Citation:	CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act) 2002 BCSC 603	Date:	20020424
		Docket:	L012517
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF
THE *JUDICIAL REVIEW PROCEDURE ACT*,
R.S.B.C. 1996, C. 241
AND
AND IN THE MATTER OF THE DECISION OF THE
INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
(ORDER NO. 01-39), DATED AUGUST 16, 2001, MADE UNDER THE
***FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*,**
R.S.B.C. 1996, C. 165

BETWEEN:

CANADIAN PACIFIC RAILWAY

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER,
TRANSLINK, THE VANCOUVER PROVINCE AND
ANOTHER APPLICANT

RESPONDENTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE ROSS

Counsel for Petitioner	Maureen E. Baird
Counsel for Respondent, The Information and Privacy Commissioner	Susan E. Ross
Counsel for the Respondent, Attorney General of B.C.	Nerys Poole
Counsel for Respondent, Translink	Angela R. Westmacott
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Date and Place of Hearing:	March 25-28, 2002 Vancouver, BC

I INTRODUCTION

[1] In July 2000, Marilyn Bell and Ann Rees, a reporter with the Province newspaper, (the "Applicants") made separate requests under the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996. C. 165 (the "***Act***") to the Greater Vancouver Transportation Authority ("Translink") for access to certain records in the possession of that public body.

[2] The requests were for agreements between Canadian Pacific Railway ("CPR") and West Coast Express, a subsidiary of Translink. Translink determined that the following records were responsive to the requests:

> (a) the Purchase of Services Agreement between CPR and BC Transit ("Purchase of Services Agreement");
>
> (b) the Commuter-Rail Crewing Agreement ("Crewing Agreement"); and
>
> (c) a one page amendment to the Crewing Agreement (collectively, the "Documents").

[3] Translink notified CPR, as an interested party, about the access requests pursuant to s. 23 of the ***Act***. CPR opposed disclosure of any of the Documents on the basis that the documents were confidential and contained information the release of which would significantly harm its competitive position.

[4] After considering CPR's submissions, Christopher Harris, Translink's Manager, Information and Privacy concluded that he was required to release the records because the mandatory disclosure exception in s. 21 of the ***Act*** did not apply.

[5] CPR filed a request for review of the public body's decision to release the records under s. 52 of the ***Act***. The Commissioner's office issued a Notice of Written Inquiry in response to CPR's request.

[6] CPR then raised two preliminary objections. First, it argued that the Commissioner's adjudication of the inquiry gave rise to bias and a reasonable apprehension of bias because of his previous relationship as legal advisor to BC Transit and subsequently to Translink. Second, CPR argued that Translink could not be a full participant in the inquiry because it had made the decision to disclose which was under review.

[7] The Commissioner issued his decision with respect to the two preliminary objections on February 28, 2001 (the "Decision"). With respect to the objection on the basis of bias, he did not disqualify himself but decided to delegate his authority to conduct an inquiry to a delegate external to his office.

[8] By virtue of s. 49(1)(c) of the ***Act***, the functions of the Commissioner under s. 58 of the ***Act***, and, in particular, his power to issue orders, cannot be delegated. The Commissioner, in referring the matter to a delegate, committed to adopt the recommendations made by his delegate.

[9] With respect to the second objection, he concluded that Translink had a statutory right to participate as a full party in the inquiry.

[10] On March 2, 2001, the Commissioner signed a formal delegation of his authority to conduct an inquiry under s. 56 of the ***Act*** to Nitya Iyer (the "Delegate"). CPR renewed its objection to Translink's participation in the inquiry.

[11] The Delegate issued her report on August 15, 2001 (the "Report"). She rejected CPR's objection to Translink's participation and concluded that CPR had not established that the information in the Documents was "supplied" within the meaning of s. 21(1)(b) or that the disclosure of the records would give rise to significant harm to CPR's position within the meaning of s.21(1)(c) of the ***Act***. On the basis that CPR had not brought itself within the ambit of s. 21, she recommended that the Documents be released to the Applicants.

[12] On August 16, 2001, the Commissioner issued Order 01-39, requiring Translink to disclose the Documents to the Applicants, based upon the recommendations in the Report. CPR then commenced these review proceedings.

II ISSUES

A. Preliminary Issues

(1) the admissibility in this judicial review of two affidavits which were not in evidence before either the Commissioner or the Delegate;

(2) the appropriate role of the Commissioner in this judicial review;

B. Bias

(1) whether there was a reasonable apprehension of bias;

(2) if so, did the delegation of the conduct of the inquiry cure the problem.

