

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Houston v. Nova Scotia (Minister of Transportation and Infrastructure Renewal)*, 2021 NSSC 23

**Date:** 20210216

**Docket:** Hfx 485067

**Registry:** Halifax

**Between:**

Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia  
Appellant

v.

Minister of Department of Transportation and Infrastructure Renewal and Bay  
Ferries Limited  
Respondents

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** November 12, 19 and December 3, 2020, in Halifax, Nova Scotia

**Written Decision:** February 16, 2021

**Subject:** *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993 c.5

**Summary:** Tim Houston, Leader of the Progressive Conservative Caucus of Nova Scotia applied to the Nova Scotia government under the *Freedom of Information and Protection of Privacy Act (FOIPOP Act)* for release of the management fee paid to Bay Ferries Limited (BFL) pursuant to a funding agreement between the Province and BFL under which BFL was to operate a seasonal ferry service between Yarmouth, Nova Scotia and Maine. The Province refused to disclose the fee. The Nova Scotia Privacy Commissioner recommended the requested information be disclosed. The Deputy Minister of Transportation and Infrastructure Renewal did not accept the

Commissioner's funding and refused disclosure. Mr. Houston appealed to the Supreme Court. The Minister of Transportation and Infrastructure Renewal and BFL were respondents.

**Issue:** Did the management fee come within the exemptions set out in sections 21(1) or 17(1) of the FOIPOP Act so that the management fee should not be disclosed?

**Result:** The management fee did not come within exemptions 21(1) or 17(1) of the *FOIPOP Act* and therefore is to be disclosed.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
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**DECISION**

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**Written Decision:** February 16, 2021

**Counsel** Nicole LaFosse Parker and Guy LaFosse Q.C., for the Appellant  
Agnes E. MacNeil Q.C., for the Respondent Minister of  
Department of Transportation and Infrastructure  
Scott R. Campbell, for the Respondent Bay Ferries Limited

**By the Court:**

[1] Her Majesty the Queen in the Right of the Province of Nova Scotia as represented by the Minister of Transportation and Infrastructural Renewal and Bay Ferries Limited (BFL) entered into a funding agreement made as of March 24, 2016 pursuant to which BFL was to operate a seasonal ferry service for a ten year term between Yarmouth, Nova Scotia and Portland, Maine or another port in the state of Maine agreed to by the parties. The Agreement provided the Province would pay a management fee to BFL each year.

[2] On May 3, 2016, the Progressive Conservative Caucus of Nova Scotia filed a request pursuant to the *Freedom of Information and Protection of Privacy Act*, SNS 1993 c.5 (*FOIPOP Act*) for all emails, memos, contracts and schedules regarding the payment of management fees to Bay Ferries, including the amount of fees to be paid and any criteria established around the payments. The Department of Transportation and Infrastructure Renewal (Department) advised it was withholding the requested information under the harm to economic interest exemption s.17 of the *Act*.

[3] The Department's decision was reviewed by the Information and Privacy Commissioner for Nova Scotia and in a Review Report dated December 17, 2018 the Commissioner found the sections 17 and 21 exemptions in the *Act* did not apply to the withheld information and recommended the Department disclose the withheld information in full.

[4] By letter dated January 16, 2019 the Deputy Minister of the Department notified the Commissioner the Department did not accept her finding that the application of sections 17 or 21 was not established and that the Department did not intend to make the requested disclosure.

[5] The Progressive Conservative Caucus of Nova Scotia filed an appeal in this Court seeking release of all information requested in FOIPOP application 2016-00241-TIR May 3, 2016.

[6] In an order issued April 30, 2019 Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia was substituted for the Progressive Conservative Caucus of Nova Scotia as an appellant. The Minister of the Department of Transportation and Infrastructure Renewal replaced the Department as the first named respondent.

[7] Subsequently Mr. Houston agreed he is not seeking all the information in the FOIPOP request of May 3, 2016 but only the redacted portions of clause 1.01 “Base Management Fee” and clause 9.01 of the funding agreement. I have reviewed the redacted information which Mr. Houston is seeking.

[8] The evidence is as follows:

[9] An affidavit of Mark MacDonald, Q.C., the chairman and Chief Executive Officer of Atlantic Ferries Holdings Limited (AFHL) was entered into evidence. AFHL has three subsidiaries: the respondent BFL; Northumberland Ferries Limited which has operated the Prince Edward Island/Nova Scotia ferry service continuously since 1941 and Bay Ferries Management Limited which has undertaken various assignments, primarily international, since its founding in 2005.

