OFFICE OF THE
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COMMISSIONER
— for —
British Columbia

Order 03-14

MINISTRY OF MANAGEMENT SERVICES

Celia Francis, Adjudicator
March 31, 2003

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Summary: Applicant requested copy of draft report of Smith Commission of Inquiry into the Nanaimo Commonwealth Holding Society. Ministry denied access under s. 3(1)(b). Section 25(1)(b) found not to apply to record. Section 3(1)(b) found not to apply as Commissioner Smith was not acting in a judicial or quasi-judicial capacity and record is not a draft decision. Ministry ordered to respond to request under the Act.

Key Words: Scope of the Act – excluded records – judicial or quasi-judicial capacity – draft decision – disclosure clearly in the public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b) and 25(1)(b).

Authorities Considered: B.C.: Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 03-02, [2003] B.C.I.P.C.D. No. 2.

Cases Considered: *Phillips* v. *Nova Scotia (Commission of Inquiry) into the Westray Mine Tragedy)*, [1995] 2 S.C.C. 97; *Re Copeland and McDonald et al.* (1978), 88 D.L.R. (3d) 724; *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Addy* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia) (T.D.)*, [1997] 3. F.C. 784; *Beno* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527; *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System) in Canada)*, [1997] 3 S.C.R. 440; *Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City)*, [1998] 3 S.C.R. 3; *Ellis-Don Ltd.* v. *Ontario (Labour Relations)* (2001), 194 DLR (4th)) 385 (S.C.C.); *3430901 Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421 (C.A.), [2001] F.C.J. No. 1327 (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537); *Rigaux* v. *British Columbia (Commission of Inquiry into the Death of Vaudreuil - Gove Inquiry)* [1999] B.C.J. No. 2002 (B.C.S.C.).

1.0 INTRODUCTION

[1] In September 2001, the applicant asked the Ministry of Attorney General ("Ministry") for a copy of what he called an "incomplete report" by the Smith Commission of Inquiry ("Smith Commission") relating to the Nanaimo Commonwealth Holding Society. He noted that the government had decided some three months earlier to end the Smith Commission at a point when Murray L. Smith, the Commissioner, said the report was "85% written". The Ministry told the applicant that it was transferring the request to the British Columbia Archives ("BC Archives"), which is part of the Ministry of Management Services as that body had the greater interest in the record. The BC Archives responded to the request in December 2001 by denying access under s. 3(1)(b) of the *Freedom of Information and Protection of Privacy Act* ("Act"). It went on to tell the applicant that, under general archival principles, the record would be made available to the public after July 1, 2031.

[2] The applicant immediately requested a review of the BC Archives' decision. According to the Portfolio Officer's Fact Report that accompanied the Notice of Inquiry, the applicant clarified during mediation that he was interested in the "final draft of the Smith Commission report". (I refer to this record below as the "draft report".) Because the matter did not settle in mediation, a written inquiry took place under Part 5 of the Act. I have dealt with this inquiry as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, by making all findings of fact and law and the necessary order under s. 58.

2.0 ISSUE

[3] The first issue is whether the BC Archives was correct in deciding that the Act does not, because of s. 3(1)(b), apply to the "final draft of the Smith Commission report".

[4] After this Office issued the Notice of Inquiry, the applicant notified the Office that he also wished to argue that s. 25(1)(b) of the Act applies to the record in dispute. The parties also made submissions on that issue.

[5] The burden of proof regarding s. 3(1)(b) is on the public body. Section 57 is silent respecting the burden of proof regarding s. 25, but previous decisions have established that the applicant has the burden regarding s. 25(1)(b). In Order 03-02, [2003] B.C.I.P.C.D. No. 2, the Commissioner summarized his view of the burden of proof regarding s. 25(1) as follows:

> [16] … In Order 02-38, [2002] B.C.I.P.C.D. No. 38, I addressed the burden of proof under s. 25(1) at paras. 32-39. As I indicated there, s. 25(1) either applies to information or it does not and it is ultimately up to the commissioner to decide that issue. In an inquiry such as this, it will be in an applicant's interest, as a practical matter but not as a legal duty, to provide whatever evidence she or he can to support the application of s. 25(1). Similarly, although a public body bears no burden of proof under s. 25(1), it has a practical incentive to assist with any relevant evidence to the extent it can. I have applied these considerations in this case.

3.0 DISCUSSION

[6] **3.1 Interpretation of Section 3(1)(b)** – The thrust of the BC Archives' argument is that, under s. 3(1)(b) of the Act, the record in dispute in this case is excluded from the scope of the Act because Commissioner Smith was acting in a quasi-judicial capacity and the record in dispute constitutes a "draft decision". Section 3(1)(b) 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 who is acting in a judicial or quasi judicial capacity; … .

[7] The interpretation and application of s. 3(1)(b) have been dealt with a number of times, in Order 00-16, [2000] B.C.I.P.C.D. No. 19, and in other decisions, in which the Commissioner has applied criteria from the Supreme Court of Canada decision in *M.N.R.* v. *Coopers & Lybrand* (1978), 92 D.L.R. (3d) 1 (quoted later in this order).

[8] As Dickson J. noted in *Coopers & Lybrand*, at p. 6, "these criteria are non-exhaustive and no one factor is necessarily determinative of the nature of the function". See, also, p. 9 of Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, where Commissioner Flaherty provided the following useful comments about the intent behind s. 3(1)(b) of the Act:

> The purpose of section 3(1)(b) appears to be to create an exclusion from the scope of the Act which extends deliberative secrecy to personal notes, communications, and draft decisions of those engaged in a judicial and quasi-judicial capacity. The only functional parameter required to trigger section 3(1)(b) is a person acting in a judicial or quasi-judicial capacity. Thus, despite the fact that the deliberative secrecy concept normally revolves around protecting the integrity and independence of *adjudicative* processes, there is no requirement in 3(1)(b) that the function be *adjudicative*. [emphasis in original]

[9] **3.2 Is the Record Excluded from the Act?** – The draft report, a sheaf of paper approximately 6 centimetres thick, deals with the issues set out in the Smith Commission's terms of reference. As noted below, it is clearly an unfinished product, a draft. The applicant argues, at pp. 2-6 of his initial submission, that Commissioner Smith was not acting in a quasi-judicial capacity in creating the record in dispute. Nor is the record a "draft decision", in his view. He argues that a commission of inquiry established under the *Inquiry Act* cannot make decisions or, if it could, that ability vanished with the cancellation of the Smith Commission. He says what he is asking for is a "partly-written report", not a draft decision.

