Date: 19971202
Docket: A970544
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,
R.S.B.C. 1979, c. 209

BETWEEN:

MICHAEL E. CROCKER and
ROBERT W. FREEMAN

PETITIONERS

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF BRITISH COLUMBIA

RESPONDENT

AND:

BC TRANSIT

RESPONDENT

REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE COULTAS

(IN CHAMBERS)

Counsel for the Petitioners:	Leo McGrady and Jasbir Parmar
Counsel for the Respondent: The Information and Privacy Commissioner	Susan E. Ross
Counsel for the Respondent: B.C. Transit	David Loukidelis
Counsel for the Attorney General of British Columbia (Intervener)	Jeffrey M. Loenen
Place and Date of Hearing:	Vancouver, B.C. May 5, 6, and 16, 1997
Written Submissions Received:	August 13, 1997 September 23, 1997 October 3 and 6, 1997

[1] This is a judicial review of an Authorization of October 31, 1996 issued by the Information and Privacy Commissioner of British Columbia (the "Commissioner") to the Respondent, B.C. Transit, under s. 43 of the Freedom of Information and Protection of Privacy Act R.S.B.C. 1996, c. 165 ("the Act") with respect to the Petitioners Crocker and Freeman.

[2] The Authorization reads:

I authorize B.C. Transit to disregard all requests for access from either Robert W. Freeman and/or Michael E. Crocker for a period of one year from and after June 13, 1996. After the year has elapsed, B.C. Transit is required to deal with only one request at any given time from, or on behalf of, each of the aforementioned persons for the period ending June 13, 1998.

[3] "Access" referred to access to information pursuant to Part 2 of the Act.

[4] Section 43 of the Act reads:

Power to authorize a public body to disregard requests

If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

[5] B.C. Transit is an agent of the Crown in right of the Province and is a public body as defined by the Act.

[6] This is the first s. 43 authorization of the Commissioner to come before the court for judicial review.

THE PETITIONERS

[7] Michael Crocker and Robert Freeman are employed as transit operators by B.C. Transit. They are members of the Independent Canadian Transit Union ("ICTU"), the certified bargaining agent for employees of B.C. Transit. Both Petitioners are active members of the Union and have held the position of job stewards for many years.

[8] In their role as job stewards, the Petitioners have made requests to B.C. Transit to obtain information relating to public safety and job concerns of their own and of other employees. They say the information sought has been used to fulfill their responsibility as job stewards in the pursuit of collective

agreement grievances and in the publishing of articles in Progress, the Union newspaper.

BACKGROUND

[9] On June 13, 1996, B.C. Transit made an application pursuant to s. 43 of the Act seeking the following relief:

> (a) B.C. Transit be authorized to disregard for a period of 18 months any further requests received after this date from either of the Petitioners; and
>
> (b) that after the eighteen month period has elapsed, B.C. Transit be required to deal with only one request at any given time from each of them.

[10] In August 1996, the Commissioner called for submissions. Evidence by way of affidavit and written submissions were filed. The Petitioners took the position that they exercised their rights for information in compliance with the Act and for the purposes of and in the spirit of the Act. On October 31, 1996, the Commissioner handed down his decision and gave the authorization. He did not accede to B.C. Transit's request that the prohibitions be for eighteen month periods; he did so for periods of twelve months, one to follow the other.

THE COMMISSIONER'S DECISION

[11] In his October 31, 1996 decision leading to the authorization, the Commissioner said, in part:

> Section 43 gives me the power to authorize a public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body, in this case the B.C. Transit Corporation.
>
> Since the purpose of the Act is to make government bodies more accountable to the public by giving the public a right of access to records, authorization to disregard requests must be given sparingly and only in obviously meritorious cases. Granting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation.
>
> Based on a detailed review of the submissions of B.C. Transit and the reply submission of Robert W. Freeman and Michael E. Crocker, the following factors have led me to decide that Messrs. Freeman and Crocker's access requests are repetitious, systematic, and unreasonably interfere with the operations of B.C. Transit in relation to both its Information and Privacy Office and its Customer Service Operations:
>
> 1. B.C. Transit received 227 formal access requests under the Act between October 4, 1993 and June 13,

1996. Messrs. Freeman and Crocker have been responsible for over one quarter of this total (58 requests). Seventeen of these requests were received during the sixty day period before June 13, 1996, when the head of B.C. Transit formally applied for a section 43 ruling. Messrs. Freeman and Crocker accounted for 63 percent of all access requests to B.C. Transit during this sixty-day period.

