IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner),* 2010 BCSC 931

Date: 20100702
Docket: S094064
Registry: Vancouver

Between:

Provincial Health Services Authority

Petitioner

And

The Information and Privacy Commissioner for British Columbia, Dr. Nevio Cimolai, Dr. Eva Thomas and Hanne Jensen

Respondents

Before: The Honourable Mr. Justice Pitfield

Re: In the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 (as amended), and in the matter of Order No. F09-07 of the Delegate of the Information and Privacy Commissioner of British Columbia

Reasons for Judgment

Counsel for the Petitioner:	E.E. Vanderburgh
Counsel for the Respondent, The Information and Privacy Commissioner for British Columbia:	C.J. Boise Parker
The Respondent, In Person:	Dr. Nevio Cimolai
No appearance by the Respondents, Dr. Eva Thomas and Hanne Jensen	
Place and Date of Hearing:	Vancouver, B.C. April 19, 20, 21, 2010
Place and Date of Judgment:	Vancouver, B.C. July 2, 2010

Introduction

[1] The Provincial Health Services Authority (the "Authority") applies by way of judicial review for an order setting aside certain directions from a delegate of the Information and Privacy Commissioner for British Columbia (the "Commissioner") requiring the Authority to produce documents to the respondent, Dr. Nevio Cimolai.

[2] The Authority says that the Commissioner's delegate erred in her determination that an investigator retained by the Authority on a contract basis to investigate allegations that Dr. Cimolai had contravened the human rights policy of Children's and Women's Health Centre of British Columbia (the "Health Centre") was not acting in a judicial or quasi-judicial capacity. As a consequence, the Authority says that the Commissioner erred in declining to rely upon s. 3 (1)(b) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"), to refuse production of certain documents:

> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> ...
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;

[3] The Authority also says that the delegate erred by ordering the production of certain documents which were subject to a publication ban imposed in a proceeding in this court.

[4] The delegate's decision which is reflected in *FIPPA* Order F09-07, and the application for judicial review arise in the following circumstances.

[5] Dr. Cimolai was employed as a pathologist at the Health Centre, for the management and administration of which the Authority was ultimately responsible. One or more members of the Health Centre's staff made allegations of physical harassment against Dr. Cimolai. The Health Centre's human rights advisor inquired into the complaints and concluded that Dr. Cimolai had violated the Health Centre's human rights policy. The Health Centre's Medical Advisory Committee reviewed the report and recommended to the Health Centre's Board, as it was constituted at that time, that Dr. Cimolai's hospital privileges be suspended. In due course, Dr. Cimolai's privileges were suspended and payment of his salary ceased.

[6] Dr. Cimolai applied to this court by way of judicial review for an order quashing the Board's determination. The court dismissed the application but in so doing, expressed the opinion that Dr. Cimolai had been denied procedural fairness: *Cimolai v. Children's and Women's Health Centre*, 2002 BCSC 250. The Court of Appeal allowed Dr. Cimolai's appeal

and quashed the suspension, but did not order that Dr. Cimolai be reinstated: 2003 BCCA 338. Dr. Cimolai was not reinstated. He remains suspended without pay.

[7] Following the Court of Appeal ruling, the Health Centre retained an independent investigator, Ms. Hanne Jensen, to investigate the complaints against Dr. Cimolai in accordance with the Health Centre's human rights policy. In the course of doing so, Ms. Jensen received and reviewed documentation of various kinds, interviewed one or more complainants and Dr. Cimolai, and received and reviewed submissions. On May 31, 2005, some 21 months after commencing her investigation, Ms. Jensen issued a report of her findings setting forth her conclusion that Dr. Cimolai had contravened the Health Centre's human rights policy.

[8] On March 16, 2006, Dr. Cimolai applied to this court by way of petition seeking judicial review of Ms. Jensen's determination: 2006 BCSC 1473. Cullen J. determined that the Jensen decision was amenable to judicial review, but exercised his discretion to refrain from reviewing it because the Health Centre had not acted on the report:

> [59] I conclude that it is not appropriate for the court to review, at this stage, the adequacy of the procedural fairness of the second investigation. Rather, it is my view that the internal reviews yet to be undertaken, should consider and address the petitioner's complaints of procedural unfairness, in advance of any determination of the substantive issues of whether to accept the Report or the recommendation of hospital management in connection with the petitioner's status.

