Commission intends to respond to questions 2 and 4 by simply pointing to the complete documentary record that was before the panel when it made its January 12, 2022 decision. Similarly, the Commission intends to respond to question 3, as a point in argument, by expressing a position on whether any part of the panel's January 12, 2022 decision identified "any deficiencies in MPL's application".

As earlier noted, the BCFIRB has before it the Commission's comprehensive January 12, 2022 reasons. This is "the end product of the collaborative process" and "speaks for itself." If the panel's process or analysis is so deficient that the BCFIRB is unable to reach a decision on prior approval, then the matter should be remitted back to the Commission with directions. The Commission's decision-making process should not be recreated or "bootstrapped" by persons who were not members of the original decision-making panel.

Yours truly,

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Per: 

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