



BRITISH COLUMBIA  
FERRY COMMISSION

ORDER  
NUMBER: 10-01

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IN THE MATTER OF  
Section 45.1 of the Coastal Ferry Act, S.B.C. 2003, c. 14  
And

BCFS' Drop Trailer Services:  
Seaspan's Request for Reconsideration of the Commissioner's Decision of October 26, 2010 on  
Confidential Information, and Seaspan's Information Request dated October 14, 2010

**BEFORE:** Martin Crilly, Commissioner, on November 15, 2010

## DETERMINATION

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### Introduction

The Commissioner is in the process of making determinations under s. 45.1 of the *Coastal Ferry Act* (the "Act"). To enable the Commissioner to make those determinations, the Commissioner requested BC Ferry Services Inc. ("BCFS") to provide information as set out in Memorandum 37 issued by the Commissioner on July 19, 2010.

### The BCFS Filing and the Seaspan September 17, 2010 Request for Disclosure of BCFS Confidential Exhibits

BCFS filed information with the Commissioner on August 31, 2010 (the "Filing"), which included the following documents which it requested be treated as confidential: Appendix A – COSA Results; Appendix B – Drop Trailer Prices; and Exhibits B to D to the EES Consulting Report (forming part of Appendix C) (the "Confidential Appendices").

At page 40 of the Filing, BCFS requested confidentiality "be maintained, as contemplated by section 54 of the Act over the commercially sensitive information included in the Confidential Appendices, and any other confidential information provided to the Commissioner upon request".

Prior to the Filing being made, Seaspan Coastal Intermodal Company ("Seaspan") in a letter dated July 30, 2010 had suggested that it would be useful if Seaspan had an opportunity to comment on the information BCFS was to file. BCFS responded to Seaspan's request on August 5, 2010, addressing the confidentiality issue. Seaspan responded to the BCFS response on August 17, 2010.

Seaspan made written submissions dated September 17, 2010 in which it requested disclosure of a subset of the documents in the Confidential Appendices. The subset was comprised of the following exhibits to Appendix C: Exhibit B – Revenue Requirement Classification, Exhibit B-1 – Route 1 Revenue Requirement, Exhibit B-2 – Route 30 Revenue Requirement, Exhibit C-1 – Route 1 Classification, Exhibit C-2 – Route 30 Classification, and Exhibit D-1 – Routes 1 and 30 Allocation (the “Confidential Exhibits”).

The treatment of information provided to the Commissioner by BCFS is governed by sections 52 and 54 of the Act.

Section 52(2)(d) requires the Commissioner to retain every record relied on by the Commissioner in reaching any decision or making any determination or order. Section 52(3) allows any person to inspect those records, subject to the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (“FOIPPA”).

Section 54 of the Act states that despite any obligation imposed on the Commissioner under the Act to obtain, maintain or make available information or records, the Commissioner must not disclose or be compelled to disclose any information or record “unless and only to the extent that such disclosure is consistent with” FOIPPA. The statutory framework under FOIPPA requires specific determinations to be applied to requests for disclosure of records within the custody or under the control of the Commissioner.

Following consideration of written submissions dated September 17, 2010 from Seaspan requesting disclosure of the Confidential Exhibits, the issuance by the Commissioner to BCFS of a Third Party Notice under s. 23 of FOIPPA on September 27, 2010, and consideration of written submissions from BCFS dated October 18, 2010, the Commissioner in a decision dated October 26, 2010 determined that s. 21 of FOIPPA was the applicable provision, and reached the following conclusions:

The Confidential Information provided to the Commission includes, among other things, information regarding BCFS’ unit costs as well as pricing and contractual arrangements with the limited number of its drop trailer customers. Such information meets the definition of “trade secrets” in FOIPPA and would generally be regarded as such in any competitive commercial market. The Confidential Information also contains commercial, financial or technical information of or about BCFS which has been supplied to the Commission in confidence. Access to the Confidential Information would likely allow a competitor such as Seaspan to target easily identifiable high volume drop trailer customers of BCFS with potentially predatory pricing incentives which would likely erode BCFS’ customer base. Therefore, a real possibility exists of future significant harm to the competitive and negotiating position of BCFS.

