IN THE MATTER OF THE
NATURAL PRODUCTS MARKETING (BC) ACT
AND IN THE MATTER OF
AN APPEAL FROM A DECISION CONCERNING
MILK TRANSPORTATION

BETWEEN:

TEAMSTERS LOCAL UNION NO. 464

APPELLANT

AND:

BRITISH COLUMBIA MILK MARKETING BOARD

RESPONDENT

AND:

AGRIFOODS INTERNATIONAL CO-OPERATIVE LTD.
VEDDER TRANSPORT LTD.
BC MILK PRODUCERS ASSOCIATION
FEELY'S TRUCK TANK SERVICE
PAN-O-RAMIC FARMS (1990) LTD.
ISLAND FARMS DAIRIES CO-OP ASSOCIATION

INTERVENORS

DECISION

APPEARANCES:

For the British Columbia Farm Industry Review Board	Christine J. Elsaesser, Vice Chair Wayne Wickens, Member
For the Appellant	James Baugh, Counsel
For the Respondent	Robert Hrabinsky, Counsel

For the Intervenors:

Agrifoods International Cooperative Ltd.	Myron Glatt, General Manager Ben Brandsma, President
Feely's Truck Tank Service	Dave Feely, Owner
Vedder Transport Ltd.	Steve Islaub, Vice President - Operations
BC Milk Producers Association	Stan Van Keulen, Director Robin Smith, Executive Director
Pan-O-Ramic Farms (1990) Ltd.	David Schaefer, Counsel
Island Farms Dairies Co-op Association	Eric Erikson, General Manager
Date of Hearing	December 14-15, 2005
Place of Hearing	Abbotsford, British Columbia

INTRODUCTION

1. On May 25, 2004, the British Columbia Farm Industry Review Board (the "Provincial board") issued its decision in the appeal of *Pan-O-Ramic Farms v. British Columbia Milk Marketing Board* concerning the non-renewal of a Transporter Agreement. In this decision, the Provincial board concluded that as the Milk Board's relationship with transporters is fundamentally regulatory, it owes a duty of fairness when terminating such an agreement.

2. Following the *Pan-O-Ramic* decision, the Milk Board decided to restructure its milk transportation system, moving its transportation policy from Transporter Agreements into its Consolidated Orders. Historically, the Milk Board had contractual relationships with a number of transporters. Some of these transporters were divisions of dairy processors; some were independent. The rates paid for milk transportation varied and were based on historical arrangements prior to October 2001 when the Milk Board became the first receiver of milk. Given that the Milk Board did not know whether the costs charged or rates paid were fair, it decided to pursue a bidding process to establish a base line.

3. The Milk Board saw an opportunity to develop a new route structure and receive competitive bids from transporters thereby ensuring competitive freight costs for dairy producers. To this end, it established a process to seek Requests For Proposals ("RFPs") from pre-qualified transportation providers. In December 2004, the Milk Board issued a notice to all transporters terminating all Transporter Agreements effective December 31, 2005. All interested milk transportation companies were asked to submit pre-qualification bids. Those transporters who were successfully pre-qualified were then requested to submit proposals for hauling milk in the eight zones of the province. The Milk Board ultimately accepted the proposals of five transporters:

    - Fraser Valley (mainstream): Zones 1A, B, C, D, E, F, G – Vedder Transport Ltd.
    - Fraser Valley (organic): Zones 1H, I – Bradner Farms
    - Vancouver Island North: Zone 2A – North Island Farms Ltd.
    - Vancouver Island South: Zone 2B, Bulkley Valley, Cariboo: Zone 4, Kootenays: Zone 6 and Okanagan: Zone 7 – Agrifoods International Cooperative Ltd.
    - Peace River: Zone 8 – Calcec Ventures Ltd.

4. As a result of this RFP process, the savings to BC dairy producers was estimated to be $1.3 million or $0.21/hectolitre:

Proposals	**Extra Charges**	**Total Proposals**	**2004/2005 projected**	**Cost Increase/(Decrease)**
15,103,272	84,000	15,187,272	18,491,576	(1,304,303)

5. Teamsters Local Union No. 464 (the "Teamsters") represents the drivers for Agri-Foods International Cooperative Ltd. ("Agrifoods") and Island Farms Dairies Co-op Association ("Island Farms"). On August 31, 2005, the Teamsters appealed the Milk Board's decision to award the foregoing routes in the Fraser Valley and South Vancouver Island arguing that its members would suffer job loss, disruption and displacement and as such were aggrieved or dissatisfied. Formerly, Agrifoods had the Transportation Agreement for hauling milk in the Fraser Valley and Island Farms had the Transportation Agreement for hauling milk on South Vancouver Island.

