

January 17, 2022

Sent Via E-mail

British Columbia Farm Industry Review Board
780 Blanshard Street
Victoria, BC V8W 2H1

Attention: Wanda Gorsuch

Dear Madam :

Re: British Columbia Farm Industry Review Board ("BCFIRB") 2021 Supervisory Review

I am co-counsel with Ms. Basham, Q.C. I write further to Ms. Basham, Q.C.'s letter of January 12, 2022 and Mr. Donkers' January 13, 2022 letter.

We write to provide MPL British Columbia Distributors Inc.'s ("MPL") submissions regarding its application to fully participate in the BC Farm Industry Review Board's ("BCFIRB") upcoming review, and its application for leave to extend the timeline for it to provide its list of proposed witnesses and for leave to call additional witnesses.

MPL's Participation in Review Hearing

As the BCFIRB is aware, Ms. Basham, Q.C. has only recently been retained as new counsel on this matter. Ms. Basham, Q.C. has determined that, in her judgment, it would now be in MPL's best interests to fully participate in the BCFIRB review hearing. The details of how or why Ms. Basham, Q.C. came to this determination are a matter of solicitor client privilege, and it would be inappropriate for the BCFIRB (or hearing counsel) to require her to set out my analysis in that respect.

Nevertheless, we will note certain developments that have occurred since MPL initially declined to participate in the review hearing:

- On December 24, 2021, hearing counsel provided an investigative update. Upon review of the investigative update, it was apparent that: hearing counsel had failed to interview any of the individuals identified by Paul Mastronardi, in his November 23, 2021 interview, as having potentially relevant evidence; and hearing counsel was refusing to seek certain documents identified by MPL as being relevant to the issues raised in this matter.
- On December 24, 2021, hearing counsel also advised that he intended to call Mr. Mastronardi as a witness at the review hearing.

By calling Mr. Mastronardi as a witness in this proceeding, hearing counsel has already required that MPL participate to a degree in the review hearing. Further, by choosing not to interview or call witnesses identified by MPL as potentially having relevant evidence and choosing not to gather documents requested by MPL, hearing counsel has left MPL in the position of either having to request leave to fully participate in these proceedings or watch the proceedings unfold without the benefit of all of the evidence that MPL believes is relevant and important.

The issues raised in this proceeding are serious and their determination is important to all parties. As a result, the parties to this proceeding, including MPL, are entitled to a high level of procedural fairness. As Mr. Mitha Q.C., noted in his September 10, 2021 investigation update, “procedural fairness for all participants is paramount”.

The BCFIRB will be considering and making determinations on issues that directly relate to and impact MPL. If MPL is not permitted to participate in this hearing, it will have no way of presenting evidence or seeking to have evidence put before the BCFIRB that MPL considers relevant but hearing counsel has declined to investigate or obtain. Mr. Mastronardi would also be forced to give evidence before the BCFIRB without the benefit of counsel. The result of this would be to significantly prejudice MPL’s interests and risk the fairness of the review hearing.

In contrast to the significant prejudice to MPL that would arise if it is refused the right to participate in BCFIRB’s review hearing, there is no real prejudice to any other parties by allowing MPL to participate. As noted by Mr. Donkers, MPL was previously given the opportunity to participate in this review hearing. There is also no prejudice to the other parties arising from the timing of MPL’s request. MPL already provided significant document production in this matter in August 2021. Hearing counsel was in receipt of that production for approximately four months before providing production to Prokam and MPL. MPL also made Mr. Mastronardi available for interview in November 2021. During that interview, Mr. Mastronardi advised hearing counsel of several individuals that MPL believes have relevant evidence regarding the issues raised in this proceeding. This occurred prior to hearing counsel conducting witness interviews in December 2021.

It was only on December 24, 2021, that MPL was advised that hearing counsel would be calling Mr. Mastronardi as a witness at the hearing. It was also on December 24, 2021, that MPL was first advised that hearing counsel would not only not be calling any of the potential witnesses that MPL had previously identified, but that it appears that hearing counsel had not even interviewed those witnesses. Further, with respect to Steven Newell, it appears that hearing counsel had requested that Mr. Newell’s brother (who has an interest in these proceedings) question him rather than hearing counsel.

After receiving hearing counsel’s December 24, 2021 investigative update and retaining myself, MPL acted promptly in advising the BCFIRB and hearing counsel, on January 7, 2022, of MPL’s wish to participate in the review hearing.

In MPL’s submission, the present situation is analogous to where new counsel is appointed and seeks an adjournment of a hearing or trial in order to properly prepare. In such cases, the court has held that a denial of a request for an adjournment is a breach of natural justice where the adjournment was needed in order to ensure the parties had a reasonable opportunity in all of the circumstances to present their evidence, make their arguments and answer the opposing case. See *Patricia Hills Landowners*

Society v. Parkland County (SDAB), 2010 ABCA 413 at para 16. Such would be the result here if MPL were refused leave to fully participate in the review hearing.

