OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

BY FAX

February 28, 2001

To the Parties:

Inquiry Regarding Canadian Pacific Railway Company ("CPR"), Greater Vancouver Transportation Authority ("Translink"), 'The Vancouver Province' and another applicant – OIPC File Nos. 11687 and 11688

1.0 BACKGROUND

[1] This decision arises out of two objections by CPR, a third party in the above inquiry, under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("Act"). The first objection to the inquiry is on the ground of bias. The second objection is to the participation of the public body, Translink, in the inquiry (including in relation to CPR's bias objection).

[2] The bias objection has three parts. The first maintains that I am disqualified from conducting this inquiry because, before I was appointed Information and Privacy Commissioner effective August 15, 1999, I was an outside legal adviser to Translink's predecessor agency, B.C. Transit, in relation to some information and privacy matters. The second part alleges that delegation of the conduct of the inquiry to the Executive Director of this Office would not cure the bias, because she is a member of my staff. The third part of CPR's bias objection is that, even if I were to recuse myself from conducting this inquiry and appoint a delegate to do so, the proceeding would remain tainted because the Act does not allow me to delegate the order-making powers under s. 58, which are to be exercised at the conclusion of an inquiry under s. 56.

[3] Before going further, I should say that, before February 15, 2001, I had no involvement with this matter. Several months ago, CPR requested a review under s. 52 of the Act. This Office, as it ordinarily does in such matters, appointed a portfolio officer to mediate under s. 55 of the Act. Because the matter did not settle in mediation, it was scheduled for a written inquiry under s. 56 of the Act. As at February 15, 2001, the dates for submissions of the parties in the inquiry were scheduled, but the submissions were not yet due and no consideration of the issues and merits of the inquiry had been undertaken (including no consideration of whether its conduct should be delegated to someone other than me). On that date, CPR wrote to the other parties to the inquiry and to me and raised its bias objections. I responded by requesting the submissions that are now before me and by re-scheduling the time for delivery of the parties' main submissions in the inquiry, to enable this matter to proceed in an orderly fashion.

[4] Further background about this matter is found in the Notice of Written Inquiry and the Portfolio Officer's Fact Report issued to the parties by this Office, both of which are dated January 17, 2001. I have, in the wake of CPR's objections, read both of these documents.

[5] The Notice of Written Inquiry and the Portfolio Officer's Fact Report indicate that the parties to this inquiry are two applicants ('The Vancouver Province' and another unnamed applicant), the public body (Translink) and the third party (CPR). According to the Portfolio Officer's Fact Report, this inquiry arises out of access requests made on July 10, 2000, by the two applicants, for copies of the West Coast Express contracts with CPR. Translink apparently identified a "Commuter-Rail Crewing Agreement" and "Purchase of Services Agreement" as being responsive to the access requests. On September 1, 2000, Translink informed CPR that it intended to release the contracts to the applicants. On September 20, 2000, CPR requested a review, under s. 52 of the Act, on the basis that s. 21 applied to except all or part of the contracts from disclosure.

[6] Section 21 of the Act creates an exception to the right of access under the Act, to protect against disclosure harmful to specified business interests of a third party. It is a mandatory exception, in the sense that a public body must refuse to disclose information to which s. 21 applies. I infer that s. 21(1), not s. 21(2), is involved here. Section 21(1) contains a three-part test. The s. 21(1) exception to the right of access applies only if all three parts of the test have been satisfied.

[7] When it receives an access request, a public body must consider whether s. 21 might apply to any information in the requested records. If it decides that s. 21 applies to information in the records, it must refuse to disclose the information to which the section applies. It must, under s. 8 of the Act, inform the access applicant of the reasons for refusal. Those reasons must be included in the public body's response to the access request.

[8] If a public body decides that s. 21 prohibits the disclosure of information, it nonetheless may, under s. 23(2) of the Act, give notice to the third party before the public body issues its decision to refuse access. If a public body decides that s. 21 does not require it to withhold a record, but has reason to believe that the record contains information that might be excepted from disclosure under s. 21, s. 23(1) requires it to give notice to the relevant third party. Under ss. 23 and 24 of the Act, the third party is then given an opportunity to make representations to the public body concerning disclosure. On reaching its decision about disclosure after receiving any third party representations, the public body must, under s. 24(2), give written notice of its decision to the applicant and to the third party. If the public body decides to give access to all or part of the record, the notice must state that the applicant will be given access unless the third party asks for a review, under s. 53, within 20 days after the day the notice is given.