6. The appeal was heard on December 14-15, 2005. A number of transporters that participated in the RFP process asked for and were granted intervenor status. These included Agrifoods, Feely's Truck Tank Service ("Feely's"), Vedder Transport Ltd. ("Vedder"), Pan-O-Ramic Farms (1990) Ltd. ("Pan-O-Ramic") and Island Farms. The BC Milk Producers Association (the "BCMPA") was also granted intervenor status in the appeal.

7. Prior to this matter proceeding to hearing, the Panel conducted two pre-hearing conferences to deal with various procedural issues. One of the issues related to disclosure of documents. Counsel for the Teamsters sought extensive disclosure of documents from the Milk Board maintaining that full disclosure was the only way to ensure that the tendering process was transparent and that the contract or work had been fairly awarded in accordance with the tendering process. The Milk Board consented to disclosure of some documents, but resisted full disclosure arguing that the disclosure of other documents would reveal confidential information and the grounds of the appeal could be advanced without the document disclosure sought. The Milk Board argued that the Teamsters were on a fishing expedition and that the request for disclosure was a complete perversion of the appeal process especially when the Teamsters were not an unsuccessful bidder and as such had no direct interest in the outcome of the bid process.

8. The Panel Chair addressed the issue through written correspondence and discussion at the pre-hearing conferences. This ultimately led to the issuance of nine-page letter from the Panel Chair on November 21, 2005 which addressed this procedural question, among others. As the process undertaken by the Panel Chair is detailed, we quote below the relevant sections of that letter:

> My decision in respect of the disclosure of documents in this appeal has been guided by the extensive written submissions of the parties on the issue as well as the further oral submissions received at the November 9, 2005 pre-hearing conference. I have also now reviewed the documents in question (which comprise two large binders).
>
> Under common law rules, in order to depart from the traditional rule of requiring full disclosure, there must be compelling grounds to do so, and any non-disclosure must be as minimal as necessary to protect those compelling interests. Further, there is no legal principle in the *Natural Products Marketing (BC) Act*, the *British Columbia Milk Marketing Board Regulation*, the *Administrative Tribunals Act* or the *Freedom of Information and Protection of Privacy Act* that would preclude the Provincial board from ordering disclosure of confidential bid

documents. Ultimately, the matter boils down to an exercise of my discretion, informed by relevant principles of law.

The parties both cited the Supreme Court of Canada's decision in the litigation context, *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41. The head note to that decision summarises the relevant principles there, in the civil litigation context, as follows:

> …A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

As the Union notes, this test was endorsed by our Court of Appeal in *Joint Industry Electricity Steering Committee v. British Columbia (Utilities Commission)* 2005 BCCA 330. In noting that s. 42 of the *Administrative Tribunals Act* applies to the Utilities Commission (as it does to the Provincial board), the court effectively adopted these principles for considering when the non-disclosure may comport with the "proper administration of justice" under s. 42.

> Further, Macaulay and Sprague, Practice and Procedure Before Administrative Tribunals at p. 12-40.1 to 12-40.3 endorses this balancing approach in the administrative tribunal context, bearing in mind:
>
> i. the importance of the individual's interest at stake;
> ii. the importance of the interest being attempted to be protected by non-disclosure;
> iii. the impact on that protected interest by disclosure; and
> iv. the need of the individual for the information in order to protect his interest.

The Union filed its appeal on August 31, 2005. It did not specifically enumerate grounds for appeal, but noted the likelihood of job losses, the requirement that transporters purchase new equipment, hardship resulting from change of drivers, the fact that bids were not made public, and the fact that this type of process leads to companies trying to underbid each other. It also included general references to "uncertainty" and "upheaval" and noted that the resulting labour strife will cost far more than the minimal savings that result from the new arrangements. In a September 23, 2005 letter, Mr. Baugh summarised the grounds of appeal as follows:

(a) The Marketing Board's decision to cancel the transportation agreements with Island Farms for the southern Vancouver Island region and Agrifoods International for routes in the Lower Mainland/Fraser Valley region, and to award those transportation routes to Agrifoods International and Vedder Transport respectively, will result in job loss and dislocation for members of Local 464 employed by Island Farms and Agrifoods International;

(b) The change in milk transportation providers is not only disruptive to the affected employees but also to the milk producers and the milk transportation system as a whole; there will be significant change over costs arising from the abolition of long-term working relationships and the need to develop new working relationships with

different personnel and companies unfamiliar with the routes, the farms and the transportation facilities;

(c) There was a lack of transparency in the bidding process and the Marketing Board's decision-making process; neither the Marketing Board's selection criteria nor the actual reasons for awarding the transportation contracts to Agrifoods International and Vedder Transport have been disclosed to Local 464;

(d) The wholesale change in transportation providers for these two regions will create more problems than it will resolve and is contrary to sound marketing policy.

At the pre-hearing conference, the Union did not add additional grounds.