2. The evidence submitted by B.C. Transit that Messrs. Freeman and Crocker act in concert with respect to their access requests.

3. The evidence submitted by B.C. Transit that its Director of Information and Privacy is the only full-time employee dedicated to access and privacy activities, including promoting openness, applying fair information practices, and actively participating in ongoing policy development related to access and privacy matters.

4. The evidence submitted by B.C. Transit that the requests made by Messrs. Freeman and Crocker have had a significant negative impact on the operations of its Information and Privacy Office and significantly and unreasonably interfered with its Director's discharge of his access and privacy duties under the Act.

5. The evidence submitted by B.C. Transit that the requests made by Messrs. Freeman and Crocker have had a significant negative impact on the operations of its Customer Service Department, which is responsible for running buses and other transit operations, the core of BC Transit's public mandate.

6. The submission of B.C. Transit that the requests made by Messrs. Freeman and Crocker have the effect of using the Act as a weapon of information warfare, which has the consequence of undermining its legitimacy amongst the managers and other employees whose cooperation is required in order for its access and privacy regime to work properly.

7. The submission of B.C. Transit that the intention of the powers conferred upon the Commissioner under section 43 of the Act is remedial: "they are intended to allow the Commissioner considerable discretion in ensuring the access rights granted by the Act are not abused to the detriment of other access requesters or in a way that unreasonably interferes with the public interest in efficient public body administration."

and consequently, gave his authorization.

THE RELIEF SOUGHT BY THE PETITIONERS

[12] The Petitioners seek the following orders in the nature of declarations:

(a) that the Commissioner acted without jurisdiction and/or exceeded his jurisdiction in giving the authorization;

(b) that he acted without jurisdiction and/or exceeded his jurisdiction when reaching his patently unreasonable conclusions that the Petitioners' requests were repetitious and systematic and they would unreasonably interfere with the operation of B.C. Transit;

(c) an order in the nature of certiorari quashing the Commissioner's authorization to B.C. Transit.

In their Petition, the applicants seek a declaration that the process by which the Commissioner's decision arose did not comply with the principles of natural justice. This submission was not advanced at the Hearing and I have not considered it.

THE ISSUES

I. The standard of review of the Commissioner's interpretation of s. 43 - "repetitious, systematic and unreasonable interference"; his application of that interpretation to the facts; and his exercise of discretion in fashioning the prospective remedial authorization.

II. Was the authorization "reasonable"? Was it made in the absence of evidence? Was it made taking into account irrelevant considerations?

III. Does s. 43 authorize the Commissioner to make a prospective remedial authorization?

IV. Should the remedy stand having regard to the appropriate standard of review?

THE ACT AND THE COMMISSIONER

[13] The Act was enacted by the Province in October 1993 for the purpose of making public bodies more accountable to the public and protecting personal privacy. Its purposes are contained in s. 2(1) of the Act:

Purposes of this Act

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 right 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.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[14] "Record", "personal information" and "public body" are defined in Schedule 1 of the Act.

[15] Section 4 of the Act refers to information rights and reads, in part:

Information rights

4.(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant...

[16] The Act does not contain a privative clause but it does not provide a right of appeal which would allow an appellate tribunal to substitute its opinion for that of the Commissioner.

[17] The Commissioner is appointed by Order-In-Council upon the unanimous recommendation of a Special Committee of the Legislative Assembly. He is an officer of the Legislature.

[18] The present Commissioner is the first to be appointed under the legislation. At the time he made the authorization complained of, he had held the position for three years.

[19] In Order #11, 1994, British Columbia (Ministry of Health) given June 16, 1994, the Commissioner spoke of his approach when interpreting the Act:

I wish to adopt an approach to interpreting the Act that encourages citizens to use it. The spirit and the underlying purposes of the Act may be thwarted by a narrow interpretation. Information rights must be

accessible to all citizens in this Province. As Commissioner, I must ensure that the door to the Act is held open and not closed prematurely on technical grounds.

I find support for this approach through a review of the legislative history of the Act. The government intended this legislation to be open to citizens and that it not be thwarted by public bodies administering the Act.

