

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.,***  
2005 BCSC 1562

Date: 20051103  
Docket: L040803  
Registry: Vancouver

In the matter of the ***Judicial Review Procedure Act***, R.S.B.C., 1996, c. 241, and the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C., 1996, c. 165, and Orders 04-04 and 04-05 of the Delegate of the Information and Privacy Commissioner of British Columbia

Between:

**British Columbia Teachers' Federation,  
Nanaimo District Teachers' Association and The Third Party**

Petitioners

And

**Information and Privacy Commissioner for British Columbia,  
Board of School Trustees of School District No. 68 and The Applicant**

Respondents

And

Docket No. L040802  
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Petitioners

And:

**Information and Privacy Commissioner for British Columbia,  
Board of School Trustees of School District No. 68 and The Applicants**

Respondents

Before: The Honourable Madam Justice Garson

(In Chambers)

**Reasons for Judgment**



Counsel for the petitioners:	
Counsel for the respondent, Information and Privacy Commissioner for British Columbia:	S. E. Ross
Counsel for the respondent, Board of School Trustees of School District No. 68:	K. Mitchell
Counsel for the respondent, Attorney General of British Columbia:	J. Tuck
Date and Place of Hearing:	May 18-19 and September 29-30, 2005 Vancouver, B.C.

## Introduction

[1] The preliminary issue raised by the petitioners concerns the role in this proceeding of the Information and Privacy Commissioner for British Columbia (the "Commissioner"), at the judicial review of his own decision. The objection to the Commissioner's submission is based on the petitioner's assertion that the Commissioner does not have general standing to appear and defend the correctness of the decision of his own delegate. Rather, according to the petitioner, its standing is limited to: (1) explaining the record of proceeding; (2) making submissions on the jurisdiction of the Commissioner; and, (3) making submissions on the standard of review to be applied by this court on judicial review. Mr. MacTavish, for the petitioners, argues the Commissioner does not have standing to delve into the merits of its decision.

[2] I understand the Commissioner to contend that he should be given broad latitude including making submissions as to the merits of its decision (which he says he did not do in the written submissions filed on this judicial review prior to the petitioners raising their preliminary objection), in order to assist the court, because there is no one else to do so, as the applicants for the disputed documents are not participating in this hearing. The Commissioner now says that his role should be unfettered, although he concedes that he should not take an aggressively adversarial role.

## Factual Underpinning

[3] I shall outline the factual underpinning of the case only insofar as it is necessary to provide a context to my ruling on the petitioners' preliminary objection. I make no findings of fact.

[4] The petitioners seek judicial review of orders made by the Commissioner to disclose certain portions of records regarding an investigation of complaints about a teacher ("the teacher"). The records in question were generated as the result of complaints made about the teacher by parents and students. As a consequence of these complaints, investigations were undertaken. The investigations resulted in reports to the School Board, the employer of the teacher. Following receipt of those reports, the School Board held private meetings and generated records. It is not important for present purposes to detail anything further concerning the nature of the investigation that was undertaken, the results of the investigation, the results of subsequent meetings, or the outcome of those proceedings.

[5] The School Board received a request from three different parents ("the applicants") under the **Freedom of Information and Protection of Privacy Act**, R.S.B.C., 1996, c. 165 ("**Privacy Act**"), for copies of the investigation report; findings in connection with the investigation and hearing about the teacher; and copies of minutes of meetings pertaining to the student and the parent complainants.

[6] The School Board granted partial access to the documents but withheld a significant amount of information. The School Board advised the applicants that the information contained in the report was personal information of the teacher and, therefore, protected from release under s. 22 of the **Privacy Act**.

[7] Nevertheless, the British Columbia Teachers Federation, representing the teacher and the Nanaimo District Teachers' Association, requested, pursuant to ss. 52 and 53 of the **Privacy Act**, a review of the School Board's decision to release partially severed versions of three investigation reports concerning the teacher, on the grounds that those reports contained personal and employment

information about the teacher.

[8] The matter went to mediation during which the School District decided to disclose more information from the investigation report and hearing records. The petitioners, on behalf of the teacher, continued to object to this decision.