[9] The Court of Appeal dismissed Dr. Cimolai's appeal: 2007 BCCA 562. On April 24, 2008, the Supreme Court of Canada denied leave to appeal: [2008] S.C.C.A. No. 18.

[10] By the time this application was heard, no action had been taken by the Health Centre or the Authority in response to Ms. Jensen's report. The privilege review process has not been finalized. Dr. Cimolai remains suspended without pay.

[11] In 2004, Dr. Cimolai commenced a defamation action against those whom he alleged had made complaints against him. At an early stage of that action, Dr. Cimolai applied for an order requiring the production of evidence that had been assembled from complainants in relation to the first investigation of the allegations against him: see *Cimolai v. Hall*, 2004 BCSC 153. Production was ordered but a publication ban was imposed in the following terms:

> [1] The Ruling on Voir Dire in these matters dated February 4, 2004 as amended by a Corrigendum issued on February 27, 2004 is hereby amended to more particularly describe the ban on publication outlined in Paragraph [54] of that ruling.
>
> [2] The ban on publication prohibits the publication of evidence, information, submissions or reasons for decision in this proceeding.
>
> 1. identifying (whether by name, capacity, or other identifying details) as a complainant any person who made a complaint of workplace

> harassment against Dr. Cimolai through the human rights policy at Children and Women's Health Centre
>
> 2. disclosing the content of any of those complaints as made in that process
>
> except
>
> 3. for the purpose of the prosecution or defence of the actions (Vancouver File Nos. S001963 and S011108) or other participation in the trial
>
> 4. for the purpose of participation in or adjudication of proceedings in relation to the complaints under the human rights policy or for other purposes associated with the management and administration of the policy, the Health Centre, or the Provincial Health Services Authority
>
> 5. in a law report or digest or legal journal, including an electronic publication, or in a similar publication for the purpose of presentation, analysis, or discussion of a ruling or the legal principles involved, or
>
> 6. in the course of reference as a legal precedent to the reasons giving rise to this order or reasons for decision after the trial.
>
> (2005 BCSC 31, App. B)

[12] On January 7, 2005, Dr. Cimolai's action in defamation was dismissed as against all defendants: 2005 BCSC 31. Dr. Cimolai's appeal to the Court of Appeal was dismissed on April 24, 2007: 2007 BCCA 225.

[13] On June 1, 2005, Dr. Cimolai requested production of the following documents from the Authority:

> All materials relating to me and which relate to the recent harassment investigation so conducted by Ms. Hanne Jensen.

[14] The Authority responded to the request on November 16, 2005, by granting access to some records, but declining access to others on the basis that they were outside the scope of *FIPPA* because the investigation conducted by Ms. Jensen was part of a quasi-judicial process. The Authority also declined to produce portions of a transcript of evidence in the defamation action because of the publication ban. Although Dr. Cimolai had provided the transcript to the Authority, it claimed that documents subject to the ban were therefore not in its custody or under its control for purposes of *FIPPA*.

[15] On November 18, 2005, Dr. Cimolai requested a review of the Authority's decision by the Commissioner. On March 2, 2006, the Commissioner issued a written notice of inquiry under Part 5 of *FIPPA*. The inquiry was scheduled to commence on March 24, 2006.

[16] On April 30, 2009, the Commissioner's delegate issued the decision flowing from the

inquiry. The delegate determined that Ms. Jensen had not acted in a quasi-judicial capacity within the meaning of s. 3(1)(b) of *FIPPA* when conducting her investigation as a contractor on behalf of the Health Centre. As a result, the Authority was ordered to produce additional documents which were in its possession including some that were the subject of the previously referenced publication ban. This application by the Authority for judicial review was commenced by petition on June 11, 2009.

[17] There are three issues to be addressed:

(a) What is the applicable standard of review in relation to the determination of Ms. Jensen's status?

(b) Is Ms. Jensen a person who was acting in a judicial or quasi-judicial capacity within the meaning of s. 3(1)(b) of *FIPPA*?

(c) Is a partial transcript of evidence in *Cimolai v. Hall, supra,* subject to production by the Authority having regard to the publication ban imposed in that proceeding?