THE COMMISSIONER'S EXPERTISE

[20] This court has commented on the expertise of the Commissioner. In Fletcher Challenge v. British Columbia (Information and Privacy Commissioner) (1996), 20 B.C.L.R. (3d) 280 (S.C.) Lowry J. at page 287, cited with approval a decision of the Divisional Court of Ontario (General Division) John Doe v. Ontario (Information and Privacy Commissioner) (1993), 106 D.L.R. (4th) 140 in which Campbell and Dunnet JJ. said at pages 155 and 156:

To the extent that information has become a commodity, the management of information by the Commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.

Accordingly, the Commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the Commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson J., as he then was, in C.U.P.E., Local 963 v. New Brunswick Liquor Corp., supra, at pp. 423-4, the commission is a specialized agency which administer a comprehensive statute regulating the release and retention of government information. In the administration of that regime; the Commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the Commissioner is all the more required if the twin purposes of the legislation are to be met.

The Commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of

government information.

Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the Commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the Commissioner's interpretation and application of its statute and, in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.

We therefore conclude the Commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislation has not insulated the tribunal by means of a privative clause.

At page 288, Lowry J. said:

While the legislation in this province cannot be characterized as a carbon copy of the Ontario statute, the stated purposes of the two statutes are the same, and the role of commissioner as well as the expertise to be employed by the person holding that office in the two jurisdictions appear to me to be entirely comparable.

In this province, as in Ontario, in addition to his powers and duties associated with reviewing requests for access to records which include an expressed statutory mandate (s.56) to decide all questions of fact and law arising, the Commissioner is generally responsible for monitoring how the Act is administered to ensure its purposes are achieved...

I consider that what was said in the quoted passages from John Doe can be said with equal force about the role of the Commissioner appointed under the legislation in this province. Significance was attached to the experience actually achieved by the Commissioner in the five years the Ontario legislation had been in force, but I do not consider that renders what I have quoted any less applicable. Here as in Ontario, the legislation contemplates the appointment of a person having sufficient expertise to undertake what is a most novel and specialized function in the management of information. The legislative intention appears to me to have been to vest in the office of the Commissioner a broad mandate to oversee all aspects of achieving the stated purposes of the Act.

I find the decisions of the Ontario Divisional Court to be, a persuasive, principled approach to the determination of the standard of review applicable in this case and I am of the view that they should be followed. I consider the Commissioner's decisions on questions of the interpretation and applicability of the provisions of the legislation that fall within his area of expertise are to be accorded substantial deference, precluding interference, unless it can be said he has made a determination which is not reasonable.

The questions of what "similar information" means - how the term is to be interpreted and what information is to be included - is one that I regard as being germane to the management of information generally. Like the questions raised in the three Ontario decisions, it is the kind of question that falls within the sphere of expertise of the person charged with the responsibility for the administration of the legislation. His interpretation must then be permitted to stand unless it falls short of what is reasonable.

STANDARDS OF REVIEW

[21] Determining the standard of review is primarily a matter of statutory interpretation. The court must determine the legislative intent with respect to the degree of deference the court ought to accord the tribunal's decision. Numerous cases were cited to me on this issue. I have read those cases but shall refer to only a few. In Fletcher Challenge, supra, Lowry J. reviewed a decision of the Commissioner ordering the Ministry of Environment, Lands and Parks to give a preservation society access to technical information supplied to the Ministry by Fletcher Challenge, in confidence. At page 285, Lowry J. said:
The issue which the Commissioner had to decide turned on the interpretation and applicability of s. 21(1)(c)(ii). It is primarily a question of law and the standard of review which is now to be employed must be considered in that context.

The Supreme Court of Canada considered the standard of review applicable in respect of questions of law before an administrative tribunal recently in Pezim v. British Columbia (Superintendent of Brokers) (1994), 114 D.L.R. (4th) 385 [92 B.C.L.R. (2d) 145]. At issue was the interpretation given by a securities commission to the provisions of its governing statute. In reviewing the authorities and discussing the principles of judicial review the court said (pp. 404-05):

> From the outset, it is important to set

> forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function.

At page 286, Lowry J. said:

Fletcher Challenge and the Ministry contend that the standard of review here with respect to questions of law in particular must be one of correctness. They attach particular significance to there being no privative clause and they maintain the legal question is not one that requires any special expertise that could be attributed to the Commissioner who is not legally trained. The Society and the Commissioner argue for a lower standard. They say the court must afford the Commissioner's decision substantial deference and refuse to interfere unless it can be said that the way he interpreted and applied the legislation was not reasonable. There is no privative clause but there is also no right of appeal which would allow an appellant tribunal to substitute its opinion for that of the Commissioner.

