OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-13

CANADA LINE RAPID TRANSIT INC.

Celia Francis, Senior Adjudicator

August 11, 2009

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Summary: Applicant requested access to the concession agreement for the Canada Line rapid transit project. Canada Line disclosed the concession agreement in severed form, withholding information under ss. 15, 16, 17 and 21. Canada Line and InTransit BC did not establish a reasonable expectation of harm flowing from disclosure. All withheld information is ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(l), s. 16(1)(a)(iii), 17(1)(d) & (e) & ss. 21(1)(a)(ii), 21(1)(b) & 21(1)(c)(i) & (iii).

Authorities Considered: B.C.: Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order F08-03, [2008] B.C.I.P.C.D. No. 6; F08-13, [2008] B.C.I.P.C.D. No. 21; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 00-41, [2000] B.C.I.P.C.D. No. 44; Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order F08-10, [2008] B.C.I.P.C.D. No. 17; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 01-39, [2001] B.C.I.P.C.D. No. 40.

Cases Considered: *Fraser Health Authority v. Hospital Employees' Union,* 2003 BCSC 807.

1.0 INTRODUCTION

[1] This order arises out of the applicant's request to the public body, Canada Line Rapid Transit Inc. ("Canada Line"),[1] under the *Freedom of*

[1] Until February 1, 2006, Canada Line was called RAV Project Management Ltd. This was its legal name at the time of the request and the name under which it was (and still is) listed in

Information and Protection of Privacy Act ("FIPPA"), for a copy of the "Final Project Agreement (or Concession Agreement) dated on or about July 29, 2005 in respect of the Canada Line rapid transit system (formerly known as RAVCO)". While processing the request, Canada Line asked the other organizations involved in the project, the Greater Vancouver Transit Authority[2] ("TransLink"), InTransit BC Limited Partnership, by its general partner InTransit British Columbia GP Ltd. ("InTransit BC"), and SNC-Lavalin Inc. ("SNC"),[3] for their views on the application of FIPPA to the Concession Agreement, including its schedules ("Concession Agreement").[4]

[2] TransLink said it had no objection to the disclosure of the Concession Agreement. InTransit BC said that it considered the entire Concession Agreement to be confidential and that its disclosure could prejudice InTransit BC's competitive interests. InTransit BC said that nevertheless it consented to the disclosure of the Concession Agreement with the exception of a series of specified portions. SNC argued that Schedule 6 was not in the custody or under the control of Canada Line but that, if FIPPA did apply, ss. 13, 17 and 21 prohibited access to Schedule 6. Canada Line disclosed the Concession Agreement to the applicant with portions severed under ss. 13, 15, 16, 21 and 22 of FIPPA.

[3] The applicant requested a review of Canada Line's decisions. During mediation, Canada Line informed the parties that it would no longer rely on ss. 13, 21 and 22 and would instead rely on ss. 17(1)(d) and (e). SNC and InTransit BC each requested a review of Canada Line's decision not to apply s. 21.[5]

[4] InTransit BC later agreed to the disclosure of more information. However, mediation did not resolve the three requests for review and this Office issued three notices of written inquiry to Canada Line, InTransit BC, SNC and the applicant. Canada Line disclosed further information while preparing for the inquiries. Around this time, SNC withdrew its request for review,[6] leaving two inquiries. Given the overlap in the issues, the record in dispute and the parties' arguments, I have dealt with the two inquiries in a single order.

Schedule 2 of FIPPA. Canada Line confirmed in a fax of June 26, 2007 to this Office that it carries on the same business as RAV Project Management Ltd. did prior to the legal name change.

[2] Now the South Coast British Columbia Transportation Authority.

[3] See the Background section of this order for a description of these organizations and their roles in the Canada Line project.

[4] Canada Line consulted SNC only about Schedule 6 of the Agreement.

[5] SNC's request for review concerned Schedule 6 only.

[6] See letter of June 1, 2007 in which SNC withdrew its objection to the production of Schedule 6. This Office therefore cancelled the inquiry on that file, OIPC File No. 30342. SNC participated in the other two inquiries as a third party.

2.0 ISSUES

[5] The issues before me are these:

1. Whether Canada Line is authorized to refuse access to portions of the record in dispute under ss. 15(1)(l), 16(1)(a)(iii) and 17(1)(d) and (e) of FIPPA.

2. Whether Canada Line is required to refuse access to portions of the record in dispute under ss. 21(1)(a)(ii), (b) and (c)(i) and (iii).

