

 GRANTED Office of Proceedings	DECISION ID NO.: <u>50487</u>
	DECIDED DATE: <u>10/23/2020</u>
	SERVED DATE: <u>10/23/2020</u>
	APPROVED: <u><i>David F. Rifkind</i></u> Director
☐ _____	

David Rifkind

PARTNER

DIRECT: 202.969.4218

OFFICE: 202.785.9100

David.Rifkind@stinson.com

October 16, 2020

The Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E. Street, S.W., Room #100
Washington, DC 20423-0001

301188

VIA E-FILING

ENTERED
Office of Proceedings
October 16, 2020
Part of
Public Record

Re: *Canadian Pacific Railway Company—Continuance In Control Exemption—
Detroit River Tunnel Company*, Finance Docket No. 36448

Dear Ms. Brown:

Enclosed for filing in the above referenced docket is Canadian Pacific Railway Company's Motion for Protective Order.

Please let me know if you have any questions.

Sincerely,

Stinson LLP*/s/ David F. Rifkind*

David F. Rifkind

DFR:ma

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36448

CANADIAN PACIFIC RAILWAY COMPANY—CONTINUANCE IN CONTROL EXEMPTION—
DETROIT RIVER TUNNEL COMPANY

MOTION FOR PROTECTIVE ORDER

David F. Rifkind
Stinson LLP
1775 Pennsylvania
Avenue, NW
Suite 800
Washington, D.C. 20006
(202) 969-4218
david.rifkind@stinson.com

Counsel for Canadian
Pacific Railway Company

Date: October 16, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36448

CANADIAN PACIFIC RAILWAY COMPANY—CONTINUANCE IN CONTROL EXEMPTION—
DETROIT RIVER TUNNEL COMPANY

MOTION FOR PROTECTIVE ORDER

Pursuant to 49 C.F.R. § 1104.14(b), Canadian Pacific Railway Company (CPRC") moves the Surface Transportation Board ("Board") to enter a protective order, substantially in the form as attached to this motion. The purpose of the protective order is so that CPRC may file under seal certain agreements in connection with CPRC's concurrently filed petition for exemption 49 U.S.C. § 10502 and 49 C.F.R. § 1121 from the provisions of 49 U.S.C. §§ 11323-11324 to enable CPRC and its wholly owned non-carrier subsidiary DRTP Holdings ULC to acquire certain interests of Borealis Transportation Infrastructure Trust (BTIT) in the Detroit River Tunnel (the "Tunnel") and to continue in control of the Tunnel.

The agreements contain certain confidential and commercially sensitive terms and conditions the public release of which would cause financial and competitive harm to the parties. Public disclosure of the unredacted agreements is not necessary for the consideration or disposition of the petition for exemption. Issuance of a Protective Order at the outset of this proceeding, as the Board has routinely done in prior control cases, will establish appropriate procedures for the submission of evidence containing proprietary and commercially sensitive information, while protecting such information from unnecessary public disclosure.

Accordingly, CPRC respectfully requests that the Board enter a Protective Order in accordance with 49 CFR §1104.14(b), in the form provided in the Appendix to this Motion. The proposed order follows the format of, and is consistent with, the protective orders approved by the Board in prior control proceedings. *See, e.g., Grupo Mexico, S.A.B. DE C. V. and GMexico Transportes, S.A. de C. V. — Control Exemption — Florida East Coast Holdings Corp.*, STB Finance Docket No. 36109 (STB served May 9, 2017).

Accordingly, CPRC respectfully request that the Board enter a protective order in substantially the form attached hereto, including the confidentiality undertakings.

Respectfully submitted,

/s/ David F. Rifkind

David F. Rifkind

Stinson LLP

1775 Pennsylvania Avenue NW

Suite 800

Washington, D.C. 20006

(202) 969-4218

david.rifkind@stinson.com

Counsel for Canadian Pacific Railway Company

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including, but not limited to, waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2 or 3 of this Protective Order and any Confidential Information contained in such materials.

(d) "Proceedings" means those before the Surface Transportation Board ("Board") concerning the transaction in STB Finance Docket No. 36448 and any related proceedings before the Board, and any judicial review proceedings arising from STB Finance Docket No. 36448 or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, a discovery request it propounds, a discovery response it produces, a transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, a discovery request it propounds, a discovery response it produces, a transcript of a deposition or hearing in which it participates, or a pleading or other paper to be submitted, filed, or served in these Proceedings contains shipper-specific rate or cost data, division of rates, trackage rights compensation levels, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Protective Order.

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to

be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Protective Order.

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

7. Designated Material may not be used for any purposes, including without limitation, any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in STB Finance Docket No. 36448 any related proceedings before the Board, or any judicial review proceedings in connection with STB Finance Docket No. 36448 or with any related proceedings.

8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that

consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order.

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

16. All parties must file simultaneously a public version of any submission containing Confidential Information it files with the Board.

EXHIBIT A

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on October 23, 2020, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 36448 understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 36448 any related proceedings before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Finance Docket No. 36448 or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that CPRC or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Name: _____

Dated: _____

EXHIBIT B

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on October 23, 2020, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 36448 understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 36448 any related proceedings before the Surface Transportation Board ("Board"), or any judicial review proceedings in connection with STB Finance Docket No. 36448 or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that CPRC or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Name: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____