C. Alleged Errors of the Delegate

(1) permitting Translink to participate as a party to the inquiry;

(2) determining that the information in the Documents was not "supplied" within the meaning of s. 21(1)(b) of the ***Act***;

(3) determining that CPR would not suffer "significant harm" to its business interests as defined in s. 21(1)(c)of the ***Act***.

III STATUTORY SCHEME

A. General

[13] The application must be considered against the background of the purposes of the ***Act*** which are as set forth in s. 2(1), to make public bodies more accountable and to protect personal privacy. Section 2(1) provides:

> 2(1) The purposes of this ***Act*** are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this ***Act***.

[14] The importance of the creation of an enforceable right of access to information held by public bodies was commented upon by Justice La Forest in ***Dagg v. Minister of Finance***, [1997] 2 S.C.R. 433 at paras. 59-61:

> As earlier set out, s. 2(1) of the *Access to Information Act* describes its purpose, *inter alia*, as providing "a right of access to information in records under the control of a government institution as accordance with the principles that government information should be available to the public". The idea that members of the public should have an enforceable right to gain access to government-held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British parliamentary tradition; see Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (1988), at pp. 61-84.
>
> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

[15] Thus, in considering this matter it is important to bear in mind that there is now a legal presumption of access to information.

[16] Counsel for the Province submits by way of background to the statutory scheme that the ***Act*** is a means by which the taxpayers can investigate how their money is being spent and the commitments given and received by public bodies on the taxpayers' behalf. Transit issues and costs are a matter of significant public concern in this province. The applicant, Ms. Rees, and the Province are seeking information for the purpose of writing articles to inform the public.

[17] Counsel observes that access to information has been found to constitute an essential component of the constitutional right to freedom of expression, citing ***C.B.C. v. New Brunswick***, [1996] 3 S.C.R. 480 per La Forest, J. at 497:

> Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information. In ***Canadian Broadcasting Corp. v. Lessard***, [1991] 3 S.C.R. 421, I noted that freedom of the press not only encompassed the right to transmit news and other information, but also the right to gather this information. At pp. 429-30, I stated:
>
> > Like Cory J., I take it as a given that freedom of the press and other media is vital to a free society. There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.

> ...Cory J. stated in ***Canadian Broadcasting Corp. v. New Brunswich (A.G.)***, [1991] 3 S.C.R. 459 at 475:
>
> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.
>
> ...As noted by Lamer J., as he then was, in ***Canadian Newspapers Co. v. Canada (Attorney General)*** [1988] 2 S.C.R. 122, at p. 129: "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom:. Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press". [emphasis added]

[18] Accordingly, he submits, where two interpretations of a section are possible, the one to be preferred is the one which will enhance the constitutional value of freedom of expression.

B. Bias

[19] With respect to the issue relating to bias, the relevant section is s. 49 which provides that the Commissioner may delegate his power to conduct an inquiry but not his order making power under s 58.

> 49(1) The commissioner may delegate to any person any duty, power or function of the commissioner under this ***Act***, except
>
> (a) the power to delegate under this section,
>
> (b) the power to examine information described in section 12(1) and (2) or 15 (Cabinet confidences and information harmful to law enforcement), and
>
> (c) the duties, powers and functions specified in section 41(1)(b), 43 or 58,
>
> (2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate,

...

58(1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order, do one of the following:

(a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;

(b) either confirm the decision of the head or require the head to reconsider it, if the commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the commissioner determines that the head is required to refuse access.

C. Standing of Translink

[20] The sections of the ***Act*** that are relevant to the question of the standing of Translink are sections 54 and 56 which provide:

54 On receiving a request for a review, the commissioner must give a copy to

(a) the head of the public body concerned, and

(b) any other person that the commissioner considers appropriate.

...

56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

(2) An inquiry under subsection (1) may be conducted in private.

(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to be made orally or in writing , and

(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

(5) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.

(6) An inquiry into a matter under review must be completed within 90 days after receiving the request for the review.

D. Exceptions

[21] The ***Act*** also stipulates certain circumstances in which disclosure may or must be refused. In the present case, which concerns a mandatory exception, the relevant exception is that found in s. 21(1)(a)(ii), (b), and (c)(i) which provides:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(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,

IV PRELIMINARY ISSUES

A. Admissibility of Fresh Evidence

[22] CPR seeks to introduce two affidavits that do not form part of the record that was before either the Commissioner or his Delegate.

