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

Order 01-20

UNIVERSITY OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
May 25, 2001

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Summary: Applicant requested a copy of a 1995 exclusive sponsorship agreement between the University of British Columbia, its student society and Coca-Cola Bottling Ltd. UBC initially denied access to most of the agreement under s. 17(1) and s. 21(1), but later disclosed further portions. Section 25 found not to require disclosure in the public interest. Remaining withheld portions of agreement required to be disclosed because s. 17(1) and s. 21(1) requirements not met.

Key Words: financial or economic interests – trade secret – third party commercial or financial information – monetary value – supplied in confidence – competitive position – negotiating position – significant harm – interfere significantly with – undue financial loss or gain – disclosure clearly in the public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 21(1) and 25(1)(b).

Authorities Considered: B.C.: Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29; Order No. 45-1995, [1995] B.C.I.P.C.D. No. 18; Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53; Order No. 315-1999, [1999] B.C.I.P.C.D. No. 28; Order 00-09, [2000] B.C.I.P.C.D. No. 9; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 00-47, [2000] B.C.I.P.C.D. No. 51; Order 01-21, [2001] B.C.I.P.C.D. No. 22. **Ontario:** Order P-263, [1992] O.I.P.C. No. 4; Order P-609, [1994] O.I.P.C. No. 7.

Cases Considered: *Tromp* v. *British Columbia (Information and Privacy Commissioner)*, 2000 BCSC 598; [2000] B.C.J. No. 761; *SNC-Lavalin Inc.* v. *Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (F.C.T.D.); *Canada Broadcasting Corp.* v. *National Capital Commission*, [1998] F.C.J. No. 676 (F.C.T.D.); *Merck Frosst Canada Inc.* v. *Canada (Minister of National Health)*, [2000] F.C.J. No. 1281 (F.C.T.D.); *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (N.T.S.C.); *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246.

1.0 INTRODUCTION

[1] This case arises out of an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for a copy of the entire 1995 exclusive sponsorship agreement entered into between the University of British Columbia ("UBC") and Coca-Cola Bottling Ltd. ("CCB"). The public body to which the request was made is the UBC.

[2] The record in dispute in this inquiry is the same as the record in issue in Order No. 126-1996, [1996] B.C.I.P.C.D. No. 53, in which my predecessor upheld UBC's decision to withhold the entire agreement. In its December 20, 1999 response to the applicant's October 19, 1999 request for the same record, UBC told the applicant that it would disclose only 4 out of 74 pages in the agreement. All of pp. 3 to 51 and 54 to 74 were withheld under ss. 17 and 21, apparently in reliance on Order No. 126-1996. This decision prompted a request for review under s. 52 of the Act, which was made on December 23, 1999.

[3] On March 17, 2000, the British Columbia Supreme Court quashed Order No. 126-1996, as it related to ss. 17 and 21 of the Act, on the basis that my predecessor had failed to consider the applicant's argument that s. 25 of the Act required disclosure of the agreement. See *Tromp* v. *British Columbia (Information and Privacy Commissioner)*, 2000 BCSC 598; [2000] B.C.J. No. 761. The Court remitted Order No. 126-1996 to me for reconsideration, but the applicant there chose not to pursue the reconsideration. The present access request had been made in the meantime by the applicant here who apparently is associated with the UBC student newspaper, *The Ubyssey*. UBC released further information from the contract following the Court's decision in *Tromp*, but it continues to withhold portions of the record under ss. 17 and 21 of the Act. It also maintains that s. 25 does not require disclosure of any information in that record.

[4] UBC and CCB initially argued that the principles of *res judicata* and abuse of process apply here. They were said to arise from the identity of the subject-matter and parties as between this access request and the access request considered in Order No. 126-1999. That position was later abandoned. It has not been argued that I am bound to, or should, follow Order No. 126-1996, whether based on the principle of *stare decisis* or otherwise. As the parties have done, I have approached this matter afresh in the circumstances of this case.

[5] I should note here that UBC and CCB – which is a "third party" under the Act – have been represented by the same counsel, who has made joint submissions for them. As a result, the evidence and arguments of both those parties have been advanced together in all respects in this inquiry.

[6] I should also note that this inquiry was held at almost the same time as another inquiry involving an access request to a different public body, Capilano College, for a similar exclusive sponsorship agreement with CCB. Order 01-21, [2001] B.C.I.P.C.D. No. 22, which is issued concurrently with this order, deals with that matter. The applicants, CCB and the public bodies have been represented by the same respective counsel in each case and some evidence was filed concurrently in both inquiries.

2.0 ISSUES

[7] The issues to be addressed in this inquiry are as follows:

1. Is UBC required by s. 25(1)(b) of the Act to disclose information to the applicant?
2. Is UBC authorized by s. 17(1) of the Act to refuse to disclose information to the applicant?
3. Is UBC required by s. 21(1) of the Act to refuse to disclose information to the applicant?

[8] Under s. 57(1) of the Act, UBC bears the burden of proof with respect to the second and third issues. Previous decisions have established that the applicant bears the burden of proof with respect to s. 25(1)(b).

[9] The parties submitted arguments on the s. 25(1)(b) issue in their initial and reply submissions even though that issue was not identified in the Notice of Written Inquiry issued by the Office. I have, accordingly, considered that issue, especially in light of comments made by Hutchison J. in *Tromp*, above.

[10] As I noted above, UBC and CCB initially argued that *res judicata* and abuse of process apply here. Since they later abandoned that position, I have not addressed those issues in this order.

3.0 DISCUSSION

[11] **3.1 Information in Dispute** – The exclusive sponsorship agreement that is in dispute here is between UBC, the UBC Alma Mater Society ("AMS") and CCB. It is dated August 1, 1995. As I noted above, UBC initially withheld the bulk of the agreement, *i.e.*, 74 pages including appendices. It reconsidered this decision after the decision in *Tromp* and released considerably more information to the applicant.

[12] It is desirable at this stage to provide a fairly detailed description of the agreement's provisions and to describe, as far as is permissible, the general nature of the information that has been withheld. This will assist with the discussion below on the merits of the ss. 17 and 21 arguments.

[13] First, every page of the agreement, including each page of its appendices, is headed by the following caption:

> CONFIDENTIAL
>
> WARNING: By the terms of this agreement, it is a breach of contract to disclose the contents. Inducing a breach of contract is actionable.

[14] The agreement's preamble identifies the parties and their activities. UBC is described as being charged with the operation and administration of its educational

facilities and campus. AMS leases the Student Union Building on campus from UBC. CCB is the authorized bottler and distributor in Canada of beverages manufactured or produced under licence from the Coca-Cola Company. The preamble goes on to say that the parties have agreed that:

- CCB will supply cold beverage products to UBC and AMS or other designated parties for use on campus;
- CCB will supply, upgrade, maintain and service beverage dispensing, point of sale and other equipment; and
- UBC and AMS will provide CCB with certain exclusive supply, advertising and promotional rights.

[15] The interpretation section found at pp. 2 through 9 sets out definitions of terms used in the agreement. UBC has withheld the text of the definitions of "Cold Beverage Products", "Commission" and a related definition. Portions of the definitions of "Minimum Volume Commitment" and "Term" have also been severed and withheld.

[16] Pages 9 through 26 consist of "sections" 2 through 5. They are called, respectively, "Grant of Rights", "UBC Marks/AMS Marks", "Supply of Cold Beverage Products", "Supply and Maintenance of Equipment" and "Advertising". The only information withheld from pp. 9 to 26 is on p. 21, under section 4.9, "Unavailability of Non-Carbonated Cold Beverage Products". This section provides that if UBC and the AMS wish to dispense and sell a non-carbonated cold beverage product for which there is no comparable CCB product, it may be obtained from a competitive supplier under certain conditions. Those conditions have been withheld.

[17] Section 7, entitled "Consideration", occupies pp. 27 through 29. Under section 7.1 ("Annual Sponsorship Fee"), the amount of the sponsorship fee, the length (or "term") of the agreement and the amount of the advance payment associated with the fee, have been withheld. Under section 7.2 ("Additional Payments"), the amount of additional payments, and some related terms, have been withheld. Portions of section 7.3 ("Commission") providing for the triggering of this payment have been withheld.

[18] Section 8 ("Minimum Volume Commitment") is found on pp. 29 and 30. The term of the agreement has been withheld from section 8.1 ("Commitment"). Section 8.2 has been withheld in its entirety. The next piece of information that has been severed is the term of the agreement, set out on p. 31, in section 11 ("Term").

[19] Section 12 ("Termination/Force Majeure") extends from pp. 31 through 39. Three passages have been withheld from these pages. Under section 12.1 ("Termination"), one of the conditions for termination of the agreement has been withheld entirely. Two percentage figures in section 12.1.6 have been withheld. Under section 12.3 ("Failure to Supply CCB Cold Beverage Products"), UBC has withheld a passage governing the purchase of cold beverage products from other local suppliers if CCB fails to supply beverage products.

[20] Section 13 ("Indemnity and Insurance") extends from pp. 39 through 44. Under section 13.5 ("Cap on Damages and Indirect or Consequential Loss"), the amount of the cap on damages for breach of the agreement has been withheld.

[21] All of the following sections, found at pp. 45 through 49, have been disclosed in their entirety: 14 ("Representations and Warranties"), 15 ("Assignment"), 16 ("Relationship of the Parties"), 17 ("Waiver"), 18 ("Severability of Provisions"), 19 ("Obligations Independent"), 20 ("Entire Agreement"), 21 ("Notices"), 22 ("Articles"), 23 ("Governing Law"), 24 ("Arbitration"), 25 ("Interest on Arrears").

[22] Sections 26 and 27, on p. 50, have been entirely withheld. All information under sections 28 ("Confidential Information"), 29 ("Unmarked Cups") and 30 ("Approvals"), found on pp. 50 and 51, has been disclosed.

[23] All of section 31 ("Ambush Marketing") and part of section 32 ("Advertising by Special Brands") has been severed and withheld. All of section 33 ("Pro Rata 'Prepaid' Amount") has been disclosed, as have the signature blocks for the agreement.

[24] Schedule A to the agreement (p. 54) – which is a map of the UBC campus – was withheld in its entirety. Schedule B ("Designated Purchasers", p. 55) was disclosed. Schedule C ("Excluded Facilities", p. 56) was withheld. Exhibit D ("Sponsored Events", pp. 57-59), Schedule E (a blank schedule, p. 60) and Schedule F ("UBC Marks", pp. 61-64) were disclosed. Schedule G ("Vending Machines", p. 64A) and Schedule H ("Cold Beverage Product List", p. 64B) were not disclosed. Schedule I ("Signage and Advertising", p. 64C) was disclosed. Schedule J ("Wholesale and Maximum Retail Prices", p. 64D) was withheld, while Schedule K ("Conditions of Use of UBC Marks and AMS Marks", pp. 64E, F, and G) was disclosed. Schedule L ("Standard Physical Case Conversion Table", p. 64H) was withheld. Schedule M ("Rogue Equipment", p. 64I) was disclosed.

[25] **3.2 Reliance On *In Camera* Evidence and Argument** – UBC and CCB filed a joint *in camera* initial submission in this inquiry, which caused the applicant to raise concerns about his ability to respond to that evidence and argument. After reviewing the *in camera* submission, I invited UBC and CCB to reconsider their contention that certain portions of it justified *in camera* treatment.

[26] As a result, UBC and CCB amended the *in camera* submission and disclosed to the applicant most of the questionable portions I had identified. UBC and CCB continued to request that some passages remain *in camera*, on the basis that their disclosure would cause the same type of harm in respect of which the ss. 17 and 21 exceptions have been claimed for the disputed information, or would reveal or permit accurate inferences to be drawn regarding the disputed information. I am satisfied that the material ultimately submitted *in camera* by UBC and CCB is properly received on that basis.

[27] UBC and CCB rely on a number of *in camera* and open affidavits, some of which were sworn in 1996 and some of which date from 2000. In order to help identify them,

I have listed all of these affidavits in Appendix A to this order. They are referred to in this order by the labels I have given them in Appendix A.

[28] **3.3 Disclosure Clearly in the Public Interest** – The first substantive issue to be considered is s. 25(1), which reads as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[29] The applicant argues that, when determining whether disclosure of a record is "clearly in the public interest" under s. 25(1)(b) of the Act, the most important factors to consider are, first, whether the public is "truly interested" in the information contained in the record and, second, whether there is a legitimate policy reason which favours the disclosure of the information contained in the record.

[30] On the first factor, the applicant refers to evidence before me which indicates that the agreement, and disclosure of its terms, has for some time been the subject of commentary and debate in *The Ubyssey* and the UBC student population. It has also received off-campus media attention and similar agreements have been the subject of media reporting in this and other jurisdictions. The applicant acknowledges that the fact that the public is interested in a record will not necessarily mean that it is in the public interest to disclose the record, unless it can be established that there is a legitimate policy reason justifying disclosure. The policy reason identified by the applicant in this case boils down to the proposition that, because UBC is a publicly-funded educational institution, its decision to accept substantial funds from a private company such as CCB, and the terms of that deal, must be open to public scrutiny and debate.

[31] UBC and CCB submit that s. 25 is an exceptional provision which operates only in the clearest and most serious of situations. Any public interest that is alleged to favour disclosure must be established unmistakably and beyond reasonable doubt. Use of the words "without delay" in s. 25, they contend, establishes a test of compelling urgency. The fact that some members of the public may be interested in a record does not necessarily make disclosure of that record "clearly in the public interest", as s. 25(1) requires.

[32] According to UBC and CCB, the fact that there have been media reports about the agreement does not trigger s. 25. They argue that evidence tendered by them demonstrates that the public interest favours non-disclosure of the withheld portions of the agreement, in order to avoid harm to their interests. The applicant objects to this last proposition, replying that s. 25 does not involve a weighing of public interest against public body or third party harm.

[33] UBC and CCB also object to the applicant's arguments by contending that media reports tendered by the applicant are either too old, being from 1996, or are irrelevant because they relate to other educational institutions and other agreements. As for the applicant's argument that there are policy reasons which trigger s. 25, they say that the reasons advanced by the applicant are not evidence of any urgent and compelling public interest which unmistakably favours disclosure. Based on the evidence they have adduced – which they argue demonstrates that disclosure of the withheld information is not in the public interest – UBC and CCB argue that s. 25(1) is not triggered.

[34] Section 25(2) provides that "subsection (1) applies despite any other provision of this Act". I agree with UBC and CCB that, if disclosure under s. 25(1) has been triggered, it is unnecessary to consider the exceptions under ss. 17 and 21 of the Act. I agree with the applicant that the application of s. 25(1) does not involve a weighing, from an evidentiary point of view, of the threshold in s. 25(1) against the exceptions in Division 2 of Part 2 of the Act.