In support of the above grounds, the Union requests disclosure of the following types of documents:

(a) the request for proposals ("RFP") documents created by the Milk Board and provided to the transporters for the two zones (southern Vancouver Island region (Zone 2B) and Lower Mainland and Fraser Valley (Zone 1));
(b) copies of all internal Milk Board documents regarding pre-qualification, qualification and selection criteria for the two zones;
(c) copies of all Milk Board documents regarding the desired system performance criteria and operating standards for selecting successful bidders for the two zones;
(d) copies of all Milk Board evaluation criteria and assessments of the qualified proposals for the two zones;
(e) minutes of all Transportation Advisory Board meetings relevant to the decision making process for the two zones;
(f) minutes of the Milk Board meetings relevant to the decision making process for the two zones;
(g) copies of all formal proposals received by the Milk Board with respect to the two zones; and
(h) copies of all communications and correspondence between the qualified bidders and the Milk Board during the qualification, bidding, tendering and decision-making process for the two zones.

Mr. Baugh on behalf of the Union is not, at this point in time, seeking disclosure of the pre-qualification proposals as these documents, he notes, were subject to a confidentiality clause. He states that the reason Pre-Qualification bids proposals are protected is to prevent other bidding parties having access to other bidders' confidential information such that they can underbid one another. However, he argues that once the bid process is concluded, the confidentiality clause is "spent" and these documents should be disclosed and he reserves his right to request their disclosure. As for the formal bid proposals, Mr. Baugh argues that these documents are not protected by a confidentiality clause and as such should be disclosed. The only way to ensure that the tendering process has been transparent, and that the contract or work has been fairly awarded in accordance with the tendering process is to disclose the final bids to all interested parties. Mr. Baugh argues that he is entitled to these documents in order to determine if the decision ultimately reached followed the established process and was not based on extraneous factors.

Mr. Hrabinsky on behalf of the Milk Board objects to the disclosure of documents that would reveal confidential information respecting the bids received. At the pre-hearing conference, the Milk Board argued that to the extent that the grounds of the appeal take issue with the lack of transparency or whether the decision represents sound marketing policy, arguments can be advanced by way of argument without the document disclosure the Union seeks. To the extent that the Union argues that there have been irregularities within the bid process as a means of justifying its document disclosure requests, the Milk Board argues that we have yet to hear of

any irregularity to justify these requests. Rather, the Union is on a fishing expedition hoping to find something in the document disclosure to give it something to argue on appeal. The Milk Board argues that this is a complete perversion of the appeal process especially when one considers the context out of which this appeal arises; unlike the usual situation where an unsuccessful bidder challenges the bid process on the basis that the party seeking bids failed to comply with its own process, the Union did not submit a bid and as such has no direct interest in the outcome of the bid process.

Having considered the submissions of the parties, I am satisfied that the analysis is not as simple as suggested by the Union. Simply because documents are not protected by a confidentiality clause does not mean that those documents should be disclosed simply because a party requests them. Similarly, just because a party describes a document as confidential does not mean it is protected from disclosure. This is something that I have independently assessed having regard to the written and oral submissions received to date, the grounds of appeal and a review of the documents.

I have concluded that the Pre-Qualification bid proposals and the formal bids themselves are confidential and that disclosure at this stage would be prejudicial. I say this because the Pre-Qualification bid proposals are comprised of sensitive corporate information of the bidders including lists of intended equipment, financial statements and strategic goals or plans, the disclosure of which would be seriously prejudicial to the bidders, and because the bid documents also contain similar and other commercial information including specific bid pricing proposals which could potentially harm the interests of parties to whom it relates.

There are four documents in the binders relating to other matters. These are:

- An unredacted version of the July 14, 2005 letter from the Milk Board to the Provincial board (RPriv0001.00), which has been previously disclosed to the Union in redacted form
- An unredacted version of the Provincial board's July 22, 2005 letter to the Milk Board (RPriv0002.00), which has also been previously disclosed to the Union in redacted form)
- Transportation Advisory Committee Minutes (RPriv0003.00)
- Transportation Advisory Sub-Committee Minutes (RPriv0004.00).

I do not generally consider these documents as a whole to be confidential and prejudicial to the interests of third parties to disclose, with the exception of certain information that can be redacted. I will address this further below.

The next question is whether or to what extent the interests of a fair and full hearing require disclosure. In assessing this question, I must consider how important disclosure is to ensuring the Appellant can adequately present its case. This requires consideration of the relationship between the documents in question and the grounds of appeal advanced. I find that there is a significant question as to whether or to what extent disclosure of the documents sought is in fact necessary for a full hearing of this appeal, having regard to the grounds of appeal. I say this for the following reasons:

- To the extent that the grounds of appeal relate to the question of whether the Milk Board should, at the end of the bid process, have disclosed all of the bid tender documents as a matter of appropriate tendering processes (Ground (c)), this is a substantive question upon which the parties can make argument at the hearing. There is no reason for the parties to see the documents in order to make argument on that question.