[9] As the matter was not resolved through mediation, the parties made submissions in response to an inquiry by the Commissioner. The petitioners made submissions on their own behalf and on behalf of the teacher. The petitioners also provided an *in camera* submission. As a result, the Commissioner issued an order requiring the School District to give partial information to the applicants, somewhat different than the information originally agreed to be disclosed by the School Board.

[10] It is this decision of the Commissioner to grant partial disclosure of the disputed information that is the subject matter of the application for judicial review.

[11] At the commencement of the application for judicial review, the petitioners raised a preliminary objection to the scope of the submissions filed by the Commissioner.

### Issue

[12] Mr. MacTavish, for the petitioners, submits that the Commissioner has limited standing to appear on this application for judicial review. The standing and scope permitted, relates only to jurisdiction and the standard of review. He says the argument filed at this hearing by the Commissioner goes beyond what is appropriate, because it relates to the merits of the Commissioner's decision. He submits that the decision of the Supreme Court of Canada in *Northwestern Utilities Ltd. et al v. The City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 ("*Northwestern*") remains the law of British Columbia. Mr. MacTavish maintains that this case is authority for the proposition that active participation by the administrative tribunal in a judicial review of its decision is improper.

[13] Ms. Ross, for the Commissioner, says that there have been refinements, and some erosion of the rule in *Northwestern*. She says that the decision of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, (2005), 196 O.A.C. 350, 253 D.L.R. (4<sup>th</sup>) 489, ("*Children's Lawyer*"), is a more recent authority, that I should apply here. She says that *Children's Lawyer* is authority for the proposition that the Commissioner has full standing in the judicial review proceedings, which assures a "fully informed adjudication of the issues." (*Children's Lawyer*, supra at ¶43).

[14] The question to decide is whether the standing of the Commissioner is limited, as described in *Northwestern*, expanded as described in *Children's Lawyer*, or otherwise constrained.

### Analysis

[15] My analysis begins with s. 15 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The *Administrative Tribunal Act*, S.B.C. 2004, c. 47 has no application to officers of the legislature. Section 15(1) of the *Judicial Review Procedure Act* provides:

For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power

- (a) must be served with notice of the application and a copy of the petition, and
- (b) may be a party to the application, at the person's option.

[16] It is not contested that the Commissioner is entitled to be a party to these proceedings, pursuant to s. 15 of the *Judicial Review Procedure Act*. However, the scope and interpretation of "party" in s. 15(1)(6) is contested.

[17] As already alluded to, the decision of the Supreme Court of Canada in *Northwestern* characterizes the role of the tribunal at the judicial review of its own decision, as akin to *amicus curiae*.

**Northwestern** concerned an appeal by the Public Utilities Board for the Province of Alberta and Northwestern Utilities Ltd., from a decision of the appellate division of the Supreme Court of Alberta, setting aside an order of the board granting an interim increase in rates pursuant to the **Public Utilities Board Act**. The tribunal whose decision was reviewed, was a tribunal constituted under the **Public Utilities Board Act** to deal with public utilities and owners thereof as provided under the **Act** and was given specific duties and powers with respect to gas utilities, including the duty to fix just and reasonable rates, tolls or charges.

[18] The court dealt with the participation of the Public Utilities Board on the appeal. Beginning at 179 the court stated in part:

It was pointed out to the court that s. 65 of the **Public Utilities Board Act** entitles the Board "to be heard ... upon any argument of any appeal". Under s. 66 of the **Act**, the Board is shielded from any liability in respect of costs by reason or in respect of an appeal.

Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but, in the absence of a clear expression of intention on the part of the legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae*, but not as a party. [...]

The Board has a limited status before the court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause, again submit itself to the rate-fixing activities of the board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions [...]

Such active and even aggressive participation can have no other affect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this court, in complete adversarial confrontation with one of the principals in the contest before the board itself in the first instance.

[19] At the opposite end of the judicial spectrum is **Children's Lawyer**, in which the Ontario Court of Appeal agreed with the lower court that the Ontario Information and Privacy Commissioner should have full standing at the judicial review proceedings of its own order; as a means of ensuring a fully informed adjudication of the issues without significantly compromising its impartiality or undermining the integrity of its decision-making process.