[35] I believe the parties have strayed from the proper application of this section, by conflating the considerations it contains with those found elsewhere in the Act. For his part, the applicant would interpret the phrase "clearly in the public interest" in s. 25(1)(b) as an extension of the general policy in s. 2(1) of the Act, which favours the accountability of public bodies by giving the public a right of access to records in their custody or under their control. UBC and CCB, for their part, would interpret the same words in s. 25(1)(b) as being open to rebuttal, in effect, by evidence of risk of harm under ss. 17 or 21 of the Act. In my view, both of these approaches are contrary to the language used in s. 25(1).

[36] I also disagree with the contention by UBC and CCB that the standard of proof under s. 25(1) is that of 'beyond a reasonable doubt'. That standard is not supported by the language of s. 25 and its adoption could well frustrate the vital and paramount legislative intent of requiring public bodies to disclose information under the conditions described in s. 25(1). The section is activated where those conditions are met. It is not appropriate, in my view, to engage in the additional inquiry as to whether there is any reasonable doubt that the alleged risk or public interest reason has been established.

[37] Even when I account for the weaknesses in the applicant's s. 25(1) evidence identified by UBC and CCB, there is evidence before me showing that there has been significant public curiosity about the agreement. Still, the fact that the public may be, or may have been, interested in a record does not necessarily mean that is "clearly in the public interest" to disclose it, without delay, under s. 25(1)(b) of the Act. The applicant acknowledges this. In the end, therefore, I am left with the applicant's policy argument that disclosure is clearly in the public interest because UBC is a publicly-funded educational institution which, under the agreement, is receiving what the applicant says is substantial funding from a private source.

[38] The mandatory disclosure requirement in s. 25(1)(b) is not, to my mind, intended to be activated by such a policy consideration. Section 25 applies despite any other provision of the Act, whether or not an access request has been made. It requires disclosure "without

delay" where information is about a risk of significant harm to the environment or to the health and safety of persons or where disclosure is for any other reason clearly in the public interest. Although the words used in s. 25(1)(b) potentially have a broad meaning, they must be read in conjunction with the requirement for immediate disclosure and by giving full force to the word "clearly", which modifies the phrase "in the public interest".

[39] Even if I assume, without deciding, that disclosure of contractual and financial information is capable of being "clearly in the public interest" within the meaning of s. 25(1)(b), the required elements of urgent and compelling need for publication are not present in this case. Again, the applicant believes the agreement should be disclosed because UBC is a publicly-funded educational institution, such that the student body, general public and media ought to have the widest ability to scrutinize an exclusive commercial commitment by UBC to substantial funding from a private source. Even if this position is well-founded as a matter of public policy, it does not give rise to an urgent and compelling need for compulsory public disclosure despite any of the Act's exceptions. In my view, no particular urgency attaches to disclosure of this record. Nor is there a sufficiently clear and compelling interest in its disclosure.

[40] For the above reasons, I find that s. 25(1)(b) does not require UBC to disclose the withheld information.

[41] **3.4 Harm to Interests Under Sections 17 and 21** – Because some of the requirements of s. 17 and s. 21 tend to overlap, and because the evidence and submissions of UBC and CCB have been jointly advanced, it is convenient in this case to analyze the application of ss. 17 and 21 under a single main heading. I will first set out the relevant parts of s. 17 and s. 21:

> 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:
>
> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> …
>
> (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 the public body or the government of British Columbia.
>
> 21(1) The head of a public body must 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, or… .

General Position of UBC and CCB

[42] As regards s. 17(1), UBC and CCB contend that the withheld information is a "trade secret" of UBC, as well as the commercial, financial or technical information of UBC. They say the evidence demonstrates that disclosure of the information could, within the meaning of s. 17(1), reasonably be expected to harm the financial or economic interests of UBC, result in undue financial loss to CCB and result in undue financial gain to competitors of CCB and UBC.

[43] As for s. 21(1), UBC and CCB argue that the disputed information is a "trade secret" of CCB as well as the commercial, financial or technical information of CCB. They say this information was supplied by CCB in confidence to UBC. They argue that its disclosure could reasonably be expected to harm significantly the competitive position of CCB or interfere significantly with its negotiating position, to result in similar information no longer being supplied when it is in the public interest for such information to be supplied, and to result in undue financial loss by CCB or financial gain to the competitors of UBC and CCB.

[44] The general position of UBC and CCB is set out as follows, at paras. 5 and 6 of their initial submission:

> 5. UBC and Coca-Cola have a mutual interest in preserving the confidentiality of the Severed Information. From the outset of the discussions that led up to the Cold Beverage Agreement, UBC and Coca-Cola agreed that all negotiations and any resulting agreement would be confidential. The Cold Beverage Agreement contains an express obligation of confidentiality (pp. 50-51).

> 6. UBC and Coca-Cola mutually agreed to reserve confidentiality because disclosure would cause serious financial and economic harm to each of them and would give their respective competitors undue benefit. The exemptions from disclosure prescribed by sections 17 and 21 of the Act are designed to prevent that type of harm and undue benefit. UBC and Coca-Cola therefore rely on sections 17 and 21 on this review as a basis for non-disclosure of the Severed Information.

[45] The evidence provided by UBC and CCB is nothing less than voluminous. To some extent, this is because UBC and CCB have in some respects treated this inquiry as an extension of the inquiry for Order No. 126-1996. UBC and CCB have provided me with the evidence, both public and *in camera*, that they provided to my predecessor in 1996. They have revised that evidence with supplementary affidavits. The supplementary affidavits reflect conditions that have changed as time has passed since 1996, including the fact that far more information in the agreement has now been released than was made available in 1996. In many places, the contents of the affidavits closely track the submissions of UBC and CCB. The deponents also follow a pattern of adopting numerous paragraphs from each others' affidavits. The overall result is that I have considered numerous, overlapping affidavits which contain both factual assertions and argument, in many cases with revisions having been made to reflect changed conditions. As I have already noted, I have listed the affidavits submitted by UBC and CCB in Appendix A to this order.

General Position of the Applicant

[46] The applicant submitted an affidavit to which there is exhibited a number of newspaper articles intended to establish the public interest in and importance of the disputed information, a number of documents (described as exclusive licence agreements) relating to cold beverage companies (including CCB) and certain U.S. universities and minutes of a meeting of the Vancouver Parks Board approving the terms of an exclusive licensing agreement with CCB. The applicant also relied on an affidavit provided by the applicant in the companion inquiry involving Capilano College, Order 01-21. The main significance of this affidavit is that it exhibits news articles, letters and a petition aimed at demonstrating the significant and continuing public interest in open scrutiny of exclusive partnership agreements between cold beverage companies and educational institutions.

[47] At para. 6 of his initial submission, the applicant summarized his position as being that s. 17 and s. 21 of the Act do not apply to the disputed information because disclosure could not reasonably be expected to harm the financial and economic interests of UBC or the competitive interests of CCB. He did not say, in his initial submission, whether he agreed or disagreed that the disputed information had been supplied in confidence to UBC. I return to this point below.

[48] There is no doubt that the agreement has notable and long-term financial consequences for UBC and for CCB. It also can be said that significant aspects of the agreement – such as providing funding for disability access on campus – are laudable. The applicant does not challenge these propositions. He argues, rather, that a reasonable expectation of harm under s. 17 or s. 21 is not established by UBC and CCB cloaking

themselves, as it were, in features of the exclusive sponsorship agreement that are not relevant to determining the applicability of s. 17 or s. 21.

[49] The applicant argues that, when irrelevant considerations are removed from the submissions of UBC and CCB, the following propositions remain:

- UBC is at a critical juncture. External circumstances require that it become more entrepreneurial. UBC needs new sources of funding for pressing, worthy purposes.
- Special UBC projects can only be funded by innovative funding sources.
- Some of UBC's entrepreneurial ventures will require the same umbrella of commercial confidentiality, which would routinely apply in transactions between two private enterprise bodies.
- If such commercial confidentiality cannot be assured, UBC will lose many new funding opportunities.

[50] According to the applicant, UBC and CCB have provided only vague and speculative evidence, from the interested parties, which is insufficient to meet the evidentiary threshold required under s. 17 or s. 21.

[51] The applicant also says that, because some time has passed since UBC and CCB entered into the exclusive sponsorship agreement, there is now more information upon which to judge whether disclosure of the agreement terms could reasonably be expected to harm the interests of UBC or CCB. The applicant has submitted to me copies of 11 different agreements between various U.S. educational institutions and cold beverage suppliers, including Coca-Cola Company subsidiaries or affiliates. The public accessibility of these other agreements demonstrates, the applicant argues, that cold beverage companies continue to enter into lucrative exclusive sponsorship contracts with universities even when they know that the agreements, including their financial details, will not be kept confidential. The applicant argues that this is a complete answer to claims of harm to the interests of UBC and CCB from disclosure of the disputed information, since there can be no reasonable expectation of harm to UBC when it is clear that universities have continued to receive lucrative agreements with cold beverage companies (including Coca-Cola Company subsidiaries or affiliates) even when the financial details of the agreements are not kept confidential. As for CCB's interests, the applicant argues, in a similar vein, as follows (at para. 52 of his initial submission):

> 52. [The applicant] accepts that private companies, like Coca-Cola would prefer to keep details of their business dealings confidential. However, the only reasonable inference to be drawn from the fact that Coca-Cola and other beverage companies routinely disclose exclusive sponsorship agreements with educational institutions and supporting information, is that the disclosure of such materials does not harm significantly their competitive interests. [emphasis in original]

[52] After the parties delivered their initial and reply submissions, I issued several orders in other cases regarding s. 21 of the Act. I therefore invited the parties to make further submissions to address those orders. The applicant's supplementary submission led

to an objection by UBC and CCB to his position, on supply of information under s. 21(1)(b). As is noted above, the applicant did not, in his initial submission, argue that the information in dispute was not "supplied" to UBC. Further, in para. 62 of his reply submission, the applicant said that he:

> … does not dispute that the information in the Cold Beverage Agreement is "financial" or that it was "supplied in confidence". It is the third criterion, "reasonable expectation of significant or undue harm", that [the applicant] says UBC has failed to meet.

[53] In his supplementary submission, the applicant for the first time took the position that the "supply" requirement in s. 21(1)(b) had not been met. UBC and CCB objected to s. 21(1)(b) being raised, on the ground that the 'supplied in confidence' requirement had been expressly admitted in the applicant's earlier submissions.

[54] The applicability of the s. 21(1) exception must be determined here and this includes each of its requirements. Because UBC bears the burden of proof for s. 17 and for s. 21, the s. 21(1)(b) requirement had already been addressed to some degree in UBC and CCB's earlier submissions. Their supplementary submission went on to address this requirement in greater detail. An affidavit specifically addressing the requirements of s. 21(1)(b) was also provided (*i.e.*, the Jordan *In Camera* Affidavit (2000)).

[55] Having the applicant shift his position on s. 21(1)(b) part way through the inquiry process is not ideal. Order 00-22, [2000] B.C.I.P.C.D. No. 25, however, brought the meaning of "supply" forward after the parties had already made their submissions in this inquiry. UBC and CCB fully addressed the issue in their supplementary submission, in response to my invitation for further submissions. I consider it is appropriate for me to decide whether s. 21(1)(b) has been satisfied. Allowing the applicant to change his position has not resulted in unfairness to UBC or CCB, as they have been able to make full submissions in response and my task here is to determine whether ss. 17 and 21 apply to the disputed information.

Proof of Harm

[56] The applicant strenuously takes exception to the form and quality of the evidence of UBC and CCB. He maintains that the arguments of UBC and CCB are essentially speculative and that the only evidentiary basis for them consists of statements of opinion and conjecture made in affidavits sworn by those interested in the outcome of this inquiry. The applicant says UBC and CCB have advanced bare assertions that are unsupported by evidence, as well as statements of position, argument, rhetoric disguised as evidence and opinions from interested parties on factual issues fundamental to the inquiry. According to the applicant, this material cannot possibly discharge UBC's burden of proof under s. 17 and s. 21. This conclusion, the applicant says, is even clearer in light of the applicant's evidence of other exclusive sponsorship agreements which have been disclosed.

[57] As I observed in Order 00-10, [2000] B.C.I.P.C.D. No. 11, Order 00-24, [2000] B.C.I.P.C.D. No. 27, and other orders, the standard of proof for harms-based exceptions is

to be found in the wording of the Act. The standard in s. 17(1) and s. 21(1) is a reasonable expectation of harm. The harm feared must not be fanciful, imaginary or contrived. Evidence of speculative harm will not satisfy the test, but it is not necessary to establish a certainty of harm. The quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the exception.

[58] As I said in Order 00-24, in the context of s. 17(1), I can be informed by evidence of a public body's or third party's perceptions of expected harm from disclosure. There may well be cases where such evidence takes on a self-serving quality which makes its value suspect. At the same time, the perspective or experience of a public body or third party may constitute a compelling, legitimate – even indispensable – consideration in the assessment of risk of harm from disclosure. These are matters which are assessed when I determine the weight to be given to opinion evidence from a source internal to, or identified with, a party for whose benefit an exception is claimed. Order 00-10 is an example of a case where I found affidavit evidence from employees of two third parties to be persuasive on the harm element under s. 21 of the Act.

[59] Affidavits which merely assert that disclosure would cause the harm described in s. 17(1) or s. 21(1) of the Act do not constitute evidence that establishes a reasonable risk of harm. This point has been made in numerous access to information cases, including *SNC-Lavalin Inc.* v. *Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (F.C.T.D.), at p. 127, *Canada Broadcasting Corp.* v. *National Capital Commission*, [1998] F.C.J. No. 676 (F.C.T.D.), at paras. 25-29, and *Merck Frosst Canada Inc.* v. *Canada (Minister of National Health)*, [2000] F.C.J. No. 1281 (F.C.T.D.), at paras. 15-16.