[23] The first, the affidavit of Don Barnhardt, sworn September 17, 2001, is submitted with respect to the issue of the apprehension of bias. Counsel submits that the evidence in this affidavit, relating as it does to the Decision, did not exist prior to the Decision. It is adduced as extrinsic evidence in support of the allegation of bias in response to concern expressed by the Court of Appeal with respect to allegations of bias made without such evidence, see ***Adams v. British Columbia (Workers' Compensation Board)*** (1989), 42 B.C.L.R. (2d) 228 (C.A.). It was also adduced to provide the respondents with notice of the concerns relating to the apprehension of bias which are said to arise from the Decision itself.

[24] The respondents submit that the evidence is inadmissible, being made up of either factual matters that are already part of the record or the opinions of the deponent which are not admissible evidence. These matters should properly have been made as submission of counsel. They do not constitute extrinsic evidence in support of the allegations as contemplated by ***Adams***, *supra*.

[25] Having reviewed the affidavit, I am satisfied that it is not admissible in these proceedings. I agree with the submissions with respect to admissibility made by the counsel for the respondents.

[26] I have, however, considered the additional concerns with respect to an apprehension of bias that are said to arise from the Decision as a submission of counsel in relation to the issue of the reasonable apprehension of bias.

[27] The second affidavit is the affidavit of Don Barnhard sworn on October 29, 2001. It sets out a number of summaries of press reports and one press clipping including statements made by senior executives of West Coast Express, a subsidiary of Translink, which indicate the desire of West Coast to have the contents of the Documents disclosed. The reports provide some detail with respect to a rate dispute between CPR and West Coast Express concerning the commuter rail line in the Lower Mainland. The evidence is offered as relevant with respect to Translink's standing before the Commissioner and his Delegate and to the weight that should be given to Translink's evidence in these proceedings.

[28] The respondents submit that there was evidence before the Delegate with respect to the fact of a rate dispute between CPR and West Coast Express. They submit that the evidence in the second affidavit is irrelevant and, accordingly, inadmissible with respect to the issue of Translink's standing which, they submit, is a matter of statutory construction.

[29] To the extent that the evidence is submitted as going to the weight that should be given to Translink's evidence, it is submitted that that is an allegation of error of law on the face of the record. CPR is not entitled to seek to establish an error on the face of the record by supplementing the evidence, see ***Greater Vancouver Mental Health Service Society v. British Columbia Information (Information and Privacy Commissioner)***, [1999] B.C.J. No. 198 (S.C.), at para. 42; ***Morlacci v. Minister of Energy, Mines and Petroleum Resources***, [1994] B.C.J. No. 3301 (S.C.), aff'd., [1997] B.C.J. No. 2045 (C.A.) at paras. 28-33; ***Ontario Hydro v. Ontario (Information and Privacy Commissioner)***, [1996] O.J. No.4196 (Ont. Div. Ct.); ***Riches v. British Columbia (Human Rights Commission)***, [1999] B.C.J. No. 2556 (S.C.).

[30] CPR submits that the test for fresh evidence on a judicial review is that set out in ***Eamor v. Air Canada Ltd.***, [1998] B.C.J. No 344 as follows:

> (1) The evidence should generally be admitted if, by due diligence, it could have been adduced at trial provided that this general princi0ple will not be applied as strictly in a criminal case as in a civil case.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the results.
>
> Eamor v. Air Canada Ltd., [1998] B.C.J. No. 344 (B.C.S.C.) at paragraph 4

[31] Even on this test, which is not accepted as the appropriate test by the respondents, the evidence, in my view is not admissible. Exhibit A provides details with respect to the rate dispute of which CPR was one party. It cannot be said that such evidence was not available to CPR at the time of the proceedings below. Exhibit B predated the Decision and the Report. It cannot be said that this evidence was not available to CPR at the time of the proceedings below. Exhibits C and D repeat the basic position of West Coast in the rate dispute and sets out the positions the parties have taken with respect to these proceedings. The position of West Coast in the rate dispute was certainly known to CPR. The position of the parties with respect to these proceedings is not evidence.

[32] The balance of the exhibits are clippings and statements issued after the date of the Report. In particular, this evidence consists of statements by the Chief Executive Officer of West Coast expressing the view that the public would be outraged if they were aware of the track rates charged by CPR and that the public should have access to the agreements.