[9] The materials before me do not reveal all the details of what transpired between the applicants, Translink and CPR. However, from the information in the Notice of Written Inquiry and the Portfolio Officer's Fact Report, the following can be inferred:

(1) Translink declined to apply s. 21 to the contracts requested by the applicants, (2) CPR disagreed with Translink's decision, (3) CPR requested a review under s. 53, (4) the review did not settle in mediation under s. 55 and has given rise to this inquiry under s. 56, and (5) the disputed contracts remain undisclosed by Translink pending the outcome of the inquiry and any order under s. 58 of the Act. If the inquiry results in an order for disclosure under s. 58 with which CPR does not agree, it is entitled to make an application for judicial review within 30 days after delivery of the order and, under s. 59(2), the order under s. 58 will be stayed subject to an order of the Court otherwise.

2.0 DISCUSSION

[10] **2.1 Translink's Role In This Inquiry –** Because my conclusion on the point will affect how I treat Translink's participation on CPR's bias objection, I will first address CPR's objection to Translink's participation.

Description of Relevant Part 5 Provisions

[11] Before I describe CPR's arguments in some detail, it is desirable to outline several provisions of the Act that are pertinent to an understanding of the nature of a review and inquiry under Part 5 of the Act and the role of public bodies in that process.

[12] I should first note that the right to ask for a review is not limited to issues surrounding the applicability of a disclosure exception in Part 2 of the Act. Under s. 52(1), a person who makes a request for access to a record or for correction of personal information may ask the Commissioner to review "any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under s. 42(2)." The right to ask for a review, therefore, also covers such matters as a public body's failure to respond to an access request at all, or to respond in a timely or otherwise required way, and its failure to assist an access applicant as required by the Act.

[13] Section 54 provides that, on receiving a request for review, the Commissioner must give a copy of it to the head of the public body concerned and any other person the Commissioner considers appropriate. Section 56 provides that, if a matter is not referred to a mediator or settled in mediation under s. 55, the Commissioner must conduct an inquiry under s. 56. Section 56(1) provides that the Commissioner "may decide all questions of fact and law arising in the course of the inquiry." By virtue of s. 44 of the Act, when conducting an inquiry under s. 56, the Commissioner has the powers to compel the attendance and testimony of witnesses and to compel the production of evidence that are found in ss. 15 and 16 of the *Inquiry Act*. Section 44 also gives the Commissioner the power to require a public body to produce any record for examination. Section 56(3) requires that the person who asked for the review, the head of the public body concerned and any person given a copy of the request for review must be given an opportunity to make representations to the Commissioner during the inquiry. Under s. 56(5), these parties are entitled to be represented at the inquiry by counsel or an agent.

[14] Section 57 of the Act deals with burdens of proof. Section 57(1) places the burden on the public body to prove that an applicant has no right of access when the public body has decided to refuse access. Section 57(2) creates an exception to this for personal information to which the public body has refused access. In such cases, the burden falls on the access applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. Section 57(3) addresses cases such as the present one, where the public body has decided to give access to a record containing information that relates to a third party. As regards personal information in such cases, s. 57(3)(a) puts the burden of proof on the access applicant. In other cases, including those involving records relating to third party business interests, s. 57(3)(b) provides that the third party bears the burden of proving that the access applicant has no right of access to the record. CPR bears the burden of proof in this case by virtue of s. 57(3)(b).

Discussion of CPR's Objections to Translink's Participation

[15] CPR argues that Translink "fulfilled its statutory obligations" as of September 21, 2000, when – apparently after considering but not agreeing with CPR's assertion that s. 21 applied – Translink decided that the requested contracts should be released. Relying on cases dealing with the role of a tribunal in an application for judicial review of its decision – notably, *Northwestern Utilities Ltd.* v. *Edmonton* (1979), 89 D.L.R. (3d) 161 (S.C.C.)) – CPR says the following, at para. 31 of its initial submission:

> … [I]n circumstances where the public body has not advanced grounds for non-disclosure in its own capacity but has simply adjudicated upon submissions received from the third party, it ought not to advocate the correctness of its decision before the Commissioner. Thus, Translink's interest in this matter should be deemed as concluded.

