IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sochowski v. British Columbia (Information and Privacy Commissioner),*** 2008 BCSC 1390

Date: 20081021
Docket: S078779
Registry: Vancouver

Between:

David Sochowski

Petitioner

And

Office of the Information and Privacy Commissioner for British Columbia

Respondent

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Petitioner	Marjorie Brown
Counsel for the Respondent	Angela R. Westmacott
Counsel for Finning (Canada)	John K. Donkor
Date and Place of Trial/Hearing:	September 24, 25 and 26, 2008 Vancouver, B.C.

INTRODUCTION

[1] When the ***Personal Information Protection Act***, S.B.C. 2003, c. 63 ["***PIPA***"] was debated on May 1, 2003, as Bill 38, the Honourable S. Santori, who introduced the bill, stated, as reported in British Columbia, ***Official Report of Debates of the Legislative Assembly (Hansard)***, Vol. 14, No. 13 (1 May 2003) at 6416, that:

> "… this bill provides provincial oversight of the activities of organizations through the office of the information and privacy commissioner. This model of commissioner is familiar to British Columbians, retains jurisdiction within the province and, because of its emphasis on mediation, has proven to be cost-effective and successful…. All of these provisions are harmonized with the federal private sector and provincial public sector legislation and are presented in an easy-to-understand manner."

[2] The anticipated cost-effectiveness and easy-to-understand benefits of the legislation did not materialize in the case of the petitioner, who now seeks a judicial review of the disposition of his complaints to the Commissioner concerning the requirement of his employer, Finning (Canada) ("Finning"), that its employees produce annual driver's licence abstracts.

BACKGROUND

[3] The Insurance Corporation of British Columbia ("ICBC") maintains driver abstracts for its customers that contain information about its customers, some of which is set out on a person's driver's licence, and some of which is not.

[4] The plaintiff has been employed by Finning for some 33 years. He works as a heavy duty mechanic. In late 2003, Finning introduced a policy requiring its employees to provide it with their driver abstracts and insurance claim histories annually. Finning argued that the information was necessary for its insurance.

[5] When ***PIPA*** came into force on January 1, 2004, Finning revised its policy. It no longer required insurance claim history information from its employees and limited the application of the balance of its policy to what it described as "directly affected employees". The petitioner did not provide his driver abstract to Finning, and instead, on March 16, 2004, filed a complaint with the respondent that his employer was in contravention of the provisions of ***PIPA*** by demanding that he produce his driver's licence abstract.

[6] On November 16, 2004, an intake officer for the respondent advised the petitioner in writing that his complaint had been referred to a Portfolio Officer for mediation under s. 49 of ***PIPA***. No mediation occurred, but by letter of March 16, 2005, the Portfolio Officer advised the petitioner's counsel that rather than conducting a mediation, he had resolved the petitioner's complaint by way of a complaint investigation. The Officer advised that, as Finning had agreed to accommodate the petitioner on what was described as a "one off" basis by only requiring that he produce a valid driver's licence on the rare occasions when he was required to operate a licensed vehicle, the result that the petitioner sought had been accomplished.

[7] Subsequently, despite the fact that Finning had not resiled from its individual accommodation of the petitioner, the petitioner came to the conclusion that Finning was not abiding by the terms of its revised policy with respect to its other employees. Based on job postings, he believed that Finning was requiring all of its other employees to produce their driving abstracts. On July 28, 2005, the petitioner's counsel wrote to the respondent asking that the petitioner's complaint be revived on the basis that it was unresolved. The respondent accepted the request on August 24, 2005 and advised that it would treat the request as a new complaint.

[8] Despite various requests for information on the progress of his complaint, the petitioner had heard nothing from the respondent by April 5, 2006, and so brought an application to this Court pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, requesting that

the respondent authorize a mediator to investigate and try to resolve the complaint, or that the respondent conduct an inquiry into the complaint.