[6] Under s. 57(1) of FIPPA, Canada Line has the burden of proof regarding ss. 15, 16 and 17. Under s. 57(3)(b), InTransit BC has the burden of showing that s. 21 applies. These are the relevant FIPPA provisions:

> **Disclosure harmful to law enforcement**
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> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> …
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.
>
> **Disclosure harmful to intergovernmental relations or negotiations**
>
> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies: ...
>
> (iii) an aboriginal government;
>
> **Disclosure harmful to the financial or economic interests of a public body**
>
> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information: …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

…

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, …

(iii) result in undue financial loss or gain to any person or organization, or

3.0 DISCUSSION

[7] **3.1 Background**—Canada Line is a wholly-owned subsidiary of TransLink. It is responsible for overseeing the procurement, construction and implementation of the Canada Line, a rail-based rapid transit line that will link Richmond, Vancouver International Airport and Vancouver. The project is a public/private partnership ("P3"). SNC and Serco Group plc ("SNC/Serco") were the successful joint proponents in the competitive process for selecting a contractor to design, build, partially finance, operate and maintain the Canada Line. Both Canada Line's procurement documents and SNC/Serco's initial expression of interest and proposal documentation contemplated a third-party concessionaire that would be a separate legal entity and special purpose vehicle for the purposes of the Agreement. With the finalization of the documentation in July 2005, SNC transferred its interests in the project to InTransit BC as the concessionaire.[7] The Concession Agreement, executed on July 29, 2005 among Canada Line, TransLink and InTransit BC, sets out the parties' rights and obligations regarding the project over 35 years.[8]

[8] **3.2 Record in Dispute**—The body of the Concession Agreement is approximately 120 pages long and its 18 schedules comprise another 1,400

[7] InTransit BC, the special purpose vehicle, was formed in March 2005 for the purposes of entering into the Concession Agreement; para. 14, Arbaud affidavit.

[8] Paras. 2-5, Canada Line's initial submission; paras. 1-15, Hewitt affidavit; paras. 3-15, Arbaud affidavit; Buchanan affidavit. Jeff Hewitt is a Chartered Engineer and the senior Vice President, Engineering of Canada Line; para. 1, Hewitt affidavit. Jean-Marc Arbaud is an employee of SNC-Lavalin and was seconded to InTransit BC where he is the President and Chief Executive Officer; para. 1, Arbaud affidavit. Douglas Buchanan is the National Managing Partner of Davis LLP and deposed that he has extensive experience with P3s; para. 1, Buchanan affidavit.

pages. Canada Line disclosed the Concession Agreement[9] in severed form to the applicant. An electronic version of the severed Concession Agreement is also available on the Canada Line website.[10]

[9] The handwritten annotations on the records showing the exceptions Canada Line applied did not match up in all respects to InTransit BC and Canada Line's tables and submissions in this inquiry. I have therefore considered the submissions, records and tables collectively.

[10] **3.3 Applicant's Position**—The applicant provided a brief initial submission and no reply. His entire initial submission reads as follows:

> The RAV Line (now Canada Line) project is a unique public works project involving an expenditure of a massive amount of public funds. Therefore, all records pertaining to the project should be available to the public, and I submit there are no valid business or proprietary grounds for concealing or expurgating them.

[11] **3.4 Harms-Based Exceptions**—Past orders have set out the evidentiary requirements for the application of FIPPA's harms-based exceptions. For example, Order 02-50[11] considers the standards for establishing a reasonable expectation of harm regarding s. 17. Order F08-03[12] has this to say about s. 15:

> [27] … As I have said many times before, the evidence required to establish that a harms-based exception like those in ss. 15(1)(a) and (l) must be detailed and convincing enough to establish specific circumstances for the contemplated harm that could reasonably be expected to result from disclosure of the withheld records; it must establish a clear and direct connection between the disclosure of the withheld information and the alleged harm. General speculative or subjective evidence will not suffice.

[12] Previous orders have also recognized that the type of harm contemplated is relevant to an assessment of whether a reasonable likelihood of harm has been established.[13] I have taken the same approach as in previous orders in considering the parties' arguments on the reasonable expectation of harm.

[13] **3.5 Harm to Security of a System**—Canada Line said, that under s. 15(1)(l), it withheld certain information on the grounds that disclosure could

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[9] My references to the "Concession Agreement" in this order include its schedules.
[10] http://www.canadaline.ca/pubLibDocs.asp?ID=4#40
[11] [2002] B.C.I.P.C.D. No. 51.
[12] [2008] B.C.I.P.C.D. No. 6.
[13] See for example F08-22, [2002] B.C.I.P.C.D. No. 40, at paras. 33-57 and Order 00-10, [2000] B.C.I.P.C.D. No. 11, at pp. 9-10. Order F08-22 is the subject of a judicial review which has not yet been heard.

reasonably be expected to harm the security of the Canada Line and ultimately the physical safety of passengers, law enforcement personnel and others. It argued that, in view of the "major acts of terrorism" against public transit systems, such as those of London and Madrid, there is a "well-founded and logical concern" that the Canada Line could be the target of a terrorist attack or other criminal activity. Canada Line submitted that I should take note of special considerations associated with the public's safety.[14] In addition, Canada Line raised concerns about vandalism.