The Commission finds that the Confidential Information satisfies the statutory elements set out above in section 21, and concludes that the disclosure of Confidential Information to Seaspan would be harmful to the business interests of BCFS. Accordingly, the Commission is required under s. 21 to refuse Seaspan’s request for access to the Confidential Information.

Confidential Information was defined in the October 26, 2010 decision as the documents comprising the Confidential Appendices.

BCFS became a “public body” under FOIPPA on October 1, 2010, when s. 225 of the *Miscellaneous Statutes Amendment Act (No 3)*, S.B.C. 2010, c. 21 came into force. As a result, s. 17 of FOIPPA applies to BCFS rather than s. 21 for information requests made on or after October 1.

### **The Seaspan request for additional information**

Prior to issuance of the Commissioner’s October 26, 2010 decision, Seaspan wrote to the Commissioner requesting additional information regarding the operations of BCFS in a document dated October 14, 2010 and entitled “Information Request #1”. In the cover letter dated October 15, 2010, Seaspan asked the Commissioner to direct BCFS to answer Information Request #1 and to direct BCFS to provide the additional information by October 22, 2010. Seaspan stated that the Information Request was made because the additional information would be useful to Seaspan in preparing its submission, and because it believed the information would also be useful to the Commissioner in its deliberations.

BCFS responded to Information Request #1 by letter to the Commissioner dated October 21, 2010. BCFS submitted that third parties like Seaspan do not have the right to issue information requests on the s. 45.1 inquiry. BCFS submitted that it is in the discretion of the Commissioner under s. 67(1) of the Act to determine what information it requires from BCFS to carry out the Commissioner’s duties, that any procedural rights that third parties may have in the s. 45.1 inquiry should still reflect the fundamentally bilateral nature of the process contemplated under s. 45.1, and that the right given to third parties to comment is more than sufficient to satisfy any procedural duty of fairness that might arise in this statutory context.

### **Seaspan submissions of October 27, 2010**

Seaspan made further written submissions dated October 27, 2010:

1. seeking withdrawal and reconsideration of the Commissioner’s October 26, 2010 decision not to disclose the Confidential Exhibits to Seaspan (the “Reconsideration Request”);
2. in support of its October 14 Information Request (the “Information Request”); and
3. requesting an extension of the deadline for providing its submissions on the s. 45.1 inquiry to the Commissioner.

Seaspan based its submissions regarding the nature of these proceedings on recommendations made in the *Report on Review of Transportation Governance Models* (October 2009) by the Office of the Comptroller General for transparency and independent oversight in the regulation of competitive services.

Seaspan argued that the Reconsideration Request should be granted in respect of the Confidential Exhibits on the following bases: (a) Seaspan was not afforded an opportunity to reply to BCFS’ response to the third party notice, (b) a line-by-line review must be conducted to identify which

information is protected under FOIPPA, (c) Seaspan can renew at any time its request for disclosure under FOIPPA, (d) all of the Confidential Exhibits do not qualify for protection under s. 21 of FOIPPA, (e) without access to the Confidential Exhibits Seaspan would be unable to point out errors, omissions and contradictions in the Filing, which would preclude important issues from being properly tested and sorted out by the inquiry, (f) Seaspan's ability to participate in the proceeding and make reasonable and informed submissions was hindered, and this contravened the legislative intention of s. 45.1(1).

With respect to the Information Request, Seaspan argued that BCFS' response to Seaspan did not dispute the relevance or value of the information sought, and made several arguments based on procedural fairness and natural justice. Seaspan submitted that given the adjudicative nature of the s. 45.1 inquiry, it would be procedurally unfair not to provide Seaspan with the information requested. It also submitted that Seaspan required the information to effectively prepare its case and adequately respond to BCFS' submissions.

