COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner),*** 2004 BCCA 210

Date: 20040416

Docket: CA030285

Between:

Guide Outfitters Association of British Columbia, Peter Klaui and Brian Swift

Appellants
(Respondents on Cross-Appeal)
(Petitioners)

And

Information and Privacy Commissioner of the Province of British Columbia, Raincoast Conservation Society, Environmental Investigation Agency, Minister of Water, Land and Air Protection and the Attorney General of British Columbia

Respondents
(Appellants on Cross-Appeal)
(Respondents)

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

T.L. Robertson, Q.C. and L.C. Zee	Counsel for the Appellants
S.E. Ross	Counsel for the Respondent Information and Privacy Commissioner of B.C.
N.E. Brown and J.M. Tuck	Counsel for the Respondent Minister of Water, Land and Air Protection and Attorney General of British Columbia
R.L. Christensen	Counsel for the Respondent Raincoast Conservation Society
Place and Date of Hearing:	Vancouver, British Columbia 22 January 2004
Place and Date of Judgment:	Vancouver, British Columbia 16 April 2004

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This case involves grizzly bear hunting in the province of British Columbia. Certain persons and groups are opposed to the continuation of the hunt, and over the past decade there have even been incidents where confrontations and threats of violence have occurred. The appellant (respondent on cross-appeal) Guide Outfitters Association of British Columbia ("Guide Outfitters") is generally in favour of the continuation of the hunt; the respondent (appellant on cross-appeal) Raincoast Conservation Society ("Raincoast") is generally not in favour of the continued hunting of the grizzly. In the middle of this controversy is the Ministry of Water, Land and Air Protection, formerly the Ministry of Environment, Lands and Parks (the "Ministry"). The respondent (appellant on cross-appeal) Information and Privacy Commissioner of the Province of British Columbia (the "Commissioner"), became involved because of an impasse reached between Raincoast and the Ministry concerning the scope or level of information that the Ministry was prepared to release about kills of bears by hunters.

[2] These proceedings have a fairly lengthy and somewhat tangled history. Although the roots of the controversy go back many years, the current proceedings have their origin in an information request forwarded by Raincoast and a British environmental association, the Environmental Investigation Agency ("EIA"), in the early part of April 2000. The request for records disclosing the physical locations where grizzly bears had been killed as a result of sport hunting was filed under the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165 (the "***Act***"). Under Schedule 1 of the ***Act*** the Ministry is a defined public body and, pursuant to the provisions of s. 4 of the ***Act***, a person who makes a request has a right of access to any record in the custody or under the control of such an organization subject to certain exceptions contained in ss. 12 to 22.1 of the ***Act***.

[3] The Ministry collects kill data concerning grizzly bears killed by hunters under a mandatory reporting system established pursuant to the ***Wildlife Act***, R.S.B.C. 1996, c. 488. Hunters are required to within 15 days after the kill report information about the location as well as the species and sex of the animal killed. This information is then placed on a mapping system used by the Ministry. The Ministry uses a tracking system called the Universal Transverse Mercator ("UTM"). The province of B.C. is divided by the Ministry into approximately 225 management units, some being in excess of 24,000 square kilometres. By the use of the UTM system and grid coordinates on the map, the Ministry is able to identify the site of a kill location to an accuracy of about one kilometre. Hunters have been advised that the information they supply will be kept confidential by the Ministry. The representatives of the Ministry throughout these proceedings have taken the position that they wish to preserve a measure of confidentiality about this information because they have apprehensions that, if too detailed information is released into the public domain, it could impair the efficacy of the continued gathering of accurate information from hunters concerning the sites of bear kills.

[4] In May 2000 the Ministry provided to Raincoast (and presumably to EIA) certain grizzly bear kill location information. Information was given about what management unit kills had occurred in, but more precise information specifying the UTM zone, coordinates, and a precise geographic description of

the kill location was not furnished. In refusing to release more detailed information about the site of grizzly bear kills, the Ministry relied upon the provisions of s. 18(b) of the ***Act***, which provides:

> 18 The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of,
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> . . .
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> (b) an endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates...