[20] In **Children's Lawyer** the court was asked to review the decision of the Information and Privacy Officer ("IPO") to release the records of the Children's Lawyer of Ontario ("CLO"). The CLO had provided representation to Jane Doe when she was a child in both child protection matters and two motor vehicle accidents. Jane Doe later became dissatisfied with the representation provided and requested her file from the CLO. The CLO treated her request as if under **The Freedom of Information and Privacy Act**, R.S.O. 1990, c. 31 (Ontario), rather than as a client, and in response released only some of her records, citing solicitor-client privilege and the exemption for "advice or recommendations of a public servant" as the reasons for holding back some of her files.

[21] The IPO reviewed the CLO's decision on appeal by Jane Doe and found that the exemption for solicitor-client privilege did not apply to requests from clients and that the exemption for advice or recommendations from public servants did not apply because the advice was prepared for a client rather than for the government or public. As a result, most of the files were released to the applicant, Jane Doe. The CLO sought review of the IPO's decision, and brought a preliminary challenge to the standing of the IPO at the review.

[22] The lower court found that a "pragmatic and functional approach" applied to the issue of the

standing of the IPO in judicial review (*Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4<sup>th</sup>) 727, 177 O.A.C. 1), at ¶40. The court held that the analysis should be approached on a case by case basis:

In our view, the Commissioner's participation and right to make submissions on a judicial review application are best left to judicial discretion rather than to a set of hard and fast rules.

[23] In the end, the court refused to limit the standing of the IPO at ¶51, because to do so would be to "deny [the court] legitimate, helpful submissions from counsel for the Commissioner."

[24] The Ontario Court of Appeal dismissed the appeal. The court emphasized at ¶27 that the legislature's silence on the scope of standing of the tribunal "necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice." However, the court rejected the application of the "pragmatic and functional approach" to this issue as determined by the lower court. Nevertheless, the court agreed that the approach to standing should not be categorical and should instead be adapted to the particular circumstances before the court, (*Children's Lawyer*, supra at ¶43).

[25] The petitioners rely on *British Columbia Securities Commission v. Pacific International Securities Inc.*, [2002] 8 W.W.R. 116, 2002 B.C.C.A. 421 ("*Pacific*") for the proposition that *Northwestern* remains the governing authority on this issue in British Columbia.

[26] *Pacific* involved a statutory appeal from a decision of the Securities Commission concerning the delivery of particulars to a party that was the target of a prosecution. The standard of review of the commission's decision was correctness. Smith J.A. held that the commission ought not to have appeared before the Court of Appeal to defend the merits of its decision. However he noted that the Executive Director of the commission was the appellant's protagonist in the matter and could have appeared at the appeal. He noted that the "the rule in *Northwestern* has been sapped only slightly in the intervening years." (*Pacific* supra at ¶39), and he held that none of the exceptions for departing from a strict interpretation of the rule in *Northwestern* were applicable to the case before him. In reviewing the cases that had departed from a strict application of the rule in *Northwestern*, Smith J.A. discussed *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1, 19 Admin. L.R. (2d) 69, at ¶41:

In *Canada (Attorney General) v. Canada* Reed J. distinguished *Northwestern Utilities* where to apply it would have left the respondents unrepresented in the judicial review of an award in their favour. Reed J. observed, at para. 51, that the challenge to the decision was purely procedural and "almost totally within the knowledge of the Commission" rather than the respondents. "If the Commission cannot defend the application," she said, "there will be no response made to the applicant's position. I cannot believe that the Supreme Court intended such a result." Similarly, concerns that no one had an adverse interest in the appeal and that no one was willing to absorb the cost of opposing were said to justify permitting a tribunal to be heard on an application for leave to appeal its decision when the tribunal would argue on behalf of the public interest [*internal citations omitted*].