STANDARDS OF REVIEW ON QUESTIONS OF LAW OR MIXED LAW AND FACT

[22] In Pezim v. British Columbia (Superintendent of Brokers) (1994), 92 B.C.L.R. (2d) 145 (S.C.C.), Iacobucci J. delivering the judgment of the court said at page 168:
In my view, the pragmatic or functional approach articulated in Bibeault is also helpful in determining the standard of review applicable in this case. At p. 1088 of that decision, Beetz J., writing for the Court, stated the following:

> ...the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

[23] He spoke of the spectrum of standards of review at pages 166 and 167:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See C.U.P.E., Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, Syndicate national des employ,s de la commission scolaire r,gionale de l'Outaoais c. U.E.S. local 298, (sub. nom. U.E.S., local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1089 ("Bibeault"), and Domtar Inc. v. Qu,bec (Commission d'appel en matišre de l,sions professionnelles), [1993] 2 S.C.R. 756.
>
> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321, Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, and Berg v. University of British Columbia, [1993] 2 S.C.R. 353 [79 B.C.L.R. (2d) 273]...
>
> Consequently, even where there is no privative clause and where there is a statutory right of appeal the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

[24] Subsequent to Lowry J.'s decision in Fletcher Challenge, the Supreme Court of Canada revisited the issue of standard of review. In Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, Mr. Justice Iacobucci gave the unanimous judgment of the court. Appeals from orders of the Competition Tribunal were before the court. The issues were: first, whether the Federal Court of Appeal erred in concluding that it owed no deference to the Tribunal's findings about the dimensions of the relevant market and in subsequently substituting that for findings of its own; second, whether the

Court of Appeal erred in refusing to set aside the Tribunal's remedial order.

[25] In Southam, the court found that the questions before the Tribunal were ones of mixed fact and law. The court spoke of the standard of review at page 2775:
F. The Standard

In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.

I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test, and, as I have said, the statutory right of appeal puts the jurisdictional question to rest. See Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, at p. 237. But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.

[26] The court adopted the standard of reasonableness simpliciter, saying at page 778:
The standard of reasonableness simpliciter is also

closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:

> ...the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view on the balance of probability. [Emphasis added by Iacobucci J.]

[27] Speaking of that standard, at page 779, Iacobucci J. said;
...It bears noting, however, that the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Tribunal has been shown to have acted unreasonably.

In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin.

[28] Although his decision was given before Southam, I find that in Fletcher Challenge, Lowry J. took into account all the relevant considerations spoken of in Southam. He considered the wording of the Act. He noted the Act did not include a privative clause but it did not contain, either, a statutory right of appeal. He considered the expertise of the Commissioner to interpret and administer the Act and found he had expertise. He found that the question the Commissioner decided was a question of law. He found that the Commissioner's decision was reasonable and the court should pay substantial deference to it. In my opinion, Judge Lowry's decision did not offend the principles spoken of in Southam.

STANDARD OF REVIEW ON QUESTIONS AND FINDINGS OF FACT

[29] In Aquasource Ltd. v. The Information and Privacy Commissioner for the Province of British Columbia (5 November 1996), Vancouver A952695 (B.C.S.C.), Vickers J. engaged in a judicial review of a decision of the Commissioner and said at page 7:
The findings of facts will only take on a jurisdictional dimension when the finding is both instrumental to the decision in question and was reached on the basis of no evidence. There is ample

authority for the proposition that if there is any evidence upon which a factual conclusion could have been reasonably reached, it would not be within the authority of the court to interfere. The test is set out in Douglas Aircraft Co. of Canada v. McConnell, [1980] 1 S.C.R. 245 at 277, where Estey J. said:

> ... a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.

[30] The same conclusion was reached by Gow J. in TSE v. The British Columbia Council of Human Rights (11 February 1991), Vancouver A902171 (B.C.S.C.) where he said at page 21:
But even where the empowering statute does not contain a privative clause, the judicial trend (still proceeding) has been and is away from exuberant intervention to restrained intervention. If the empowering statute contains a provision suggesting privation or finality, the immunity of a privative clause will be accorded to it. Even without a quasi-privative clause, the current trend more and more restricts the scope of review based upon error on the face of the record to, at the very least, error which assumes significant jurisdictional dimensions. The gap is narrowing and may be closed at the discretion of the supervising court.

and at pages 22 and 23, Gow J. continued:

A finding of fact is unreasonable and jurisdictional error if either there is no evidence before the tribunal to justify its finding, or in the light of that evidence it appears to be wholly unreasonable. On the other hand, if there be evidence before the tribunal which permitted it to reach rationally its conclusion, there is no jurisdictional error: Wylie v. B.C. Police Commissioner (1988), 18 B.C.L.R. (2d) 192 per Carrothers, J.A. at p. 204.

