IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, Chap. 241 and in the Matter of the decision of Celia Francis, in her capacity as a delegate of the Information and Privacy Commissioner of British Columbia, dated March 31, 2003 (Order No. 03-14), made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, Chap. 165

Citation: ***British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.,***
2004 BCSC 1597

Date: 20041203
Docket: L031378
Registry: Vancouver

Between:

The Attorney General of British Columbia

Petitioner

And:

Information and Privacy Commissioner of British Columbia, Ted Hayes, Robert C. Simson, Cary Corbeil, Steven Greenaway, Brian Smith, Barry Kelsey, Thomas Venner, E.H. Hintz

Respondents

Docket: L031340, L031346, L031349, L031350, L031353, L031355, L031356, L031388
Registry: Vancouver

Between:

Robert C. Simson, Richard Macintosh, Steven Greenaway, Brian Smith, Barry W. Kelsey, Thomas S. Venner, Carey Corbeil and Al Hintz

Petitioners

And:

Information and Privacy Commissioner, Minister of Management Services and Royal British Columbia Museum

Respondents

Before: The Honourable Mr. Justice Paris

Reasons for Judgment

Counsel for the Attorney General:	G.H. Copley, Q.C. and J. Tuck
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Date and Place of Trial/Hearing:	October 12-15 and 19, 2004 Vancouver, B.C.

Introduction:

[1] In these proceedings there are applications by several persons (including the Attorney General of British Columbia) for an order pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 to set aside an order made March 31, 2003 by a delegate of the Information and Privacy Commissioner for British Columbia. The delegate ordered the British Columbia Archives to process a request made pursuant to the ***Freedom of Information and Protection of Privacy Act*** R.S.B.C. 1996, c. 165 (FIPP Act) by a member of the public, Mr. Ted Hayes, for production of the incomplete draft report of the Smith Commission of Inquiry into the affairs of the Nanaimo Commonwealth Holding Society (NCHS). Mr. Hayes' request had been denied by the BC Archives and the delegate made the order pursuant to a review of that denial launched by Mr. Hayes pursuant to s. 52(1) of the ***Act***.

[2] The petitioners (apart from the Attorney General) are persons referred to in various ways in the draft report and to whom "Notices of Adverse Interest Finding" had been delivered by the Commission, giving them an opportunity to respond to the proposed conclusions about them set out in the Notices and contained in the draft report. However, before that could be accomplished, the Commission was rescinded by Order-in-Council on June 22, 2001.

The History of the Smith Commission of Inquiry:

[3] The Smith Commission was created by provincial Order-in-Council on April 24, 1996. It came about as a result of information that had come to the attention of provincial government authorities that a society called the Nanaimo Commonwealth Holding Society had over the course of many years diverted proceeds from bingo games which it conducted to legally non-permitted uses. By the combination of the provisions of the ***Criminal Code*** related to gaming and provincial government regulations in British Columbia, 25 percent of the gross proceeds of such gaming had to be paid out for charitable purposes. A forensic audit conducted at the instance of the provincial government by Mr. Ron Parks disclosed that, during the 1980s in particular, over 80 percent of the funds that should have been paid out to charities were diverted back to NCHS and used mainly to pay off debts arising from two real estate ventures, as well as for some other non-legitimate purposes.

[4] The terms of reference of the Commission were as follows:

> 1. To inquire into and report on the adequacy of past and present rules and restrictions governing the use of proceeds from licensed gaming and without restricting the generality of the foregoing to examine the use of proceeds from gaming for political purposes.

2. To inquire into and report on existing legislation including the ***Society Act***, R.S.B.C. 1979, c. 390 and other rules and regulations governing the use of assets of societies and to make recommendations concerning any inadequacies found to exist so as to improve the supervision of directors and officers and the transparency of financial dealings of those societies.

3. To give particular attention under sections 1 and 2 above to the activities of the Nanaimo Commonwealth Holding Society and related entities and any other politically-linked organization in the Province of British Columbia.

4. To inquire into and report generally on the handling of matters related to the Nanaimo Commonwealth Holding Society and related entities by public bodies or officials since bingo licences were first issued in 1970.

5. To make recommendations for the better regulation of the matters referred to above including the form and content of legislation and administrative measures that may be necessary to implement these recommendations.

6. To ensure that the Inquiry is conducted in a manner that, in the opinion of the Commissioner, does not compromise any criminal investigation or the prosecution of any organization or individual.