[33] In my view, this evidence, while it may satisfy the due diligence requirement, fails to satisfy the criteria with respect to relevance and weight. The evidence is not relevant to the question of Translink's standing, which is a matter of statutory construction and would not, in my view, have affected the result in the proceedings before the Delegate. Accordingly, the evidence is not admitted.

B. Role of the Commissioner in this Proceeding

[34] CPR submits that the role of the Commissioner in this judicial review should be limited to:

> (a) an explanatory role with reference to the record; and

(b) the question of whether the Commissioner has jurisdiction under the ***Act*** to delegate the conduct of an inquiry.

[35] The Commissioner ought not, in CPR's submission, to have a role in this review with respect to:

(a) his own bias;

(b) the appropriateness of his purported delegation and subsequent order making;

(c) the appropriate role of Translink;

(d) the standard of review;

(e) whether s. 21 is applicable to the documents;

(f) the evidence to be considered on this judicial review.

[36] CPR relies upon ***Northwestern Utilities Ltd. v. Edmonton (City)*** (1979), 89 D.L.R. (3d) 161 (S.C.C.) and ***Bell Canada v. C.T.E.A.***, [1997] 143 F.T.R. 24 in support of its position.

[37] Counsel for the Commissioner submits that it is appropriate for the Commissioner, in the circumstances of this proceeding, to make submissions on:

(a) the ***Act*** and the record;

(b) the standard of review;

(c) questions of jurisdiction, and in particular:

(i) Translink's standing in the inquiry;

(ii) the Commissioner's jurisdiction to delegate the inquiry function;

(iii) the Commissioner's jurisdiction to make an order under s. 58 after he had delegated the inquiry function under s. 56;

(d) fairness issues that arise out of the statutory provisions or out of institutional practices;

(e) where underlying evidence is known to the Commissioner or the Delegate and is unknown to other participants.

[38] I am satisfied that the submissions of the Commissioner with respect to the standard of review and questions of jurisdiction are supported by the ***CAIMAW v. Paccar of Canada Ltd.***, [1959] 2 S.C.R. 983 decision and by ***Bibeault v. McCaffrey***, [1984] 1 S.C.R. 176. Support for the submissions with respect

to fairness issues and circumstances in which the evidence is known to the Commissioner but not to other parties is found in ***Canada (A.G.) v. Canada (Human Rights Tribunal)***, [1994] F.C.J. No. 300; ***Re Consolidated-Bathhurst and International Woodworkers of America*** (1985), 20 D.L.R. (4th) 84 (Ont. Div. Ct.); ***Bibeault***, *supra*; ***Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*** (1998), 41 O.R. (3d) 1 C.A.

[39] I find that the Commissioner has standing in each of the subjects it has identified, consistent with its submissions. I note that while this issue is important, in practical terms in relation to the outcome of this case, the matter was somewhat academic since the other respondents, and in particular, the solicitor for the Province, adopted the submissions made by the Commissioner.

IV BIAS

A. Did the Commissioner lose jurisdiction to conduct the inquiry, to delegate the conduct of the inquiry, or to issue the Order by reason of the reasonable apprehension of bias?

[40] This issue goes to the Commissioner's jurisdiction under the ***Act***. The appropriate standard of review is correctness.

[41] CPR objects to the Commissioner's participation in the inquiry on three grounds:

> (a) the Commissioner's previous professional relationship with Translink and Mr. Harris;
>
> (b) the fact that the Commissioner had previously advised Translink with respect to a question at issue in these proceedings, namely, "what degree of harm to the competitive position of a third party is significant harm?";
>
> (c) the fact that on two prior occasions in 2000 the Commissioner had disqualified himself from conducting inquiries in matters involving B.C. Transit (now Translink), relying on ***Valtchano v. Johnson***, [1994] N.J. No. 205 (Nfld. S.C.).

[42] It also relies upon certain language used by the Commissioner in the Decision, which it submits raise additional concerns about his ability to bring an impartial mind to his duties under the ***Act***.

[43] CPR relies upon the decision in ***Newfoundland Telephone. Co. v. Newfoundland (Board of Commissioners of Public Utilities*** (1992), 4 Admin. L.R. (2d) 121 (S.C.C.) in support of the proposition that the effect of a finding of reasonable apprehension of bias is that the decision-maker's decision and everything flowing from it are null and void. In this case, it submits, that means that the Commissioner's appointment of the Delegate, the Delegate's Report and the Order are all null and void.

[44] CPR also submits that the Commissioner improperly fettered his discretion in determining, in advance, to accept, without modification, the Delegate's Report.