[16] I agree with Translink that, even if *Northwestern Utilities* applied in the present context, it is well established that tribunals have the right to address jurisdictional questions on judicial review. CPR's bias objections are unconnected to the merits or the fairness of Translink's decision to disclose the disputed contracts. They relate solely to my jurisdiction as Commissioner over this matter or the jurisdiction of a person who might be delegated to conduct the inquiry in my place. On this basis alone, CPR's objection to Translink's participation in the bias matters raised by CPR is not sustainable.

[17] CPR responds, at para. 11 of its reply submission, by saying that *Northwestern Utilities* stands for the proposition that a tribunal whose decision is under judicial review is entitled to standing only in relation to its jurisdiction. I note that this argument is untenable in light of the Supreme Court of Canada's later decision in *CAIMAW, Local 14* v. *Paccar Canada Ltd.*, [1989] 2 S.C.R. 983, *per* La Forest J., at pp. 1016-1017, in which a labour relations tribunal was explicitly held to have standing to make submissions on the standard of review applied by a reviewing court – an issue of jurisdictional dimension in relation to the reviewing court, not the tribunal.

[18] CPR's objection also fails because it relies on principles developed in the context of judicial review proceedings, without regard to the fact that the Act's inquiry process is not the same as judicial review proceedings and is not, in many respects, even similar to such proceedings. For one thing, the s. 56 inquiry process is inquisitorial. While it is expected that parties will come forward with evidence, the Commissioner can also independently compel testimony and evidence.

[19] Further, a public body to which an access request has been made, or to which a request for correction of personal information has been made, is necessarily a central participant in the inquiry process. There is nothing in the Act to suggest that its role is a passive one. To the contrary, provisions in the Act – particularly s. 56(3) – explicitly give public bodies the unrestricted right to participate in an inquiry in the same way as other parties. If accepted, despite the language of s. 56(3), CPR's argument would restrict the scope of a public body's participation in an inquiry where, under s. 57(3)(b), a third party bears the burden of proving the applicability of the s. 21 disclosure exception. Nothing in the language of the Act supports such a restriction and s. 56(3) expressly cuts against it.

[20] CPR also justifies its objection to Translink's full participation in the inquiry by distinguishing between disclosure exceptions protecting third party interests and disclosure exceptions protecting the public body's own interests. It says that, in this case, Translink has not relied on s. 17 to prevent harm to its own financial or economic interests, but instead has not accepted CPR's argument that s. 21 applies to prevent harm to CPR's business interests. As CPR's argument goes, Translink therefore has no "interest" in the inquiry and no right to participate fully as a party.

[21] Again, the structure and wording of the Act reflect no such restriction on Translink's inquiry role. CPR's posited dichotomy between a public body's role in relation to exceptions which protect the interests of third parties and its role in relation to exceptions which protect the public body's interests is not supported by the language of the Act. It is possible for a public body to be entirely responsible for claiming an exception that protects important rights of others. Section 19 is a good example of this. That section protects the health or safety interests of individuals by authorizing a public body to refuse to disclose information the disclosure of which could reasonably be expected to threaten "anyone else's safety or mental or physical health" or "interfere with public safety."

[22] Moreover, the s. 23 third party notice requirements in relation to ss. 21 and 22 interests do not diminish the obligation of a public body to apply those exceptions, even without obtaining third party representations, if the ss. 21 or 22 tests for non-disclosure have been met. The fact is that public bodies are directly responsible to administer the Act in respect of records in their custody or under their control. Third party interests are recognized under the Act and some third party rights of participation are built into the access to information process, at the public body decision stage, and are built into the review and inquiry process under Part 5. These rights of participation do not, however,

diminish the responsibilities of public bodies in applying the Act or the scope of their participation in proceedings before the Commissioner.

[23] Last, in an *in camera* submission CPR argues that certain information in the disputed contracts mitigates against Translink's being able to participate as a full party in this inquiry. I have considered CPR's *in camera* submission, including the contractual wording on which it relies, and Translink's *in camera* response. Translink's right to participate in this inquiry as fully as any other party is found in the statute. It is not defined by the disputed contracts. Information in the disputed contracts could, perhaps, lessen or enhance the force of evidence or argument from Translink, but it does not affect its statutory standing to participate as the public body involved in CPR's request for review.