[10] Mr. Macdonald set out BFL’s objection to the disclosure sought in this appeal in his affidavit stating:

6. As I explain below, BFL objects to public disclosure of the information at issue, which includes the amount of a management fee paid by the Province of Nova Scotia to BFL. The amount of this management fee is confidential and commercially sensitive information, because it essentially represents the margin that the company is willing to accept on a service of this nature. In the hands of a competitor in the ferry industry, the release of this information would give considerable insight into how BFL structures its bids in any competitive tendering process.

7. In this context, I am concerned that public disclosure of the management fee will harm BFL’s competitive position in the ferry industry, particularly when it comes to BFL’s participation in public procurement opportunities.

8. I am also concerned that public disclosure of the management fee will prejudice the ability of BFL to negotiate the lowest possible price for goods and services from third party suppliers in a competitive marketplace.

[11] All services provided by all subsidiaries of AFHL currently arise either as a result of government-initiated processes or pursuant to contracts with government.

[12] The Prince Edward Island/Nova Scotia ferry service operated pursuant to contracts with the Government of Canada which have typically been of one, two or three year terms. The current contract expires on March 31, 2020 but the federal government has indicated its intention to extend the arrangements to March 31, 2022. However, the government could initiate a competitive tendering process at any time.

[13] The Saint John, New Brunswick/Digby, Nova Scotia ferry service is operated by BFL pursuant to contractual arrangements with the Governments of Canada, Nova Scotia and New Brunswick. BFL was selected as the operator following a government-initiated Request for Expressions of Interest to various ferry and other marine operators. This service has also been conducted on contracts of one, two or three year terms. As with the Nova Scotia/Prince Edward Island service the current operating contract expires March 31, 2020 but the Government of Canada has indicated its intention to extend the arrangements to March 31, 2022.

[14] BFL commenced operating the Yarmouth/Maine ferry service upon privatization of the service in 1997. The service was operated without government contribution until 2006, when a limited fixed financial contribution was agreed upon in the context of expanding the service to include both Portland and Bar Harbor, Maine.

[15] During the recession of 2008/2009, BFL informed the Province of Nova Scotia (Province) additional financial contribution was required in order for BFL to continue the service given the general economic conditions, rapidly increasing oil prices and challenges from the new Canada-United States passport law. In December 2009, the Province elected to terminate its contribution and BFL announced termination of the service.

[16] The Province initiated a request for proposals process for resumption of the service in 2013 but BFL did not consider the terms of the process to be realistic and declined to participate. The service was operated by MV NOVA STAR for two summers, 2014 and 2015.

[17] In mid 2015, the Province indicated its intention to seek an operator for the service. On September 8, 2015, the Province issued an invitation to all qualified parties to respond to a Request for Submissions for the ferry service. On September 25, 2015, BFL responded which led to the funding agreement between BFL and the Province.

[18] As a result of the disruption to the ferry service, including the absence of service from 2010 to 2013, the bankruptcy of Nova Star and extensive negative attention in the media and from politicians, BFL was only prepared to undertake the service based on a financial structure which would reimburse BFL and the payment of an incentivized management fee which could increase with the success of the service.

[19] Pursuant to the funding agreement, BFL is reimbursed on an agreed basis, with no markups or profit element, for the amount of the cash deficiency, namely, the amount by which eligible expenses for the service exceed total revenue. In addition, BFL is paid a management fee. The funding agreement specifies the amount of the agreed upon management fee. All of the financial terms are publicly disclosed, except the amount of the management fee. The aggregate amounts expended by the Province pursuant to the funding agreement are publicly disclosed.

[20] In his affidavit, Mr. MacDonald described the management fee:

36. In essence, the Management Fee represents the margin that the company is willing to accept to undertake the work. That rate of return is commercially sensitive information, which is informed by a number of factors, including:

- (a) BFL's extensive knowledge of and experience in the worldwide ferry industry;
- (b) BFL's ability to accurately predict the revenue and expenses associated with operation of a ferry service of this size and of this nature;
- (c) BFL's credibility in insurance markets and ability to obtain insurance coverages required to insure both the ferry vessel itself and operation of the ferry service (which, in this instance, involves liability coverage in excess of \$4 billion USD);
- (d) BFL's experience responding to the operating challenges typically associated with this type of international ferry service;
- (e) BFL's experience in the technical and safety management of such a ferry service, including the implementation of the company's maintenance management system and safety management system;
- (f) The level of effort required to undertake a ferry service of this nature; and
- (g) BFL's specific experience with a Yarmouth/Maine ferry service in the past and knowledge of the specific market environment of this ferry service.

[21] The funding agreement expires in 2026. BFL assumes any renewal of the service will be subject to a competitive tendering process. If that happens, BFL intends to bid for the continued operation of the ferry service.

