File No. 44200-35\MPL

BC FARM INDUSTRY REVIEW BOARD

MPL BRITISH COLUMBIA DISTRIBUTORS INC. (MPL BC) AGENCY PRIOR APPROVAL PROCESS

CLOSING STATEMENT OF WINDSET FARMS (CANADA) LTD. AND GREENHOUSE GROWN FOODS INC.

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I. Overview

1. Windset Farms (Canada) Ltd. ("**Windset**") and Greenhouse Grown Foods Inc. ("**GGFI**") are grateful to have had the opportunity to participate in this Supervisory Review of the January 12, 2022 decision (the "**Decision**") of the BC Vegetable Marketing Commission (the "**Commission**") to recommend that MPL British Columbia Distributors Inc. ("**MPL BC**") be designated as an Agency for regulated greenhouse vegetables.

2. In the Final Terms of Reference issued March 8, 2023, this board, the BC Farm Industry Review Board (the "**Board**" or "**FIRB**") indicated the scope of this proceeding, and that it would consider the following two questions:

(a) Did the BC Vegetable Marketing Commission conduct a SAFETI-based process? and

(b) Is the BC Vegetable Commission's decision to designate MPL BC as an agency in the public interest and consistent with sound marketing policy?

3. The first question is a threshold question – if there were fundamental issues with respect to the procedure the Commission followed that resulted in unfairness to parties, then its Decision recommending to the Board that MPL BC be designated as an Agency cannot stand.

4. It is the position of Windset and GGFI that the evidence shows that the Commission did not follow a SAFETI-based process, as the process was not fair and not transparent (the "F" and the "T" in SAFETI). Accordingly, this Board should not let the Commission's decision stand, and must: (a) either substitute its own decision on MPL BC's Agency application, as it is empowered to do, or (b) send the matter back to the Commission for reconsideration.

5. With respect to the second question, this Panel of the Board clearly articulated that it was not its intent to repeat the full agency designation process, but rather it intended to reach its own conclusion on whether the approval of MPL BC's agency licence is beneficial to the regulated vegetable industry in BC. This Supervisory Review therefore was a *de novo* consideration of the Agency designation decision. As stated by this Panel on March 8, 2023 in tis Final Terms of Reference:

> BCFIRB's in-person supervisory hearing is an opportunity to address earlier process concerns raised by some participants that the Commission did not hold an

> oral hearing before issuing its decision on MPL BC's agency designation. In addition to addressing process concerns, the prior approval process is an opportunity for participants to provide their supported rational for why BCFIRB should (or should not) grant MPL BC an agency designation as a matter of sound marketing policy.

6. The evidence gathered by this Panel as part of this Supervisory Review indicates that all of the factors outlined in Part XIV, s. 2(6) were not satisfied by MPL BC, and accordingly, it should not be granted designated Agency status.

II. Procedural Unfairness in the Commission's Process

A. The Commission's Timelines did not allow for Sufficient Participation

7. The right to be heard is fundamental to a fair proceeding. This right includes the requirement to have an adequate opportunity to present one's case, which deals with matters relating to the ability of an individual to be able to present their evidence and argument to the decision-maker and their ability to know and meet the case against them.[1]

8. At a foundational level, as stated by the Supreme Court of Canada, "[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly."[2]

9. It is understood that the right to be heard does not contain an absolute requirement that an oral hearing be provided to persons likely to be affected by a decision. The principles of fairness require that the parties have the ability to present their positions in a fair manner. However, the decision with respect to what process to undertake must take into account all of the circumstances such as relevant statutory directions and reasonable expectations in order to permit the decision-maker to collect the necessary information necessary for the decision to be made properly.[3]

10. As stated in the leading Supreme Court of Canada case regarding judicial review of administrative decisions, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, "Where a

[1] Macaulay & Sprague, 2023, *Practice and Procedure before Administrative Tribunals*, at ss.13.11.

[2] *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para. 28 [*Baker*].

[3] Macaulay & Sprague, 2023 *Practice and Procedure Before Administrative Tribunals*, at ss.13.11; *Baker*, at para. 33.

particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances."[4] The Court in *Vavilov* went on to reaffirm the non-exhaustive list of factors that inform the content of the duty of procedural fairness as first iterated in *Baker*[5]:

(a) the nature of the decision being made and the process followed in making it;

(b) the nature of the statutory scheme;

(c) the importance of the decision to the individual or individuals affected;

(d) the legitimate expectations of the person challenging the decision; and

(e) the choices of procedure made by the administrative decision maker itself.

11. It is submitted that taking into account both this industry, that is, farming, and the magnitude of the decision to designate an additional Agency, an oral hearing was the only appropriate process. It is not appropriate for the Commission to suggest that even though the amendment of Part XIV of the General Orders on March 15, 2021 no longer required an oral hearing for an Agency designation application, this meant they did not have to provide for one. Designing a fair process may require, in certain circumstance such as this one, more than what is provided for under the General Orders.

12. Upon receiving the letters from other Agencies and producers with respect to their concerns about designating MPL BC as an Agency, it was incumbent on the Commission to take those concerns consideration and offer those participants a full and fair opportunity to be heard. This is particularly so when considering the tradition in the farming industry of parties "getting on the mic" as part of an oral hearing process when there are issues of concern to the industry at large, as well as the Commission's previous process of requiring an oral hearing for Agency applications.