[5] Raincoast and EIA were not content with the extent of the disclosure made to them by the Ministry and, pursuant to s. 52 of the ***Act***, in June of 2000 they made a request to the Commissioner to review the response that the Ministry had made to their access requests. Section 52(1) of the ***Act*** reads as follows:

> A person who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyist Registration Act*, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42(2).

[6] Pursuant to the provisions of s. 55 of the ***Act***, the Commissioner invoked a mediation process to endeavour to settle the differences between the applicants seeking the information and the Ministry. But that proved to be an unsuccessful process. Since the matter could not be settled by mediation, the Commissioner thereafter proceeded to conduct an inquiry as required by s. 56(1) of the ***Act***. The undertaking of this process brought into play ss. 54, 56(3), (4), and (5) of the ***Act***. Those sections are as follows:

> **54** On receiving a request for a review, the commissioner must give a copy to
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> (a) the head of the public body concerned, and
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> (b) any other person that the commissioner considers appropriate.
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> **56**(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.
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> (4) The commissioner may decide

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

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

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

[7] By the provisions of s. 57 of the ***Act***, at any inquiry the onus lies upon the public body, in this case the Ministry, to establish that an applicant has no right of access to the requested information.

[8] On 23 October 2000 the Commissioner caused notice of written inquiry to be given to Raincoast, EIA, and the Ministry. He informed the parties that on 15 November 2000 he would conduct a written inquiry under s. 56 of the ***Act***. The notice advised that the parties who had been given notice would be entitled to make written submissions to the Commissioner. The Commissioner further gave notice that at the inquiry the Commissioner would review the Ministry's invocation of s. 18(b) of the ***Act*** to protect information disclosing the exact kill locations of grizzly bears for the years 1975 to 1999. The Ministry summarized its position as follows in its written material:

> 4.23 The Public Body submits that the head of the Public Body was authorized under section 18 to refuse to disclose the information at issue in this inquiry. The Public Body submits that the evidence demonstrates that any public disclosure of such information would be harmful to both the conservation of grizzly bears and other vulnerable vertebrates and harmful to the preservation of a workable system of accurate hunter reporting. The Public Body submits that this is exactly the sort of information that section 18(b) of the Act was intended to protect....

[9] Considerable affidavit material putting forward differing points of view of a number of experts enlisted on behalf of Raincoast and EIA on one hand, and the Ministry on the other hand, was placed before the Commissioner. Although no member of Guide Outfitters or Guide Outfitters itself was given notice pursuant to s. 54 of the ***Act***, or invited to formally participate as a party in the proceedings before the Commissioner, steps had been taken to obtain information from Mr. Dale Drown, general manager of Guide Outfitters. Mr. Drown furnished an affidavit to be used in the proceedings before the Commissioner. Included in Mr. Drown's affidavit sworn 10 November 2000 are these paragraphs:

> 14. Resident hunters and guide outfitters have, to date, been confident in the Ministry's ability to keep specific kill location data confidential. My belief, and a common concern amongst hunters, is that disclosure of specific harvest locations

could reasonably be expected to result in interference or harassment by members of environmental activist groups.

15. As mentioned, I fail to understand why anyone outside of the Ministry would need access to the requested Information. My understanding is that applicants already have access to the number of animals hunted in specific management units, along with the date of the kill and the age and sex of the bear. In order to scrutinize the effectiveness of the Ministry's conservation efforts that is all the information one needs, in conjunction with the estimated overall number of bears. One does not need to access specific kill locations.