Seaspan submitted that the Commissioner must exercise his discretion regarding the extent of any discovery and disclosure in a manner that permits Seaspan to make meaningful and effective submissions. Seaspan argued that concerns about prejudice to BCFS could be addressed by disclosure to counsel and experts for Seaspan on a confidential basis.

In respect of FOIPPA, Seaspan argued that the information sought in the Information Request did not fall within either s. 16 or s. 17. It also argued that the FOIPPA process would take too long because of the deadline for Seaspan's submissions in the s. 45.1 inquiry. Seaspan took the position that the Commissioner could request the information from BCFS under s. 67 of the Act. It argued that the Commissioner has a duty to request the information directly from BCFS under s. 67 rather than require Seaspan to obtain it through another process that would not yield the information until the s. 45.1 inquiry was complete.

Lastly, Seaspan argued that an extension of the deadline for its s. 45.1 submissions was required, to enable it to review the Requested Information before making its submissions.

### **BCFS response of November 2, 2010**

BCFS filed a written response dated November 2, 2010. It argued that it had provided to the Commissioner the information identified in Seaspan's letter of July 30, 2010 and in the Information Request that the Commissioner wished to see, and that the Commissioner has full access to the information he reasonably requires to undertake the s. 45.1 review.

BCFS listed the opportunities afforded to Seaspan to participate and be heard during the s. 45.1 process, and argued that these opportunities met the test set out in *Baker v. Canada*, [1999] 2 S.C.R. 817 in respect of this particular tribunal process. BCFS argued that (a) the process is administrative rather than judicial in nature; (b) the Act provides a right of appeal; (c) the indirect effect of the s. 45.1 review on Seaspan is commercial and therefore does not attract significant procedural rights; and (d) the legitimate expectations factor is not relevant for a new provision such as s. 45.1.

BCFS also argued that Seaspan had several opportunities to respond to BCFS' request for confidential treatment, that the debate was properly brought to a close after BCFS' letter of October 18, 2010, that the current process had met any applicable standard of procedural fairness, and that the issue of confidentiality was properly addressed by the Commissioner in his October 26, 2010 decision with reference to the requirements of the Act and FOIPPA.

### **Extensions of time**

The Commissioner, by email sent October 29, 2010, granted an extension to Seaspan until November 8, 2010 with respect to the deadline for receipt of Seaspan's comments on BCFS' filing in the s. 45.1 inquiry. The Commissioner, by emails sent November 8 and 12, 2010, granted further extensions to Seaspan until November 15 and 19, 2010 respectively.

### **Recusal of Deputy Commissioner**

By email dated November 5, 2010, the Commissioner informed BCFS, Seaspan and others that Deputy Commissioner Sheldon Stoilen had recused himself from further consideration of matters in the s. 45.1 inquiry. The circumstances regarding the recusal are more fully set out in that document.

### **Partial disclosure of information requested by Seaspan on October 15, 2010**

By email dated November 10, 2010 the Commissioner provided Seaspan with the Commissioner-edited responses of BCFS to the 22 questions asked by Seaspan in the Information Request. Seaspan replied the same day, requesting a complete response to its letter of October 27 and an extension to November 19, 2010 for receipt of Seaspan's comments on BCFS filing in the s 45.1 inquiry.

### **Procedural fairness**

Central to the submissions of both Seaspan and BCFS is the extent of procedural fairness that should be afforded to a participant such as Seaspan in this inquiry.

In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada held at para. 22 that:

... the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected .... [T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

The court in *Baker* sets out at paras. 23-27 factors to be considered, including the nature of the decision being made, the process followed in making it, the nature of the statutory scheme and the terms of the legislation pursuant to which the administrative agency operates, the importance of the decision to the persons affected, the legitimate expectations of those persons that a certain procedure will be followed, and the choices of procedure made by the agency in light of its institutional constraints.

