



November 22, 2019

File: 44200-20 MMB

**DELIVERED BY E-MAIL**

Benjamin Janzen  
Chair  
BC Milk Marketing Board

Dear Chair Janzen:

**BC MILK MARKETING BOARD AND PROPOSED PROCESSING PLANT**

On behalf of the BC Farm Industry Review Board (BCFIRB), I would like to thank you and the BC Milk Marketing Board (MMB) for updating us on November 13, 2019 about the progress that you have made on the two major projects under development with the Western Milk Pool, including the creation of a new milk concentrate processing plant outside of British Columbia.

We now have a greater appreciation for some of the challenges currently confronting dairy producers in British Columbia, particularly with processing capacity and transportation costs. These initiatives, if fully implemented, could provide BC's producers with greater access to processing and markets. Similar to the MMB, BCFIRB works to ensure that the three pillars of supply management and BC's regulated agri-food sectors are working effectively for all stakeholders while, at the same time, meeting the public interest. As outlined in your presentation, reducing costs for producers can help achieve a sustainable domestic dairy industry.

While we are encouraged by the information presented and the apparent support that the MMB has received during your meetings with BC producers, BCFIRB would like to remind you of BCFIRB's July 18, 2019 letter (attached) which identified a range of legal and regulatory issues that must be thoroughly examined and addressed before you undertake any additional commitments to these projects. These include, but are not limited to:

- Ensuring legislative and/or regulatory authority exists for the MMB to become involved in, or participate in, the proposed corporate governance structure and/or ownership of a new milk concentrate processing plant, particularly if located outside of BC. The current proposal seems to suggest MMB ownership and governance through a federally registered and regulated non-profit agency. Similar questions around legal authorities will likely arise regardless of whether the plant is located within or outside of BC, but the questions would become more numerous and complex should the plant be established outside of BC.

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**British Columbia  
Farm Industry Review Board**

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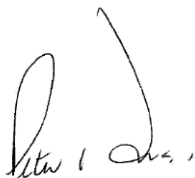
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- Description of the accountability and reporting mechanism that would be in place with respect to MMB's regulatory role and any involvement in a corporate and/or federally regulated not for profit agency consistent with its legal and other obligations to registered producers, BCFIRB, and the provincial government under the *Natural Products Marketing Act* (NPMA).
- Examination of delegated federal authorities to determine if any constitutional issues arise from the division of federal and provincial powers, or whether currently delegated federal authorities in the supply managed milk sector contemplate this type of arrangement.
- Use of levies collected under the NPMA, or any federally delegated authority, to capitalize and fund the construction and operation of the contemplated business, and specifically a federally-regulated not-for-profit agency (including use of surplus levy funds derived from reduced transport costs).
- Potential implications or allegations of conflict of interest for the MMB, particularly its producer members, depending on levels of financial involvement by the MMB, roles of the MMB members in the plant's corporate and/or governance structure and financial or other implications to BC processors.
- Aside from questions related to legal authority, there may be trade implications to this model which may need to be explored.

BCFIRB believes it is critical that the Ministry of Agriculture be consulted as soon as possible by the MMB to identify any legislative and/or regulatory gaps that may exist and any possible federal or provincial statutory amendments or orders that may be necessary to enable the MMB to lawfully engage in an enterprise such as you are currently contemplating are developed and brought into force, either federally or provincially.

We raise the issues with you to ensure that, in our capacity as the supervisory body to the MMB, we have identified potential areas of legal and sound marketing policy concern in a timely manner. As discussed at our briefing on November 13, we are encouraged by the vision and we invite the MMB to continue an open and collaborative dialogue with us.

Yours truly,



Peter Donkers  
Chair

cc: Wes Shoemaker, Deputy Minister,  
Ministry of Agriculture

James Mack, Assistant Deputy Minister,  
Agriculture, Science and Policy Division  
Ministry of Agriculture



July 18, 2019

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**DELIVERED BY E-MAIL**

Rob Delage  
General Manager  
BC Milk Marketing Board

Dear Mr. Delage,

**BC MILK MARKETING BOARD AND PROPOSED PROCESSING PLANT**

I write in follow-up to our meeting on June 13, 2019 with Peter Donkers, BC Farm Industry Review Board Chair, and Ben Janzen, BC Milk Marketing Board Chair.

At this meeting the BC Farm Industry Review Board (BCFIRB) was asked for its perspective about the BC Milk Marketing Board's (Milk Board) potential involvement in a proposed dairy processing plant built in Alberta to produce milk ingredients, thus helping to manage the current excess of skim milk product. The proposed plant would be established and held in some form, yet to be determined, by the four western milk boards (BC Milk Board, Alberta Milk, SaskMilk, Dairy Farmers of Manitoba).

The following sets out some of the initial legal and sound marketing policy issues that would need to be addressed before the Milk Board could consider entering such a business arrangement. This is not an exhaustive list, and it will need to be revisited once further information is made available to BCFIRB as to the precise role the Milk Board, its members, and BC producers would have with the proposed processing plant.

BCFIRB notes that the legal and policy issues for the other western milk boards will likely vary significantly given the differences in provincial legislation and regulatory structures.