[10] It would be fair to say that the position advanced in the affidavit of Mr. Drown was generally supportive of and in congruence with the position advanced before the Commissioner on behalf of the Ministry. Both were opposed to the release of more detailed information. Affidavit material in opposition to the position of the Ministry and Guide Outfitters was put forward on behalf of Raincoast and EIA by the methodology of, *inter alia*, an affidavit from Mr. Wayne McCrory, a registered professional biologist. He deposed this in his affidavit sworn 14 November 2000:

13. As a professional wildlife scientist, I have never encountered any scientific evidence or reference to scientific evidence demonstrating that the public disclosure of mortality locations poses any threat to grizzly bears or their populations.

14. Early in my career (1966), I had a hunting guide licence and a hunting area for grizzly bear hunters etc. I have also in the past hunted for bears, and was a big game hunter for over 20 years. In my experience, local bear hunters, poachers, and guides for non-resident hunters have intimate knowledge of the best locations to kill bears, which is why kills are often concentrated. Moreover, such information is usually readily available from local sources including residents who do not hunt bears, but who know where most of the bears are hunted.

15. Unlike locally available anecdotal information, grizzly kill location data is not presented in a form that is readily useful to those intent on illegal hunting. Kill location data must be converted to a grid, which must then be superimposed over maps containing landscape data. This requires technical expertise and access to mapping resources. Moreover, kill location data does not contain the information about access trails, landmarks, local feeding areas and animal habits that is important for a hunter.

16. In my professional opinion, the release of this grizzly bear kill location information would not pose a risk to grizzly bear populations. In fact, the release of this information would be of considerable assistance to

> scientists who are working to ensure the viability of grizzly bear populations.

[11] The hearing and decision process was delayed somewhat when, in February of 2001, the Commissioner queried the parties as to whether the inquiry might have become moot as the result of an announced three year moratorium on grizzly bear hunting by the then government of B.C. The parties seeking the information advised they did not consider the inquiry to be moot and, in any event, a change of government in Spring 2001 resulted in the revocation of the previously announced moratorium. After hearing further submissions made by the parties in 2001, on 3 December 2001 the Commissioner issued his decision under order 01-52 ("Order 01-52"). The decision is summarized as follows:

> Applicant conservation groups requested access to records disclosing the geographic locations of grizzly bear kills since the Ministry began keeping such records. One applicant sought only hunting kill locations. The other applicant sought both hunting and non-hunting kill locations. The Ministry disclosed the Ministry's geographic wildlife management units in which each kill occurred, as well as the date and type of kill, and the sex, maturity and age of the animal, where recorded, but concluded that, if the Ministry could not ensure the confidentiality of more specific kill location data, hunting regulations and grizzly bear management strategies could be compromised and hunters would no longer provide detailed kill data. The Ministry is not authorized by s. 18(b) to refuse to disclose more specific kill location data as it has not established that disclosure could reasonably be expected to damage grizzly bears or interfere with their conservation.

[12] Following this decision of the Commissioner, the Ministry filed an application for judicial review of Order 01-52 on 2 January 2002.

[13] In April of 2002, before the Ministry's judicial review application could be heard in the B.C. Supreme Court, the present appellants also filed an application for judicial review. The basis for their application was that they had not been invited to or allowed to participate in the proceedings before the Commissioner. They submitted that this resulted in a breach of natural justice. In order to forestall any question being raised concerning the exhaustion of remedies, the appellants applied to the Commissioner in early May 2002 asking that the inquiry be re-opened to allow them to put forward arguments against the release of more detailed information about bear kills. Ultimately, they sought the same general relief as did the Ministry. However, they asserted that their interests were somewhat different from those of the Ministry and that they therefore ought to be allowed to make submissions on this subject pursuant to other sections of the ***Act***.

[14] On 10 May 2002 the Commissioner, having reconsidered his earlier decision in light of new submissions made by the appellants, declined to re-open the inquiry. He concluded that it had not been necessary for him to

either notify the appellants concerning the earlier review and inquiry process or to allow them to participate in a formal way.