[14] I agree that the possibility of a terrorist attack on public works carries with it the threat of serious and significant harm to public safety. This raises special concerns, which must be taken into consideration when determining whether a public body has discharged its burden to establish a reasonable expectation of harm. In other words, it may, in some circumstances, be appropriate to find that the public body has established a sufficiently clear and direct connection between the disclosure of information and the anticipated harm, even when the likelihood of the harm actually occurring is less than may be required with respect to other types of harm, such as purely financial harm.

[15] On the other hand, the fact that the information involves public works or systems, which may be a target for terrorist activity, does not relieve the public body of its obligation to, at the very least, demonstrate how the release of specific requested information may lead to the anticipated harm. There is a strong public interest in transparency in relation to contracts involving public services to be delivered by private contractors and, in order to fit within the s. 15 exception, there must be some indication that the public interest in transparency is outweighed by risks associated with disclosure.

[16] The text which Canada Line withheld under s. 15 involves the following matters: the level of police and communications personnel required to be provided, the operation of the CCTV system, the tunnel ventilation system and the communications systems and equipment. In addition, Canada Line withheld a diagram titled "Basic Layout of the Control Room" and a diagram titled "Proposed Cross Section of One Bored Tunnel under False Creek and Downtown Vancouver". Finally, Canada Line withheld over 400 pages of drawings.

[17] I accept that the information that Canada Line withheld under s. 15(1)(l) concerns systems as contemplated by that section. However, there is no evidence at all to establish that there is any specific security risk associated with the withheld information. The only evidence relating to s. 15 concerns is set out in five paragraphs of the Affidavit of Jeff Hewitt. The first paragraph sets out Jeff Hewitt's experience as an engineer. The second states that, in his experience, safety and security of public infrastructure are critical considerations

[14] Paras. 20-23, Canada Line's initial submission.

and that many projects, including Canada Line, now consider the threat of terrorism as a risk which must be allocated between owners and operators of infrastructure. The entirety of the evidence relating to how the release of the withheld information might lead to increased risk of terrorism is in the third paragraph, which reads:

> Canada Line is very concerned that if Canada Line were ever a target of terrorist activity, the release of materials referred to in paragraphs 25 to 27 of Canada Line's Initial Submissions in this Inquiry could facilitate or increase the severity of such activity. Similarly, the drawings from Schedule 6, Appendix B1 of the Concession Agreement (at pages 1208-1626 of the Records in Dispute) would enable those planning to harm the system to optimize the harmful impact because they would have access to very detailed structural, electrical and mechanical drawings for the entire system.

[18] The fourth paragraph goes on to state that the information could be used to commit "other mischiefs" and the fifth relates to the distribution of costs of certain activities.

[19] While Canada Line, in its argument, posits some possible risks, it is not clear from an examination of the information itself that it would give rise to such risks. As a result, there must be some evidentiary basis to establish that disclosure will lead to the expectation of harm. Although significant portions of the affidavit were received *in camera*, Jeff Hewitt does not explain how the specific information might be used by terrorists or vandals. He also does not depose that any or all of the withheld information is generally considered to be of a sensitive nature or why this would be the case. He does not describe how the information would enable a criminal or terrorist to identify or exploit any weaknesses in the system.

[20] Canada Line argued that the release of "detailed information" on the number of police who would be patrolling the system, the type and frequency of surveillance, security response times, operational abilities of the CCTV system and technical details of the telephone system would allow those who intend to engage in mischief or in criminal or terrorist activity to identify and exploit weaknesses in the Canada Line and plan such activity in accordance with the level of security and surveillance at a given time, for example, by hindering or delaying response times of security personnel.

[21] However, although Canada Line described the information in question as "detailed", much of it (such as the information on the telephone and radio systems) is in fact extremely general in character. Canada Line has disclosed some information on the requirements and criteria for the alarm, radio, public announcement and telephone systems in Schedule 3 at pp. 460-462 and 467-468 and also at pp. 476-550. The withheld information on these systems is general and appears to be straightforward.

[22] While there is some specific information about the *minimum* staffing levels which must be provided at all times, this will not reveal how many police or communications operators will be on staff at any given time. In any case, this is likely information which could be readily ascertained in some other way. Similarly, the information regarding CCTV requirements is fairly general and, where it is more specific, consists mainly of minimum standards. There is also no explanation of why much of the information, such as the location of the cameras, would not be otherwise ascertainable.

[23] The withheld material includes a general description of the radio equipment to be used. However, it also makes clear that there are a number of possibilities for communications options still being considered. It does not appear that the material is detailed enough to provide any security risk if it is released.