***Purpose and Authorities of the BC Milk Marketing Board***

The Milk Board is established under the *Natural Products (BC) Marketing Act* and the British Columbia Milk Marketing Board Regulation. It is responsible for ensuring orderly marketing of regulated product<sup>1</sup> in BC. As a first instance regulator, it is granted powers to promote, regulate

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<sup>1</sup> Milk, fluid milk, or a manufactured milk product

and control in any and all respects the production, transportation, packing, storage and marketing, or any of them, of a regulated product within BC.

### **Levies**

Under section 11(1)(o) of the *NPMA*, the Milk Board has the authority to set and collect levies, and to use those levies to carry out the purposes of the Milk Marketing Board Regulation.

BCFIRB observes that this is not the first time a commodity board has considered potentially using levies collected under *NPMA* authority to capitalize and fund the operation of a business. However, we would note here that there is the additional concern related to whether the legal authority exists for producer levies to be used to support an out-of province business.

In 2014 BCFIRB reviewed a joint supervisory submission from BC's poultry boards recommending that poultry boards use their assumed authorities under the *NPMA* to collect levies for the purposes of capitalizing and operating a captive insurance company. In its April 14, 2014 decision<sup>2</sup>, BCFIRB determined that:

...the boards using their authority to support formation and operation of a captive insurance company is, in our view, clearly not contemplated by the *NPMA*.

BCFIRB went on to say that:

In BCFIRB's view, legal challenge of the poultry boards using their authority under the *NPMA* to support establishment and operation of an association-owned captive insurance company is likely. Such a challenge, which may come from a single commodity producer, regional interest or stakeholder, could potentially impact the entire poultry industry's ability to deliver and administer an effective approach to risk management.

While different to the situation here, similar legal risks and issues could apply should the Milk Board consider use of levies collected under the *NPMA* for the purposes of investing in the establishment and/or operation of the proposed out-of-province processing plant. This assessment cannot be properly made until further details are known about the proposal.

In addition, whether there is in fact legal authority to support such a proposal needs to be determined.

### **Conflict of Interest**

Without knowing the role that the Milk Board, its members, and potentially BC producers and/or processors would play in the establishment and operation of the proposed plant, it is difficult to set out the full suite of potential conflict of interest considerations at this time.

The potential for conflicts of interest arise out of the different responsibilities between the Milk Board and its members as opposed to a private business and its owner, board of directors or shareholders. As regulatory decision-makers, Board directors have a duty to be fair to, and balance the interests of the dairy supply chain in accordance with their statutory authority under the BC Milk Marketing Board Regulation and the *NPMA*. While members are not expected to

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<sup>2</sup> 2014 August 14. BCFIRB. [Supervisory Decision – Sound Marketing Policy and Board Authority – Mandatory Poultry Disease Insurance](#).

check their backgrounds or their interests at the door, they have a duty to be independent, unbiased and fair in their decision making.

On the other hand, a private business has no duty to be impartial and no regulatory responsibilities for which it is accountable to BCFIRB and, ultimately, the public. Company directors have a fiduciary duty to act in the best interest of their organization, as such their duty may conflict with the broader legislative role of a Milk Board director. This situation may in fact create irreconcilable conflicts.

### ***Additional Considerations***

BCFIRB questions if the establishment and operation of a processing plant to produce ingredients through the use of provincial legislative authorities will risk drawing a trade challenge. Particularly given the original international questions raised with the establishment of Class 7, and now the removal of Class 7 under the Canada United States Mexico Agreement (CUSMA).

### ***Closing***

The legal and policy implications of a provincial regulatory body investing in a private business have the potential to be complex and significant. These issues will need thorough examination and assessment once further details are known.

Given the Milk Board's legislated role and responsibilities, the following initial legal and policy questions arise when considering involvement in the proposed plant:

- What are the legal and other implications of the Milk Board using levies collected under the authority of the *NPMA* to capitalize and fund the operation of a for-profit business?
- Does the *NPMA* and the BC Milk Marketing Board Regulation authorize the use of levies to support an out-of-province business enterprise?
- How would the Milk Board's involvement with the proposed processing plant satisfy the purposes of s. 2(1) of *NPMA*?

The purpose and intent of this Act is to provide for the promotion, control and regulation of the production, transportation, packing, storage and marketing of natural products in British Columbia, including prohibition of all or part of that production, transportation, packing, storage and marketing.

- How would the Milk Board's involvement in the proposed processing plant help to ensure the orderly marketing of regulated product in BC?
- Why it would be sound marketing policy for the Milk Board, as a first instance regulator in BC, to be involved in an Alberta-based processing plant, as opposed to a dairy producer or processing organization or business?
- Potential implications or allegations of conflict of interest for the Milk Board and its members, depending on levels of financial involvement by the Milk Board (use of *NPMA* levies), roles of Milk Board members in the plant's corporate and/or governance structure and financial or other implications to BC processors.

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Once further details are available on how the Milk Board proposes to be involved with the plant, I suggest we discuss an appropriate process for the Milk Board and BCFIRB to fully review and consider the necessary legal and sound marketing policy areas.

Regards,



Kirsten Pedersen,  
Executive Director

cc. P. Donkers, Chair, BCFIRB  
B. Janzen, Chair, BC Milk Marketing Board