[10] Because the parties referred frequently in their submissions to the Order in Council and terms of reference for the Smith Commission, I have reproduced them here for convenience. The BC Archives provided me with a copy of Order in Council 377/97, dated March 22, 1997 ("OIC"), appointing Murray Smith as a commissioner.

[11] The OIC reads as follows:

> On the recommendation of the undersigned [the Attorney General], the Lieutenant Governor, by and with the advice and consent of the Executive council, orders that:
>
> 1. The Honourable Nathaniel Theodore Nemetz, C.C., Q.C., having resigned the commission issued pursuant to order in council 544/96, a Commission be issued under the Great Seal pursuant to section 8 of the *Inquiry Act* appointing Murray Smith as a sole commissioner to inquire into and report on the matters and in the manner set out in the attached Terms of Reference.
>
> 2. The entitlement to reimbursement for living and travelling expenses incurred by the sole commissioner appointed under section 1 is equivalent to the entitlement approved by Treasury Board for managerial employees in Group III.
>
> 3. Consent is given to the sole commissioner to appoint the clerks and stenographers the sole commissioner considers necessary for the conduct of the inquiry, and to pay them at rates or salaries that are equivalent to the rates of salaries paid to employees in similar positions in the public service.
>
> 4. To assist in achieving the objectives of the inquiry, the sole commissioner may appoint or retain the council [*sic*], research assistants and professional advisors that the sole commissioners [*sic*] considers appropriate and the rates, fees and expenses applicable to these appointees will be those established by the Attorney General.

[12] The terms of reference attached to the OIC read 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.

[13] I will now consider whether Commissioner Smith was acting in a quasi-judicial capacity with respect to the draft report.

Acting in a quasi-judicial capacity

[14] The applicant says that, under s. 1 of the *Inquiry* Act (under which he says Commissioner Smith was appointed), a commissioner can only inquire and report. He cannot make a decision, only recommendations. I note that the OIC was in fact issued under s. 8 of the *Inquiry Act*. I take the applicant's point to be, however, that Commissioner Smith had no decision-making powers.

[15] Section 1 of the *Inquiry Act*, which is in Part 1 of that Act, provides for powers to inquire and report similar to those in s. 8, but specifies different areas of inquiry for commissions. In particular, it provides the power to inquire into the conduct of individuals in relation to their duties:

Inquiry into conduct of government

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.

[16] Section 4 of the *Inquiry Act*, also found in Part 1 of that Act, requires that a commission may not make a report against any person until that person has been given reasonable notice of a charge of misconduct and has had an opportunity to be heard.

[17] Section 8 of the *Inquiry Act*, under which Commissioner Smith was appointed, reads as follows:

> **Appointment of commissioners**
>
> 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:
>
> (a) any matter relating to the election of any member or former member of the Legislative Assembly;
>
> (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;
>
> (c) payments or contributions for campaign or other political purposes, or for the purpose of obtaining legislation, or obtaining influence and support for franchises, charters, or any other rights or privileges, from the Legislature or the government by any person or corporation or by any of the promoters, directors or contractors of that corporation, or by any other person in any way connected with, representing or acting for or on behalf of that corporation or any of the promoters, directors or contractors.

[18] Section 8 of the *Inquiry Act* is found in Part 2 of that Act. I note that there is no requirement in Part 2 of the *Inquiry Act*, as there is in Part 1, for a commission to give a person notice of findings of misconduct before a report is made against that person. Nor is there a requirement under Part 2 to give that person an opportunity to be heard before a report is made against that person. Section 14 of the *Inquiry Act* requires commissioners appointed under s. 8 (as Commissioner Smith was) to carry out the duties entrusted to them, allows them to "hold meetings" and requires them to report to Cabinet on their findings "with reference to the matters examined in the inquiry". In this respect, I quote below a useful discussion by Allan J. of the two parts of the *Inquiry Act* in *Rigaux* v. *British Columbia (Commission of Inquiry into the Death of Vaudreuil - Gove Inquiry)* [1999] B.C.J. No. 2002 (B.C.S.C.), and the different powers and scope of inquiry they give commissioners appointed under the two parts.

[19] In *Gove*, Allan J. found that Commissioner Gove had exceeded his jurisdiction under the terms of reference of his appointment (which was also under s. 8 of the *Inquiry Act*) by making findings of misconduct against the conduct of Joyce Rigaux after the death of a particular child. Allan J. found that Commissioner Gove was restricted to inquiring into and reporting on the adequacy of services provided by, and the policies and practices of, the Ministry of Social Services respecting children and their families, as they related to events preceding the death of that child.

[20] Allan J. also said the following about the differences in powers and areas of inquiry between Parts 1 and 2 of the *Inquiry Act*:

> [36] I do, however, venture to comment generally that inquiries in British Columbia are hampered by the unwieldy structure of the *Inquiry Act* which is a single statute comprised of two ancient acts which were merged sometime after 1960: Part I of the present Act is the *Departmental Inquiries Act*, S.B.C. 1926-27; Part II is the *Public Inquiries Act*, S.B.C. 1872. The powers, duties, and statutory protections of commissioners differ greatly according to whether they were appointed under Part I or Part II. While the focus of the inquiry in Parts I and II is very different, it is questionable that the disparate procedures set out in each part are justified. For example, Part I, which specifies that a commissioner can inquire into the conduct of a person, requires that any person against whom a charge is made in the course of an inquiry, is to be represented by counsel; no report can be made against a person until he or she has been given reasonable notice of "the charge of misconduct" alleged against them and has been given full opportunity to be heard in person or by counsel. 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. One important question, which was argued but must remain unanswered in these reasons, is 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.