13. In fact, this Board has clearly determined as part of its <u>own</u> process in this proceeding that an oral hearing was necessary: written submissions and an oral hearing were necessary to ensure fairness in this Supervisory Review. Clearly, the decision to provide for an oral hearing was made

[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, At para. 77 [*Vavilov*].

[5] *Ibid.*

in order to remedy any defects in the Commission's process. As noted by this Board in its March 8, 2023 Final Terms of Reference:

> BCFIRB's in-person supervisory hearing is an opportunity to address earlier process concerns raised by some participants that the Commission did not hold an oral hearing before issuing its decision on MPL BC's agency designation.

14. In addition, the Commission has admitted, in both its written Reply Submissions and in Mr. Solymosi's evidence on cross-examination, that its process lacked procedural fairness.[6] Specifically:

(a) the Commission did not provide participants with any of the additional records MPL BC provided on October 8, 2021 to supplement its application (in either redacted or unredacted form) or an opportunity to comment on them; and

(b) the Commission did not provide participants with a copy of MPL BC's Reply Submission dated November 15, 2021 (in either redacted or unredacted form) or an opportunity to comment on this submission.

15. The Commission has conceded that these failures gave rise to procedural unfairness.[7]

16. Further, this Board should carefully consider the context in which the Commission's Decision was made, that is, that multiple Commissioners, including those on the panel that made the Decision, were afraid of being sued personally by MPL BC. This evidence leaves participants and this Board to wonder whether Commissioners somehow felt they were in personal jeopardy if they did not find in favour of MPL BC's application.[8]

B. The Commission Failed to Undertake Sufficient Information Gathering Prior to Making its Decision

17. It has been Windset and GGFI's position throughout these proceedings that the Commission's process in MPL BC's designation application did not involve any canvassing of industry participants to determine the current state of affairs of the BC greenhouse vegetable industry. In Windset and GGFI's submission, the Commission should have, as it has done on other

[6] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 25, lines 14-29.

[7] Reply Submission of the British Columbia Vegetable Marketing Commission, dated April 14, 2023, paras. 22-23.

[8] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 32, lines 23-45.

occasions, solicited more feedback from industry participants as to market conditions, such that it had a proper evidentiary foundation in which to make its determination.[9]

18. Without that information, the Commission was left with only the bare assertions of MPL BC, an applicant whose parent company is based in Ontario, as to the current state of affairs of the BC greenhouse vegetable industry. And it is no answer that the Board directed that the General Manager of the Commission, Mr. Solymosi, could not participated in the MPL BC application. The Commission had at its disposal other staff members that it could have called upon to step in in the absence of Mr. Solymosi.

19. It should not be that other industry participants who are opposed to the designation of MPL BC were required to muster evidence regarding the current state of BC's greenhouse vegetable industry. The purpose of having a dedicated Commission, rather than *ad hoc* decision makers, is to gather and understand the needs of the industry. As set out in the Commission's Strategic Plan provides, the first goal of the Commission is to "understand the needs of our growers by segment and organize services and processes based on this understanding."[10] The Commission failed to undertake this information gathering prior to reaching its decision and accordingly, it was required to rely, in large part on the untested assertions of MPL BC as to what the BC industry required. Windset and GGFI say that this was a failing in the Commission's procedure.

C. Conclusions Regarding the Commission's Process

20. Because of the Commission's flawed process, the Commission's Decision cannot be allowed to stand. The Board must reject the Commission's recommendation and must come to its own decision with respect to whether MPL BC should be designated as an Agency.

21. In the alternative, Windset and GGFI submit that if this Board is not prepared to make a decision on MPL BC's application at this time because it finds that further evidence is required, the only other course for this Board would be to send the application back to the Commission with directions that it gather additional information and hold its own oral hearing.

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[9] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 29, line 43 to p. 32, line 6; Exh. 3.

[10] Commission Strategic Plan, Exh. 4.

III. Part XIV of the General Orders and its Proper Interpretation

A. The Part XIV Factors Must all be met

22. There was a suggestion on the part of the Commission Chair, Ms. Etsell, who was part of the Commission panel that made the Decision that the factors in Part XIV, s. 2(6) of the General Order are not all required to be met in order for an applicant to be designated as an Agency.[11] However, as pointed out by counsel for the Commission, this is properly a matter of statutory interpretation.[12] It is the submission of Windset and GGFI that, based on the principles of statutory interpretation, the only reasonable interpretation of Part XIV, s. 2(6) of the General Orders is that all of the factors set out under that subsection must be met by an applicant.

23. The purpose of the Consolidated General Order is to "promote, control and regulate in any respect the production, transportation, packing, storage and marketing of Regulated Product grown in British Columbia, including the production, transportation, packing, storage and marketing of Regulated Product for sale within British Columbia and for interprovincial and export trade".[13]

24. Part XIV of the Consolidated General Orders set outs the procedures for the designation of agencies and section 2 provides an onerous application process, involving a review of the application by a five-member panel, presentation by the applicant and industry consultation.

25. Reading "and" in subsection 2(6)(i) of Part XIV as conjunctive is consistent with the context and ordinary meaning of s. 2, the grammatical structure of subsection 2(6), and the purpose of the Consolidated General Order.

26. Both "and" and "or" are coordinating conjunctions, which express the relationship between two nouns, phrases or clauses. "And" is usually considered to be conjunctive as indicating a combination or sequencing of the elements it conjoins. "Or" is usually considered to be disjunctive as indicating a choice between alternatives.[14] In legislative text, however, "and" can be read conjunctively or disjunctively. What matters is that "the particular provision is read in its entire

[11] Draft Transcript, Day 2, Cross-Examination of D. Etsell, p. 15, lines 26-41.