It is settled law that the interests of justice in ensuring a fair hearing on the merits is the paramount consideration on an adjournment application by new counsel: *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paras. 19-20. Likewise, it should be the paramount consideration of the BCFIRB in deciding whether MPL can participate.

In sum, if the BCFIRB refuses to allow MPL to fully participate in the review hearing, it would be a breach of MPL's right to procedural fairness and result in undue process. It would significantly prejudice MPL by denying it the right to participate in a hearing that directly impacts MPL interests and at which MPL has a significant interest in ensuring that all relevant evidence is before the BCFIRB. In contrast, there is no real prejudice to any other party in allowing MPL to now participate. Accordingly, it would be appropriate and just to grant MPL's request to participate in these proceedings.

Leave to Provide a Witness List and Call Additional Witnesses

In addition to requesting the ability to participate in these proceedings, MPL is seeking:

1. an extension of time to provide its list of proposed witnesses;
2. leave to lead the evidence of Paul Mastronardi; and
3. leave to call Trevor Jones and Ravi Cheema as witnesses and lead their evidence in chief.

At this time, MPL anticipates that the majority of the witnesses it would include on its proposed witness list would be individuals MPL had previously identified to hearing counsel, including those Paul Mastronardi identified when he was interviewed by Mr. Mitha, QC, on November 23, 2021. In particular, in November and early December 2021, MPL identified Steven Newell, Jeff Madu, Dawn Glyckherr and Ravi Cheema as potentially having evidence relevant to the issues raised in this matter. MPL also currently intends to list Trevor Jones on its witness list. Mr. Jones' anticipated evidence is expected to be limited to providing evidence regarding a conversation he had with Mr. Newell in which Mr. Newell allegedly indicated that MPL would not get a licence.

Despite MPL identifying Mr. Newell, Mr. Madu, Ms. Glyckherr and Mr. Cheema as all having potentially relevant evidence, it appears from hearing counsel's December 24, 2021 investigation update, that they have not even interviewed these potential witnesses – let alone indicated that they intend to call any of them. While MPL was not previously a participant in these proceedings, hearing counsel still had an obligation, under Rule 18 of the Rules of Practice and Procedure, to collect all of the evidence counsel determines is relevant, ensure a fair hearing, and represent the public interest throughout the process.

As noted above, the parties to this proceeding are entitled to a high level of procedural fairness. Further, due to the serious nature of the allegations, it is vital that the BCFIRB have before it all relevant evidence in order to ensure a fair hearing on the merits. As hearing counsel has chosen not to even interview witnesses previously identified by MPL, it is imperative that MPL now be permitted to provide a list of witnesses and seek leave to call any witnesses hearing counsel refuses to call. If MPL is denied the opportunity to list and call witnesses, it will be severely prejudiced by not having the BCFIRB hear from

witnesses who MPL believes have important and relevant evidence. This is not only an issue of fairness to MPL, but it is also in the best interests of the public that a fair hearing be conducted.

Further, hearing counsel has already identified that he intends to call Mr. Mastronardi to give evidence at the BCFIRB hearing. Accordingly, with respect to Mr. Mastronardi, MPL is only really seeking leave to be allowed to lead his evidence in chief. As Ms. Basham, Q.C. is counsel for MPL, it is entirely appropriate that she be permitted to lead Mr. Mastronardi's evidence in chief regardless of whether or not MPL is allowed to fully participate in the BCFIRB hearing. It would be astonishing for MPL to be refused the right to have its counsel lead the evidence of its representative in such an important hearing.

Similarly to there being no prejudice in allowing MPL's involvement in these proceedings, there is no real prejudice to any party in allowing MPL to provide its list of witnesses, lead the evidence of Mr. Mastronardi or to call and lead the evidence of Mr. Jones and Mr. Cheema. It is apparent from hearing counsel's December 24, 2021 investigation update that hearing counsel only really started interviewing third party witnesses in early December 2021 – after MPL had already identified the majority of the above noted witnesses – and yet hearing counsel still neglected to interview any of the identified witnesses. Further, it appears that hearing counsel only interviewed a subsection of witnesses identified by Prokam. Accordingly, even if MPL had provided its list of proposed witnesses at the same time as Prokam, it is unlikely that hearing counsel would have interviewed those witnesses prior to this request.

In light of the lack of prejudice to any other party and the significant prejudice to MPL if it not be allowed to call witnesses, it would be in the interests of justice for the BCFIRB to grant MPL's requests.

We look forward to hearing from the BCFIRB regarding MPL's involvement in these proceedings.

Yours truly,

Dentons Canada LLP



Emma Irving
Partner

EI/ht