[45] Finally, CPR submits that, because the legislature did not provide for the circumstance where the Commissioner is unable to act, by virtue of bias or circumstances creating the reasonable apprehension of bias, there is a lacuna in the statutory scheme. The result, it submits, is a stalemate which has the effect of preventing disclosure of the documents at least until the ***Act*** is amended since no one can rule on the review.

[46] The Commissioner responded in the Decision to the allegations as follows:

> CPR alleged actual and reasonably apprehended bias, but no grounds for actual bias had been advanced. It was therefore only necessary to discuss the allegation of reasonable apprehension of bias.
>
> A former professional relationship will not normally 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 before the Commissioner.
>
> The Commissioner (and the law firm of which he was a partner) had had no involvement with the contracts to which access was being sought; he had had no direct involvement and acquired no confidential information about the matter now in issue.
>
> There is no strict rule as to how long a cooling off period is required. Approximately 19 months had elapsed since the Commissioner's, by law, one-time appointment to his office and this was a sufficient cooling off period given the nature and structure of his appointment and the circumstances of this case.
>
> The fact that the Commissioner had recused himself from two BC Transit inquiries during the first 12 months of his single term appointment did not raise a new or continuing apprehension of bias on his part.

[47] He determined to step aside and delegate consideration of the matter in the interest of achieving a speedy resolution of the matter. The applicant's interest, he observed, does not lie in being tied up in a case addressing the propriety of the decision maker conducting the inquiry. He reasoned that any apprehension of bias would not extend to his delegate and that the doctrine of necessity would permit him to make the order under s. 58.

[48] In the proceedings before me, the Respondents made submissions which adopted and amplified the Commissioner's observations. Counsel for the Commissioner did not make submissions with respect to the question of whether there was an apprehension of bias.

[49] The test for the apprehension of bias, which has been accepted in subsequent jurisprudence, is that stated by Justice Grandpre in ***Committee for Justice and liberty v. Canada (National Energy Board***, [1978] 1 S.C.R. 369:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude.
>
> ...
>
> The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience.

[50] Although the test must be applied to the circumstances of the particular case, there are some useful general principles which can be drawn from the cases, including:

> (a) the onus of demonstrating apprehension or the reasonable apprehension of bias lies with the person who is alleging its existence, see ***R. v. S.(R.D.)***,[1997] 3 S.C.R. 484;
>
> (b) there is a presumption of regularity, a presumption that the member will act fairly, honestly, and impartially, see ***Zundel v. Citron (C.A.)***, [2000] 4 F.C. 225 (F.C.A.);
>
> (c) members of tribunal are appointed for their prior knowledge and expertise. Prior experience in dealing with the subject matter or issue will not found a reasonable apprehension of bias, see ***Committee for Justice and Liberty***, *supra*; ***R. v. R.(D.S.)***, *supra*;
>
> (d) 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 in issue, see ***Zundel***, *supra*, ***Committee for Justice and liberty***, *supra*, ***Fogel v. Canada*** (1999), 164 F.T.R. 99 (F.C.T.D.); ***Flamborough (Town) v. Canada (National Energy Board)*** (1984), 55 N..R. 95 (Fed. C.A.).

[51] I have concluded that the circumstances in this case, given the nature of the Commissioner's functions and the time limited nature of his appointment, are not such as to give rise to a reasonable apprehension of bias. The Commissioner had no involvement in this matter prior to assuming his office. His professional relationship with Translink had ended 19 months previously. There has been, in my view, an appropriate "cooling off period".

[52] The two earlier occasions when he did disqualify himself occurred much earlier in his tenure. Now that an appropriate cooling off period has elapsed they no longer constitute a factor giving rise to a reasonable apprehension of bias.

B. In the Alternative, did the delegation of the inquiry function to the Delegate cure the problem?

[53] In the event that I am wrong in that conclusion, I will address the balance of the objections raised by counsel for CPR in this regard. In my view, even if there was a reasonable apprehension of bias, the delegation of the conduct of the inquiry to the Delegate was not tainted by it. I do not believe that the decision in ***Newfoundland Telephone Co.***, *supra*, was ever intended to produce such a result as urged upon me by counsel for CPR, which would, in my view, be to paralyze the work of the office every time an allegation of bias was raised, see ***Flamborough***, *supra*.

[54] I am fortified in this conclusion by a consideration of the nature of bias. Bias is, "an attitude of mind unique to an individual", ***Bennett v. British Columbia (Securities Commission)*** (1992), 94 D.L.R. (4th) 339 (B.C.C.A.) at 349. There is no suggestion of any bias or the reasonable apprehension of bias on the part of the Delegate.