[24] The Canada Line argued that the "disclosure of the operation and workings of the ventilation system could lead to disastrous consequences should a criminal party attempt a gas attack" such as happened with the Tokyo subway system. However, the withheld information on the ventilation system provides only a general description of its workings. Canada Line has not explained in any way how a terrorist could exploit this information to make a gas attack on the Canada Line. Finally, the released material states:

> The Tunnel Ventilation System will be analyzed to ensure the performance of the system under all foreseen normal, abnormal and emergency scenarios in the unique environment of the Canada Line.[15]

[25] This suggests that the outlined ventilation system is simply a starting point, *i.e.*, the details of the ventilation system which are actually to be utilized had not been finalized.

[26] Canada Line argued that the diagram of the "detailed layout of the control room", showing the "exact configuration of the control room, the location of the work stations and the general setup of the system", might enable someone to "seize control" of the Canada Line which, coupled with the diagrams at pp. 1208 to 1626 and information on surveillance and policing, "would allow a potential criminal or terrorist to optimize the harmful impact of their activity".[16] However, the diagram of the control room[17] is referred to as the "basic layout" and uses what appear to be general terms for the workstations; there is no information on the physical or other security for the room; it is not clear from the information itself and Jeff Hewitt does not provide any evidence about how

[15] Page 731.
[16] Paras. 18-33, Canada Line's initial submission; paras. 19-21, Hewitt affidavit.
[17] Page C-14.

knowledge of the room's general layout could assist a criminal or terrorist in committing criminal or terrorist activities

[27] Similarly, the withheld information on maintenance requirements and the staffing plan in Schedule 4 appears straightforward and in line with InTransit BC's responsibilities under the Concession Agreement. I have difficulty understanding how its disclosure could lead to the harms Canada Line foresees. The withheld information on the "configuration and characteristics" of the "YVR3" station[18] is general and describes a hypothetical structure that may not be built. If it is, its structure will be evident to its users. Again, it is not clear from the text how this general information creates or increases the risk of criminal or terrorist activities as contemplated by s. 15(1)(l).

[28] I am also not persuaded that disclosure of the drawings at pp. 1208-1626 could reasonably be expected to result in harms to the various systems they depict. As noted above, Canada Line's entire evidence on the drawings[19] was that disclosure "would enable those planning to harm the system to optimize the harmful impact because they would have access to the very detailed structural, electrical and mechanical drawings for the entire system". The drawings range in subject matter from roadworks to traffic management to electrical and communications systems. Some of them, such as drawings of the proposed changes to the roadway, are not at all technical and cannot be considered sensitive. I cannot conclude that disclosure of every single drawing could reasonably be expected to result in harm to Canada Line's systems. While some of the drawings may contain more detail which could possibly reveal matters of importance, it is not obvious which ones those would be and the Canada Line did not make any submissions which would enable me to make that determination. Without more details, including evidence regarding which of the drawings contain sensitive information and how the disclosure of that specific information could give rise to a security risk, I am unable to conclude that disclosure of the diagrams meets the test in s. 15(1)(l).

[29] Similarly, it has not been shown that the tunnel diagram would allow a criminal party to exploit the structural integrity of the system. The tunnel diagram[20] does reveal the composition of the tunnel, but Canada Line disclosed some information on tunnel composition in the text accompanying the diagram. The remaining information on the tunnel elements in the diagram appears straightforward. Similarly, the withheld information on the underground

[18] Pages 680-681. Canada Line's table and submission did not address the application of s. 15(1)(l) to pp. 680-681 but the pages themselves are annotated with this section. I have therefore included them in my discussion here.
[19] Para. 19, Hewitt affidavit. Canada Line's table does not list s. 15(1)(l) as an exception for the diagrams but I have considered it here because of the Hewitt evidence.
[20] Page. 792.

emergency evacuation system is readily derived from information the Canada Line disclosed in the previous paragraph.[21]

[30] Canada Line did not provide evidence that is detailed and convincing enough to establish specific circumstances for the harm it argued could reasonably be expected to flow from disclosure of the information in question. Nor, as noted above, do the records themselves assist Canada Line's position. Its arguments and evidence are speculative and vague and do not establish a clear and direct link between disclosure of the information in question and the reasonable expectation of harm. I find that s. 15(1)(l) does not apply to any of the information that Canada Line withheld under that section.[22]

[31] **3.6 Harm to Conduct of Aboriginal Relations**—Canada Line said that it withheld the First Nations Consultation plan at pp. 855 and 855A under s. 16(1)(a)(iii). Canada Line argued that disclosure of this plan could lead to the following harms:

- it might be difficult to achieve a timely resolution of any issues that arise with affected aboriginal governments during construction and operation of the Canada Line, leading to delays to the project

- it might create expectations regarding consultations in future projects that would not be appropriate or feasible; this could be detrimental to relations between the government and aboriginal governments, with the result that emerging projects could be delayed, disrupted or "rendered unattainable"

- aboriginal governments' dissatisfaction with the form and level of consultation on the Canada Line project could have a chilling effect on the Province's ability to engage aboriginal governments in future projects[23]

[32] Pages 855 and 855A are in Volume C, the "Operations and Maintenance" section of Schedule 6 to the Agreement. The information in the consultation plan is similar in character to information in the 2004 "Invitation to Submit a Best and Final Offer"[24] ("BAFO"), which outlines consultations the project team had undertaken to date and suggests that the affected aboriginal governments would be aware of the kinds of consultations that the successful proponent would be encouraged to undertake. It is thus not clear from the withheld information how the harms Canada Line envisions might come about from disclosure of these pages.