THE NATURE OF THE QUESTIONS POSED BY SECTION 43 AND DECIDED BY THE COMMISSIONER

[31] I find:

- the interpretation of s. 43: the meaning of "repetitious, systematic and unreasonable interference with the operations of the public body is a question of law;

- his application of that interpretation to the facts is a question of mixed law and fact;

- the exercise of his discretion in fashioning his remedy is a question of law.

THE APPROPRIATE STANDARD OF REVIEW

[32] The appropriate standard of review will depend on the circumstances of the case, the section of the Act in question and the expertise of the Commissioner to interpret the questions of law before him.

[33] In this Province, courts have ruled that some orders of the Commissioner were not entitled to deference and have set them aside. In Fletcher Challenge, supra, Lowry J. held that the decision of the Commissioner pursuant to s. 21 of the Act was to be accorded substantial deference. However, in Legal Services Society v. The Information and Privacy Commissioner (25 September 1996), Vancouver 960275 (B.C.S.C.), Lowry J. found that the Commissioner's interpretation of s. 14 of the Act was not a matter that fell within the purview of the Commissioner's expertise and that deference should not be accorded. The court set aside the Commissioner's order for it constituted an error of law. In Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner) (1994), 1 B.C.L.R. (3d) 180 (S.C.), Vickers J. set aside an order of the Commissioner made under s. 58(2)(b) of the Act as being beyond his jurisdiction. In British Columbia (Ministry of Environment, Lands & Parks v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (S.C.). Thackray J. found that a standard of correctness should be applied to the Commissioner's interpretation that s. 14, dealing with solicitor/client privilege, should be interpreted narrowly.

APPLICATION OF STANDARDS OF REVIEW IN THE SUBJECT CASE

[34] The parties disagree on the standard of review of the Commissioner's interpretation of s. 43. The Petitioners submit the appropriate standard is one of correctness. They say his interpretation of s. 43 was incorrect or, in the alternative, patently unreasonable.

[35] The Attorney-General submits the interpretation of s. 43 is a general question of law and there is no basis for reasons of relative expertise to accord any deference to the Commissioner's interpretation. The Commissioner does not fall within the select group of tribunals to whom the court ought to accord deference in

the absence of a privative clause. The Attorney-General submits that the Commissioner's responsibilities under the Act and his expertise cannot be compared to the degree of expertise courts have found exist in the fields of communication and financial markets; that it is implausible to characterize the proper interpretation of the terms "repetitious, systematic and unreasonably interfere" as matters falling squarely within the specialized expertise of the Commissioner. The Attorney-General submits the standard of review on this issue is one of correctness, but submits also that the Commissioner's interpretation of s. 43 was correct.

[36] The Commissioner and BC Transit submit the Commissioner has expertise in the management of information and his decisions on questions of the interpretation and application of the Act which fall within his area of expertise should be accorded deference if they are found to be reasonable as that term was interpreted and applied in Southam.

[37] I conclude that the standard of review of the Commissioner's interpretation of s. 43 is reasonableness simpliciter. The Commissioner's expertise is determined by taking into account the factors spoken of by Beetz J. in Bibeault, approved in Pezim. The Act confers specialized jurisdiction to the Commissioner. He has expertise is the field of information management which includes the interpretation and administration of the Act: Lowry J. in Fletcher Challenge, supra, Section 43 is an integral part of the Act and one of his functions is to analyze and interpret the meaning of the words found in s. 43 within the context of the Act; that function falls squarely within his specialized jurisdiction.

[38] Right of access forms part of the comprehensive scheme of access to information and protection of privacy in which the Legislature has struck a balance between the right of access and the public interest in an efficient, reasonable administration of the scheme for access, which in part, ensures that the operation of a public body is not unreasonably interfered with by requests for information that are repetitious or systematic in nature.