[21] Similarly, the Smith Commission's terms of reference did not empower Commissioner Smith to inquire into the conduct of individuals, but only to inquire and report generally on a variety of matters related to the gaming industry in British Columbia.

[22] The BC Archives provided some background comments on the need for commissions of inquiry to apply principles of procedural fairness and quoted from a number of court decisions in support of this notion. At para. 4.13 of its initial submission, the BC Archives also referred to *Canada (Attorney General)* v. *Canada (Commission of Inquiry on the Blood System of Canada)*, [1997] 3 S.C.R. 440 (I refer to this decision below as the "*Blood System*" case) and acknowledged that, in *Blood System*,

> … the Supreme Court of Canada observed that while commissions of inquiry are prohibited from making findings of criminal or civil liability, their work can still potentially affect reputations, and "that no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly".

[23] The BC Archives goes on, at para. 4.19 of its initial submission, to discuss what it contends are the public policy reasons behind s. 3(1)(b) of the Act, saying there is a long-standing general rule that one is not entitled to go behind the reasons for decision of someone acting in an adjudicative role by obtaining that person's notes. Only the final decision of a judicial or quasi-judicial decision-maker should be open to public scrutiny, it says. The principle to which the BC Archives is referring is deliberative secrecy, on which Commissioner Flaherty commented in Order No. 321, as noted above. That principle has been extended to administrative tribunals as well as judicial decision-makers. See, most

recently, *Ellis-Don Ltd.* v. *Ontario (Labour Relations)* (2001), 194 DLR (4th) 385 (S.C.C.). The BC Archives' position on this issue does not of course answer the question at hand – whether Commissioner Smith was acting in the capacity of a quasi-judicial decision-maker to which the principle of deliberative secrecy would apply. No cases were cited where the principle of deliberative secrecy applied, or was said to apply, to a commission of inquiry.

[24] The BC Archives then quotes the following definition of "quasi-judicial" from *Black's Law Dictionary* (7th ed., 1999):

> Adj. of, relating to, or involving an executive or administrative Official's adjudicative acts. * Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by the courts.

[25] The BC Archives also refers to a discussion of the term "quasi-judicial" in the Ministry of Management Services' own Policy and Procedures Manual, which gives the view (at section A.2) that a person is acting in a judicial or quasi-judicial capacity

> If he or she is required to:
>
> - Investigate facts, hear all parties to the matters at issue, weigh evidence or draw conclusions as a basis for their action;
> - Exercise discretion of a judicial nature; and
> - Render a decision following the consideration of the issues rather than simply making a recommendation

[26] Even if one refers to the manual's view of the factors to be considered – and the manual is not binding on me – such guidance as it gives actually assists the applicant, not the BC Archives. As I discuss below, the Smith Commission was not, in my opinion, adjudicating anything, exercising discretion of a judicial nature or rendering a decision. It was in fact able, at most, only to make recommendations. As noted below, the cases the BC Archives cites all refer to commissions of inquiry as investigative or administrative, not quasi-judicial, bodies.

[27] The BC Archives discusses, at paras. 4.23-4.29 of its initial submission, the meaning of the term "quasi-judicial", with references to legal texts which consider the term to apply to administrative functions or decisions which must be exercised in some ways as if they were judicial and with procedural fairness. The BC Archives also referred to Dickson J.'s comments in *Coopers & Lybrand*, to the effect that quasi-judicial decision-making and functions lie on a continuum. Tribunals, labour boards and similar bodies, whose decisions may be judicially reviewed, lie at one end of the spectrum with, at the other end, decisions such as purchasing a battleship or appointing the head of a Crown corporation (decisions which are not appropriate for judicial review). While the functions and kinds of decision at each end of the spectrum are clear, whether or not a decision must be exercised judicially becomes less clear as one moves to the middle of the continuum, Dickson J. continues (at p. 6), requiring one to weigh the factors for or against a conclusion on this point.

[28] The BC Archives also refers to *Principles of Administrative Law*, by D. Jones and A. de Villars, where (at pp. 85-86, 3rd ed., 1999) the authors describe the term "quasi-judicial" as referring to "discretionary powers which are essentially judicial in nature, but which are exercised by officials other than judges in their courtrooms." The authors go on to say that it becomes more difficult to determine when a discretionary power can be more properly described as administrative or ministerial as opposed to judicial. They express the view that, while the distinction used to be more important, since the principles of natural justice were not thought to apply to administrative powers, the duty to be fair has come to be applied in administrative decision-making as well, thus more or less eliminating the distinction between exercising administrative powers and quasi-judicial powers.

[29] The BC Archives cites the test that the Commissioner applied in Order 00-16 – Dickson J.'s test in *Coopers & Lybrand* – for determining whether a matter is judicial or quasi-judicial. Its initial submission sets out, at some length, why it contends the criteria from *Coopers & Lybrand* drive one to the conclusion that Commissioner Smith was acting in a quasi-judicial capacity (paras. 4.30-4.52). At pp. 5-6 of *Coopers & Lybrand*, Dickson J. said the following:

> 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.

[30] Of course, the decision in *Coopers & Lybrand* was framed around the assumption that a decision or order had been made. The issue in that case was whether the decision or order was one that had to be made judicially or quasi-judicially.

[31] The BC Archives argues that Commissioner Smith was not acting in a ministerial or administrative capacity but in a manner "much closer to the judicial paradigm" and therefore in a quasi-judicial capacity. It says, among other things, that the fourth criterion from *Coopers & Lybrand* applies because Commissioner Smith was required to apply the rules of fairness and natural justice. It does not explain how those are "substantive rules" of the kind contemplated by the Supreme Court in *Coopers & Lybrand*. I do not believe the Court considered the rules of fairness and natural justice to be "substantive rules".