[22] On May 4, 2017, with approximately twelve hours notice. Public Works and Government Services Canada initiated a solicitation in connection with three Eastern Canadian ferry services, including the Saint John/Digby service and the Prince Edward Island/Nova Scotia service. Pursuant to the solicitation the government sought feedback concerning the delivery of ferry services under long term contracts.

It was intended this process could lead to a competitive process for long term supply of assets and ferry service. Both BFL and Northumberland Ferries Limited submitted a response to the solicitation and attended meetings with federal bid authorities. As far as Mr. MacDonald knows, nothing further has taken place pursuant to the process. Mr. MacDonald does not know what process will take place when the current contracts expire.

[23] In setting out why disclosure of the management fee would harm BFL, Mr. MacDonald deposed:

43. The Management Fee is substantially indicative of BFL's acceptable margin for operating the Yarmouth/Maine ferry service. Public disclosure of pricing and fee structures that our companies have charged for this and other services would be detrimental to our competitive position, as we continue to compete to provide ferry services in different jurisdictions. It is for this reason that the amount of the Management Fee was provided to the Province, and included in the Province Agreement, on the understanding and with express reference to BFL's position that the information is confidential and commercially sensitive.

44. Public disclosure of the amount of the Management Fee would allow a knowledgeable competitor to gain considerable insight into the tendering approach of BFL in future procurement processes. In the result, the concern is that a knowledgeable competitor in the ferry industry would be able to predict and underbid BFL's tender pricing. This would threaten the ability of BFL to participate in future procurement processes in a fair and meaningful way.

45. I believe this concern is legitimate and reasonable, because I know that the reverse would be true. With such margin details about our competitors in the ferry industry, we would be able to gain confidential insight into how these companies would tender in a future competitive process. This is because such information provides an informative glimpse into the mindset and operations of a competitor; it indicates their acceptable rate of return, and the value they place upon the service they provide. We possess no such information in relation to any of our competitors.

46. To give some sense of the competitive landscape in the ferry industry in Canada, I anticipate that there are approximately ten to fifteen companies that are potentially competing with the Group at any given time in Canada. By and large, these are sophisticated entities, including entities owned by other provincial governments, with considerable knowledge and experience in the ferry industry. As was the case in response to the 2017 RFI Process, I anticipate that many – if not all – of these competitors will seriously consider participating in future procurement processes for ferry services in Canada.

47. The Management Fee approach to the financial structure of ferry service contracts has been implemented by the Group in various jurisdictions and will, in all likelihood, continue to form a key part of the Group's participation in future competitive bids in the ferry industry. Going forward, the Group – including BFL

– intends to respond to future procurement opportunities as they may continue to arise in the Maritimes (and elsewhere around the world) for the provision of ferry services.

48. For all these reasons, BFL has insisted that the Province keep the amount of the Management Fee confidential. Although I agree that Nova Scotia taxpayers should be entitled to know the total amount of money that the Province contributes to the Yarmouth/Maine ferry service in a given year, I maintain that the subset amount of the Management Fee itself must be withheld from public disclosure in order to prevent against harm to BFL's competitive position and the resulting financial loss that can ensue.

49. I am also concerned about the impact of public disclosure of the Management Fee on BFL's ability to preserve its negotiating position with suppliers on the Yarmouth/Maine ferry service itself. This would include, for example, third party suppliers of crew, fuel, food, beverage and other operating-related services.

50. BFL does not reveal the amount of the Management Fee to any such suppliers, in the same way as BFL would not wish its margins to be revealed to any of its suppliers in the ordinary course. If BFL's acceptable margins were revealed to these suppliers, this would – in all likelihood – prejudice BFL's ability to negotiate the lowest price for third party goods and services. In a competitive market, suppliers can be expected to leverage this information to their benefit.

[24] Mr. MacDonald stated any resultant increase in supplier costs would be borne as eligible expenses under the funding agreement.

[25] In cross-examination, Mr. MacDonald testified BFL had an understanding with the Province that the management fee was confidential but subject to the FOIPOP Act. The management fee represents the profit BFL makes on the ferry service. Pricing on various ferry services are generally the same, but the cost of transport of fuel are different and not all suppliers of goods are common to all companies. Pricing differs. The ferry services do whatever they can to get the lowest price for goods but there are different models for different ferry services. The management fee is the rate BFL established in looking at the ferry service. The funding agreement has provision for the management fee to grow if BFL reduces the cost deficiency of the service.