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[21] Pages 657-658.
[22] See Orders F08-03, [2008] B.C.I.P.C.D. No. 6 and F08-13, [2008] B.C.I.P.C.D. No. 21, which rejected similar arguments. Order F08-13 is the subject of a judicial review which has not yet been heard.
[23] Paras. 34-36, Canada Line's initial submission; paras. 22-23, Hewitt affidavit. A few words of the Hewitt evidence were received *in camera*.
[24] See para. 6.2, Exhibit "D", Arbaud affidavit.

[33] In addition, I note that Canada Line's arguments really amount to an assertion that the consultation plan must be kept secret because some people may find the plan itself inadequate or may find other consultation processes inadequate in comparison. This is not a document which reveals the development of provincial policies or provincial negotiating positions. It is the consultation plan of a contractor who has been awarded a contract by government to construct and operate a publicly-owned transportation system.

[34] Canada Line's arguments on harm are vague, speculative and hypothetical. They do not provide a sufficient evidentiary basis on which to conclude that current or future relations with aboriginal governments could reasonably be expected to be harmed by disclosure. I find that s. 16(1)(a)(iii) does not apply to pp. 855 and 855A.

[35] **3.7 Financial or Economic Harm**—Canada Line argued that disclosure of much of the information it withheld under ss. 17(1)(d) and (e) could reasonably be expected to harm the financial or economic interests of Canada Line, InTransit BC and the Province regarding future negotiations and existing, ongoing and future procurement efforts, as follows:

- negotiated items (such as pricing and payment information and the definitions of "compensation event", "relief event" and "equity threshold IRR [Internal Rate of Return]") reveal the level of financial risk the Province was willing to accept and concessions the Province was willing to make in this project, which it might not be willing to accept or make in future similar projects

- even though the Province can "walk away from any negotiations where terms are unfavourable", disclosure of this information would "materially interfere" with the Province's ability to achieve objectives (*e.g.*, in cost-savings and innovation) and to negotiate effectively with future proponents in P3 projects, because the proponents could use this information during negotiations to make the negotiating process longer and more difficult, leading to higher negotiating costs to the Province, higher profit for the proponents (a monetary gain) and higher costs to taxpayers

- the Province might have no choice in the future but to negotiate with certain proponents where there are only a few qualified bidders, leading to inflated prices; with few bidders, such as here, it is important to keep competition alive during the Request for Proposal ("RFP") and BAFO processes

- premature disclosure of information on procurement strategy for this and other future projects (*e.g.*, the information at p. 667) would harm InTransit BC's ability to procure works and services by providing confidential information on each party's risk profile and methodologies to prospective proponents, which would result in less competition and innovation, less

meaningful and attractive options, lower value for money and an undue and unfair competitive and economic advantage to prospective proponents

- disclosure of certain financial information on work that has not yet been done (*e.g.*, the target utility price figure at p. 378) might serve as a "disincentive" to keep costs down and might affect future negotiations for outstanding RFP opportunities or existing contracts

- projects of this magnitude are unique and fewer contractors might be willing to bid on such projects in future because disclosure of their confidential or proprietary information might give competitors or subcontractors an advantage, compromising the contractors' competitive or negotiating position

- proponents would be less willing to provide detailed and comprehensive information in their bids which they would tailor to be similar to previously accepted proposals, detracting from genuine competition, handicapping the Province in making informed choices, decreasing the likelihood of reaching agreement and leading to increased costs, delays and cost overruns;[25] Canada Line provided further examples of the harm it argued could reasonably be expected to flow from disclosure and also referred to *Fraser Health Authority Hospital Employees' Union et al.*[26]

[36] Canada Line included evidence in support of withholding pp. 856-878,[27] although it did not list these pages in its table of excepted pages. However, the material before me indicates that Canada Line disclosed these pages and so I need not consider s. 17 regarding pp. 856-878.