[9] Two days later, on April 7, 2006, the respondent's Portfolio Officer wrote to the petitioner's counsel advising that he had conducted a review of the petitioner's complaint directly with Finning. The Officer also advised that Finning's Human Resources Manager, Ray Mazurak, "did not provide the detailed factual analysis of the postings you had submitted that I had expected from Finning for it to demonstrate that, for each of the posted positions requiring a driver abstract, the inclusion of the requirement was in accordance with the revised driver abstract policy". The petitioner was invited to decide if the position communicated by Mr. Mazurak satisfactorily responded to his complaint, and if not, to request that the respondent conduct a formal inquiry to decide the matter.

[10] The petitioner's counsel replied on April 9, 2006, advising that the petitioner was not satisfied with the review, and wanted the respondent to conduct an inquiry.

[11] On April 28, 2006, the respondent agreed to an inquiry into the petitioner's complaint under s. 50 of ***PIPA***, and set out three specific questions to be considered. Those questions were:

i. Whether the information collected by the organization under its driver abstract policy is "employee personal information" as defined under PIPA.

ii. Whether the organization is entitled, under sections 13 and 16 of PIPA, to apply its driver abstract policy to collect and use the information in employees' driver abstracts without the consent of the affected employees.

iii. Whether the organization is requiring, through its recent job postings, the production of employees' driver abstracts in circumstances inconsistent with its own driver abstract policy and whether the collection and use is contrary to PIPA ss. 6(1), 13 or 16.

[12] The petitioner then elected not to pursue his judicial review application. On May 12, 2006, in accordance with the procedure directed by the respondent, the petitioner and his employer both provided submissions on the three questions. In its submissions, Finning raised the issue of the petitioner's standing to make the complaint he sought to advance. On May 28, 2006, both sides were invited by the respondent to submit simultaneous submissions in reply to each other's initial submissions. When the petitioner received Finning's reply submissions he complained that they were based on hearsay evidence, and was given an opportunity to make even more submissions.

[13] Thereafter, the petitioner's counsel wrote to the respondent on several occasions to inquire as to when they could expect a decision from the respondent. The respondent ultimately replied in May 2007, advising that he anticipated issuing an order before the end of the month. A decision was issued by the respondent on June 4, 2007, stating that the respondent declined to complete his inquiry or make any findings or orders with respect to the three issues he had framed. The respondent advised at paras. 19-20 of that decision that he "decline[d] to invest the resources of this office in pursuing [the petitioner's] desire for what he styles as a public interest disposition of issues….[The petitioner] is not affected by the present Finning policy or practice and that is the end of it in this case."

[14] Upon receipt of the respondent's decision, the petitioner brought a second application to this court, this time for judicial review of the June 4, 2007 decision on the basis that the respondent lacked the jurisdiction to issue his decision without completing his inquiry and

answering all questions of fact and law that arose in the course of the inquiry. When the judicial review application was served on the respondent, he conceded that he was wrong in refusing to complete his inquiry or make an order, and invited further submissions from the petitioner and his employer. As a result, the petitioner did not pursue his second judicial review application.

[15] On October 24, 2007, the respondent issued a further decision indexed as ***Finning Canada***, Order P07-01, [2007] B.C.I.P.C.D. No. 32, finding that the petitioner lacked sufficient interest to advance his complaint; that his earlier decision to conduct an inquiry was in error; and that, on the evidence before him, he would not find that Finning's policy presented reasonable grounds to believe that it was not complying with ***PIPA***. It is this decision that is the subject of the petitioner's application for this judicial review.

ISSUES

[16] The petitioner raises the following issues:

a) Does the petitioner have sufficient interest in the complaint that he filed to warrant its investigation and/or an inquiry by the respondent?

b) If the petitioner lacks sufficient personal interest to advance his complaint, should he have been permitted to do so on the basis of public interest?

c) Did the manner in which the respondent dealt with the petitioner's complaint result in a denial of natural justice?

d) Having found a lack of standing, should the respondent have made findings with respect to Finning's abstract policy?

e) Entitlement to costs.