[26] In commenting on the factors used in determining the management fee, Mr. MacDonald testified BFL, and associated companies, have operated in Eastern Canada for years as well as in the Caribbean and Lake Ontario. He has been active in the International Ferry Organization. BFL's skill in predicting costs is important to government. BFL works with the Province to provide cost projections. For example, BFL knew the terms of the process in 2013 were unrealistic and did not

bid. BFL had the skill to accurately project the costs of the ferry operation, but not the pandemic or problems in Bar Harbor. BFL's experience with the Yarmouth/Maine ferry service was one of the factors it took into consideration to establish the management fee.

[27] Mr. MacDonald testified any competitive procurement process should have a level playing field. The ferry industry is a very narrow discrete industry. Knowing BFL's approach to the management fee could be beneficial to a competitor. Currently halfway through the ten year term of the contract, in two or three years the Province will start planning what will happen at the end of the contract. If BFL knew a competitor's management fee, it would be relevant in how BFL would calculate its management fee. However, BFL would not have a loss as it would be a cost-plus contract.

[28] There was at least one circumstance, but there could be more, when the amount of BFL's management fee was publicly disclosed as well as the operating costs of the ferry service.

[29] BFL was aware the *FOIPOP Act* applied to the funding agreement.

[30] Diane Saurette, a chartered professional accountant, is Executive Director of Finance and Strategic Capital and Infrastructure Planning with the Department. Ms. Saurette has worked in government since September 2008, when she took a position as a corporate Financial Analyst and a year later became Senior Corporate Financial Analyst, both with the Province's Treasury and Policy Board. She assumed her current position in April 2013. Ms. Saurette agrees with Mr. MacDonald's statements in his affidavit concerning the history of the Yarmouth-Maine ferry service.

[31] Ms. Saurette's involvement with the Yarmouth-Maine ferry service began in the spring of 2015. She was part of the Senior Management Ferry Committee tasked with managing the existing contract with Nova Star and overseeing the request for submissions process in the coming year.

[32] On September 8, 2015, the Province issued a Request for Submissions with respect to the ferry service. There were only four bids received in response, one of which was from BFL, which was the successful bidder. The contract entered into with BFL was for a ten year term commencing April 1, 2016. The funding agreement with BFL provides the Province pays the actual costs of the ferry service net of

revenues, plus a management fee. The management fee is incentivized so increased success in the operation of the ferry service means an increased management fee.

[33] In discussing the nature of the contract with BFL, her discussions with Mr. MacDonald and the Department's concerns regarding the release of the BFL management fee information, Ms. Saurette deposed:

17. This "cost-plus" agreement makes the actual costs of the ferry service transparent to the Province. As part of the Agreement, Bay Ferries agreed to an audit of their books to support the expenses claimed. The Province can satisfy itself that the costs presented have actually been incurred and it gives the Province a solid foundation for preparing budgets for the ferry service going forward.

18. The cost-plus agreement also enables the Province to better predict costs, which supports creating better forecasts and estimates for the budgeting process. It mitigates the risk of large, unexpected price fluctuations.

19. Another benefit to the cost-plus agreement is that it puts the Province in a better position to assess the actual cost of the services in order to make informed decisions regarding the services.

20. Often bids are received which build the bidder's profit into the various components of the bid, but it is not clear which components include a profit mark-up, or how much the profit margin is. This was the situation with Nova Star. The structure of that contract did not provide transparency as to the profit being charged or the actual costs being incurred.

21. The total costs of the ferry services provided by Bay Ferries are published annually in the Province's Public Accounts.

22. Based on discussions I had with Mr. MacDonald, I understood that it was important to Bay Ferries that the management fee information be kept confidential. This information was considered to be confidential, commercially sensitive information, that, if disclosed, could harm Bay Ferries' business. This is reflected in paragraph 17.01 of the agreement which is contained in the redacted Record.

23. TIR has a number of concerns regarding the consequences of releasing the Bay Ferries' management fee information, which include the following:

(a) Release of Bay Ferries' management fee or profit margin information may send a message to other companies that the Province could release their confidential business information, dissuading them from doing business with the Province.

(b) If businesses are not willing to enter into transactions with the Province because of the risk of the disclosure of their commercially sensitive information, it will result in a less competitive environment which in turn will likely drive costs higher for the Province;

(c) Mr. MacDonald, Bay Ferries, and Mr. MacDonald's other companies may not wish to continue to do business with the Province if their confidential business information is released;

(d) The release could dissuade bidders from entering into a cost-plus structured agreement with the Province, which has been beneficial to the Province in this case.

24. As set out in his Affidavit, Mr. MacDonald and Bay Ferries have experience offering ferry services and have been in business for a long time. TIR is concerned that the release of this information will harm its business relationship with Mr. MacDonald and Bay Ferries to the detriment of the taxpayers of this Province.