[60] In *Canada Broadcasting Corp.*, where the CBC was the third party and the National Capital Commission was the public body, Teitelbaum J. dealt with the third- party business interest exception in the federal *Access to Information Act*. The following passage from his reasons merits quotation at length, since it nicely summarizes the import of the cases to which I have just referred:

> 25. In *SNC-Lavalin Inc.* v. *Canada (Minister of Public Works)* (1994), 79 F.T.R. 113, at page 127 (F.C.T.D.), the court held the applicant cannot merely affirm by affidavit that disclosure would cause the harm discussed in paragraph 20(1)(c) of the Act. The court stated that these affirmations are the very findings that the court must make and so further evidence establishing probable harm is needed.
>
> 26. The evidence as to the harm that would be caused to the CBC is, at best, very meagre. In her affidavit of October 9, 1997, Ms. Marshall states, in paragraphs 6, 7, 8 and 9:
>
> > 6. The agreement reflects the manner in which CBC contracts for events such as Canada Day.
> >
> > 7. The Agreement contains many elements of a sensitive competitive nature. The Agreement includes not only the amount requested by CBC for participating in and broadcasting events such as the shows, but also the

> manner in which its services are delivered, and the type of incentives provided such as a sponsorship package.
>
> 8. I believe that the disclosure of the Agreement would be harmful [*sic*] the CBC's competitive position as it would disclose all those elements referred to in Paragraph 7 of this my affidavit and permit competitors of CBC to incorporate those items in any competing proposal to N.C.C. The release of the following Articles of the contract, in particular, could reasonably be expected to prejudice the CBC: Article 2.03(d), Article 3.01(a), Article 4 and particularly 4.05, Schedule B.
>
> 9. I believe that the disclosure of the Agreement could also interfere with CBC's contractual or other negotiations. The release of sponsorship information could reasonably be expected to interfere with other sponsorship negotiations. The release of the contract price per year, and the method by which CBC delivers its services could also be expected to interfere with CBC's contractual or other negotiations: Article 2.03(d), Article 3.01(a), Article 4 and particularly 4.05, Schedule B.
>
> 27. After careful reading of these paragraphs, I cannot come to any other conclusion than that what Ms. Marshall is doing is making certain confirmations without giving any evidence that there is a reasonable expectation of probable harm to the applicant if the information requested is divulged.
>
> 28. It is not enough to merely speculate that the applicant may suffer some probable harm if the requested information is made public.
>
> 29. In *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)*, [1990] 3 F.C. 665, at pages 682-3 (F.C.T.D.), the court held that paragraph 20(1)(d) of the Act requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the applicant will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems were held to be insufficient to qualify under the exemption. Similar reasons were provided in *Societe Gamma Inc.* v. *Canada (Secretary of State)* (1994), 79 F.T.R. 42 (F.C.T.D.), where the court stated that paragraph 20(1)(d) must refer to an obstruction to negotiations rather than merely the heightening of competition which might flow from disclosure. Finally, in *Saint John Shipbuilding Ltd.* v. *Canada (Minister of Supply and Services)* (1990), 107 N.R. 89 (F.C.A.), the court stated at page 91 that mere speculation or possibility is insufficient to ground an exemption under paragraph 20(1)(d). Given the lack of evidence about the effect on actual contractual negotiations, I have no difficulty finding that the applicant has failed to satisfy paragraph 20(1)(d) of the Act.

[61] I recognize that, in the many affidavits provided to me by UBC and CCB, considerable effort has gone into presenting a detailed context for the disputed information. This is commendable, even though there are many passages which are, strictly speaking, of tenuous relevance to the issues before me. I also agree with the applicant that a significant number of paragraphs in the UBC and CCB affidavits are hypothetical assertions or conclusionary statements and that these paragraphs have no real probative value. The same is true of many paragraphs that can only described as argument, not evidence. An example of this 'evidence' is found in paras. 10 and 11 of the Strangway Affidavit (1996):

> 10. I firmly believe there will be severe financial injury to UBC if the Sponsorship Agreement (or related documents disclosing its terms) is ordered to be disclosed to the Applicant and is thereby made public. In addition to the very adverse consequences to UBC's relationship with Coca-Cola, UBC will find opportunities for other future sponsorship agreements with potential corporate partners either disappear entirely or become significantly less profitable. Like Coca-Cola, those other potential corporate partners have made it clear to UBC that they consider it necessary to keep the terms of any sponsorship agreement confidential. If the Coca-Cola agreement is disclosed there is a real risk it could bring an end to this type of funding for UBC. If these funding opportunities are not available, UBC will not have money to pay for these important projects. UBC and the community it serves will therefore suffer severe financial harm.
>
> 11. The Board of Governors of UBC gave careful consideration to the issue of confidentiality before it approved the Sponsorship Agreement. The Board concluded, on balance, that the benefits of the Sponsorship Agreement were so significant that they outweighed any normal considerations in favour of disclosure.

[62] These statements are speculations and conclusions, not evidence of risk of harm. I agree with the applicant that 'evidence' of this nature does not discharge the burden of proving risk of harm under s. 17(1) or s. 21(1) of the Act. The fact that the above paragraphs in the Strangway Affidavit (1996) are "adopted" in other affidavits – such as the Harmon Open Affidavit (2000) – does not change or enhance their evidentiary character or probative value.

[63] Another example of affidavit material that is without evidentiary value is para. 12 of the Ufford *In Camera* Affidavit (1996). (Paragraphs 1 to 11, 13 and 14 of the 1996 Ufford *In Camera* Affidavit (1996) were excised for purposes of this inquiry, on the basis that they concern matters which are not now in issue or information which has been overtaken by developments since 1996. Paragraph 12 remains.) It says: "This intense competition among post-secondary educational institutions is not mere speculation." It may be that intense competition among post-secondary educational institutions can be established by an affidavit from a knowledgeable individual. It is meaningless as evidence, however, to simply declare that a proposition is not mere speculation.

[64] Again, I am faced with a significant number of overlapping and interlocking affidavits from UBC and CCB. A number of them contain lengthy passages of background material or, in some cases, irrelevant information. As I have already noted, speculative, conclusionary, argumentative or rhetorical passages – which are not evidence and to which the applicant has understandably objected– are also common in a substantial number of those affidavits.

[65] On the one hand, I am not bound by the strict rules of evidence which would govern a trial in a court. I am also reluctant to be too quick to entirely disregard background information relating to the exclusive sponsorship agreement. On the other hand, it is my task to determine whether s. 17 or s. 21 applies to except the disputed information from disclosure. I must make that determination bearing in mind that UBC, not the applicant, bears the onus of proof, that the evidence adduced in support must be

tied to the various elements of s. 17 and s. 21, and that the evidence must be sufficiently detailed and cogent to establish each of those elements.

[66] In an effort to be both flexible and fair, in a way that suits the inquiry process under the Act, I decided I would consider all of the arguments and supporting materials provided to me by the parties. I have tried to identify and analyze the evidence, from both parties, that is properly and truly relevant to the pertinent elements of s. 17 and s. 21 of the Act. In this way, I have done my best to bring to bear what I regard as necessary specificity to my determination of the factual and legal questions in this inquiry, without chopping out parts of the UBC and CCB materials in a way which might affect their overall intelligibility.

Meaning of "Trade Secret"

[67] UBC and CCB argue that all of the disputed information is a "trade secret" that is jointly owned by UBC and CCB. On this argument, the disputed information could be withheld under s. 17(1)(a) as a trade secret of UBC and would also meet s. 21(1)(a), as a trade secret of a third party.

[68] The term "trade secret" is defined in Schedule 1 of the Act as follows:

> "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
>
> (a) is used, or may be used, in business or for any commercial advantage,
>
> (b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,
>
> (c) is the subject of reasonable efforts to prevent it from becoming generally known, and
>
> (d) the disclosure of which would result in harm or improper benefit.

[69] This definition is exhaustive and all four of its elements must be made out before it is satisfied. I note that paragraphs (a) and (d) of the definition tend to overlap with other requirements under s. 17(1) and s. 21(1), while paragraph (c) tends to overlap with the requirement of confidence in s. 21(1)(b). Because paragraph (b) is more specific to the definition of "trade secret", I will at this point focus on whether the evidence before me establishes that the disputed information meets that element of the definition of "trade secret".

[70] Paragraph 38 of the initial submission of UBC and CCB provides a list of references to parts of the various affidavits filed by UBC and CCB. I have examined that evidence to determine if it goes to the requirement of para. (b) of the definition of "trade secret" and find that most of it does not. Because they are lengthy, I have quoted those portions of the affidavit evidence in Appendix B to this order.

[71] The passages set out in Appendix B speak to the question of whether the whole of the agreement had economic value to UBC, CCB or others in 1996. That value is

characterized in terms of the efforts that went into creating a commercial agreement. Value is said to be inherent in the special form of the agreement, not in particular dates, product descriptions, costs or other information in the agreement. This is why concern is expressed about a competitor filling in the blanks of the agreement if its form is disclosed to them.

[72] The entire agreement was withheld in 1996. The situation now is different. To the extent that the form of the agreement itself is said to have independent value, that argument is no longer tenable. As is acknowledged in the Sparks Open Affidavit (2000), para. 33 of the Sparks Open Affidavit (1996) – which spoke to value of the form of the agreement itself – has been overtaken by the fact that the form of the agreement has been disclosed and, except for specific information within the agreement, that form is not in issue.

[73] I find that the disputed information has not been shown to have independent economic value in any sense intended in para. (b) of the definition of "trade secret". Even if it could be shown that UBC or CCB may be harmed if the disputed information is disclosed, and that others may benefit from its disclosure, those findings would not mean there is independent economic value in the secrecy of the disputed information.

[74] Since I have found that paragraph (b) of the definition of "trade secret" has not been satisfied, it is not necessary for me to go further. I will add, however, that even if all of paras. (a) to (d) of the definition had been established here, I would not be satisfied that ownership of the form of the agreement by UBC, CCB or both, has been established. In my view, s. 17(1)(a) and s. 21(1)(a)(i) contemplate ownership of a trade secret. Although UBC and CCB may have 'created' contract terms in the agreement, and agreed to keep them confidential between themselves, I am not satisfied that the disputed information has been shown to be proprietary and of an independently valuable nature.

[75] I find that the disputed information does not qualify as a "trade secret" under s. 17(1)(a) or s. 21(1)(a)(i) of the Act.

Financial, Commercial or Technical Information

[76] As I noted earlier, the applicant says he does not argue that the disputed information is not "financial" information within the meaning of s. 17(1)(b) or s. 21(1)(a)(ii). With the exception of information in the agreement that only shows the location of vending machines on the UBC campus, I am of the view that the disputed information is "commercial", and in some cases also "financial", information. I do not agree, however, that it is "technical" information, as it does not relate to techniques for a process, craft or enterprise.

[77] In Order 00-22, I said that the reference in s. 21(1)(a)(ii) to information "of" a third party does not mean that information can be "of" only one party. I found that to the extent that disputed contract information either derived from the third party contractor or was arrived at by a process of negotiation between the third party contractor and the public body, it could be characterized as information of the third party contractor under s. 21(1)(a)(ii). The same reasoning applies here. Again with the exception of information

that only shows the location of vending machines on the UBC campus, the disputed information is "of" CCB under s. 21(1)(a)(ii). In my view, the disputed information – with the same exception of vending machine locations – also qualifies as UBC's commercial or financial information within the meaning of s. 17(1)(b).

UBC's and CCB's Understanding of Confidentiality

[78] Section 28 of the agreement, an explicit confidentiality provision, reads as follows:

> 28. The parties to this Agreement acknowledge and agree that the provisions contained in this Agreement are confidential to the parties and that they shall keep the provisions of this Agreement confidential. Without limiting the foregoing, the parties acknowledge and agree that the provisions of this Agreement constitute commercial and financial information of CCB which has been supplied to UBC and AMS in confidence. The parties further acknowledge and agree that the disclosure of the provisions of this agreement could reasonably be expected to harm significantly the competitive position and/or interfere significantly with the negotiating position of CCB. The parties acknowledge and agree that before any of the provisions of this Agreement are disclosed, other than on a "need to know" basis, all parties to this Agreement must agree in writing. Any confidential information that comes to the attention of a party as a result of this Agreement shall be kept confidential.

[79] Turning to the evidence, it is clear from the affidavits submitted by UBC and CCB that the parties to the agreement explicitly intended to keep confidential both the contents of the agreement and information relating to its negotiation. The applicant does not contest that the "in confidence" element of s. 21(1)(b) has been made out and I agree that that element has been established for the disputed information under s. 21(1)(b).

[80] It must be said, however, that the fact the parties intended the entire agreement to remain confidential does not establish the "supply" element necessary under s. 21(1)(b) or a reasonable expectation of harm under s. 21(1)(c) if the agreement is disclosed. This is a point I also made in Order 00-09, [2000] B.C.I.P.C.D. No. 9. I also agree with applicant that CCB's wish to keep information confidential does not establish risk of harm to UBC under s. 17(1). A third party that contracts with a public body may prefer that the terms of the contract not be publicly disclosed. Yet even if the third party obtains a contractual commitment of confidentiality, as CCB did here, that commitment cannot dictate whether the contract, or part of it, is accessible under the Act. Nor is the application of s. 17 dictated by a third party contractor maintaining that it prefers or insists on confidentiality as a condition of its doing business with a public body. As I found in Order 00-47, [2000] B.C.I.P.C.D. No. 51, any attempt to contract out of the Act is void as against public policy.

The Question of "Supply"

[81] As is noted above, one of the requirements of s. 21(1) is that the disputed information must have been "supplied". It is well-accepted that information that has been negotiated between a public body and a third party does not ordinarily satisfy the supply

requirement in s. 21(1)(b). In Order 00-22, for example, I said the following, at pp. 5 and 6:

> In Order No. 00-09, I said that information negotiated in an agreement between two parties does not ordinarily qualify as information that has been "supplied" to a public body. This view accords with other decisions, in British Columbia and elsewhere. In British Columbia, see Order No. 26-1994, Order No. 45-1995 and Order No. 315-1999. In Ontario, see (for example) Order P-263 (January 24, 1992) and Order P-609 (January 12, 1994). (Consistent with these decisions, I have also acknowledged that the "supply" element may be met if an accurate inference can be made, from a negotiated agreement, of underlying, supplied confidential information that qualifies under s. 21(1)(a). That argument was not made here.) On the question of supply of information and negotiated contracts, also see *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (F.C.T.D.), and *Re Atlantic Highway Corp*., [1997] N.S.J. No. 238 (S.C.). The Federal Court of Appeal decision in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246, is also of interest, more generally, on the issue of supply.

[82] The fact that a third party provides information which is negotiated with the public body and incorporated, changed or unchanged, into a resulting contract will not mean that information has been "supplied" by the third party under s. 21(1)(b). As I said in Order 00-09, at p. 6:

> The material before me does not support a finding that confidential commercial or financial information of the third parties was "supplied" to the Province. Delta Fraser says the "documents" were supplied to the Province, yet the material before me establishes that the agreements included in the records were negotiated between the Province and the third parties. The parties, in effect, jointly created the records.