STATUTORY PROVISIONS

[17] Since 2006, ***PIPA*** has undergone amendments, including the sections which are relevant to this proceeding. The discussion that follows is thus based on the provisions as they were before the amendments, when the respondent considered the complaint, not as they are currently in force.

[18] ***PIPA*** defines the term "investigation" in s. 1 as an investigation, "if it is reasonable to believe that the breach, contravention, [or] circumstance… in question may occur or may have occurred" related to, among other grounds,

(b) a contravention of an enactment of Canada or a province, [or]

(c) a circumstance or conduct that may result in a remedy or relief being available under an enactment, under the common law or in equity,

[19] Part 10 of ***PIPA*** describes the role of the commissioner, only parts of which are relevant to this proceeding. Section 36 sets out the commissioner's general powers. Subsection (1) states that "the commissioner is responsible for monitoring how this *Act* is administered to ensure that its purposes are achieved". To do so, the commissioner may do the following, among other actions:

(a) whether a complaint is received or not, initiate investigations and audits to ensure compliance with any provision of this *Act*, if the commissioner is satisfied there are reasonable grounds to believe that an organization is not complying with this *Act*;

(b) make an order described in section 52 (3), whether or not a review is requested;

…

(d) receive comments from the public about the administration of this *Act*;

…

(f) comment on the implications for protection of personal information of programs proposed by organizations;

…

(i) authorize the collection of personal information by an organization from sources other than the individual to whom the personal information relates; [and]

(j) bring to the attention of an organization any failure of the organization to meet the obligations established by this *Act*;

….

[20] In addition to the actions permitted by s. 36(1), subsection (2) gives the commissioner the discretion to "investigate and attempt to resolve complaints that", among other things,

(a) a duty imposed by this *Act* or the regulations has not been performed, [and]

…

(e) personal information has been collected, used or disclosed by an organization in contravention of this *Act*.

[21] Before the commissioner "begins or continues a review or an investigation … of an applicant's complaint", he or she may require that the individual and the organization attempt to resolve the dispute in a particular manner pursuant to s. 38(4).

[22] Under s. 43, the commissioner may delegate his or her powers, duties, and functions to other persons, provided the delegation is in writing and contains any appropriate conditions or restrictions.

[23] Section 44, the last provision in Part 10 of ***PIPA***, requires the commissioner to report annually to the Legislative Assembly and the Speaker of the Legislative Assembly.

[24] Part 11 of ***PIPA*** sets out the means by which ***PIPA*** is to be administered. Section 45 is a definition provision. This section defines "complaint" and "inquiry" by referring to ss. 36(2) and 50, respectively. A "request", which must be in writing and be made to the commissioner to resolve a complaint or conduct a review, is defined with reference to s. 46. A "review" is defined as:

… a review of a decision, act or failure to act of an organization

(a) respecting access to or the correction of personal information about the individual who requests the review, and

(b) referred to in the request for the review.

[25] Section 46 deals with requests for reviews. Under s. 46(2), an individual "may make a complaint to the commissioner." However, if s. 38(4) applies, then the commissioner "may defer beginning or adjourn the review" to permit time for the parties to resolve the dispute.

[26] The process for requesting reviews or making complaints is set out in s. 47, while s. 48 deals with the persons whom the commissioner must notify of the request or complaint received.

[27] The commissioner's power to authorize a mediator's involvement is set out in s. 49. Section 50 then addresses in detail the process for inquiries where a complaint or a review is not referred to or settled by a mediator. Subsection (4) grants the commissioner the discretion to limit both the representations to verbal or written submissions, and parties' access and responses to another party's representations. Subsections (6)-(9) set out the time limits in which the commissioner must complete an inquiry, as well as the procedures for extending and calculating the time periods.