[34] In cross-examination, Ms. Saurette testified the Privacy Commissioner decided the requested information should be released. The Deputy Minister of the Department made the decision not to release the information. Ms. Saurette raised the concerns set out in paragraphs 23 and 24 of her affidavit with the Deputy Minister and Minister of the Department.

[35] Ms. Saurette agreed the *FOIPOP Act* applies to the *Public Procurement Act*.

[36] It was Ms. Saurette's opinion if a business is successful in obtaining a contract with the Province and its profit margin is disclosed, it could discourage other businesses from doing business with the Province. She testified management fees are disclosed in some situations but this was the first one in her Department.

[37] When Ms. Saurette deposed Mr. MacDonald, BFL and related companies may not wish to do business with the Province if confidential business information is released she testified as an accountant, that was her opinion looking at risk and risk mitigation. She did not consider this opinion was at odds with Mr. MacDonald's statement that BFL and related companies intended to respond to future procurement opportunities in the Maritimes and elsewhere in the world for the provision of ferry services. Ms. Saurette confirmed she and the Department had the same opinion concerning the disclosure of the BFL management fee.

[38] On re-direct examination Ms. Saurette testified the Department considered the management fee confidential because it is a profit margin. In her position, which she has held for nine years, she deals with large projects for the Department and has been involved with a lot of large contracts.

## Analysis

[39] The right of appeal to the Supreme Court is set out in s.41(1) of the *FOIPOP Act*:

41 (1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the *Nova Scotia Civil Procedure Rules* or by the regulations.

[40] The powers of the Court in dealing with an appeal are set out in s.42 of the *Act*:

42 (1) On an appeal, the Supreme Court may

- (a) determine the matter *de novo*; and
- (b) examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to the *Act*.

...

(5) Where the head of the public body has refused to give access to a record or part of it, the Supreme Court, if it determines that the head of the public body is not authorized to refuse to give access to the record or part of it, shall

- (a) order the head of the public body to give the applicant access to the record or part of it, subject to any conditions that the Supreme Court considers appropriate; or
- (b) make any other order that the Supreme Court considers appropriate.

(6) Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record.

[41] The burden of proof is set out in s.45(1) of the *Act*:

45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

[42] Mr. Houston brought the appeal and, as provided in the *Act*, I determine the matter *de novo*. The burden of proof is on the respondents.

[43] The issue for the Court is does the information requested fall within the exemptions provided in sections 17(1) and 21(1) of the *FOIPOP Act* such that it should not be disclosed?

[44] The purpose of the *Act* is set out in s.2 which provides:

2 The purpose of this Act is

- (a) To ensure that public bodies are fully accountable to the public by
  - (i) giving the public a right of access to records,
  - (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
  - (iii) specifying limited exceptions to the rights of access,
  - (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
  - (v) providing for an independent review of decisions made pursuant to the Act; and
- (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
  - (i) facilitate informed public participation in policy formulation,
  - (ii) ensure fairness in government decision-making.
  - (iii) permit the airing and reconciliation of divergent views;
- (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

[45] In dealing with the purpose of the *FOIPOP Act*, Saunders J.A., in giving the Court's judgment in *O'Connor v. Nova Scotia (Deputy Minister of the Priorities & Planning Secretariat)*, 2001 NSCA 132, stated at paras. 40 and 41:

40 Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

41 The FOIPOP Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.

[46] And at paras. 55 to 57:

55 In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure the public bodies are *fully* accountable to the public, so too does it stand apart in that in no other province is there anything like s.2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute, that being:

- (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
  - (i) facilitate informed public participation in policy formulation,
  - (ii) ensure fairness in government decision-making,
  - (iii) permit the airing and reconciliation of divergent views; ...

56 Thus, the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to “necessary exemptions that are limited and specific.”

57 I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information that might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia’s lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[47] Section 4(1) provides for the application of the *Act*:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records.

[48] Record is defined in s.3(1)(k) as:

3(1) In this *Act*,

(k) “record” includes books, documents, maps, drawings, photography, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

...

[49] Public body is defined in s.3(1)(j) as:

(j) “public body” means

(i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which

(A) are appointed by order of the Governor in Council, or

(B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,

and includes, for greater certainty, each body referred to in the Schedule to this Act but does not include the Office of the Legislative Counsel,

(ii) the Public Archives of Nova Scotia,

(iii) a body designated as a public body pursuant to clause (f) of subsection (1) of Section 49, or

(iv) a local public body;

[50] The funding agreement is a record as defined in the *Act* and was in the control of the Department of Transportation and Infrastructure Renewal, a public body as defined by the *Act*. None of the exemptions in section 4(2) of the *Act* apply. The funding agreement is therefore subject to the provisions of the *FOIPOP Act*.