[15] The judicial review applications brought by the appellants and the Ministry came on for hearing in the Supreme Court before Satanove J. Satanove J. dismissed the application for judicial review brought on behalf of the Ministry, but she allowed in part the application for judicial review brought by the appellants. She found that there had been a breach of natural justice by reason of the failure of the Commissioner to include the appellants as participants in the inquiry process. She directed that the matter should be remitted to the Commissioner in order to allow him to consider further material and submissions on behalf of the appellants concerning economic issues and safety issues relating to the hunting of grizzly bears. The chambers judge found that the appellants would bring a different perspective to the matters that were at issue before the Commissioner on his inquiry. She observed that the perspective of the appellants would not necessarily coincide with that of the Ministry or be expected to be brought forward by the Ministry. However, the chambers judge concluded that everything had been argued that could usefully be argued before the Commissioner under the provisions of s. 18(b) of the ***Act***. Her order did not permit the appellants to make further submissions relating to s. 18(b). She thus granted some but not all of the relief that had been sought on judicial review by the appellants.

[16] As I noted, the proceedings in this case have taken somewhat more than the usual time, partly because of the issue of mootness raised at the inquiry stage arising out of a temporary moratorium, and thereafter by reason of the involvement of the appellants, who had come into the proceedings only at the judicial review stage. As matters stood after the judgment of Satanove J., delivered on 11 October 2002, there was an order directing the Commissioner to conduct what I might term a partial review of Order 01-52 in order to afford the appellants an opportunity to address those issues that they considered could have an impact on their interests if the more detailed bear kill information sought by Raincoast and EIA should be disclosed pursuant to Order 01-52.

[17] However, the case did not thereafter proceed back for this review before the Commissioner. At this point, the Ministry elected not to appeal from the order of Satanove J. dismissing its application for judicial review. The appellants, however, were not content with the scope of the order granted by the chambers judge on their application for judicial review. They filed an appeal in this Court on 7 November 2002. The gravamen of their appeal is that they ought not to be fettered in placing material before or in making argument before the Commissioner concerning conservation issues pursuant to the provisions of s. 18(b) of the ***Act***.

[18] Consequent upon the filing of that appeal, notices of cross-appeal were filed on behalf of the Commissioner and Raincoast. The gravamen of the cross-appeals is that the chambers judge erred in partially allowing the application for judicial review brought by the appellants. The Commissioner and Raincoast submit that the chambers judge failed to properly conduct the required standard of review analysis of the Commissioner's original determination and, as well, adopted an erroneous standard of review of his decision in any event. Counsel for the Commissioner and for Raincoast submit that the decisions of the Commissioner relating to notice, participation, and ordering disclosure of information were decisions within his jurisdiction,

were reasonable, and the learned chambers judge thus ought to have dismissed the application for judicial review brought on behalf of the appellants.

[19] When this appeal came on for hearing before this Court, counsel for the appellants sought to tender the affidavit of Dr. Peek, Professor Emeritus of Wildlife Resources at the University of Idaho. His affidavit had annexed to it a copy of a final report dated 6 March 2003. This report involved a review undertaken by an independent scientific panel concerning the management of grizzly bears in British Columbia. Contained in that material is the following paragraph that appears to be directed to the issue of whether the release by the Ministry of more detailed information about bear kills might in the future discourage the obtaining of detailed and useful data from hunters about the location of bear kills:

> Although kill locations may be useful data, they are data that must be obtained directly from hunters. Hunters may be reluctant to provide this information accurately if they believe it will result in attracting more hunters to their hunting areas, or if it will be used by those opposed to hunting to highlight potential areas of over-harvest. To the degree that hunters have this motive for misrepresenting the locations of their kills, then kill location data will be seriously compromised, and the data will be useless or, worse, misleading. It may be preferable to ask hunters to report their kill locations to small geographic areas (portions of MUs) rather than precise locations, so as not to risk losing accurate kill location data altogether. Alternatively, hunters could report precise locations, but these data would be released to the public at a lower level of resolution.