- With respect to items (a), (b) and (d), it is not clear to me why the Union would need to see the documents to make submissions on the points at issue. These relate to matters such as whether the revised transportation system will result in loss and dislocation of jobs for union members, costs arising from the disruption of working relationships, and the creation of other unspecified problems that it asserts are contrary to sound marketing policy.

After assessing how prejudicial disclosure would be, and how important it is to a full and fair hearing, I have determined that I should make an order which differentiates between two categories of documents, as follows.

Category A – these are documents or portions thereof that I consider to have minimal prejudicial effect to any third party in terms of disclosure. As such, I am ordering disclosure of them irrespective of whether they are of marginal importance to fair hearing, having regard to the grounds of appeal. These include documents numbered RPriv0001.00, RPriv0002.00, RPriv0003.00 and RPriv0004.00 which I have redacted where necessary.

Category B – these are documents or portions thereof for which I consider disclosure to have significant potential prejudicial effect to a third party due to commercially sensitive information, and which I do not consider important to disclose in order to ensure a fair hearing having regard to the grounds of appeal advanced. In this regard, I note that three of the grounds of appeal relate to the merits of the modified transportation system as opposed to the former system, in terms of resulting impact on jobs and dislocation of existing relationships. I do not consider it necessary to disclose confidential bids and related documents in order for the Appellant to present its case on these issues. Moreover, even if there were any marginal benefit to doing so, I would, in accordance with the legal principles discussed earlier, consider on balance that the benefits of disclosure would be outweighed by the prejudicial effect of doing so, having regard to the nature of the matters in question and the interests at stake. A fourth ground of appeal relates to matters of procedural transparency in the process used by the Respondent, including whether successful bids should have been made public and reasons given. This is a substantive issue that will be considered by the Provincial board at the hearing and I do not intend to form or express any view on this at present. I do however note that I do not consider it essential to order disclosure of the documents in question to allow argument on whether appropriate tendering processes require disclosure of those documents. To do so would be to grant the Appellant part of the relief it ultimately seeks on this appeal (an open bid process) in an interlocutory application.

I am today providing the Respondent with copies of the documents in Category A that I intend to disclose to the Appellants. I will defer disclosing those to the Appellant until end of day November 25, 2005. This will afford the Respondent reasonable time before actual disclosure to initiate judicial review proceedings if the Respondent considers that necessary in the circumstances.

In reviewing the documents for which I intend to order disclosure in redacted form, I do not consider there will be any information released that would directly relate to or even identify any third party that has raised confidentiality concerns in this application. As such, I do not consider it necessary to provide notice of the pending disclosure to any person or entity other than the Respondent.

9. Also by way of a letter dated November 21, 2005, the Panel Chair issued a further two-page decision dealing with disclosure of documents including a handout on selection criteria, a table titled “Change by Transporter” and a table titled “Comparison to Current Costs”. In accordance with the principles set out in the first November 21, 2005 letter, the disclosure of these documents was found to

have significant potential prejudicial effect to third parties but because the Milk Board's analysis of bid proposals was at issue in the appeal, they were released in redacted form.

ISSUES

10. The Appellant has framed its issues on appeal thus:

    a) The Milk Board's decision to cancel the Transportation Agreements with Island Farms for the southern Vancouver Island region and Agrifoods for routes in the Lower Mainland/Fraser Valley region, and to award those transportation routes to Agrifoods and Vedder respectively, will result in job loss and dislocation for members of Local 464 employed by Island Farms and Agrifoods;

    b) The change in milk transportation providers is not only disruptive to the affected employees but also to the milk producers and the milk transportation system as a whole; there will be significant changeover costs arising from the abolition of long-term working relationships and the need to develop new working relationships with different personnel and companies unfamiliar with the routes, the farms and the transportation facilities;

    c) There was a lack of transparency in the bidding process and the Milk Board's decision-making process; neither the Milk Board's selection criteria nor the actual reasons for awarding the transportation contracts to Agrifoods and Vedder have been disclosed to Local 464; and

    d) The wholesale change in transportation providers for these two regions will create more problems than it will resolve and it is contrary to sound marketing policy.

DECISION

11. The Panel heard extensive evidence during the hearing of this appeal. We do not consider it necessary to set out all evidence in detail in this decision, but instead will deal with each of the Appellant's grounds of appeal and discuss the evidence and position of the parties within the context of each issue. The Panel however wishes to expressly note that we have carefully considered all of the evidence and submissions, even though we do not intend to refer to it all in the course of this decision.