[28] Finally, s. 52 sets out the orders which a commissioner may make after completing an inquiry. Notably, s. 52(1) requires the commissioner to make an order under this section to "dispose of the issues" once he or she completes an inquiry. Under s. 52(3) the commissioner may:

(a) confirm that a duty imposed by this *Act* or the regulations has been performed or require that a duty imposed by this *Act* or the regulations be performed;

(b) confirm or reduce the extension of a time limit under section 31;

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require an organization to stop collecting, using or disclosing personal information in contravention of this *Act*, or confirm a decision of an organization to collect, use or disclose personal information;

(f) require an organization to destroy personal information collected in contravention of this *Act*.

ANALYSIS

a) Standard of Review

[29] Counsel agreed that the provisions of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, do not apply to the legislation or to the facts in this case. As a result, the standard of review falls to be determined by the application of the decision of the Supreme Court of Canada in ***Dunsmuir v***. ***New Brunswick***, [2008] 1 S.C.R. 190 [***Dunsmuir***].

[30] In ***Dunsmuir***, the majority addressed the proper method by which to determine the appropriate standard of review. At para. 62, Bastarache and LeBel JJ. stated:

> … the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[31] Eschewing the previously approved three standards of review, the majority agreed that two of the three should be collapsed, with the result that in British Columbia, in cases where the B.C. ***Administrative Tribunals Act*** does not apply, there are only two standards of judicial review of the decisions of administrative tribunals: reasonableness and correctness. The two standards were explained in ***Dunsmuir*** at paras. 47 and 50 respectively:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> …
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> The [correctness] analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

b) Application of the Appropriate Standard of Review to the Respondent's Decision of October 24, 2007

[32] On the issue of the respondent's jurisdiction, I consider that the standard of correctness applies. On issues involving the exercise of his discretion, the standard of reasonableness applies.

i. The Petitioner's Personal Interest in the Subject Matter of His Complaint

[33] The petitioner argues that the accommodation afforded to him by his employer is by no means permanent, and that if he were to apply for a different position with Finning, he would then be subject to the policy that he complained about.

[34] Due to its accommodation of the petitioner, Finning's impugned policy does not apply to him. In my view the respondent is entitled to bring a measure of reasonable constraint to the exercise of his mandate, including the exercise of discretion with respect to who should have standing to require an investigation or an inquiry under ***PIPA***. I am not persuaded that the unlikely scenarios argued by the petitioner are sufficient to satisfy me that the respondent was incorrect in finding a lack of sufficient interest in the complaint by the petitioner.

[35] In the alternative, the petitioner argued that even if the impugned policy does not and will not apply to him, it is nonetheless a condition of his employment, and as a result he should be permitted to challenge it.

[36] I am not prepared to find that the decision of the respondent as to direct interest standing is incorrect based upon the fact that it is a policy of the petitioner's employer. To conclude otherwise would entitle any employee to complain about anything that his or her employer does or fails to do, even if it has no direct effect upon him or her, simply because he or she is an employee of that employer. That would entitle the "mere busybody" involvement that was said to be insufficient even on public policy grounds in ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 [***Finlay***].

[37] I reject the argument that the respondent was incorrect in finding that the petitioner lacked sufficient personal interest in his complaint to require him to conduct an investigation or an inquiry on that basis.

ii. Public Interest Standing

[38] Standing based upon public interest is discussed in the decision of the Supreme Court of Canada in ***Finlay***. There, a resident of Manitoba who met the definition of "a person in need" in the *Canada Assistance Plan* objected to the payment of monies, to which he was entitled from the Federal government, by that government to the province of Manitoba for his indebtedness to the province. He sought a declaration that relevant federal cost-sharing payments were illegal.

[39] The Supreme Court of Canada unanimously concluded that the resident lacked a sufficiently direct personal interest in the legality of the federal cost-sharing payments to give him standing on the matter, but went on to consider whether he should be afforded standing on a public interest basis. LeDain J., for the Court, discussed the requirements for such standing at 630-631, commenting:

> … the judgments of this Court in *Thorson*, *McNeil* and *Borowski* cannot be regarded as providing clear and direct authority for the recognition of public interest standing, as a matter of judicial discretion, to bring a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. It is fair to say, however, that they do not clearly exclude such recognition. The issue, then, as I see it, is whether the principle reflected in *Thorson*, *McNeil* and *Borowski* should be extended by this Court to such cases. This question raises again the policy considerations underlying judicial attitudes to public interest standing, and in particular, whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this Court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority.