Also contained in that report is this paragraph:

> Some controversy exists over both the usefulness and availability of data concerning the exact locations of grizzly bear kills for assessing areas of over-harvest. The issue has been raised as to whether the MWLAP should release this information to persons requesting to evaluate it. The MWLAP has resisted releasing these data on the grounds that this would result in hunters and outfitters providing misleading information about where kills were made, and would also represent a violation of the implicit agreements under which the data were obtained. The refusal to release these data has been portrayed by those requesting them as an effort by the MWLAP to obfuscate evidence of overharvests. We believe it is plausible that misrepresentation of kill location data will increase if hunters and outfitters know this information will be released, but we have no basis for judging the extent of this. Reliable information on kill locations, at least to the level of general geographic region has significant utility for managers; however, we believe that data on precise geographic location is of little value in indicating over-harvests at the MU or LEH level. Such data are primarily useful to managers for identifying local management concerns: for example, in highlighting the need for restricting access to areas where bears may be especially vulnerable or identifying shortcomings of administrative boundaries.

[20] The information in this report was obviously not available at the time the Commissioner conducted his original inquiry. Counsel for the appellants suggested that this additional evidence demonstrated the necessity for the appellants to be given a chance to address the s. 18(b) issues in light of this up to date material. The cross-appellants objected to the admission of this evidence. Following the usual practice of the Court, we permitted the material to be filed, reserving our decision as to whether it would or would not be appropriate to admit this material as fresh evidence on appeal.

[21] The appellants submit that the chambers judge erred in her directions insofar as those directions impaired the Guide Outfitters' ability to be heard on conservation issues. They submit that, although the chambers judge had not specifically found a denial of natural justice, such a finding could be clearly inferred from the reasons for judgment and her decision to remit the matter back for further consideration by the Commissioner. The appellants submit that the chambers judge erred in directing that the Commissioner at this new hearing would not be required to consider additional material and submissions from the appellants concerning whether disclosure of the more detailed information sought by Raincoast and EIA could reasonably be expected to result in harm to or interference with the conservation of grizzly bears.

[22] The cross-appeals are directed at an issue that could be said to be anterior to the matters raised on the appeal. That is so because, if the submissions of Raincoast and the Commissioner (to the effect that the chambers judge erred in granting judicial review of Order 01-52) on the cross-appeal should be successful, then it would follow that the appeal brought by the appellants would become moot. The respondents seek to have this Court set aside the order of Satanove J. granting judicial review. If they are successful in that, then Order 01-52 would be the extant order. Because of this situation, I consider that it is therefore appropriate for the Court to first consider whether or not it has been demonstrated that the chambers judge erred in her order partially allowing the application that had been brought by the appellants seeking judicial review of Order 01-52.

[23] As I noted above, the learned chambers judge dismissed the application for judicial review brought on behalf of the Ministry, but allowed, in part, the application for judicial review that had been brought on behalf of the appellants. Although the Ministry filed no appeal from the decision of Satanove J., it appeared before us and filed a factum that was limited to supporting the position of the appellants on certain administrative law issues. Counsel for the Ministry and Attorney General of British Columbia take no position with respect to the issue of whether the process before the Commissioner was fair; however, they submit, in support of the position advanced by the appellants, that no particular deference ought to be accorded by a court to the decision of the Commissioner as to what fairness required concerning who should be entitled to notice and hearing pursuant to s. 54 of the ***Act***. They submit that this question does not give rise to complex or technical issues, or issues to be resolved within a specialized context. They refer to ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [***Baker***]; ***Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*** (1998), 58 B.C.L.R. (3d) 6, [1999] 6 W.W.R. 1 (C.A.) [***Aquasource***]; and ***College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*** (2002), 9 B.C.L.R. (4th) 1, 2002 BCCA 665.