Grounds of Appeal

a) Job Loss and Dislocation

12. The Appellant argues that the loss of milk transportation by Agrifoods for the entire Fraser Valley and by Island Farms for Vancouver Island South will result in job losses, dislocation and severe hardship to its members. Some members will be forced to resign, take early retirement or relocate at considerable cost and disruption to their families. Teamster members were not consulted by the Milk Board and had no input in the decision. The Teamsters say the Milk Board failed to look at the role of and impact of its decision on drivers and failed to realise the significant disruption that this decision will cause throughout the whole milk transportation system.

13. While the Panel does not want to minimise the disruption that drivers will see as a result of the change to a new transportation system, we are not satisfied that the type of disruption here is grounds to overturn the Milk Board's decision to move to a new transportation regime. More specifically, we do not see it as a procedural flaw that the Milk Board did not consult with the Teamsters or its members. The Milk Board was entitled to rely on consultation with its transporters, the party it directly regulates. When the transporters put together their bids, one would expect them to take into account all those factors that may have an impact on the ultimate cost to move milk (including any obligations owed to employees under employment contract, the *Employment Standards Act*, or collective agreements). All those issues which the Teamsters raise as flaws on the part of the Milk Board for not considering (the cost of hiring or firing employees, recruiting and training new employees, acquiring of or disposing of equipment) should all have been taken into account by the transporter making the bid. The Milk Board was entitled to rely on the expertise of transporters in hauling milk in British Columbia when assessing the various proposals.

b) Disruption to System as a Whole

14. The Appellant argues that the change in milk transportation systems will disrupt long-term working relationships. It says adjustments to new routes by new drivers will take time and will result in greater costs. There will be a steep learning curve for new drivers while they gain familiarity with each farm, route and schedule. Further if new drivers have not hauled milk, they will need to complete the necessary training to hold a Bulk Tank Milk Graders Licence. They must abide by all regulations pertaining to duties set out by the Milk Board and Ministry of Agriculture and Lands and be responsible to maintain accurate records and documentation, and for load protection, food safety and regular timely farm pickup.

15. The Appellant argues that the Milk Board's transitional period of three months is inadequate. Transporters will lose experienced drivers and may also need to

purchase new equipment as equipment varies depending on the route, schedules and turning or maneuverability on farm driveways.

16. Once again, the Panel does not wish to make light of the disruption that will be brought about by the change in transportation systems. However, the type of disruption testified to by the Appellant's witnesses was not unexpected by the Milk Board. Change by necessity brings about some level of uncertainty and disruption among those who must adapt. The Milk Board has confidence in the ability of its transporters to fulfill their commitments based not only on their proposals but also on the fact that the successful transporters are experienced in the milk hauling business in British Columbia. The Panel does not believe that this confidence is misplaced. Further, the Milk Board has acknowledged that issues may arise as it moves through the transitional period and it confirms that it will work with transporters to facilitate a smooth changeover.

c) Lack of Transparency

17. Apart from the merits of the revised transportation system, the Appellant objects to the bid tendering process used by the Milk Board, arguing that it was a fatal flaw that the bids were not publicly revealed after the bid selection occurs. The Panel rejects this argument for the following reasons.

18. None of the many cases cited by the Appellant impose the requirement for public disclosure as a matter of common law. Rather, the test is whether there were sufficient safeguards to ensure compliance with the RFP, including terms of fairness whether express or implied.

19. In the present case, we are satisfied that the RFP process was complied with and that the process was consistent with the RFP. In this regard, we do not find that there was any express or implied term that the bids would be publicly disclosed. Further, we recognise the right of parties to have commodity board decisions reviewed by the Provincial board on appeal adds a further procedural safeguard.

20. The Appellant also sought to impugn the decision making of the Milk Board by alleging conflict of interest on the part of Milk Board, Transportation Advisory Committee ("TAC") or sub-committee members. The Appellant points to one Milk Board member (Ben Janzen) who holds shares in Agrifoods and argues that despite this apparent conflict of interest, this member was allowed to vote on the TAC sub-committee recommendations. The Appellant points to the composition of the TAC with transporter representation and argues that it is a clear conflict of interest for transporters to have a vote on this issue. As for the TAC sub-committee comprised of Milk Board Chair Blaine Gorrell, Milk Board member Debbie Aarts, producer David Pendray and Milk Industry Advisory Committee Chair Gordon Souter and Lloyd Ash, transportation consultant, the Appellant does not argue that there was a conflict of interest but does suggest that dairy producers have an inherent interest in achieving lower transportation costs. Even if the TAC sub-committee can be seen

as a safeguard from conflict of interest, the Appellant argues that the Milk Board made the ultimate decision and given that one member was an Agrifoods Co-op member, a conflict of interest remains.