[83] Similarly, in Order 00-22, at p. 8, I found that information delivered to a public body by a third party contractor was not "supplied" when it was the very subject of the negotiation process leading to the contract in question:

> In my view, it would put form over substance to characterize the process described in Ron Williams' affidavit, for example, as the "supply" of information by JS to the Ministry within the meaning of s. 21(1)(b). JS may, in a literal sense, have supplied information by delivering to the Ministry a document on which the information was written. I do not believe, however, that the Legislature intended the "supply" element in s. 21 to be determined on such a literal and artificial basis. Section 21(1)(b) contemplates the delivery of confidential business information of a third party, not information which is prone to change (and does change in some way) because it is the very subject of the negotiation process and, having been negotiated, becomes part of the essential terms of the contract. The disputed information in the contract referred to in the Williams and other affidavits was determined through a dialogue, or negotiation, between the Ministry and JS. I cannot agree that this information is to be characterized as "supplied" by the contractor, when it was the result, in this particular case, of the give and take of negotiations between the parties.

[84] I addressed the supply issue again in Order 00-24, at p. 8, as follows:

> Conair says it supplied the Ministry with "information relating to the range of interest rates and commitment fees agreed to previously by Conair" in other financing arrangements. Conair argues, in effect, that the interest rate it negotiated with the Ministry is information supplied by Conair or would reveal such information. It does not follow, in my view, that the interest rate agreed to by the parties in the Term Sheet can be equated with background information supplied by Conair regarding the range of interest rates it had found acceptable for other loans. The fact remains that the interest rate on which the parties agreed is information that was created through the give and take of negotiations between the Ministry and Conair. It was not "supplied" by Conair within the meaning of s. 21(1)(b) of the Act.

[85] This is not to say that the "supply" element in s. 21(1)(b) can never be met in relation to information that has been generated by a public body or by information that is part of a contract with a public body. In Order 00-09, Order 00-22 and other orders, I referred to satisfaction of the "supply" element if an accurate inference can be drawn of underlying supplied confidential information. I agree with the following description of this concept in C.H.H. McNairn and C.D. Woodbury, *Government Information: Access and Privacy* (Carswell: Scarborough, 1992-2000), at pp. 4-5:

> Information supplied by a third party would include any information that, if disclosed, would permit an accurate inference to be drawn as to information that was supplied by a third party. Thus, information generated by an institution could qualify for protection from disclosure if it were to carry such an inference.

[86] If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected by s. 21(1). This concept has sometimes been described in terms of an exception to a general rule that negotiated information is not "supplied". Yet the concept of inferred disclosure is not tied to negotiated information – it has a broader application.

[87] It hardly bears mention that inferred disclosure of information "supplied" in confidence cannot be boot-strapped by a contractor proposing or submitting negotiated terms which are subsequently incorporated into a contract with a public body or by finessing the negotiation process so that the contractor is the party that delivers the negotiated terms which have flowed from discussions between the contractor and the public body. The fact that the contractor proposes the terms, or delivers them in the form in which they appear in the contract, does not mean the disclosure of that information in the contract will disclose, by derivation, any underlying confidential information supplied by the contractor to the public body.

[88] A useful recent example, in my view, of a contract with a public body that contained both negotiated terms which were not supplied by the contractor and other

information which was supplied by the contractor, is *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)*, [1999] N.W.T.J. No. 117 (N.T.S.C.). In that case, Vertes J. considered the application of the Northwest Territories access to information legislation to leases of commercial and residential space. Although that legislation is not identical to the Act, the following passage relating to "supply" is apposite:

> ¶54 … The third parties argue that confidential information does not change its character just because it is incorporated into a contract. With respect to the information relating to operating and maintenance costs, supplied in the proposals and incorporated into the lease documents, I agree. But can the same be said for the rental rates stipulated in the lease documents? The third parties argue that it can.
>
> ¶55 Each lease contains a figure for base rent. Some of them also contain figures for an "additional rent" based on all or a percentage of operating and maintenance expenses. Counsel for the respondent government drew a distinction between the "rent" (a figure based on negotiations as between the government and each lessor after receipt and evaluation of proposals) and the operating and maintenance costs (whether designated as "additional rent" or in some other way). Her submission was that rent was not information obtained by the government in confidence (although it may still not be disclosable under other parts of s. 24). Counsel for the appellants argued that there should be no exception of confidentiality concerning the actual rents negotiated and incorporated into the agreements.
>
> ¶56 In my opinion, the base rents set out in each document do not constitute confidential information within the purview of subsection 24(1)(b)(i). They are amounts arrived at through negotiation after receipt and evaluation of proposals. They do not depend on information relating to operating and maintenance costs. While the base rents may have been proposed by the third parties, in the sense that they may have been contained in the proposals submitted by them, they are still contract prices negotiated and agreed to by the parties.
>
> ¶57 In *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 (F.C.T.D.), the court was asked to review a decision to release, in response to a request, information relating to leases of property to the federal government, including terms of the leases, the amount of space leased, and the rental rates for each space. McGillis J. held that the rental rates were not exempt from disclosure. In doing so she concluded that, since the rental rates were negotiated between the parties, a negotiated term is not information "supplied" to government as per s. 20(1)(b) of the federal statute. I respectfully agree. The base rent negotiated as a term of a lease is not information either obtained by or supplied to the government in confidence.
>
> ¶58 I note that the Information and Privacy Commissioner, on her review of this matter, had the *Halifax Development* case before her but held that it was not directly applicable as the federal legislation is worded quite differently. She made this comment in the context of her discussion of the exemption provided by subsection 24(1)(c), not that provided by subsection 24(1)(b)(i). I will discuss ss. 24(1)(c) next but, in the context of ss. 24(1)(b)(i), in my respectful opinion the *Halifax Development* case is relevant and helpful.

> ¶59 I therefore conclude that (a) the base rent figure contained in each lease is not exempt from disclosure pursuant to s-s. 24(1)(b)(i), but (b) operating and maintenance costs, whether set out separately or as part of an additional rent component, are exempt from disclosure. Since s. 24 says that the head shall refuse disclosure if any exemption is established, then I conclude that the head was justified in refusing access to the information relating to operating and maintenance costs.

[89] In my view, a contract with a public body may contain information that is relevant to negotiated terms in the contract, but that is not itself negotiated by the parties. Such information can be supplied in confidence to the public body within the meaning of s. 21(1)(b) of the Act.

[90] The evidence and argument of UBC and CCB in this inquiry establish, not surprisingly, that the agreement in question was the product of extensive discussion and negotiation between the parties. This is reflected, for example, in paras. 5 and 13 of the initial submission of UBC and CCB. Peter Ufford, then UBC's Vice- President, External Affairs, deposed as follows at para. 33 of the Ufford Open Affidavit (1996):

> 33. After agreeing in principle to conclude a corporate sponsorship with Coca-Cola, UBC entered a series of protracted, complex and sensitive negotiations. These negotiations, and the agreement-in-principle that preceded it, were all premised on the complete confidentiality of the negotiations and any agreement that would result. Those negotiations entailed disclosure by both parties of sensitive corporate information, including market analyses and financial projections.

[91] UBC and CCB have provided the Jordan *In Camera* Affidavit (2000), sworn by Len Jordan, the Cold Drink Manager for the Western Canada Division of CCB, specifically to address the s. 21(1)(b) requirement of supply in confidence. Paragraphs 6 and 7 of that affidavit, and the *in camera* exhibits to which they refer, describe a process in which a proposal document was provided by CCB to UBC, with a letter of intent later being entered into between UBC and CCB:

> 6. Attached and marked collectively as Exhibit "A" to this my affidavit are true copies of excerpts from a confidential proposal document supplied in confidence by Coca-Cola to UBC in May, 1995. It identified many of the terms upon which Coca-Cola was prepared to agree in a new cold beverage agreement with UBC.
>
> 7. Attached and marked as Exhibit "B" to this my affidavit is a true copy of a letter of intent supplied in confidence by Coca-Cola to UBC on June 23, 1995. It also identified terms upon which Coca-Cola was prepared to agree in a new cold beverage agreement with UBC.

[92] The following paragraphs in the Sparks Open Affidavit (1996) are also relevant here. David Sparks is the Director for Immediate Consumption for the Western Canada Division of CCB. He deposed as follows:

> 12. Coca-Cola submitted its bid in a "Confidential" Letter of Intent from Coca-Cola to UBC dated 23 June 1995 (Exhibit "A", page 98, Tab 8). The "Confidential" label on the Letter of Intent was consistent with Coca-Cola's requirement of UBC, from the inception of negotiations, that complete confidentiality apply to all of the negotiations and to any agreements that might result. The Letter of Intent expressly stipulated that it and any agreements entered into between UBC and Coca-Cola would be kept confidential.
>
> 13. The Letter of Intent sets out the key business and financial terms of the Cold Beverage Agreement. Disclosure of the Letter of Intent would disclose the information about the key business terms which became reflected in the Cold Beverage Agreement, and *vice versa*.
>
> 14. UBC explicitly told Coca-Cola that all negotiations and documents would be treated confidentially. In the negotiations, Coca-Cola disclosed sensitive corporate information to UBC, including market analyses and financial projections. Coca-Cola's market analyses and financial projections are inferentially contained in the Cold Beverage Agreement.
>
> …
>
> 34. Disclosure of the Cold Beverage Agreement to Coca-Cola's competitors will give their experts a document that, once deciphered, will allow them to do a volume calculation or cost-per-student calculation. Competitors' financial experts will be able to determine Coca-Cola's financial considerations and determine the key financial factors that underlie Coca-Cola's offer. The competitor can then fine-tune the figures to offer competitive bids to other post-secondary educational institutions.

[93] UBC and CCB argue that, in order for information to be "supplied" for the purpose of s. 21(1), it is sufficient that the information has been "furnished or provided" by a third party to a public body. They say that the identity of the creator of information is not relevant to the meaning of "supply". I do not disagree that the concept of supplying entails "furnishing" or "providing". I also think it is possible for a third party to supply a public body with information which was not created by the third party. Much more problematic, in my view, is the proposition implicit in UBC and CCB's argument, *i.e.*, that contractual information which has been negotiated by a public body and a third party is still nevertheless "supplied", so long as it is furnished or provided by the third party and accepted by the public body. To accept this would require rejection of what I believe is a correct proposition – that negotiated contractual terms are arrived at by the parties to the contract and are not "supplied" by one to the other. The proposition advanced by UBC and CCB would also, in my view, undermine the principled basis, described above, for the concept of inferred disclosure of supplied confidential third-party business information.

[94] As for the evidence offered by UBC and CCB on supply, a pattern is followed in paras. 8 to 23 and 27 of the Jordan *In Camera* Affidavit (2000). Each paragraph says that specified information withheld from the agreement was supplied in confidence by CCB to UBC. The information is then identified in Exhibits "A" and "B" (respectively, CCB's

proposal document and the letter of intent). It is then said, "alternatively", that disclosure of the specified information would permit accurate inferences to be drawn about information supplied in confidence by CCB to UBC. Although not all of the items of information which have been withheld from the agreement are dealt with in this fashion in the Jordan *In Camera* Affidavit (2000), I quote para. 9 of that affidavit, as an example of the evidence offered for many items of information in the agreement:

> 9. The definition of "Commission" contained in s. 1.1 of the Cold Beverage Agreement was supplied in confidence by Coca-Cola to UBC. I refer in this regard to numbered paragraph 6 of Exhibit "B". Alternatively, disclosure of the definition of "Commission" contained in s. 1.1 of the Cold Beverage Agreement would permit accurate inferences to be drawn about commission rate information supplied in confidence by Coca-Cola to UBC.

[95] I have examined all of the similar paragraphs in the Jordan *In Camera* Affidavit (2000) and the related exhibited materials and provisions in the agreement. I have concluded that each item of information was a negotiated component of the agreement. In my view, the fact that CCB may have proposed these contractual terms in identical or similar form to that form in which they subsequently were incorporated into the agreement does not change the fact that they were negotiated by the parties to the agreement – nor does it mean that these items were "supplied" by CCB within the meaning of s. 21(1)(b). I also find that the proposal of these contractual terms (or some form of them) by CCB, during the course of discussion and negotiation with UBC, does not constitute the supply of confidential information which would be disclosed, by inference, by disclosure of the contractual terms.

[96] I have also considered the statement in the Sparks Open Affidavit (1996) that sensitive market analyses and financial projections of CCB were provided to UBC and are inferentially contained in the Cold Beverage Agreement. I am unable to identify any specific information in the agreement to which this general statement applies. My examination of the Jordan *In Camera* Affidavit (2000) and the disputed information in the agreement does not reveal market analyses or financial projections or how either of these could be derived from the disputed information. If a volume calculation or a cost per student calculation can be performed from the disputed information, these may have been considerations for CCB in entering into the agreement, but those considerations were not supplied by CCB to UBC. I find, therefore, that the "supply" element in s. 21(1)(b) has not been established for this disputed information. Because supply is a requirement for s. 21(1), I find that this disclosure exception has not been made out for this information.

[97] Regarding Schedule H (the Cold Beverage Products List) and Schedule L (the Standard Physical Case Conversion Table), it is said at para. 26 of the Jordan *In Camera* Affidavit (2000) that the information in these documents was not contained in the CCB proposal document, but was "subsequently supplied in confidence by Coca-Cola to UBC." Having examined these schedules in the context of the entire agreement and the Jordan *In Camera* Affidavit (2000) as a whole, I conclude that Schedule H is an extension of the definition of "Cold Beverage Products" found in section 1.1 of the agreement. I have already found that this definition was a negotiated contractual term. I find that UBC and CCB have not established that the information in this schedule was "supplied" within the

meaning of s. 21(1)(b) of the Act. Again, supply being a necessary element of the s. 21(1) exception, that exception is not established for this information.

[98] I have concluded that the information in Schedule L was supplied by CCB to UBC and was not a negotiated term of the agreement. I have reached this conclusion having regard to fact that the definition of "Standard Physical Case" in section 1.1 of the agreement incorporates standard case sizes and conversion ratios of CCB communicated to the industry for a "standard physical case" of each Cold Beverage Product of CCB. The supply criterion of the s. 21(1) exception is made out for this information.

[99] Schedules A, C and G are not addressed in the Jordan *In Camera* Affidavit (2000). Neither are the conditions regarding outsourcing of non-carbonated cold beverage products that have been withheld from section 4.9, the conditions for agreement termination withheld from section 12.1, the two percentage figures withheld from section 12.1.6, the passage regarding failure to supply Cold Beverage Products withheld from section 12.3 or the amount of the cap on damages for breach of the agreement withheld from section 13.5. Nor does the Jordan *In Camera* Affidavit (2000) address section 31 (regarding Ambush Marketing) or section 32 (regarding Advertising by Special Brands), the text of both of which has been withheld from the agreement. I find that these items of the disputed information have not been established to have been "supplied" under s. 21(1)(b) of the Act. Again, supply being a requirement for s. 21(1), I find that this disclosure exception has not been made out for this information.

