

June 4, 2021

Sent Via E-mail

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

Attention: Wanda Gorsuch

Re: British Columbia Farm Industry Review Board (“**BCFIRB**”) notice of Supervisory Review

We write on behalf of MPL British Columbia Distributors Inc. (“**MPL**”) in response to the BCFIRB’s notice of supervisory review dated May 26, 2021. The BCFIRB has requested submissions from MPL in respect of two matters:

1. Potential interim orders arising from the declaration of a supervisory review, including the request of the BC Vegetable Marketing Commission’s (the “**Commission**”) counsel for orders to prevent the Commission from considering applications for licences brought by Prokam, CFP, and MPL related bodies until the allegations in the civil claim have been resolved.
2. Scope of the supervisory review, and participation and participatory rights of interested parties.

MPL disagrees with and objects to the Commission’s request to further delay processing of pending agency applications. This order would further undermine the statutorily mandated regulatory purposes of the Commission. It would reinstate the moratorium on agency applications that was previously overturned by the BCFIRB in October 2020. It would also benefit the defendants in the two misfeasance claims by preserving the current market structure and status quo to the advantage of their affiliated marketing agencies, by keeping qualified applicants, such as MPL, out of the market. Such a decision would be detrimental to the public.

With respect to the second issue, MPL is encouraged that the BCFIRB is taking steps to investigate and address its serious concerns. However, as the specifics of MPL’s misfeasance claims overlap with BCFIRB’s proposed supervisory review mandate, the supervisory review panel must ensure that it carries out its mandate in a way that does not prejudice parties to the ongoing court actions. Failure to consider this could undermine the BCFIRB’s mandate to be an impartial arbiter of the issues, and also prejudice the parties in the action. The process of any supervisory review must be crafted carefully such that the interests and rights of the parties to the extant litigation are appropriately protected. To this end, the supervisory review panel should hold a preliminary telephone conference to canvass the parties’ views on these issues and determine how these concerns can be accommodated.

MPL's position on both points is outlined in greater detail below.

Interim Orders Requested by BC Vegetable Marketing Commission

The Commission, through its counsel, requested the following orders in its May 12, 2021 letter to the BCFIRB:

1. That the BCFIRB direct the Commission to defer any decisions in relation to existing or future applications made by or in relation to Prokam, CFP Marketing Corporation, or their affiliates and related companies, until such time as there is a final disposition of the allegations made against Mr. Solymosi in the Prokam claim; and
2. That the BCFIRB defer any decisions in relation to existing or future applications made by or in relation to MPL, or its affiliates and related companies, until such time as there is a final disposition of the allegations made against the names defendants in the MPL claim.

The Commission's request for these orders is a wholly inappropriate attempt to reinstate the previously overturned moratorium, and preserve the present market position of current agencies. It would impose a regulatory penalty on MPL for raising its allegations of misconduct and seeking redress in court by effectively prohibiting it from participating in the industry until its misfeasance claim is completed. There is no basis in law for such an order and the Commission cites no cases to support its submission that the requested orders are appropriate or necessary.

The Commission's Amending Order #54 requires that its agency review panel determine whether granting MPL's application for a 2022 licence meets the requirements set out therein, and in particular whether it would be in the interests of the industry as a whole to permit the application. Mr. Guichon is no longer a Commissioner and is no longer a member of the panel that will consider MPL's 2022 agency application. The current Commissioners appointed to MPL's agency review panel are Armand Vander Meulen, Brent Royal, Hugh Reynolds, and Debbie Etsell (Chair). None of the Commission's current panellists are defendants in the misfeasance claim. There is thus no rational basis to conclude that the Commission cannot fulfil its mandated regulatory function and process MPL's application as it is required to do under its General Orders. In all the circumstances, it should do so expeditiously.

The Commission was directed by the BCFIRB in October 2020 to lift the agency review moratorium and proceed with a review of the pending agency applications expeditiously. This decision to lift the moratorium was grounded in part on the fact that it was initially put into place in June 2019. This meant that the regulatory work of the Commission in reviewing and processing agency applications had been paused for nearly one and a half years by the time BCFIRB issued its direction to overturn the moratorium. In making the decision to overturn the moratorium, the BCFIRB referenced the necessity of not indefinitely pausing the regulatory work of the Commission and the negative impact that an indefinite delay would have on sound marketing and regulation of the BC vegetable industry. The moratorium decision stated, in particular, that both the BCFIRB's supervisory review panel and the Commission's working group "agreed... that lifting the moratorium is critical as it is not sound marketing policy to put business on hold indefinitely".

Despite conceding this point to the BCFIRB in the previous supervisory review, the Commission seeks to, again, put the review of applications on hold indefinitely. Further, it seeks to do so because of the alleged misconduct of some of its members, which was directed at preventing the review and granting of designated marketing agency applications. In MPL's submission, the Commission's concession to the BCFIRB in the previous supervisory review process remains true. It is not sound marketing policy to put business on hold indefinitely, which is what the new interim orders sought by the Commission would, again, do. It would be a bizarre interim solution to allegations that some members of the Commission acted improperly that the Commission discontinue its work. A better, at least interim, solution is that the BCFIRB take steps to ensure that the Commission fulfils its mandate.