### **Section 21(1)**

[51] To justify its refusal to disclose information, the Province must bring itself within one of the exemptions set out in the *Act*. The Province claims exemption pursuant to sections 21(1) and 17(1) of the *Act*.

[52] Section 21(1) of the *Act* provides:

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

(a) That would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of 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,
- (ii) result in similar information no longer being supplied to the public body, when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person or organization.

...

[53] In order to withhold the information pursuant to s.21(1) the criteria in subsections (a) (b) and (c) have to be established.

[54] Subsection (a) is satisfied in that the information requested is commercial or financial information of a third party, namely BFL.

[55] Was the management fee supplied, implicitly or explicitly, in confidence? Articles 17.01, 17.03 and 17.04 of the funding agreement provide:

17.01 This Agreement is subject to the provisions of the *Freedom of Information and Protection of Privacy Act* and the Province shall make any decision respecting release of information in relation to the Agreement in compliance with the Act. If the Province determines that it will release any information in relation to this Agreement under the Act it agrees to provide reasonable notice to BFL before such information is released. It is understood that BFL takes the position that the amount of Management Fee payable pursuant to this Agreement is confidential, commercially sensitive information which should not be publicly disclosed.

17.03 For the purposes of this Article:

“Confidential Information” means any information, regardless of the form in which it is communicated or maintained, whether oral, written, electronic or visual, and whether prepared by a party or otherwise, which is disclosed by the one party (the “Disclosing Party”) and/or its authorized representatives to the other (“Receiving Party”) for the purpose of obtaining services hereunder and includes all reports, analyses, notes, memoranda, contracts, commercial arrangements, intellectual property, trade secrets, corporate strategies, business plans, legislative or regulatory proposals, draft legislation or regulations, briefing notes, personal information, or other information based on, or that contains or reflects any such Confidential Information provided that the Disclosing Party shall identify such information as confidential at the time of disclosure to the Receiving Party.

17.04 The parties covenant:

- (a) to maintain the confidentiality of the Confidential Information at all times:

- (b) to use the information only for the purposes of or relating to this Agreement and for no other purposes;
- (c) to refrain from disclosing or granting access to the Confidential Information to any third party in any manner whatsoever; and
- (d) to disclose the Confidential Information only to those employees as is reasonable necessary.

[56] In article 17.01, BFL took the position the amount of the management fee is confidential, commercially sensitive information which should not be publicly disclosed. Of course, it is not sufficient that the third party state, without further evidence, that the information is confidential (see *Air Atonabee Ltd. v. Canada (Minister of Transport)*), [1989] F.C.J. No 453 at para. 37).

[57] Mr. MacDonald stated, and I accept, the management fee represents the margin, the profit, BFL is willing to accept to undertake the ferry service. That BFL had an understanding with the Province the management fee was confidential but subject to the *FOIPOP Act*.

[58] In her affidavit Ms. Saurette deposed she understood it was important to BFL that the management fee be kept confidential as BFL considered it to be confidential, commercially sensitive information which if disclosed could hurt its business. Ms. Saurette testified as a result it was going to be considered and treated as confidential. However, the Department was aware the funding agreement was subject to the provisions of the *FOIPOP Act*.

[59] The position of BFL that the amount of the management fee was confidential, commercially sensitive information which should not be disclosed does not determine if the management fee was supplied in confidence. The test as to whether the information was supplied in confidence is an objective test (*Unama'ki Board of Police Commissioners v. Canadian Broadcasting Corporation*, 2003 NSCA 124 at para. 67. *Air Attonabee v. Canada (Minister of Transport)*, *supra*, at para. 37). If the test was subjective, parties could avoid the *FOIPOP Act* by just agreeing particular information was supplied in confidence.

[60] Two things are clear from article 17.01 of the funding agreement. First, the agreement is subject to the *FOIPOP Act*. Second, although specifically addressing the issue of the confidentiality of the management fee, the Province did not adopt BFL's position that the management fee was confidential, commercially sensitive information which should not be publicly disclosed. Article 19.07 of the funding agreement provides:

#### 19.07 Whole Agreement and Amendments

(a) This Agreement constitutes the whole Agreement unless amended in writing and signed by both parties.

(b) No modifications of the obligations of any party to this Agreement shall be effective unless made in writing and signed by each of the parties to this Agreement.

[61] Article 17 contains the whole agreement between the parties to the funding agreement concerning the confidentiality of the management fee. The Province did not agree the management fee was confidential.