[100] Sections 26 and 27 of the agreement are addressed in the Jordan *In Camera* Affidavit (2000) by acknowledging that they were not supplied in confidence by CCB to UBC. It is said, however, that their disclosure would nevertheless "facilitate the disclosure of information which was disclosed in confidence by CCB to UBC." I have addressed this issue under a separate heading below, having concluded that it has not been established that this information has been "supplied" within the meaning of s. 21(1)(b).

[101] One heading of reasonable expectation of harm under s. 21(1)(c) that is relied upon by UBC and CCB is that under s. 21(1)(c)(ii) – harm resulting from similar information no longer being supplied to the public body "when it is in the public interest that similar information continue to be supplied". Section 21(1)(c)(ii) speaks to harm, but it also relates to "supply". It follows from my finding that all items (but one) of the disputed information were not "supplied" under s. 21(1)(b) that this information also does not qualify for protection under s. 21(1)(c)(ii). It was not "supplied" in first instance, so the harm of "similar" such information being "no longer being supplied" does not arise for the purposes of that section.

[102] As regards the supplied Schedule L information, I am not persuaded that a reasonable expectation has been established for the purposes of s. 21(1)(c)(ii). I therefore find that UBC is not required by that section to withhold that Schedule L information.

Evidence of Reasonable Expectation of Harm

[103] Before UBC or CCB can rely upon ss. 17(1) or 21(1), UBC must establish a reasonable expectation of harm to the interests identified in those sections. Much of the affidavit evidence from UBC and CCB on harm is general, in that it relates to disclosure of the agreement in a global sense (or, at least, not necessarily in relation to specific items of information withheld from the applicant). Further, because of the way in which UBC and CCB have presented their cases, and the overlapping relevance of some of the evidence to risk of harm under both s. 17 and s. 21, it makes sense for me to discuss the general evidence of risk of harm to UBC and to CCB under a single heading. The following general discussion of harm is followed by discussions of evidence submitted by UBC and CCB on the risk of harm from disclosure of specific items of the disputed information.

[104] I have sifted carefully through the general evidence submitted by UBC and CCB in assessing whether a reasonable expectation of harm under s. 17 or s. 21 is established on the whole of the material presented to me on the harm issues. Because of the length of that evidence, I have quoted from it in Appendix C to this order.

[105] For his part the applicant has submitted copies of 11 different non-confidential agreements between cold beverage companies, including Coca-Cola Company or its affiliates, and various U.S. universities. He says this shows that disclosure of the disputed information cannot reasonably be expected to harm the interests of UBC under s. 17(1) or CCB under s. 21(1). UBC and CCB answer this by saying, in summary, that

- the context for the non-confidential U.S. agreements is completely different,
- the applicant has provided no evidence that the U.S. agreements did not cause the harms contemplated by s. 17(1) and s. 21(1) of the Act, and
- in any event, harm in relation to the U.S. agreements is irrelevant to the question of whether disclosure of the information in dispute here could reasonably be expected to cause the harms to UBC and CCB contemplated by s. 17(1) and s. 21(1).

[106] In support of their contention about differences between the U.S. and Canadian context, UBC and CCB have included a schedule to their reply submission which appears to summarize to some degree access to information legislation in various U.S jurisdictions. It is not possible to conclude from this schedule that the U.S. agreements provided by the applicant were not confidential because of requirements of access to information legislation. I do not, in any case, consider this to be critical. Even if it could be shown that the U.S. agreements are not confidential because of specific legal requirements which may not exist in Canada, the applicant's point is that the absence of confidentiality has not prevented universities and cold beverage companies from entering into exclusive sponsorship agreements. I agree with the applicant that this point is a cogent one in relation to the alleged reasonable expectation of harm to the interests of UBC and CCB and in my view the agreements provided by the applicant have probative value on that point.

[107] The U.S. agreements are not identical, of course, to the agreement between UBC and CCB. They do have probative value, however. Their probative value lies in the fact

that, in some cases more than others, they demonstrate that the non-confidentiality of agreements which are materially similar to the agreement between UBC and CCB has not caused cold beverage companies and universities to stop entering into exclusive sponsorship agreements. Particularly relevant and compelling in my view – in light of similarities between them and the disputed agreement – are Exhibit N to the applicant's affidavit (the agreement dated April 12, 1996, relating to the University of Minnesota and The Coca-Cola Company), Exhibit T (the agreement dated August 8, 1997, relating to the University of Kansas and The Coca-Cola Company) and Exhibit X (the agreement dated February 1, 1998, relating to the University of Iowa and The Coca-Cola Company).

[108] UBC and CCB say that the U.S. agreements are not probative because the applicant has failed to establish a negative proposition – that the non-confidentiality of those agreements has not caused the harms alleged by UBC and CCB. I disagree with UBC and CCB. The burden is on UBC to establish harm within the meaning of ss. 17(1) and 21(1). The applicant has produced agreements which indicate, by their very existence, that U.S. universities and cold beverage companies enter into exclusive sponsorship contracts on a non-confidential basis. UBC and CCB were aware of this evidence from the applicant from at least the autumn of 1999, when the applicant's affidavit (sworn on September 27, 1999 and filed the next day) would have been delivered in connection with the judicial review of Order No. 126-1996. If UBC and CCB wished to advance evidence showing that the non-confidentiality of the U.S. agreements has resulted in s. 17(1) and s. 21(1) type harms, they could have done so.

[109] I am reinforced in my view of the U.S. agreements by the decision of the Federal Court of Appeal in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246. That case involved the question of whether disclosure of government inspection reports containing negative assessments of meat-packing plants posed a sufficient risk of harm to the business interests of the third-party meat-packer. Evidence of similar, but not identical, reports in the U.S. (and in Canada, from a time before access to information legislation existed) was considered relevant by the court. The court said the following, at pp. 256-257:

> The headquarters audit team usually includes one or more Foreign Review Officers (F.R.O.'s). In the case of plants which export to the United States, like those covered by the audits in the cases at bar, the F.R.O.'s are members of the U.S. Department of Agriculture, who participate in the inspection, ask their own questions, and prepare independent reports on each establishment for Washington. It was conceded by the appellant's counsel in argument, and also appears from the cross-examination of their witness Joseph Krochak (A.B., p. 196), that these reports, although not identical with those prepared by the Canadian auditors, are similar in content. [FN5] All of the American reports have been made available to the public under the U.S. *Freedom of Information Act* since 1974. The Canadian reports were also available in Ottawa from late 1980 or early 1981 to 1983, but have not been released since the coming into effect of the *Access to Information Act* on July 1, 1983.
>
> …

> [FN5] A comparison was available of two reports, at pp. 140 and 152, and at pp. 142 and 154, of the Confidential Appeal Book. The U.S. reports are more summary, the Canadian ones are more discursive, but both fasten on the same defects.

[110] The court referred to evidence of negative publicity surrounding product safety issues discussed in government reports, then said the following at p. 257:

> If such examples have any relevance, they are certainly much farther from the present case than are the similar reports available in the United States for many years and the very same reports in Canada, which were available for some two years, both relating primarily to plants rather than to products. No evidence was presented of any unfavourable publicity with respect to either. I find the appellant's argument on the effect of press coverage to be the sheerest speculation.

[111] I conclude, in this case, that it has not been established that disclosure of the disputed information in the agreement could reasonably be expected to harm the financial or economic interests of UBC under s. 17(1) of the Act, by virtue of cold beverage companies no longer entering into lucrative exclusive sponsorship agreements with UBC. To the extent that the same risk of not entering into such agreements was argued to constitute a reasonable expectation of harm to CCB under s. 21(1)(c) of the Act, I find that this has also not been established.

[112] I should add that I do not think it lies for UBC and CCB to say that, because CCB insisted that UBC contract on confidential terms and said or suggested that it would not deal with UBC in any other way, there is a reasonable expectation of harm to either or both of them under s. 17(1) or s. 21(1). First, it remains to be seen whether that would in fact be the case. It is apparently not the case in the U.S. Second, and perhaps even more fundamentally, in the context of this inquiry – where UBC and CCB were jointly represented and made joint submissions in all respects – and this agreement and its confidentiality clause, such an argument amounts to CCB defining a reasonable expectation of harm under s. 17(1) and s. 21(1) on the basis of its own resistance to the public accessibility of its negotiations and contracts with UBC. This stands the reasonable expectation of harm requirement on its head. In my view, the reasonable expectation of harm must flow from disclosure of the information in question, not solely from the public body's or third party's opposition to disclosure.

[113] As I intimated above, many passages of the UBC and CCB evidence on the risk of harm to their interests consist of sweeping assertions of harm in relation to disclosure of either the whole of the agreement or to unspecified parts of it. For an example of assertions of harm through disclosure of the agreement as a whole, see the Ufford Open Affidavit (1996), at para. 55. For an example of assertions of harm due to disclosure of unspecified portions of it, see the Ufford Open Affidavit (1996), at para. 61. I cannot give evidentiary weight to such material. Evidence relating to the whole of the agreement, as a product, is irrelevant, as most of the agreement has been disclosed. The evidence needs to address the specific items of information which have been withheld. Evidence that vaguely connects speculative harm to unspecified parts of the agreement is not meaningful. It is not at all evident, and is not established, for example, by para. 61 of the Ufford Open

Affidavit (1996), or my own examination of the agreement, what "negotiating strategies" were developed by UBC and how they are revealed by the disputed information in the agreement.

[114] Similarly, as I have already said in connection with the question of "supply" under s. 21(1)(b), I have considered the statement in para. 14 of the Sparks Open Affidavit (1996), that sensitive market analyses and financial projections of CCB were provided to UBC and are inferentially contained in the agreement. I have been unable to identify any such information on the basis of that general statement or to determine that such information could be derived from the disputed information.

[115] Other passages have no evidentiary value because they merely assert a conclusion (for example, para. 54 of the Ufford Open Affidavit (1996)). Other passages are simply vague and speculative (for example, para. 59 of the Ufford Open Affidavit (1996)).

[116] Paragraph 21 of the Sparks Open Affidavit (1996) is troubling. If it is correct, third parties would be able to avoid the Act by simply offering to pay more if their contract with a public body is kept confidential. In my view, this would subvert the overall intent of the Act as well as the Act's specific requirements respecting supply of information, in s. 21(1)(b), and respecting reasonable expectation of harm in s. 17(1) and s. 21(1).

[117] There is also a theme running through the UBC and CCB evidence of harm from disclosure of information variously described as "pricing structure", "specific pricing information" and the "price paid for exclusive supply, advertising and promotional rights granted by UBC" (see the Ufford Open Affidavit (1996), paras. 56, 58, 59, 63; Boniface Affidavit (1996), para. 10; Sparks Open Affidavit (1996), paras. 30 to 32, 34; Sparks *In Camera* Affidavit (1996), paras. 19, 21, 22). The disputed information that is broadly described as such information consists of the agreement's definition of "Commission" (and the related definition which follows it), the information withheld from section 7 of the agreement ("Consideration") and Schedule J ("Wholesale and Maximum Retail Prices"). UBC and CCB say that disclosure of this information would result in the following harms:

- competitors of UBC and CCB would formulate competing agreements to the agreement between UBC and CCB,
- UBC and CCB would be pressured by their respective customers to provide similar terms to those in the agreement between UBC and CCB, and
- there would be dissension and dissatisfaction by CCB customers who have not received the same terms as those reached between UBC and CCB in the 1995 agreement.

[118] These arguments are, in my view, essentially based on speculation. As a symptom of this, the supporting passages in the various affidavits submitted by UBC and CCB tend to run up against each other and present themselves as alternative pleadings, rather than as harms which would co-exist. For example, it is said that the disputed information would assist CCB's competitors in formulating competing agreements to the advantage of those competitors and the disadvantage of CCB. However, the possibility of competing

agreements being formulated by other cold beverage companies would also offer the potential for an enhanced deal for UBC, which would run counter to the arguments made to me of harm to UBC's interests under s. 17(1). The obvious possibility that some competitive challenges for CCB could work to the financial and economic advantage of UBC is not answered by UBC and CCB. It is left to the same speculative realm as the rest of this evidence.

[119] Of course the cogency of this evidence from UBC and CCB must also be assessed with reference to the existence of similar non-confidential U.S. agreements and bearing in mind the requirements for "undue" financial loss or gain to a third party in s. 17(1)(d) and s. 21(1)(c)(iii) or for "significant" harm to competitive position or interference with negotiating position of a third party under s. 21(1)(c)(i). These statutory thresholds cannot be forgotten. In this regard, the evidence concerning pressure from UBC's and CCB's other customers, and dissension from CCB's customers as a result of disclosure of the disputed information, speaks to just that – the possibility of pressure and dissatisfaction from other customers. It dwells on the challenges of explaining deal and contract differences to other customers and falls short of establishing that UBC or CCB anticipate actually making any pricing concessions as a result of disclosure of the disputed information. Nor does this establish that any such concessions would be of an "undue" or "significant" nature or magnitude. I find that the evidence from UBC and CCB regarding harm from disclosure of "price" type information is insufficient to discharge the onus of proving a reasonable expectation of any of the harms contemplated under s. 17(1) or s. 21(1) of the Act.

[120] I have also considered the evidence provided by UBC and CCB concerning a 1996 non-confidential deal apparently made between CCB and the Vancouver Parks Board. That evidence is somewhat dated; it is not, in any case, specific enough to discharge the burden of proof to establish a reasonable expectation of harm under s. 17(1) or s. 21(1). It is also flawed because of its focus on CCB's unwillingness to enter into non-confidential contracts rather than on what can objectively be seen as harmful effects from disclosure. I have similarly considered the evidence provided by UBC and CCB concerning a 1998 deal between UBC and Canadian Airlines International and the confidentiality of that agreement. I find that that evidence, although more recent than the evidence of the Vancouver Parks Board deal with CCB, suffers from the same flaws as the Vancouver Parks Board evidence. It is vague and speculative and focuses on the desire of a third party to contract on a confidential basis, rather than on harm from disclosure.