[12] Draft Transcript, Day 2, Cross-Examination of D. Etsell, p. 15, line 43 to p. 16, line 10.

[13] *Consolidated General Orders* (March 9, 2023), s. 1 of Part 1.

[14] Paul Salembier, *Legal and Legislative Drafting*, 2d ed (Toronto: Lexis Nexis Canada Inc., 2018) at 133.

context and in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[15]

27. Subsection 2(6) is a paraphrased provision. Paragraphing is a typological device for arranging legislative text. One of its advantages is to more clearly indicate how different parts of a sentence relate to each other and avoid ambiguity.[16] The conjunction used in the penultimate paragraph of a provision indicates the legal relationship between all paragraphs in the provision.[17]

28. Paragraphed provisions are subject to numerous grammatical rules, including that each paragraph must be congruent with the opening words of the provision. This is another way of interpreting the words within the context and harmoniously with the scheme.

29. The opening words of s. 2(6) states that the "panel will grant designated agency status only where it is satisfied that," and then ten conditions are listed. It is inconsistent with the context of s. 2 and the onerous application process to read the paragraphs as disjunctive, meaning that only 1 of the 10 must be satisfied.

30. It cannot be that the Commission intended to design a high threshold for Agency applicants to meet by setting out ten factors, and then only require them to meet one or two of them, particularly when they all speak to different considerations.

31. Clearly, the only reasonable interpretation of Part XIV, s. 2(6), based on both the language of the General Order and the intent of the scheme, is that all of the factors from (a) to (j) must be met, and sufficient evidence proving each must be tendered by the applicant.

B. The Burden is on the Applicant to prove it meets the Factors

32. It is also important to keep in mind who bears the onus of proving that MPL BC should be designated as an Agency. That burden rests with MPL BC. It is not Windset or GGFI's burden to disprove that it should not. Instead, it is MPL BC's burden to prove, as an applicant in this *de*

[15] *Strata Plan KAS 3549 v 0738039 B.C. Ltd.*, 2016 BCCA 310 at paras. 16-17.

[16] Salembier at 231-233

[17] Salembier at 142.

novo process, that it meets the high threshold set out by the Commission in Part XIV of its General Orders.

33. MPL BC did not file any supplementary evidence to update its May 27, 2021 application. Mr. Mastronardi was asked to provide explanations of statements made in that application, but his evidence was simply a reflection of his thoughts on MPL BC's May 27, 2021 application. MPL BC did not provide any new evidence and there was no additional information filed with this Panel to update or provide the current state of affairs with respect to any of the Part XIV factors.

34. It is Windset and GGFI's position that MPL BC simply did not provide sufficient evidence in support of each of the required Part XIV factors. Details with respect to MPL's lack of evidence on each of those factors is set out below.

IV. Factor A – There is a market requirement for the proposed Agency and the designation of that Agency would benefit the industry as a whole having regard to the interests of all producers, including those marketing through other Agencies

A. There is a Market Requirement for the Proposed Agency

35. The evidence is that there is no market requirement for MPL BC to act as an Agency in British Columbia at this time. This aspect of factor (a) speaks to whether there is some kind of "gap" in the kind of Agency outlets currently available such that producers are unable to get their product to market. There was no evidence tendered that this is, in fact, the case here in BC at this time.

36. The evidence is that there are currently eight agencies operating in BC, and that producers are generating stable returns.[18] There was no evidence provided by MPL BC that there are producers who are unable to get their product to market at a good return.

37. The evidence was that there are in fact 13 marketers in Ontario, and that there had been a trend of consolidation of marketers in that province.[19] In addition, the evidence was that marketers in Ontario represent a larger proportion of production by square meters of production than do Agencies in BC. In fact, marketers in Ontario market 1.2 million square meters per marketer,

[18] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 37 lines 21 to 33.

[19] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 36 line 11-28; Exhibit A, Tabs 13, 15-17.

whereas in BC, it is approximately 350,000 square meters per Agency.[20] This suggests that, if anything, there are too many Agencies in BC.

38. It cannot be that if the trend in Ontario has been consolidation between marketers, and they each represent a larger proportion of production than BC Agencies, that there is, in fact, a market need for an additional Agency to be designated here in BC. This is particularly the case when the evidence is that the number of retailers to which Agencies are marketing has also been consolidating (a consideration that is canvassed in further detail below).

39. MPL BC seemed to suggest that its market reach was that existing BC Agencies do not have the customer relationships on a national level, a warehousing system at a national level, and do not have access to the proprietary varietals of MPL BC.[21] There was also suggestion that the existing BC Agencies do not have the "suite of products" that MPL BC had. However, these statements made by Mr. Mastronardi on behalf of MPL BC are not responsive to the requirement. This requirement speaks to market <u>need</u>, that there is a market <u>requirement</u> for an additional Agency. It is not a requirement of potential market access to a <u>different</u> set of retail customers or a different kind of product offering. MPL BC has simply not provided sufficient evidence to satisfy the requirements of this factor.

B. The Designation would benefit the Industry as a Whole

40. This is the second aspect of Part XIV, s. 2(6)(a) – whether industry as a whole would somehow benefit from the addition of another Agency. There was no actual evidence put forward beyond mere speculation that, in fact, the greenhouse vegetable industry in BC would somehow benefit as a whole if MPL BC were to be designated an Agency as it would both fuel growth and result in higher prices for all produce as "rising tide would benefit everybody else."[22] This was not evidence, but instead, mere conjecture.