[24] The appellants argued both before the Commissioner when seeking a re-opening of the inquiry and before the chambers judge that they ought to have been considered to be interested parties having regard to the provisions of ss. 19(1) and 21(1) of the ***Act***. These sections are as follows:

> **19**(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
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> (a) threaten anyone else's safety or mental or physical health, or
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> (b) interfere with public safety.
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> . . .
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> **21**(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
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> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[25] In his response refusing the request of the appellants to reconvene the inquiry, the Commissioner observed as follows:

According to the principles of administrative law, in the absence of a statutory provision, any interested person generally has the right to make representations at a hearing. The Act contains specific statutory provisions for required notice and participatory rights in relation to the access request and review and inquiry processes. Those provisions must be construed in a harmonious and meaningful way, including when a discretion is conferred, as is the case under s. 54(b).

Many organizations and individuals may feel they are affected by disclosure under the Act of particular information in the custody or control of a public body. This is the nature of many of the public interests the Act seeks to balance. To a very significant degree, as the Act contemplates, the important role and right of assessing and invoking provisions of the Act relating to those interests rests with public bodies, not with third parties. This is consistent with traditional government authority over records in its custody or control that existed before the relatively recent advent of access to information legislation across Canada. This is also consistent with the exigencies of this statutory system. It simply is not tenable for every person who has an interest in the outcome of an access request or an inquiry under the Act to have a sufficient interest to attract a right of notice and participation. This reality is reflected in the specific required-notice provisions in the Act.

In closing, I consider the following passage from the judgment of the majority of the Supreme Court of Canada in *T.W.U.* v. *C.R.T.C.*, [1995] 2 S.C.R. 781, is instructive in this case:

> ... it is important to note that a finding in the case at hand that the TWU was entitled to notice would have grave consequences that could paralyse regulatory agencies. Effectively, it would mean that all individuals with contractual relations with a regulatee would have to be given notice of regulatory proceedings concerning that regulatee if such proceedings were likely to effect [*sic*], even indirectly, the person in question. Given the wide scope of many regulatory agencies, their decisions are likely to have an indirect effect on a large number of individuals in contractual relations with the regulatee. As a result, all such parties would have to be provided with notice of the regulatory proceedings. This is particularly problematic in light of the extreme difficulty of ascertaining exactly who these parties are in advance of the hearing and the possibility that, in the absence of notice, these parties would be able to challenge the legality of the regulatory decision. This could result in an endless series of challenges that would effectively paralyse regulatory agencies. Accordingly, the *audi alteram partem* rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings.

[26] The salient issue on the cross-appeals is whether the chambers judge afforded the appropriate level of deference to the decision of the Commissioner to not give notice or allow the appellants to formally participate in the inquiry. As noted above, the appellants submit that they should have been found entitled to such notice and participation because of the degree to which their interests could be affected by any decision of the Commissioner. They say that they have economic and safety issues at stake and submit that "harm to the grizzlies" causes "harm to the guides (hunters)" because the grizzly bear hunt is a significant economic feature of many guide outfitting enterprises. Counsel for the Attorney General submits that, since the primary issue before the chambers judge was whether or not the appellants were treated fairly from a procedural point of view, this is not a case which falls to be decided on the pragmatic and functional approach by the Supreme Court of Canada in administrative law cases such as ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19, but rather falls to be decided on a correctness standard: ***Baker***, *supra*. Analogy is made to a situation where the Commissioner is engaged in an issue of statutory interpretation where no particular deference will usually be appropriate: ***Aquasource***, *supra*. The cross-appellants submit that a pragmatic and functional approach is the appropriate method a court should adopt when deciding on the appropriate scope or standard of review of the decision of the tribunal in this case.

[27] The ***Act*** provides a fair measure of detail as to who is to be given notice by the public body in certain defined circumstances. Sections 23(1) and (2) of the ***Act*** provide that a party affected by the proposed disclosure of information must be given notice before information will be disclosed and may be given notice even if the public body requested does not propose to grant access to the information.

[28] Sections 23(3), (4), and 24 provide the following quite detailed provisions for notice and hearing:

> **23**(3)The notice must
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> (a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,
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> (b) describe the contents of the record, and
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> (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.
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> (4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that
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> (a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,
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> (b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

24(1)Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, or

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to

(a) the applicant, and

(b) the third party.