[37] InTransit BC supports Canada Line's arguments on s. 17 for the same reasons that Canada Line advanced. It also offered the Arbaud and Cuthbert affidavit evidence.[28]

[38] The purpose of s. 17(1)(e) is to protect information "about negotiations" which past orders have interpreted to mean information about negotiating strategies, techniques, criteria, positions or objectives.[29] The information in question here is not such information but rather the product or results of negotiations, *i.e.*, what the parties agreed upon. Section 17(1)(e) therefore has no application here. Canada Line did not argue harm under s. 17(1)(f), a provision which protects the negotiating position of a public body or the

[25] As noted above, SNC withdrew its request for review which concerned Schedule 6.
[26] 2003 BCSC 807; see paras. 42-64, Canada Line's initial submission; paras. 24-54, Hewitt affidavit; Cuthbert affidavit; Buchanan affidavit.
[27] Para. 30, Hewitt affidavit
[28] InTransit BC's initial submission in the inquiry on OIPC File No. F06-28739 at para. 3. An earlier footnote explains who Jean-Marc Arbaud is. Allan Cuthbert is a Professional Engineer employed by SNC-Lavalin; para. 1, Cuthbert affidavit.
[29] See Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example.

government. Rather, the thrust of Canada Line's position is that disclosure of the information could reasonably be expected to harm Canada Line's and InTransit BC's future negotiations and competitive position. Section 17(1)(d) contemplates "undue" (*e.g.*, inappropriate or excessive) loss or gain to a third party, *i.e.*, here, InTransit BC or another contractor. Sections 17(1)(a) to (f) are of course only examples of the s. 17(1) harm that could reasonably be expected to flow from disclosure. It is also worth noting that the opening wording of s. 17(1) contemplates harm to the economic or financial interests of the government or a public body. I have considered the parties' submissions with these things in mind.

[39] There are a number of difficulties with Canada Line's and SNC's arguments and evidence on s. 17 harm. By Canada Line's own admission, the Canada Line is unique in its magnitude. It is thus not clear how it might be a precedent for future projects. Negotiations on future projects will be influenced by their own unique requirements, the prevailing financial climate and other relevant factors. I am not persuaded that the Province would be obliged to accept certain terms or assume certain risks in future, unspecified, negotiations, simply because it did so in these negotiations, which culminated in an agreement that is now four years old. On the contrary, the Province can be presumed to drive the best bargain it can in the circumstances of each project, as can the contractors involved. Contractors would not be at an advantage or disadvantage in future negotiations simply because they knew of InTransit BC's pricing in this case. Nor does obliging contractors to be more competitive in their pricing or in the terms and risks they will accept constitute "undue" harm, in my view.

[40] I also do not see how the disclosure of information on works which have yet to be completed could reasonably be expected to harm InTransit BC's ability to negotiate pricing with subcontractors. The "procurement strategy" is a list of various high-level components of the project while the "target utility price" is a total projected figure. Canada Line did not explain how disclosure of this general information, or the list of "utility conflicts" (a list of utilities that would have to be moved or otherwise dealt with during construction), would put InTransit BC at a disadvantage in its negotiations and this is not evident from the information itself.

[41] I am also not persuaded that InTransit BC, SNC or other contractors would be less likely to bid on future projects if the information were disclosed. Nor do I accept that contractors would provide less comprehensive and innovative bids or that, if they did, the Province would be obliged to accept such bids. Contractors are just as likely, if not more so, to present proposals which are different and more attractively priced, so as to stand out from their competitors and to be more competitive. Moreover, the RFP and BAFO

documentation makes it clear that the Province was free not to enter into an agreement.[30]

[42] As for the argument that Canada Line might have no choice but to negotiate with a small number of bidders, if the field of competition is indeed small (and Canada Line provided no evidence of this), the Province might well find itself in future projects negotiating with the same proponents as it did on the Canada Line project. In such a case, each party would have full knowledge of the concessions, risks and terms the others considered or agreed to for the Canada Line.

[43] Finally, for the same reasons as those the Commissioner gave in Order F08-22 at para. 54, I do not consider that Canada Line's reference to *Fraser Health Authority v. Hospital Employees' Union* assists it.

[44] For all these reasons, I find that s. 17(1) does not authorize the withholding of the information.

[45] **3.8 Harm to Third Party's Business Interests**—InTransit BC argues that the information is commercial information which was supplied in confidence, the disclosure of which will lead to one of the outcomes in s. 21(1)(c). Many orders have considered the application of s. 21[31] and I take the same approach here without repetition.

[46] InTransit BC provided evidence in support of withholding pp. 856-878 under s. 21.[32] As noted elsewhere, the material before me indicates that Canada Line disclosed these pages and so I need not consider InTransit BC's s. 21 arguments on these pages.

Financial or commercial information

[47] InTransit BC argued that the information it believes should be withheld under s. 21 is financial or commercial information, or both, of InTransit BC, InTransit SPV or InTransit Ltd or their respective share or unit holders.[33] I agree. The information in question includes financial terms of the Concession Agreement, services InTransit BC will provide and other types of information that previous orders have found to constitute financial or commercial information of or about third parties.[34] I therefore find that the first part of the s. 21 test is satisfied.

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[30] See Orders 03-15, [2003] B.C.I.P.C.D. No. 15, 00-41, [2000] B.C.I.P.C.D. No. 44, 00-24, [2000] B.C.I.P.C.D. No. 27, and F08-22, all of which rejected much the same arguments for similar reasons.