[32] The applicant says in his reply (pp. 6-7) that Commissioner Smith may have had, and exercised, certain judicial and quasi-judicial functions and agrees that Commissioner Smith may have written many notes, communications and draft decisions in that capacity. But, he goes on, he is not asking for such records, but has requested "access to a partly-written report about the facts that Commissioner Smith discovered". The applicant argues that "the facts are not a decision and their recording does not constitute the forming of a decision".

[33] The applicant disputes what he sees as the BC Archives arguing that the report is a quasi-judicial decision, saying that any use by Commissioner Smith of his powers under ss. 15 and 16 of the *Inquiry Act* is an issue separate from the nature of his draft report. He points out that the Commissioner drew a distinction in Order 00-16 between a decision-maker acting in a judicial or quasi-judicial capacity as opposed to an administrative capacity and held that s. 3(1)(b) only applies to the former role. He views the Commissioner as having separated the adjudicative or decision-making process from administrative processes. While an inquiry commissioner may have the power to use adjudicative processes or powers to further his or her investigation, the applicant suggests, the draft report in this case is not an adjudicative decision. He again points out that Commissioner Smith could not make any orders in his report respecting any improper acts he revealed in his report.

[34] I will now discuss each of the four criteria from *Coopers & Lybrand* in the circumstances of this case. As the following discussion indicates, I am satisfied that, applying the *Coopers & Lybrand* criteria, Commissioner Smith was not acting in a judicial or quasi-judicial capacity in the sense required under s. 3(1)(b). In addition, however, I consider that the other cases discussed below lead one to conclude that Commissioner Smith was not acting in a judicial or quasi-judicial capacity.

First criterion – hearings

[35] The BC Archives points out that s. 15 of the *Inquiry Act* contemplates the holding of hearings and says that the Smith Commission held 87 days of public hearings. It says witnesses were summoned, testified under oath and were permitted to be cross-examined

and re-examined. It goes on to say that Commissioner Smith permitted witnesses whose conduct was under investigation to be represented by legal counsel. It then says that Commissioner Smith, as a commissioner appointed under Part 2 of the *Inquiry Act*, had the powers and protections under ss. 12, 13(b), 15, 16(1)(a) and (b) of that Act. These sections provide protection for commissioners in case of legal action, allow commissioners to appoint staff, empower them to summon witnesses and require those witnesses to bring documents and gives them the same powers as judges if summoned persons do not appear or refuse to answer questions if they do appear.

[36] The case law on commissions of inquiry that the BC Archives has cited in its submission does not, in my view, support its arguments on this aspect of the test. The decisions all mention that the inquiry commissions under consideration held hearings, but in the same breath also say these commissions could not decide anything. See, for example, *Addy* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (T.D.), in a case involving the Somalia Inquiry, where, at pp. 26-27, Teitelbaum J. said:

> … it is necessary to briefly characterize commissions of inquiry. In the case at bar, although the Commission's functions are investigative or inquisitorial, it still must pay due heed to individual interests. In fact, the Commissioners made numerous and express statements to that effect. During the opening statement at the evidentiary hearings, Commissioner Létourneau remarked:
>
> > Although the rules of evidence applicable in adversarial proceedings such as a trial do not apply to this inquiry, common sense and fairness require that the final conclusions and recommendations of this inquiry not be based on mere speculation, unsubstantiated rumours, innuendo and unreliable or incredible evidence. This is particularly the case when the reputation of participants in the inquiry, members of military personnel or citizens may be detrimentally affected by these conclusions or recommendations. [At page 97, respondents' application record.]
>
> The Commission made similar comments at the opening of the "In-Theatre" phase (at pages 106-107). The Commission was therefore very conscious of its own role within the larger framework of the Commission as an institution. The characterization of the Commission as investigative is entirely accurate despite some appearances that commissions of inquiry are often trials in the court of public opinion (Sopinka J. in "The Role of Commission Counsel" in Pross, Christie, Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990) 75, at page 76). In fact, the Commission does have the coercive powers to compel the attendance of witnesses under section 5 of the *Inquiries Act*, *supra*. As well, the Commission operated under a public, not to mention media spotlight. However, one cannot push the trial analogy too far. The Federal Court of Appeal in *Beno*, supra held that Mr. Justice Campbell had erred in the Trial Division decision (*Beno* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 1 F.C. 911 (T.D.)), when he characterized the Commission as "trial-like". The Federal Court of Appeal stated, at page 539 in *Beno*:
>
> > In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate . . . . The rules of evidence and procedure are therefore considerably

> less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report". . . .
>
> Nonetheless, the Court of Appeal in Beno did agree that the stakes were often high for those implicated and named in the final report of a commission of inquiry.

[37] The holding of public "hearings" may be part of a commission's inquiry into a matter, boosting the public's confidence in the inquiry process and increasing public awareness. Commissioner Smith did not, however, necessarily hold hearings within the sense intended in *Coopers & Lybrand*.

[38] Part 2 of the *Inquiry Act* and the terms of reference for the Smith Commission do not require the Commissioner to hear and decide, but simply to inquire and report. This part of the *Inquiry Act* does not require a commission to hold hearings nor is there any mention of such a requirement in the terms of reference for the Smith Commission. Under the *Inquiry Act* and terms of reference, Commissioner Smith could have received submissions only in writing, had he so chosen. Even if he adopted a hearing component as part of his inquiry, his mandate was simply to inquire. His ability to "hold meetings" does not equate, to my mind, to a requirement to hold hearings as contemplated by *Coopers & Lybrand*.

Second criterion – rights affected

[39] The BC Archives argues that, had the Smith Commission not been terminated, Commissioner Smith would have placed his report before the Legislative Assembly, at which point the report would have been made public. So publicized, his findings could, the BC Archives argues, have adversely affected the rights of those against whom he made any findings of misconduct. The adverse affects could, it suggests, include damage to reputation, with associated impacts on employment and relations with others. It does not develop this theme further by explaining how damage to an individual's reputation equates to affected "rights" as contemplated by *Coopers & Lybrand*.