(3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

[29] By contrast, s. 54 of the ***Act***, the section under consideration here, is framed in much more general terms. It provides simply that the Commissioner, upon receiving a request for review (as occurred here), must afford notification to the head of the public body concerned and any other person that the Commissioner considers appropriate. The emphasized category of parties to whom notice is to be given is phrased in such a way as to afford a fair measure of discretion to the Commissioner. The Commissioner must engage in a process of consideration and analysis to reach an informed decision on such an issue. The use of the terminology "that the Commissioner considers appropriate" is an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision; this of course will inform any decision as to those groups or individuals who should receive notice and be given formal standing at any inquiry. This jurisdiction or mandate given to the Commissioner by the ***Act*** is, I should say, quite different from the sort of situation found to exist in cases such as ***Aquasource***, where the Commissioner was engaged in purely an exercise of the interpretation of legislative provisions. The situation in the instant case also differs from cases where what I might term a pure issue of notice and hearing arises for consideration. That class of case where such a procedural issue is being considered will attract a less deferential standard of review by a reviewing court. While he was in the instant case acting under and considering the parameters of the legislation, the Commissioner was not so much interpreting a legislative provision as deciding who ought to be found to have a sufficient interest in the inquiry proceedings to become a participant in the process.

[30] Although the learned chambers judge discussed the proper standard of review concerning the decision of the Commissioner when she was assessing the petition for judicial review brought on behalf of the Ministry, she did not engage in any such exercise when discussing the petition for judicial review

brought on behalf of the appellants. The argument of the appellants in this Court on this issue is that she was not required to undertake such an analysis because, if she found error on that part of the Commissioner arising from a breach of natural justice, it would then be appropriate for her to order a rehearing to remedy the deficiencies. As I observed above, the issue in this case is not just about natural justice but also concerns a process of consideration that the Commissioner is mandated to perform under the ***Act***.

[31] It appears to me to be doubtful that it could be said here that it has been or could be demonstrated by the appellants that any injustice had occurred to them by reason of the actions taken by the Commissioner in the conduct of the inquiry. As I recited above, the Commissioner had before him written material adduced from Mr. Drown, the general manager of Guide Outfitters. In its written submission to the Commissioner, dated 14 November 2000, the Ministry referred, *inter alia*, to the information from Mr. Drown. The affidavit material dated November 2000 from Mr. Drown and Mr. Walker of the B.C. Wildlife Federation set out concerns about hunter and guide harassment if detailed kill site information were to be released into the public domain. The material that emanated from Mr. Drown that was before the Commissioner at the time of the original inquiry also referred to concern about interference with hunting and guiding activity if the information being sought by Raincoast and EIA were released. All of this information in my view raised for consideration by the Commissioner the economic and safety issues that the appellant now says it had no sufficient opportunity to place before him. At para. 141 of Order 01-52, the Commissioner specifically refers to information from the Walker and Drown affidavits. It seems to me that the argument that the point of view and concerns of the appellants on these issues was not placed before and taken account of by the Commissioner at the time of his original decision is a proposition difficult to maintain, having regard to what in fact occurred over the course of the inquiry. The chambers judge made no detailed reference to these circumstances in her reasons.

[32] But leaving aside this consideration, it seems apparent on the face of the reasons of the chambers judge that she did not undertake any particular analysis of what standard of review would be appropriate in reviewing the determination of the Commissioner that no formal notice to or participation by the appellants was required under s. 54 of the ***Act***. His decision in that regard was reiterated and expanded upon in the reasons he furnished to the appellants declining to re-open the inquiry in May 2002. A number of factors fall to be considered in determining what standard of review is appropriate. The case of ***Pushpanathan v. Canada (Minster of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, is instructive in this regard. Beginning at para. 29, Bastarache J. sets out a number of factors to be considered, namely, the existence of a privative clause or a right of appeal, the expertise of the tribunal, the purposes of the ***Act***, and the nature of the problem. He observed that even in cases involving a question of statutory interpretation, a measure of deference may be appropriate where what is being interpreted is the tribunal's constituent legislation.

