

**BNSF**



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F.H.

November 24, 2003

Mr. Alan Wallace, ~~Managing~~ Director  
CIBC World Markets Inc.  
400 Burrard Street, 12<sup>th</sup> Floor  
Vancouver, BC, V6C 3A6 CANADA

Dear Mr. Wallace:

Thank you for your letter of November 19, in response to the concerns The Burlington Northern and Santa Fe Railway ("BNSF") raised about the process being followed by the Province and its advisors in connection with the BC Rail transformation process. We also briefly discussed BNSF's concerns in our telephone call on November 19, 2003. Although your letter and email assume that you have addressed my concerns, you have not. Because you copied in the individuals below on your response to me, I am similarly copying them in on my response to you.

I appreciate your response that no information from the OmniTRAX submission for BC Rail was shared with the chosen proponent. However, our concern about "confidential information" being provided the chosen proponent includes other areas, as well.

Since my letter and our discussion, we have been advised that the chosen proponent was provided, as early as the first half of October, with information from BC Rail including confidential interline rate and interline division information involving BNSF customers and business flows. This confidential information was contained in confidential pricing contracts between customers, BNSF and BC Rail. Disclosure of such information to a competitor of BNSF places BNSF at a distinct competitive disadvantage, with irreparable negative financial impacts to our company and customers. We will be exploring options open to us as a result of such breach. Immediately we request that you provide a detailed list of the confidential competitive interline business information involving BNSF and BC Rail which was provided, and when that information was provided, to the chosen proponent so we can assess impact on BNSF's business and relationships with our customers. In addition, we request that you described how you or BC Rail complied with the disclosure obligations contained in those agreements.

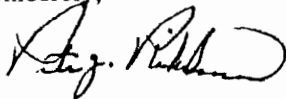
I have also had the opportunity to review the "Fairness Evaluation of the Restructuring of the BC Rail Freight Division" document of November 14 ("Fairness Report"). The Fairness Report raises more questions than it answers and further underscores the issues I raised on November 19<sup>th</sup>, including:

- Under Section 1.2, "Purpose", the fairness advisor is to "confirm whether processes are designed and managed in a way that is consistent with best practices, treat all participants in a fair and honest manner, . . ." The process followed by CIBC did not comply with this purpose. Because there was a proponent chosen in October that received additional information the other proponents did not, then all participants have not been treated in a fair and honest manner. In addition, requiring OmniTRAX to respond (with the assistance of BNSF) with additional information to CIBC appears to have been an exercise in futility because CIBC had evidently already selected its chosen proponent. Lastly, the memo you released on November 13<sup>th</sup> should instead have been released when you began detailed discussions with the chosen proponent, rather than letting the other bid proponents learn of your chosen proponent from unofficial sources. Such openness would have helped diffuse BNSF's concerns about process fairness and honesty.

- Figure 2, on Page 6, confirmed in Section 2.2.3 on pages 8 and 9, clearly shows a process designed to announce a finalist prior to final negotiations and due diligence. As we have learned from public sources, and your November 13<sup>th</sup> memo confirms, final negotiations and due diligence with the chosen proponent began perhaps months ago – and the finalist has yet to be announced, although we anticipate that announcement shortly.
- There is much information in the Fairness Report that draws into question the veracity and objectivity of that Report. Some of that information is:
  - Charles River Associates chose not to interview the three finalist proponents prior to issuing their interim report. Failure to interview the companies involved in the BC Rail bidding process prior to concluding the process, which the Fairness Advisor's report indicates will not happen, will serve no purpose at all. The transaction will have been concluded and any wrong will be left unaddressed.
  - The Fairness Report indicates that the restructuring was undertaken to take advantage of the economies of scale associated with larger railway operations. This goal is not included in the objectives continually articulated by the Province. Does this statement in the Fairness Report justify and foreshadow the selection of one proponent, or is it merely an unfair objective added in after the bidding has almost concluded?
  - The Fairness Report indicates that the second instance of disclosure of information to one proponent, but not to all bidders, did not result in any harm because the data was retrieved or destroyed by those who had access. There are no other facts that support this conclusion. One specific question I have is: Were employees of the bid proponent that reviewed the information excluded further from participating in the process? It would be difficult to imagine that this person/persons could erase from his/her memory that erroneously-released information while reviewing properly released information.
  - CRA also arrives at other unsupported conclusions in the Fairness Report. For example, the report concludes that the transaction was carried on in a manner consistent in all material respects with current best practices usually followed in similar transactions. CRA, however, does not in any way indicate how it arrived at this conclusion.
  - Based on a press release issued by the Province, CRA was to issue a report after selection of the final proponent. It is interesting, especially based upon all the recent press questioning the process, why CRA chose to issue an interim incomplete report when it did. One can only question the timing and the reason for such a report.

In summary, we remain concerned about BNSF confidential commercial information being provided without our knowledge to our competitor, as well as failure of CIBC to follow the process that CIBC and the government said would be followed. Because of these serious matters, your prompt itemized response to our concerns is requested.