The matter under consideration is a determination by the Commissioner under s. 45.1(1) of whether BCFS (a) is pricing its drop trailer service below the direct costs and an appropriate proportion of the indirect costs associated with providing that service, or (b) has an unfair competitive advantage for any of the reasons listed in s. 45.1(1).

This determination will directly affect BCFS. The determination could have an indirect effect on the commercial interests of Seaspan, as a competitor of BCFS in the drop trailer market. The determination could also affect persons who use drop trailer services. In addition, because the income received by BCFS from its drop trailer services has an impact on its overall financial position, the determination could have an impact on the rates charged to users of BCFS' other services.

Seaspan has based its submissions on recommendations in the *Report on Review of Transportation Governance Models*. However, the statute itself is the primary source of legislative intention.

Section 45.1 was recently enacted, and this is the first inquiry under that section. The Act does not import any provisions from the *Administrative Tribunals Act*, and the Act does not contain any provisions setting out procedural requirements for this inquiry. Unlike under s. 44 of the Act, a public hearing is not required under s. 45.1. Section 50 of the Act provides for appeal on questions of law to the Court of Appeal with leave. Subject to that provision, orders, decisions or proceedings of the Commissioner are excluded from review under s. 49(2) of the Act.

This inquiry into the pricing practices of BCFS, and whether they create an unfair competitive advantage, is being carried out by the filing of written submissions by BCFS, with an opportunity to comment in writing given to the public. The Commissioner is being assisted in its review of the Filing and other submissions by Pricewaterhouse Coopers, an independent advisor retained by the Commissioner.

Section 54 of the Act prohibits the Commissioner from disclosing information provided to him under the Act unless such disclosure is consistent with FOIPPA. The Commissioner is a public body for purposes of FOIPPA.

Based on all of these considerations, the Commissioner has determined that procedural fairness in these circumstances entitles Seaspan to sufficient disclosure to allow Seaspan to participate meaningfully and present its case.

A central issue before the Commissioner is the interpretation of the word "appropriate" in the phrase "appropriate allocation of indirect costs" in s. 45.1(1). The principles and methodology that BCFS considers appropriate for allocating indirect costs are evident in its non-confidential filing of August 31, 2010, notably in Appendix C (Letter from EES Consulting). The Commissioner is therefore especially interested in submissions on the principles and methodology given in BCFS' filing, and also on those that should be employed.

In the Commissioner's view:

- (a) the Filing (without the Confidential Exhibits), and
- (b) the elaboration of BCFS' methodology in the Commissioner-edited answers to the Information Request

provide sufficient information about the principles and methodology that BCFS consider appropriate, to allow for meaningful submissions.

Once the Commissioner has determined the principles and methodology that should be employed, he may apply them to BCFS' cost base. The Commissioner would first need to satisfy himself that the cost base is, among other things, net of any unfair competitive advantage, as may result from factors such as the three listed in s 45.1(1), which he may consider BCFS to have. Accordingly, the Commissioner is also especially interested in submissions on the nature and size of any unfair competitive advantage.

In the Commissioner's view, the Confidential Exhibits have no bearing on, and contain no information relative to, unfair competitive advantage. Their disclosure could not add anything to a submission on the nature and size of any unfair competitive advantage that BCFS might be considered to have.

### **Reconsideration request**

The Commissioner has reviewed the October 26, 2010 decision in light of the submissions of BCFS and Seaspan summarized above, and has decided that Seaspan's request for reconsideration should be granted in part.

The October 26, 2010 decision defines Confidential Information as meaning the Confidential Appendices. However, Seaspan only requested access to the Confidential Exhibits.

The Commissioner is of the view that Seaspan was afforded sufficient procedural fairness with respect to an opportunity to make submissions on access to the Confidential Exhibits. The Commissioner followed the procedure set out in FOIPPA for a s. 21 determination.

In addition to principles of procedural fairness, the Commissioner is also required to comply with FOIPPA in making determinations about disclosure of the Confidential Exhibits.