[55] With respect to the issue concerning fettering of discretion, I am in agreement with the submissions of the respondents that the question does not arise because, given the conclusions contained in the Report, the Commissioner had no discretion with respect to his order under s. 58.

[56] I turn then to the final issue, whether there is a lacuna in the legislation. I agree with the submissions of the respondents that the petitioner's argument must fail for two reasons. First, the common law rule against bias is subject to the express or necessarily implied requirements of a statutory scheme, see ***Ocean Port Hotel Ltd. v. B.C. (General Manager, Liquor Control and Licensing Branch)***, [2001] S.C.C. 52; ***Brosseau v. Alberta Securities Commission***, [1989] 1 S.C.R. 301; ***Ringrose v. College of Physicians and Surgeons (Alberta)***, [1977] 1 S.C.R. 814.

[57] Here the ***Act*** requires the Commissioner to issue orders under s. 58. The requirement to issue the order necessarily overrides the common law requirements for impartiality. I do not agree with CPR's submission that the situation here is voluntary and not arising from the legislation. In my view, it arises from the fact that the legislation does not permit delegation of the order making power under s. 58.

[58] In addition, the operation of the doctrine of necessity leads to the same result. The doctrine of necessity operates to prevent a frustration of the statutory provisions in circumstances such as these where the only adjudicator is disqualified, see ***Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***, [1998] 1 S.C.R. 3; ***Finch v. Association of Engineers and Geoscientists (British Columbia)*** (1996), 18 B.C.L.R. (3d) 361 (CA).

[59] Finally, I do not accept CPR's submission that this falls into one of the exceptions to the doctrine; namely, that the application of the doctrine would involve positive and substantive injustice. By virtue of the delegation of the inquiry to the Delegate, CPR was afforded a hearing untainted by any apprehension of bias. In addition, it has the opportunity, which it has utilized, of seeking judicial review.

[60] In summary, I find that there was no reasonable apprehension of bias in the circumstances of this case but that in any event, any apprehension that there was cured by the delegation of the inquiry to the Delegate.

V ALLEGED ERRORS BY THE DELEGATE

A. Did the Delegate err in permitting Translink to participate as a party to the inquiry?

[61] The parties are in agreement that the appropriate standard of review with respect to this issue is correctness because the determination is based upon the interpretation of the ***Act***.

[62] CPR objects to Translink having been granted full party status because, in its submission::

> (a) the ***Act*** does not require it and s. 56(4) gives a discretion to the Commissioner in that regard;
>
> (b) the ***Act*** requires Translink to apply the disclosure exceptions in a neutral fashion without any vested interest in the outcome;
>
> (c) it is inappropriate for the public body to participate as an advocate in circumstances in which it has a vested interest in the outcome.

[63] Recent cases arising from the Federal Access to Information legislation have established that public bodies have standing as full parties before the Commissioner and on judicial review applications, see ***Desjardins, Ducharme, Stein, Monast v. Canada (Dept. of Finance)***, [1999] 2 F.C. 381 (F.C.T.D.); ***Group dorchester/St-Damase, Cooperative Avicole v. Canada (Agriculture and Agri-Food)***, [1999] F.C.J. No. 1987 (F.C.T.D.); ***Aliments Prince foods Inc. v. Canada (Dept. of Agriculture and Agri-Food Canada)***, [1999] F.C.J. No 247 (F.C.T.D.).

[64] I find that the ***Act*** contemplates that the public body will be a full participant in the review and inquiry process. Section 54(a) provides that the Commissioner must give a copy of the Request for Review to the public body. Section 56(3) provides that the head of the public body concerned must be given an opportunity to make representations during the inquiry. I find that s. 56(4)(b) creates a discretion with respect to a party's access to and ability to respond to another party's representations. It does not create a discretion to exclude or limit the public body's ability to make representations in the manner submitted on behalf of CPR.

[65] I find further that the ***Act*** contemplates numerous situations in which the public body will have a vested interest in the decision with respect to disclosure. The existence of such an interest in any particular case does not, in my view, in any way limit the standing of the public body. Nor does it constitute a basis upon which to limit the weight to be given to that public body's submission on judicial review as contended by CPR anymore than does CPR's vested interest in the outcome.

[66] Finally, I note that, because of the nature of the documents, and the provision for in-camera hearings and submissions, the public body will frequently be, as it was in the case at bar, the "only effective presenter of the other side of the case".