[62] As Mr. MacDonald deposed, BFL was only willing to undertake the operation of the ferry service if it was reimbursed on an agreed basis, with no mark-ups or profit element, for the annual cash deficiency and in addition paid the management fee. The management fee was not something “supplied in confidence” by BFL but rather the fee BFL was prepared to accept to operate the Yarmouth to Maine Ferry service.

[63] Would disclosure of the management fee reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of BFL?

[64] The test as to what evidence is required to establish disclosure “could reasonably be expected to” result in harm was set out by Cromwell J., in giving the majority judgment in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 when he stated at para. 201:

. . . I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.

[65] The formulation was further described by Cromwell and Wagner J.J. in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54:

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach

that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”: *Merck Frosst*, at para. 94, citing: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[66] In *Merck Frosst*, Cromwell J, addressed the balancing of competing interests which must occur stating at para. 23:

Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution’s decision to release information which the third party thinks falls within the protected sphere.

[67] The evidence required to establish the harm would have to convince the court that there is a direct link between the disclosure and the apprehended harm and the harm could reasonably be expected to ensue from disclosure (*Merck Frosst* at para. 219). The words “harm significantly” in s.21(1)(c)(i) of the Act mean harm which is important enough to have an effect, not minor or trivial.

[68] As set out in Mr. MacDonald’s affidavit, there are approximately ten to fifteen companies that are potential competitors to BFL at any time in Canada. These competitors are by and large sophisticated entities, including entities owned by other provincial governments, with considerable knowledge and experience in the ferry industry.

[69] The management fee is the profit margin BFL is prepared to accept to operate the Yarmouth/Maine ferry service. Knowing the management fee would give its competitors considerable insight as to how BFL structures its bids. Mr. MacDonald deposed if BFL knew the margin details about its competitors, it would be able to gain confidential insight as to how such competitors would tender in future competitive processes. BFL is regularly negotiating contracts for ferry services. The management fee approach has been used by BFL and associated companies and the management fee approach will likely continue to be used by BFL.

[70] Mr. MacDonald also expressed concern about BFL's ability, if the management fee was disclosed, to preserve its negotiating position with suppliers of the Yarmouth/Maine ferry service including third party suppliers of crew, fuel, food, beverage and other operating-related services. BFL's suppliers can be expected to leverage the information of the management fee to their benefit, which would in all likelihood prejudice BFL's ability to negotiate the lowest price for the goods and services.

[71] During cross-examination of Mr. MacDonald the following exchange took place:

**Q:** You say that the management fee is confidential. But, would you say that in being confidential it is also proprietary to your company?

**A:** I will have to ask you to explain that some more, I am not sure what you are getting at.

**Q:** It is something unique to your company? It is your secret recipe for this, that makes up that fee.

**A:** Well those are your words, not mine. But, um, it is a fee that was arrived at after consideration of the various factors that we've discussed and that are referenced in the affidavit and it is a fee which, if known to competitors would give some indication of how our company approaches the charging of fees or the compensation for conducting a service of this nature.

**Q:** So the criteria you use for the 2015 management fee could be "X" but then you could have a totally different management fee for this same service the next time the bid comes around in 2026, correct?

**A:** In individual competitive situations, obviously, your company responds as you think appropriate and yes, of course, the fee which we would charge in a future circumstance could be different.

*(emphasis added)*

[72] I was referred to cases in which either confidentiality orders were granted or disclosure of FOIPOP applications were dismissed:

- (a) *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc.*, 2014 NSCA 98. The defendant sought a confidentiality order. The information in question included lengthy and detailed technical submissions on the process proposed by Resolve to manage and administer the Canada's Student Loan Program loan portfolio on an end-to-end basis.

- (b) *Shannex Inc. v. Nova Scotia (Health and Wellness)*, 2019 NSSC 24 was a FOIPOP request for information. The information requested was (1) information on annual operations funding, adjusted by consumer price index increments, on the amounts paid to Shannex for each nursing home from 2011 to 2013 and (2) budget summaries, including per diem rates, for each of Shannex's nursing homes as of April 2014.
- (c) *Canadian Bank Note Ltd. v. Saskatchewan Government Insurance*, 2016 SKQB 362 was a FOIPOP request for information. The information requested was related to a contract for the provision of drivers' licenses, identification cards and facial recognition services. Canadian Bank Note Ltd., a competitor to the company which had the contract requested (1) contract price, including price per card components, lump sum price components, if any, and other price components, if any; (2) card volume forming the basis for contract price per card; and (3) contract term.
- (d) *Seon v. Board of Education of the Regina Roman Catholic School Division No 81*, 2018 SKQB 166 was an application pursuant to the *Local Authority Freedom of Information and Protection of Privacy Act* SS 1990-91 c L-27.1. The information requested related to a tender including information related to unit prices, delivery times and point scores.

