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British Columbia Farm Industry Review Board
PO Box 9129 Stn Prov Govt
Victoria, BC V8W 9B5

Attention: Wanda Gorsuch, Manager of Issues and Planning

Dear Ms. Gorsuch:

Re: MPL British Columbia Distributors Inc. ("MPL") Agency Prior Approval Process

We write in reply to the submissions made by Mr. Ferris, K.C. on behalf of Greenhouse Grown Foods Inc. ("GGFI") and Windset Farms (Canada) Ltd. ("Windset") regarding MPL's request for a non-disclosure order over certain information contained in the documents produced by the Commission.

In addition to the below submissions, MPL supports and adopts the reply submissions made by Mr. Hrabinsky on behalf of the Commission, dated March 30, 2023.

Firstly, it is important to note that there are two aspects to the non-disclosure orders being sought by MPL and the Commission. Namely:

a. an order providing that certain identified information be provided to BCFIRB in confidence, to the exclusion of industry participants; and

b. an order withholding the identified information from publication on BCFIRB's website.

GGFI and Windset's opposition to MPL and the Commission's request for a non-disclosure application appears to focus on the first aspect of the application. In doing so, GGFI and Windset primarily rely on the open court principle. However, their reliance in this respect is misguided.

The current prior approval proceeding is not a court proceeding and does not fall within BCFIRB's quasi-judicial functions—BCFIRB is not being asked to adjudicate a dispute between parties. Rather, it is part of BCFIRB's supervisory function to approve all agency designations. In this respect, it should be noted that unlike appeals conducted 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.[1]

Moreover, and in any event, even if the open court principle were to apply to this matter, it does not follow that MPL or the Commission were required to produce evidence above and beyond what was already provided on the non-disclosure applications. As the Commission noted in its submissions, BCFIRB has been provided with the evidence of the unredacted text along with the rational for its proposed exclusion. It is self evident from the nature of the information MPL proposes to redact that the information is

[1] *Natural Products Marketing (BC) Act*, RSBC 1996 c 330 at ss. 7.1(2) and 8.1; and *Administrative Tribunals Act*, SBC 2004, c 45 at s. 41.

confidential and that there is a serious risk of harm to MPL if that information were disclosed to its competitors—who in the course of this proceeding are not required to make a similar disclosure.

The Supreme Court of Canada has confirmed that parties are not necessarily required to provide direct evidence of potential harm on applications for sealing or confidentiality orders. While a decision maker should not engage in speculation, a decision maker can infer a serious risk of harm from the documents and factual circumstances before it. In this respect, the Supreme Court of Canada recently stated, in *Sherman Estate v. Donovan*, 2021 SCC 25 at paragraph 97:

> At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).
>
> [emphasis added]

Similarly, in the case of *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, the Court found that while evidence of a direct, harmful consequence is relevant, courts may also conclude that there is objectively discernable harm and that "…absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic".[2]

In this matter, the proposed redacted information relates to MPL's customer lists, template agreements, financial statements, forecasts and projections, production areas and results, shipment volumes, pricing, and market shares. These are all confidential business information. The other industry participants are MPL's competitors. BCFIRB can infer in these circumstances that there is a serious risk of harm to MPL's commercial interests if this information is disclosed to its competitors. Disclosure of this information would in essence allow MPL's competitors to gain a commercial advantage over MPL simply by virtue of their opposition to MPL's agency licence.

The BC Court of Appeal has previously recognized that in certain circumstances it is appropriate for an administrative decision maker to withhold certain business information from a competitor participant. In *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.*,[3] the BC Court of Appeal held that the B.C. Ferry Commissioner did not breach fairness in declining, in tariff proceedings, to order full disclosure of all of a ferry service's financial data to a competitor who was a party to the proceeding. In coming to this decision, the Court noted that the requirements of fairness are functional in nature and that the primary goal of disclosure in cases such as the one before it was to ensure that the parties were able to participate meaningfully and fully in the process. The Court of Appeal found that all that was required was that the competitor have sufficient information to allow it to participate in a meaningful manner and that this did not require that full detailed financial information be given to it. The Court of Appeal further concluded that the Commissioner did not act unfairly when concluding that the financial harm that might be caused to the ferry service by the full disclosure of all of its financial information to a competitor might be unduly damaging to the service.[4]

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[2] *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 15 and 16.

[3] *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.* 2013 BCCA 55 (emphasis added).

[4] *Ibid* at paras. 72, 82 and 83.

Here, GGFI and Windset acknowledged themselves in their submissions that certain business information should be protected from disclosure. Specifically, they stated that they agreed that "protecting certain limited confidential business information, such as client lists, is important and a valid interest."[5]

It is also noteworthy that GGFI and Windset have failed to provide any basis or rational for why they need disclosure of the proposed redacted information in order to fully participate in these proceedings or to provide meaningful feedback on MPL's agency application. If they had a real need for access to this information, it can be presumed that they would have set this out in their submissions. The absence of any explanation of how this information is necessary (or even helpful) to GGFI and Windset in responding to MPL's application is not surprising. This is because it is simply not necessary for them to have disclosure of this information in order for them to participate meaningfully and fully in the process.

Further, contrary to GGFI's and Windset's assertion that the Commission "simply accepted MPL BC's assertions of confidentiality", it is evident from the Commission's Final Decision, dated December 21, 2021, that the Commission considered MPL's proposed redactions in conjunction with its goal of ensuring the appropriate level of openness for the process. In this respect, the Commission found:

> The panel has taken all appropriate measures to ensure that processes, practices, procedures, and reporting on how the mandate is exercised are open, accessible and fully informed. Though some aspects of the application have been redacted to protect confidential or proprietary information, stakeholders have been provided with a fulsome opportunity to express their positions.[6]

As with the initial consideration of MPL's agency application before the Commission, MPL's request for redactions of certain confidential and proprietary information is necessary to protect its interests and avoid the serious risk of harm to MPL if this information were disclosed to its competitors. Further, the requested non-disclosure does not impair GGFI's and Windset's ability to participate meaningfully and fully in this process. In the circumstances, it is appropriate for BCFIRB to grant the Commission's and MPL's request for a non-disclosure order over the specified materials.

It goes without saying that if the information is received in confidence by the BCFIRB, it should not be published to BCFIRB's website. Should BCFIRB refuse to receive the information in confidence (to the exclusion of eligible participants), then MPL submits that BCFIRB should, at the very least, issue a non-disclosure order excepting it from publication on its website. If BCFIRB finds that eligible participants cannot fully and meaningfully participate in the proceeding without the redacted information (which is denied), and further finds that the prejudice to them in not having the information outweighs the prejudice to MPL's interests in protecting its confidentiality (which is denied), BCFIRB should nonetheless protect MPL's interests in maintaining the information's confidentiality (for all the reasons set out in this and our March 22 letter) by excepting it from publication on BCFIRB's website.

[5] Letter from Mr. Farris, K.C. on behalf of GGFI and Windset, dated March 29, 2023 at p. 6.

[6] Commission, Decision Re: In the Matter of an Application Made by MPL British Columbia Distributors Inc. for an Order Designating it as an Agency, dated December 21, 2021 at p. 10.

For all the reasons set out above, MPL submits that it would be appropriate and just for BCFIRB to grant a non-disclosure order over the proposed redacted information.

Yours truly,

Dentons Canada LLP

Morgan L. Camley
Partner