[40] The applicant suggests, at p. 8 of his reply, that any damage to the reputations of those whose acts were under scrutiny stems from the acts themselves. Commissioner Smith had no power to order anyone to do anything, or otherwise give a remedy or relief, respecting those acts. He was empowered only to report on them. In any case, the applicant also points out, *Coopers & Lybrand* acknowledges that the fact that "rights are affected does not necessarily carry with it an obligation to act judicially". It would follow, in my view, that it does not necessarily carry with it an obligation to act quasi-judicially.

[41] The applicant points out again in his reply (at pp. 9-10) that Commissioner Smith was permitted to name and comment on those he had found misconducted themselves, but could not impose any sanctions. Even though his report could recommend changes, the applicant continued, it could not recommend legal action against people nor prejudice any actual or potential judicial proceedings. While Commissioner Smith's report was intended to address social policy and governance issues, he goes on, this was in a strictly advisory role. The applicant acknowledges that Commissioner Smith's final report might have caused "discomfort", as he calls it, to anyone named in the report, but says Commissioner

Smith's obligation to be fair required him to give those people advance notice of any adverse interest finding, so they had an opportunity to "set the record straight", as he calls it. This was, says the applicant, simply part of Commissioner Smith's fact-finding role.

[42] I do not accept the BC Archives' arguments on this point. While I acknowledge, as the courts have done, that reputations may suffer in the course of a public commission of inquiry, the reputations of those who testified before the Smith Commission or who might be named in the draft report do not, in my view, constitute "rights" as referred to in the second criterion in *Coopers & Lybrand*. Nor do I consider that any potential damage to reputations affects "rights". One's reputation is an aspect of one's character or how one is perceived.

[43] The theme of potential damage to reputations runs through the case law that the BC Archives cited, but those cases support the view that "rights" do not include one's reputation. See, for example *Addy*, at p. 26. See also *Blood System*, at para. 12, where Cory J. commented on the trial court's finding that "the Inquiry had both an investigatory and advisory role" and reiterated, at para. 18, the Federal Court of Appeal's comment that "public inquiries into tragedies inevitably tarnish reputations and raise questions about the responsibility borne by certain individuals". In my view, "rights" as contemplated by *Coopers & Lybrand* are "legal rights". See, for example, *3430901 Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421 (C.A.), [2001] F.C.J. No. 1327 (leave to appeal denied June 13, 2002, [2001] S.C.C.A. No. 537), where Evans J.A. found (at para. 70) that "rights" meant "legal rights" and that Telezone had no legal right to be awarded a licence, although it had an interest in the outcome of the licence application. See also *Blood System*, below, where Cory J. said (at para. 34) that there are no legal consequences to the determinations of an inquiry commissioner. Since the Smith Commission was not able to issue binding findings and the final report would have had no legal consequences, I fail to see how Commissioner Smith was acting in a judicial or quasi-judicial capacity, that is, in such as way as to affect anyone's legal rights, in carrying out his duties as inquiry commissioner.

[44] The BC Archives appears to argue that possible adverse impacts on employment equate to an indirect effect on "rights". It does not elaborate on this, including by explaining how an impact on one's economic or other interests in employment amount to "rights" as contemplated by the *Coopers & Lybrand* criteria. Whether or not the draft report contains information the disclosure of which might be damaging to individuals mentioned in the draft report, as noted above, Commissioner Smith was not, in my view acting in such a way as to affect anyone's legal rights. I therefore do not consider that the BC Archives' argument on this point establishes that the Smith Commission draft report affected or could affect, directly or indirectly, any "rights" of individuals related to their employment.

Third criterion – adversarial process

[45] In the BC Archives' view, the Smith Commission clearly involved an "adversarial component" and it cites examples. It says legal counsel for a third party brought an application for an extension of time for responses to a Notice of Adverse Finding. It says Commissioner Smith made various decisions regarding hearings, such as whether they

would be adjourned, held in private or held in public, but subject to a publication ban until the publication of the report. As another example, the BC Archives also said that a petition had been filed in the Supreme Court of British Columbia seeking, among other things, "a declaration that the Commissioner did not have the jurisdiction to inquire into or report findings of misconduct against the Petitioner". It did not otherwise explain how these activities support the conclusion that the Smith Commission was an adversarial process.

[46] The applicant counters these arguments in his reply (at pp. 8-9) by saying that the BC Archives failed to articulate who the adversaries were. He says that the BC Archives' examples simply involved arguments by the parties, including differences of opinion. He asks how the inquiry commissioner's obligation to act fairly is indicative of an adversarial process. Representation by legal counsel and differences of opinion are not necessarily indicative of an adversarial process, he argues.

[47] An "adversarial process" *includes* a process in which opposing parties in a dispute come before a neutral third party who hears the parties and then adjudicates or disposes of the matter in some way. The BC Archives has not persuaded me that the Smith Commission involved an adversarial process. The fact that witnesses may have had legal representation does not in my view drive one to conclude that the process was adversarial. On the contrary, the material before me supports the notion that the Smith Commission was acting in an investigative capacity. There were no allegations or charges to answer or prove. The process was not considered and was not adversarial in the sense just mentioned or otherwise.

[48] The Supreme Court of Canada took this view in *Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City)*, [1998] 3 S.C.R. 3, as para. 41 of that decision indicates:

> … Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants. Judicial inquiries are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.