> In my view an affirmative answer should be given to this question. The recognized standing of the Attorney General to assert a purely public interest in the limits of statutory authority by an action of his own motion or on the relation of another person is a recognition of the public interest in the maintenance of respect for such limits. For the reasons indicated in *Thorson*, I do not think that his refusal to act in such a case should bar a court from the recognition, as a matter of discretion in accordance with the criteria affirmed in *Borowski*, of public interest standing in a private individual to institute proceedings. The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*. I shall deal with each of them in relation to the question of the respondent's standing in the present case.

[40] Ledain J. concluded at 632-634 that the resident had established public interest standing, having demonstrated:

1) That the legal proceeding raised a serious legal question;

2) That the resident had a genuine interest in the resolution of the question; and

3) That there was no other reasonable and effective manner for the legal question to be brought before the court.

[41] The petitioner claimed public interest standing before the respondent. In rejecting this type of standing, the respondent reasoned at paras. 51-53:

> The complainant wishes to make a complaint in the public interest. In my view, that role under PIPA falls to the commissioner and not to a complainant. Section 36(1)(a) empowers the commissioner to initiate an investigation whether or not a complaint is received, so the commissioner can investigate a case that no individual does or can bring forward. For such cases, the Legislature, in its wisdom, has imposed a threshold that is not present for complaints by individuals, which requires the commissioner to be satisfied that there are reasonable grounds to believe an organization is not complying with PIPA.
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> This threshold is reminiscent of the minimum grounds for authorizing a search or seizure in connection with a criminal or quasi-criminal matter—reasonable and probable grounds to believe that an offence has been committed and there is evidence to be found at the place of search—but it applies to any level of investigation or audit by the commissioner. The standard of "reasonable and probable grounds" is arguably higher than "reasonable grounds" in s. 36(1)(a) of PIPA. Still, in my view the precondition for reasonable grounds to believe an organization is not in compliance restrains the commissioner from being able to conduct random investigations or audits of organizations. It also prevents him or her from undertaking investigations or audits on the basis of as yet

> unsubstantiated suspicions of non-compliance with PIPA. Police are certainly able and expected to investigate suspicions of criminal or quasi-criminal conduct in order to gather information that may then support issuance of a search warrant on reasonable and probable, or other statutorily prescribed, grounds. Regulatory authorities such as the OIPC are ordinarily able and expected to investigate as yet unsubstantiated suspicions of non-compliance, but because of the wording of s. 36(1)(a) of PIPA, the commissioner may not even begin a self-initiated investigation without first having reasonable grounds to believe that an organization is not complying with the legislation.
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> There is also a distinction between a complainant who makes a complaint without there being any directly interested person who is capable of bringing or likely to bring the matter forward in his or her own right and a complainant who makes a complaint about a matter that affects others. The complainant in this case falls into the latter category. Finning is a large company with many employees and its driver abstract policy and practices are matters about which directly affected individuals have the ability to complain and can be expected to complain on their own behalf.

[42] The distinction drawn by the respondent between the "reasonable and probable grounds" that he says applies to the authorization of police searches or seizures, and the "reasonable grounds" referred to in ***PIPA*** is not a valid distinction.

[43] In ***Baron v. Canada***, [1993] 1 S.C.R. 416 at 446-447, Sopinka J., for a unanimous Court, explained that "reasonable" and "probable" are synonymous in the context of the minimum standard required for a reasonable search, as they "import the same standard". He thus concluded that a statutory standard of "reasonable grounds" also includes the standard of "probable grounds".

[44] While the distinction drawn by the respondent is incorrect, it was not determinative of his approach to the issue, and thus does not warrant reconsideration.