[121] Last, the potential for harm to Spectrum Marketing Corporation ("Spectrum"), a third party, through disclosure was briefly addressed in paras. 13 to 15 of the Boniface Affidavit (1996). I find that this evidence adds nothing compelling to the general evidence from UBC and CCB that I have already discussed at length. In fact, the relationship of Spectrum to the information in dispute in this inquiry is far more attenuated than the relationships of UBC and CCB to that information. I also note that the Spectrum evidence is quite dated, that there is no more recent evidence before me and that UBC has made no argument on harm to Spectrum under s. 17(1)(d) or under s. 21(1). I find that neither s. 17(1) nor s. 21(1) can be applied to withhold the disputed information because of risk of harm to Spectrum from disclosure.

Harm From Ambush Marketing

[122] UBC and CCB have also advanced the risk of harm from 'ambush marketing' as a basis for withholding information from the definition of "Cold Beverage Products", from section 4.9 (regarding Unavailability of Non-Carbonated Cold Beverage Products), from section 12.3 (regarding Failure to Supply CCB Cold Beverage Products), from section 31 (regarding Ambush Marketing) and from Schedule L (the Standard Physical Case Conversion Table).

[123] Paragraphs 12 to 14, 17 and 19 of the Harmon Open Affidavit (2000) read as follows:

> 12. UBC has severed the definition of "Cold Beverage Products" in order to avoid the risk of ambush marketing by Coca-Cola's competitors. The Cold Beverage Agreement in fact excludes a broad range of cold beverages from its scope. If one or more of Coca-Cola's competitors learned which beverages were excluded, those competitors could aggressively market those products in a manner that could detract from the exclusive rights granted by UBC to Coca-Cola. In addition, ambush marketing by Coca-Cola's competitors could jeopardize UBC's ability to meet its volume commitments under the Cold Beverage Agreement. … [One *in camera* sentence omitted.]
>
> 13. UBC has severed the lettered paragraphs of section 4.9 for substantially the same reasons as the definition of "Cold Beverage Products" in section 1.1. Section 4.9 discusses the circumstances in which products that compete with Coca-Cola's products may be sold on campus, and it therefore poses a similar risk of ambush marketing and a similar risk of harm.
>
> 14. Again, UBC has severed the lettered paragraphs of section 12.3 for substantially the same reasons as the definition of "Cold Beverage Products" in section 1.1. Those lettered paragraphs set out the conditions under which UBC is at liberty to purchase Cold Beverage Products from Coca-Cola's competitors, including PepsiCo Inc. UBC is concerned the competitors of Coca-Cola could seek to exploit disclosure of this information to their commercial advantage and to the financial harm of UBC and Coca-Cola.
>
> …
>
> 17. UBC has severed section 31 for substantially the same reasons that it severed the definition of "Cold Beverage Products" in section 1.1.
>
> …
>
> 19. UBC has severed Schedule L for substantially the same reasons as the definition of "Cold Beverage Products" in section 1.1. Disclosure of Schedule L would enable Coca-Cola's competitors to infer which cold beverage products were and were not covered by the Cold Beverage Agreement. Schedule L therefore poses a similar risk of ambush marketing and a similar risk of harm.

[124] The term "ambush marketing" is not defined in the agreement and UBC and CCB have provided no explicit explanation of what it means. I have determined from the above paragraphs – and from information in the agreement – that ambush marketing would occur where a CCB competitor markets its products in a way that associates its products with consumer-recognized marks, institutions or events, with the goal of undermining consumer identification of CCB products with those marks, institutions or events, thus taking away consumer allegiance to CCB products. Here, an objective would be to associate one's products with UBC marks.

[125] This understanding of the term conforms generally with the definition of "Ambush Marketing" that appears in section 1.1 of the Exclusive Beverage and Sponsorship Agreement, dated April 12, 1996, between The Coca-Cola Company and the University of Minnesota, a copy of which forms Exhibit N to the applicant's affidavit. I take it the word "ambush" is used, in this context, because of the indirect nature of this marketing method. Rather than promoting products or denigrating others on the basis of quality or price, primarily or at all, it relies on the association of products with things that consumers value. The UBC and CCB argument, therefore, is that if limits on the cold beverage products covered by the agreement are disclosed, CCB competitors will be more likely to attempt to "ambush" market to UBC consumers products that are not covered by the agreement, making the exclusive sponsorship deal less successful for both UBC and CCB.

[126] I have concluded that the evidence of UBC and CCB on risk of harm by ambush marketing does not establish a reasonable expectation of harm to UBC, CCB or any other third party under s. 17(1) or s. 21(1) of the Act. The reasons for this follow.

[127] The information that has been withheld from section 4.9 and section 31 does not disclose what beverages are or are not covered by the agreement. Disclosure of that information, therefore, would not inform CCB competitors what beverages are excluded, so that they could engage in ambush marketing with respect to those products. Also, on the face of section 31, disclosure of this agreed-upon mechanism for dealing with ambush marketing would seem more likely to inhibit ambush marketing than to increase that risk.

[128] It is unclear from the evidence how risk of ambush marketing turns on knowledge of the scope of the cold beverages products covered by the agreement. To the extent that cold beverage companies could lawfully market their products by associating them with UBC marks, institutions or events, they could attempt to do this with or without specific knowledge of the cold beverage products excluded under the agreement. If a particular ambush marketing activity impinged on UBC's legal rights with respect to its marks, institutions or events, UBC could take action to restrain the unlawful activity.

[129] Finally, on a more general plane than was argued by UBC and CCB, it is my view that the potential for some financial loss or other competitive impact as a result of CCB's competitors knowing the product boundaries of the exclusive sponsorship agreement – a negotiated term of the agreement, as I have found – would not constitute a reasonable expectation of harm to UBC under s. 17(1) nor an undue financial loss or gain or significant competitive harm as contemplated by s. 17(1)(d) or s. 21(1)(c) of the Act.

Sections 26 and 27 of the Agreement

[130] Sections 26 and 27 relate to administration of the agreement. Paragraphs 15 and 16 of the Harmon *In Camera* Affidavit (2000) say that sections 26 and 27 have been withheld in response to concern expressed by the AMS, which is a signatory to the agreement. Two further sentences of explanation are provided *in camera*. Paragraphs 24 and 25 of the Jordan *In Camera* Affidavit (2000) also address the basis for withholding sections 26 and 27, but most of the information on this point has been provided to me *in camera*. In the open part, it is said that sections 26 and 27 were not supplied in confidence by CCB to UBC, but their disclosure would "facilitate" something occurring. There is then stated, *in camera*, a reason for withholding the entire text and the titles of these sections.

[131] Sections 26 and 27 are boilerplate type provisions dealing with administration of the exclusive sponsorship agreement. They do not disclose the subject matter, scope, term or other specific details of the agreement. Information in section 26 and 27 was not "supplied" by CCB to UBC and it has not been established that disclosure of sections 26 or 27 – which are boilerplate administrative provisions – would inferentially disclose confidential business information of UBC, CCB or any other third party. Nor has it been shown that the administration of the agreement, having regard to its own provisions, could reasonably be expected to harm the interests of UBC, CCB or any other third party under s. 17(1) or the interests of CCB or any other third party under s. 21(1). I have no hesitation in concluding that the *in camera* justification offered by UBC and CCB for withholding sections 26 and 27 does not satisfy s. 17(1) or s. 21(1) of the Act. It may or may not be that disclosure of sections 26 and 27 would affect the way the parties administer the agreement on its own terms, but no s. 17(1) or s. 21(1) harm has been established as required by those sections.

Schedules A, C and G to the Agreement

[132] Schedule A to the agreement – which is a map of the UBC campus showing the location of vending machines as well as facilities excluded from the agreement – has been withheld for two reasons. The first is that vending machine vandalism has been a problem at UBC and, although the location of any particular vending machine is not confidential, a consolidated list of vending machine locations is not publicly available. It is said disclosure of the map would permit "competitors and those who oppose the Sponsorship Agreement to plan further acts of protest and vandalism" (see Ufford Open Affidavit (1996), para. 35). The Harmon *In Camera* Affidavit (2000) adds the following claim, in para. 10:

> 10. UBC is aware that one or more individuals are systematically stealing the coinage from vending machine equipment on campus. Coca-Cola vending machines and other vending machines are located side-by-side throughout campus. Within the last two weeks alone, thefts have been discovered at more than 20 vending machines (including Coca-Cola vending machines). The stolen coinage represents a direct financial loss to Coca-Cola, and an indirect harm to UBC since it impairs UBC's ability to meet its volume targets. UBC is concerned that disclosing the location of Coca-Cola vending machines on campus will exacerbate this situation.

[133] The second reason for withholding Schedule A is that it discloses the facilities which are excluded from the agreement (see Harmon *In Camera* Affidavit (2000), para. 18). (The excluded facilities are also listed in Schedule C to the agreement.)

[134] In my view, a map of the campus showing the location of cold beverage vending machines is not a trade secret, financial, commercial, scientific or technical information of UBC or CCB. Vending machines are highly visible. They are intended to be highly visible, so as to advertise the products they contain and attract customers. One could go so far as to say the locations of vending machines constitutes consumer information. It is not, in any case, a trade secret, financial, commercial, scientific or technical information of UBC or CCB. I also find that the concerns of UBC and CCB about increased vending machine vandalism do not meet the threshold of reasonable expectation of harm under s. 17(1) or s. 21(1). Like bank branches, the locations of which are published in telephone books and are otherwise easily ascertained, vending machines can readily be found by those intent on vandalism and theft. There is no reasonable expectation of harm within the meaning of those sections flowing from disclosure of this information.

[135] I also note that David Sparks, at paragraph 36 of the Sparks Open Affidavit (1996), advanced the "substantial work" done by CCB employees to conduct a thorough inventory of vending areas at UBC as a component of the claimed harm to CCB, and advantage to its competitors, which would result from disclosure of the agreement. This contention has, wisely in my view, been withdrawn in para. 20 of the Sparks Open Affidavit (2000).

[136] For the above reasons, if Schedule A disclosed no more than the location of cold beverage vending machines on campus, I would conclude that it cannot be withheld under s. 17(1) or s. 21(1) of the Act. (I return to Schedule A below.) Schedule G is a list of vending machines and their locations on the UBC campus, broken down further according to general product categories offered. For the reasons just given, I find that Schedule G cannot be withheld under s. 17(1) or 21(1) on the basis that it discloses the locations of vending machines on campus.

[137] Some evidence as to the risk of harm flowing from disclosure of what appears to be the general product categories information in Schedule G was provided in para. 35 of the Sparks Open Affidavit (1996):

> 35. Any of Coca-Cola's competitors would be very interested to learn the details of any equipment plan showing the type of equipment itemized in the Cold Beverage Agreement. The document also describes future product categories, at least one of which Coca-Cola obtained only several months ago. If a competitor were given access to the Cold Beverage Agreement, it could discern information about the characteristics of new Coca-Cola products under consideration.

[138] The above contention, which I would had considered speculative at best, has been withdrawn in para. of the Sparks Open Affidavit (2000). I find that harm under s. 17(1) or s. 21(1) has not been established with reference to the product categories in Schedule G.

[139] The analysis does not end here. This is because the Schedule A map of the UBC campus also discloses the on-campus facilities which are excluded from the exclusive sponsorship agreement and Schedule C lists the excluded facilities. "Campus" and "Excluded Facilities" are defined, in section 1.1 of the Agreement, as follows:

> "Campus" means those facilities other than the Excluded Facilities, now or in the future, within the University that are controlled and/or operated exclusively by UBC or AMS, or in respect of which UBC or AMS has, pursuant to a written agreement or otherwise, the right to designate the supplier of Cold Beverage Products, which at the date hereof means those areas outlined in red in Schedule A attached hereto other than the cross-hatched areas (it being understood that the Excluded Facilities known as Royal Society of Canada (Research Evaluation Unit at UBC) and Shad Valley UBC are not cross-hatched as they are too small);
>
> "Excluded Facilities" means those buildings and areas described in Schedule C together with additional buildings and areas as may be consented to by CCB from time to time, who shall act reasonably in determining whether to provide its consent … .

[140] The Ufford *In Camera* Affidavit (1996) addresses the disclosure of which facilities are excluded from the agreement as follows:

> 28. At page 56 of the target document appears Schedule C to the Sponsorship Agreement. This Schedule lists on-campus facilities that were excluded from UBC's grant of exclusive rights to Coca-Cola. [One *in camera* sentence is omitted.]
>
> 29. Disclosure of the excluded facilities could permit UBC's competitors to undercut the Sponsorship Agreement and jeopardize its continuance. Competitors who knew which facilities were excluded from the Sponsorship Agreement could simply concentrate their marketing efforts at those facilities and undercut the prices of counterpart beverages sold at facilities that are not excluded from the Sponsorship Agreement.

[141] The Sparks *In Camera* Affidavit (1996) also has two relevant paragraphs:

> 13. Around [*in camera* extract omitted] "excluded facilities" are listed in Schedule C of the Sponsorship Agreement. That list is sensitive. If Pepsi-Cola or one of Coca-Cola's other competitors had access to that list, I am certain that they would make an attempt to acquire rights in those facilities for their own products. Pepsi-Cola, for example, could launch a collateral attack on Coca-Cola's presence at UBC by positioning Pepsi-Cola's own products and promotional materials in the excluded facilities in such a way that Coca-Cola would lose many of the advantages it currently enjoys because of its exclusivity rights.
>
> 14. Initially, Coca-Cola was not prepared to sign the Sponsorship Agreement if it did not also cover the excluded facilities, precisely because those facilities potentially offer Pepsi-Cola and other competitors an opportunity to undermine the Cold Beverage Agreement's exclusivity. … [Two *in camera* sentences are omitted.]

[142] As I said above, in dealing with ambush marketing and the cold beverage product boundaries of the agreement, the potential for some financial loss or other competitive impact as a result of CCB's competitors knowing the boundaries of the facilities covered by the agreement – a negotiated term of the agreement – would not constitute a reasonable expectation of harm to UBC under s. 17(1) nor an undue financial loss or gain or significant competitive harm as contemplated by s. 17(1)(d) and s. 21(1)(c) of the Act.

[143] I also find the evidence of UBC and CCB on the impact of disclosure of the excluded facilities – including the *in camera* evidence, to which I have given careful consideration – is unclear and essentially speculative in nature. CCB's competitors are already aware that some campus facilities are excluded from the agreement and, even without necessarily knowing the specific identity of those facilities, other cold beverage companies could attempt to market their products by approaching UBC or AMS about the sale of those products at excluded facilities. The Sparks *In Camera* Affidavit (1996) speaks of competing products and promotional materials being "positioned" in excluded facilities, but it is difficult to see how such activity could occur without the cooperation of UBC, AMS or whatever other entity controls the facility. Even assuming that the claimed "positioning" could be such a "risk", it is one that already exists. For these reasons as well, I find that the evidence of UBC and CCB in relation to disclosure of the facilities excluded from the agreement does not discharge the onus of establishing a reasonable expectation of harm under s. 17(1) or s. 21(1) of the Act.