[49] It is worth noting that Commissioner Smith himself did not consider the inquiry process to be adversarial. In reasons of February 12, 2001 disposing of an application by witnesses seeking more disclosure of documents (a copy of which the BC Archives helpfully provided), Commissioner Smith made the following comments (at p. 7) after referring to a number of court decisions on commissions of inquiry:

> An inquiry is a unique statutory creature. Unlike a judicial proceeding, an inquiry has no parties or accused. Unlike a trial, it is inquisitorial in nature rather than adversarial. There is no pre-trial discovery of the opposing party and there are no formal pre-trial pleadings. There is no "case to meet". The formal rules of evidence applicable in a judicial proceeding do not apply. Each commission of inquiry sets its own rules of procedure and evidence. The inquiry concludes, not with a judgement for or against a party, but with a report to government. Damages are not assessed, and sanctions are not imposed.

> Commissions of inquiry are also to be distinguished from the *quasi*-judicial disciplinary proceedings of self-governing professions (where the proceedings are grounded on specific allegations of misconduct and sanctions may be imposed), and human rights tribunals (where the human rights body is a party adverse in interest to the alleged discriminator) … .

[50] While I have not based my conclusion here on these views, Commissioner Smith's assessment of the nature of inquiries, based on his understanding of the law, is noteworthy. These views are also consistent with the court decisions cited here, the *Inquiry Act*, the OIC and the terms of reference.

Fourth criterion – obligation to apply substantive rules to individual cases

[51] The BC Archives argues that the Smith Commission had, at least in part, to apply substantive rules, including (as noted above) principles of administrative fairness. In its view, the inquiry was more than a review of general policy issues and, in the collection of evidence and the examination of witnesses and judging their credibility, was closer to a judicial than an administrative process. The BC Archives believes it is clear from the requested draft report that Commissioner Smith's findings were likely to have an impact on the rights of individuals and, as with any quasi-judicial decision-maker, he had "to deal with the rules of administrative fairness".

[52] The BC Archives acknowledges that, in *Re Copeland and McDonald et al.* (1978), 88 D.L.R. (3d) 724, Cattanach J. held that a commission of inquiry was not a quasi-judicial body. It says the court held that, if there was no issue or dispute between parties ("*lis inter partes*") to be determined, then the tribunal is to be described as having an administrative function and the principles of natural justice do not apply as vigorously as they do to a quasi-judicial tribunal, which must determine a "quasi-*lis*", *i.e.*, some kind of dispute. The BC Archives says that this case is of little precedential value, however, as it predates *Coopers & Lybrand*, which should determine the issues here.

[53] At p. 9 of his reply, the applicant argues that the Smith Commission report was intended to address important social policy issues. Again, he says, Commissioner Smith could do no more than report any misconduct he might come across in the course of his investigations. His role was to determine what went wrong and to make recommendations on how to fix the problem, he argues. I take the applicant to suggest that Commissioner Smith was not dealing with individual cases but rather with broader issues, such that his actions did not meet the fourth criterion.

[54] In any case, I do not agree with the BC Archives' arguments. In my view, it is equating, incorrectly, the Smith Commission's obligation to be procedurally fair with acting in a judicial or quasi-judicial capacity. The OIC and terms of reference required Commissioner Smith to inquire into and report on a variety of matters to do with the gaming industry and to make recommendations for its improvement – essentially, a review of the broader social issues involved in the gaming industry. This might have involved the examination of individuals' conduct or misconduct as part of his overall examination of the issues. Commissioner Smith's obligation to be administratively fair to these individuals

(including to give them the opportunity to respond to any adverse findings) does not, however, mean that he was applying "substantive rules" as contemplated by *Coopers & Lybrand*.

[55] I note also that Dickson J. said that the governing legislation in *Coopers & Lybrand* was silent on the issue of substantive rules to be followed in individual cases and that the fourth criterion therefore did not apply in that case. While such silence may not be determinative of this issue, I note that the *Inquiry Act* is also silent as to the requirement to follow substantive rules in individual cases, no doubt because the purpose of inquiry commissions, as set out in s. 8 of that Act, is to inquire and report into matters generally, making it undesirable (indeed, almost impossible) to lay down any substantive rules for inquiries to follow or apply.

Commissioner Smith was not acting in a quasi-judicial capacity

[56] As the above discussion of the four criteria from *Coopers & Lybrand* indicates, I have concluded that Commissioner Smith was not acting in a judicial or quasi-judicial capacity in carrying out his duties as an inquiry commissioner in this case. He was, rather, acting in an investigative or inquisitorial capacity.

[57] To summarize, I do not read the *Inquiry Act* as authorizing or empowering Commissioner Smith to do anything other than inquire into and report on matters. There is nothing in them to suggest that he had, or could have been given, the power to make findings of guilt or impose sanctions or remedies on anyone. Similarly, the OIC required Commissioner Smith "to inquire into and report on the matters and in the manner set out in the attached Terms of Reference". The terms of reference, in turn, required him "to inquire and report on" a number of matters and "to make recommendations" on the better regulation of those matters. Nothing in the OIC or Terms of Reference gave Commissioner Smith any power or authority to make findings of guilt, to impose penalties or to award remedies. These sources do not require the holding of hearings nor do they depict an adversarial process or one involving the application of substantive rules.

[58] I note that at pp. 73-78 of *Administrative Law, A Treatise* (2nd ed., Carswell: Toronto, 1985), by R. Dussault & L. Borgeat, the authors describe commissions of inquiry as being responsible for

> … providing the government with recommendations that it may need to direct its policies and which it is unable to draw upon from its own ranks. Although, strictly speaking, they are not administrative agencies, since they have no decision-making power, the indispensable role which they play alongside the Cabinet, both as privileged sources of information and advice, justifies them being considered in a general study of administrative structures. …
>
> [Commissions of inquiry] have functions which may vary according to the subject matter of the inquiry. There are two major categories of commissions or inquiry which are recognized. On the one hand, there are those of a generally quasi-judicial character which are responsible for examining the conduct of public officer or of a given sector of the central or decentralized administration; they are usually established following a particular event or a set of circumstances. On the other hand,