[31] See for example Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order F08-22.

[32] Para. 42, Arbaud affidavit.

[33] Paras. 46-52, InTransit BC's initial submission.

[34] As I noted in Order F08-10, the Commissioner observed in Order 03-03 at para. 13 that s. 21(1)(a)(ii) information need not be just "of the third party": "I have observed in previous orders

Was the information supplied in confidence?

[48] InTransit BC argued that it (or SNC on its behalf, before InTransit BC existed) "provided" the information in question implicitly and explicitly in confidence. InTransit BC also pointed to affidavit evidence and to confidentiality agreements the parties entered into early in the process and as part of the Concession Agreement (p. 325 of the records) and said that there was a general expectation of confidentiality among the parties in this case, as there is in P3 situations generally. InTransit BC also said that it consistently treated the information in a confidential manner.[35]

[49] With respect to three particular portions of the Concession Agreement (to which InTransit BC referred as items #9, #10 and #23), InTransit BC said that none of the information is generally available to the public. It also argued as follows:[36]

- **Pages C-1—C-89 in Schedule 6 (operations and maintenance) ("Item #9"):** InTransit BC said this section contains extracts from a proposal that SNC submitted to Canada Line in confidence in response to the RFP; the information in Schedule 6 would allow a "reasonably informed observer" to draw accurate inferences about the underlying proposal that SNC supplied to Canada Line.

- **Schedule 10 (corporate information) ("Item #10"):** InTransit BC said this item was supplied by SNC's legal counsel in confidence to Canada Line at Canada Line's request; although some of the partnership unit holdings and directors reflected in Schedule 10 changed by the time the agreement closed and InTransit BC's legal counsel revised the schedule accordingly, Canada Line requested no changes and the schedule was thus not the subject of negotiation between InTransit BC and Canada Line

- **Schedule 16 (financial model) ("Item #23"):** InTransit BC said this item was supplied in confidence to Canada Line during the BAFO phase of the process. It added the following arguments:

  - Schedule 16 is "an unusual item that must be carefully considered in light of the overall context" as, although it is a schedule to a negotiated agreement, it was not negotiable between InTransit BC (or SNC) and Canada Line

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that information 'of' a third party under s. 21(1)(a) need not relate only to that party. The terms of a mutually agreed-upon contract, assuming they are commercial, financial, labour relations, scientific or technical information, are information that is of both contracting parties under s. 21(1)(a)(ii)." Order F08-10 is the subject of a judicial review which has not yet been heard.

[35] Paras. 55-78, InTransit BC's initial submission; Buchanan affidavit; Cuthbert affidavit.

[36] Paras. 82-89, InTransit BC's initial submission; Arbaud affidavit.

- the fact that the model changed from time to time to reflect different components that Canada Line, SNC and InTransit BC supplied "does not mean that the Financial Model itself was negotiated between those parties"[37]

- InTransit BC submitted different financial models with alternate proposals during the RFP and BAFO stages in response to changes in Canada Line's base case (which reflected changes in the level of government funding for the project) and to changes in InTransit BC's financing (which was the outcome of InTransit BC's negotiations with its potential lenders after the project was finalized—in which Canada Line was not involved—and which dictated the form and content of the financial model in Schedule 16)

- Schedule 16 contains the financial model that InTransit BC designed and supplied to Canada Line at the financial close of the project and was at no time negotiable between InTransit BC and Canada Line[38]

[50] I accept from InTransit BC's submissions and evidence that the discussions leading to the Agreement were conducted in confidence. I therefore find that this part of the s. 21(1)(b) test is met.

[51] Of the three items that InTransit BC addressed in particular regarding the issue of "supply", the evidence (including the records) supports a finding of "supplied" only for item #10 and item #23. As for item #9 (Pages C-1—C-89 in Schedule 6), it reads in places as if it was written at the RFP stage. However, the bottom of each page in item #9 contains the phrase "(revised for concession agreement)". I cannot therefore conclude that item #9 was "supplied". I therefore find that the "supply" part of the s. 21(1)(b) test is met for InTransit BC's items #10 and #23 but not item #9.[39]

[52] From a careful reading of InTransit BC's and Canada Line's submissions and evidence, it is clear that the rest of the information in the Concession Agreement to which InTransit BC argues s. 21 applies (or disclosure of which it opposes) was actually negotiated, not "supplied", as past orders have interpreted this term. As stated in Order F08-22, the contents of a concluded contract between a third party and a public body will not normally be considered information that has been "supplied" simply because there is little or no negotiation. The exception to this involves information not susceptible of

[37] Paras. 75-89, InTransit BC's initial submission; para. 16, Arbaud affidavit.
[38] Paras. 19-28, Arbaud affidavit.
[39] See para. 66 of Order 03-02 where the Commissioner refers to discussions of "supplied" in confidence in the judicial review decision on Order 01-39, [2001] B.C.I.P.C.D. No. 40.

negotiation and likely of a proprietary nature. I find that the "supply" part of the s. 21(1)(b) test is not met for this remaining information.