41. The evidence was in fact, that the BC greenhouse vegetable industry has experienced a large period of growth in the late 1990s and the early 2000s, and stable organic growth since that

[20] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 32, lines 37-45.

[21] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 60, lines 42-47.

[22] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 79, lines 32-35.

period. The evidence was that, in BC, traditionally growth had been driven by family farms deciding whether to take on the financial risk to expand their farms, not externally from Agencies wanting to lure farms into marketing their own product.[23]

42. In fact, the evidence was that at no time since GGFI had been designated as an Agency had a single producer been refused an application for quota (that is, additional production allocation) by the Commission.[24]

43. The evidence of a stable and growing greenhouse vegetable industry in British Columbia was consistent. This was the evidence of more than one witness, as Mr. Solymosi, on behalf of the Commission answered in response to questions from the Panel that the greenhouse industry in BC is healthy.[25]

44. In fact, the evidence was that instead of benefitting the greenhouse vegetable industry in BC, the addition of MPL BC as an Agency risks harming the industry. The evidence is that the addition of MPL BC as an Agency may cause harm to the industry rather than provide a benefit because it will result in further fracturing of Agency representation.

45. The evidence was that there has been substantial consolidation among retailers such that Agencies are dealing with fewer and fewer retail customers. In fact, Mr. Mastronardi's testimony was that retailers want to deal with less people.[26] This in fact supports the position of Windset and GGFI that BC does not need additional Agencies when the trend has been towards retail consolidation.

46. The evidence of Windset's representative, Mr. Newell, was that where multiple Agencies are providing quotes to retailers, retail buyers will "play one off the other. So it's a race to the bottom often when it comes to pricing."[27] The evidence was that further fracturing the producers

[23] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 33 line 32 to p. 33, line 44 to p. 34, line 2.

[24] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 40, lines 13 to 24.

[25] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 24, lines 4-21; Draft Transcript, Day 2, Direct Examination of S. Newell, p. 39, lines 21-29. .

[26] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 47, lines 3-17.

[27] Draft Transcript, Day 2, Direct Evidence of S. Newell, p. 37, line 35 to p. 38, line 2.

among a greater number of BC Agencies will not result in higher prices for producers, but instead will add more quotes for large retail sellers, who will push down prices, ultimately resulting in less net grower returns.[28]

47. In addition, it is important to consider that MPL BC, through its actions, has already harmed the industry, particularly, the financial returns of producers. The litigation proceedings brought by MPL BC with respect to its Agency application, including one civil claim for misfeasance (referred to by the Board in its Supervisory Review of those allegations as the "**Bad Faith Proceedings**") and two judicial reviews, have already resulted in costs to the industry. The Commission has had to raise the fees and levies it charges producers by 10%, and one of the factors in that raise in charges was to pay for the litigation brought by MPL BC.[29] Clearly, any agreement reached by MPL BC with this Board with respect to the Bad Faith Proceedings did not render the Commission whole.

V. Factor B – It would not be in the interests of the industry for the proposed regulated product to be marketed by an existing Agency

48. The evidence on this point was clear – there was no evidence that existing BC Agencies are unable to market on behalf of producers.

49. Mr. Mastronardi made repeated reference to "proprietary varietals," contracts with "25 national retailers," and "coast to coast" customer reach as support for what he suggested was the obvious conclusion that the BC greenhouse industry would be better served by MPL BC's services. However, the evidence was that:

(a) greenhouse products being marketed by existing Agencies in British Columbia also include exclusive varietals; and

(b) greenhouse products being marketed are also sold to national retailers, although they are typically currently being sold more regionally rather than "coast to coast"

[28] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 62, line 44 to p. 63, line 21.

[29] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 28, line 41 to p. 29, line 20; Exhibit A, Tab 2, p. 59.

> in order to maintain the quality and the best returns for producers due to freight and other associated costs.[30]

50. Having "national scale" or "coast to coast" contracts with retailers are not responsive to the requirements of this factor. The question instead is whether current Agencies in BC are serving the interests of the industry well – there must be some evidence that it would not be in the interests of the industry to have an existing Agency do the job.

51. The evidence is that the existing British Columbia Agencies are going a good job – by several accounts, the industry is "healthy." The fact that existing Agencies may not have "coast to coast" reach with retailers does not mean that the industry is not already well served by existing Agencies.

52. In fact, the evidence was that existing Agencies, including GGFI, are already marketing BC product in a very similar manner to MPL BC: they are using similar packaging, exclusive cultivars that are similar (and in some instances, identical to those used), and servicing national retail customers in Canada and the US, on a regional basis.[31]

53. The fact is that they existing Agencies in BC, such as GGFI, have decided upon a different business strategy than that of MPL BC – to focus on regional markets in order to ensure the best net grower returns for producers. The evidence is that this strategy has served producers well, result in a healthy industry.

54. This Board should also consider that Mr. Mastronardi knowingly provided a misleading view of Mastronardi Produce Limited's sales of certain items versus those of GGFI, in order to portray that he was a more capable marketer and doing something not achievable by a BC Agency.[32] He suggested that the "IRI scan data" was hard evidence of Mastronardi sales versus those of GGFI. On cross-examination, it became evident that despite assertions that IRI data was "factual" and therefore reliable, such data was of limited utility, as it did not include many types

[30] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 105, line 42 to p. 106, line 38; Exh. A, Tabs 34, 35 and 37.

[31] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 42, line 9 to p. 49, line 45.