> there are also those which allow the government to obtain the views of the population and of interested groups on a question of administrative, economic or social policy or in a comprehensive field of the State's activities. The official role of these commissions is to research and to formulate a global policy for an entire sector of activities; but they are also used simply to prepare the way for a policy which has been determined in advance, or to resolve a political or social controversy, to forestall eventual popular pressure or even to delay the Cabinet's analysis of a problem or relative urgency.
>
> Set up with the purpose of having the population participate in reaching policies and decisions that concern them, commissions of inquiry of this latter category "supplement in a valuable way the traditional machinery of government, by bringing to bear the resources of time, objectivity, expertise and by offering another forum for the expression of public opinion". They represent "an answer to government's unrelenting search for solutions, which, unaided, it apparently cannot devise". … [citations omitted]

[59] The Smith Commission, with its broad mandate (under the terms of reference and Part 2 of the *Inquiry Act*) of inquiring and reporting into a variety of matters to do with this province's gaming industry and making recommendations for their improvement, falls squarely into the authors' latter category of inquiry commissions. This conclusion is also consistent with the views Allan J. expressed in *Gove*.

[60] Last, the cases the BC Archives has cited all support the view that Commissioner Smith was not acting in a quasi-judicial capacity. In addition to the cases mentioned above, see also *Phillips* v. *Nova Scotia (Commission of Inquiry) into the Westray Mine Tragedy)*, [1995] 2 S.C.C. 97, *Re Copeland* and *Beno* v. *Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527. See also *Blood System*, where Cory J. said the following about the history, nature and role of inquiry commissions:

> 29 Commissions of inquiry have a long history in Canada, and have become a significant and useful part of our tradition. They have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations.
>
> …
>
> 34 A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter. … Thus, although the findings of a commissioner may affect public opinion, they cannot have either penal or civil consequences. To put it another way, even if a commissioner's findings could possibly be seen as determinations of responsibility by members of the public, they are not and cannot be findings of civil or criminal responsibility.

[61] 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.

Is the record a "draft decision"?

[62] It follows from the above discussion that the record in dispute is not, in my view, a "draft decision" for the purposes of s. 3(1)(b). I will first set out the parties' arguments on this aspect of the s. 3(1)(b) issue.

[63] The BC Archives says that the *Inquiry* Act requires a commissioner to report to Cabinet on his or her findings. In the BC Archives' view, any "findings" Commissioner Smith would have arrived at in his report qualify as a "decision". It relies on various dictionary definitions that in its view support the notion that these terms are synonymous. A "finding", like a "decision", it argues, involves a final determination of the facts of a particular matter. Moreover, a review of the requested record clearly indicates that it is unfinished, says the BC Archives, as it includes editorial comments, suggestions throughout to add information to the text and other indications that it is a draft work. The report could have changed considerably or not at all, it argues, before Commissioner Smith finished it (paras. 4.45-4.51, initial submission).

[64] As noted above, the applicant argues that a report is not a decision. The applicant refers to a definition from *The Shorter Oxford Dictionary* (1980), which says that a report is "a formal statement of the results of an investigation, or of any matter on which definite information is required, made by some person or body instructed or required to do so". He says that, while a decision may result from the inquiry, Commissioner Smith would not, and did not, give that decision. The decision may be quite different from the inquiry commissioner's recommendations, he says. He does not explain what he thinks a "decision" is, however.

[65] The applicant then points to the Terms of Reference attached to the OIC which established the earlier commission of inquiry, the Nemetz Commission, and the OIC and terms of reference for the Smith Commission. He argues that both terms of reference do not suggest that the inquiry commissioner should make a decision, judgement, determination, adjudication or other "form of arbitration" on the subject of the inquiry but only allow the inquiry commissioner to make recommendations and to deliver a final report.

[66] I have reviewed a copy of the record in dispute in this case and agree with the BC Archives that it is a draft of a final product. The text contains numerous notes, comments, questions, handwritten annotations and other indications that the record is an unfinished work. However, the record is not, in my view, a draft "decision" as contemplated by s. 3(1)(b) of the Act and as Commissioner Loukidelis has considered the term in various orders. See, for example, p. 9 of Order 00-16 where the Commissioner found that s. 3(1)(b) covered draft decisions written by Labour Relations Board panel

members who heard the applicant's application for leave to reconsider. See also paras. 82-85 of Order 02-01, [2002] B.C.I.P.C.D. No. 1, where, after finding that the Special Compensation Fund Committee (SCFC) was acting in a quasi-judicial capacity in deciding on the applicant's claim for compensation, the Commissioner found that s. 3(1)(b) applied to the SCFC's draft decisions.

[67] 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.

[68] I find that s. 3(1)(b) does not apply to the record in dispute in this case. The right of access to records under the Act therefore applies and BC Archives must consider the applicant's request for access under the Act.

[69] **3.3 Public Interest Disclosure** – I will now deal with the applicant's argument that s. 25(1)(b) of the Act applies to the record in dispute. The appropriate parts of s. 25 read as follows:

> **Information must be disclosed if in the public interest**
>
> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

How to approach s. 25 and s. 3

[70] The applicant says that s. 25 overrides s. 3(1). He relies on Levine J.'s Adjudication Order No. 3 (June 30, 1997), under s. 62 of the Act.

[71] The BC Archives argues, at paras. 12-51 of its reply, that s. 25 does not apply to records that are not subject to the Act by virtue of s. 3(1). One must look at the Act as a whole, it says, noting that s. 3 is in the introductory part of the Act (Part 1), whereas s. 25 is in Part 2 of the Act. Essentially, BC Archives suggests that, if s. 25 had been intended to apply to records that are not within the scope of the Act, it would have been placed in Part 1. Rather, s. 25's placement in Part 2 indicates in the BC Archives' view that it only applies to records that are covered by the Act.