[24] I have, for the above reasons, decided to hear from Translink, without restriction, on CPR's bias objections.

[25] **2.2 Commissioner's Alleged Disqualification** – CPR's bias objections are summarized on the first page of its initial submission, where it says I am without jurisdiction, or have lost jurisdiction, to conduct this inquiry on the following grounds:

> …your professional background as counsel for BC Transit prior to your appointment as Commissioner and your voluntary disqualification from conducting certain previous inquiries,
>
> (a) Amount to actual bias, or
> (b) Raise a reasonable apprehension of bias.

[26] Some background is necessary before I address the merits of CPR's bias objections.

Background to the Bias Objection

[27] The relevant facts are that, before my appointment as Commissioner effective August 15, 1999, I was engaged in the private practice of law and, in that capacity, acted for B.C. Transit and, to a lesser extent, Translink, on access to information and privacy protection matters.

[28] B.C. Transit is Translink's predecessor in the sense that, in the spring of 1999, responsibility for transit services in the Lower Mainland was transferred from B.C. Transit to a new entity, the Greater Vancouver Transit Authority. The Greater Vancouver Transit Authority is also known as Translink. As I understand it, B.C. Transit continues to operate transit services outside of the Lower Mainland, including in the Greater Victoria area. As CPR notes in its submissions, my legal work for B.C. Transit included representing it on an application for judicial review relating to a matter under s. 43 of the Act, *Crocker* v. *British Columbia (Information and Privacy Commissioner)* (1997), 155 D.L.R. (4th) 220 (B.C.S.C.) and in the inquiry which gave rise to Order No.

45-1995. My relationship as a legal adviser to Translink ended, of course, when I was appointed as Commissioner.

[29] Since my appointment, I have delegated two inquiries concerning B.C. Transit, not Translink, to the Executive Director of this Office. The orders made under s. 58 in those inquiries were issued by me, in the terms recommended by the Executive Director, because s. 49(1)(c) of the Act prevents my delegation of powers, duties and functions specified in s. 58. In the first case, I disqualified myself from conducting the inquiry in November of 1999 and the Executive Director's report on the inquiry, and my order under s. 58, were issued on June 20, 2000. This was Order 00-17. In the second case, I disqualified myself from conducting the inquiry in May of 2000 and the Executive Director's report on the inquiry, and my order under s. 58, were issued on September 13, 2000. This was Order 00-41.

Discussion of the Bias Objection

[30] CPR alleges that I am disqualified from this matter by actual bias or by reasonable apprehension of bias. Having alleged actual bias, CPR has not advanced any grounds to support that allegation. I am not aware of any grounds for such an allegation. The following discussion, therefore, deals only with CPR's allegation of reasonable apprehension of bias.

[31] As CPR notes in its submissions, not every past professional relationship creates a reasonable apprehension of bias. There is no doubt, however, that a past professional relationship can, in some circumstances, give rise to a reasonable apprehension of bias. This is why I decided early in my tenure as Commissioner, in light of my then recent professional relationship with B.C. Transit, to delegate to the Executive Director two inquiries relating to that public body. At the time, I considered this was the right thing to do in the circumstances. In both cases I did it on my own motion without seeking submissions from the parties to those inquiries. The issue here is whether my past professional relationship with B.C. Transit (and, briefly, Translink) now disqualifies me from conducting this inquiry.

[32] On this point, it is well established that a former professional relationship will generally not give rise to a reasonable apprehension of bias if there has been a reasonable lapse of time following the association and the prior association did not relate to the matter now in issue. The 1998 report of the Canadian Judicial Council, *Ethical Principles for Judges*, contains a useful discussion of how the issue of past professional relationships is treated (granted, in a judicial context), including as to the relevance of the passage of time. The following passage is of assistance:

> **E.19 Former Clients**
>
> Judges will face the issue of whether they should hear cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practised before appointment. There are three main factors to be considered. First, the judge should not deal

> with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.
>
> The following are some general guidelines which may be helpful:
>
> (a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.
>
> (b) Where the judge practised for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.
>
> (c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period," often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.
>
> (d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

[33] Neither I nor the law firm of which I was a partner was involved with the applicants' access requests, this inquiry or the contracts requested by the applicants. Before my appointment as Commissioner, therefore, I had no direct involvement and acquired no confidential information respecting this matter. Two points remain for consideration, *i.e.*, the question of what is a reasonable "cooling-off period" and CPR's argument that issues to be determined in this inquiry will be the same as those on which I would have advised B.C. Transit in respect of Order No. 45-1995.