MPL alleges in its misfeasance claim that members of the Commission have engaged in a concerted effort to block the review and granting of its agency licence. The determination of this issue is currently before the courts, however, granting of the requested interim order would permit the misfeasance defendants to benefit from their alleged misconduct by further delaying resolution of the pending agency applications – the very conduct that is at the heart of MPL's misfeasance action. The requested orders are thus not, in MPL's submission, in the interest of sound marketing of the regulated BC vegetable industry, and would allow the misfeasance defendants to gain a benefit from raising allegations of their wrongful conduct.

The Commission's position amounts to an attempt to abdicate its statutorily mandated responsibility to regulate the BC vegetable industry and to be excused from its duties as a first instance regulator while the misfeasance claims of MPL are extant. There is no basis in law for such a position, and granting such an order would set a dangerous and untenable precedent. As outlined by Prokam in its submissions, regulatory bodies are regularly called on to continue their work in respect of parties that have sued them, and must do so. It would be untenable and dangerous if a police agency, health authority, tax collector or other government agency could refuse to fulfil their mandates because of a pending lawsuit.

In addition, granting such an order would be contrary to public policy in that it would create a broad and perverse disincentive to the reporting of wrongful conduct of regulatory agencies under the purview of the BCFIRB. Further delaying review of pending applications would be punitive to MPL, and grant a benefit to the misfeasance defendants, creating an incentive to not report allegations of wrongful conduct. If such an order is granted, it will indicate to the industry that raising allegations of wrongful conduct has negative consequences to those raising the allegations. This would have a chilling effect on whistleblowing and on bringing issues to the attention of BCFIRB or to the attentions of the courts in misfeasance or other actions. More broadly, it would create a roadblock to pursuing compensation for wrongful conduct in courts of law by imposing a regulatory punishment on the party raising the allegations.

MPL's 2022 agency application outlines the many ways in which granting its application for an agency designation will benefit the BC regulated vegetable industry. MPL would like to begin growing the regulated vegetable sector and pursuing the markets and opportunities outlined in its agency application. MPL has invested significant time and energy into preparing its 2022 agency application and is entitled to have it adjudicated in accordance with the requirements of the General Order. It is not in the interest of the BC vegetable sector to delay making this decision indefinitely while the courts adjudicate its misfeasance claims. Permitting further delay is not permissible at law. The Commission is required to exercise its regulatory functions and must continue these vital and necessary functions. Doing so is in the best interests of the BC vegetable industry.

Scope of Supervisory Review, Terms of Reference and Participants' Rights

The BCFIRB advises in its letter that the following points inform the initial terms of reference for the supervisory review:

1. The Commission's exercise of powers to direct producers to agencies and the issuance of new agency licenses in a manner that is designed to further the self-interest of members of the Commission, including:
 - a. Self-interested prevention of new agencies from entering the British Columbia agency market to further the Commission members' economic interests, by both failing to adjudicate agency licence applications, and preventing the granting of additional production allocation to growers thought to be aligned with applicants;
 - b. Collusion by members to "vote swap" on agency applications and thus circumvent the conflict of interest policy;
 - c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest;
2. Prosecuting enforcement proceedings in bad faith and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

MPL is encouraged that the BCFIRB is taking steps to investigate and address its serious concerns. However, given the BCFIRB's proposed supervisory review mandate, the supervisory review panel must be careful to ensure that it carries out the supervisory review process in a way that does not interfere with or impinge on the role of the superior courts in the misfeasance claim and does not prejudice parties to the ongoing court actions.

MPL must continue with its misfeasance claim despite the BCFIRB's declaration of a supervisory review. BCFIRB is not the proper or appropriate forum in which to adjudicate MPL's misfeasance claim, for a variety of reasons. MPL cannot seek redress in the BCFIRB for damages from losses resulting from the wrongful conduct alleged in its misfeasance claim as the BCFIRB lacks jurisdiction to award such damages.

The fact that the supervisory review will occur while there is an ongoing court process that deals with the same factual issue, creates a number of issues that must be addressed by the BCFIRB. Proceeding with the supervisory review process concurrently or in advance of the court proceeding creates real risk to the parties involved given the seriousness of the alleged conduct. The procedural rights which are inherent in a court proceeding are not present, including discovery rights, and protections with respect to questions that the parties may be compelled to answer. The absence of these procedural rights increases the risk that the parties to the misfeasance action may be prejudiced by the BCFIRB's supervisory review.

Permitting the allegations to be tested first by the BCFIRB could prejudice any outcomes at trial and prejudice the parties to that process. Any appeal rights from the BCFIRB's findings in the supervisory review would be reviewed on the standard of patent unreasonableness, a higher burden than on appeal

from a BC Supreme Court decision. This would make an appeal by either party from prejudicial findings of the BCFIRB more difficult to pursue.

While MPL recognizes the BCFIRB's supervisory authority to investigate the Commission and Commissioners, and welcomes its efforts in this respect, its authority cannot be exercised in a manner that interferes with the judicial function of the courts and rights of the parties in ongoing litigation. To this end, the supervisory review panel should hold a preliminary telephone conference to canvass the parties' views on these issues and determine how these concerns can be accommodated.

Yours truly,

Dentons Canada LLP



Morgan Camley
Partner

cc Robert P. Hrabinsky and Claire E. Hunter, QC