7. To deliver a final written report of the Commissioner on or before March 31, 1997.

[5] In early 1997 because of ill health, the original Commissioner, Nathan T. Nemetz (previously the Chief Justice of British Columbia) was replaced by Mr. Murray Smith, who had been legal counsel to the Commission. The original due date for the filing of the report of the Commission (March 31, 1997) was extended a total of six times, the last extension being to August 31, 2001. The Commission commenced public hearings in 1999. As mentioned, the Order-in-Council rescinding the Commission was issued on June 22, 2001 and on the same day, the Attorney General issued a statement which said in part the following:

> This has been a long process, and it’s time to bring the Smith Commission of Inquiry to an end. I don’t think we’ll learn anything more about gaming in B.C. by giving the commission more time and money.
>
> The cost of the commission to date is about $6 million, and another $2 million could well be spent by year’s end, including publicly funded legal fees for some of the people who received adverse findings from the commission. I do not believe the taxpayers would be well served by this additional expenditure and delay.
>
> It’s simply not in the interests of the public, or the public purse, to continue with this inquiry. It’s time to close the book on the long nightmare of the Nanaimo Commonwealth Holding Society and move forward.

[6] In the following year, substantial changes were made to the legal framework of the gaming industry in British Columbia.

[7] The Order-in-Council establishing the Commission recites that it was established pursuant to s. 8 of the ***Inquiry Act*** R.S.B.C. 1996, c. 224, the relevant part of which reads:

> 8 Whenever the Lieutenant Governor in Council thinks it expedient, the Lieutenant Governor in Council may by commission titled in the matter of this Act, and issued under the Great Seal, appoint commissioners to inquire into the following:
>
> …
>
> (b) any matter connected with the good government of British Columbia, or the conduct of any part of the public business of it, including all matters municipal, or the administration of justice in British Columbia.

[8] The ***Act*** is an amalgamation of two older ***Acts*** and has been criticized as being obsolete. Section 8 is contained in Part 2 of the ***Act***. Part 1 contains the following provisions:

> 1 The minister presiding over any ministry of the public service of British Columbia may at any time, under authority of an order of the Lieutenant Governor in Council, appoint one or more commissioners to inquire into and to report on
>
> (a) the state and management of the business, or any part of the business, of that ministry, or of any branch or institution of the executive government of British Columbia named in the order, whether inside or outside that ministry, and
>
> (b) the conduct of any person in the service of that ministry or of the branch or institution named, so far as it relates to the person's official duties.
>
> …
>
> 4 (1) The commissioner or commissioners may allow a person whose conduct is being investigated under this Part, and must allow a person against whom any charge is made in the course of an inquiry, to be represented by counsel.
>
> (2) A report must not be made under this Part against a person until the person
>
> (a) has been given reasonable notice of the charge of misconduct alleged against the person, and
>
> (b) has been allowed full opportunity to be heard in person or by counsel.

[9] It can be seen that investigations into conduct and charges of misconduct are specifically mentioned in s. 4 of Part 1 of the ***Act***. No specific such language appears in Part 2. In ***Rigaux v. British Columbia (Commission of Inquiry into the death of Vaudreuil-Gove Inquiry)*** (1998) 155 D.L.R. (4th) 716 (B.C.S.C.), Allan J. of this Court, having found that the terms of reference of that Commission did not authorize findings of misconduct, said at para. 36:

> Part II, which governed the Gove Inquiry, does not contemplate findings of misconduct and provides no procedural protections in the event that such findings are made. <u>One important question, which was argued but must remain unanswered in these reasons, is</u>

> whether it is open to a Commissioner to make findings of misconduct in a Part II inquiry; if so, do the statutory protections of notice, counsel and the right to be heard contained in Part I apply or, in the alternative, are common law principles or Charter rights available? A revision of the Act would eliminate these foreseeable difficulties.
>
> [Emphasis mine]

[10] However the case of ***Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*** [1998] 3 S.C.R. 3 should be noted. On November 23, 1992 the council of Sarnia, Ontario passed a resolution pursuant to s. 100(1) of the ***Municipal Act***, R.S.O. 1990 c. M45 asking for a judicial inquiry into certain real estate transactions involving the municipality. Section 100(1) as reproduced in part at page 12 of the Judgment of the Supreme Court of Canada reads as follows:

> 100. — (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [*the first branch*] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [*the second branch*] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors . . . .

In that passage the bracketed words "the first branch" and "the second branch" are the words of the Supreme Court itself.

[11] In dealing with concerns about procedural protections, the Court said at paragraph 29:

> That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself. Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

[Emphasis Mine]

[12] In the last sentence of that passage the Supreme Court seems to acknowledge virtually explicitly that findings of misconduct are permitted even under a general inquiry under s. 100(1) and that in such circumstances "the full strictures of natural justice" will be called for.

[13] In any event, it is clear what the view of Commissioner Smith was as to these questions. In September 1999, he published Rules of Procedure for the Commission hearings, paragraph 1 of which was as follows:

> The Commissioner will inquire into those matters set out in the terms of reference. On the basis of oral and documentary evidence tendered during the hearings, the Commissioner will make findings of fact and may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it. The Commissioner's findings of fact and conclusions they contain cannot be taken as findings of criminal or civil liability.

[14] Presumably he relied on the third and especially the fourth terms of reference of the Order-in-Council establishing the Commission.