[33] In the instant case there is neither a privative clause nor a right of appeal. The absence of such clauses in itself is not determinative; this is somewhat of a neutral factor. However, the statute is the constituent legislation of the tribunal. This latter circumstance could be said to indicate a more deferential standard of review. The relative expertise of the tribunal also falls to be considered. This area of access to information

is a fairly specialized area and one with which the Commissioner will, over time, gain a familiarity. He is well situated to appreciate the issues and concerns that have arisen and will arise in the operation of the ***Act***. The continuing administration of the ***Act*** will cause the Commissioner to be alive to issues such as the parameters of likely concern by those who could be potentially affected by decisions relating to the release of information under the ***Act***. There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the ***Act*** requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is appropriate to notify and to allow to formally participate in any inquiry. In ***Macdonell v. Quebec (Commission d'accès à l'information)***, [2002] 3 S.C.R. 661, 2002 SCC 71 [***Macdonell***], a case where a limited right of appeal in the legislation could have been indicative of a less deferential standard of review, Gonthier J., speaking for the majority, had this to say, at para. 8, regarding the expertise of privacy commissioners:

> The Quebec Commission d'accès à l'information has no special interest in the decision it must make, and so it is able to play its role independently. By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.

In ***Macdonell***, the court found it appropriate to apply a standard of reasonableness to the decision of the Commissioner.

[34] In the recent case of ***Deloitte & Touche LLP v. Ontario Securities Commission***, [2003] 2 S.C.R. 713, 2003 SCC 61, the Supreme Court of Canada found appropriate the application of a reasonableness standard in reviewing a decision made concerning disclosure of information in the public interest under the provisions of the ***Securities Act***, R.S.O. 1990, c. S.5. Although a decision made by a tribunal on what is in the public interest could arguably attract a greater ambit of deference than, as here, a decision as to who should be appropriately notified of a hearing, both decisions clearly involve the consideration of case specific factual matters as well as the exercise of a discretion. I am inclined to the view that in assessing any decision of the Commissioner under s. 54(b) of the ***Act***, a standard of reasonableness is the appropriate standard of review to be employed by a reviewing court. There is, as I noted, a considerable factual element in any such decision and, because this question also engages in a general way the *audi alteram partem* rule, there is as well a legal aspect to the issue. Because of these mixed elements, factual and legal, the intermediate standard of reasonableness appears to me to be the appropriate standard of review to be adopted by a court on judicial review of such a decision.

[35] Having regard to the broad overlap between the position of the Ministry and the position of the appellants (as set forth in material placed before the Commissioner at the inquiry) I do not consider that he was required to do more than he did concerning these appellants. The appellants were made aware of the proceedings, and affidavit material setting forth their views and interests was received as detailed above. The Commissioner received material not only from the appellants but also material from those with an interest

similar to them, including the Wildlife Federation. This helped to ensure that all relevant points of view were placed before him for consideration. In the vernacular, the appellants were not "left out of the loop". The chambers judge, in my respectful opinion, erred in failing to more fully articulate and consider the proper standard of review to be applied to the decision of the Commissioner under s. 54(b) concerning notice to and participation by the appellants. If she had undertaken this exercise I consider it likely that she would have reached the conclusion that any deficiencies suggested to exist by the appellants were more apparent than real. I consider the decision of the Commissioner under attack was a reasonable one and not at all unfair to the appellants. The Commissioner was not required to do more that he did concerning these appellants.

[36] In my opinion the cross-appeals brought by the Commissioner and Raincoast ought to be allowed. That conclusion makes it unnecessary to consider the issue of the admission of the fresh evidence tendered in these proceedings on behalf of the appellants. It also follows from that conclusion that the appeal of the appellants to this Court ought to stand dismissed and I would so order.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Mr. Justice Lowry"