[32] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 65, line 37 to p. 66, line 44.

of GGFI's sales, such as those of big box stores or unpackaged produce.[33] The takeaway for the Board on this point is that Mr. Mastronardi's testimony throughout this proceeding cannot be said to be reliable.

VI. Factor C – The presence of the proposed Agency will not be disruptive to orderly marketing and will not result in increased competition among Agencies on price, which may have a detrimental effect on producer returns

A. The Presence of the Proposed Agency will not be Disruptive to Orderly Marketing

55. Orderly marketing is essential in a regulated system like BC's greenhouse vegetable marketing scheme. There needs to be enough agency outlets with a sufficient and stable customer base and sufficient packaging formats to ensure net grower returns and allow for expansion of the industry. Collective marketing enhances grower returns by allowing for efficient marketing at the appropriate scale.

56. In addition, orderly marketing in the BC regulated system requires cooperation among all participants in the industry, including cooperation among Agencies. The evidence is that there is a serious risk that MPL BC will be disruptive to orderly marketing because it does not understand this requirement. Instead, it has routinely sued industry participants in this jurisdiction and in others.

B. The Presence of the Proposed Agency will not Result in Increased Competition among Agencies on Price

57. As noted under Factor B, above, the evidence is that the addition of MPL BC may cause harm to the industry rather than benefit because it will result in further fracturing of Agency representation of existing producers in BC. This fracturing of Agency representation risks competition between Agencies for retail customers, which will have the effect of lowering the net returns for producers.

58. There has been substantial consolidation among retailers such that Agencies are dealing with fewer and fewer retail customers, both in the United States, and in Canada. Many of those

[33] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 88, line 6 to p. 89, line 21.

consolidations are either recent, or will be forthcoming in the next year, such as the significant Kroger and Albertson's planned merger for 2024.[34]

59. It is important to consider MPL BC's application in the context of this retail environment, including mergers that have occurred or have been announced since MPL BC's application was filed. The Commission, in including this factor in its list of requirements for designation, has clearly considered that there is an appropriate balance to be struck in the number of designated Agencies such that there are not so many such that the result is competition between them.

60. In the current climate of retail consolidation, it is likely that there are already too many Agencies in British Columbia, and the addition of another one will simply result in greater competition, negotiation by retailers resulting in reduced prices offered, and a concomitant reduction in returns to producers.[35]

VII. Factor D – The proposed Agency has demonstrated an understanding of the regulatory system and has adequately expressed its intention to follow Commission Orders and the enabling legislation and regulations

61. The history of MPL BC's actions in BC, as well as its parent company's past litigious business practice in other jurisdictions should leave this Board with serious concerns as to whether its addition as an Agency will be disruptive to orderly marketing in BC.

62. As this Board is aware, MPL BC commenced the following litigation proceedings in BC with respect to its Agency licence application:

(a) a judicial review proceeding commenced on March 19, 2021 against the Commission and the Board (the "**2021 Judicial Review**");

(b) a civil lawsuit commenced on April 23, 2021 against five Commissioners as well as the General Manager of the Commission, Mr. Solymosi, claiming personal damages against them for misfeasance (the "**Bad Faith Claims**"); and

[34] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 61, line 1 to p. 62, line 21.

[35] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 62, line 44 to p. 63, line 21.

(c) a judicial review proceeding commenced on September 12, 2022, against the Board, the Commission, Mr. Solymosi, and the same five Commissioners named in the civil proceeding. [36]

63. It is fair to say that MPL BC took an aggressive approach to pursuing its Agency designated application, and that this approach included pursuing the Bad Faith Claims against the Commissioners personally. Those claims were investigated by a panel of this Board which struck a Supervisory Review, and that panel found that the Bad Faith Claims were founded on no more than "speculation, rumour and innuendo."[37]

64. While the finding of the panel appointed by the Board was that the Bad Faith Claims were based on "speculation, rumour and innuendo," Mr. Mastronardi was repeatedly asked whether he accepted the Board's findings, and declined to agree that he did. He said he "did not start a lawsuit based on rumour and innuendo" and that he did not have "much trust in some of the Commissioners."[38] In the face of these admissions, and MPL BC's conduct to date which has already resulted in increased costs to producers (increased fees and levies) and the Commission (difficulty obtaining directors and officers' insurance),[39] there clear evidence that MPL BC has no understanding of the regulatory system in BC and no intent to follow its orders. MPL BC's track record to date suggests that it will challenge the Commission and this Board's orders unless they decide in its favour.

65. It is important for this Board to consider the rationale provided by Mr. Mastronardi for the three litigation proceedings he authorized be brought on behalf of MPL BC against the Commission, the Board, Commissioners, and Commission staff in a time span of approximately one and a half years: delay in processing his Agency application.[40] The BC system was too slow for MPL BC's liking.

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[36] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 105, line 42 to p. 106, line 38; Exh. A, Tabs 34, 35 and 37.

[37] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 101, line 42 to p. 106, line 38; Exh. A, Tabs 34, 35 and 37.

[38] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 106, lines 25-27.

[39] Draft Transcript, Day 1, Cross-Examination of A. Solymosi, p. 33, lines 15-24.

[40] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 106, lines 19-27

66. The context of MPL BC's discontent with alleged procedural delays in processing its application must also be put in context. At the time of its application, MPL BC was already working within the BC regulated system selling BC greenhouse product through an existing wholesale licence and its relationship with the BC Agency Country Fresh.[41] The only reasonable conclusion we can draw is that MPL BC was not making much money as a wholesaler as it could have made if it had been granted an Agency designation.