[15] In August 2000, counsel for the Commission issued "Notices of Adverse Interest Finding" to 22 persons. The petitioners in these proceedings (apart from the Attorney General) are persons who were government officials in various capacities during the period with which the Commission was concerned. Each Notice set out proposed findings of fact and misconduct about that person and each person was invited to address the Commission with respect thereto by way of evidence and submissions. By a subsequent ruling on December 8, 2000, the Commissioner agreed that the contents of the Notices should be kept private until his final report was published (which remains the case to the present) and that he would hear such evidence and submissions under a publication ban. He also said:

> The Commission of Inquiry's final report will be divided into two sections. The first section will contain a thorough chronology of events respecting NCHS since it received its first gaming licences in 1970. Based on the evidentiary record, I will make findings of fact. Where the evidence on a particular matter is in dispute I intend to resolve the controversy by making findings of fact or I will state it is not possible on the evidence available to resolve the fact in issue. Where I conclude that an individual has misconducted himself or herself, and that misconduct is directly related to the Terms of Reference, I intend to draw conclusions about that conduct. These conclusions may adversely affect the individual involved.

[16] And further:

> I am intensely aware that some of my findings and conclusions may adversely affect the reputation of individuals and that for most people their reputation is their most highly prized attribute.

[17] And further:

> It seems clear to me that it would be unfair, at this stage in the Inquiry's proceedings, to the Commission to say or do anything publicly that would imply that I have made a determination that an identified individual misconducted himself in the execution of public duties. In other words, I should not

> prejudge any individual's conduct, before all the evidence and submissions have been received and carefully considered.

[18] On May 4, 2001, in a ruling refusing a request for adjournment of the rebuttal hearings the Commissioner said:

> On April 20, 2001 I released a 41 page set of written Reasons, addressing numerous jurisdictional arguments raised by counsel for eight present or former public servants ("the Applicants"), who received Notices of Adverse Interest Finding. I concluded that I have jurisdiction to make adverse findings, when required to carry out the mandate of the Inquiry, provided that the procedures adopted are fair to the individual involved. I also concluded that no action taken by the Inquiry has resulted in loss of jurisdiction to make adverse findings.

[19] At the time that the Commission was rescinded and its work brought to an end it had produced a substantial but incomplete draft report of its findings. The draft report, including the "Notices of Adverse Interest Finding", were subsequently transferred to the British Columbia Archives.

[20] On October 12, 2001, the Archives received the above-mentioned request of Mr. Hayes for access to the draft report. By letter to Mr. Hayes dated December 12, 2001, the Ministry of Management Services refused the request advising him that the draft report was outside the scope of the ***FIPP Act*** by virtue of s. 3(1)(b) thereof which reads as follows:

> Scope of this Act
>
> 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 acting in a judicial or quasi-judicial capacity.

[21] As mentioned, Mr. Hayes asked for a review of that decision and pursuant to the ***Act***, the Information and Privacy Commissioner (IPC) delegated the conduct of the review to Ms. Celia Francis.

The Delegate's Decision:

[22] The delegate was provided with a copy of the draft report which she described as "clearly an unfinished product, a draft". Mr. Hayes, who was not represented by counsel, and counsel on behalf of the B.C. Archives made their submissions in writing to the delegate in May 2002. Counsel had a copy of the report. Mr. Hayes, of course, did not. It is, incidentally, 670 pages in length including the Notices of Adverse Interest Finding, although a number of those pages are copies of emails, heading pages, lists of names and the like. The parties to whom the Notices had been delivered were not given the opportunity to make submissions to the delegate, either personally or by counsel. The delegate delivered her order by way of written Reasons on March 31, 2003.

[23] The principal thrust of the delegate's Reasons was to find that in the conduct of the Inquiry the Commissioner had not been "acting in a judicial or quasi-judicial capacity" nor was the draft report a "draft decision" for the purposes of s. 3(1)(b) of the ***FIPP Act***. It, therefore, did come within the scope of the ***Act*** and she ordered the B.C. Archives to process the applicant's request. This meant that the IPC would then have had to proceed to consider the request and determine whether, considering all the other provisions of the ***Act***, the applicant was entitled to a copy of the report.

[24] I shall return later to the delegate's Reasons in more detail.

The History of these Proceedings:

[25] As mentioned, the petitioners seek an order pursuant to the ***Judicial Review Procedure Act*** quashing the delegate's order requiring the B.C. Archives to process Mr. Hayes' request for the production of the draft report. I have received a copy of the report and of the Notices of Adverse Interest Finding. On February 26, 2004 I ordered that counsel for the petitioners also be provided with copies thereof upon giving their undertakings to the Court that they would not disclose the contents of the report to anyone, including their own clients. The courts in Ontario have made such orders in similar circumstances. Mr. Hayes is still not represented by counsel and I observed that if he had been, his counsel would also have been given copies of the draft report and Notices upon giving the same undertaking. I was advised by counsel that Mr. Hayes did not wish to appear before me on the hearing of these applications, although he did appear on the hearing of the application in February 2004. Counsel for the IPC appeared on these applications and defended the delegate's order.