4.0 CONCLUSION

[144] Because I have found that s. 25(1)(b) does not require the University of British Columbia to disclose the information it has withheld, no order is required in that respect.

[145] For the reasons given above, I find that the University of British Columbia is not authorized by s. 17(1) or required by s. 21(1) to refuse to disclose all or part of the information it has withheld from the record requested by the applicant and, under s. 58(2)(a) of the Act, I order the University of British Columbia to give the applicant access to the record.

May 25, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

Appendix A
to Order 01-20

List of Affidavits Filed by UBC and CCB

This appendix lists affidavits filed by UBC and CCB in this inquiry and provides the terms used in this order to refer to particular affidavits.

	Sworn by	**Sworn on**	**Description**
1.	John Lane	May 31, 1996	Lane Affidavit (1996)
2.	David Strangway	May 31, 1996	Strangway Affidavit (1996)
3.	Peter Ufford	May 31, 1996	Ufford Open Affidavit (1996)
4.	Peter Ufford	May 31, 1996	Ufford *In Camera* Affidavit (1996)
5.	Dale Boniface	June 3, 1996	Boniface Affidavit (1996)
6.	David Sparks	June 3, 1996	Sparks Open Affidavit (1996)
7.	David Sparks	June 3, 1996	Sparks *In Camera* Affidavit (1996)
8.	Linda Harmon	March 26, 2000	Harmon Open Affidavit (2000)
9.	Linda Harmon	March 26, 2000	Harmon *In Camera* Affidavit (2000)
10.	David Sparks	March 27, 2000	Sparks Open Affidavit (2000)
11.	David Sparks	March 27, 2000	Sparks *In Camera* Affidavit (2000)
12.	Carol Ann Simpson	March 31, 2000	Simpson Affidavit (2000)
13.	Len Jordan	December 7, 2000	Jordan *In Camera* Affidavit (2000)

APPENDIX "B"
to Order 01-20

Evidence Relating to the "Trade Secret" Issue

The following passages are quotes from the affidavits identified below and filed in this inquiry by UBC and CCB.

A. UFFORD OPEN AFFIDAVIT (1996)

55. The Sponsorship Agreement and Administration Agreement have intrinsic value, in the sense that they are unique products, created and developed at considerable expense not only in legal fees and expenses, but also in UBC staff time. All of this intrinsic value is lost the moment they are disclosed. The entire Cold Beverage Agreement reflects the acquired body of knowledge regarding supply of cold beverage products to UBC, AMS, or parties designated by UBC or AMS for use on campus, and the supply of beverage dispensing, point-of-sale and other equipment, in return for certain exclusive supply, advertising, and promotional rights on the terms and conditions set firth in the Sponsorship agreement. It also reflects an original body of knowledge concerning the development of sponsorship agreements. Disclosure of this information would provide third parties with substantial undue financial gain.

56. The Cold Beverage Agreement also contains highly sensitive commercial information that belongs to UBC and that holds monetary value. The pricing structure of the Cold Beverage Agreement did not simply follow standard retail pricing arrangements. Instead, both the Sponsorship Agreement and the Administration Agreement contain an intricate scale of pricing and sales terms. Both documents describe pricing and marketing terms and conditions. Both also contain financial information that reveals the price paid by Coca-Cola for the exclusive supply, advertising, and promotional rights granted by UBC. All of this information holds monetary value since it resulted only after many hours of hard-fought negotiation. UBC is unaware of any comparably sized institution securing a pricing structure as desirable as that negotiated by UBC.

…

67. UBC takes the position that the documents at Tab a of Exhibit "A" meets the definition of "trade secret" in Schedule 1 of the Act in that they contain information that:

(a) is used, or may be used, by the competitors of UBC and Coca-Cola for commercial advantage;

(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons, including competitors or UBC or Coca-Cola, who can obtain economic value from its disclosure or use;

(c) is the subject of reasonable efforts to prevent it from becoming generally known; and

(d) if disclosed would result in harm or improper benefit.

68. For reasons stated above, the Cold Beverage Agreement is unique to the relationship between UBC and Coca-Cola and has intrinsic economic value.

69. Most of the Sponsorship Agreement and the Administration Agreement is the result of custom drafting by legal counsel to UBC and Coca-Cola. It reflects a complex, innovative approach to corporate sponsorship. It is the product of many hours of careful thought by representatives of the contracting parties and skilful and unique legal drafting. Competitors of UBC and Coca-Cola could not duplicate its terms unless they were given access to a copy. Once a copy is released to the public, the Cold Beverage Agreement loses every penny's worth of its current value to the parties.

B. SPARKS OPEN AFFIDAVIT (1996)

33. The Cold Beverage Agreement, if disclosed to competitors, will give them virtually cost-free possession of an expensive document. For a competitor, the Cold Beverage Agreement not only contains a wealth of information about how to structure a sophisticated sponsorship transaction, but also can be adapted to a "fill-in-the-blanks" exercise by competitors who are chasing the same potential clients.

C. SPARKS OPEN AFFIDAVIT (2000)

12. The Cold Beverage Agreement was one of the first of its kind to be undertaken by a Canadian post-secondary institution. In 1996 the Cold Beverage Agreement represented an original and unique body of knowledge concerning development of sponsorship agreements. Disclosure of the Cold Beverage Agreement in 1996 would therefore have conferred a significant competitive advantage on UBC's and Coca-Cola's competitors by providing them with virtually cost-free possession of a document developed at considerable expense.

13. Since 1996, several other Canadian post-secondary educational institutions and other public bodies have followed UBC's lead and pursued their own corporate partnerships. This includes many of the universities, colleges, and other institutions with whom UBC competes for private-sector partners. Without access to the Cold Beverage Agreement, these other institutions were required to design and draft their own contracts at no doubt considerable expense.

14. The increased number of agreements between post-secondary institutions and corporate suppliers has provoked a wide range of opinion among the relevant stakeholders – including the students, the faculty, the post-secondary institutions themselves, and the public at large. Stakeholders have debated not only the desirability of these agreements but also the proper role of confidentiality in relation to them.

15. Coca-Cola has been very aware of these stakeholders' interests, and the special considerations that arise in commercial agreements between private corporations and public institutions. Coca-Cola has increasingly sought to strike an appropriate balance between the desirability of openness in public institutions and the need for confidentiality if private-sector sponsorships are to deliver their full financial potential to these institutions.

16. These developments over the last five years have influenced the application of s. 21 of the Act to the Cold Beverage Agreement. Disclosing certain parts of the Cold

Beverage Agreement today poses a lesser risk of harm to Coca-Cola than would have been the case in 1996.

17. For this reason, Coca-Cola is now able to consent to UBC's disclosure of significantly more of the Cold Beverage Agreement now than was possible in 1996. Coca-Cola does so in a good faith effort to accommodate the concerns expressed by the relevant stakeholders while still protecting Coca-Cola's significant and legitimate commercial interests.

18. Despite the reduced risk of harm to Coca-Cola from disclosure of general business terms, the Cold Beverage Agreement continues to contain information whose disclosure is not clearly in the public interest and could reasonably be expected to harm the business interests of Coca-Cola protected under s. 21 of the Act. I will canvass that information in the following section.

…

20. The statements made in paragraphs 33, 35, and 36 of Exhibit "B" [Sparks Affidavit, June 3, 1996], though accurate in 1996, have been overtaken by the developments described in section IV of this my affidavit.

APPENDIX C
to Order 01-20

Evidence of Reasonable Expectation of Harm Under Sections 17(1) and 21(1)

The following passages are quotes from the affidavits identified below and filed in this inquiry by UBC and CCB.

A. UFFORD OPEN AFFIDAVIT (1996)

34. Coca-Cola repeatedly stressed to UBC its requirement that the cold beverage negotiations and whatever agreement emerged must remain confidential. I understood at all times that Coca-Cola would not have been prepared to conclude a cold-beverage agreement with UBC on the terms that UBC sought if UBC had not agreed to keep negotiations and any resulting agreement confidential.

…

54. Disclosure of the target documents could reasonably be expected to result in undue financial gain to UBC's competitors and undue financial loss to UBC. UBC's competitors are not only other universities and colleges, but also public sector institutions such as hospitals and municipalities as well as various private sector institutions.

55. The Sponsorship Agreement and Administration Agreement have intrinsic value, in the sense that they are unique products, created and developed at considerable expense not only in legal fees and expenses, but also in UBC staff time. All of this intrinsic value is lost the moment they are disclosed. The entire Cold Beverage Agreement reflects an acquired body of knowledge regarding supply of cold beverage products to UBC, AMS, or parties designated by UBC or AMS for use on campus, and the supply of beverage dispensing, point-of-sale and other equipment, in return for exclusive supply, advertising and promotional rights on the terms and conditions set forth in the Sponsorship agreement. It also reflects an original body of knowledge concerning the development of sponsorship agreements. Disclosure of this information would provide third parties with substantial undue financial gain.

56. The Cold Beverage Agreement also contains highly sensitive commercial information that belongs to UBC and that holds substantial monetary value. The pricing structure of the Cold Beverage Agreement did not simply follow standard retail pricing arrangements. Instead both the Sponsorship Agreement and the Administration Agreement contain an intricate scale of pricing and sales terms. Both documents describe pricing and marketing terms and conditions. Both also contain financial information that reveals the price paid by Coca-Cola for exclusive supply, advertising, and promotional rights granted by UBC. All of this information holds monetary value since it resulted only after many hours of hard-fought negotiation. UBC is unaware of any comparably sized institution securing a price structure as desirable as that negotiated by UBC.

57. Release of the Cold Beverage Agreement would place UBC at a competitive disadvantage against its competitors in several respects. First, disclosure would give UBC and Coca-Cola's competitors significant information that is not otherwise available to them. Through analysis of the Cold Beverage Agreement, UBC's competitors could

simply copy what UBC has done, at no expense to them, fine-tune their operating procedures, and increase or replicate the Sponsorship Agreement.

58. Harm could also flow to UBC through disclosure of specific pricing information in the Sponsorship Agreement and the Administration Agreement. Competitors could conduct a thorough evaluation of the two agreements and use that information to develop competing business strategies or they could use the information to enhance or formulate competing agreements, at considerably reduced expense, in future sales or commercial activities.

59. Disclosure could also provide competitors with precise information from which they could match or better the terms offered by UBC and Coca-Cola. As well, disclosure would interfere with UBC's negotiations with other potential sponsors, who might insist on the same terms.

60. Disclosure of the Cold Beverage Agreement could also provide clues to the competitors of UBC and Coca-Cola on how to subvert the Sponsorship Agreement. Certain tactics of subversion could cause termination of the Sponsorship Agreement altogether. That threat is of acute concern in the context of a long-term contract such as the Cold Beverage Agreement.

61. Disclosure of the Cold Beverage Agreement would also reveal to UBC's competitors valuable information about UBC's negotiating strategies and thereby provide an unfair advantage to UBC's competitors. Those strategies were developed at substantial expense to UBC in order to address the complexity of multi-party negotiations within the environment of a post-secondary educational institution.

62. To my knowledge, the Cold Beverage agreement is the first of its kind to be undertaken by a Canadian post-secondary educational institution. UBC pioneered this fund-raising technique in Canada and hopes to pursue further agreements without sharing strategies that it has developed. To disclose those strategies will negate UBC's ability to maintain the market advantage it has secured by their development.

63. Value-added agreements, such as the Cold Beverage Agreement, offer to generate several million dollars in further revenue to UBC. I am convinced that harm would result from disclosing the pricing structure in the Sponsorship Agreement. Disclosure could be expected to result in other customers pressuring UBC to provide terms similar to those that UBC gave Coca-Cola, or pressuring Coca-Cola to supply price concessions similar to that Coca-Cola gave UBC. The potential for lost sponsorship revenue is significant.

64. The release of these records could reasonably be expected to prejudice UBC in the competitive marketplace, interfere with its ability to obtain additional contracts, and adversely affect UBC's ability to protect and advance its legitimate economic interests.

65. The market for sponsorship agreements is becoming increasingly competitive. Details of the Cold Beverage Agreement would have substantial value to other persons or entities seeking to enter in sponsorship agreements or negotiations for sponsorship agreements.

66. Any advantage that a competitor institution can obtain from the release of this information is a real threat to UBC. By losing the benefit of this or other sponsorship agreements, the economic spin-off benefits as well as the direct benefits would be lost.

B. UFFORD *IN CAMERA* AFFIDAVIT (1996)

15. Furthermore, none of UBC's potential sponsors is prepared to negotiate with UBC on anything but a confidential footing. They require that UBC maintain the confidentiality of information conveyed to UBC and that UBC promise to keep confidential any agreement eventually achieved. UBC is convinced that disclosure of the Sponsorship Agreement will cause these potential partners to pursue sponsorship agreements with other institutions that are able to guarantee confidentiality. Businesses simply will not deal with us if their agreements and sensitive business data are disclosed to others.

C. BONIFACE AFFIDAVIT (1996)

6. Based on my knowledge and experience with corporate sponsorship and private sector business alliance transactions, I am certain that public disclosure of the August, 1995 sponsorship agreement (the "Agreement") between Coca-Cola and the University of British Columbia ("UBC") would either destroy or severely impair UBC's ability to attract significant sponsorship and private sector business alliance agreements in the future. This comment applies to potential corporate sponsors for UBC in other business sectors in addition to the soft drink sector. I am also certain that public disclosure would cause substantial injury to Coca-Cola, by providing crucial information to Coca-Cola's competitors and by exposing Coca-Cola to serious problems in terms of its relationship with many of its other public sector sponsorship partners and potential future relationships with other private and public sector partners.

7. To my mind, the vital importance of confidentiality is demonstrated by the fact that, with an isolated exception, every sponsorship agreement made by a soft drink supplier with either public or private institutions is subject to strict confidentiality. With respect to educational institutions, I am not aware of any case in Canada where the contracting parties have released the terms of such an agreement or made public the details of the negotiations concerning the agreement. Although rumours may circulate about corporate sponsorship transactions involving educational institutions, they are often inaccurate and invariably incomplete. They are never authenticated by the parties. Unsubstantiated rumours have little or no value to competitors.