67. As this Board has clearly articulated, Agency designations are privileges, not rights.[42] However, MPL BC's conduct to date with respect to its application has been highly disruptive. It has treated the processes of the Commission and the Board as if they, by necessity, were required to designate it as an Agency within the timeline it dictated. Its rationale for this conduct – because the processes decided upon our administrative agencies here in BC has been too slow. MPL BC was prohibited from making as much money as it could were it an Agency rather than a wholesaler.

68. The best MPL BC could offer was Mr. Mastronardi in reply where he cited his apology letter to the Commission for the litigation MPL BC commenced. We ask that the Board take a hard look at this letter. In particular, we note the following words Mr. Mastronardi testified he took part in drafting personally:

> MPL acknowledges that BCFIRB has made a decision arising out of the first phase of the Supervisory Review and **reached the conclusions it did. At this point, I want our company to move on** and get back to showing BCFIRB what a valuable asset MPL can be for growers and the industry in BC. [Emphasis added]. [43]

69. This is not an acceptance of the BCFIRB phase one supervisory decision nor is there any contrition about commencing baseless and damaging litigation. Rather, it is, as Mr. Mastrondi put it, a "deal" made to once again move on and try to jumpstart the timeline to obtaining an agency licence. In our submission, the Board should not be so quick to find that MPL BC has changed its

[41] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 42, line 40 to p. 43, line 11 and p. 68, lines 15-18.

[42] Exh. 1, Tab 4, *British Columbia Farm Industry Review Board Future of Regulated Marketing, Agency Designation*, January 31, 2017, p. BCVMC-058, para. 83.

[43] Draft Transcript, Day 2, Redirect of P. Mastronardi, p. 5, line 10 to p. 6, line 40, Exh. B.

ways or demeanour. It remains out to get what it wants, at whatever cost to all other industry participants.

70. This Board should not shy away from finding that MPL BC has not met this factor, and the evidence provided in this proceeding supports this Board in finding that it is a complete bar to its participation in the BC regulated industry going forward.

VIII. Factor E- There is evidence-based demand for the specific product(s), grouped by end use customer, that are to be marketed by the proposed Agency, which demand is not already satisfied by existing Agencies

71. The key to this factor is that there is existing, additional demand for the BC regulated product that is somehow not being satisfied.

72. While MPL BC's application and Mr. Mastronardi's testimony was that there was some special demand for Sunset branded products, there was simply no evidentiary foundation that this was the case. There was no evidence that there was a market demand that was not already satisfied by the existing BC products marketed by existing BC Agencies.

73. The evidence was that Windset and other Agencies offer similar products and similar packaging formats. Mr. Newell provided extensive evidence regarding the similarity of the product offering between Windset branded products and Mastronardi's Sunset branded products and the fact that retailers consider them to be "switchable." In fact, the evidence was that for some products, such as Campari tomatoes, both Windset and Mastronardi use the same cultivars.[44]

74. In addition, the evidence was in fact, that existing agencies, including GGFI and Village Farms are already marketing to the US market, although on a regional basis in western Canada and the western US. And the evidence was that Windset, as a grower, pools its own production with that of other producers and markets that production under the Windset brand through GGFI, and gets good returns for that BC product, suggesting that MPL BC's "proprietary varietals" are not as special as MPL BC has suggested.[45]

[44] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 42, line 11 to p. 46, line 45.

[45] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 100, lines 14-29.

75. MPL BC's evidence is that there was a "huge opportunity for growth" with the United States market for Mastronardi brand "proprietary" and "snacking programs" and that BC producers are currently missing out on this opportunity is just simply not borne out on the evidence. It has not met the evidentiary requirements of this factor.

IX. Factor F – There is evidence-based support from multiple licensed Commercial Producers, who are at arms-length from each other, and who intend to market regulated product through the proposed Agency

76. MPL BC bears the onus of convincing this Panel that it has met this requirement. In particular, this Board was clear that it is not enough for an Agency to represent only one producer, and that an Agency will only be designated (or keep its designation) where it represents more than one producer. As stated by this Board:

> VIP [Vancouver Island Produce Ltd.] had every opportunity to establish that its marketing operations supported more than one producer. It has not done so. Even if VIP were able to provide concrete evidence of an actual new entrant application, we not that all new entrants require Commission approval.
>
> The very nature of an agency in the regulated marketing system is that it exists to market real production on behalf of multiple producers – to represent the interests in the marketplace of a group of growers. [46]
>
> [Emphasis added]

77. MPL BC has not met this evidentiary burden – an applicant must provide concrete evidence that it has the support from more than one producer. The only documentary evidence MPL BC has tendered with respect to this factor are the letters from the Cheema family of Fresh4 U Farms and Creekside Hothouse Ltd. (which must be regarded as single entity given its owners were admitted to not be arm's length), and a letter from Millennium Produce, which is for sale. [47]

78. In addition, the only current evidence before the Board on this factor is Mr. Mastronardi's testimony in this proceeding. The Board should be skeptical of the accuracy of the currency of

[46] Exh. 1, Tab 4, *British Columbia Farm Industry Review Board Future of Regulated Marketing, Agency Designation,* January 31, 2017, p. BCVMC-060, paras. 91-92.

[47] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 73, line 21 to p. 74, line 25; Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 114, lines 24-29; Draft Transcript, Day 2, Direct Examination of S. Newell, p. 64, lines 3-36.

these assurances, particularly where Mr. Mastronardi's testimony was at times evasive, convenient and less than completely candid. In short, his evidence lacked credibility and the Board should feel free to find as such.