[39] The standard of review in respect of the Commissioner's application of his interpretation to the facts is one of reasonableness. A finding of mixed fact and law is unreasonable and a jurisdictional error if there is no evidence before the Tribunal to justify its finding, or in the light of that evidence it appears to be wholly unreasonable: (Gow J. in TSE).) The Commissioner's application of s. 43 to the facts should be accorded some deference.

[40] The standard of review of the Commissioner's authorization to BC Transit to disregard future requests of the Petitioners is that of correctness.

THE COMMISSIONER'S AUTHORIZATION

[41] Section 43 of the Act is remedial, not punitive in nature. The Petitioners submit that if the right of access is to be

interpreted broadly as the Commissioner said in Order #11-1994, supra, s. 43, which limits that right, must be interpreted strictly. Further they submit the effect of the section being in direct contradiction with the expressed purposes of the Act, there is a high onus cast on a public body seeking to invoke it.

[42] I do not agree with either submission. Section 43 is an important remedial tool in the Commissioner's armory to curb abuse of the right of access. That section and the rest of the Act are to be construed by examining it in its entire context bearing in mind the purpose of the Legislation. The section is an important part of a comprehensive scheme of access and privacy rights and it should not be interpreted into insignificance. The legislative purposes of public accountability and openness contained in s. 2 of the Act are not a warrant to restrict the meaning of s. 43. The section must be given the "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects", that is required by s. 8 of the Interpretation Act.

[43] The Commissioner has issued only four s. 43 authorizations since the Act came into force in 1993. The Commissioner has expressed an intention to approach s. 43 applications cautiously and to use it sparingly, but that does not imply that s. 43 should be read restrictively.

[44] The Petitioners submit that the Commissioner either without jurisdiction or exceeding his jurisdiction, improperly considered irrelevant information. That information was BC Transit's submission that the Petitioners' requests had the effect of using the Act as a "weapon of information welfare". In his decision, the Commissioner repeated that phrase, correctly attributing it to BC Transit's submission. There is no evidence that conclusion was based on any considerations other than the evidence before him. Courts frequently adopt the language of counsel given orally or in submissions, in Reasons. Counsel will well recognize their language in these Reasons. It is not an objectionable custom.

CONCLUSIONS WITH RESPECT TO THE COMMISSIONER'S AUTHORIZATION

[45] I find the Commissioner's interpretation of s. 43 was reasonable and deference should be extended to it. Had I found that "correctness" was the appropriate standard of review. I would have found the Commissioner was correct in his interpretation. The terms "repetitious and systematic and unreasonably interfere" are not defined in the Act and the Commissioner did not expressly define them in his decision. However, his interpretation of those terms may be inferred from his decision when he recited the facts that prompted the authorization, and from the authorization itself.

[46] With respect to his findings of fact, there was evidence before him to support those findings. BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a

significant portion of the company's Information and Privacy resources were being expended responding to the Petitioners' requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient evidence to make an informed assessment of the negative impact of the Petitioner's requests on BC Transit.

[47] I find the Petitioners have failed to demonstrate that there was "no evidence" before the tribunal that justified the authorization, and they have failed to demonstrate that the authorization was wholly unreasonable based on the evidence.

[48] The authorization given was not intended to punish the Petitioners for any wrongful conduct. Rather, it was issued to alleviate a continuing burden on BC Transit which the Commissioner determined to be excessive.

[49] The question of whether the Commissioner had jurisdiction to authorize BC Transit to disregard the Petitioners' future requests is a matter of statutory interpretation properly characterized as jurisdictional. In my opinion, the language of s. 43 imports a remedial power to make prospective orders. I agree with the submissions of counsel for BC Transit that the Legislature did not intend the section to apply only to requests that have been made to, but not yet considered by, a public body, at the time it applies for a s. 43 authorization. Section 43 would be rendered useless if a public body, which is being unduly burdened by a number of repetitious or systemic requests, had to make separate applications to the Commissioner every time it received a new request from that person. Section 43 could not have been intended to increase the administrative burden on public bodies which would likely occur if the Commissioner did not have the power to make authorizations that extend to future requests.

[50] I agree with the submissions of counsel for BC Transit, the Attorney-General and the Commissioner that the words "would reasonably interfere" in s. 43 supports the forward looking nature of the remedial power to make prospective orders.

[51] In Bell Canada v. Canada (Canadian Radio-Television and Communications Commission), [1989] 1 S.C.R. 1722, Gonthier J., delivering the judgment of the court said at page 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although

courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

[52] I conclude the ability of the Commissioner to restrain an abuse of the information access scheme would be largely frustrated if s. 43 could only be applied to pending access requests.

