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## BC Farm Industry Review Board

May 1, 2024

### DELIVERED BY EMAIL

Janice Comeau, Chair  
BC Milk Marketing Board  
32160 South Fraser Way, Unit 200  
Abbotsford, BC V2T 1W5

Dear Janice Comeau:

### RE: BC MILK MARKETING BOARD WESTERN MILK POOL TRANSFORMATION INITIATIVE

We write further to the documents provided to the BC Farm Industry Review Board (“**BCFIRB**”) regarding the Western Milk Pool Transformation Initiative (“**Transformation Initiative**”).

Specifically, further to meetings between the BC Milk Marketing Board (“**BCMMB**”), BCFIRB, and the Ministry of Agriculture and Food regarding the Transformation Initiative, in October of 2023 the BCMMB provided a draft of the proposed Western Milk Pool Agreement (the “**2023 WMP Agreement**”) with one Memorandum of Understanding, which the BCMMB advised was designed to implement the Transformation Initiative. On December 1, 2023, the BCMMB provided three Memoranda of Understanding (“**MOUs**”), which were said to replace the one previous Memorandum of Understanding.

Our initial review of the documents has given rise to a number of concerns and questions, which we outline below.

First, we have determined that the BCMMB must not enter into the proposed Memorandum of Understanding with the BC Dairy Association (“**BCDA**”), as the proposed integration and sharing of resources under that MOU are not consistent with the legislative scheme. We also require the BCMMB to confirm what steps have been taken to date to integrate or share resources with the BCDA so that further directions can be issued if required.

Second, given the lack of detail in respect of the other documents provided to us regarding the Transformation Initiative, we have set out a number of questions in **Appendix A**, the responses to which will allow us to undertake a proper analysis of legalities of the Transformation Initiative.

We wish to clarify that the questions we have posed are directed at understanding the proposed legal framework for the Transformation Initiative. Once we are in a position to understand the details of that framework, we will be able to go on to determine whether the Transformation Initiative is consistent with orderly marketing and sound marketing policy in British Columbia.

We ask that a response to this letter be provided by May 28, 2024.

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**Web:**

Email: [firb@gov.bc.ca](mailto:firb@gov.bc.ca)

Website: [www.gov.bc.ca/BCFarmIndustryReviewBoard](http://www.gov.bc.ca/BCFarmIndustryReviewBoard)

**Phone:**

Info: 250 356-8945

Fax: 250 356-5131

**Mail:**

PO Box 9129 Stn Prov Govt  
Victoria BC V8W 9B5

**Office:**

2975 Jutland Rd  
Victoria, BC V8T 5J9

## Proposed MOU between the BCMMB and the BCDA

As you aware, the BCMMB operates under a different legislative structure than the milk regulators in other provinces.

In other provinces, the lobbying group and the regulator are fully integrated. Notably, all of Alberta Milk, Dairy Farmers of Manitoba and SaskMilk are registered lobbyists, and fulfill general roles promoting the interests of the milk industry under their respective statutes. The BCMMB is not a lobbyist; in BC that role is fulfilled by the BCDA.

The directors of each of Alberta Milk, SaskMilk and Dairy Famers of Manitoba are wholly elected producer boards.<sup>1</sup> All of them require approval from their supervisory board before they can exercise much of their supervisory powers.<sup>2</sup> Alberta Milk has the authority to appoint its own advisory boards in its discretion.<sup>3</sup> Dairy Farmers of Manitoba can establish its own committees, and is expressly authorized to co-operate with extra-provincial boards with ministerial approval.<sup>4</sup>

Unlike these other Western Canadian milk regulators, the BCMMB is not governed solely by producers.<sup>5</sup> It also has greater authority to make orders on its own, without approval from its supervisor, BCFIRB.<sup>6</sup> Further, the BCMMB operates independently from local producer lobbying groups, subject to recommendations from a statutorily-mandated advisory committee, the Milk Industry Advisory Committee ("**MIAC**"), with which it is required to consult pursuant to regulation.<sup>7</sup>

For the reasons set out below, we have concluded that the proposed MOU between the BCDA and the BCMMB is inconsistent with the legislative scheme in British Columbia and the rules of procedural fairness, and we direct the BCMMB not to sign it.

First, the proposed integration and sharing of resources under the MOU is inconsistent with the Legislature's choice to establish the BCMMB as a regulatory body that operates independently from the provincial producer advocacy organization. If the Legislature intended for the kind of integration proposed in the MOU, it could have created that structure, as legislatures have done in other western provinces. Moreover, the Legislature has also created the MIAC as a means for the BCMMB to consult with the industry.<sup>8</sup> Providing for a different form of industry input under the MOU is directly contrary to the legislative choice to establish the Committee.