Sincerely,



cc: Chris Trumpy, Ministry of Provincial Revenue  
David Morhart, Ministry of Finance  
John McLemon, British Columbia Railway Company  
Brian Kenning, British Columbia Railway Company  
Robert Souldice, Borden Ladner Gervais LLP  
Robert Richardson, CIBC World Markets

(89)

**Smith, Peter J TRAN:EX**

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**From:** Wells, Yvette FIN:EX  
**Sent:** December 5, 2003 3:51 PM  
**To:** 'Matsuda, Ammon'  
**Cc:** 'Shughart, Larry'; 'Munro, Ian'; 'Foster, Harry'; 'Miller, Brad'; Trumpy, Chris REV:EX; 'Bob Shouldice (E-mail)'; 'mhny@shaw.ca'  
**Subject:** RE: DRAFT-Final Report

hello all. much too late in your day to deal with comments now. will call you monday morning. i realize you are missing two key components of info to finish anyway (transaction documents and the chronology of events). these should be to you monday also. there has been some talk about a release next wednesday (dec. 10). we will try and make that possible if you are agreeable. otherwise, the concern is that it will be too close to holiday season. more monday. yvette

-----Original Message-----

**From:** Matsuda, Ammon [mailto:AMatsuda@crai.com]  
**Sent:** Tuesday, December 02, 2003 3:43 PM  
**To:** Wells, Yvette FIN:EX  
**Cc:** Shughart, Larry; Munro, Ian; Foster, Harry; Miller, Brad; Matsuda, Ammon  
**Subject:** DRAFT-Final Report

Yvette:

Please find attached our latest draft of the final report, along with two confidential appendices for the Province's eyes only. You will notice that there are highlighted areas--these are currently being addressed by our team. We will continue to revise and edit the report as appropriate, and we appreciate any feedback from you and other involved individuals. Please let me know if you have any trouble receiving the two files (the main report is almost 2MB). You can reach me tonight at 617-794-0134 if you need me to resend the files. Thanks very much.

Regards,

Ammon

<<Report of Findings 12-02.doc>> <<Report of Findings 12-02 Confidential Appendices.doc>>

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Charles River Associates Incorporated  
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December 11, 2003

The Honourable Judith Reid  
Minister of Transportation  
Ministry of Transportation  
Parliament Buildings, Room 306  
Victoria, British Columbia V8V 1X4

CRA No. D04879-00

Re: Report of Findings—Fairness Evaluation of the Restructuring of the BC Rail Freight Division

Dear Minister Reid:

Charles River Associates Incorporated (CRA), as Independent Fairness Advisor on the BC Rail restructuring process, is pleased to submit our Final Report documenting our findings regarding the fairness of the selection process and the fairness of the transaction value for the restructuring of the BC Rail Freight Division.

Consistent with our Interim Report of November 14, 2003, CRA has concluded that the Province and its advisors designed and managed the BC Rail restructuring process in a manner consistent in all material respects with current best practices usually followed in similar transactions. Furthermore, we found the process was designed and managed to be fair to the proponents. We also found that the Province and the Evaluation Committee employed an objective and structured process in the evaluation of the proposals.

CRA believes that, compared to the status quo, the BC Rail transaction will improve the competitiveness of British Columbia industries, promote growth of new passenger services and freight products, including intermodal, and make a long-term, positive contribution to communities and First Nations. In addition, we believe the transaction agreement includes sufficient and appropriate controls that will ensure sustained economic development and preserve competition among freight rail service providers.

The financial value obtained by the Province was above what might be expected, based upon a quantitative comparison of the BC Rail transaction to recent, similar railroad transactions. We believe the purchase price properly reflects BC Rail's efficient operations, potential for market growth, and the stability and quality of British Columbia's economic base.

TRA-07-097 Vol\_780



CRA developed and applied a detailed discounted cash flow model to validate further that the Province received fair and reasonable compensation for BC Rail. In our estimation, the restructuring of the BC Rail Freight Division provided the Province a net value increase of between \$796 million and \$983 million more than if the BC Rail transaction had not occurred. This value will be enhanced further upon the completion of the BC Rail Port Subdivision transaction.

We look forward to submitting an addendum to this final report including our analysis of the process and value of the BC Rail Port Subdivision transaction.

Sincerely yours,

CHARLES RIVER ASSOCIATES INCORPORATED

Kevin Neels  
Vice President

JKN/awm

Info Bulletin Draft # -  
For Immediate Release  
December 15, 2003

Ministry of Transportation

**FAIRNESS ADVISOR'S FINAL REPORT ON BC RAIL RELEASED**

VICTORIA – The provincial government and its advisers designed and managed the BC Rail revitalization process in a fair and impartial manner, ensuring the best proposals were put forward for consideration, concludes the final report issued by independent fairness adviser Charles River Associates (CRA).

“Consistent with our Interim Report of November 14, 2003, CRA has concluded that the Province and its advisers [sic] designed and managed the BC Rail restructuring process in a manner consistent in all material respects with current best practices usually followed in similar transactions,” says the report.

The final report also addressed concerns raised about the selection process: “What the Evaluation Committee and its advisers [sic] viewed as the normal identification of and discussions with a front-runner prior to the selection of a proponent for final negotiations, others viewed as being selection and negotiation prior to the final announcement. It is unfortunate if some proponent representatives had an understanding that was different from the actual flow of the process and now feel that the process was carried out improperly. However, based on our understanding of the process, how the process was communicated to participants, and how these types of process normally are conducted, we do not believe that they were treated unfairly.”

**Other findings include:**

- Government consistently treated bidders in a fair and impartial manner.
- All proponents had access to the same information at the same time, ensuring no proponent gained an unfair advantage.
- The province was clear in defining the non-financial objectives of the railway revitalization initiative.
- All proponents included sufficient detail in their proposals to allow for thorough comparison evaluations.
- Selecting CN as the successful investment partner preserves and promotes competitiveness.

A copy of the fairness adviser's final report can be found at [www.XYZ.bc.ca](http://www.XYZ.bc.ca)

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Contact: Steve Anderson, Communications Director  
250 387-7787

For more information on the Ministry of Transportation,  
visit our Internet home page at [www.gov.bc.ca/tran](http://www.gov.bc.ca/tran) TRA-07-097 Vol 14 / pg. 20