Standard of Review of the Delegate's Order

[26] The jurisprudence from the Supreme Court of Canada has established that there is a spectrum of standards which the Courts must apply in exercising their review or appellate functions. It ranges from correctness of the decision in question, through reasonableness *simpliciter* to patent unreasonableness, depending on the legislative framework applicable. The position of the Attorney General and the other petitioners is that the strictest standard, i.e. correctness, is the standard that should be applied by the court in reviewing the delegate's interpretation of s. 3(1)(b) of the ***FIPP Act***. Counsel for the IPC submitted that reasonableness applies in this case.

[27] I note parenthetically that the recently proclaimed ***Administrative Tribunals Act***, S.B.C. 2004, c. 45, which evidently is intended as a codification of standards of review with respect to certain tribunals, does not apply in the circumstances of this case and does not affect the following analysis.

[28] Starting with ***U.E.S. 298 v. Bibeault*** [1988] 2 S.C.R. 1048, a series of judgments of the Supreme Court of Canada has established that to determine the appropriate standard of review in any given case a pragmatic and functional approach must be used. That approach has been defined by the Supreme Court as the weighing by the reviewing court of four factors:

(a) the existence or non existence of a privative clause or a statutory right of appeal;

(b) the expertise of the administrative body or decision maker;

(c) the purpose of the legislation pursuant to which the latter operates; and in particular, the specific provision involved; and

(d) the nature of the problem, that is, whether law or fact.

[29] The principal focus of the delegate's decision involved her interpretation of the words in s. 3(1)(b) cited above which limit the scope of the statute's operation. The heading of section 3, although of course not part of the operative words of the ***Act***, is "Scope of this Act". Such an interpretation, it is submitted by the petitioners, involves a determination of law alone (given that the facts are not in dispute) and in this case the

determination of law goes to the issue of the jurisdiction of the IPC himself.

[30] When such tribunals or bodies are called upon to interpret the words of a statute defining their own jurisdiction the reviewing courts have applied the standard of correctness. The most recent case in that regard referred to me by counsel is ***Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) et al.*** (2004) 242 D.L.R. (4th) 193 (S.C.C.). Furthermore it was pointed out that previous cases in this province reviewing decisions under this ***Act*** and s. 3 in particular, have always applied the standard of correctness, although admittedly sometimes the issue of standard of review was conceded by counsel. (***Neilsen v. British Columbia (Information and Privacy Commissioner)*** [1998] B.C.J. No. 1640 (B.C.S.C.); ***Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*** [1999] B.C.J. No. 198 (B.C.S.C.); ***British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)*** [2000] B.C.J. No. 1494 (B.C.S.C.); and ***Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*** (1998) 58 B.C.L.R. (3d) 61 (C.A.)).

[31] Counsel for the IPC submits, however, that that approach to jurisdictional questions and the last cited cases must be re-evaluated in the light of more recent judgments of the Supreme Court of Canada. It is said that they establish the "primacy" of the pragmatic and functional approach and make its use mandatory in all cases of judicial review. (***Pushpanathan v. Canada (Minister of Employment and Immigration)*** [1998] 1 S.C.R. 982; ***Law Society of New Brunswick v. Ryan*** [2003] 1 S.C.R. 247; and ***Dr. Q. v. College of Physicians and Surgeons of British Columbia*** [2003] 1 S.C.R. 226.)

[32] The older "categorical" approach is to be eschewed. At paragraph 22 of ***Dr. Q.*** the Court said:

> To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (***Southam***, *supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

[33] And at paragraph 24:

> The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.

[34] And at paragraph 25:

> For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker.

[35] Counsel for the IPC submits that when the four factors of the pragmatic and functional approach (to which I shall return) are considered with respect to the circumstances in this case, particularly with respect to the somewhat amorphous concept of "quasi-judicial" action, a greater degree of deference by the court is called for and that the correct standard of review to be applied is reasonableness. Applying that standard, it cannot be said that the delegate's Reasons and order were unreasonable and they must therefore be sustained.

[36] It is countered by the petitioners, however, that the ascendancy of the pragmatic and functional approach does not mean that considerations of proper statutory interpretation and jurisdiction *per se* are now entirely irrelevant. In ***Pushpanathan***, the Court said at page 1005:

> Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[37] In subsequent decisions the Supreme Court of Canada has reinforced the position that on questions of pure law and the jurisdiction of municipal bodies, at least, correctness is the appropriate standard of review without need to engage in the pragmatic and functional analysis: ***(Nanaimo) City v. Rascal Trucking Ltd.*** [2000] 1 S.C.R. 342; ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary*** [2004] 1 S.C.R. 484)

[38] It is fundamental that, to use the words of counsel, "statutory bodies cannot incorrectly assume jurisdiction they do not have".

[39] I note also that the Supreme Court of Canada in ***Dr. Q.***, while clearly putting paid to the pure categorical approach, did observe at paragraph 24:

> Just as the categorical exceptions to the hearsay rule may converge with the result reached by the Smith analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded.