Second, the integration contemplated by the MOU would constitute a breach of the rules of procedural fairness, as it would compromise the BCMMB's independence in a manner that is not authorized by statute. The rule against bias requires decision makers to maintain structural

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<sup>1</sup> *Alberta Milk Plan Regulation*, ss. 15-16; *Dairy Farmers of Manitoba Marketing Plan Regulation*, s. 3(2); Saskatchewan Milk Board Order No. 43/22 made pursuant to *the Milk Marketing Plan Regulations*, s. 6(2) and 7(1)(hh) and *Agri-Food Act*, s. 12

<sup>2</sup> *Alberta Milk Regulation*, s. 9(1); *Marketing of Agricultural Products Act*, s. 29(1); *Dairy Farmers of Manitoba Marketing Plan Regulation*, ss. 17-19; *Agri-Food Act*, ss. 12(4) & 26. Note also the requirement for Alberta Milk and Dairy Famers of Manitoba to enforce their compliance orders through the courts: *Marketing of Agricultural Products Act*, s. 45, 46; *Farm Products Marketing Act*, ss. 27-28.

<sup>3</sup> *Marketing of Agricultural Products Act*, s. 32

<sup>4</sup> *Dairy Farmers of Manitoba Marketing Plan Regulation*, s. 7; *Farm Products Marketing Act*, ss. 8 and 17

<sup>5</sup> *BC Milk Marketing Board Regulation*, s. 3

<sup>6</sup> *BC Milk Marketing Board Regulation*, s. 7, *NPMA* s. 11; See also the BC Milk Marketing Board's General Order, Part XIV

<sup>7</sup> *BC Milk Marketing Board Regulation*, s. 8. Section 8 sets out the appointment process for members of the MIAC, which includes consultation with producer and processor organizations.

<sup>8</sup> *BCMMB Regulation*, s. 3;

independence and reach their decisions independently of those that they regulate.<sup>9</sup> In British Columbia, this means the BCMMB must ensure it maintains independence from those it is charged with regulating, including any of their industry associations. In the absence of statutory authorization to do so, the proposed integration creates an appearance that the BCMMB lacks the requisite regulatory independence.

Third, there are additional issues with the proposal to have the BCDA and BCMMB share an executive director. As the executive director will be a senior officer of both organizations, it will owe a fiduciary duty to both of them.<sup>10</sup> Given that the BCMMB is an independent regulatory body, and the BCDA is an association of entities who are regulated by the BCMMB, there is in our view a clear case of divided loyalties between the competing interests of the BCDA and the BCMMB.<sup>11</sup>

Importantly, the proposed requirement in the MOU for the executive director to step back from duties with the BCMMB in a case of conflict<sup>12</sup> is not sufficient to resolve the issue in this specific context, where the BCMMB acts as regulator of the BCDA's members. From an institutional perspective, the fiduciary duty owed to both organizations makes it impossible for a reasonably informed member of the public to determine whether the executive director is making decisions or providing advice with a view to benefiting the industry interests represented by the BCDA, or in furtherance of sound marketing policy in the public interest for the BCMMB. In this way, the shared executive director exacerbates the broader problem of ensuring the BCMMB, as regulator, maintains independence from the BCDA.

Moreover, even if case-by-case management of conflicts did not give rise to this problem, the proposed arrangement in the MOU would leave both organizations in the impossible position of being without the guidance of their executive director where a conflict arose.

Accordingly, for all of these reasons, BCFIRB directs the BCMMB not to enter into the proposed MOU with the BCDA, and to advise of all steps that have been taken to integrate and or share resources with the BCDA to date, such that further directions can be issued.

### **Further Information Required on the Transformation Initiative Structure**

From the documents provided to date, we understand that the Transformation Initiative will create a number of bodies but are unclear as to the details of their role and any delegated authority they will be exercising.

First, the 2023 WMP Agreement proposes to create a "Members Committee". The Members Committee appears to be set up to make binding decisions which may then be appealable to the BCMMB.

Second, two MOUs propose to create a "Western Milk Board" with an as yet undefined role, as well as a "Service Provider" that will receive some kind of (as yet undefined) delegated authority.

In order to determine whether the proposed structure is consistent with the statutory scheme and sound marketing policy, BCFIRB needs more information to assess, among other things,

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<sup>9</sup> *Bell Canada v. Canadian Telephone Employees Association*, [2003 SCC 36](#), paras. 17-19; *R. v. Généreux*, [\[1992\] 1 S.C.R. 259](#). See also: *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at 329-335

<sup>10</sup> With respect to the fiduciary duty owed to the BCDA, see the BCDA Bylaws, ss. 52, 55 and the *Societies Act*, s. 53. The proposed MOU with the BCDA expressly acknowledges the duty of loyalty that the executive director will owe to the BCMMB(s. 7) which follows from a fiduciary duty.