79. This requirement for producer support is evidence – based. We do not have any update on MPL's application since it was made on May 27, 2021, two years ago. There was nothing preventing MPL BC from tendering two new, up to date letters from two producers.

80. The Board must ask itself why, during this extensive oral hearing which was known to be a *de novo* proceeding by all participants, MPL BC made the conscious decision not to tender two new letters of support from producers who intend to market product through this new Agency. The only reasonable conclusion to draw is that it was not possible for MPL BC to obtain this support. In fact, the evidence is that there is overwhelming opposition to MPL BC's application from both producers and existing Agencies. In fact, the vast majority of the square metres with quota and half of the agencies are opposing MPL BC's application to be designated as an Agency.

81. As previously outlined, the burden is on MPL BC to prove evidence in support of each of the ten factors in Part XIV, s. 2(6). It is not for Windset, GGFI, or any other participant in this proceeding to disprove it. The Board should find that this factor has not been made out as no concrete evidence was provided.

X. Factor G – The primary responsibility for marketing regulated product will rest with the proposed Agency, rather than wholesalers who may market regulated product on behalf of the proposed Agency

82. This factor speaks to whether the marketing will rest with the Agency rather than wholesalers. We do not take a position on this factor of the application, as MPL BC has already been operating as a wholesaler, and the evidence is that it has applied to be designated as an Agency such that it no longer needs to act as a wholesaler.[48]

[48] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 42, line 40 to p. 43, line 11 and p. 68, lines 15-18.

XI. Factor H – The proposed Agency will comply with the Commission's orders, including all applicable minimum pricing orders in relation to sales occurring both within and outside the Province

83. This factor is similar to Factor D. Windset and GGFI have already submitted that there is no credible evidence MPL BC intends to comply with the Commission's orders.

84. In addition to the evidence provided for above under Factor D, there is further evidence that MPL BC in fact, does not intend to be transparent and obey Commission orders. We note that it is a requirement under Part XIV, s. 1(3)(a)(ii) of the Commission's General Orders that an application for designated Agency status must include a detailed business plan addressing:

> (ii) the identities of all shareholders and other Persons with a direct or indirect financial interest in the proposed Agency.

85. On his direct examination, Mr. Mastronardi made extensive reference to the fact that Mastronardi Produce Limited was a family business, and was family run.[49] However, the evidence was clear that these assertions were only partly accurate. On cross-examination, it was put to Mr. Mastronardi that, in fact, in the fall of 2022, after MPL BC had made its agency application, there had been a transfer of shares in Mastronardi Produce Limited to a Singaporean sovereign-wealth fund, Temasek Holdings, and that this shareholding transfer had been scrutinized by the Competition Bureau of Canada. After several evasive answers, Mr. Mastronardi admitted that he had not updated the Commission of this transfer in shares to a foreign sovereign entity, despite this transaction undergoing federal regulatory scrutiny.[50]

86. In addition, it is clear from the evidence that in fact, despite statements that Mastronardi Produce Limited was "family owned but professionally run,"[51] in fact Mastronardi Produce Limited is not family owned. The evidence was that the Mastronardi family does not own a majority of the shares outstanding in Mastronardi Produce Limited, but instead, has a minority interest, and that Temasek Holdings and an individual named Bruce Mitchell have a majority

[49] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 75, line 8 to p. 88, line 5.

[50] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 87, line 8 to p. 88, line 5.

[51] Draft Transcript, Day 1, Direct Examination of P. Mastronardi, p. 76, lines 18-19.

shareholding in Mastronardi Produce Limited, but that Bruce Mitchell "votes with the Mastronardi family."[52]

87. What the Board should take from these statements is that Mr. Mastronardi and MPL BC do not intend to be completely candid and forthright to regulators. The evidence is that they will only disclose information to the Commission or this Board when its suits their best interests, despite such information being relevant and required to the Commission's decision to designate MPL BC as an Agency.

88. In the face of these admissions, which is that the MPL BC's application was not up to date, and Mr. Mastronardi's cavalier responses, which suggested an attitude that such information was not relevant or "no big deal," this Board cannot find that MPL BC intends to comply with the Commission's orders.

XII. Factor I – The proposed Agency will not have a detrimental effect on the delivery allocation and production allocation of existing producers not represented by the proposed Agency

89. The evidence was that MPL BC intends to participate as an Agency in BC by stripping growers from existing Agencies.[53] The suggestion is that existing BC producers will be enticed to move to MPL BC because of its proprietary varietals, customer network and fixed price contract.

90. The difficulty is that with this strategy, existing BC Agencies will have their marketing plans thrown out of balance, and this results in risks to the returns that may be available to the producers that remain with those Agencies.

91. As Mr. Newell explained, retailers like to purchase the "full suite" of products and if one producer leaves the Agency, the Agency may struggle to fulfill the full suite of products for that existing customer, and that results in less returns for the producer.[54] Surely, in including this factor the Commission intended to consider whether there was an unmet need among producers for a

[52] Draft Transcript, Day 2, Cross-Examination of P. Mastronardi, p. 10, line 38 to p. 11, line 39.

[53] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 94, lines 8-21.

[54] Draft Transcript, Day 2, Direct Evidence of S. Newell, p. 67, lines 5-31.

new Agency, rather than having the potential result of risking returns to producers through a game of Agency "musical chairs."