[27] It is unclear whether Smith J.A. was citing *Canada (Attorney General) v. Canada (Human Rights Tribunal)* with approval as an exception to, or encroachment on, the rule in *Northwestern*, because he also referred to *Quintette Coal Ltd. v. British Columbia (Assessment Appeal Board)* (1984), 54 BCLR 359 (S.C.) in which Finch J. (as he then was) noted that it would take a statutory amendment to the word "party" to broaden the role of the statutory decision-maker at the hearing of a judicial review of its own decision. However, I do infer from Smith J.A.'s statement at ¶39, where he concluded that the vitality of the rule in *Northwestern* "has been sapped only slightly," that he contemplated something other than its strict application in certain circumstances. I therefore do not accept the petitioner's assertion that *Pacific* stands for an absolutely limited standing for a tribunal in all cases.

[28] Another case of particular importance in understanding the circumstances in which courts have departed from strict adherence to *Northwestern* is *Paccar of Canada Ltd. v. Canadian Association*

of *Industrial, Mechanical and Allied Workers Local 14*, [1989] 2 S.C.R. 983, 62 D.L.R. (4<sup>th</sup>) 437 (S.C.C.). In *Paccar*, a union had applied to the Labour Relations Board of British Columbia, alleging violations of the labour code and seeking to determine whether the collective agreement was still in full force and effect. A hearing decided the issue against the union. The Union petitioned under the *Judicial Review Procedure Act* for an order quashing the Board's decision. The Supreme Court of Canada heard submissions from the Union that the Industrial Relations Council, having had the opportunity in two lengthy sets of reasons, to offer a rational basis for its conclusion, had no standing to make submissions before the court in support of the reasonableness of its decision.

[29] In response, La Forest J. stated at 461:

In my view, the Industrial Relations Council has standing before this court to make submissions, not only explaining the record before the court, but also to show that it had jurisdiction to embark upon the inquiry, and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.

[30] Yet the court went on to cite *Northwestern*, with approval.

[31] The court also cited *B.C.G.E.U. v. Industrial Relations Council*, (1998), 26 B.C.L.R. (2d) 145, 32 Admin. L.R. 78 (C.A.), with approval at 462:

The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction, or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

La Forest J. went on to state:

Before this court, the Industrial Relations Council confined its submissions to two points. It first argued that the Court of Appeal erred in applying the wrong standard of review to the decision of the Board. It submitted that the Court of Appeal reviewed for correctness instead of for reasonableness. As I have already indicated, I agree that the Court of Appeal erred in adopting such an approach. The second brand of the Council's submissions was to show that the Board had considered each of the union's submissions before it, and reasoned, rational rejections to each of the arguments. The argument before us emphasized that the Council had made a careful review of the relevant authorities and had made a decision that was within its exclusive jurisdiction. At no point did it argue that the decision of the Board was correct. Rather it argued that it was a reasonable approach for the Board to adopt. The Council had standing to make all these arguments, and in doing so, it did not exceed the limited role the court allows an administrative tribunal in judicial review proceedings.

[32] The decision in *Paccar* is therefore similar to the decision in *Pacific*, in that it does not specify strict adherence to the principle in *Northwestern*, limiting the standing of a tribunal in the judicial review of its own decision. Both decisions demonstrate that the principle has indeed been somewhat eroded.

[33] Professor Mullan in *Administrative Law* (Toronto: Irwin Law, 2001), advocates a more flexible approach to the definition of the role of the tribunal than the one dictated by *Northwestern*. He argues that the tribunal's role should be dependant upon the circumstances of the case. He writes at 457:

Obviously, this is a domain fraught with uncertainty for any statutory authority evaluating whether or not it should attempt to defend itself in judicial review proceedings. Obviously also, there is a need for a fundamental rethinking of the whole issue. Going back to first principles, there are a number of interconnected reasons why courts have been reluctant

to accord status or recognition to tribunals or other statutory bodies attempting to defend their decisions or actions in the context of judicial review or statutory appeal.

Principal among those justifications is the analogy drawn to the situation of the regular courts. Regular courts do not defend their decisions in resistance to appeals from their judgments or verdicts. They have had the opportunity to justify their position in reasons for judgment. It is also perceived to be inappropriate and as bringing into question their independence if they were to take an adversarial role in the context of an appeal. At a more practical level, there will generally always be someone there to defend the decision of the court in the person of the losing party at first instance. Failing that, the possibility exists for intervention in support of the judgment under appeal by the appropriate attorney general or the appointment of an *amicus curiae*.