[72] The BC Archives continues in a similar vein for the rest of its discussion of the applicability of s. 25, pointing out, correctly, that s. 25 applies to information not records. It acknowledges Levine J.'s decision in Adjudication Order No. 3 and suggests that it is not binding, as Levine J. was not acting as a judge but as *persona designata*, that is, as an adjudicator under the Act with the same duties, functions and powers as the Commissioner. The BC Archives acknowledges that Commissioner Loukidelis looked at this issue in Order 00-16 but says (at para. 25 of its reply) that "he did not take a definitive position on the issue".

[73] Commissioner Loukidelis's approach to this issue in Order 00-16, at p. 13, was as follows:

> It would appear from the wording of s. 25(2) that s. 25(1) may apply to a public body despite the exclusions in s. 3(1) of the Act. This was the conclusion of Levine J. in Adjudication Order No. 3 (June 30, 1997), under s. 62 of the Act, where she stated:
>
> > Counsel for the Commissioner submits that Section 25 does not apply to the present records because they are excluded from the operation of the Act under Section 3. I disagree. Section 25(2) makes it clear that Section 25(1) applies despite any other provision of the Act. Section 25 is accordingly paramount over section 3. However, only information, not the entire operational record, that satisfies either the significant harm or clear public interest tests must be disclosed by the Commissioner pursuant to Section 25.
>
> I have therefore approached this issue independent of my conclusions on the applicability of s. 3(1)(b) to some of the records requested by the applicant. Section 25(1)(b) differs in nature from the access and privacy rights, and disclosure exceptions, in the Act. Section 25(1)(b) is a mandatory, and paramount, requirement for an information disclosure which is "clearly in the public interest."

[74] I have taken the same approach as Commissioner Loukidelis in this decision and have considered whether s. 25 applies in this case, independently of my findings on s. 3(1)(b).

Does s. 25(1)(b) apply?

[75] The applicant argues that s. 25 applies to the record in dispute, given the "public scandal concerning the Nanaimo Commonwealth Holding Society", vigorous public debate at the time, the criminal convictions and resignations of various officials and the large sums of money spent on the Smith Commission. He goes on to argue as follows at pp. 7-8 of his initial submission:

> Perhaps the public interest is best illustrated by examining the effect of *not* releasing the unfinished report. A government could, in bad faith, order a public inquiry into a matter in order to give the appearance that it was acting to disclose contentious political activities. The appointment of a dispassionate inquiry might quell public concern. Then, when either the inquiry found politically damaging information or the public attention to the matter began to dissolve, the government could quietly dissolve that Commission and seal all the damaging information from public

> scrutiny. Whether or not the present government has such an intention is not relevant. What is relevant is that a decision by the Freedom of Information and Privacy Commissioner not to disclose the entirety of the unfinished report would provide precedent for such scurrilous actions.

[76] In Appendix 2 to his initial submission and in a supplementary letter of May 7, 2002, the applicant suggests that the Attorney General, through the BC Archives, has suppressed the report because of "its potential to embarrass or name culpable individuals" and may not have been acting in good faith in doing so. He goes on to say that "… for the past ten years, the public has been embarrassed by the gaming scandals of its public officials". It is in the public's interest to release the report, he concludes, "to see why the Attorney General might have sought to bury the report".

[77] The applicant returns to this theme at p. 1 of his reply:

> … the Attorney General acted improperly and vexatiously in suppressing and withholding the Smith Report. I further believe that, if his Section 3(1)(b) argument fails, he will next act by severing all or most of the record I am requesting. I have asked the Commissioner to rule that the record falls under Section 25(1)(b) and should be released to me in its entirety.

[78] For its part, the BC Archives argues that, even if s. 25 does apply to records that are not within the scope of the Act, s. 25 does not apply to the record in dispute in this case. It outlines the Information and Privacy Commissioner's thinking on s. 25 and then says that the duty to disclose under s. 25 is not triggered simply by the public's interest in a record. In the BC Archives' view, there is no reason to believe that there is an urgent or compelling need to disclose this record. While the Nanaimo Commonwealth Holding Society issues received considerable media attention at the time, the BC Archives points out that there has since been a report by Ron Parks and criminal proceedings that led to guilty pleas by some. Moreover, the Smith Inquiry had a public website, it says, and also held public hearings and published transcripts of its proceedings and other matters.

[79] Noting that one of the purposes of the Smith Commission was to recommend changes to gaming legislation, the BC Archives says the government has since enacted legislation, the *Gaming Control Act*, which "establishes a comprehensive framework for regulating and managing gaming more effectively" (para. 44, reply submission). Given the passage of time, the BC Archives sees no compelling reason to disclose information in the record here. It would, in fact, be contrary to the public interest to disclose the report, the BC Archives argues, given its unfinished state and the possible effect on third-party reputations. If I decide that s. 25 does require the BC Archives to disclose the report, the BC Archives suggests that the affected third parties should first be given an opportunity to make representations.

[80] In light of the Commissioner's views on application of s. 25(1)(b) in Order 01-20, [2001] B.C.I.P.C.D. No. 21, I have reviewed the draft report and am of the view that, while it may well be of interest to the general public who wish to know what Commissioner Smith might have reported, there is no compelling or urgent need for its disclosure within the meaning of s. 25(1)(b). The draft report responds to the issues set out in the terms of

reference and deals with events going back decades. It recounts inquiry testimony and other items, which were public, describes events which apparently received media coverage and sets out the inquiry's draft conclusions, comments and recommendations. I do not see how any of this information, however useful or interesting it might be to an observer of the gaming industry in this province who wishes to scrutinize that and related issues, requires disclosure "without delay" as Commissioner Loukidelis has interpreted s. 25(1)(b) in a number of orders, including Order 01-20, at paras. 38 and 39. I find that s. 25(1)(b) does not apply to the record in dispute.

4.0 CONCLUSION

[81] For the reasons given above, under s. 58(3)(a) of the Act, I order the BC Archives to perform its duty to respond to the applicant's access request for the draft report. In light of my finding respecting s. 25(1), no order is necessary in that respect.

March 31, 2003

ORIGINAL SIGNED BY

Celia Francis
Adjudicator