The information which was the subject of the above cases is very different from the management fee that is the subject of this appeal.

[73] With regard to section 21(1)(c)(i), in considering the evidence as a whole, I am unable to find the evidence demonstrates disclosure will result in a risk of harm to BFL's competitive position or interfere with its negotiating position that is beyond the merely possible or speculative. As Mr. MacDonald testified, if the management fee was known to BFL's competitors they would have some indication of how BFL approaches the charging of fees or the compensation for conducting a service. He also testified in individual competitive situations, the company responds as it thinks appropriate and the fee charged could be different in a future circumstance.

[74] For the reasons set out in dealing with the section 17(1) exemption I find the evidence does not meet the required test to establish, pursuant to s.21(1)(c)(ii), release of the management fee would result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied.

[75] For the reasons set out above, I find the evidence does not meet the test to establish, pursuant to s.21(1)(c)(iii), that release of the management fee will result in undue financial loss for BFL or undue gain to another bidder.

## **Section 17**

[76] Section 17(1) of the *Act* provides:

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 Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

- (a) trade secrets of a public body or the Government of Nova Scotia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (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 Nova Scotia.

[77] The Province submits disclosure of the management fee could result in less competition in a cost-plus public procurement process, lessening competition with a consequent increase in costs. Disclosure could interfere with the ability to use a cost-plus contract to the detriment of the Nova Scotia taxpayer in situations where such a contract allows for a monitoring of actual costs and a cap on profits.

[78] The Province is also concerned disclosure of the management fee could, as set out in s.21(1)(c)(ii), reasonably be expected to result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied. As set out in s.17(1)(d) the Province submits the disclosure could result in undue financial loss to BFL.

[79] The cost to the Province of the ferry service is available in the Province's Public Accounts, but the information which breaks out the profit margin or information that relates to it has not been disclosed. While a bidder's profit margin is not generally released, the actual amount paid is released.

[80] There is less experience with ferry operations in Nova Scotia given the number of contracts. The structure of the cost-plus contract provides valuable information to the Province regarding the real cost of operating the ferry. If the management fee is released, the Province is concerned the effect it would have on (a) the Province's ability to use this structure of contract going forward. (b) the willingness of bidders to participate in a process which could release their profit margin information; (c) the consequent effect that might have on competitions, particularly as there is not a large number of potential bidders; and (d) the consequent effect this might have on cost to taxpayers.

[81] The purpose of withholding such information is not to share information which would allow a bidder to undercut other bidders in a competitive environment.

[82] The evidence of Ms. Saurette was provided in support of the Province's position. She deposed pursuant to the funding agreement with BFL the Province pays the actual costs of the ferry service net of revenues, plus a management fee. The management fee is incentivized so increased success in the operation of the ferry service means an increased management fee. The "cost-plus" agreement makes the actual costs of the ferry service transparent to the Province. This type of contract enables the Province to better predict costs which supports improved forecasts and estimates for the budgeting process. It mitigates the risk of large, unexpected price fluctuations and allows the Province to assess the actual cost of the services to make informed decisions concerning them.

[83] Ms. Saurette deposed the Department has concerns concerning the disclosure of the management fee including: (a) release may send a message to other companies that the Province could release their confidential business information, dissuading them from doing business with the Province; (b) if businesses are not willing to enter into transactions because of the risk of disclosure of their commercially sensitive information, it will result in a less competitive environment which will likely drive costs higher for the Province; (c) BFL and its associated companies may not wish to continue to do business with the province; and (d) the release could dissuade bidders from entering a cost-plus structured agreement with the Province. The Department is also concerned the release of the management fee may harm its business relationship with BFL and Mr. MacDonald.

*(emphasis added)*

[84] The test as to the evidence required to establish an exemption claimed is as set out in *Merck Frosst Canada Ltd. v. Canada (Health)*, *supra*, and *Ontario*

*(Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra*. The evidence in this appeal does not establish more than a mere possibility disclosure of the management fee could reasonably be expected to harm the financial or economic interest of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy as set out in section 17(1) of the *Act*.

[85] The sections 21(1) and 17(1) exemptions do not apply to the requested information. I allow the appeal and order the release of the redacted portion of clause 1.01 “Base Management Fee” and clause 9.01 of the funding agreement.

[86] The respondents have a right to appeal this decision. Pursuant to s.42(5)(b) of the *FOIPOP Act*, I direct the redacted portions of the funding agreement ordered released remain sealed for a period of thirty days after my order is issued; pending further order of this Court or the Court of Appeal.

[87] If the parties are unable to agree on costs, counsel may submit written briefs on the issue.

Coughlan, J.