[67] This underscores the importance of the full participation of the public body in the inquiry and in any subsequent judicial review process.

[68] In summary, I find that the Delegate did not err in granting full party standing to Translink.

B. Did the Delegate err in concluding that the information in the Documents had not been "supplied" within the meaning of s. 21(1)(b) of the *Act*?

[69] The appropriate standard of review is reasonableness, see ***Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*** *supra*.

[70] Counsel for CPR submits that the Delegate erred in her interpretation of the meaning of the term " supplied". In particular, counsel submits that the Delegate erred in requiring the disputed information to be by nature immutable and non-susceptible to change in order to be considered "supplied" within the terms of the section. This interpretation, it was submitted, is contrary to the decision of Justice Satanove in ***Jill Schmidt***, *supra*.

[71] CPR also submits that the Delegate failed to recognize the adequacy of the evidence adduced by CPR in the inquiry, did not adequately consider, and misinterpreted that evidence.

[72] The Delegate noted that, for purposes of the section, information that is contractual is negotiated, not supplied, despite having been initially drafted or delivered by a single party, see Order 01-20.

[73] She then made reference to an exception to this rule, stating:

> [45] Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied". It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.

> [46] In other words, information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

[74] With respect to this first exception, the Delegate considered the decision in ***Jill Schmidt*** and then concluded:

> [49] In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is "supplied" information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity of finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is "supplied" rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was "supplied."
>
> She also addressed a second exception, namely, that the otherwise negotiated information is such that its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the Third Party, that is, information not expressly contained in the contract.

[75] CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence, see for example Order 26-1994:

> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and...

[76] Further, I do not consider that the Delegate elevated immutability to a test. Rather, it is clear from her reasons that she considered it, legitimately, in my view, to be one of the factors to be considered in assessing whether the information is "supplied" in the terms of section 21. I do not find her interpretation to be unreasonable.

[77] The Delegate undertook a lengthy and meticulous examination of the evidence adduced by the parties. Her conclusion was that CPR had failed to bring itself within either of the two exceptions. Accordingly, she concluded:

> CPR's evidence on the question of supply falls short of what is required to establish that the information in issue was "supplied" within the meaning of s. 21(1)(b).

[78] Having carefully reviewed her Report, together with the evidence and submissions, I can find no material evidence that was overlooked or misapprehended by the Delegate. It is for the Delegate to weigh the evidence, I do not find either her review, or her conclusion in that regard to be unreasonable.

C. Did the Delegate err in concluding that CPR would not suffer "significant harm" to its business interests as defined in s. 21(1)(c) of the *Act*?

[79] With respect to the standard of review, counsel for the Commissioner submits that the appropriate standard is reasonableness to the extent to which the determination is a question of mixed fact and law and clearly wrong, to the extent to which the matter involves a clear question of fact, see ***University of British Columbia v. Berg***, [1993] 2 S.C.R. 353; ***Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 826; ***Re McInnes and Simon Fraser University et al*** (1982), 140 D.L.R. (3d) 694 (B.C.S.C.).

[80] Counsel for CPR submits that because the determination involves a situation of significant harm, the standard should be higher, closer to correctness. No support was cited in support of this proposition. I have concluded that there is no basis for such a "bump up" in the standard of review.

[81] The standard of review is reasonableness; namely, whether the Delegate's finding is unreasonable in terms of being unsupported by any evidence or defective in terms of the logical process by which the finding was reached.

[82] CPR submits that the Delegate erred in "failing to adequately consider and properly apply the uncontradicted evidence adduced by CPR." It submits further that it is not possible for CPR to establish with precision the nature of the harm that it would suffer. It submits that "the fact that these senior officers, knowledgeable and experienced in this competitive, complex and technological industry are prepared to swear to the magnitude of harm that would be suffered is, ...in the absence of any evidence to the contrary, compelling and should suffice for the purpose of the ***Act***."

[83] My first observation is that CPR is inviting me to review the evidence and to substitute my own conclusions for that of the Delegate. That, however, is not the appropriate role for the court. Rather, the Delegate's Report is to be reviewed to see if there was no basis in the evidence for the decision or if it was contrary to the overwhelming weight of the evidence or if there was a fundamental flaw in the reasoning, see ***Director of Investigation and Research v. Southam*** (1997), 144 D.L.R. (4th) 1 S.C.C. per Iacobucci J. at pp. 19-21.