[53] I do not accept that the Commissioner was in error by issuing his authority without making a determination that BC Transit may have eased the burden of the requests by imposing fees upon the Petitioners provided for under s. 75 of the Act. Sections 43 and 75 are independent provisions. The wording of both sections does not suggest that a s. 43 authorization can only be issued after a s. 75 fee requirement has been tried and found wanting. Section 75, while having a possible deterrent effect appears to be concerned with alleviation of financial burdens on a public body while s. 43 is designed to alleviate administrative hardship.

[54] The Commissioner fashioned two discretionary remedies. His discretion is not completely unfettered. The remedy must redress the harm to the public body seeking the authorization. If the remedy is wholly disproportionate to the harm inflicted, it may be set aside. In my respectful opinion, the authorization to BC Transit to disregard all requests for information by these Petitioners for one year was wholly disproportionate and clearly wrong. That authorization prevents the Petitioners themselves from accessing personal information. The Act contemplates that individuals will have free and full access to their own personal information, subject only to the express limitation in s. 19 of the Act.

[55] That said, I can conceive of circumstances where requests for information, including personal information, should be prevented by invoking s. 43, because the requests are made habitually, persistently and in bad faith, or are clearly frivolous and vexatious. The Commissioner has not so characterized these Petitioners' requests. He has done so, however, in other cases in which he has invoked s. 43.

[56] In Order #110-1996, made on June 5, 1996, the Commissioner authorized the head of the Vancouver School Board to refuse access to Board records, saying at p. 5:

I agree with the School Board in the present matter that this applicant is not using the Act for the purposes for which it was intended and that he is not, indeed, acting in good faith...

A statutory scheme of access to general and personal information is only going to work for innumerable public bodies and applicants if common sense and responsible behaviour prevail on both sides. This is

not the first applicant whom I have come to regard as making excessive, indeed almost irrational, demands on a public body.

[57] In an Application for Authorization to Disregard Requests under s. 43 by Joan Hesketh, Assistant Deputy Minister, Ministry of Employment and Investment, on August 23, 1996 the Commissioner gave authority under s. 43 based on his conclusion that the respondent habitually, persistently and in bad faith, was making excessive and irrational requests and demands on the Ministry. On August 30, 1996, he gave a s. 43 authorization based on identical conclusions, in an application brought by the Vancouver School Board.

[58] The Commissioner has not found that the Petitioners in this case were acting in bad faith.

[59] The absolute prohibition against the Petitioners has now expired. Were it not so, I would have remitted that part of the authorization to the Commissioner for reconsideration.

[60] With respect to the second remedy he fashioned - that BC Transit is required to deal with only one request of the Petitioners at a time, in my respectful opinion, the Commissioner was correct. That authorization will permit BC Transit to deal with the Petitioners' requests seasonably and it should prevent unreasonable interference with its operations which the authorization was designed to prevent. Had the Commissioner imparted that limitation into the first year as well as the second, there would be no quarrel with it.

THE DAGG DECISION

[61] In August, counsel for the Commissioner brought to my attention the decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 (S.C.C.), which was released following the conclusion of argument in this case. The Dagg case was concerned with an appeal regarding the Access to Information Act R.S.C. 1985, c. A-1. I invited counsel to submit on the impact of the Dagg decision on the case at bar, to which all counsel responded.

[62] I conclude that Dagg does not change my conclusions regarding either the standard of review by which I have assessed the Commissioner's authorization or the merits of that assessment.

[63] I note that the Access to Information Act contains a statutory right of appeal to the Federal Court. Our Act does not contain a similar provision. The Dagg case was concerned with the refusal by the Ministry of Finance to disclose records of when employees signed in or out of a government building. Those records were considered personal information and thus, excluded under s. 19(2)(c) of the Access to Information Act and s.

8(2)(m)(i) of the Privacy Act. Section 43 of this Act deals with different considerations: whether information requests pose an unreasonable hardship on a public body.

COSTS

[64] The Intervener, the Attorney-General, does not seek costs. There will be no order for costs for or against any party. Success has been divided. Counsel have agreed to share the cost of transcripts of submissions.

[65] I wish to express my gratitude to counsel for their submissions, both written and oral. They were excellent and very helpful.

"Coultas, J."
The Honourable Mr. Justice Coultas