[34] On the first point, there is no strict rule as to how long a cooling-off period suffices to dispel a reasonable apprehension of bias arising from a past professional association. I have now served as Commissioner for almost 19 months. The term of my appointment is six years and the Act provides that I cannot be re-appointed. Unlike the case with judges, there is only one Commissioner. I have no deputy or assistant commissioner and, although I may delegate the conduct of inquiries to others, I am prohibited by s. 49(1)(c) from delegating the order-making power under s. 58.

[35] During the first year of my appointment, I considered it prudent to delegate inquiries concerning B.C. Transit to the Executive Director. I am not sure this continues to be necessary. To paraphrase from the Canadian Judicial Council report cited above,

I should be mindful not to withdraw unnecessarily, as to do so adds to the burdens on my staff and may contribute to delay in the inquiry process under the Act. In my view, the structural limitations in the Act noted above may also be relevant to assessing the length of a cooling-off period before I conduct inquiries concerning former clients.

[36] At para. 2 of its reply submission, CPR says the cases relied on by Translink on the issue of what is a reasonable period of time for a decision-maker to decline to hear matters involving former clients involved time lapses much greater than the approximately 19 months involved here. The periods are said to range from three or four years, through to seven, 12 and 24 years. In *Marques* v. *Dylex Ltd.* (1977), 81 D.L.R. (3d) 554 (Ont. Div. Ct.), however, the time lapse was only 12 months. At para. 3 of its reply submission, CPR attempts to distinguish this case in part on the basis that there are different expectations regarding the impartiality of labour relations board members.

[37] I am not persuaded that expectations for impartiality in the world of labour relations boards are unique to that setting. Nor am I persuaded that they are irrelevant in the present context, where I have a time-limited, non-renewable appointment as Commissioner, before which I worked in the information and privacy law fields and after which I am likely to do the same again.

[38] As was observed by Dubé J. in *Fogal* v. *Canada*, [1999] F.C.J. No. 129 (F.C.T.D.), judges do not descend from heaven. Neither do information and privacy commissioners. Qualifications which suit someone for appointment as Commissioner – expertise and experience in the field of access to information and privacy protection and knowledge of the law – are acquired largely through work as a practising lawyer. When my six-year term as Commissioner ends, another individual with relevant professional expertise and experience will be appointed to the position for a single six-year term and I will return to private practice. In my view, this situation mitigates against a very long cooling-off period and suggests a shorter limitation on my full functioning as Commissioner than might be the case for a judge who is appointed to a court with many members and who has tenure for the rest of his or her working life. Considerations very similar to those just outlined prompted the court in *Dylex* to accept a 12-month cooling-off period and to observe that practices respecting judicial recusal were not determinative for the administrative tribunal involved in that case.

[39] CPR also argues that the fact that I disqualified myself from conducting the inquiries for Orders 00-17 and 00-41 is relevant to the issue of bias in this case. Relying on the case of *Valtchanov* v. *Johnson*, [1994] N.J. No. 205 (Nfld. S.C.), CPR says the following, at para. 19 of its initial submission:

> … the fact that you have disqualified yourself in the past from reviewing access to information decisions of BC Transit itself would raise an apprehension of bias if you were to conduct the Inquiry in this case.

[40] As I see it, the effect of this argument would be that, when a decision-maker recuses himself or herself from a matter because of a past professional relationship with

one of the parties, a 'new' reasonable apprehension of bias arises, which then travels forward to the next time a matter arises concerning the same party. This cannot be correct, as it could have the effect of extending the disqualification period indefinitely. Yet the law is clear that – other factors being equal – a past professional association does not require disqualification after the lapse of a reasonable period of time.