[40] In my view, whether jurisdictional issues are an exception to the pragmatic and functional approach, or whether it is that when the pragmatic and functional approach has been applied heretofore to jurisdictional questions the resulting standard of review has always been correctness, is academic in this case. That is so because the fundamental issue that had to be resolved in this case by the delegate was jurisdictional and I conclude

that if the pragmatic and functional approach is followed the appropriate standard of review of her decision is correctness.

[41] I must note at this point that as to the process I must follow in that regard the decision of the Court of Appeal in the ***Aquasource*** case seems almost entirely on point and is extremely helpful, if not binding. In that case the standard of review of a decision of the IPC was determined to be correctness. The only difference is that in that case it was the application of s. 12 of the ***Act*** which was in issue rather than that of s. 3(1)(b). That difference, if anything, only serves to make the case more persuasive because the application of s. 3(1)(b) is even more clearly a jurisdictional issue than is that of s. 12 (which is in the part of the ***Act*** setting out exceptions to the right of access to public records).

1. Privative Clause:

[42] That there is no privative clause is now generally considered to be a neutral factor. However, at the very least, it can be said in this regard that there is no explicit direction from the legislature that a high degree of deference must be given as to the interpretation of s. 3(1)(b).

2. Expertise of the Decision Maker:

[43] A relatively greater degree of curial deference will be afforded to a tribunal of special expertise as the question involved approaches more closely to the heart of that expertise. What is involved here is not the specialized expertise required of and accumulated by the IPC in the operation of the ***Act*** generally. What is involved is a threshold question, namely the interpretation of terms defining his jurisdiction ("quasi-judicial" and "decision"). Ascertaining their meaning requires considerable legal analysis (cf. the delegate's reasons) and there is nothing to indicate that the IPC is better equipped to do that than the Court.

3. The Purpose of the ***Act*** as a Whole, the Provision in Particular:

[44] The IPC's delegate was required to resolve a dispute between the applicant and the public body concerning the proper interpretation of the ***Act***. The Court of Appeal said in ***Aquasource*** that that "conflict resolution" was much more "bipolar" (between parties) than "polycentric" (resolving policy issues) and, therefore, the greater degree of deference called for by the latter is not appropriate here.

4. The Nature of the Problem: Law or Fact?

[45] The issue here involves one of virtually pure law. There is no dispute as to the terms of reference, what the Commission did or the contents of the draft report and Notices of Adverse Interest Finding. Again I note, as with regard to the second factor above, the terms required to be interpreted by the delegate did not relate to any special expertise of the IPC. The Court is in as good a position to resolve the legal questions at stake as was the IPC. Furthermore, that the terms "quasi-judicial" and "decision" may be somewhat vague does not make the process of determining their meaning in the context of this case any less an issue of law.

[46] I think that I should also take into account that the decision of this Court or of appellate courts in this case as to whether commissions of inquiry can be quasi-judicial in function could have significant precedental impact and entrain significant implications as to the conduct of future commissions of inquiry. Again, in my view, it is better that such decisions be left to the courts.

[47] In sum, considering the nature of the questions the delegate had to resolve, the directions of the Supreme Court of Canada as to the primacy of the pragmatic and functional approach in matters of curial deference to decision making bodies, and that according to the Supreme Court of Canada "the central inquiry in determining the standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (***Pushpanathan,*** page 1004), I am completely satisfied that the standard of review that must be applied in this case is correctness.

"Acting in a Judicial or Quasi-Judicial Capacity"

[48] The delegate's task, as mentioned, was to determine whether pursuant to s. 3(1)(b) of the ***FIPP Act***, the draft report of the Commission was excluded from the scope of the ***Act*** because it was: (a) "a draft decision"; (b) "of a person acting in a … quasi-judicial capacity". I shall deal firstly with the second issue set out because that is the order in which the delegate dealt with them and that is how all the submissions of counsel were made to me.

[49] The difficulty that is manifest immediately is the determination of the meaning of, giving content to, the term "quasi-judicial" and to measure the activities of the Smith Commission against that definition. Evidently the term has a difficult history but it is generally used to describe administrative bodies and decision makers, as opposed to courts, from which the law will require some measure of judicial procedural conduct. But what determines whether such bodies or their activities can be characterized as "quasi-judicial" and can that characterization (or when does it, if ever) apply to the activities of a public inquiry?

[50] In the case of ***Canada (M.N.R.) v. Coopers and Lybrand Ltd.***, [1979] 1 S.C.R. 495, the Supreme Court of Canada established certain guidelines for this analysis. The core of the decision in this regard is, it seems to me, a "spectrum" analysis. At page 505 the Court says:

> Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis.

[51] The Court also formulated certain criteria at page 504 which have often been referred to since to assist courts in this determination:

> 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.

[52] It is essential to note that the Court stated that the list is not exhaustive nor is the presence or absence of any of the criteria in any particular case necessarily determinative.

[53] In her analysis of this issue the delegate first concluded, considering the provisions of the ***Inquiry Act*** and the ***Rigaux*** case, that the Commission was not empowered to inquire into the conduct of individuals. She then reviewed the four criteria of ***Coopers and Lybrand*** and considered whether, in her view, they apply to the circumstances in this case. As to whether hearings were "contemplated" she held that the Commissioner was not "required" to hold hearings and "could have received submissions only in writing, had he chosen" and therefore "Commissioner Smith did not … necessarily hold hearings within the sense intended in ***Coopers and Lybrand***". She next found that no rights would be affected by the publication of the findings of misconduct reflected in the draft report because reputation is not a right in the sense contemplated by ***Coopers and Lybrand***. "One's reputation is an aspect of one character or how one is perceived", not a "legal right". She held that the adversarial process was not involved because "the Smith Commission was acting in an investigative capacity. There were no allegations or charges to answer or prove". The fourth criterion did not apply because even if the Commission had "an obligation to be procedurally fair, its role was 'to inquire and report' but not to apply substantive rules to individual cases." Finally, she reiterated her view that the Commission was of the second of the "two major categories of Commissions of Inquiry" that is, one whose function is "to research and to formulate … policy" rather than examine the conduct of public officials. She concluded:

> In my view, a person acting in a judicial or quasi-judicial capacity is someone who is acting in a capacity to hear and decide legal rights, most frequently by issuing an adjudicative determination that resolves the legal interests of opposing parties. Commissioner Smith was not, for the above reasons, acting in either of these capacities.

[54] At this point it is useful to consider a later decision of the Supreme Court of Canada in ***2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)***, [1996] 3 S.C.R. 919. In that case the court said at paragraphs 22 and 23:

> That being the case, it is now necessary to identify the tests for distinguishing functions that are quasi-judicial from those that are not. The debate surrounding this distinction was for a long time of great importance in administrative law and resulted in numerous judicial decisions. Thus, the superior courts, owing inter alia to enactments requiring them to do so, relied on the distinction in order to determine what acts were subject to judicial review. The scope of the rules of natural justice then

> depended to a large extent on the characterization of the process by which the agency in question made its decision. However, this Court gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions… As Sopinka J. noted in ***Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)***, [1989] 2 S.C.R. 879, at pp. 895-96:
>
> > Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.
>
> The distinction, which was often a source of confusion, is thus now less relevant. It is no longer applied unless a statute so requires. That was the case for a long time with the ***Federal Court Act***, R.S.C., 1985, c. F-7, and is still the case with s. 56 of the ***Charter***. The judgments of this Court based on the ***Federal Court Act*** thus continue to be important, as do the more general considerations relating to the quasi-judicial process put forward in other contexts.
>
> [Emphasis Mine]

[55] And further at paragraph 25:

> ... a restrictive enumeration of the characteristics of a quasi-judicial decision is risky. As a general rule, no factor considered in isolation can lead to a conclusion that a quasi-judicial process is involved. Such a finding will instead be justified by the conjunction of a series of relevant factors in light of all the circumstances.

[56] It seems to me that Gonthier J. is there saying (as well as was alluded to in the "spectrum" analysis in ***Coopers and Lybrand***) that to attempt a strict characterization as "quasi-judicial" in the abstract is not as important as deciding if in the given circumstances the rules of natural justice should apply. This approach of course blurs the boundaries between what is quasi-judicial and what is not, and may even make such a characterization unnecessary. But the fact remains that I have to determine what the word means in the ***FIPP Act***. If I cannot fix upon a definition that is universally applicable then I must at least determine what it means for the purposes of this case.

[57] Firstly, I am afraid I must disagree in good measure with the delegate's analysis of the applicability of the ***Coopers and Lybrand*** criteria.

Hearings:

[58] Commissioner Smith held 87 days of public hearings wherein 70 witnesses testified under oath. Such hearings are common at inquiries and, at the very least, "contemplated" by the ***Inquiry Act*** even if not absolutely required in every instance. If something closer to an adjudicative hearing was what the delegate meant was required, I note that the Commissioner did give the persons to whom Notices had been sent the right to be heard, to call rebuttal evidence and to cross-examine witnesses. I am satisfied that there were and would have been further hearings within the meaning of ***Coopers and Lybrand***.

Rights Affected Directly or Indirectly

[59] One does have the legal right to a good reputation, assuming, of course, that it is merited. It is enforceable, as witness the common law action of defamation. If what the delegate had in mind was that there is no remedy for its breach against judges and inquiry commissioners for what they express in the course of their duties, my analysis would be that the right subsists, but, exceptionally, it is not enforceable against those specific individuals with respect to those specific statements. Furthermore, given that all the jurisprudence establishes that public inquiries engaged in fault-finding must afford the benefit of the rules of procedural fairness to those involved, it must be that substantive legal rights as contemplated by the ***Coopers and Lybrand*** test are engaged in some way, most obviously, of course, the right to reputation.

Adversarial Process:

[60] Certainly the procedure of the Commission as a whole was not of the traditional common law model where opposing parties present their versions of the truth to an arbiter who then decides accordingly. But when it arrived at the stage with which we are concerned, of specific allegations of misconduct being delivered by Commission counsel to persons who were then invited to respond, it did develop an adversarial character or (if I may be forgiven) a quasi-adversarial character.

Substantive Rules to Individual Cases:

[61] The process of a public inquiry generally does not involve the usual judicial intellectual process of applying rules of general application to particular facts. But once embarked upon his review of the conduct of individuals, it is apparent from a perusal of the report that the Commissioner drew certain conclusions of legal misconduct as well as conclusions of violations of more general norms of behaviour.

[62] Next I observe that even if the enabling Order-in-Council recited that the Commission was constituted pursuant to Part 2 (s. 8) of the ***Inquiry Act***, the fourth term of reference explicitly authorizes it to "inquire into … the handling of matters related to the NCHS and related entities by public bodies or officials …". In my view that is a quite explicit mandate to inquire into the conduct of such persons with respect to the execution of their duties. So I must find, contrary to the delegate, that the Commissioner was not acting only "in an investigative or inquisitorial capacity" with respect to general policy matters, but also had the authority pursuant to the terms of reference to make findings and judgements of misconduct. Certainly he thought so, as is evident from his various rulings. I see no reason why an inquiry, this one in particular, cannot with respect to certain of its functions be policy oriented or "poly-centric", but with respect to others be something closer to or similar to a judicial body.

[63] I note here that in the ***Rigaux*** case, which concerned an inquiry into the policies and practices of the provincial Ministry of Social Services, but without any terms of reference authorizing findings of misconduct such as exist in this case, Allan J. nevertheless remarked that the Inquiry had a "quasi-judicial flavour", noting the Commissioner's own view that he was in fact conducting a quasi-judicial proceeding.

[64] I deal next with what is in my view probably the most compelling factor as to this issue. All counsel for the petitioners urged that I must consider, as well as what the Commissioner may or may not have been by law authorized or empowered to do pursuant to his terms of reference and the provisions of the ***Inquiry Act,*** but also the actions he actually took. It is said that given the consequences to the petitioners (and others) of the course which the Commissioner pursued, the words "acting in a … quasi-judicial capacity" must be interpreted so as to require the court to take into account the manner in which he acted. I agree.

[65] From the passages from his various rulings which I have cited above it is obvious that the Commissioner intended to act in a judicial-like capacity. Presumably acting pursuant to the third and fourth terms of reference he explicitly set out to pass judgments on the conduct of individuals and in fact proceeded to weigh evidence, make findings of credibility and to pass such judgment on a good number of people. Twenty-two Notices of Adverse Interest Finding were sent out drawing conclusions and making statements—sometimes in forceful language—as to unlawful and unethical conduct. Undoubtedly alive to the consequences of such proposed findings to those concerned, he very fairly established extensive procedural safeguards—the right to cross-examine, to respond, to legal representation and publication bans. Some procedures he adopted and rulings he made were similar to those in court proceedings, including various rulings of law. Under the ***Inquiry Act*** he had most of the powers and legal privileges of a Supreme Court judge.

[66] In a word, with respect to the issue of findings of misconduct, the Commissioner certainly acted and proposed to act "like" or "similarly" to a judge.

[67] Section 8 of the ***Interpretation Act***, R.S.B.C. 1996, c. 238 reads:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[68] The Supreme Court of Canada has reiterated the established approach to statutory interpretation in the ***Monsanto*** case at page 205, citing Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[69] Counsel for the IPC submits that a purposive approach to statutory interpretation cannot override plain language read in context. I agree. However the problem here, as all acknowledged, is the vagueness of the term "quasi-judicial".

[70] All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect

on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.

[71] However, deliberative secrecy is meant also to protect individuals who could be affected by the publication of such preliminary and tentative remarks. I am sure that any judge would acknowledge having made notes, comments or observations in memoranda, bench books or similar such places which subsequently turn out to be unsupportable and which should not be published, not just to avoid embarrassment to the judge, but also because of the unfairness to third parties involved. That too would apply to commissions of inquiry engaged in judging the conduct of individuals. It seems to me to be especially so of the Smith Commission draft report which contains extensive but not final judgments of misconduct of many individuals who did not have, as the Commissioner intended, a full opportunity to defend themselves.

[72] For the above reasons, therefore, I conclude that in paragraph 61 of her reasons cited above the delegate ascribed too narrow a meaning to the words "acting in a ... quasi-judicial capacity" in s. 3(1)(b) of the ***FIPP Act*** and I conclude that the actions of the Commissioner in this case do come within the ambit of those words.

Draft Decision:

[73] The word "decision" on its face seems to be broad in scope, having different meanings in different contexts. The sixth edition of Black's Law Dictionary defines it as follows:

> **Decision.** A determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.

[74] The eighth edition of Black's, however, defines it somewhat more narrowly:

> **Decision, 1.** A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case. See JUDGMENT (1); OPINION (1). – **decisional**, adj.

[75] The delegate gave the word a fairly strict or narrow interpretation. Following is her conclusion in that regard:

> I consider that a "decision" in the context of s. 3(1)(b) means a decision affecting someone's legal rights. It must actually decide or resolve something and *includes*, in my view, a decision, order, adjudication or judgement in which, after hearing from the parties to a dispute, a decision-maker disposes of or adjudicates the matter by deciding the matter in favour of or against someone. The record in dispute in this case is not, in my view, a decision so understood and is not otherwise a "decision". Commissioner Smith's draft report was not deciding or determining anything to which the principle of deliberative secrecy would apply and which is the purpose behind the exclusion in s. 3(1)(b) of the Act. It is, in my view, a draft report following Commissioner Smith's investigation and hearings.

[76] Although she used the word "includes" in the second sentence of that passage (the italics are hers) the net effect of the language and her decision on the subject was to virtually identify the word with a purely adjudicative decision.

[77] The submission of counsel for the IPC was essentially that the report of the Commission would not be a decision as contemplated by s. 3(1)(b) because it would have no civil or legal consequences and therefore would effect no one's legal rights. The case of ***Morneault v. Canada (Attorney General)*** (2000) 189 D.L.R. (4th) 96 (S.C.R.) was referred to in which the Federal Court of Appeal expressed "difficulty" in viewing the findings of misconduct of the Somalia Inquiry as "decisions" for the purposes of s. 18.1(4)(d) of the ***Federal Court Act*** (powers of review). The trial court judge was firmly of the opinion that they were. The Court of Appeal's view in this regard is essentially *obiter dicta* because it found another section of the ***Act*** which provided for curial review. Furthermore the relevant passage must be considered in full:

> I must confess to some difficulty in viewing the findings in issue as "decisions" within the meaning of the section. The decision in ***Krever***, *supra*, suggests that the contrary may be true for, as has been seen, the findings of a commissioner under the ***Inquiries Act***" are simply findings of fact and statements of opinion" that carry "no legal consequences", are "not enforceable" and "do not bind courts considering the same subject matter". In an earlier case, ***R. v. Nenn***, [1981] 1 S.C.R. 631 at 636, 122 D.L.R. (3d) 577, it was held that the "opinion" required of the Public Service Commission under paragraph 21(b) of the ***Public Service Employment Act***, R.S.C. 1970, c. P-32, was not a "decision or order" that was amenable to judicial review by this Court under section 28 [***Federal Court Act***, R.S.C. 1970, c. 10 (2nd Supp.)]. I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by paragraph 18.1(4)(d) despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record.
>
> (Emphasis Mine]

[78] I find that the considerations concerning the meaning of "quasi-judicial" in s. 3(1)(b) apply very much to the determination of the meaning of the words "draft decision".

[79] I note again the course which the Commissioner took. He was firmly of the opinion (apparently correctly) that he was empowered to make findings of misconduct. He did in fact draw conclusions and make judgments—legal and moral—about people's conduct. To publish those findings would affect the reputations of those involved. Again, a purposive approach to legislative intention is called for to resolve any ambiguity which may exist (and which does exist in this instance). Contrary to what the delegate concluded, my view is that the contents of the draft report as to its findings of misconduct fall within the type of decision and decision-making process that the principle of deliberate secrecy as reflected in s. 3(1)(b) was meant to apply.

[80] The draft report was a draft decision for the purposes of s. 3(1)(b).

Conclusion:

[81] If one asks the question whether it was the purpose of s. (3)(1)(b) to exclude from the scope of the ***FIPP Act***, the unfinished work of a rescinded public inquiry which was in the course of making findings of misconduct against various individuals as to serious matters, such individuals not having had the opportunity to respond fully, the answer, in my view, must be in the affirmative. One could ask, if the Commissioner had been persuaded that some or any of his preliminary opinions as to misconduct were wrong and if the Commission had proceeded to its conclusion and he had deleted those preliminary findings from his final report, could they nevertheless be the subject of an application for access under the ***Act***. That would not seem right.

[82] To summarize, I am completely satisfied that the incomplete draft report of the Smith Commission is excluded from the scope of the ***Freedom of Information and Protection of Privacy Act*** by virtue of s. 3(1)(b) because it is a draft decision of a person acting in a quasi-judicial capacity.

[83] Given my Reasons, I do not have to rule on the argument made by counsel that because the Commission has been "rescinded" and therefore must be considered as never having existed, it is not a public body for the purposes of the ***Act***, and records emanating from it do not come within its ambit.

[84] The delegate's order is set aside. The BC Archives need act no further on the applicant's request for access to the draft report.

[85] I order that the *in camera* affidavit of Maria Dupuis to which are annexed the draft report and Notices of Adverse Interest Findings be sealed and it is to be unsealed only by order of a judge of this Court or a judge of the Court of Appeal.

"R.M.P. Paris, J."
The Honourable Mr. Justice R.M.P. Paris