21. The Panel rejects this argument. The TAC sub-committee did the vetting of the pre-qualification proposals and formal bids. The presence of producers on the TAC sub-committee does not create an apparent conflict of interest. A decision of this sort must be made by persons with knowledge of the industry. There is no suggestion that the dairy producers on this sub-committee had any personal interest in the outcome of the decision as to who ultimately got the work. A general interest in saving the producer money cannot be twisted into a preference for one bidder over another. The TAC and the Milk Board accepted the sub-committee's recommendations. The presence of transporters on the TAC does not create a conflict of interest as to the awarding of the contract as the actual assessing and weighing of the various proposals occurred at the sub-committee level.

22. As for the allegation that Mr. Janzen as a member of Agrifoods and a holder of shares was in a conflict of interest, the Panel disagrees. Mr. Janzen does not sit on the Board of Directors of Agrifoods nor does he have managerial responsibilities in that company. Rather, because he historically shipped to the Dairyland Co-operative, he like any other producer who shipped to Dairyland, received shares in the Co-operative. When Dairyland was purchased by Saputo Foods Ltd., the transportation division which is now Agrifoods remained. To the extent that the Appellant's arguments can be more broadly construed as a challenge to the actual composition of the Milk Board, these arguments must also fail as the composition of the Milk Board is prescribed by regulation.[1]

23. The Appellant also argues that it was a flaw on the part of the Milk Board not to consult with drivers. We rejected this argument earlier and will not repeat those reasons here.

24. The Appellant also takes issue with the Milk Board's use of Lloyd Ash, a consultant retained to assist with the RFP process. First of all, the Appellant argues that the Milk Board cannot hold Mr. Ash out as an expert in tendering to defend itself in these proceedings as no expert report was prepared by Mr. Ash and tendered in these proceedings. While the Milk Board says Mr. Ash is an "expert", there is no probative evidence as to his qualifications. Further, the evidence as to Mr. Ash's actual role is unclear. The Panel finds that irrespective of Mr. Ash's role in the RFP process, at the end of day what we have to determine is whether the process followed was fair and reasonable. Whether Mr. Ash was or was not an expert in tendering is not determinative of this issue.

[1] Historically, producers either shipped to a co-op (Dairyland, Island Farms) or to an independent processor. The British Columbia Milk Marketing Regulation required that the Milk Board have elected producer representation from both co-op and independent processors.

25. In assessing the alleged irregularities advanced by the Appellant, a significant factor that we have taken into account is that none of the other bidders appealed the Milk Board's decision.[2] The Panel does not accept the Appellant's argument that the reason no transporter appealed was because of the following waiver in the Pre-qualification and RFP documents:

> Any and all claims for damages or other recovery against the BC Milk Marketing Board, in connection with the request for proposal process and related matters and the conduct or outcome of the tender and related matters will be limited to $100.00.
>
> Each Transporter, by submitting a proposal, accepts all of the conditions and stipulations set out herein, and acknowledges and agrees that the BC Milk Marketing Board will have no liability or obligation to any Transporter except only the party, if any, awarded the ultimate transportation assignment(s) by the BC Milk Marketing Board, and agrees that, if not awarded the transportation assignment(s), then, whether or not any express or implied obligation has been discharged by the BC Milk Marketing Board, the BC Milk Marketing Board shall be fully and forever released and discharged of all liability and obligation in connection with the request for proposals process and all related matters, and all actions and procedures which may have preceded.

26. The Panel finds that the foregoing terms relate only to claims for damages by bidders and the corresponding financial obligations on the part of the Milk Board arising out of the tender process. The terms in no way purport to eliminate the right of any dissatisfied or aggrieved party to bring an appeal of any decision made by the Milk Board in this process. Further, it is trite law that a commodity board does not have the authority to contract out of the provisions of the *Natural Products Marketing (BC) Act* (the "*Act*") or circumvent the appellate jurisdiction of the Provincial board. The transporters involved in the RFP process are sophisticated businesses, well versed in the regulatory complexities of their industry. The Panel does not accept that the foregoing terms in any way restricted or compromised a transporter's decision to appeal. Further, many of the transporters intervened in this appeal and at no time indicated that they were under any misapprehension with respect to the above terms or were unaware of their right to an appeal.

27. Returning now to the Appellant's arguments with respect to disclosure requirements in the tendering process, we concluded earlier that there is no common law requirement for public disclosure of bids. However, the Provincial board has the authority to go beyond common law legal requirements and impose a disclosure requirement as a matter of sound marketing policy. However, given the confidential nature of business information at issue and the other means of ensuring accountability of the Milk Board, we are not persuaded on the evidence and arguments submitted in this appeal that it is necessary for the Provincial board to establish a blanket requirement in this regard. Having said this, nothing in this

[2] One bidder sought to file an appeal (after the Teamster's appeal was filed and made known to the industry) but that filing was out of time and no special circumstances existed for the Provincial board to accept a late filing.

decision precludes another panel from reviewing that issue further in future if it considers it appropriate to do so.