[84] My second observation is that it cannot be said that the evidence of CPR is completely uncontradicted. In any event, pursuant to s. 57(3)(b) of the ***Act***, CPR, as the Third Party, bears the burden of proof of establishing "significant harm". The evidence of such harm is likely to be uniquely within the knowledge of the Third Party, making it unlikely that there will by evidence to directly contradict that offered by the Third Party. Hence, the appropriate question is not whether the evidence is contradicted or not, but whether it is sufficient.

[85] The Delegate observed that CPR's evidence was similar to that found to be insufficient by the Commissioner in Order 00-09. She then concluded:

> 77 PB's affidavit is not long, and it does not specifically address most of the information in the disputed records. While PB states the nature of the harm that would follow disclosure and related that harm to disclosure of some specific items of information in the Services Agreement, PB does not explain how disclosure of that information, much less the rest of the agreement, would lead to the harm described. Similarly, PB's evidence of harm flowing from disclosure of the Crewing Agreement identifies some items in that agreement and asserts that their disclosure will cause significant harm to CPR's negotiating and competitive position relating to future crewing bids and in labour relations. Again PB does not say how disclosure of the identified information, or the other information in the agreement, would lead to the harm described.
>
> 78 PB's affidavit asserts that part of one of the agreements contains discrete and proprietary business information disclosure of which would allow the calculation of certain CPR costs. It is not clear to me, from reading the indicated part of the agreement, how such costs could be calculated. Nor is there evidence to establish CPR's claims that the disclosure of such costs would result in significant harm to its competitive or negotiating positions, or that the contract information from which it is said sensitive CPR costs might be derived is of a proprietary nature.
>
> 79 CPR's evidence is also that the agreements in issue in this inquiry differ in unspecified ways from other commuter agreements, so that if those differences are disclosed, they would be used to CPR's disadvantage in negotiations for contracts with other commuter authorities. CPR's evidence on this point is both vague and speculative and does not satisfy s. 21(1)(c)(i).
>
> 80 Disclosure of the items of information objected to in the affidavit of PB would certainly put more information in the hands of those with whom CPR is currently negotiating, or expects to negotiate with in the future, as well as in the hands of its competitors. However, it does not necessarily follow that the information would be useful in negotiations or competitively, or so useful as to interfere significantly with CPR's negotiating position or significantly harm its competitive position. For example, the terms of the agreements may reflect the particular geography, population, track and track facilities, and other features of the West Coast Express service, so that they are

> quite specialized and disclosure will not be of significant value to others. This is a point made by the Applicants in their initial submission; it is not adequately answered by CPR.
>
> 81 It is not self-evident that disclosure of all or part of the disputed records could reasonably be expected to cause significant harm to CPR. There is no evidence of the comparability of the commuter rail services for which CPR is currently negotiating (or for which it expects to negotiate in future) to the West Coast Express service. From the evidence provided, it is not possible to determine how useful (or harmful to CPR) disclosure of information in the agreements would be to CPR's negotiations or to CPR's competitors. Nor can I determine how useful (or harmful to CPR) information in the agreements would be useful to parties in future negotiations with CPR over shipping rates for unspecified distances and locations.
>
> 82 Finally, with respect to the risk of significant harm in labour negotiations, CPR's submission is that its future negotiating position will be harmed because disclosure of the Crewing Agreement will allow the union to derive certain information valuable to the union's negotiating position and harmful to CPR's position. While I accept that the type of information involved might strength the union's negotiating position, the evidence is insufficient to establish significant interference with CPR's negotiating position. Absent evidence as to the scope of CPR's collective agreements and when CPR will be involved in labour negotiations, it is not possible to determine how relevant CPR's profits on the Crewing Agreement will be or what significance information from the Crewing Agreement would have for labour negotiations.
>
> 83 I conclude that CPR has not established that disclosure of all or part of the disputed records presents the risks of harm described in s. 21(c)(i).

[86] I have reviewed the evidence, the Report and the submissions. The Delegate in my view had regard to the appropriate question and undertook an appropriate review of the evidence that was before her. She concluded that the evidence was insufficient to support a finding of significant harm. Her conclusion cannot be said to be unreasonable and I am unable to conclude CPR has established that she erred in this regard.

VI CONCLUSION

[87] CPR has failed to establish any error in the Report of the Delegate or in relation to the issuance of the Order under s. 58 of the ***Act***. Accordingly, the petition is dismissed.

"C. Ross, J."
The Honourable Madam Justice C. Ross