A. Standard of Review

[18] There is little doubt that the delegate's capacity to order the production of any documents in Ms. Jensen's possession depends upon her status and the character of the documents. The exception to the general requirement for production will apply if Ms. Jensen was acting in a quasi-judicial capacity. Should it apply, the exception from the requirement of production will only extend to documents that are personal notes, communications or draft decisions within the meaning of s. 3(1)(b) of *FIPPA*.

[19] The standard of review that applies to the determination of Ms. Jensen's status in the context of s. 3(1)(b) of *FIPPA* is correctness: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al*, 2004 BCSC 1597; and *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481.

[20] Should Ms. Jensen be found to have been acting in a quasi-judicial capacity, the standard that will apply to the identification of the documents in her possession that are personal notes, communications, or draft decisions is that of reasonableness.

B. Was the Investigator Acting in a Judicial or Quasi-judicial Capacity?

(i) The Delegate's Decision

[21] The delegate described the procedure by which a member of the Health Centre's medical staff could be disciplined and his or her privileges suspended. Section 4 of the *Hospital Act Regulation* requires the Health Centre's Board of Management to promulgate by-laws for its medical staff and permits the medical staff to discipline its members and to recommend the cancellation, suspension, restriction or non-renewal of a member's hospital privileges to the Hospital Board. Section 8 of the *Regulation* permits a medical practitioner whose privileges have been suspended, restricted, cancelled or not renewed to appeal to the Hospital Board and to appear in person before the Board. If the practitioner is dissatisfied with the Hospital Board's decision, he or she may appeal to the Hospital Appeal Board which is independent of the hospital itself. Under s. 46 of the *Hospital Act*, R.S.B.C. 1996, c. 200, the Hospital Appeal Board can affirm, vary, reverse or substitute its own decision for that of a Hospital Board in respect of privileges. The decision of the Hospital Appeal Board is final and binding. The delegate described the human rights policy which had been adopted by the Health Centre and noted that the policy was intended to provide a fair complaint resolution process that assures the rights of both the complainant and the practitioner to dignity, safety and confidentiality. The Health Centre's complaint resolution process was described as remedial and involving progressive discipline.

[22] The complaint made against Dr. Cimolai was one of personal harassment which the policy defined as:

> ...objectionable or unprofessional conduct or comment, directed towards a specific person, which serve no legitimate work purpose and has the effect of creating an intimidating, humiliating, hostile or offensive work environment.

[23] The delegate described the policy including the process for complaint intake and informal resolution of complaints, and the conduct of a formal investigation, in the course of which the investigator would apply appropriate procedures and practices to investigate and conduct interviews properly and confidentially within the framework of natural justice. One aspect of the procedure was each party's right to know of and respond to all allegations. The investigation was intended to result in a determination with respect to the question of whether or not there had been a violation of the policy.

[24] The delegate noted that the policy stated that an investigation report was to contain:

- A summary description of the allegations;
- A summary of the testimony provided by the witnesses and the respondent;
- A determination as to whether the allegations have been proved on the balance of probabilities of whether the policy has been violated;
- If the allegations are supported, a determination of whether the discrimination or harassment was intentional or not;

- If the complaint is not substantiated, a determination of whether the complaint was vexatious or made in bad faith; and
- Mitigating or aggravating circumstances affecting either party.

[25] The policy requires the report to be delivered to various individuals including the vice-president, human resources, the complainant, and the respondent. Where the respondent is a member of the medical staff, as was Dr. Cimolai, the department head and the vice-president of medical affairs are obliged to discuss their recommendation as to the appropriate course of action in response to the investigator's report. In the event that the respondent does not agree with the proposed course of action, the report and recommendations are referred to the chair of the Medical Advisory Committee, which is then obliged to form a Peer Review Committee. The Peer Review Committee is obliged to conduct a form of investigation in which the respondent practitioner is permitted to make a presentation and to produce the supporting documentation and comments of others who can't speak directly to the matters in issue. At the completion of its investigation, the Peer Review Committee is obliged to compile recommendations and to forward them to the Medical Advisory Committee to be accepted or rejected. If the Medical Advisory Committee approves the recommendation of the Peer Review Committee, the recommendations are forwarded to the Health Centre Board. If the Medical Advisory Committee rejects the recommendations, it is then obliged to form its own recommendations and to forward those to the Health Centre Board. The practitioner must be notified of the fact that the recommendations have been forwarded to the Board and must be provided with an opportunity to be heard by the Board before the Board makes a substantive decision in respect of the practitioner. As previously noted, the Board's decision may be appealed to the Hospital Appeal Board by way of a new hearing.