[41] I also consider CPR's interpretation of the *ratio* in *Valtchanov* to be too broad. The past relationship in that case appears to have touched on the matters in issue in the second proceeding; it is also unclear whether the past relationship had recently ended at the time of the second proceeding.

[42] Next, CPR says the following at para. 1(a) of its reply submission:

> … in the present case you are asked to decide the very issue on which you previously advised Translink as a public body. You then advocated the correctness of Translink's decision flowing from that advice on its behalf before your predecessor Commissioner. The common issue is, "What degree of harm to the competitive position of a third party contractor is significant harm?"

[43] This refers to Order No. 45-1995, in which I acted for B.C. Transit. That inquiry concerned a request for review by corporate third parties that objected to partial disclosure, intended to be made by B.C. Transit, of transit operating agreements between it and the third parties. The disclosure exception in question was s. 21, which will be involved in the present inquiry. Since the schedule for submissions on the merits of this inquiry has not yet closed, I cannot say whether there will be true identity between the issues in the inquiry for Order No. 45-1995 and the issues in this inquiry.

[44] On the one hand, circumstances should be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that I am not impartial in my conduct of an inquiry. CPR is entitled to a fair process – not a perfect process – within the constraints of the Act. On the other hand, I should not withdraw unnecessarily, as I noted earlier, and I have some doubt that the law would disqualify me here.

[45] In the circumstances, however, I have decided to put a further consideration into the balance. That consideration is the interests of the applicants. They have requested access to records in the custody or under the control of Translink and are concerned in this inquiry with whether they are entitled to access to the requested contracts. Their interests do not lie in being tied up in a case addressing the propriety of my conducting this inquiry. For this reason, I have decided to step away from this inquiry. Section 49(1) of the Act authorizes me to delegate the conduct of this inquiry to someone else and that is what I will do.

[46] **2.3 Delegation of the Conduct of the Inquiry –** CPR argues that, if I am disqualified from conducting this inquiry, the reasonable apprehension of bias extends to my staff, because they are not independent of me. Delegating the conduct of the inquiry to the Executive Director of this Office therefore would not, according to CPR, resolve

any reasonable apprehension of bias. I have some difficulty with this contention, at the very least because it fails to account for the fact that, under the Act, I am not limited to delegating the inquiry to the Executive Director or someone else in my Office.

[47] Assuming, for the purposes of discussion, that I delegate the inquiry to a member of the staff of this Office, s. 56(1) authorizes the delegate to make all necessary findings of fact and law arising in the course of the inquiry. The presumption of regularity would apply and, in the absence of evidence to the contrary, would hold that the delegate will carry out her or his duties according to law. CPR has cited no cases which support the view that disqualification due to a past professional association is contagious to others, be they fellow judges or tribunal members or agency staff. In fact, the opposite conclusion was reached by the Ontario Divisional Court in *E.A. Manning Ltd.* v. *Ontario Securities Commission* [1994] O.J. No. 1026 (Ont. Div. Ct.), aff'd. 23 O.R. (3d) 257 (C.A.), in the context of a 'pre-judgment' form of bias. The following passage from that case, at pp. 8-9 (O.J.), merits quotation at some length:

> It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.
>
> Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992), states at p. 92:
>
> > Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not the panel hearing the matter does not usually give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.
>
> There is no evidence that the views of the Chair are shared by the new Commissioners. Further, there is no evidence before the court to indicate any underlying agenda of Mr. Geller or Ms. Meyer. As well, the minutes of the Commissioners indicate they were not party to any of the decisions respecting Policy 1.10 or the OSC's position in *Ainsley*.
>
> There must be a presumption in the absence of contrary evidence that a Commissioner will act fairly and impartially in discharging his/her adjudicative responsibility. As noted in *Bennett* v. *British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at p. 181, 94 D.L.R. (4th) 339 (C.A.), leave to appeal to the Supreme Court of Canada dismissed August 27, 1992, [1992] 6 W.W.R. vii:
>
> > Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where

> an entire tribunal of unidentified members has been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

I therefore conclude that Mr. Geller and Ms. Meyer are not biased, nor is there any evidence of conduct by them raising any apprehension of bias. The vacant position may or may not be filled. The presumption remains that whomever is appointed to that vacancy is unbiased.