In many instances, some of these same conditions apply to the administrative process. However, on occasion, the analogy may not be appropriate. Where the decision under attack is not one involving a *lis inter partes* as, for example, in the case of the denial of an application for a licence, there may be no opposing party available to defend the tribunal's position and the attorney general may be unwilling or lack the resources to act as a surrogate. Indeed, even where the decision under attack is the culmination of a *lis* or contest, the winning party may also lack the resources to resist effectively an application for judicial review or a statutory appeal. Even where there is an unsuccessful party willing to appear in defence or in justification of the tribunal's decision, the matters raised by way of an application for judicial review may be matters that stem not from the merits of the decision under attack but from facts of which the respondent party would have at best incomplete knowledge such as assertions of inappropriate post-hearing consultation as in *Consolidated-Bathurst*, claims of legitimate expectation arising from previous conduct or statement, and even allegations of bias by reason of various associations and involvements (as in *Gale*). There, the only way the full facts and possible justifications will emerge will be by conceding a role to the tribunal. Finally, in a domain where courts acknowledge frequently the need for considerable deference to tribunals because of their expertise and experience, an argument arises that the courts' relative unfamiliarity with the substantive matters being dealt with by the tribunal may necessitate an opportunity for the tribunal to explain particularly in situations of allegations of patent unreasonableness. True respect or deference especially where the customary form of reasons provided by the tribunal do not contain essential background may require an opportunity for the tribunal to provide that background and relate it to the facts of the case. Indeed, this may be so even where there is a respondent actively participating in the proceedings.

In this regard, one of the interesting observations made by Osler J. in *Consolidated-Bathurst* was that

the rule restricting the right of a tribunal to make submissions before the Court is a rule of the Court rather than a rule of law, and the extent of the participation to be permitted to the [tribunal] must depend on the circumstances of each case.

Whether or not that does represent the current state of Canadian law in this area, Osler J.'s approach has much to commend it. The issue of tribunal participation would be far better conceived of in terms of judicial discretion than as a set of precise rules where tribunal participation depends on the grounds on which appeal or review is being pursued.

Under a discretionary approach, the principal question should probably be whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack. If that decision will almost certainly be presented adequately by the losing part at first instance or by some other party or intervenor such as the attorney general, there may be no need for tribunal representation irrespective of the ground of judicial review or appeal. On the other hand, where no one is appearing to defend the tribunal's decision, where the matter in issue involves factors or considerations peculiarly

within the decision maker's knowledge or expertise, or where the tribunal wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent, then there should clearly be room for that kind of representation to be allowed within the discretion of the reviewing or appellate court. Indeed, in at least some instances, a true commitment to deference and restraint in intervention would seem to necessitate it.

[34] Ms. Ross says that the decision concerning standing should be based on the individual circumstances of the case. She says that the analysis is similar to the functional and pragmatic analysis in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4<sup>th</sup>) 193, used to determine the standard of review. Similar to the standard of review analysis, Ms. Ross submits there are varying degrees of tribunal standing, which can be determined in a particular case by engaging in an analysis akin to the "pragmatic and functional approach". In this case, she argues the rationale for expanding the standing of the tribunal is based on the following considerations:

- the general shift in administrative law jurisprudence from formalism to functionalism, in matters of both substance and procedure;
- the desirability of a fully informed adjudication by the court;
- the subject matter, nature and features of the *Privacy Act* and the Commissioner's role and processes under it;
- the position of the Commissioner as an independent officer of the legislature and his or her specialized role with respect to the administration of the *Privacy Act*;
- the Commissioner or delegate issues reasons for decision but, because of s. 47 of the *Privacy Act*, those reasons must be constrained so as not to disclose records in issue or other information that may be protected from disclosure under the *Act*;
- the access applicants do not have knowledge of the complete record of proceeding (including the records in issue) and are not participating in the hearing of these judicial reviews;
- the School District (as the decision maker of first instance) and the Attorney General of British Columbia are both limiting their participation in these judicial reviews; and,
- the Attorney General, in any event, has not had knowledge of the complete record of proceeding and conventionally acts for many public bodies, not for access applicants, on judicial reviews of decisions or orders of the Commissioner or delegates.