[45] The approach utilized by the respondent, however, makes no provision for an investigation under ***PIPA*** without a complaint by an individual directly affected by another or an investigation based upon the commissioner's reasonable belief that an organization is not complying with ***PIPA***. His approach effectively restricts his investigations to complaints by those directly affected, as, unless the commissioner had some personal knowledge sufficient to create the required reasonable belief, the enforcement of ***PIPA*** would be impossible.

[46] Although he initially invited submissions about whether Finning was adhering to its own policy, the inference that arises from the respondent's decision is that there were no reasonable grounds for him to believe that Finning was not complying with ***PIPA***. This conclusion appears to be at odds with the fact that Finning's union bargaining agent in the province of Alberta had successfully arbitrated that matter against Finning in that province, and with the reservations expressed by the respondent's Portfolio Officer about Finning's response to the petitioner's complaint on April 7, 2006.

[47] In his decision, the respondent stated at para. 13 that:

> PIPA's goal is for the OIPC to resolve complaints and reviews by means of investigation, mediation, inquiries and orders. To achieve expeditious, efficient and fair administration of those processes, it would be unnecessary and often counterproductive to turn over and decide every factual and legal rock for every case, or even for every matter that reaches a formal inquiry. I have interpreted

> ss. 52(1) and (3) in order to respect and give life to the statutory wording in a manner that reflects reality, which I believe the Legislature intended, and that does not foster obfuscation by technicality, which was clearly not its objective.

[48] While this is indeed one of the key goals of ***PIPA***, it is my view that this restrictive approach fails to address another key goal of ***PIPA***: for the commissioner, pursuant to s. 36 of ***PIPA***, "to ensure that its purposes are achieved". That goal is not restricted to breaches of ***PIPA*** that are the subject of complaints by those directly affected, or those of which the respondent has some insight. It is virtually unlimited in scope. That goal of ***PIPA*** cannot be achieved by the narrow approach stated by the commissioner.

[49] In this case, one legal question framed by the respondent is whether the organization, Finning, is requiring, through its recent job postings, the production of employees' driver abstracts in circumstances inconsistent with its own driver abstract policy and whether the collection and use is contrary to ***PIPA*** ss. 6(1), 13 or 16.

[50] I am unable to conclude that the petitioner has a genuine interest in the resolution of this question, for the same reasons that I am unable to conclude that the respondent's decision that the petitioner lacked sufficient personal interest to give him other than public interest standing is incorrect.

c) Natural Justice

[51] As a result of my decision with respect to standing, it is unnecessary to address the question of whether or not there exist other reasonable and effective manners for the legal question to be brought before the court. Were it necessary to resolve this question, I am not persuaded that the question should be answered in the negative. As the onus is on the petitioner on this review to demonstrate that the respondent was incorrect, I find that he has failed to do so, on this factor as well.

[52] Counsel for the petitioner conceded that if the petitioner was unsuccessful in attacking the respondent's decision on standing, his application for judicial review would fail. I agree with that view. Having found against the petitioner on this issue, it is unnecessary for me to determine whether the respondent's resolution of the petitioner's actual complaint was conducted in accordance with the principles of natural justice, and I will therefore refrain from a consideration of that issue.

d) Finning's Abstract Policy

[53] The question of whether or not the respondent should have made findings with respect to Finning's abstract policy is, however, a matter that should be addressed.

[54] Counsel for the petitioner argued that even if the petitioner failed on the matter of standing, I should only uphold the decision with respect to that issue, and quash the decision insofar as it purports to address whether the Finning policy complies with ***PIPA***.

[55] Despite the fact that he dismissed the petitioner's complaint based upon a lack of standing, the respondent determined in para. 57 of his decision that:

> I do not agree with the complainant that personal information in the nature of driving violation history can almost never be reasonably required to establish, manage or terminate an employment relationship, and then only on a strictly

> individual-by-individual basis. For the purposes of s. 36(1)(a), I would not find that Finning's policy presented reasonable grounds to believe that it was not complying with PIPA.