If it is felt elsewhere that there is some corporate taint, I would allow the above two or three persons, as the case may be, to sit on the basis of the doctrine of necessity. Natural justice must give way to necessity. The doctrine of necessity was enunciated by Jackett C.J. in *Caccamo* v. *Canada (Minister of Manpower and Immigration)*, [1978] 1 F.C. 366 at p. 373, 75 D.L.R. (3d) 720 at p. 726:

> As understand the law concerning judicial bias, however, even where actual bias in the sense of a monetary interest in the subject of the litigation is involved, if all eligible adjudicating officers are subject to the same potential disqualification, the law must be carried out notwithstanding that potential disqualification … . If this is the rule to be applied where actual bias is involved, as it seems to me, it must also be the rule where there is no actual case of bias but only a "probability" or reasonable suspicion arising form the impact of unfortunate statements on the public mind.

This case does not require the doctrine of necessity to be applied to the extent of the example referred to in *Caccamo* v. *Canada (Minister of Manpower and Immigration)*. The doctrine of necessity is properly used to prevent a failure of justice and not as an affront to justice: De Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at pp. 276-77. Neither new member has acted in any way or even participated in any process which could give rise to a reasonable apprehension of bias on their part. Therefore the doctrine of necessity is rightly applied to these facts to allow a panel to be constituted, in case any general corporate disqualification beyond those members were found: R.R.S. Tracey, "Disqualified Adjudicators: The Doctrine of Necessity in Public Law", [1982] Public Law, at p. 632.

[48] It is not necessary to for me to discuss the other cases cited on the presumption of regularity. The principles applied in the *E.A. Manning Ltd.* case are on point and are fatal to CPR's objection to my delegating the conduct of this inquiry under s. 56.

[49] **2.4 Inability To Delegate the Order-Making Power** – On completing an inquiry, the Commissioner must, under s. 58, dispose of the issues by making an order under that section. As I noted earlier, s. 49(1)(c) of the Act prohibits me from delegating the duties, powers and functions found in s. 58. Accordingly, even though I will be delegating the conduct of this inquiry to another person, I will still be required to act under s. 58 on the completion of the inquiry.

[50] In Order 00-17 and Order 00-41, where I disqualified myself from conducting the inquiries, I reviewed the delegate's report on the inquiry, including findings of fact and

law, and the recommended order. I then made the recommended order, without variation, under s. 58. Translink argues that my role in making an order under s. 58 in this inquiry will be wholly formal and, therefore, an unobjectionable one.

[51] In my view, the decision as to what order to make under s. 58 on the completion of an inquiry can involve a measure of judgment, depending on the issues in the inquiry and the findings of fact and law made by the person who has conducted it. In this case, although I have not found that I am disqualified from conducting this inquiry – and I have some doubt that I am – I have decided to delegate it to another person. I do not know exactly what will happen in the inquiry or what findings the delegate will make, but I do intend to act as I did with Order 00-17 and Order 00-41, by making the order under s. 58 on the basis of the order terms recommended in the delegate's report. As with those previous orders, this will eliminate substantive participation by me in this matter, under s. 56 or s. 58.

[52] CPR argues that the Act is flawed, because it does not permit me to delegate the order-making power under s. 58 even if I am disqualified from conducting an inquiry. The result, CPR argues, is a gap, which freezes the access request process in cases where I am disqualified. That flaw, CPR says, can only be fixed by an amendment to the Act. As CPR puts it, in para. 24 of its initial submission:

> … there is a stalemate: CPR has requested a review, which it is entitled by this Act to do. By virtue of s. 24 of the Act, the proposed disclosure of the Documents by Translink has been stayed. You as Commissioner cannot delegate your s. 58 order making power. The words can bear no other interpretation. Absent legislative change, that is the end of the matter.