The Commissioner has reviewed the Confidential Exhibits again in light of Seaspan's submission that a line-by-line review is required, and to determine whether the conclusions reached in the October 26, 2010 decision are valid in respect of the narrower set of documents comprising the Confidential Exhibits.

Applying the test set out in s. 21 of FOIPPA, the Commissioner has concluded that Exhibit B – Revenue Requirement Classification does not contain information that is precluded from disclosure, because the disclosure of that information fails to meet the test set out in s. 21(1)(c).

The Commissioner has also concluded that the headings of table columns and rows can be disclosed, but with all the numerical data in the body of each table removed, in the following exhibits to Appendix C: Exhibit B-1 – Route 1 Revenue Requirement, Exhibit B-2 – Route 30

Revenue Requirement, Exhibit C-1 – Route 1 Classification, Exhibit C-2 – Route 30 Classification, and Exhibit D-1 – Routes 1 and 30 Allocation. The numerical data in the bodies of the respective tables meet the test for exclusion under s. 21 of FOIPPA on the basis set out in the October 26, 2010 decision.

As was determined in the Commissioner’s October 26, 2010 decision, access to the cost data in the Confidential Exhibits would likely allow a competitor such as Seaspan to target easily identifiable high volume drop trailer customers of BCFS with potentially predatory pricing incentives which would likely erode BCFS’ customer base. Disclosure of the data in the Confidential Exhibits to Seaspan would be harmful to the business interests of BCFS.

In addition, after a possible future determination by the Commission on an appropriate methodology for allocating indirect costs, a competitor such as Seaspan, if also in possession of all of the data in the Confidential Exhibits, would likely be able to estimate a minimum tariff set by the Commission under s. 45.1(2)(b). While the Commission has not yet determined that a potential future minimum tariff should be kept confidential, the Commission is mindful that it may do so in future. To disclose all the data in the Confidential Exhibits could render ineffective a potential future determination that a minimum tariff be kept confidential.

The Commissioner therefore has decided to grant the Reconsideration Request in part, but affirms his decision not to disclose the numerical data in the Confidential Exhibits.

### **Information request**

In the exercise of his power under s. 67 of the Act to request information from BCFS, the Commissioner asked BCFS to respond to the 22 questions in the Information Request. The Commissioner then considered how much of the information he obtained could be disclosed to Seaspan, given the constraints imposed by s. 54 of the Act.

Disclosure of this additional information is governed by s. 17 of FOIPPA, as BCFS became a public body under FOIPPA on October 1, 2010.

Decisions of the Information and Privacy Commissioner under s. 17 have required that a real and substantial possibility of future harm to financial or economic interests must be established. The Commissioner applied that test in his review of the answers provided by BCFS to the Information Request.

The Commissioner determined that some of the information provided by BCFS meets the s. 17 test (the “Excluded Information”), and on November 10, 2010 provided to Seaspan an edited version of BCFS’ answers without the Excluded Information. That document, entitled “Commission’s Responses to SCIC’s Disclosure Request attached to SCIC’s cover letter dated October 15, 2010”, states the basis for exclusion under s. 17. In summary:

- The Commissioner identified some of the requested information as relating to existing contracts and pricing incentives, the disclosure of which could reasonably be expected to be harmful to the financial or economic interests of BCFS because Seaspan could use it to target individual customers of BCFS.

- Similarly, identification of specific sailings where drop trailers were carried, and information on the number of live semi trailers carried per year by BCFS, was determined to be information that could be used to target BCFS' business and could reasonably be expected to be harmful to the financial or economic interests of BCFS.
- Information regarding what percent of drop trailer service pays the published tariff rate was determined to be information that could help Seaspan determine the actual prices paid by BCFS' drop trailer customers. Given the competitive environment surrounding the drop trailer business, the Commissioner determined that this information amounts to a trade secret of BCFS, and that its disclosure could reasonably be expected to be harmful to the financial or economic interests of BCFS.
- Part of BCFS' response to a question asking about off-peak incremental live trailer service as compared to off-peak incremental drop trailer service was withheld, because the Commissioner determined that its disclosure could assist Seaspan in assessing market conditions and result in harm to the financial or economic interests of BCFS.