[26] The delegate described the general investigation process followed by Ms. Jensen The delegate reproduced the investigator's description of the legal framework for decision-making contained in the investigator's report:

> ...In complaints of discrimination and harassment heard by tribunals, the burden of proof is on the complainant. The standard of proof is the civil standard balance of probabilities. This means that a decision maker must decide whether the complainant's version of events is more probable than other conflicting versions of those events, considering the totality of the circumstances. It means that a decision maker must be satisfied that, on balance, what a complainant says happened did happen. This is a more relaxed standard than that applied in a case of criminal charges where the adjudicator must be persuaded beyond a reasonable doubt that the accused committed the offence with which he or she is charged.
>
> The role of an investigator is to make findings of fact regarding the matters which form the basis of a complaint. It is imperative that all relevant information is sought and obtained and that all evidence be considered and weighed very cautiously. An investigator then bases her findings on a careful analysis of all the available information.
>
> In an investigation, the interviewees are not sworn to tell the truth and the safeguards of

> a process such as an arbitration hearing are absent. At the same time, and as is often the case in complaints of harassment, much hinges on the impressions, perceptions and interpretations of exchanges between individuals that occurred in the context of a busy workplace over an extended period of time. ...
>
> (Order F09-07, para. 39)

[27] The delegate then said the following in respect of the investigator's work in respect of the investigator's report:

> The report continues with the investigator's assessment of the credibility of the interviewees' evidence and her findings of fact. It concludes with a finding that the third party's allegations of harassment were substantiated and proved, that the applicant had violated the CWHC's Human Rights policy and that the applicant had acted intentionally. The report makes no recommendations.
>
> (Order F09-07, para. 40)

[28] The delegate's reasons for declining to conclude that the investigator was acting in a judicial or quasi-judicial capacity may be summarized as follows:

1. The ruling by Holmes J. on a *voir dire* in the context of Dr. Cimolai's defamation action (2004 BCSC 153) to the effect that a workplace harassment complaint was protected by absolute privilege because the complaint was made in the course of a quasi-judicial proceeding, was not determinative. In that regard, the delegate said the following:

   > Holmes J. also held that, because the ultimate decision is one which is required to be made on a quasi judicial basis, the absolute immunity which is afforded to that process extends to all activities which are necessarily incidental to that process, such as the making of the complaints under the Human Rights policy. However, the fact that the immunity from suit flows back over complaints brought pursuant to the policy does not address whether any specific participant in the application of the policy is required to act in a quasi judicial capacity.
   >
   > (Order F09-07, para. 58)

2. The delegate considered the question before her to be whether the investigator herself, and not the Health Centre Board charged with the responsibility of making the adjudicative determination in relation to the suspension of Dr. Cimolai's privileges, was acting in a quasi-judicial capacity.

3. A distinction was to be made between decisions that were subject to judicial review and decisions that were made on a judicial or quasi-judicial basis.

4. A proceeding in which an investigator was not empowered to decide or adjudicate anything, but to determine facts, was not a judicial or quasi-judicial inquiry: see *Guay v. Lafleur*, [1965] S.C.R. 12.

5. The criteria identified by the Supreme Court of Canada in *MNR v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, (1978) 92 D.L.R. (3d) 1, did not support the conclusion that Ms. Jensen was acting in a judicial or quasi-judicial capacity. The delegate cited the reasons of the Supreme Court of Canada in *Coopers and Lybrand* at pp. 5-6:

> The leading case from the Supreme Court of Canada on the characteristics of a body that is required to act on a judicial or quasi judicial basis is Coopers & Lybrand. That case states:
>
> > It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
> >
> > (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
> >
> > (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
> >
> > (3) Is the adversary process involved?
> >
> > (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
> >
> > These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In Howarth v. National Parole Board [[1976] 1 S.C.R. 453.], a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also Martineau and Butlers v. Matsqui Institution Inmate Disciplinary Board [[1978] 1 S.C.R. 118.].
> >
> > In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see Durayappah v. Fernando [[1967] 2 A.C. 337 (P.C.).]. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.
>
> (Order F09-07, para. 65)

6. The investigator's decision was not required "by law" to be made on a quasi-judicial

basis because her position and responsibility did not arise from any statute but rather from internal Health Centre policy:

> ...In my view, the hospital would not have the capacity to create a position such as that of the investigator if the functions which the investigator exercised with respect to those bound by the policy were, in fact, judicial or quasi judicial. That would be a matter for the legislature. On that basis alone, I would find that the investigator is not acting "in a quasi judicial capacity.
>
> (Order F09-07, para. 66)

7. The investigator's process did not have "procedures, functions and happenings approximating those of a court", a situation to be contrasted with the activities considered to be "quasi-judicial" in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597, in which the court noted that a quasi-judicial body is one from which the law will require some measure of judicial procedural conduct.

8. The investigator did not conduct a "hearing" as contemplated by *Coopers and Lybrand* because the complainant and Dr. Cimolai were afforded an opportunity to address the investigator in a series of separate interviews and written submissions.

9. The investigator had no power to compel Dr. Cimolai, the complainant or witnesses to be interviewed or to produce documents. Rather, she depended on their voluntary cooperation to participate in interviews and to provide requested documents. While the complainant and Dr. Cimolai chose to have legal counsel present during their individual interviews, neither they nor other witnesses gave sworn evidence and there was no cross-examination.

10. The fact that the investigator was required to apply the Health Centre human rights policy to an individual's behaviour was not sufficient to establish that the investigator was acting in a quasi-judicial capacity.

11. The investigator's decision was not one whereby she adjudicated on or disposed of anyone's rights. Rather, her report was only one in a series of steps leading to further reviews, recommendations, investigations and ultimately, a Board decision.

12. The determination made by Cullen J. in *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473, that the investigator's report played a significant role in the process of internal review and the fact that significant consequences could flow from acceptance of the determinations made at the investigation stage made the investigator's report amenable to judicial review, were not

conclusive. In that regard the delegate said the following:

> The "significant consequences" arise, not from the Report itself, but from the possible acceptance of its determinations by another body. In any case, the fact that there may be consequences for an individual does not necessarily involve a duty to act judicially, although it may impose a duty of fairness. Indeed, it was such a duty of fairness which the Court held might attach to the preparation of the report. The Court concluded:
>
> > What clearly emerges from the judgments of Fraser J. and the Court of Appeal in relation to the first investigation and its subsequent review is that it is incumbent on those discharging the function of the peer review committee, the medical advisory committee and the Board in relation to the complaints at issue, to bring an independent responsible and committed approach to the review process and to not merely serve as a rubber stamp to the investigation. That approach includes assessing the procedural fairness of the investigation, in light of complaints made by [the applicant], and, if necessary, deciding what, if any, measures must be taken to ameliorate any unfairness.
>
> 76 It is clear from this passage that, if an individual's rights are to be affected, it will only be after the peer review committee, the medical advisory committee and the Hospital Board have each discharged their own functions independent of the investigation. In these circumstances, it cannot be said that the report itself affects those rights, although it may be utilized in a process which will affect them.
>
> 77 As recognized in Coopers & Lybrand, "[a]dministrative decision does not lend itself to a rigid classification of function." Rather, the determination of whether an activity must be carried out on a quasi judicial basis depends on weighing the relevant factors to determine where the function falls on the spectrum of decision-making. I find that, on balance, the investigator was not required to, and indeed did not, act in a manner similar or analogous to a court.
>
> (Order F09-07, para. 75)

13. While the investigator's report was subject to judicial review because of the role the investigation and report played in the disciplinary process, that did not mean that the investigator herself, as opposed to the Health Centre Board, was required to act in a quasi-judicial manner when carrying out her functions under the Health Centre's human rights policy.

14. The investigator did not act in a quasi-judicial capacity within the meaning of s. 31(b) of *FIPPA*.

[29] On this application for judicial review, the Authority made helpful and thorough submissions in respect of the delegate's ruling. Not surprisingly, Dr. Cimolai, who is self-represented, had little to say but to endorse and support the delegate's ruling.

[30] With respect, I do not find the delegate's reasoning compelling, and on a standard of correctness, the determination that the investigator was not acting in a quasi-judicial capacity must be set aside.

(ii) Analysis

[31] The purpose of s. 3(1)(b) of *FIPPA* is to protect deliberative secrecy. Deliberation encompasses the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it.

[32] I endorse the conclusion expressed by Holmes J. in *Cimolai v. Children's and Women's Health Centre (British Columbia), supra,* para. 28, that the statutory regime authorized by the *Hospital Act*, the *Hospital Act Regulation*, and the resulting by-laws governing medical and professional staff at the Health Centre, create a quasi-judicial process in relation to the proposed or actual cancellation of privileges at the Health Centre. In view of the legislation, the regulation, and the by-laws, I must disagree with the following view that more is required if Ms. Jensen is to be regarded as acting in a quasi-judicial capacity:

> In my view, the Hospital would not have the capacity to create a position such as that as the investigator if the function which the investigator exercised with respect to those bound by the policy were in fact judicial or quasi-judicial. That would be the matter for the legislature. On that basis alone, I would find that the investigator is not acting "in a quasi-judicial capacity".
>
> (Order F09-07, para. 66)

[33] Nor do I accept the delegate's conclusion that the only person or persons who serve in a quasi-judicial capacity in the discipline and privilege context are the members of the Board of the Health Centre charged with the responsibility of making the final determination in respect of the suspension or cancellation of privileges. Because of the process which has been created for the purpose of addressing human rights and privilege issues, all deliberative steps must be protected. In that way, those charged with the responsibility of formulating opinions which are essential to the eventual disposition of a complaint will be able to formulate their opinions free from concerns about inquiries into their thought-making processes.

[34] In this instance, the investigator was charged with more than the mere accumulation of evidence and findings of fact. The investigator was required to look at the evidence available to her from a number of sources, assess and weigh the evidence, and formulate an opinion as to whether or not the facts as she found them supported the conclusion that Dr. Cimolai had contravened the Health Centre's human rights policy. It was most improbable that any other person involved in the discipline process would alter or reverse her determination in that regard. Rather, the responsibilities of others involved in the disciplinary process was to assess

the consequences that should flow from the contraventions which had been identified by the investigator.

[35] In reaching her conclusion with respect to the capacity in which the investigator was acting, the delegate considered the principles identified by the Supreme Court of Canada in *Coopers and Lybrand*. With respect, the delegate's conclusion that the factors supported the view that the investigator was not acting in a quasi-judicial capacity resulted from an unduly narrow interpretation of the factors and their application to the circumstances before her.

[36] The four factors identified by the Supreme Court of Canada in *Coopers and Lybrand* as relevant in assessing whether or not an individual is exercising a quasi-judicial function were described as follows:

> (a) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggest that a hearing is contemplated before a decision is reached?
>
> (b) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (c) Is the adversary process involved?
>
> (d) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[37] In respect of the application of the factors, the Court said the following at pp. 505-506:

> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially....
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: ... The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.
>
> The existence of something in the nature of a lis inter partes and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.

[38] As I have stated, there can be little doubt that the investigator's decision directly or

indirectly affected Dr. Cimolai's rights and obligations.

[39] The adversary process was engaged because a complaint had been made, and the validity of the complaint was denied by Dr. Cimolai. It was incumbent upon the investigator to determine the relevant facts, to assess those facts, and to reach a conclusion with respect to the question of whether the complaint was substantiated. The investigation resulted in a determination that Dr. Cimolai had contravened the Health Centre's human rights policy.

[40] While no hearing in the formal sense of the word was undertaken, the method of investigation and the method of inquiry undertaken by the investigator afforded all interested persons the opportunity to state their position and to respond, both in writing and in person before her, to the statements of others that were adverse in interest. The determination affected Dr. Cimolai directly.

[41] In the circumstances, there can be no doubt that the investigator was acting in a quasi-judicial capacity. Contrary to the delegate's conclusions, several judicial decisions support the conclusion that investigations can be part of a quasi-judicial process such that the investigator shall be regarded as acting in a quasi-judicial capacity.

[42] In *Hung v. Gardiner*, 2003 BCCA 257, and *Schut v. Magee*, 2003 BCCA 417, the Court of Appeal confirmed that investigations undertaken by professional disciplinary bodies are part of the quasi-judicial process, whether or not the investigation results in an adjudicative proceeding. In doing so, the court relied upon a decision of the Ontario Court of Appeal in *Sussman v. Eales* (1985), 33 C.C.L.T. 156, 1 C.P.C. (2d) 14, 31 A.C.W.S. (2d) 114 (Ont. H.C.J.), in which the Ontario Court of Appeal endorsed the trial judge's finding that no distinction should be drawn between a discipline committee constituted for the purpose of assessing the professional conduct of dentists in Ontario and the complaints committee which was responsible for the investigation of a complaint and the formulation of recommendations in relation thereto. The reasoning is equally applicable in the context of discipline associated with the Health Centre's human rights policy because of the effect on hospital privileges.

[43] Finally, in *Ayangma v. NAV Canada*, 2001 PESCAD 1, 197 Nfld. & P.E.I.R. 83, 203 D.L.R. (4th) 717, the Prince Edward Island Court of Appeal disagreed with the conclusion that the Canadian Human Rights Commission, in performing an investigative rather than an adjudicative function, was not carrying out a quasi-judicial function. At para. 41, the court stated:

> It is not correct for the purposes of determining the application of the defence of absolute privilege to statements made by witnesses responding to the questions of investigators, to focus solely on the functions of the Commission without regard to its role in the complete scheme of the Canadian Human Rights Act supra. The role of the Commission

> is intrinsically a part of what can be characterized as a comprehensive quasi-judicial process of addressing human rights complaints. Therefore, statements made to investigators by individuals having knowledge of the circumstances surrounding the complaint are made on an occasion of absolute privilege. This is necessary to accomplish the quasi-judicial purpose of the entire Act.

[44] In all the circumstances, I am satisfied that the investigator, acting in conformity with the Health Centre's human rights policy and the process authorized by the *Hospital Act*, the *Hospital Act Regulation*, and Health Centre's bylaws, was acting in a quasi-judicial capacity and the delegate's determination to the contrary was incorrect.

C. Records Subject to the Publication Ban

[45] The final issue of concern is whether or not a partial transcript of proceedings which is in the possession of the Health Centre, and the subject of the publication ban imposed in *Cimolai v. Hall*, *supra,* is within the Health Centre's custody or under its control for purposes of *FIPPA*. Dr. Cimolai provided the transcript to the Authority in the course of his dealings with the Authority. The publication ban permitted him to do so. Dr. Cimolai has a copy of the transcript in his possession.

[46] With respect, the transcript in the possession of the Authority is in the custody or control of the Health Centre and no one else. Restrictions imposed on use, distribution, or publication do not deprive the Health Centre of the custody or control of the transcript. *Prima facie* the transcript is a record which must be produced by the Health Centre. If an order for production is to be denied, the justification therefor must be found in some other provision of *FIPPA*, or in some term of the publication ban.

[47] The purpose of the ban was to protect the private interests of those persons who were complainants in relation to Dr. Cimolai's conduct. As a party to the complaints and the defamation proceedings, Dr. Cimolai was aware of all that the complainants alleged against him and all of the evidence adduced in the course of the proceeding. "Publication" for purposes of the ban means communication of information regarding identity to a member of the public at large, and does not embrace communication to a party to the action who already lawfully has full knowledge of the information to which the ban pertains.

[48] The application for judicial review in relation to that aspect of the delegate's decision is dismissed.

Disposition

[49] In the result, the delegate's decision that the investigator was not acting in a quasi-

judicial capacity is set aside.

[50] The question of which of the investigator's documents are exempt from production as a personal note, communication or draft decision within the meaning of s. 3(1)(b) of *FIPPA* is remitted to the delegate for determination.

[51] The application for an order that the delegate's decision regarding the production of documents subject to the publication ban imposed in *Cimolai v. Hall* is dismissed.

Costs

[52] The parties shall bear their own costs.

"Mr. Justice Pitfield"