[53] In my view, the Act's stipulation that only the Commissioner can make orders under s. 58 is addressed by the doctrine of necessity. There is no gap in the statutory scheme as contended by CPR. The doctrine of necessity – which prevents a failure of justice or the frustration of statutory provisions – has already been described in the above-quoted passage from *E.A. Manning Ltd.* and in the *Caccamo* case, which is referred to in that passage. Other cases where the doctrine has been explained or applied include *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*, [1998] 1 S.C.R. 3, [1998] S.C.J. No. 10, and *Milne* v. *Joint Chiropractic Professional Review Committee* (1992), 90 D.L.R. (4th) 634 (Sask. C.A.). The following passage from *Reference Re Remuneration of Judges*, at paras. 4-7 (S.C.J.), outlines the parameters of the doctrine:

> … Although there is a general rule that a judge who is not impartial is disqualified from hearing a case, there is an exception to this rule that allows a judge who would otherwise be disqualified to hear the case nonetheless, if there is no impartial judge who can take his or her place. The law recognizes that in some situations a judge who is not impartial and independent is preferable to no judge at all.

> This exception, usually referred to as the "doctrine of necessity" or the "rule of necessity", developed side by side with the general rule of disqualification. The first recorded case in which this principle was applied seems to be one decided in 1430, in which it was held that the judges of the Common Pleas were not disqualified from judging an action against all of them, because there was no other court in which the case could be brought … .
>
> …
>
> After an exhaustive analysis of cases applying the necessity exception to judicial disqualification, R.R.S. Tracey describes the scope of the rule as follows ("Disqualified Adjudicators: The Doctrine of Necessity in Public Law", [1982] Public Law 628, at p. 641):
>
> > The doctrine will operate when the only adjudicator with jurisdiction is disqualified or, in multi-member tribunals, where a quorum cannot be found because of disqualification, provided that the cause of the disqualification is involuntary. It will not operate when the cause is voluntary, except in the rare case in which the disqualified adjudicator is the only person with power to perform a formal act which must be performed if the course of justice is to continue.
>
> We would add to this definition the two provisos noted by the High Court of Australia in *Laws* v. *Australian Broadcasting Tribunal, supra*, at p. 454:
>
> > … the rule of necessity is, in an appropriate case, applicable to a statutory administrative tribunal, as it is to a court, to prevent a failure of justice or a frustration of statutory provisions. That rule operates to qualify the effect of what would otherwise be actual or ostensible disqualifying bias so as to enable the discharge of public functions in circumstances where, but for its operation, the discharge of those functions would be frustrated with consequent public or private detriment. There are, however, two prima facie qualifications to the rule. First, the rule will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule does apply, it applies only to the extent that necessity justifies.

[54] CPR argues, in its reply submission, that the doctrine of necessity does not apply here because it would result in what CPR calls a "substantial injustice". In its reply submission, at para. 6, CPR says the following on this point:

> … for you to adjudicate in this case on what level of harm to CPR is significant harm from the disclosure of information by Translink, when you have made submissions, on behalf of your former client BC Transit, to your predecessor that there was no significant harm from disclosure of similar information, would be a 'substantial injustice'.

[55] With respect, this confuses two issues: whether I am disqualified from conducting the inquiry and whether, because the Act prohibits the delegation of the Commissioner's order-making powers, the doctrine of necessity applies to my execution of the order to be made after the completion of the inquiry. I fail to see how an injustice

will result when I have explicit statutory authority to delegate the inquiry to another person and the ability to accept, without variation, that person's recommended order under s. 58. Such a process does not, in my view, create injustice, much less substantial injustice. I consider that the doctrine of necessity applies here and there has been no demonstration of positive and substantial injustice that suggests otherwise.

[56] Last, I wish to make it clear that I do not agree with CPR that s. 24 of the Act creates a 'stay' or bar to the access to information process, with the potential for an indefinite suspension of Translink's ability to disclose the disputed contracts. First, s. 24 says no such thing. Second, the doctrine of necessity addresses the statutory gap alleged by CPR. Third, it should not be forgotten that s. 2(2) of the Act states that it does not replace other procedures for access to information or limit in any way access to information that is not personal information and that is available to the public. Similarly, s. 71(3) of the Act says that s. 71(1) – which permits a public body to prescribe categories of records available to the public on demand – does not limit the discretion of the government of British Columbia or a public body to release records that do not contain personal information. There may, therefore, be means other than these applicants' access requests, and this inquiry process, by which Translink could make the disputed records available to the public.

[57] As contemplated by my February 22, 2001 letter to the parties, initial submissions on the merits of the inquiry are due 10 days after this date. An amended schedule for those submissions and for reply submissions will be issued to the parties by this Office's Acting Registrar.

February 28, 2001

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia