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VIA ELECTRONIC MAIL

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

Attention: Wanda Gorsuch, Manager, Issues and Planning

Dear Sirs/Mesdames:

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

We write to provide MPL British Columbia Distributors Inc.'s ("**MPL**") response to Hearing Counsel's submissions, dated July 27, 2022, and Chair Donkers' July 28, 2022 request for submissions from the Complainant participants regarding proposed steps to be taken in the BC Farm Industry Review Board ("**BCFIRB**") Allegations of Bad Faith and Unlawful Activity Review (the "**Supervisory Review**").

MPL opposes Hearing Counsel's proposal that BCFIRB investigate and make findings in this Supervisory Review related to allegations that MPL filed its Notice of Civil Claim and made the within allegations in bad faith or for an improper purpose. It is MPL's position that taking such actions would be an impermissible re-opening of the Supervisory Review; beyond the scope of the Terms of Reference for the Supervisory Review (the "**TOR**") and BCFIRB's authority; and a violation of MPL's reasonable expectations and right to procedural fairness.

<u>The Panel's Proposed Actions are Beyond the Scope of the TOR</u>

The Panel has previously stated on numerous occasions that this Supervisory Review is governed by the scope of the TOR. The TOR were issued by BCFIRB on June 18, 2021, and provide that:

> **Scope of Focus**
>
> BCFIRB's supervisory review is directed by two objectives:
>
> - ensuring effective self-governance of the Commission in the interests of sound marketing policy and the broader public interest; and
> - ensuring public confidence in that fairness and integrity of the administration of the BC regulated vegetable sector.

The Supervisory Review will consider the following allegations, which form the 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-interest prevention of new agencies from entering the British Columbia 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
    c. Self-interested direction of producers to agencies in which the Commission members have a financial or personal interest.
2. Commission members and staff exercising or failing to exercise statutory duties in bad faith, for improper purposes, and without procedural fairness due to a personal animosity toward at least one producer, specifically Prokam.

BCFIRB's final decision in the Supervisory Review, dated July 14 2022 (the "**BCFIRB Decision**"), similarly expressly sets out the purpose of the Supervisory Review as:

> …the overarching objectives of this Supervisory Review are twofold: ensuring effective self-governance of the Commission in the interest of sound marketing policy and the broader public interest; and ensuring public confidence in the integrity of the regulation of the BC regulated vegetable sector.[1]

Under the TOR, BCFIRB's purpose and role in the Supervisory Review was to consider whether there was a basis for the concerns raised in MPL's Notice of Civil Claim and not MPL's motivations and now alleged bad faith in filing its claim.

Nowhere in the TOR is there any reference to the motivations or alleged bad faith of MPL being in issue.

The scope of the Supervisory Review is constrained by its TOR. There is no basis for the Panel to stray beyond the scope of the TOR and consider new issues – particularly not an issue as serious as an allegation of bad faith on the part of a party.

The Panel is *functus officio* and does not have the Authority to Determine the Proposed Issues

Further, the Panel has already determined and made a final decision on the issues that were the subject of this Supervisory Role. The Panel made it clear in the BCFIRB Decision that the Panel

[1] BCFIRB Decision at para. 267.

considered it to be a final decision. It is noteworthy that, in the BCFIRB Decision, the Panel expressly advised the Complainants of the deadline by which they would need to bring a juridical review application, stating:

> In accordance with s. 57 of the *Administrative Tribunals Act,* "an application for judicial review of a final decision of (BCFIRB) must be commenced within 60 days of the date the decision is issued."[2]
>
> [emphasis added]

By rendering a final decision on the issues before it, the Panel has discharged its authority and is now *functus officio.* It no longer has the jurisdiction to continue this Supervisory Review by investigating and considering new issues, and any attempts to do so would result in an impermissible re-opening of the case.

As the Supreme Court of Canada stated, in *Chandler v Assn of Architects (Alberta)* "as a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited".[3]

Having rendered its final decision on the issues before it, it is not now open to the Panel to consider additional issues that were not raised in the TOR and with respect to which the parties against whom the allegations have been made were not given an opportunity to defend against from the start of the proceedings.

Further, and in any event, the issue of MPL's motivations and the allegation that it acted in bad faith are not for BCFIRB to decide and are beyond its authority and jurisdiction. If these issues are to be determined, they are for the court to determine them in the context of MPL's civil claim.

At all times, MPL was entitled to bring its concerns to the court for determination. If BCFIRB were to now try to make a ruling on MPL's motivation and good faith basis for bringing that claim, it would amount to an impermissible infringement on MPL's right to access the courts and an attempt to usurp the court's power and function.

Continuing the Supervisory Review would be a Violation of MPL's Reasonable Expectations and Right to Procedural Fairness

Moreover, even if BCFIRB had the power and authority to determine issues regarding MPL's motivations and good faith, doing so at this stage in the proceedings would be a breach of MPL's reasonable expectations and right to procedural fairness.

From the start, BCFIRB advised the parties that the scope of the review would be governed by the TOR, which expressly provide that the focus of the Supervisory Review was to investigate the allegations made against the Commissioners and Mr. Solymosi and ensuring public confidence in

[2] BCFIRB Decision at para. 271.

[3] *Chandler v Assn of Architects (Alberta),* [1989] 2 SCR 848.

the integrity of the regulation of the BC regulated vegetable sector. At no point prior to the commencement of the hearings in the Supervisory Review did BCFIRB advise MPL that the Panel may also consider issues related to MPL's motivations and good faith basis for bringing its civil action.

At various times throughout the proceedings, the Panel referred to the scope of the TOR as a basis for denying MPL's procedural applications. For example, the scope of the TOR was used as one of the bases to justify imposing time limits on MPL and Prokam's cross examinations of the Commissioners and Mr. Solymosi, when no time limits had been imposed on the cross examinations of MPL and Prokam's principals.[4] Again, in the Panel's April 29, 2022 ruling denying MPL's request that Dawn Glyckherr be called as a witness, Chair Donkers stated, in reference to one of the areas MPL sought to question Ms. Glyckherr on, "[t]hat issue has no relevance to the terms of reference for this supervisory review".[5] Similarly, in the same decision, in the context of denying MPL's application to have Mr. Solymosi recalled to answer questions related to documents produced after he had testified, Chair Donkers stated that "[w]hile MPL now appears to be potentially advancing a theory of wrongdoing dating back to 2017 and in initial inquiry from MPL, that theory is at the margins of, if not outside, the terms of reference."[6]

Chair Donkers had even noted, in his prior, February 3, 2022, ruling on MPL's application to have Ms. Glyckherr called as a witness that:

> Again, and perhaps most importantly, I do not see any unfairness arising to either Prokam or MPL. There is no "case" against the complainant participants, and thus they are not being deprived of the knowledge necessary to meet that case.[7]

At all material times, it was reasonable for MPL to expect that this Supervisory Review would be conducted within the scope of the TOR and that the Panel would not seek to determine issues not set out in the TOR. Particularly in circumstances where the scope of the TOR was consistently being used to either curtail or limit MPL's procedural rights or requests for further evidence be called.

In the circumstances, it would be procedurally unfair and contrary to MPL's reasonable expectations for the Panel to now seek to "investigate" and make a determination on serious issues affecting MPL that were not contemplated in the TOR.

MPL would Suffer Irreparable Prejudice

Moreover, while it is MPL's position that BCFIRB does not have the jurisdiction to inquire into MPL's good faith in filing its Notice of Civil Claim, MPL would, in any event, be irreparably prejudiced if BCFIRB were to proceed with Hearing Counsel's proposal or otherwise attempt to reopen the Supervisory Review. The prejudice that would arise to MPL by having the Panel

[4] Chair Donkers Ruling, dated March 18, 2022.

[5] Chair Donkers Ruling, dated April 29, 2022, at page 3.

[6] Chair Donkers Ruling, dated April 29, 2022, at page 5.

[7] Chair Donkers Ruling, dated February 3, 2022, at page 4.

consider, at this late juncture in the proceeding, issues related to MPL's motivations and alleged bad faith cannot be cured through any procedural steps. Throughout the Supervisory Review, the parties have made reference to the serious nature of the bad faith allegations made against the Commissioners and Mr. Solymosi. Likewise, allegations that MPL acted for an improper purpose and in bad faith are serious.

The hearing of the Supervisory Review has taken weeks and involved the examination of numerous witnesses. If MPL had known from the start of the proceedings that its motivations and good faith were in issue, MPL would have conducted the proceedings differently, including by examining witnesses on different issues and seeking to have additional witnesses called. MPL also lost several procedural applications on the basis of the scope of TOR.

The scope of the TOR, and the restrictions placed on MPL on the basis of that scope, permeated throughout the Supervisory Review. For the Panel to now, at this late stage, consider and purport to make findings on issues related to MPL's good faith (issues which as Hearing Counsel acknowledged were "never put squarely in issue in this Supervisory Review") would be fundamentally unfair and prejudicial to MPL.

While it is MPL's position that, at this stage, there is no procedure by which the prejudice to MPL could be sufficiently remedied, the limited and curtailed procedure proposed by Hearing Counsel is clearly insufficient to allow MPL to properly defend itself against allegations of bad faith. It only serves to highlight the unfairness to MPL in attempting to investigate these new issues after the conclusion of the Supervisory Review. Hearing Counsel's proposal would simply have Mr. Mastronardi participate in another interview with Hearing Counsel similar to the interviews Hearing Counsel conducted of all participants prior to the calling of evidence, but more limited in scope. Hearing Counsel would then report *his* findings to the Panel for consideration. The scope of the investigative powers employed to consider allegations of bad faith against the Commissioners and Mr. Solymosi compared to the proposal being suggested by Hearing Counsel to "investigate" allegations of bad faith on the part of MPL is striking.

Hearing Counsel's proposal will significantly prejudice MPL and is an example of the issues that can arise when a decision maker re-opens a concluded matter to consider additional issues not previously raised. There is no basis for MPL not to be given the same opportunity to defend itself against allegations of bad faith as the other participants to this matter were given, and it would be fundamentally unfair to curtail MPL's rights in the manner proposed.

In sum, it is MPL's position that the Panel has completed and discharged its authority in this Supervisory Review and is now *functus officio*, and that taking steps to consider and make a determination on issues not previously before the Panel would amount to an impermissible re-opening of the Supervisory Review. Such actions would further be beyond the scope of the TOR and BCFIRB's authority, and would be a significant violation of MPL's reasonable expectations and right to procedural fairness.

If, notwithstanding the above, BCFIRB chooses to take further steps, in this Supervisory Review, to purportedly investigate and make a determination on new issues related to MPL's motivations

and alleged bad faith in bringing its civil claim, MPL will not voluntarily consent to participate further in these proceedings.

Yours truly,

BASHAM LAW

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