[35] In my view, an inquisitorial proceeding is more likely to support the expanded standing of a tribunal in judicial review because the objective of the tribunal is to gather as much information as possible. Conversely, an adversarial proceeding is more likely to support the restricted standing of a tribunal in consideration of the fairness to the parties and the tribunal's opportunity to state its position in its original reasons for decision.

[36] This access to information proceeding is not completely adversarial and does involve inquisitorial elements. The purposes of the *Privacy Act* and the Commissioner's consequent mandate are both polycentric and favour a more deferential approach to the decisions of the Commissioner. With reference to the affidavit of David Loukidelis, I conclude that the proceedings are somewhat inquisitorial because the Commissioner is the only party in the judicial review that is fully informed of all the records in issue and of all the *in camera* submissions. The Commissioner is also fully independent of public bodies governed by the *Privacy Act* as well as the interests of access applicants and individual and other third parties.

[37] A further consideration weighing in favour of a more flexible approach to standing is the absence of a party to defend the decision of a tribunal, which in this case, would be the absence of the applicant parents. In his response to this concern, Mr. MacTavish suggests that if the tribunal is found to have been in error, then the matter could be sent back for reconsideration. I disagree with this suggestion. Without an opposing party, the court's present adjudication of the issue of judicial review will not be fully informed.

[38] In my view this is one of those cases mentioned by Reed J. in *Canada (Attorney General) v. Canada (Human Rights Tribunal)*, in which the circumstances suggest greater rather than less participation by the tribunal. Many of the reasons for greater participation by the tribunal are also canvassed in the excerpt of the article by Prof. Mullan quoted above.

[39] The petitioners also argue that if the Commissioner wishes to be relieved of the constraints imposed by the *Northwestern* rule it should seek a statutory amendment to its constating legislation. They say that at common-law, the tribunal has very limited standing, there is no common-law support for the proposition advanced by the tribunal, and that I am bound by *Pacific* which provides that active participation by the tribunal is improper.

[40] On April 25, 2005, the B. C. Court of Appeal issued its judgment in *Lang v. British Columbia (Superintendent of Motor Vehicles)*, [2005] B.C.J. 906, 254 D.L.R. (4<sup>th</sup>) 111, (C.A.) ("*Lang*"). This judgment was released just three days before *Children's Lawyer* and consequently did not comment on *Children's Lawyer*.

[41] *Lang* involved an application for the judicial review of decisions by the Superintendent of Motor Vehicles, issuing administrative licence suspensions. In its decision, the B.C. Court of Appeal discussed the permissible submissions of a tribunal at the judicial review of its own decision. Donald J.A. explained the changes in the state of the law in British Columbia on the standing of the tribunal at ¶50:

[T]he traditional restriction against the tribunal's arguing the merits of its own decision, articulated clearly and emphatically in cases like *Canada Labour Board v. Transair*, [1977] 1 S.C.R. 722, 67 D.L.R. (3d) 421, and *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, has been relaxed somewhat by the decision in *CAIMAW v. Paccar of Canada Ltd.*, [1989 2 S.C.R. 983, 62 D.L.R. (4<sup>th</sup>) 437. *Paccar* permits the tribunal to demonstrate that its decision was not patently unreasonable. [emphasis added].

[42] After quoting *Paccar* in some detail, Donald J.A. continued at ¶54:

When read closely, the passage adopted by La Forest J. does not in my view provide the tribunal a broad opportunity to argue the merits[...]. While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed. It will be up to the judgment of the reviewing judge in each case to determine if the tribunal, or the Attorney General on its behalf, has gone too far.