The Commissioner has concluded that disclosure of the Excluded Information would cause a real and substantial possibility of future harm to the financial or economic interests of BCFS. The Commissioner has discretion under s. 17 of FOIPPA to disclose the Excluded Information. In exercising that discretion, the Commissioner has considered the degree of procedural fairness to which Seaspan is entitled, the purpose of the s. 45.1 inquiry, whether Seaspan can make meaningful submissions without access to the Excluded Information, and the extent to which disclosure of the Excluded Information to Seaspan would cause a real and substantial possibility of future harm to BCFS.

In exercising this discretion, the Commissioner has also considered the principles set out in s. 38 of the Act. The Commissioner is required to undertake regulation of BCFS in relation to the core ferry services provided by it, and the tariffs that may be charged for those core ferry services, in accordance with those principles. Those principles include placing priority on the financial sustainability of the ferry operator, and encouraging ferry operators to adopt a commercial approach to ferry service delivery.

After consideration of these factors, the Commissioner has decided not to disclose the Excluded Information to Seaspan. The potential for harm to BCFS outweighs Seaspan's need for access to the Excluded Information for purposes of participation in the s. 45.1 inquiry.

The Commissioner has considered Seaspan's request that any prejudice to Seaspan could be addressed by disclosure of the Excluded Information to counsel and experts for Seaspan on a confidential basis. The Commissioner has decided not to proceed with this type of confidentiality order. First, it is not contemplated in the Act or in FOIPPA. Second, it is not required by the level of procedural fairness to which Seaspan is entitled in the s. 45.1 inquiry. Seaspan can make meaningful submissions without access to the Excluded Information. Third, one of the roles of the independent advisor to the Commission is to review the Filing and other information provided by BCFS for errors, omissions and contradictions.

### **Extension request**

The Commissioner has been cognisant throughout of the difficulties inherent in Seaspan preparing its submissions without a final determination on disclosure of the Confidential Exhibits and the Excluded Information. These determinations have now been made. However, the Commissioner has decided not to release Exhibit B and the edited versions of Exhibits B-1, B-2, C-1, C-2 and D-1 to Seaspan until Friday November 19, 2010. This is in order to give BCFS an opportunity, as was requested in its submission of August 31, 2010, to take any additional steps it considers are required to protect the confidentiality of this information.

The Commissioner will extend the deadline for receipt of Seaspan's comments on the Filing to 5:00 p.m. on November 26, 2010. No other party has been granted this extension.

### **Conclusion**

Having considered Seaspan's requests, the Commissioner has determined that:

1. The Reconsideration Request is granted in part.
2. Subject to paragraph 4 below, Seaspan is to receive Exhibit B to Appendix C, and the Commissioner-edited versions of Exhibits B-1, B-2, C-1, C-2 and D-1 to Appendix C on Friday, November 19, 2010.
3. Seaspan is to receive the Commissioner-edited responses of BCFS to the Information Request. These were provided to Seaspan by email on November 10, 2010.
4. BCFS will have until 5:00 p.m., Thursday November 18, 2010 to advise the Commissioner in writing whether it intends to commence any further process to prevent disclosure to Seaspan of Exhibit B to Appendix C, and the Commissioner-edited versions of Exhibits B-1, B-2, C-1, C-2 and D-1 to Appendix C. In the absence of such written advice, the documents referred to in paragraph 2 will be released to Seaspan on November 19, 2010.
5. The deadline for Seaspan to file its comments on the Filing is extended to 5:00 p.m. on November 26, 2010.

**DATED** in Comox, in the Province of British Columbia, this 15th day of November, 2010.

BY ORDER



Martin Crilly  
British Columbia Ferries Commissioner