28. Despite these findings, the Panel is of the view that one aspect of the Milk Board's tendering processes should be improved if such a process is used again in future. Specifically, the RFP documents should more clearly explain at the outset of the process exactly which information submitted through the process will be treated as confidential and which will be disclosed (and in what form). This would allow any party who has a concern with the proposed tendering system to make an objection up front and if necessary, subsequently launch an appeal concerning the process before bids are submitted and evaluated and before successful bidders are announced. This would minimise both the uncertainty for the parties and the need for the Milk Board to rely upon an *ex post facto* review of the tendering process by the Provincial board.

d) Contrary to Sound Marketing Policy

29. The Appellant's final argument is that the wholesale change of transporters between the regions will cause disruptions and create additional problems. There will be a loss of experienced drivers, on changeover drivers will be unfamiliar with routes or farms and the Milk Board has done nothing to assure transporters that there will be qualified drivers, nor has it considered the extra costs the disruptions will generate. For its part, the Milk Board concedes that with change there are risks. However, the Milk Board is prepared to work with the transporters to manage those risks. The transition period can be adjusted through sub-contracts with current milk transporters; timelines can be flexible to assure smooth transitions of services. The Milk Board has confidence that the successful bidder's expertise, qualifications and supporting facilities will allow them to carry out their duties. The Milk Board appreciates that there may be extra costs during the changeover, but these costs are more than offset by the expected $1.3 million savings in transportation costs over time.

30. The Panel rejects this ground of appeal. The Panel is satisfied that transporters know their businesses and carried out the necessary financial analysis before putting forward their bids. The fact that some drivers will be displaced is a reality that flows from the decision to move from the historical transportation system to the new system.

31. Looking to the broader issues at stake here, when the Milk Board became first receiver of milk in 2001, it inherited a system of milk transportation. Arrangements varied with transporters and regions. The Milk Board had no way of assessing whether the rates being paid for transportation of milk were fair, reasonable and competitive. In order to bring some order and efficiency to this system, the Milk Board made its decision to put transportation out to tender. It was not required to go through a tender process; it was required to be fair and reasonable as it moved to its new transportation system. The Panel accepts that

there were sound marketing policy reasons for the Milk Board to make the decision to move to a new transportation system.

32. While we recognise that the consequence of moving from the status quo will be job loss and dislocation and some disruption to the system as a whole, we are not satisfied that this decision is contrary to sound marketing principles. The decision to find a reasonable base line for transportation costs will bring about efficiencies that benefit processors, transporters, producers and ultimately the consumer.

Standing

33. It should be noted that the Milk Board did not take the position that the Teamsters lacked standing to bring this appeal. The Milk Board did raise the issue of the Teamsters' interest in the appeal obliquely in a pre-hearing conference but only to the extent that as the Teamsters were not an unsuccessful bidder, they lacked a direct interest in the appeal and that factor ought to be taken into account in the Panel's consideration of the document disclosure issue. The Milk Board in closing argument made the point that while the Teamsters may be aggrieved by the decision of the Milk Board, being aggrieved is not in and of itself enough to succeed on an appeal.

34. Given that the issue of standing was not raised by any party in advance of the appeal, the Panel made no rulings in this regard. However in their closing submissions two intervenors, the BCMPA and Island Farms, raised concerns regarding the Teamsters' standing. Island Farms took issue with the Teamsters initially appealing on the strength of its arguments about job loss and dislocation but then purporting to represent not only its affected employees but also the transporters and producers in the province. BCMPA found it hard to understand how a union or employee group could challenge the awarding of a transportation assignment to any transporter when they were secondary to that assignment.

35. The Appellant took great umbrage to the suggestion that the Teamsters lacked standing arguing that its drivers are part of the dairy industry in the province. Further as there was no violation of the terms of the collective agreement between the Teamsters and the transporters, the Teamsters argue that the only avenue to dispute this decision was through an appeal to the Provincial board.

36. Given that this issue was raised so late in the hearing and given that the Milk Board made no such objection, the Panel does not think it is necessary to make a ruling on this issue. Should parties choose in the future to raise an objection to the standing of a party, these objections should be raised as early as possible. Having gone through the expense of an appeal, it would be most unfair to the Teamsters to dismiss the appeal now for lack of standing.