Reasonable expectation of harm

[53] Because only item #10 and item #23 meet the requirement of being supplied in confidence, it is necessary to assess the argument regarding harm related only to those items.

[54] With respect to item #10, InTransit BC did not identify any harm which would flow from disclosure. Rather, the Affidavit of Jean-Marc Arbaud states that the information regarding the number of partnership units and the shares held by the partnership units is not otherwise available to the public and that he has "assumed that the parties holding such units and shares may suffer harm if the information was released to the public".[40] The requirement that the third party demonstrate harm is not met by simply assuming that harm will occur.

[55] With respect to item #23, InTransit BC argues that disclosure could harm InTransit BC's unit holders who are involved in other P3 projects, as it would give competitors an advantage by giving the competitors access to the unit holders' risk profiles and other financial information, thus putting InTransit BC's unit holders at a disadvantage, and would assist opponents of the Canada Line "to directly target harm" at InTransit BC in a way that will cause financial harm to InTransit BC through mischief or delay.[41] In addition, InTransit BC made further argument regarding harm *in camera*.

[56] While I am, for obvious reasons, constrained in my ability to discuss the arguments made *in camera*, I note that they relate, in part, to a process which was to have commenced several months after the submissions in this inquiry were made and which is likely completed by this time. If that process was in fact completed, the relevance of the withheld information for the other concerns expressed *in camera* is greatly diminished or eliminated.

[57] InTransit BC argues that disclosure of percentage values, numerical figures, construction and milestone payment amounts and formulas in Schedules 11 and 18 would cause InTransit BC the same types of harm as those it described just above, as would disclosure of a series of other specified items, examples of which are: the severed portions of pp. C-1—C-89 (Volume C, Schedule 6); the First Nations Consultation Plan (pp. 855-85A); figures on certain requirements on p. 586-597 (Schedule 4) in combination with other figures in Schedule 11 at pp. 973-1074; the staffing plan and quality standards for the

[40] Paras 18, Arbaud affidavit.
[41] Paras. 32-36, Arbaud affidavit.

system in Schedule 4; various other numerical and payment figures (*e.g.*, on pp. 222-223); and formulas.[42]

[58] In Order 00-24,[43] the Commissioner rejected similar arguments on disclosure of the interest rate on a government loan. Among other things, he said that the third party, Conair, had not provided clear evidence as to the state of competition in its marketplace. He also rejected Conair's arguments that it would be prejudiced in negotiating interest rates in future, if prospective lenders knew what it had agreed to in the past, and that it would be otherwise harmed in its future business activities, including bidding on work.

[59] Similarly, in this case, InTransit BC has not provided sufficient evidence to support its arguments on the reasonable expectation of "significant" harm to its own competitive or negotiating position or that of others, nor of undue loss or gain to itself or others on disclosure of the information in question. The Arnaud affidavit asserts that some of InTransit BC's unit holders are involved with other P3 projects nationally and internationally and that they will be at a disadvantage in bidding on other P3 projects if competitors are aware of the risk profile they took on for this project. However, there is no evidence put forward to support this—no explanation of what other projects the unit holders are bidding on nor any explanation as to why knowledge of this risk profile would provide a competitor with an undue advantage in making its own proposal, for an entirely different project. InTransit BC's arguments are speculative and hypothetical and fall far short of establishing harm for the purposes of the third part of the s. 21 test. I do not accept them for reasons similar to those the Commissioner gave in Order 00-24 and those I gave above in the discussion of s. 17.

[60] I also am not prepared to accept, without some evidentiary basis, that members of the public are likely to target InTransit BC if the withheld information is released. The evidence on which InTransit BC relies consists of complaints and public debate about the system, but does not establish a significant threat to target the system or the company through the kind of activities suggested in the submissions. I therefore find that ss. 21(1)(c)(i) and (iii) do not apply here.

Conclusion on s. 21

[61] I find that s. 21(1)(a)(ii) applies to the information in question. I find that s. 21(1)(b) applies only to InTransit BC's items #10 and #23. I find that ss. 21(1)(c)(i) and (iii) do not apply to any of the information in dispute under s. 21. I therefore find that s. 21(1) does not require Canada Line to withhold any of the information to which InTransit BC argues s. 21 applies.

[42] Paras. 37, 39, 42-53, Arbaud affidavit.
[43] [2000] B.C.I.P.C.D. No. 27.

4.0 CONCLUSION

[62] For reasons given above, I make the following orders:

1. I require Canada Line to give the applicant access to all of the information it withheld.

2. I require Canada Line to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before September 23, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

August 11**,** 2009

ORIGINAL SIGNED BY

Celia Francis
Senior Adjudicator

OIPC File Nos.: F06-30431 & F06-28739