[43] Ms. Ross argues that *Lang* is distinguishable and that I should follow *Children's Lawyer*. She says that *Lang* related to an award of costs upon the quashing of administrative licence prohibitions on judicial review. The issues required a determination of the correct parties before the courts and the exposure of the various parties to costs. The court held that costs should not be levied against the tribunal unless, "[the tribunal] made submissions on the merits of the judicial review application and did not limit itself to jurisdiction."

[44] Notwithstanding the evident erosion to the rule in *Northwestern* and the persuasive submissions of Ms. Ross in this regard, there is no authority for the proposition (however attractive) that the scope of a tribunal's submissions at the judicial review of its own decision are completely unfettered. I agree with Mr. MacTavish that *Lang* confirms the present state of the law applicable in British Columbia, which does not permit a tribunal to argue the merits of its decision upon judicial review. Although *Lang* is factually distinguishable from the present case, it makes clear that the essential principle in *Northwestern* continues to be applied in British Columbia and further, that the court must monitor what can often be a blurry line between arguing the merits of a decision and explaining the record. In my view, the line between permissible and impermissible argument by the tribunal is drawn at the point at which the Commissioner defends the actual merits of his decision.

[45] In this case the particular factors that weigh in favour of greater, but not unfettered, participation include:

- the lack of representation before the court of the applicant parents;

- the role of the Commissioner within the statutory scheme, which is to balance and resolve the public interest in access to information with individual interests in personal privacy;
- the inquisitorial nature of the Commissioner's process; and,
- the special knowledge and expertise of the tribunal, all of which weigh in favour of greater participation.

[46] Counsel for the Commissioner says that it will not act as a proxy for the access applicants, and would not advance aggressively adversarial positions.

[47] I will now turn to consider the nature and scope of the proper submissions of the Commissioner.

[48] In *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 B.C.S.C. 603, Ross J. described the appropriate role of the Commissioner in a judicial review proceeding. She stated at ¶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.

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.*, [1989] 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-Bathurst 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) 464, C.A.

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.

[49] In this case Mr. MacTavish says that the Commissioner may only address the record of proceedings and the standard of review.

[50] I have already alluded to my concern that constraining the role of the Commissioner in the manner contended for by the petitioners would leave the court without the benefit of balanced submissions and could lead the court into error. I have reviewed the written submissions of the Commissioner on the merits of this judicial review.

[51] In her written submissions on the substantive questions in this case, Ms. Ross divides the argument into six main issues. Mr. MacTavish agrees that those are the six issues relevant to the

judicial review of the Commissioner's decision.

[52] It is not necessary to specifically outline those issues, except to say that in each of those issues, Ms. Ross describes the position of the petitioners, sets out the relevant portion of the tribunal decision, and reviews the relevant statutory and judicial authorities. She places the issues within the context of the overall scheme of the *Privacy Act*. Separately, she argues that the issues are questions of mixed fact and law and that the standard of judicial review should be reasonableness.

[53] In my view those submissions have not stepped over the somewhat blurry line described by Donald J.A in *Lang*. She does not address the merits of the decision on each issue.

[54] Accordingly, I would dismiss the preliminary objection made by the petitioners.

[55] Mr. Tuck, for the Attorney General of British Columbia says that the Attorney General takes no position on the preliminary objection as to standing by the petitioners. However, the Attorney General intends to argue on the judicial review that the Commissioner does not have jurisdiction to order a public body to exercise its discretion or to order a public body to reconsider a discretionary decision. He says, and I agree, that the Commissioner should have full standing to argue that it does have such jurisdiction.

[56] Mr. Mitchell, for the Board of School Trustees of School District No.68, supports the Commissioner's standing to make the submissions it has made.

### **Disposition**

[57] The preliminary objection to the standing of the Commissioner to make the submissions it has made, is dismissed.

[58] The petitioners do have leave to argue that a specific part of the submissions over-steps the Commissioner's proper standing and deals directly with the merits or correctness of the Commissioner's decision.

"N. Garson, J."

The Honourable Madam Justice N. Garson

November 14, 2005 – *Revised Judgment*

Corrigendum to the Reasons for Judgment issued advising that with reference to "Counsel for the respondent, Information and Privacy Commission for British Columbia" should read "Counsel for the respondent, Information and Privacy Commissioner for British Columbia".