[56] The respondent cannot, in my view, assert that there is an insufficient basis for him to investigate, and decline to do so, then answer only a part of the third question he posed for himself on April 28, 2006, and then give the policy complained of any approval. Either he has the basis to investigate, or he does not. He has concluded in this case that he does not. That is a matter of the exercise of his discretion, and despite the reservations that I have referred to in para. 46 above, I am unable to say that his conclusion that he had no basis on the evidence before him to conduct an inquiry is unreasonable. Having found that the basis for an investigation was lacking, then, as he himself stated at para. 54 of his decision, "no other issues need to be decided".

[57] If other issues needed to be decided, surely they should only have been decided by addressing the entirety of the questions initially posed by the respondent. The blanket approval of Finning's policy was something that even Finning argued against. Its position was summarized by the respondent at para. 31 of his decision:

> It is not a useful exercise for the OIPC to attempt to formulate a blanket ruling regarding the application of the Finning driver abstract policy when each job posting, of which hundreds are posted each year, is fact specific.

[58] The respondent found at paragraph 57 of his decision that "For the purposes of s. 36(1)(a), I would not find that Finning's policy presented reasonable grounds to believe that it was not complying with PIPA." He does not explain how he reached this conclusion. This conclusion cannot be assessed on a judicial review without adequate reasons from the respondent addressing the contrary decision for the comparable employees of Finning in Alberta, or the concerns of the respondent's own Portfolio Officer.

[59] As the respondent's decision with respect to the issue of standing rendered moot the consideration of the manner in which he conducted the inquiry, I find that the conclusions reached by the respondent at para. 57 of his decision were as he said himself, unnecessary. The respondent does not explain how he arrived at these conclusions, and given a lack of adequate reasoning I cannot determine if these conclusions are reasonable or not. There is nothing to be gained by referring these issues back to the respondent. I order that they be set aside.

COSTS

[60] The petitioner has had no real success on this review. Although I have struck the respondent's conclusions with respect to Finning's policy, I have not disturbed the respondent's conclusion that the petitioner lacks standing. I do not consider that this result entitles the petitioner to any costs.

[61] Finning participated in these proceedings as an interested party, and as such would not normally be entitled to any costs. Given my decision about the respondent's findings with respect to its policy, Finning cannot be said to have enjoyed any real success in any event, and I am not prepared to exercise my discretion to award any costs to Finning.

[62] The respondent quite properly refrained from any request for costs, based upon the reasoning of Donald J.A. for the British Columbia Court of Appeal in ***Lang v. British Columbia***

(Superintendent of Motor Vehicles), 2005 BCCA 244, 43 B.C.L.R. (4th) 65, where at para. 47 the court adopted the following statements from Brown and Evans, *Judicial Review of Administrative Law in Canada* (Toronto: Canvasback, 1998):

> 5:2560 *Costs Payable by or to the Administrative Agency*
>
> Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part. As one court has noted:
>
> > It has been recognized ... that, contrary to the normal practice, costs do not necessarily follow the event where administrative or quasi-judicial tribunals are concerned. They may be awarded only in unusual or exceptional cases, and then only with caution ... where the tribunal has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs ... I am of the view that the circumstances which prevail here do not warrant an order for costs against the commission [***St. Peters Estates Ltd. v. Prince Edward Island (Land Use Comm.)*** (1991), 2 Admin. L.R. (2d) 300 at 302-04 (PEITD)].
>
> [underlining by Donald J.A.]

[63] In this case, the respondent properly refrained from casting himself in an adversarial manner, and restricted his submissions to explanatory comments with respect to ***PIPA*** rather than the merits of his decision.

[64] I therefore order that the parties who appeared on this review each bear their own costs.

CONCLUSION

[65] The petitioner's application for an order that the respondent reconsider the petitioner's complaint is dismissed.

[66] The respondent's findings at para. 57 of the decision under review are quashed.

[67] Each of the parties will bear their own costs.

"Hinkson J."