8. The importance of confidentiality is not limited to the soft drink industry. UBC is currently engaged in negotiations with other private sector industries that attach great value on preserving the confidentiality of corporate sponsorship terms. By way of additional example, in a matter not involving UBC, a major consumer goods manufacturer (whose name is a worldwide household name) told me last month that it would not do a contemplated sponsorship deal with a public institution in British Columbia (or elsewhere, for that matter) if the sponsorship agreement would be made public.

9. Confidentiality of the Agreement is important to Coca-Cola for a variety of reasons, most of which also apply to other corporate sponsors. First, preserving confidentiality eliminates (or at least significantly reduces) the potential for dissension between the corporate sponsor and its other customers. Disclosure of the terms of a transaction with a new customer might provoke a jealous or critical reaction from an

existing customer who has received less favourable terms, or even simply a differently-structured deal that was not as lucrative. It is no solution that the corporate sponsor should be able to persuade the existing customer that different facts justified the new customer getting a better business deal. Human nature does not work that way. An unhappy existing customer is bad for business. Demands by discontented customers for a new deal, or even unspoken resentment by existing customers, can do serous harm to long-term goodwill in business relationships. Second, prospective customers of Coca-Cola may expect or demand treatment at least as favourable as the terms given UBC. In a sense, Coca-Cola has absolutely nothing to gain and everything to lose by public disclosure of the details of the transaction with UBC.

10. Preserving confidentiality also eliminates the serious risk that Coca-Cola's competitors would try to provoke dissension among Coca-Cola's clients by inviting them to draw unfavourable comparisons between their particular business deal with Coca-Cola and UBC's. That strategy by a competitor of fomenting dissatisfaction could be coupled with invitations by the competitor to Coca-Cola's client to abandon existing or proposed business deals with Coca-Cola and to do business instead with the competitor. Knowing the details of Coca-Cola's business deal with UBC, the competitor would be in a position to tailor its own offer to match or better Coca-Cola's existing business deal on future opportunities.

11. If the Coca-Cola/UBC business deal is made public, UBC's competitors will be able to analyze the deal and to adjust and improve their own negotiating strategies on future potential public sector opportunities. In a more general sense, this comment applies not only for soft drink transactions but to others involving different consumer goods or services. UBC's document with Coca-Cola was developed at the expense of considerable time and labour. Public access to the Agreement will confer a significant advantage on UBC's competitors, who can model their own contracts on this well-thought-out transaction.

12. If UBC can continue to make reliable commitments of confidentiality to potential corporate sponsorship partners, it will be able to generate very significant long-term revenue funding sources over the next decade. If UBC cannot give confidentiality, I am certain that many businesses will have no interest in doing transactions with UBC. Further, any business prepared to enter into a public agreement with UBC will probably offer substantially poorer financial terms, by reason of the factor of publicity.

13. Disclosure of the UBC/Coca-Cola Agreement would also severely harm Spectrum, whose competitors include companies based in Vancouver, Toronto, the United States of America, and England. Those competitors could employ the Agreement and the related presentation documents prepared by Spectrum for UBC in their own business dealings with private and public institutions seeking corporate sponsorship or private sector business alliance agreements.

14. In effect, Spectrum's competitors would have the advantage of documentation that Spectrum helped draft. If the Agreement is not disclosed, on the other hand, Spectrum's competitors will only have their own wits and resources to draw upon. Needless to say, because the Agreement is a confidential document, Spectrum cannot and will not employ it in future transactions with other private or public sector institutions. Competitors would not be bound, however, by the fiduciary and contractual obligations that prevent Spectrum from using the UBC/Coca-Cola Agreement for other deals.

15. Spectrum is a small business employing five people in addition to myself. I have built the business of Spectrum over the past 11 years at great personal expenditure or time and effort. Spectrum will be placed as a distinct competitive disadvantage if its competitors are given access to the UBC/Coca-Cola information.

D. SPARKS OPEN AFFIDAVIT (1996)

12. Coca-Cola submitted its bid in a "Confidential" Letter of Intent from Coca-Cola to UBC dated 23 June 1995 (Exhibit "A", page 98, Tab 8). The "Confidential" label on the Letter of Intent was consistent with Coca-Cola's requirement of UBC, from the inception of negotiations, that complete confidentiality apply to all of the negotiations and to any agreements that might result. The Letter of Intent expressly stipulated that it and any agreements entered into between UBC and Coca-Cola would be kept confidential.

13. The Letter of Intent sets out the key business and financial terms of the Cold Beverage Agreement. Disclosure of the Letter of Intent would disclose the information about the key business terms which became reflected in the Cold Beverage Agreement, and *vice versa*.

14. UBC explicitly told Coca-Cola that all negotiations and documents would be treated confidentially. In the negotiations, Coca-Cola disclosed sensitive corporate information to UBC, including market analyses and financial projections. Coca-Cola's market analyses and financial projections are inferentially contained in the Cold Beverage Agreement.

…

16. I am personally certain that Coca-Cola would not have been prepared to conclude an agreement on the terms reflected in the Letter of Intent of the Cold Beverage Agreement, if UBC had not agreed to keep negotiations and any resulting agreement confidential.

…

19. As matter of general policy, Coca-Cola generally provides that strict confidentiality apply to its corporate sponsorship agreements with private and public sector institutions. Such sponsorship agreements are invariably of large magnitude. If an institution refused to agree to confidentiality, Coca-Cola will ordinarily not enter into negotiations for a corporate sponsorship agreement with that institution. Alternatively, Coca-Cola will tailor its negotiations and its final proposal to take into account the fact that confidentiality will not be granted and that all information disclosed to the institution including the final agreement will be available to Coca-Cola's competitors.

20. For example, Coca-Cola ordinarily would not disclose sensitive internal corporate information in sponsorship negotiations that are conducted on a non-confidential footing. In such negotiations Coca-Cola would disclose only trade information that is already known to Coca-Cola's competitors.

21. Further, non-confidentiality may significantly affect the amount Coca-Cola is prepared to pay. If UBC had not promised confidentiality, it is questionable whether Coca-Cola would have pursued the transaction. If Coca-Cola had decided to pursue a deal with

UBC notwithstanding the prospect of publicity, it is highly probable that UBC would not have obtained the same financial benefits.

22. To the best of my knowledge and belief, Coca-Cola has a confidentiality clause in each and every corporate sponsorship agreement with post-secondary educational institution in Canada. To the best of my knowledge and belief, Coca-Cola has never publicized the terms of any such agreement with a post-secondary institution.

23. Coca-Cola will continue to explore the possibility of other sponsorship agreements with other post-secondary educational institutions elsewhere in Canada. Each of those transactions will involve highly sensitive negotiations and Coca-Cola intends to require confidentiality in each.

24. An example of a non-confidential Coca-Cola transaction with a public institution of which I am aware is a pending agreement with the Vancouver Parks Board. At the outset of negotiations with the Vancouver Parks Board, Coca-Cola was aware that its bid and that of Gray Beverages Inc., a bottler of Pepsi-Cola products ("Pepsi-Cola"), would be given full publicity at a public meeting of the Board. Coca-Cola's bid succeeded and the business terms of its supply and advertising arrangement with the Vancouver Parks Board will be publicized, along with Pepsi-Cola's bid, at a public board meeting on 10 June 1996. In part because of the publicity, the nature of the Vancouver Parks Board arrangement differs markedly from that of the Cold Beverage Agreement. For example, there is no sponsorship component to the Vancouver Parks Board arrangement.

25. There is intense competition in the soft drink industry. Coca-Cola's principal competitors in Western Canada include Pepsi-Cola, Cott Beverages West Ltd. and Gray Beverages Inc. Coca-Cola, like its competitors, zealously protects its confidential business information and constantly seeks to enhance its current competitive advantage.

26. Coca-Cola places great value on the "Coca-Cola" trade-marks and the marketing advantages they provide. Coca-Cola's success in promoting its products is due in large measure to the efficacy of its marketing strategies and tactics. A unique component of Coca-Cola's business success is its operating style and identity. Coca-Cola does not want to give its competitors access to information about how Coca-Cola develops and strengthens its customers relationships.

27. Currently, competition is particularly intense with respect to corporate sponsorship and private sector business alliance agreements involving both private enterprise facilities and public institutions.

28. Confidentiality is extremely important to Coca-Cola because of the harm that disclosure would cause Coca-Cola's financial and economic interests and the benefits that disclosure would confer on Coca-Cola's competitors.

29. Coca-Cola's concerns about harm to its competitive position may be grouped under the following categories:

30. Harm could reasonably be expected to arise from disclosure to existing clients in a number of ways. First, some existing clients might be upset if they perceive that their deal is inferior in dollar amounts or some other respect. Those clients could seek to re-open their agreements, creating ill-will in the relationship and prejudicing the possibility of a

suitable renewal transaction. Other clients might not voice any discontent to Coca-Cola, but goodwill in that business relationship might still be at risk. Theoretically, Coca-Cola could justify the dollar and other differences between the transactions, pointing to differences in the context and scope of the agreement. In reality, such explanations would not make those difficulties disappear.

31. Competitors might take the Cold Beverage Agreement to other Coca-Cola clients and seek to provoke unhappiness or discontent. It is not far-fetched, given the intense competition in my industry, to foresee that competitors will attempt to create dissatisfaction and attempt to steal Coca-Cola clients.

32. Prospective clients can be expected to demand business terms at least as favourable as those given by Coca-Cola to UBC. Disclosure of the Cold Beverage Agreement can reasonably be expected to prejudice Coca-Cola's position in future negotiations with other parties. Further, although Coca-Cola can seek to justify different terms by pointing to factual distinctions between UBC and the potential client, human nature being what it is, such distinctions will weigh less heavily with the potential client than the actual terms of the UBC deal.

…

34. Disclosure of the Cold Beverage Agreement to Coca-Cola's competitors will give their experts a document that, once deciphered, will allow them to do a volume calculation or cost-per-student calculation. Competitors' financial experts will be able to determine Coca-Cola's financial considerations and determine the key financial factors that underlie Coca-Cola's offer. The competitor can then fine-tune the figures to offer competitive bids to other post-secondary educational institutions.

…

37. It can reasonably be expected that disclosure of the Cold Beverage Agreement would give competitors considerable insight into Coca-Cola's negotiating strategies, thereby permitting them to adjust and improve their own negotiating strategies on future potential public and private sector sponsorship opportunities.

E. SPARKS *IN CAMERA* AFFIDAVIT (1996)

15. There are many sensitive provisions in the Cold Beverage Agreement. Coca-Cola is concerned that competitors, or others intent on sabotaging the Cold Beverage Agreement, could design attacks on Coca-Cola's rights, or exploit loopholes in the Cold Beverage Agreement that would create involuntary and technical breaches of contract by one party or the other. Given the intense competition in the soft drink industry, this concern is not far-fetched.

16. With respect to the Cold Beverage Agreement, Coca-Cola does not expect to [*in camera* passage omitted]. Inevitably, disclosure of the Cold Beverage Agreement will put Coca-Cola in a difficult position with other private and public sector institutions, who will probably look to Coca-Cola for a similar deal.

17. I cannot say for certain whether Coca-Cola would have negotiated with UBC if UBC had not agreed to provide confidentiality. I am certain that the magnitude of the

transaction would have been very different. Publicity of a deal of this large a magnitude would have an impact throughout Canada, where to the best of my knowledge and belief a handful of similar agreements are currently being negotiated.

…

19. If the Cold Beverage Agreement became common knowledge in other marketplaces, Coca-Cola could expect to see a negative reaction from its customers in those markets. Those customers will complain that Coca-Cola favours UBC over them. Each business deal turns on its particular circumstances, but I know from personal experience that many clients cannot be persuaded to understand that those differences are a legitimate basis for structuring a transaction differently.

…

21. Each sponsorship transaction must be structured differently. The financial terms are invariably different. The variable factors include, but are not limited to, up-front payments, character and timing of expenditures, sponsorship rights, type of promotional and advertising rights, timing of payment of sponsorship and/or marketing dollars, promotion of on-site activities, capital requirements, and breakdown between institution and related organizations.

22. Coca-Cola has many different kinds of customers, all of whom it values. For example, [*in camera* passage omitted]. If that customer saw the Cold Beverage Agreement details about [*in camera* passage omitted], it could become upset because [*in camera* passage omitted]. The [*in camera* passage omitted] might well say to us: "Why [*in camera* passage omitted]" Although there are valid reasons for [*in camera* passage omitted] those reasons may not be accepted by that customer. In short, Coca-Cola could anticipate very significant problems with its existing clients if the Cold Beverage Agreement is disclosed.

F. SPARKS OPEN AFFIDAVIT (2000)

21. Since 1996, Coca-Cola has entered into more than 75 cold beverage agreements with post-secondary and other public institutions. I have seen every one of the larger agreements and some of the smaller agreements. To the best of my knowledge, all of them contain an express requirement of strict confidentiality. Coca-Cola continues to stress the importance of confidentiality with respect to the Severed Information.

G. HARMON OPEN AFFIDAVIT (2000)

41. As indicated in 1996, the success of the Cold Beverage Agreement was such that UBC hoped to conclude similar agreements with other preferred suppliers. UBC has now done so. One such preferred supplier agreement is the contract that UBC signed with Canadian Airlines International in January, 1998 (the "Airline Agreement").

42. Like the Cold Beverage Agreement, the Airline Agreement contains a confidentiality clause. Canadian Airlines International placed even more emphasis on confidentiality than did Coca-Cola, and UBC was able to invoke Commissioner's order No. 126-1996 to demonstrate our ability to provide an assurance of confidentiality where appropriate.

43. After the Airline Agreement was concluded, Canadian Airlines International confirmed that it provided UBC extraordinarily attractive terms that have not been replicated in any other such agreement. I am absolutely certain that UBC would not have been able to conclude the Airline Agreement if UBC could not have preserved its confidentiality.

44. In preparing this affidavit, I contacted Ms. Helen Donovan who is the Manager, Corporate programs, Canada, for Canadian Airlines International. I asked Ms. Donovan to consider what the consequences would have been for the Airline Agreement if UBC declined to preserve its confidentiality. Ms. Donovan informed me, and I believe, that Canadian Airlines International would not have entered into an agreement with UBC such as one that currently exists, unless the contents were kept entirely confidential. Ms. Donovan added that Canadian Airlines International would expect a similar assurance of confidentiality in all future agreements with UBC.

45. The Cold Beverage Agreement is a fixed-term contract. When it comes up for renewal, UBC will want to secure the terms most financially advantageous to UBC. Coca-Cola has already indicated that a lack of confidentiality in a preferred supplier agreement may significantly affect the amount that Coca-Cola is prepared to pay. I have no doubt that if the Cold Beverage Agreement must be renewed on a non-confidential basis, UBC's financial and economic interests will be harmed.