92. The BC regulated system can be contrasted with that in Ontario, where Mr. Mastronardi confirmed that producers can build whatever they want and grow and switch crops when they want without regulatory approval.[55] In BC, the quota for tomatoes, peppers, and cucumbers (and even the specialties within those categories) are specific to the producer to ensure orderly marketing. In addition, in BC, growers cannot switch back and forth between Agencies whenever they like but instead, this requires Commission approval.[56] This regulated system makes it even more important to be careful when considering new Agencies and their potential disruption to the industry and ultimately the potential instability to grower returns.

XIII. Factor J – The proposed Agency has the knowledge, capacity and ability to operate effectively as an Agency

93. It is the submission of Windset and GGFI that an Agency under the BC Vegetable Marketing Commission's scheme requires more than just being a marketer. That position carries with it certain responsibilities. As indicated by Ms. Etsell during her cross-examination, the BC Vegetable Marketing Commission's Strategic Plan includes the important goal that industry participants "work together across the value chain for the industry's success."[57] Industry participants, including Agencies must cooperate and work together.

94. By contrast, when asked, Mr. Mastronardi indicated that his view was that an Agency was simply a marketer.[58] Despite the requirement in the General Orders at Part XIV, s. 3(4)(f) that applicants demonstrate to the satisfaction of the Commission that they have taken "all reasonable steps to meet with, and seek the cooperation of, existing Agencies, and provide particulars of the result of such initiatives," MPL BC's evidence falls short on this requirement. Mr. Mastronardi's evidence was that the only attempt MPL BC made to seek the cooperation of existing Agencies

[55] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p. 98, lines 6-21.

[56] Draft Transcript, Day 2, Direct Evidence of S. Newell, p. 100, lines 36 to p. 101, line 12.

[57] Draft Transcript, Day 2, Cross-Examination of D. Etsell, p. 13, line 45 to p. 14, line 6, Exh. 4.

[58] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p.98, lines 22-25.

was to send a letter setting out MPL's agenda as to how it saw cooperation should function from its point of view.[59]

95. While MPL BC may be a capable marketer, it has not demonstrated an understanding of the role and the responsibilities of Agencies to work cooperative in the regulated environment of the BC scheme. Agencies must work together to get BC product to market and provide value for producers.[60]

96. The evidence is that Windset and GGFI have supported the designation of other Agencies, including Village Farms and Global Greenhouse Produce.[61] The concern of Windset and GGFI to the designation of MPL BC as an Agency does not stem from a fear of competition with MPL BC, as suggested. Instead, the evidence is that their concern with respect to designating MPL BC rests with its reputation in the business of being litigious.

97. The evidence was that not only has MPL BC started its entry into the BC regulated system by commencing proceedings against the Commission, the Board, Commissioners and the Commission General Manager, but the Mastronardi family of companies has also sued other industry participants such as producers and marketers in other jurisdictions. The evidence was that Mastronardi Produce Limited's reputation was not one of cooperation and collaboration.[62] It is for this reason that Windset and GGFI are opposed, for the first time ever, to the designation of a new Agency – because they have a concern that the addition of MPL BC will <u>continue</u> to be disruptive to the greenhouse vegetable industry in BC.

XIV. <u>Conclusion</u>

98. For more than 15 years, the BC greenhouse vegetable industry has enjoyed stability and collaboration among its participants. By all accounts, the industry is healthy.

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[59] Draft Transcript, Day 1, Cross-Examination of P. Mastronardi, p.99, lines 8-42.

[60] Draft Transcript, Day 2, Cross-Examination of S. Newell, p. 50, lines 19-22.

[61] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 60, lines 15-30.

[62] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 55, line 7 to p. 60, line 5.

99. There has been balanced, responsible and stable growth. No growers have been impeded from expanding, and there have been new entrants. That kind of growth has not put at risk the invested capital of family farms.

100. We have grown a BC based industry that is healthy and producing stable and positive returns for BC producers. The regulation of this industry has allowed BC based producers to achieve the scale require to complete in the global industry. MPL BC's application threatens the progress we have made in BC and the stability and viability of our BC producer base.

101. The Commission has set out a number of important factors that must be met before designating a new Agency, and an applicant has to meet all of the factors. It is a high burden, and rightly so. The Commission does not want a period of instability, or put at risk the businesses of producers that they have worked hard to build.

102. For the first time, there has been a large cross-section of growers who have indicated their opposition to an application for Agency designation.[63] These growers collectively represent more than half of the square meters of production area in BC. Other Agencies – in fact half of all Agencies in the province for greenhouse grown vegetables – have also indicated their opposition to this application.

103. This should give the Board significant pause, particularly when it is a requirement for industry participants to collaborate and work together. Suing industry participants undermines the trust and cooperation that has been established in the BC greenhouse vegetable industry.

104. New Agencies need to understand the regulated environment in which they are operating, and MPL BC clearly does not understand that environment.

105. Industry participants across the whole value chain need to work together to get BC product to market, to obtain the best possible net grower returns. The current consolidation of retailers speaks to the fact that it is not the right time to fracture production amongst more Agencies.

[63] Draft Transcript, Day 2, Direct Examination of S. Newell, p. 69, lines 1-9; Exh. 2.

106. We ask that the Board recognize the opposition of producers, including family farms, to MPL BC being designated as an Agency. MPL BC has not met all of the factors required by the Commission. It is therefore Windset and GGFI's respectful submission that this Board determine that is MPL BC should not be designated as an Agency.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of May, 2023

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