<sup>11</sup> *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, para. 35; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, para. 186, per Cromwell J; para. 65 per Deschamps J.; *Lacroix v. CMHC and McCann v. CMHC*, 2016 ONSC 2641, paras. 86-87

<sup>12</sup> Proposed MOU with the BCDA, s. 7(b)

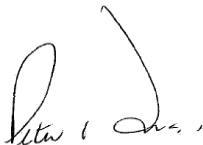
whether the proposed structure will result in an impermissible delegation of authority, or an improper fettering of the BCMMB's discretion.

## **Conclusion**

Pursuant to s. 7.1 of the *NPMA*, we are therefore issuing the following directions:

1. The BCMMB shall not enter into the proposed MOU with the BCDA.
2. The BCMMB shall advise as to what steps have been taken to integrate or share resources with the BCDA to date so that further directions can be issued as required.
3. The BCMMB shall provide responses to the questions and follow up set out under Appendix A.
4. In the interim, the BCMMB shall not take any further steps towards the implementation of the Transformation Initiative.
5. The BCMMB is to respond to this letter by May 28, 2024.
6. After receiving this information from BCMMB, BCFIRB will then arrange a meeting to further discuss the matter.

Regards,



### **Peter Donkers**

Chair, BC Farm Industry Review Board

Cc: Rob Delage, BCMMB General Manager  
Cc: Peter Pokorny, Deputy Minister, Ministry of Agriculture and Food  
Cc: Eric Kristianson, Assistant Deputy Minister, Ministry of Agriculture and Food  
Cc: Gunta Vitins, BCFIRB Vice-Chair  
Cc: Martha Anslow, BCFIRB Executive Director  
Cc: BCFIRB Website

## **Appendix A: Questions & Follow Up for the BCMMB**

1. The 2023 WMP Agreement envisions the creation of a “Members’ Committee” that will make decisions concerning “the 2023 WMP Agreement.” Please explain in detail the role of the Members Committee, including without limitation the types of topics on which the Members Committee will make decisions.
2. Please explain in detail the role of MIAC in relation to the Members Committee, the 2023 WMP Agreement, and the Transformation Initiative more generally.
3. Will the Members Committee receive any authority delegated from the BCMMB? If so, what specific powers will the BCMMB delegate to the Members Committee?
4. Will decisions by the Members Committee be implemented locally by the BCMMB in order to take effect in British Columbia? Or will BC regulated actors be affected by decisions taken by the Members Committee standing on their own, without further implementation by the BCMMB?
5. Section 1.05 of the 2023 WMP Agreement would require the BCMMB to request legislative changes to implement decisions of the Members Committee. Is the BCMMB also required to implement decisions of the Members Committee when legislative change is not otherwise required?
6. Section 1.04(k) of the 2023 WMP Agreement requires the BCMMB to hear all reviews and appeals related to decisions made by the Members Committee and/or the Western Milk Marketing Boards. Does the BCMMB propose to hear appeals of decisions taken by the Members’ Committee locally in British Columbia? What types of decisions will be appealed to the BCMMB? How does this power overlap with BCFIRB’s appellate power?
7. On what types of issues will the Western Milk Board make non-binding policy advice and recommendations?
8. On their face, the role of the Western Milk Board and the Members’ Committee under the 2023 WMP Agreement appear to overlap. Explain how the work performed by the two new bodies will overlap and/or differ from one another.
9. Will the Western Milk Board exercise any powers delegated to it from any of the Western Milk Marketing Boards? If so, what specific powers will the BCMMB delegate to the Western Milk Board?
10. What will the make-up be of the Independent Third Party Service Provider (“Service Provider”)? Will the Service Provider have representation from any industry associations, including but not limited to the BCDA?
11. Will the Service Provider have the authority to make policy recommendations to the BCMMB?
12. What specific powers will the BCMMB delegate to the Service Provider?
13. What kind of services will the Service Provider perform for the Western Milk Marketing Boards, including the BCMMB? How will those services relate to the mandate of the BCMMB?

14. Provide BCMMB's SAFETI<sup>13</sup> analysis on the Transformative Initiative to support BCFIRB in its policy analysis on whether the Transformation Initiative is consistent with orderly marketing and sound marketing policy in British Columbia.
15. Provide information on how BCMMB intends to address Transformation Initiative issues raised by producers (e.g., issues raised at BCMMB's spring 2024 producer meetings, which BCFIRB members attended).

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<sup>13</sup> Strategic Accountable Fair Effective Transparent Inclusive. 2016 June 6. [Delivery of Principles-Based Regulation-Expectations Going Forward.](#)