Admissibility of Document at Issue at the Hearing

37. During the course of the hearing, the Appellant sought to rely in its cross-examination of Rob Delage, Controller for the Milk Board, on a July 6, 2005 letter from Mr. Gorrell, Milk Board Chair to Pan-O-Ramic. This letter was contained in Pan-O-Ramic's Book of Documents, copies of which had been given to the parties, but which Pan-O-Ramic had not submitted to the Panel as evidence. The Appellant maintained that the Milk Board should have disclosed the letter and it should be entitled to cross-examine Mr. Delage with respect to the contents of the letter. Pan-O-Ramic's position was that if and when Pan-O-Ramic chose to express any position as an intervenor then those documents may become part of the hearing at that time. The Milk Board maintained that it had no duty to disclose this letter to the Appellant as it related to Pan-O-Ramic's own "idiosyncratic" issues and did not touch on issues in this appeal.

38. The Panel physically received Pan-O-Ramic's Book of Documents but expressly made no finding as to its admissibility at that time. The Appellant was permitted to question Mr. Delage with respect to issues arising out of the letter but was encouraged to frame the question without reference to actual text in the letter to the extent possible. To the extent that the actual text of the letter was referred to, the Panel advised that depending upon its determination of the admissibility issue, those questions might be inadmissible either in whole or in part. The Panel advised it would provide reasons with respect to the admissibility of the letter in its written reasons. The Panel also reserved its decision on the issue of whether the document should have been disclosed by the Milk Board.

39. The Appellant questioned Mr. Delage concerning the issues addressed in the letter and it likely makes little difference if the letter itself is formally admitted as evidence or not. However, because this was an issue raised by the parties and one which the Panel said we would address in our reasons, we advise that our decision is to admit the letter. We are not bound by formal rules of evidence and we do not see any reason why we should not admit it (even though Pan-O-Ramic's Book of Documents was not tendered generally as evidence). The letter does not, in any event, have any material affect on our decision.

40. In concluding that we will admit the letter, we should not be taken as implicitly criticising the Milk Board for not having tendered this letter itself. The Panel agrees with the Milk Board that the letter is particular to Pan-O-Ramic and its issues (which were not the subject of the appeal) and there was no duty on the Milk Board to have disclosed it.

Appellant's Position Concerning Undisclosed Documents

41. The Appellant renewed its request for disclosure of the formal proposal documents at the close of the hearing. Given our decision with respect to the Appellant's four grounds of appeal, we dismiss this request.

42. In its closing written submission, the Appellant also argues that, to the extent the Panel has decided that it was not appropriate for certain documents to be disclosed, then the Panel itself is prevented from considering such documents in the course of its decision. This argument would apply to the documents that fall within Category B as referenced in the Panel Chair's first letter of November 21, 2005, which stated:

> Category B – these are documents or portions thereof for which I consider disclosure to have significant potential prejudicial effect to a third party due to commercially sensitive information, and which I do not consider important to disclose in order to ensure a fair hearing having regard to the grounds of appeal advanced. In this regard, I note that three of the grounds of appeal relate to the merits of the modified transportation system as opposed to the former system, in terms of resulting impact on jobs and dislocation of existing relationships. I do not consider it necessary to disclose confidential bids and related documents in order for the Appellant to present its case on these issues. Moreover, even if there were any marginal benefit to doing so, I would, in accordance with the legal principles discussed earlier, consider on balance that the benefits of disclosure would be outweighed by the prejudicial effect of doing so, having regard to the nature of the matters in question and the interests at stake. A fourth ground of appeal relates to matters of procedural transparency in the process used by the Respondent, including whether successful bids should have been made public and reasons given. This is a substantive issue that will be considered by the Provincial board at the hearing and I do not intend to form or express any view on this at present. I do however note that I do not consider it essential to order disclosure of the documents in question to allow argument on whether appropriate tendering processes require disclosure of those documents. To do so would be to grant the Appellant part of the relief it ultimately seeks on this appeal (an open bid process) in an interlocutory application.

43. The Category B documents are potentially relevant to the grounds of appeal only to the extent that the Provincial board considered them (along with all other evidence presented at the hearing) in concluding that there was no express or implied commitment to share such bid information, and that the RFP process was followed. In our view, the confidential documents (which related to specific commercial information and proposals) had little or no bearing on this issue.

44. Moreover, even to the limited extent that this material was considered, we believe this to be consistent with applicable law. This conclusion is consistent with s. 8 of the *Act* which differentiates the information the Provincial board must be provided by a marketing board on appeal (s. 8(4)), from the information a panel may order disclosed to parties (s. 8(5)). It is also consistent with common law which allows tribunals to consider, in exceptional cases, information that has not been disclosed to all the parties. These principles are canvassed in the authorities referenced in the Panel Chair's November 21, 2005 letter (and the cases cited therein) and it is clear, in the Panel's view, that those authorities deal with the limited circumstances in which a panel can consider non-disclosed information.

ORDER

45. The appeal is dismissed.

46. There will be no order as to costs.

Dated at Victoria, British Columbia this 17th day of February, 2006.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

Original signed by

Christine J. Elsaesser, Panel Chair
Wayne E.A. Wickens, Member